

NEW RULES ON MORTGAGE OF UNDEVELOPED AND UNDERDEVELOPED LAND IN TANZANIA: ISSUES AND COMMENTS

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Abstract

In 2018 and 2019 respectively, the law of mortgages in Tanzania was amended by introducing the rules which, among others, require mortgagors of undeveloped and underdeveloped land to apply the obtained loans in developing the mortgaged land. Further, such loans should be invested in Tanzania. In this paper, it is shown that these rules have far reaching legal implications. First, they curtail the right of land holders to enjoy their interests in land by entering into mortgage arrangements for purposes of securing funds for purposes other than developing the mortgaged land. Second, the need to develop land comprised in the granted right of occupancy is already taken care of by prescribed conditions which come with the grant; the rules, therefore, amount to over-regulation. Third, third party mortgages over undeveloped and underdeveloped land are no longer possible. Fourth, the rules do not apply to mortgages of customary rights of occupancy and other informal mortgages; and this may defeat their purpose. It is recommended that the rules be abolished in order to leave room for mortgagors to enjoy their interests in land.

Key words: *Mortgage, mortgagee, mortgagor, prescribed conditions, underdeveloped land, undeveloped land.*

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1. INTRODUCTION

The Written Laws (Miscellaneous Amendments) Act¹ introduces several amendments to the Tanzania Land Act,² relating to mortgage of land in general and mortgage of undeveloped³ and underdeveloped⁴ land in particular. Notable ones include a requirement on the mortgagor to use money obtained by mortgaging undeveloped or underdeveloped land to partly or wholly develop the land in question;⁵ money obtained through mortgage arrangements to be invested in Tanzania;⁶ and mortgagee to report to the Commissioner for Lands that money has been invested in Tanzania by the mortgagor.⁷ Another aspect of the amendments relates to the consequences of failure to comply.⁸

The Land (Procedure for Mortgage of Land) Regulations⁹ were promulgated to give effect to the amendments referred to in the above paragraph.¹⁰ The Regulations give a detailed procedure on mortgage of undeveloped and underdeveloped land by, *inter alia*, providing for contents of the declaration by the mortgagor on the utilization of borrowed money in Tanzania;¹¹ type of documents to

¹ Act No. 1 of 2018.

² Cap 113, R.E., 2018.A

³ According to section 120B (3) of the Land Act, underdeveloped land means land which is not developed in accordance with the conditions of the right of occupancy.

⁴ *Ibid.*, it means land without improvement or any change of substantial nature in its use.

⁵ The Land Act, *id.*, section 120A (2) (b).

⁶ *Id.*, section 120B (1).

⁷ *Id.*, section 120B (2).

⁸ *Id.*, section 120D. Failure to comply amounts to breach of conditions of the right of occupancy under section 45(2) of the Land Act.

⁹ Government Notice Number 345 of 2019.

¹⁰ The Regulations were made under section 120E of the Land Act.

¹¹ *Id.*, regulation 5 read together with Form No. 54H of the Schedule.

be submitted to the Registrar of Titles by the mortgagee;¹² and contents of the report to be submitted by the mortgagor on utilization of money in Tanzania.¹³

In this paper, three arguments are advanced. First, it is argued that the conditions imposed by the above amendments interfere with the enjoyment of land interests by mortgagors. Second, the objectives behind the amendments, especially requiring the mortgagor to use money obtained by way of mortgage of land to develop the land in question, can be achieved by using the available laws, especially those relating to development conditions. Third, by limiting the scope of applicability of the amendments to the granted rights of occupancy, the new rules leave loopholes which can be utilized to defeat their purpose. The study uses documentary review approach whereby land laws and scholarly materials are visited to advance the above arguments.

The paper is divided into sections. The first section is an introduction. The second section gives a historical background to the amendments which introduced more conditions on mortgage of the right of occupancy, undeveloped and underdeveloped land in particular. The third section gives an overview of mortgages – meaning, essential characteristics and types. The fourth section entails a discussion on legal implications of the amendments. The fifth section provides concluding remarks and recommendations.

2. BACKGROUND TO THE AMENDMENTS

The objectives behind the amendments of the Land Act are clearly stated under the “Objects and Reasons” part in the Written Laws

¹² *Id.*, regulation 6(2).

¹³ *Id.*, regulation 7.

(Miscellaneous Amendments) (No. 5) Bill 2017.¹⁴ The relevant part reads as follows:

...Sections 120A, 120B and 120C are being added with the aim to allow any loan obtained through mortgaging a piece of land in Tanzania to be used for the development of the same parcel of land which has been used as a security. This condition is only for undeveloped and underdeveloped land. This amendment is intended to bind the occupier of the right of occupancy to be responsible and give feedback on how he has procured the loan obtained through mortgage. Further, this amendment also aims at making sure that moneys obtained from mortgaging piece of land [sic] in Tanzania is strictly used to develop the same mortgaged piece of land...As a sanction, ...any loan obtained through mortgage and used for investment outside Tanzania shall be invalid...¹⁵

From the above quotation, it is clear that the amendments aimed at achieving three main objectives. First, making mortgagors invest money obtained through mortgages in Tanzania. Second, using money obtained through mortgage of the right of occupancy to develop underdeveloped or undeveloped land. Third, prohibiting investment of money obtained by mortgaging the right of occupancy outside Tanzania.

¹⁴ United Republic of Tanzania, Special Bill Supplement, Number 7, 19th October, 2017.

¹⁵ *Id.*, page 8.

3. MORTGAGES: AN OVERVIEW

3.1 Meaning

According to Bhattacharya,¹⁶ a mortgage is a loan which is secured by an asset which may be repossessed in the event of default. Talamo¹⁷ defines a mortgage as putting up real property (land) to secure a loan. Reinhard¹⁸ defines the term in two senses. First, a written document, the mortgage instrument, in which the borrower pledges his title to property as security for the loan.¹⁹ Second, a written pledge by the borrower to the lender relinquishing the borrower's interest in the landed property in the event of default.²⁰ Gray and Gray²¹ define the term as security over land created by a borrower in favour of a lender in consideration of a loan of money. According to section 2 of the Land Act of Tanzania, a mortgage is an interest in a right of occupancy or a lease securing the payment of money or money's worth or fulfillment of any conditions. It is to be noted that in some jurisdictions, a mortgage operates as a transfer of ownership by the mortgagor to the mortgagee subject to redemption by the mortgagor upon successful completion of loan repayment.²² To

¹⁶ Bhattacharya, A.K., "An Overview of Mortgages and the Mortgage Market", in Fabozzi, F.J. (Editor), *The Handbook of Mortgage-Backed Securities* (6th Edition), New York: McGraw – Hill, 2006, page 4.

¹⁷ Talamo, J.J., *The Mortgage Answer Book* (2nd Edition), Illinois: Sphinx Publishing, 2008, page 2.

¹⁸ Reinhard, M., *Commercial Mortgages 101*, New York: AMACOM, 2010.

¹⁹ *Ibid.*, page 3.

²⁰ *Ibid.*

²¹ Gray, K. & Gray, S.F., *Land Law* (7th Edition), New York: Oxford University Press, 2011, page 263.

²² See Perrins, B., *Understanding Land Law* (3rd Edition), London: Cavendish Publishing Ltd., 2000, page 168. The author states that the borrower gives ownership of real property as security but retains possession. Ownership is transferred to the lender subject to a provision for reconveyance on

the contrary, section 116(1) of the Land Act provides that a mortgage shall have effect as security only but not to operate as transfer of any interests in land from the mortgagor to the mortgagee.

3.2 Essential Characteristics

According to Dixon²³ a mortgage has three essential characteristics. First, it is a contract between the borrower and the lender. The contract may be express or implied and parties are at liberty to agree on any terms they wish. The borrower receives a capital sum on the security of real property.²⁴ It is on account of the existence of this relationship that one of the remedies available to the mortgagee in events of default is suing the mortgagor on his covenant to repay the loan.²⁵

Second, a mortgage is an interest in land; the mortgagee acquires proprietary rights in the mortgaged real property while the mortgagor retains the equity of redemption. Rights arising out of the relationship are capable of being transferred to third parties.²⁶

Third, a mortgage is a security for a loan; it comprises transfer or conveyance of legal or equitable interest in the borrower's land to

redemption. See also McFarlane, N., *et al*, *Land Law: Text, Cases and Materials* (2nd Edition), Oxford: Oxford University Press, 2012, page 1047.

²³ Dixon, M., *Modern Land Law* (10th Edition), London: Taylor & Francis Group, 2016.

²⁴ *Id.*, page 403. In the context of the laws of Tanzania, the borrower and the lender cannot just agree on any terms. For example, section 121(1)(a) – (c) of the Land Act prohibits the inclusion of any clauses in the mortgage agreement which seeks to: (a) deprive the mortgagor of the right to get the mortgage discharged; (ii) fetter the exercise of the right to discharge; or (iii) stipulate a collateral advantage which is unfair and unconscionable.

²⁵ *Ibid.*

²⁶ *Id.*, page 404. Regarding transfer of mortgages under the laws of Tanzania, section 122 of the Land Act provides that the mortgagor may, subject to the mortgagee's consent, transfer the mortgage to another person.

the lender with provision that the latter's interest shall come to end when the former has successfully repaid the loan, interest and costs. However, the author notes that, once a mortgage, always a mortgage; meaning that once the borrower completes repayment of the loan and other costs, he should be able to have his property returned fully.²⁷

3.3 Types of Mortgages

According to Dixon²⁸, under common law mortgages can be classified depending on arrangements put in place for repayment of the loan and discharging other obligations. In this regard, there are four types of mortgages. The first type, repayment mortgage, occurs where the mortgagor borrows a capital sum and agrees to pay back the principal amount and interest over a fixed period of time.²⁹ The second type, the endowment mortgage, involves arrangements whereby the mortgagor pays interest and enters into an endowment policy. The policy enables the mortgagor to make regular contributions towards repaying the principal sum at the end of the mortgage period.³⁰ In the third type of mortgage, namely current account mortgage, the lender gives an overdraft facility to the value of the mortgage. Money paid into the mortgage current account by the borrower is used to repay the capital sum and interest.³¹ Any surplus funds paid by the borrower are used to pay off the debt.³² In the fourth type of mortgage, namely a secured overdraft, the lender promises to make an overdraft and the borrower may draw funds up to the agreed limit as and when

²⁷ *Ibid.*

²⁸ Dixon, M., *Modern Land Law* (10th Edition), note 23 above.

²⁹ *Id.*, page 406.

³⁰ *Id.*, page 407.

³¹ *Ibid.*

³² *Ibid.*

such funds are needed. There is no lump sum which is paid and interest is charged on the actual debt.³³

Furthermore, mortgages under common law can be classified as legal or equitable.³⁴ A legal mortgage is created by a deed,³⁵ which should expressly declare to be a legal mortgage, and registered as a charge against the land title.³⁶ An equitable mortgage can arise where an equitable interest³⁷ in land is mortgaged; where there is an express equitable charge; or where there is a contract for a legal mortgage.³⁸ According to Dixon,³⁹ an equitable mortgage is created where the potential mortgagor has an equitable interest in land or has an equitable lease. It is also possible to create an equitable mortgage where the borrower has a legal interest in land but the mortgage is not executed in accordance with the statutory formalities for creating legal mortgages.⁴⁰

Under the laws of Tanzania, there is no clear classification of mortgages as opposed to the situation under common law as seen in the two immediate preceding paragraphs above.

³³ *Ibid.*

³⁴ Smith, R.J., *Introduction to Land Law* (2nd Edition), Edinburgh: Pearson Education Ltd., 2010, page 275. See also Duddington, J., *Land Law* (5th Edition), Edinburgh: Pearson Education Ltd., 2015, page 168.

³⁵ According to Law, J. & Martin, E.A.(Editors), *Oxford Dictionary Law* (7th Edition), Oxford: Oxford University Press, 2009, page 158, a deed is a written document which must make it clear that it is intended to be a deed and validly executed as such.

³⁶ Dixon, M., *Modern Land Law* (10th Edition), page 413.

³⁷ According to Dixon, M., *Modern Land Law* (10th Edition), page 13, an interest in land is equitable for any of the following three reasons. First, the interest is excluded from the definition of a legal estate under the law. Second, no deed was used in creating the right. Third, no registration was effected in respect of the right although it was created by deed.

³⁸ Green, K., *Land Law* (3rd Edition), London: MACMILLAN PRESS LTD., 1997, pages 82 – 83.

³⁹ Dixon, M., *Modern Land Law* (10th Edition), note 23 above, at page 413.

⁴⁰ *Ibid.*

According to section 113(1) of the Land Act, a mortgage may be created, by using a prescribed form,⁴¹ by an occupier of the right of occupancy or a lessee. Where the mortgage is over registered land or lease, the same must be registered under the Land Registration Act.⁴² It is submitted that this category of mortgages qualifies to be called “legal mortgages”.

Apart from mortgages created and registered in accordance with the provisions of the Land Registration Act, the Land Act allows other ways of creating mortgages. First, the lender and the borrower may enter into a written and witnessed undertaking the clear intention of which is charging the borrower’s land with repayment of money’s worth obtained from the lender.⁴³ This arrangement is referred to as informal mortgage under section 113(6) of the Land Act. Second, the mortgagor may deposit any of the following documents with the lender for purposes of securing repayment of money advanced by the latter: certificate of the granted right of occupancy; certificate of customary right of occupancy; a lease document; any document evidencing a right to an interest in land; and any other document which may be agreed upon between the parties.⁴⁴ This category of mortgages is called lien by deposit of documents.⁴⁵ Third, customary mortgages are created and operated in accordance with customary law

⁴¹ Land Forms Number 40 – 43, Land (Forms) Regulations, GN No. 71 of 2001.

⁴² According to section 41(1) &(3) of the Land Registration Act, a disposition should be registered and once registered, it is effectual to create, transfer, vary or extinguish any estate or interest in registered land. According to section 2 of the Land Act, disposition includes mortgage.

⁴³ The Land Act, section 113(5) (a).

⁴⁴ *Id.*, section 113(5) (a).

⁴⁵ *Id.*, section 113(6).

applicable to the land in respect of which the mortgage is created.⁴⁶

3.4 An Overview of Rights and Obligations of the Parties

A mortgage, once created, attracts both rights and obligations on the mortgagor and mortgagee respectively. This sub-section looks at these aspects in general and in the context of the laws of Tanzania in particular.

3.4.1 Rights and Obligations of the Mortgagor

The most fundamental right, in both law and equity, is the right to redeem; which means the right to pay off the mortgage on the date specified in the contract. The mortgagor is entitled to redeem the mortgage even after the set date by simply paying the principal debt, interest and costs.⁴⁷ The right is manifested in several principles as developed by case law and, in some cases, included in statutory provisions. First, the rule against irredeemability; meaning that a mortgage cannot be so constructed to the extent that it is legally impossible to repay the loan.⁴⁸ Second, any provision in the mortgage instrument which gives the right to the mortgagee to buy the mortgaged property is void.⁴⁹ Third, there should not collateral advantages; that is, there should be no other conditions attached to the right of redemption.⁵⁰ An example of a collateral advantage is where in addition to loan repayment, the borrower promises to buy all of his supplies from the lender.⁵¹ Fourth, there should be no unconscionable terms, unconscionable use of remedies or

⁴⁶ *Id.*, section 115(1).

⁴⁷ Dixon, M., *Modern Land Law* (10th Edition), page 418.

⁴⁸ *Ibid.*

⁴⁹ *Id.*, page 420.

⁵⁰ *Id.*, page 421.

⁵¹ *Ibid.*

unreasonable interest rates.⁵² This means that a mortgage term or the whole mortgage may be struck out by a court of law if it is established that it was a result of unconscionable bargain.⁵³

Section 116(1) of the Land Act stipulates that a mortgage shall have effect as security only and not the transfer of interests in land from the mortgagor to the mortgagee. Section 121(1) of the Act requires the mortgagee to discharge the mortgage once the mortgagor pays off the debt or discharges other obligations secured by the mortgage. The section declares any provision in the mortgage instrument void if it purports to deprive the mortgagor the right to redeem; seeks to fetter the exercise of the right to redeem; or stipulates for a collateral advantage which is unfair and unconscionable. Section 125(1) of the Act abolishes any rule of law entitling the mortgagee to foreclose the equity of redemption.

Rights of the mortgagor are not without obligations. Section 124(1) of the Land Act sets out implied covenants by the mortgagor to the mortgagee binding the mortgagor. These touch on such obligations as payment of the principal sum and interest; payment of rates, charges, rent, taxes and other outgoings payable in respect of the mortgaged land; repairing the buildings and other improvements on the mortgaged land; insuring buildings on the mortgaged land; using the land in a sustainable manner; not leasing or sub-leasing the mortgaged land for longer than a year without a written consent from the mortgagee; and not to transfer or assign the right of occupancy or lease without the mortgagee's written consent.

⁵² *Id.*, page 422.

⁵³ *Ibid.* A term is unconscionable where it is in substance objectionable and has been imposed by one party on the other in a morally reprehensible manner. See *Multiservice Bookbinding Ltd v Marden*, [1979], (Ch.), 84, per Wilkinson, J.

3.4.2 Rights and Obligations of the Mortgagee

As already pointed out, a mortgage serves as security for repayment of a loan, interest and other costs. Consequently, the mortgagee is given certain rights which enable him to recover his money in events of default by the mortgagor. According to section 126 of the Land Act, the mortgagee has the right to appoint a receiver; lease or sub-lease the mortgaged land; enter into possession of the mortgaged land; or sell the mortgaged land. Before exercising any of these rights and remedies, the mortgagee is required to give notice to the mortgagor specifying, among others, nature of default; action(s) to be taken by the mortgagor to rectify the default; steps to be taken by the mortgagee in the event the default is not rectified within the specified period.⁵⁴

4. LEGAL IMPLICATIONS OF THE NEW RULES

It is argued that the new rules on mortgage of undeveloped and underdeveloped land have negative legal implications on the part of mortgagors. First, it is shown that the rules interfere with the mortgagor's enjoyment of his property rights in the right of occupancy. Second, the objectives behind the rules can be achieved by using prescribed conditions relating to the granted right of occupancy. Third, by limiting their applicability to the granted right of occupancy, the rules leave loopholes which can be used to defeat their own purpose.

4.1 Enjoyment of Land Rights by Mortgagors

In Tanzania, all land is public and is vested in the President as trustee for the citizens.⁵⁵ Consequently, one is given the right to occupy and use the land, the right of occupancy. The granted right

⁵⁴ The Land Act, section 127(1) & (2).

⁵⁵ *Id.*, section 4(1).

of occupancy, in particular, is governed by Part VI of the Land Act, which spells out the procedure for allocation/grant, conditions and dispositions in general. The essential attributes of the granted right of occupancy are summarized under section 22(1) of the Land Act; and these include, among others, grant by the President;⁵⁶ land which has been surveyed;⁵⁷ registration under the Land Registration Act;⁵⁸ given for a period of up to ninety nine years;⁵⁹ and capable of being the subject of dispositions.⁶⁰

The grantee of the right of occupancy, as seen in the paragraph above, has the right to engage in different dispositions. One such disposition is mortgaging the right in order to secure repayment of a loan or discharging other obligations. The necessity of mortgaging undeveloped or underdeveloped land does not arise out of the need to develop such land only; rather, it may arise out of other needs of the mortgagor. Furthermore, lenders advance loans to borrowers on commercial basis; that is, lending attracts interest and other costs. In other words, lenders do business by giving loans to borrowers; and such loans attract interest and other associated costs – which should be paid by borrowers. And this is expressly provided for in law to the effect that one of the implied covenants binding the mortgagor is payment of the principal amount of the loan, interest and other costs as agreed upon between the parties.⁶¹ It is argued that the requirement that money obtained by mortgaging undeveloped or underdeveloped land should be used to develop the land in question is a serious curtailment on the mortgagor's enjoyment of his rights in the right

⁵⁶ *Id.*, section 22(1) (a).

⁵⁷ *Id.*, section 22(1) (c).

⁵⁸ *Id.*, section 22(1) (d).

⁵⁹ *Id.*, section 22(1) (e).

⁶⁰ *Id.*, section 22(1) (i).

⁶¹ *Id.*, section 124(1) (a).

of occupancy, namely, the right to use his right to get funds to do whatever is legal. As is shown under section 4.2 below, development of the land is enforced through prescribed conditions which form part of the grant of the right of occupancy. It is further argued that forcing the mortgagor to use the borrowed money to develop the land may result in his failing to repay the loan and interest as such development may not necessarily result in availability of sufficient funds for purposes of loan repayment and discharging other obligations under the mortgage instrument.

In addition to the above, requiring that money obtained by mortgaging undeveloped or underdeveloped land to be used to develop the mortgaged land means that third party mortgages over undeveloped or underdeveloped land can no longer be created in Tanzania. This is because, in a third party mortgage, the mortgagor is not the borrower; he simply mortgages his land so that a third party, the borrower, can access funds from the lender.⁶² Although one may argue that in case of underdeveloped land, the mortgagor may use the money to partly develop the mortgaged land, it is not clear in law how the calculations are to be made so that borrowed funds are shared between the mortgagor and the borrower who is not the occupier of the right of occupancy.

As indicated under item 4.2 below, developing the land the subject of the right of occupancy is mandatory and in case it is not done, the President is empowered to revoke the right of occupancy in question. There is no need, for that matter, to impose other rules in respect of something which is already taken care of. It is concluded that the rules unnecessarily curtails the right of land holders to enter into mortgage arrangements for purposes of

⁶² Smith, R.J., *Introduction to Land Law* (2nd Edition), note 34 above, at page 274.

securing funds to be used for purposes other land developing the mortgaged land

4.2 Enforcement through Prescribed Conditions

The granted right of occupancy is officially acquired by making an application to the Commissioner for Lands. According to section 22(1) (a) &(c) of the Land Act, the granted right of occupancy is given by the President on general or reserved land which has been surveyed. Thus, where there is such land, a person can make the application to the Commissioner for Lands under section 25 of the Land Act; the application is made through Land Form Number 19 of the Land (Forms) Regulations.⁶³ The application is determined by the Commissioner by issuing a certificate of occupancy on behalf of the President of the United Republic of Tanzania under section 29 of the Land Act; the certificate is Land Form Number 22 of the Land (Forms) Regulations.⁶⁴ The certificate should be registered by the Registrar of Titles in line with the provisions of section 27 of the Land Registration Act.⁶⁵

The granted right of occupancy is given subject to the following conditions. First, according to section 31(1) of the Land Act, the Minister may require payment of premium; to be paid in one or more instalments. In line with section 31(3)(a)-(f) of the Act, determination of the amount of premium is guided by the following factors: (i) the use of land permitted by the right of occupancy; (ii) value of the land; (iii) any unexhausted improvements on the land; and (iv) an assessment by a qualified valuer.

⁶³ Government Notice Number. 71 of 2001.

⁶⁴ *Ibid.*

⁶⁵ Cap 334, Revised Edition 2018.

Second, a right of occupancy may be granted: (i) for a term up to but not exceeding 99 years; (ii) for a term together with an option for a further term or terms which, together with the original term, may be up to but not exceeding 99 years; and (iii) from year to year or for periods less than a year. This is in accordance with section 22(1) (e) read together with section 32(1) (a)-(c) of the Land Act.

Third, section 33(1) of the Land Act imposes an obligation on the holder of the right of occupancy to pay annual land rent in the manner provided for by the Public Finance Act. In determining the amount of annual rent, the Commissioner for Lands is guided by the following considerations: (i) the area of the land which is the subject of the right of occupancy; (ii) the use of the land permitted by the right of occupancy; (iii) value of the land; and (iv) the amount of premium required to be paid upon grant of the right of occupancy.

Fourth, according to section 34(1) of the Land Act, a right of occupancy is granted subject to development conditions applicable to the land in question. For example, where the right of occupancy is for residential purposes in urban areas, the grantee is required to seek and obtain development consent/ building permit in accordance with the Urban Planning Act 2007 and the Local Government(Urban Authorities)(Development Control) Regulations 2008.

Fifth, section 35(1) of the Land Act permits the occupier of the right of occupancy to apply for change or variation of the conditions so that developments which are not otherwise allowed can be executed. The application is made by using Land Form Number 27 of the Land(Forms) Regulations referred to above and is submitted to the Commissioner for Lands or an authorized officer.

Sixth, there are conditions regarding dispositions. According to section 2 of the Land Act, disposition means sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the creation of an easement, a usufructuary right, servitude or any other interest in a right of occupancy or lease. General conditions governing dispositions of the right of occupancy are stipulated under sections 36 – 43 of the Land Act. Section 36 is to the effect that if such conditions are not complied with, a given disposition becomes void. Section 37(2) of the Act requires that an assignment of the right of occupancy which was granted to the holder thereof less than three years before the proposed assignment is to take effect should be approved by the Commissioner for Lands; the application for approval is made by using Land Form Number 30. According to section 64(1) of the Land Act, a contract for disposition of the right of occupancy is enforceable if it is in writing or there is a written memorandum of its terms and such contract or memorandum is signed by a person against whom it is sought to be enforced. Specific conditions on dispositions are found under sections 73-76(sale of the right of occupancy); 77 – 110(leases); 111 – 142(mortgages) and 143- 158(easements and analogous rights) of the Land Act.

Seventh, according to section 34(1) of the Land Act, a right of occupancy is granted subject to other conditions which may be prescribed by the Minister for Lands or any other Government organ. There are Regulations which have been made by the Minister for Lands prescribing more conditions on the right of occupancy. For example, regulation 5 of the Land (Disposition of Right of Occupancy) Regulations,⁶⁶ states that where approval for

⁶⁶ G.N. No. 74 of 2001.

any disposition is required, it shall be the duty of the holder thereof and the intended grantee/transferee to apply for such approval.

According to the Land (Conditions of Rights of Occupancy) Regulations,⁶⁷ holders of granted rights of occupancy are subjected to further conditions. First, rights of occupancy are subject to development or other conditions as prescribed or imposed by the Commissioner for Lands.⁶⁸ Second, where land is located in a planning area, urban, peri-urban or redevelopment area and is undeveloped, the occupier is required to apply for planning consent and building permit within six (6) months of the grant.⁶⁹ Third, where land is for agricultural purposes, the occupier should, during the first year of the term of the right of occupancy, cultivate one eighth (1/8) of the area; and for each of the next four years, shall further cultivate one eighth (1/8) of the total area of arable land.⁷⁰ Fourth, where land is for mixed agricultural and pastoral purposes, the occupier is required to fully cultivate 1/5 of the total area and fully stock 1/10 of the total area during the first year of the term of the right of occupancy.⁷¹

Failure to comply with the conditions of the right of occupancy leads to revocation of the right by the President.⁷² Prior to the amendments the subject of the discussion in this paper, the President could not revoke the right of occupancy save for good cause⁷³ or public interest.⁷⁴ And as shown under footnote number

⁶⁷ Government Notice Number 77 of 2001.

⁶⁸ *Id.*, regulation 3.

⁶⁹ *Id.*, regulation 6(1).

⁷⁰ *Id.*, regulation 7(a).

⁷¹ *Id.*, regulation 9(a).

⁷² The Land Act, section 45(1).

⁷³ *Id.*, section 45(2). Prior to the amendments, good cause included: (i) attempted disposition of the right of occupancy to a non-citizen contrary to law; (ii) abandonment of the land for not less than two years; (iii) failure to develop the land; (iv) disposition or attempted disposition not complying with the law; (v) breach of a condition contained or implied in the Certificate of Occupancy; (vi)

73 below, the list of circumstances amounting to ‘good cause’ did not include failure to observe conditions relating to mortgages of underdeveloped or undeveloped land.

Based on the above, it is clear that once a person is given a granted right of occupancy, the land the subject of such right must be developed within a certain period. It is not necessary, for that matter, to enforce development conditions through mortgage arrangements in which the mortgagor might have aims other than developing the mortgaged land.

4.3 Loopholes

The new rules on mortgage of undeveloped and underdeveloped land do not apply to mortgages of customary right of occupancy.⁷⁵ This means that the mortgagor is not required to invest the money in Tanzania, nor use the money to develop the mortgaged land. It is argued that mortgages of customary rights of occupancy are just like those of the granted right of occupancy. In fact, the Village Land Act states that both the granted right of occupancy and customary right of occupancy are of equal status.⁷⁶

As noted under section 3.3 above, the Land Act recognizes other ways of creating mortgages, especially those not involving

breach of regulations made under the Land Act. Currently, the list of circumstances amounting to good cause today includes failure to observe conditions regarding mortgaging underdeveloped or undeveloped land.

⁷⁴ *Id.*, section 45(3). Public interest is not defined by statute. However, according to the Court of Appeal of Tanzania “public interest ...must include a purpose, that is to say an aim or object in which the general interest of the community is concerned or involved as opposed to the particular interest of individuals or institutions”. See *Attorney General v SISI Enterprises Ltd.*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal Number 30 of 2004(unreported), page 8.

⁷⁵ The Land Act, section 120C.

⁷⁶ The Village Land Act, section 18(1).

registration under the Land Registration Act. These include liens by deposit of documents and informal mortgages. Impliedly, persons holding unregistered land in both urban and rural areas can mortgage the land to secure funds from banks and other financial institutions. Since these transactions are not regulated by the Land Registration Act, there is no obligation to spend the secured finances to develop the mortgaged land or invest such monies in Tanzania. In law, mortgages are not limited to the granted right of occupancy but the new rules simply limit their applicability to land registered under the Land Registration Act. It is concluded that these loopholes can be used to defeat the purpose for which the rules were made.

5. CONCLUSION AND RECOMMENDATIONS

Based on the above discussion, it is concluded that the new rules on mortgage of undeveloped and underdeveloped land have serious legal implications on mortgagors. First, according to the Land Act, a mortgage is an interest in land securing payment of money or money's worth or fulfillment of certain obligations. The purpose for which money is borrowed from the lender is best known by the mortgagor. The rules depart drastically from this basic statutory definition. Second, by requiring the mortgagor to spend the borrowed money on developing the mortgaged land, it implies that the mortgagor can no longer freely secure funds to do what he wishes to do; borrowed money must be spent on the mortgaged land – where such land is undeveloped or underdeveloped. It further implies that third party mortgages on undeveloped and underdeveloped land are no longer possible since borrowers are not mortgagors. Third, the new rules are not necessary since every grant of the right of occupancy comes with a condition that the land in question should be developed within a specified period. Failure to effect the intended developments may result in the right of occupancy being revoked by the President.

Fourth, the new rules do not regulate mortgages of unregistered land as well as mortgage of customary rights of occupancy; this loophole may be used to defeat the purpose for which they were made.

It is recommended that the Land Act be amended to abolish the rules which impose unnecessary burden on mortgagors where undeveloped or underdeveloped land is concerned. The need to develop land the subject of the granted right of occupancy is already taken care of by the conditions which come with the grant; no need for over regulation. Much as land is public, holders of land rights should be given the opportunity to enjoy their interests.