

COMPULSORY LAND ACQUISITION AND THIRD PARTY INTERESTS UNDER TANZANIAN LAND LAW: THE CASE OF MORTGAGEES AND TENANTS

*Laurean Laurent Mussa**

Abstract

The President of the United Republic of Tanzania has power to acquire, subject to payment of compensation, any land where such land is required for public purpose. The acquisition leads to extinction of both the right of occupancy and third party land interests, such as mortgages and leases, created out of it. Using documentary review of legislation and other pieces of literature, the paper explores the extent to which the law in Tanzania treats third party interests generally and leases and mortgages in particular as far as eligibility for payment of compensation is concerned. It is concluded that despite the fact that mortgagees and tenants have proprietary interests in land, laws relating to compulsory land acquisition in Tanzania focus on holders of the right of occupancy. The paper recommends amendments to relevant laws so that third party interests generally and mortgages and leases in particular are accorded the requisite attention in the compulsory acquisition process; especially eligibility for payment of compensation.

* PhD(Law), Lecturer, Department of Private Law, University of Dar es Salaam School of Law, Tanzania. Contacts: +255 764 025 332, lmussa2003@yahoo.com.

Key words: *compensation, compulsory acquisition, leases, mortgages, right of occupancy, third party land interests.*

1. INTRODUCTION

According to the Land Acquisition Act,¹ the President of the United Republic of Tanzania (the President) can compulsorily acquire² any land of any estate where such land is required for public purpose. According to the Act³, public purpose includes scenarios where land is required for: exclusive Government use, general public use, any Government scheme, the development of agricultural land or for the provision of sites for industrial, agricultural or commercial development, social services or housing; for or in connection with sanitary improvement of any kind, including reclamations; for or in connection with the laying out of any new city, municipality, township or minor settlement or the extension or improvement of any existing city, municipality, township or minor settlement; for or in connection with the development of any airfield, port or harbour; for or in connection with mining for minerals or oil; for use by any person or group of persons who, in the opinion of the President, should be granted such land for agricultural development. In case the President considers that land should be acquired but the aim for which such land is needed does not fall within the above items, he may secure a resolution from the National Assembly and publish an

¹ Cap 118, Revised Edition, 2018, section 3.

² According to the Food and Agriculture Organization (FAO), compulsory acquisition means the power of government to acquire private rights in land without the willing consent of the owner for the society's benefit. See FAO, "Compulsory Acquisition of Land and Compensation" FAO Land Tenure Studies 10, Rome, 2008, page 5.

³The Land Acquisition Act, section 4(1) (a) – (f).

Order in the Government Gazette to declare the aim for which the land is needed to be public purpose.⁴

Mortgages and leases are some of third party land interests capable of being created out of the right of occupancy under Tanzanian law. According to section 113(1) of the Land Act,⁵ a mortgage⁶ can be created out of the right of occupancy or a lease for purposes of securing payment of a debt or discharging any other obligation. Leases⁷, on the other hand, can be created by occupiers of rights of occupancy.⁸

Upon compulsory acquisition of land by the President, holders of rights of occupancy are entitled to compensation in the form of cash or grant of public land.⁹ Furthermore, the rights of occupancy get extinguished as the land in question reverts to the President free from any rights and interests whatsoever.¹⁰ It should be noted that mortgages and leases are forms of land interests recognized by law; hence the need to explore their status in the event of compulsory acquisition. This paper, therefore, sets out to explore the extent to which mortgagees and tenants are

⁴*Id.*, section 4(2).

⁵ Cap 113 Revised Edition, 2018.

⁶ According to section 2 of the Land Act, a mortgage means an interest in a right of occupancy or lease securing the payment of money of fulfillment of certain conditions. According to Dixon, M., *Modern Land Law*(10th Ed.), London: Routledge: Taylor & Francis Group, 2016, p. 404, a mortgage is a security for a loan involving transfer of legal or equitable interests in the mortgagor's land to the mortgagee with the condition that the mortgagee's interest shall come to an end upon repayment of the loan by the mortgagor.

⁷ According to Smith, J.R., *Introduction to Land Law* (2nd Ed.), Edinburgh: Pearson Education Ltd., 2010, pp. 172 & 172, a lease is a right to possess land for a certain period/ an estate where land is enjoyed for a fixed period.

⁸The Land Act, section 78(1).

⁹ The Land Acquisition Act, section 11(1) & (2). According to section 12(3) of the Act, grant of public land is possible if the acquired land was being used as a cemetery, crematorium or for any purpose other than for gain or profit.

¹⁰*Id.*, section 29.

treated by law in the compulsory acquisition process as far as eligibility for payment of compensation is concerned.

The paper is divided into seven sections. The first section gives introductory remarks. The second section provides a general overview and background information on compulsory land acquisition. Section three gives a description of the relevance of third party land interests in general and mortgages and leases in particular. The question is why third party land interests matter in the acquisition process? The fourth section gives a discussion on entitlement to compensation with a special attention to mortgagees and tenants. The fifth part looks at compensable items in events of compulsory land acquisition. The sixth part gives concluding remarks while the seventh part provides recommendations.

2. COMPULSORY LAND ACQUISITION: OVERVIEW AND HISTORICAL BACKGROUND

According to FAO,¹¹ compulsory land acquisition means power of government to acquire private land rights without consent of owners or occupiers for the benefit of the society. Commonly accepted grounds for compulsory acquisition include transport uses such as roads, canals, highways, railways, bridges and airports; public buildings; public utilities for water, sewage, electricity, gas, communications, irrigation, drainage, dams and reservoirs; public parks and defence purposes.¹²

¹¹ "Land Reform: Land Settlement and Cooperatives", 2008, p.8.

¹²*Ibid.* One author argues that the rate of compulsory land acquisition in Tanzania is likely to go higher owing to the Government's policy on investment in sectors such as mining, energy, agriculture, roads, water drainage systems, electricity, hospitals, schools, housing estates and railways. See Ndjovu, C., "Understanding Causes of Dissatisfactions among Compensated Landowners in Expropriation

Modern day compulsory acquisition legislation in Africa generally and Tanzania in particular traces its origins from European colonization. It is reported that, for example, the 1876 Public Lands Ordinance in the Gold Coast (Ghana) permitted compulsory acquisition of lands which were required for the public service.¹³ In the then Tanganyika, the Land Acquisition Ordinance of 1926 enumerated instances where land could be acquired for public purposes; and these were: for exclusive Government use, for the use of the native inhabitants of the Territory or for general public use;¹⁴ for or in connection with sanitary improvements of any kind;¹⁵ for or in connection with the laying of any new township or Government station or the extension or improvement thereof;¹⁶ for obtaining control over land contiguous to any port; ¹⁷ for obtaining control over land required for or in connection with mining or oil mining purposes;¹⁸ or for obtaining control over land required for or in connection with construction of any work.¹⁹

It is argued that the land acquisition legislation in the then Tanganyika provided room for the legislature to amend the interpretation of “public purpose” so that the Government could easily put its eminent domain²⁰ powers to use at any contemplated

Programs in Tanzania”, Vol. 5, Issue 1, *International Journal of Scientific and Technology Research*, January 2016, p. 160.

¹³ Dunning, H.C., “Law and Economic Development in Africa: The Law of Eminent Domain”, Vol. 68, No. 7, *Columbia Law Review*, Nov., 1968, p. 1290.

¹⁴*Id.*, p. 1295.

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸*Ibid.*

¹⁹*Ibid.*

²⁰ On the genesis and development of the doctrine of eminent domain, see Kelly, D.B., “The ‘Public Use’ Requirement in Eminent Domain Law: A Rationale Based on Secret Purchasers and Private Influence”, Vol. 92, No.1, *Cornell Law Review*, 2006, pp. 9 – 12. See also Khan, M.I., “The Eminent Domain of Land Acquisition: An Embedded Instrument of Economic Exclusion”, Vol. 2, Issue 2, *International Journal of Management and Humanities*, 2015, page 2.

time. In 1965, for example, the definition was broadened to include instances where land was required "for exclusive Government use, for general public use, for any Government scheme for development of agricultural land, or for the provision of sites for industrial or commercial development, social services or housing".²¹ Further amendments were effected in 1967 when the 1926 Act was repealed and replaced by the Land Acquisition Act.²²

3. THE CONCEPT OF THIRD PARTY LAND INTERESTS

The land laws of Tanzania treat all land as public and vested in the President as trustee for and on behalf of citizens.²³ Citizens of Tanzania can enjoy estates²⁴ in the form of the right of occupancy.²⁵ The right of occupancy is divided into two sub categories, namely the granted right of occupancy²⁶ and

²¹*Ibid.* Dunning, H.C., "Law and Economic Development in Africa: The Law of Eminent Domain"

²²*Id.*, pp. 1295 – 1296.

²³ The Land Act, section 4(1) and the Village Land Act, Cap 114, R.E., 2018, section 3(1) (b).

²⁴ According to Duddington, J., *Land Law* (5th Ed.), Edinburgh: Pearson Education Ltd., 2015, p.5, estate in land includes rights which a person has to control and use the land. According to the author, under English law land is owned by the Crown; hence the most that can be enjoyed by the rest are estates. Needhan, B., *Planning, Law and Economics: An Investigation of the Rules we make for Using Land*, London: Routledge- Francis & Taylor Group, 2006, p. 34, defines estate as an interest in land which can be defined by and defended at law.

²⁵ According to section 2 of the Land Act, a right of occupancy means title to the use and occupation of land; it also includes the deemed right of occupancy.

²⁶ According to section 2 of the Land Act, it means the right of occupancy granted in line with Part VI of the Land Act. The attributes of the granted right of occupancy are summarized under section 22(1) (a) – (k) of the Land Act. Suffice to say that, in view of the attributes referred to above, the granted right of occupancy is an official title to land issued by the President for a specified period. The title is evidenced by a certificate of occupancy which is registered by the Registrar of Titles.

customary right of occupancy.²⁷ From the above, it is clear that holders of rights of occupancy are in direct relationship with Government authorities responsible for granting and managing land in Tanzania. These authorities, apart from granting land rights, are also responsible for ensuring that grantees use the land in accordance with prescribed conditions²⁸. With respect to the granted right of occupancy, the Commissioner for Lands is required to ensure that holders thereof comply with conditions prescribed in certificates of occupancy and different pieces of legislation; and failure to comply may lead to revocation.²⁹ Village councils are responsible for managing village land and to that effect they ensure that holders of customary rights of occupancy conduct their affairs in accordance with prescribed conditions.³⁰

Whereas there is a direct relationship between holders of the rights of occupancy and Government institutions, such a relationship does not exist between holders of land interests created out of the said rights of occupancy and Government institutions. A mortgage, for example, is an arrangement between the mortgagor and mortgagee while a lease is an agreement between the landlord and the tenant. In as far as compulsory land acquisition is concerned, the holder of the right of occupancy gets in touch with the Government, which granted him the right to

²⁷ According to section 2 of the Village Land Act, customary right of occupancy means a right of occupancy which is evidenced by a certificate of customary right of occupancy; and includes the deemed right of occupancy. According to section 2 of the Village Land Act, a deemed right of occupancy means title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land under and in accordance with customary law.

²⁸ Some of the conditions subject to which the granted right of occupancy is granted are stipulated under Part VI, Sub Part 2 of the Land Act(sections 31 – 35)

²⁹ The Land Act, section 45(1).

³⁰ The Village Land Act, section 8(1).

occupy and use land in accordance with certain conditions. Mortgagees and tenants, in this context, are third parties.

4. TENANTS' AND MORTGAGEES' INTERESTS IN LAND

It is now settled in law that once leases and mortgages are created, tenants and mortgagees respectively acquire land interests capable of enforcement and protection at law. The tenant is entitled to exclusive possession³¹ of the leased land; in fact, according to Dixon, a lease is an estate signifying a type of "ownership" of land for a specific period.³² Consequently, a tenant can sue in trespass and nuisance as well as assigning the lease.³³ The tenant's proprietary interest in land imposes a duty on the rest of the world; in that regard, he may take legal actions against third parties whose activities interfere with his reasonable enjoyment of the land.³⁴ This position is reflected in local law(s). According to section 88(1)(a) of the Land Act, there is an implied covenant in every lease that the lessee shall peaceably and quietly possess and enjoy the leased land; of course, he must have paid rent and observed all conditions, express or implied, in the lease. The

³¹ According to Harris, C. & Rodell, A., *Property Law and Practice 2011/12*, Guildford: College of Law Publishing, 2011, p. 309, exclusive possession means the right of the tenant to exclude all others, including the landlord, from the leased premises/land. See also Tenga, R.W. & Mramba, S.J., *Conveyancing and Disposition of Land in Tanzania: Law and Practice*, Nairobi: LawAfrica Publishing (K) Ltd, 2017, p. 131, Onalo, P.L., *Land Law and Conveyancing in Kenya*, Nairobi: LawAfrica Publishing(K) Ltd (undated), pp.67-70 and Gray, K. & Gray, S.F., *Land Law* (7th Edition), New York: Oxford University Press, 2011, pp. 160 – 162.

³² Dixon, M., *Modern Land Law* (10th Edition), note 6 above, at p. 219.

³³ *Ibid.*

³⁴ McFarlane, B., *et al.*, *Land Law: Text, Cases and Materials* (2nd Edition), Oxford: Oxford University Press, 2012, p. 758.

same is provided for by section 56(2) of the Land Registration Act.³⁵

Likewise, mortgagees have interests in land which are legally recognized and protected. Dixon notes that much as a mortgage is a contractual arrangement, it creates proprietary interests on the mortgaged land on the part of the mortgagee/lender.³⁶ The mortgagor retains the equity of redemption, which is another form of an interest in land.³⁷ Both parties can transfer their respective interests to third parties.³⁸ Under Tanzanian laws, mortgages do not operate to transfer rights or interests in land from mortgagors to mortgagees; that is to say, they serve as security only.³⁹ However, this does not mean that mortgagees do not have any proprietary interests in mortgaged lands. According to the Land Registration Act and the Land Act, there are implied covenants binding mortgagors which show that mortgagees have land interests in mortgaged lands. These include, for example, covenants: to repair buildings and other improvements on mortgaged land;⁴⁰ to insure buildings on mortgaged land;⁴¹ not to lease the mortgaged land without the written consent of the mortgagee;⁴² and not to transfer or assign the right of occupancy without the mortgagee's written consent.⁴³ Mortgages are also

³⁵ Cap 334, Revised Edition, 2018.

³⁶ Dixon, M., *Modern Land Law* (10th Edition), note 6 above, at p. 404. See also Goo, S.H., *Land Law* (3rd Edition), London: Cavendish Publishing Ltd., 2002, p. 813.

³⁷ Dixon, M., *Modern Land Law* (10th Edition), *Ibid*.

³⁸ *Ibid*.

³⁹ The Land Act, section 116(1). See also section 57 of the Land Registration Act.

⁴⁰ The Land Registration Act, section 62(b). See also section 124(1)(c) of the Land Act.

⁴¹ *Id.*, section 62(c). See also section 124(1) (d) of the Land Act.

⁴² *Id.*, section 62(d). See also section 124(1) (f) of the Land Act.

⁴³ The Land Act, section 124(1) (g).

registrable dispositions in terms of section 41(1) of the Land Registration Act.

Based on the above, it is argued that since leases and mortgages are interests in land recognized and protected by law, it is fair and logical that they be considered for purposes of payment of compensation in cases of compulsory land acquisition. This is because of two major reasons. First, compulsory acquisition occurs without the land owners' consent. As already pointed out above, this is a phenomenon involving the exercise of Governmental powers in the name of public purpose/benefit to the society. The process does not involve any consensual negotiations on whether land should be acquired or not. Second, once rights of occupancy are acquired, mortgages and leases become terminated as they no longer have legal basis for their continued existence. It is to be noted that these are secondary land interests created out of the right of occupancy. Termination of the right of occupancy through compulsory acquisition implies that other derivative land interests, in this case mortgages and leases, cease to exist. The mortgagee loses security for the mortgagor's loan or any other obligation while the tenant loses exclusive possession and enjoyment of the leased premises.

5. COMPULSORY ACQUISITION AND THE POSITION OF MORTGAGEES AND TENANTS

5.1 The Acquisition Process

In accordance with the Land Acquisition Act and other pieces of legislation, the acquisition process is as briefly described below.

5.1.1 Establishing whether there is Need to acquire Land

Although this step is not expressly provided for in compulsory acquisition laws, it is logical that the Government establishes

whether there is need to acquire land compulsorily. Ultimately, this will be guided by section 4 of the Land Acquisition Act, which stipulates undertakings falling within “public purpose”. Consequently, it is equally important to establish if there is public purpose in the intended acquisition. This is because, much as the process is non-consensual, the same can be challenged if public purpose is not clearly manifested. In the case of *the Attorney General v Sisi Enterprises Ltd*,⁴⁴ the Court of Appeal of Tanzania observed that public purpose or public interest must include an object or aim in which the general interest of the community is concerned as opposed to interest of individuals or institutions.⁴⁵ The case involved compulsory acquisition of a plot of land comprised in certificate of title number 16395 (famously known as Drive in Cinema) and subsequent grant to the Embassy of the United States of America. The Court concluded that the acquisition was not for public purpose as it did not fall within the ambit of section 4 of the Land Acquisition Act.⁴⁶

5.1.2 Conducting Cadastral Surveys of the Land to be acquired

Cadastral survey is carried out for the purposes of obtaining information for recording the position of boundaries of the land in separate ownership, or land which is intended to be the subject of a disposition or partition, or re-establishing the boundaries or setting up new boundaries.⁴⁷ The need to conduct cadastral surveys arises out of the fact that the notice of intention to acquire land makes reference to survey plan. According to Form A in the Schedule to the Land Acquisition (Prescribed Forms)

⁴⁴ Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 30 of 2004.

⁴⁵ *Id.*, p.8.

⁴⁶ *Id.*, p.10.

⁴⁷ The Land Survey Act, Cap 324, R.E., 2002, section 2. See also Silayo, E.H., “Searching for an Affordable and Acceptable Cadastral Survey Method”, FIG Working Week, Cairo, April 16th – 21st, 2005, p.2.

Regulations,⁴⁸ the notice of intention to acquire land should sufficiently describe the land to be acquired. The form makes reference to a registered plan number which is deposited with the Director of Surveys and Mapping. It is further stated in the form/notice that copies of the survey plan are available for inspection at the Office of the Commissioner for Lands.

The law governing survey of land in Tanzania provides that land surveys must be conducted by land surveyors.⁴⁹ According to Mango,⁵⁰ cadastral survey involves three major steps. The first is that the surveyor should submit a request for survey to the relevant local government authority. If the request is successful, the surveyor is issued with survey instructions and access to data by the Director of Survey and Mapping. The second step involves cadastral survey execution. The third step involves submission of cadastral survey work to the Director of Survey and Mapping for scrutiny and approval.

5.1.3 Notice of Intention to acquire Land

According to section 6 of the Land Acquisition Act, the notice is served on all persons with interest or claiming to have interest in the land to be acquired. In the event that the person with interest in the land is not found, the notice can be served on any person in occupation of the land or, in his absence, on any conspicuous place. According to section 8(3) of the Act, the notice must be published in the Government Gazette as soon as practicable after being served on affected persons. Persons claiming to have interest in the land to be acquired must send their claims to the Minister within six weeks from the date of the notice.

⁴⁸ G.N. No. 118 of 1968.

⁴⁹ The Land Survey Act, section 4(1) (a) – (d).

⁵⁰ Mango, J., "An Overview of the Cadastral System in Tanzania", WCS-CE, the World Cadastre Summit, Congress and Exhibition, Istanbul, 20th – 25th April, 2015, p.4.

5.1.4 Valuation

Assessment of compensation payable under item 5.1.5 is done by a qualified valuer.⁵¹ The valuation process is as prescribed under regulation 64 of the Valuation and Valuers Registration (General) Regulations.⁵² The process can be summarized as follows: receiving instructions from the acquiring authority; valuer to satisfy himself that the acquisition is satisfactory; preliminary inspection of the project site; convening and participating in sensitization and awareness meetings with interested persons; field inspection of the area; preparation of valuation reports and compensation schedules and submission of the same to the Chief Valuer for approval.

Some of the steps highlighted above need elaboration. According to regulation 64(1) (d) of the Valuation and Valuers Registration (General) Regulations 2018, preliminary inspection of the project site involves several activities on the part of the valuer. These include identification of the boundaries of the area where assessment is to take place; determination of compensation value rates; notifying local leaders about the valuation exercise; and resource mobilization. During sensitization meetings, the valuer is required to: disclose the purpose of the exercise and the name of the acquiring authority; disclose coverage of the area to be affected; define compensable items; describe valuation methodology to be applied; share value rates to be used; give cutoff date⁵³ and entitlements to persons to be affected by the project; inform persons to be affected about their statutory

⁵¹ The Land (Assessment of the Value of Land for Compensation) Regulations 2001, regulation 5 and the Valuation and Valuers Registration (General) Regulations 2018, regulation 10.

⁵² G.N. No. 136 of 2018.

⁵³ According to section 53(1) of the Valuation and Valuers Registration Act, cutoff date is the day of commencement of valuation .Section 53(3) of the Act prohibits developments on the land and premises the subject of valuation once valuation commences.

entitlements and obligations; show the duration of the exercise; and supervise the distribution of all statutory forms.

According to regulation 64(1) (e),⁵⁴ field inspection involves the following sub activities: (a) giving notice, through local leadership, to persons to be affected by the intended valuation exercise; (b) identifying persons to be affected; (c) identification of compensable items ; (d) inspection and recording of compensable items in a prescribed form; ⁵⁵ (e) adjudication of individual parcels of land; (f) taking measurements of buildings, structures and other developments; (g) counting of crops; (h) capturing images showing people who are affected by the exercise; (i) handing over copy of endorsed valuation form to affected persons; and (j) filling in and signing the valuation form.

Regulation 64(1) (f)⁵⁶ requires the valuer to prepare: (a) valuation reports;⁵⁷ (b) assessment methods;⁵⁸ (c) compensation schedules; and (d) submit valuation reports to the Chief Valuer for approval.

5.1.5 Payment of Compensation

Payment of compensation in events of compulsory land acquisition is internationally and locally recognized. For example, according to the World Bank,⁵⁹ compensation at replacement cost and other assistance should be given to affected persons in order to enable them improve their standards of living or livelihoods.⁶⁰

⁵⁴ The Valuation and Valuers Registration (General) Regulations 2018.

⁵⁵ This is Valuation Form Number 3 in the Fourth Schedule to the Valuation and Valuers Registration (General) Regulations 2018.

⁵⁶ The Valuation and Valuers Registration (General) Regulations, *ibid*.

⁵⁷ Valuation reports are submitted by using Valuation Form Number 5, Fourth Schedule to the Valuation and Valuers Registration (General) Regulations.

⁵⁸ According to section 51(1) of the Valuation and Valuers Registration Act, *op cit.*, valuation methods include: direct market comparative method; replacement cost or contractors test method; profit method; and residual method.

⁵⁹ "Environmental and Social Framework", Washington, 2017.

⁶⁰ *Id.*, p. 56, paragraph 12.

FAO⁶¹ stresses that compensation should be for loss of land acquired; buildings and other improvements; reduction in value of land retained after acquisition; and disturbance or other losses to the livelihoods of owners and occupants caused by the acquisition.

Under Tanzanian land law, the main form of compensation in cases where the state compulsorily acquired land is cash. Section 11(1) of the Land Acquisition Act provides that when there is compulsory acquisition, the affected person(s) must get compensation out of the moneys set aside for the purpose and as approved by the Parliament. Regulation 7 of the Land (Assessment of the Value of Land for Compensation) Regulations 2001 states that compensation for loss of interest in land should include the value of unexhausted improvements; disturbance allowance; transport allowance; accommodation allowance and loss of profits.

Section 11(2) of the Land Acquisition Act states that the President may, instead of paying monetary compensation, give plots over public land to affected persons. These plots must be of the same value and condition as the acquired ones. These plots may be in lieu of or in addition to cash/monetary compensation. The main condition is that affected persons must give their consent to the arrangement. Section 12(3) of the Land Acquisition Act states that alternative plots must be given in cases where the acquired land was being used as a cemetery or crematorium or for any purpose other than for gain or profit.

Moreover, regulation 10(1) of the Land (Compensation Claims) Regulations, 2001 states that compensation should take the form

⁶¹ "Land Tenure Studies 10: Compulsory Acquisition of Land and Compensation", Rome, 2008, p. 27, paragraph 4.12.

of cash. However, sub regulation 2 gives discretion to the Government to give compensation in kind in either of the following forms: a plot of land of comparable quality, extent and productive potential to the land lost; building or buildings of comparable quality, extent and comparable to the building or buildings lost; plants and seedlings; or regular supplies of grain and other basic foodstuffs for a specified time. The guiding principle is that compensation must be full,⁶² fair⁶³ and prompt.⁶⁴

5.1.6 Notice to take Possession

This is the notice given occupiers of acquired land informing them that the President shall take possession of the land after lapse of a specified period. According to the Land Acquisition Act,⁶⁵ the notice may be contained in the notice of intention to acquire land or given separately. For example, according to Government Notice Number 14 of 2019⁶⁶, the notice of intention to acquire certain pieces of land in Tabora, Manyara, Kagera, Geita, Singida and Dodoma regions states that the President shall take possession of

⁶² The Land Act, sections 3(1) (g) & 22(1) (k).

⁶³ The Constitution of the United Republic of Tanzania, *op cit.*, article 24(2). According to FAO, fair and adequate compensation should meet four criteria; that is, compensation and rehabilitation should be sufficient to ensure that the resettled populations: (i) achieve a minimum standard of living and access to land and natural resources and social services; (ii) recover all losses caused by transitional hardships; (iii) experience little disruption to their social networks, employment and access to natural resources and public facilities; and (iv) have access to opportunities for social and economic development. See FAO, "Land Tenure Studies 10: Compulsory Acquisition of Land and Compensation", pp. 42 – 43.

⁶⁴ This is a requirement under section 52(4) of the Valuation and Valuers Registration Act, No. 7 of 2016. Section 52(5) of the Act is to the effect that if compensation is not promptly paid, interest starts to accrue at the rate offered by commercial banks on fixed deposits. Section 52(8) of the Act interprets prompt payment of compensation to mean payment within six months after approval of valuation by the Chief Valuer.

⁶⁵ Cap 118, section 7(1).

⁶⁶ P.6, paragraph 3.

the land six weeks after the notice is published in the Government Gazette.

5.2 Entitlement to Compensation

Generally, property rights are protected by the Constitution of the United Republic of Tanzania 1977. According to article 24(1), every person is entitled to own property. Article 24(2) prohibits deprivation of the person's property for nationalization or other purposes without fair and adequate compensation.

With regard to interests in land, the Land Acquisition Act, the Land Act and the Village Land Act provide for payment of compensation in events land interests are interfered with by the Government. One of the fundamental principles of the National Land Policy under the Land Act is payment of full, fair and prompt compensation to any person whose right of occupancy, recognized long-standing occupation or customary use of land is revoked.⁶⁷ Assessment of compensation is based on market value of the property,⁶⁸ disturbance allowance, and transport allowance, loss of profits or accommodation and costs of acquiring the property.⁶⁹ Furthermore, one of the attributes of the right of

⁶⁷ The Land Act, section 3(1) (g). See also section 3(1) (h) of the Village Land Act.

⁶⁸ This means the highest price the asset would fetch in a free market. See Komu, F.J., "Conceptualizing Fair, Full and Prompt Compensation – the Tanzanian Context of Sustaining Livelihood in Expropriation Projects", Vol. 2, Issue2, *Journal of Land Administration in Eastern Africa*, July 2014, p. 259. According to one scholar, compensation based on market value is often insufficient to cover losses incurred by affected land owners. See Tagliarino, N.K., "The Status of National Legal Frameworks for Valuing Compensation for Expropriated Land: An Analysis of whether National Laws of 50 Countries/Regions across Asia, Africa and Latin America Comply with International Standards on Compensation Valuation", Vol. 6, Issue 37, *Land*, June 2017, p. 3.

⁶⁹ *Ibid.*

occupancy is that it can be acquired subject to payment of compensation by the State.⁷⁰

The main question is whether tenants and mortgagees are entitled to compensation when the right of occupancy is acquired. It has already been shown that mortgages and leases are interests in land. And according to section 2 of the Land Acquisition Act, land includes a parcel of land held under a Government lease, right of occupancy or an estate or interest in such parcel. Technically, this means the President can acquire both the right of occupancy and other interests created out of it.

To answer the question posed in the above paragraph, it is imperative to review legislation on entitlement to compensation in events of compulsory acquisition. According to regulation 4 of the Land (Compensation Claims) Regulations,⁷¹ the following are entitled to claim compensation: holders of granted rights of occupancy in respect of general or reserved land which is transferred to village land; holders of rights of occupancy which are compulsorily acquired by the President; holders of granted or customary rights of occupancy in respect of land which is declared to be hazardous land;⁷² holders of customary rights of occupancy where the land becomes the subject of the granted right of

⁷⁰ The Land Act, section 22(1) (k). See also section 18(1) (i) of the Village Land Act.

⁷¹ G.N. No. 79 of 2001.

⁷² According to section 7(1) of the Land Act, hazardous land means land the development of which is likely to pose danger to life or lead to environmental degradation and destruction. It includes the following categories of land: (i) mangrove swamps and coral reefs; (ii) wetlands and offshore islands; (iii) land designated or used for the dumping of hazardous waste; (iv) land within sixty metres of a river bank or the shore line of an inland lake, beach or coast; (v) land on slopes with a gradient exceeding any angle specified by the responsible Minister; and (vi) land which should not be developed as directed by any relevant authority.

occupancy;⁷³ and occupiers of land in urban or peri-urban areas where land is acquired by the President under section 60 of the Land Act.⁷⁴ Clearly, tenants and mortgagees are excluded; the list is almost entirely limited to “occupiers” of the right of occupancy, customary or granted.

Even in instances where the right of occupancy is extinguished owing to transfer of village land to reserved or general land, mortgagees and tenants are not entitled to claim compensation. According to regulation 8 of the Village Land Regulations,⁷⁵ it is Village Councils and villagers occupying land under the customary right of occupancy who are allowed to claim compensation.

5.3 Compensable Items

There are six items in respect of which compensation is payable. According to regulation 7 of the Land (Assessment of the Value of

⁷³ According to section 34(3)(b)(iv) of the Land Act, where the right of occupancy includes land which was previously occupied under customary law, previous rights holders should be moved subject to, *inter alia*, prompt payment of full compensation for loss of their interests in land.

⁷⁴ Section 60 of the Land Act provides for, *inter alia*, payment of compensation in the event land is compulsorily acquired owing to the implementation of a scheme of regularization. According to section 57(2) of the Land Act, the purpose of the scheme of regularization is to facilitate the recording, adjudication, classification and registration of the occupation of land. Before a scheme is declared by the Minister, the following matters must be taken into account: whether the area is substantially used for habitation; whether a substantial number of persons living in the area appear to have no apparent lawful title to their occupation and use; whether the land is occupied under customary law; whether the area is substantially built-up; whether the area has been or is likely to be declared a planning area under relevant urban planning laws; whether the area is well-established from a social point of view; whether there is evidence that a considerable number of persons living in the area appear to be investing in their houses and businesses; whether a substantial number of people and community based organizations in the area indicate that they wish to participate in the scheme of regularization; and other considerations as prescribed.

⁷⁵ G.N. No. 86 of 2001.

Land for Compensation) Regulations,⁷⁶ the items are: (i) value of unexhausted improvements;⁷⁷ (ii) disturbance allowance; (iii) transport allowance; (iv) accommodation allowance; (v) loss of profits; and (vi) value of land. The items are also reproduced by the Valuation and Valuers Registration (General) Regulations 2018.⁷⁸

Disturbance allowance is calculated by multiplying the value of interest in land by the average percentage of interest rate offered by the Bank of Tanzania on fixed deposits for twelve months.⁷⁹ The value of interest in land includes the totality of all compensable items as pointed out above. These items do not take into account third party land interests, mortgages and leases inclusive. Transport allowance is the actual costs of transporting twelve tons of luggage by rail or road within twenty kilometres from the point of displacement.⁸⁰ Accommodation allowance is the market rent for the building multiplied by thirty six months.⁸¹ These two items are payable to the owner of the property only if the house built on the land is in use at the time of valuation.⁸² Focus is on the owner, not holders of third party interests, including tenants and mortgagees.

Loss of profits in respect of business carried out on the land to be acquired is arrived at by multiplying net monthly profit by thirty six

⁷⁶ G.N. No.78 of 2001.

⁷⁷ According to section 12(7) of the Land Acquisition Act, unexhausted improvements means any quality permanently attached to the land directly resulting from the expenditure of capital or labour by a person holding land under a right of occupancy or Government lease and increasing the productive capacity, utility or amenity of the land.

⁷⁸ G.N. No. 136 of 2018, regulation 12.

⁷⁹ *Id.*, regulation 15.

⁸⁰ *Id.*, regulation 16.

⁸¹ *Id.*, regulation 13.

⁸² *Id.*, regulation 12(2).

months.⁸³ The loss is assessed and evidenced by audited accounts and returns filed with the relevant revenue authority.⁸⁴

In assessing land and unexhausted improvements, the law⁸⁵ requires the following items to be taken into account, namely, crops, plants and trees; buildings and ancillary structures; site works; canals and irrigation water systems; infrastructure systems; water storage tanks, water wells and boreholes; children playing grounds; and graves. Third party interests are named as part of issues to be considered by the Chief Valuer when preparing land value rates.⁸⁶ Prescribed forms used in the valuation exercise do not indicate if third party land interests are taken into account.⁸⁷

Looking at the nature of compensable items listed above, it is clear that tenants' and mortgagees' interests are not accommodated. In line with the definition of unexhausted improvements under the Land Acquisition Act, for example, the focus is on the occupier of land under the right of occupancy or Government lease. The definition of the term under section 2 of the Land Act also focuses on the occupier or any other person acting on behalf of the occupier. Other compensable items also focus on the owner/occupier of the right of occupancy. Despite the fact that third party interests are considered in preparing land

⁸³*Id.*, regulation 14.

⁸⁴*Ibid.*

⁸⁵*Id.*, regulation 54

⁸⁶*Id.*, regulation 53(4)(l).

⁸⁷ For example, according to Valuation Form No. 3(Property Inspection for Compensation Purpose) under the Fourth Schedule to the Valuation and Valuers Registration(General) Regulations, the following particulars are included: owner; general description of the property; description of the main building; and crops(types and farm size). According to Valuation Form No. 4(Analysis of Valuation for Compensation), the following particulars must be supplied, among others: name of the owner; general description of the property; main buildings; description of the farm; size of the land; value of buildings; value of crops; value of land; and value of allowances.

value rates, the same are not given the requisite attention in other statutory provisions.

5.4 Remedies under Contract and Land Law

The fate of mortgagors' and tenants' land interests can be looked at from the contract and land law perspective. In law, apart from being estate relationships, both mortgages and leases are contracts.⁸⁸ The first set of remedies applies in events where there is breach of contract, and these include, for example, damages, specific performance and injunctions.⁸⁹ These are irrelevant as compulsory acquisition is not breach of contract by either of the parties. The second set of remedies comes into play when a contract is frustrated. Frustration means a situation where, following formation of a contract, an event occurs independent of the fault of either party which makes performance impossible.⁹⁰ The main remedy where a contract is frustrated is that if any benefit has been paid for but not yet enjoyed, money can be recovered; that is, where there is total failure of consideration, money paid can be recovered.⁹¹ It is argued that contractual remedies deal with contractual rights and obligations and not land interests. This paper is about loss of land interests by mortgagees and tenants where the subject land is compulsorily acquired by the state.

The Land Act provides for remedies for both mortgagor-mortgagee and landlord-tenant relationships but they relate to default by either party. For example, under section 126, the

⁸⁸ Dixon, M., *Modern Land Law* (10th Edition), note 6 above, at pp. 229(leases) & 403(mortgages).

⁸⁹ Stone, R., *The Modern Law of Contract* (5th Edition), London: Cavendish Publishing Ltd., 2002, pp. 429 – 461.

⁹⁰*Id.*, p. 485.

⁹¹*Id.*, p. 396.

mortgagee may, upon default by the mortgagor, appoint a receiver, lease the mortgaged land, enter into possession of the mortgaged land, or sell the mortgaged land. Section 109(1) & (2) empowers both lessor and lessee to institute a suit where either party is in breach for purposes of obtaining an order for damages, specific performance, injunction, or recovery of rent arrears. Clearly, these remedies are applied when there is breach by either party and, for that matter, not relevant to the discussion in this paper.

6. CONCLUSION

Based on the above discussion, the following concluding remarks are worth noting. First, the President is given powers to acquire any land and for any estate if that land is needed for public purpose. Basically, public purpose includes Government-initiated projects and undertakings. Second, the acquisition process should be conducted in accordance with the laid down procedures; these include, for example, issuing of notice to acquire land, cadastral surveys, valuation, payment of compensation and taking possession of the acquired land. Third, the law recognizes existence of third party land interests which are created out of the right of occupancy; examples being leases and mortgages. Tenants and mortgagees, for that matter, have proprietary land rights which are protected at law. Fourth, despite their recognition by law, the said third party interests are not accorded due weight in compulsory acquisition legislation in Tanzania as the law concentrates on holders of the right of occupancy – customary or granted. Fifth, remedies provided for by contract and land law relate to breach of contractual duties by the parties and therefore not relevant to the discussion in this paper.

7. RECOMMENDATIONS

On the basis of the above conclusions, it is recommended that relevant legislation be amended in order to offer firm protection to third party interests in general and leases and mortgages in particular during the compulsory acquisition process. First, amendment of the Land (Compensation Claims) Regulations 2001 so that tenants and mortgagees are recognized as among persons who can claim compensation. Second, amendment of the Land Acquisition Act so that third party land interests generally and leases and mortgages are explicitly recognized as being capable of being affected by compulsory acquisition hence be able to be compensated. Third, amendment of the Valuation and Valuers Registration Act and the Valuation and Valuers Registration (General) Regulations so that there are elaborate procedures for assessing value of third party land interests in general and leases and mortgages in particular in the acquisition process. The two pieces of legislation should also indicate that leases and mortgages are part of compensable items.