

**EXAMINING THE ADEQUACY OF THE MORTGAGE ACT IN  
PROTECTING THE RIGHTS OF THE MORTGAGOR AND  
MORTGAGEE**

**BY  
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1153-01024-00206**

**A DISSERTATION SUBMITTED TO THE SCHOOL OF LAW IN  
PARTIAL FULFILLMENT OF THE REQUIREMENT FOR  
THE AWARD OF A DEGREE OF BACHELOR OF LAWS  
OF KAMPALA INTERNATIONAL UNIVERSITY**

**JUNE 2019**

## DECLARATION

I ABOR MOSES declare that this dissertation as being my original work and have not been submitted to any other university or institution for the award of any academic qualification.


Signature:..........

Date:.....18<sup>th</sup>/06/2019.....

### APPROVAL

I certify that this dissertation satisfies the partial fulfillment of the requirement for the award of Degree of Bachelor of Laws (LLB) of Kampala International University.

Dr. Tajudeen Sanni



Supervisor

Date.....18-6-19.....

## **DEDICATION**

This research paper is dedicated to my beloved parents; Rev. Jimmy Okodi and Mrs. Daphne Okodi, my brother Junior Jabez Okodi, My sisters; Peace Kica, Joy Akullu, Charity Acheng who have enabled me advance this far with my education through their untiring efforts both materially and emotionally. I dedicate this paper to them as an appreciation for their support in my academic progress.

## **ABSTRACT**

The Research examines the adequacy of the Mortgage Act, 2009 in protecting the rights of mortgagors and mortgagees in Uganda, following the amendment of Land Laws, in particular the Land Act, 1998 as amended in 2009 and the Registration of Titles Act, Cap 230. The study examines the statutory regime introduced by the Mortgage Act in relation to mortgages focusing on, among others, what the Act ought to address, its weaknesses and achievements.

## **ACKNOWLEDGEMENT**

I would like to thank my supervisor Dr. Tajudeen Sanni for his dedication, guidance and tireless effort to advise me throughout this project. He was always there for me during difficult times. It was a privilege to work with him.

I would also like to thank the staffs of Kampala International University School of Law for their assistance. Furthermore, I would like to thank my friends (not in the order of importance) Alex Oyo Okidi, Murohoza Moreen, Enock Bwambale, Ankunda Shalom, for their advice and assistance in conducting this research.

Lastly, I would like to thank my parents and relatives for their encouragements and ceaseless prayers.

## LIST OF CASES

Re-forest trust trustee's executors & agency co. ltd v Anson [1953] VLR 246  
Swiss bank corporation v Lloyds bank ltd [1982] AC 584  
Walsh v Lonsdale [1882]  
Re sir Thomas Spenser wells [1933] Ch. 29  
United bank of Kuwait v sahib and others [1997] Ch. 107  
Windella v Hughes [1999]  
Parker v house field  
Mestaer v Gillespie [1803-13] ALL ER Rep 594 at 595f-g per Lord Eldon LC.  
RE RICHARDSON [1885]  
Harold v plenty [1901]  
Stubbs v Slater [1910] 1 Ch. 632  
Edge v Worthington 29 ER 1133  
Lord Dudley and ward v Lady Dudley [1705]  
Patagonia meat and cold storage co. ltd [1914] AC 25  
Salt v Markees of Northampton [1892] 1 AC 19  
Samuel v Jarrah timber and wood paving corporation limited [1904] AC 323  
Biggs v Hoddinott [1898] 2 Ch. 307  
Woodward v Heseltine [1891] 1 Ch. 469  
Re Richardson [1885]  
Campbell [1985] QB 210  
Chapman v Chapman  
Montagu v Earl of sandwich [1886] 32 Ch. D 525  
Guaranty discount co. v credit finance ltd  
National provincial and union bank of England v Charnley [1924] 1 KB 431  
Jones v Woodward 116 l.t 378  
Tenant v Trenchard [1869]  
Noakes v Rice [1902] ac 24  
Maids ltd v Dudley Marshall properties ltd [1957] Ch. 317  
Vint v Padget  
Sharp v Pickards [1909] 1 Ch. 109  
Cummins v Fletcher [1880]  
Re Raggett [1880]  
Kinnaird v Trollope [1888]  
Mills v United Countries Bank Ltd [1912] 1 Ch. 231

## **LIST OF STATUTES**

1. The 1995 Constitution of The Republic of Uganda as amended.
2. The Mortgage Act, 2009, Cap 8 Laws of Uganda.
3. The Mortgage Act 1974.
4. The Judicature Act.
5. The Land Act 1998.
6. The Registration of Titles Act.
7. The Chattels Security Act, 2014.



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## **LIST OF ABBREVIATIONS**

1. C & B Burn, E. H Cheshire and Burn's Modern Law of Real Property
2. HCB High Court Bulletin
3. EA Court of Appeal for East Africa
4. EACA East African Court of Appeal
5. EALJ. East African Law Journal
6. EALR East African Law Review
7. F & L Tyler, E. L. G. Fisher and Lightwoods Law of Mortgages
8. G & G Gray, K, & Gray, S. F. Elements of Land Law
9. G & S Gray, K. J. & Symes, P. D. Real Property and Real People: Principles of Land Law
10. M & B Burn, E. H, Maudsley & Burn's Land Law: Cases and Materials
11. M & W Megarry, R & Wade, W. The Law of Real Property

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 BACKGROUND ON MORTGAGES:

A mortgage is defined to include “any charge or lien over land or any estate or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money or money’s worth or the performance of an obligation and includes a second or subsequent mortgage, a third party mortgage and a sub-mortgage.”<sup>1</sup> However, the nature of a mortgage under the Mortgage Act<sup>2</sup> differs from the common law mortgage. A mortgage created under the Act takes effect as a security over the mortgaged and but shall not operate as a transfer of any interest or the right to the land from the mortgagor to the mortgagee shall have all the powers and remedies in case of default by the mortgagor and subject to all the obligations conferred and or implied in a transfer of an interest in the land subject to redemption<sup>3</sup>.

In *Re-forest trust trustee’s executors & agency co. ltd v Anson*<sup>4</sup>, Herring CJ described the effect of a mortgage created under the corresponding provision of the transfer of land Act (Victoria), that “it confers on the creditor merely a group of powers to secure the money lent.” The debtor (mortgagor) remains the owner of the land subject to fulfillment of his or her obligations under the mortgage agreement.

A mortgagee is defined to mean “a person in whose favor a mortgage is created or subsists and includes any person deriving title under the original mortgagee”.<sup>5</sup>

A mortgagor is defined to mean “a person who has mortgaged land or an interest in land and includes any person from time to time deriving title under the original mortgagor or entitled to redeem the mortgage according to his or her estate, interest or right in the mortgaged property”.<sup>6</sup>

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<sup>1</sup> Section 2 of The Mortgage Act, 2009

<sup>2</sup> Cap 8

<sup>3</sup> Section 8 of the Mortgage Act, 2009 and John T. Mugambwa, Principle of Land Law in Uganda at p. 114

<sup>4</sup> [1953] VLR 246

<sup>5</sup> Section 2 of The Mortgage Act, 2009

<sup>6</sup> Section 2 of the Mortgage Act, 2009

### **1.1.1 Legal Considerations**

#### **1.1.2 Land tenure**

There are four types of land tenure i.e. the land available to individuals and private companies can be broadly classified under;

- i. Mailo,
- ii. Freehold,
- iii. Leasehold and
- iv. Customary

Customary land introduced by the 1995 Constitution of Uganda and the Land Act, 1998. The Mortgage Act has also recognized it and in that respect, mortgages can be created by registering the customary land and acquiring a certificate of ownership. The issues relating to the tenure system in Uganda in relation to mortgages are discussed herein.

## **1.2 STATEMENT OF THE PROBLEM**

Despite this favored position in the hierarchy of creditors<sup>7</sup>, the mortgagee has not been spared in the perplexities which have attended debt collection during the past decade; foreclosure and sale of the mortgaged property in the atmosphere of declining land values has frequently yielded less than the secured debt. Bankruptcy has provided a refuge for many defaulting mortgagors, while others have resorted to “milking”<sup>8</sup> the pledge asset in order to buy off threatening creditors.

There’s lack of proper scrutiny of securities or collaterals offered, probably due to imperfect physical inspection and monitoring of the properties offered as securities, or due to reliance on unreliable property valuations. Unsurprisingly, most of the time the security given are insufficient to cover the credit facilities and hence there’s a shortfall. Borrowers sometimes take advantage of improper or invalid mortgages to defeat the enforcement process. A typical example involves mortgages of matrimonial homes. Sometimes failure by the mortgagee to obtain a spouse’s consent is used as an excuse to prevent the realization of the home. The Mortgage Act, 2009 has overprotected the mortgagor in such a way which violates the principle and freedom of contract.

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<sup>7</sup> Owing to the common law and statutory remedies available in the Mortgage Act 2009

<sup>8</sup> “milking” has become a standard term denoting spoliation of the mortgaged property, rent reductions and lease cancellations granted by the mortgagor for cash consideration, and prepayments of rent-all devices by which the hard pressed mortgagor saps the value from the pledged assets

Even in default, the Mortgage Act<sup>9</sup> still protects the mortgagor's property in that some of the remedies available therein are only subject to the court's intervention. Despite the problems mentioned above, courts have to play a decisive role.

This strategic default has not been addressed by the Mortgage Act.<sup>10</sup> The burden given to the mortgagee to avoid liability is overwhelmingly heavy and thus the Act ought to be amended to share the rights and obligations in the mortgage contract. The Act ought to expressly provide for the consequences of a strategic default.

### **1.3 OBJECTIVES OF THE STUDY**

#### **1.3.1 General Objective**

1. To examine the adequacy of the Mortgage Act, 2009 in protecting the rights of the mortgagors and mortgagees.

#### **1.3.2 Specific objectives**

1. To analyze the legal rights and duties of the mortgagor and the mortgagee under the Mortgage Act, 2009 Cap 8.

2. To examine the effectiveness of the Mortgage Act, 2009 in protecting the rights of the mortgagors and mortgagees.

3. To analyze the issue of the family and matrimonial home in relation to mortgages and the issue of ownership of a matrimonial home.

### **1.4 PURPOSE OF THE STUDY**

The researcher seeks to examine the adequacy of the Mortgage Act, 2009 in protecting the rights of the mortgagors and mortgagees. The study seeks to examine the available rights in the Mortgage Act, 2009; identify the lacuna in addressing the rights of mortgagees and mortgagors and how effective and efficient it has been so far.

The researcher seeks to find means on how the government can handle the issues relating to mortgages and make proper recommendations.

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<sup>9</sup> Cap 8 of 2009

<sup>10</sup> Cap 8 of 2009



### **1.5. SCOPE OF THE STUDY**

The study is centered on the aspect of rights of both the mortgagee and the mortgagor and the protection of parties to a mortgage as provided by the Mortgage Act, 2009. It will also briefly discuss the issues relating to customary land as a result of the introduction of mortgages on customary land in the Mortgage Act, 2009. The matrimonial home as security for mortgages is also discussed herein. The geographical scope is Uganda as a country and no specific district as the Mortgage Act applies to the whole of Uganda.

### **1.6. RESEARCH METHODOLOGY**

As pointed earlier, this thesis examines the Law of Mortgages of land, and in particular the examination of the adequacy of the Mortgage Act, 2009 in protecting the rights of mortgagors and mortgagees. This work is solely theoretical analysis of the law of mortgages in Uganda and its conclusion is based on that; as a result, it examines an in depth study of the relevant laws; Acts of Parliament, Customary Law and Common Law. Relevant text books and other writings on the subject, both hard and soft copies were used as reference. In the context of search in the text, it will be observed in the bibliography that there are very few Ugandan books on Land Law, non on the Law of mortgages. Not much has been written on the Law of mortgages in Uganda but reference was made on papers, articles, reports and theses as the state of lending and mortgages in Uganda are recorded therein. Reference was also made on both Ugandan and English Law cases. A field research was also conducted since it was helpful to test the hypotheses on the ground. Field research would not only enhance the researchers' understanding of the state of lending in Uganda but would also unearth some issues which otherwise would not have been covered by the study hence a field research was conducted in Uganda.

Consultations were made to legal practitioners (professional advisers); as people who provide professional advice to lenders and borrowers, and are called upon in case of conflicts, their practical experiences of the market needed to be shared as well. Their views on the practicability of the whole process of creating and enforcing mortgages were sought.

The mode of the research was mainly by the way of an interview.

### **1.7. SIGNIFICANCE OF THE STUDY**

By the end of the study, the research would prove that there is need for further reforms in the Mortgage Act, 2009 in order for it to be of much relevance in addressing the issues relating to rights and responsibilities in the mortgage transaction. The study further expresses concerns that the families occupying customary land may not be protected once such land becomes a subject of mortgage transaction.

### **1.8 HYPOTHESES**

1. The Mortgage Act has been greatly influenced by English law, that is; common law and principles of equity.
2. Some of the remedies awarded are still not adequate and thus some reforms need to be made in the current Mortgage Act to fit the Ugandan situation and perception of the people.
3. The aspect of a matrimonial home has to be properly addressed to cover any lacuna and ambiguity. The definition of a matrimonial home should be clear and unambiguous, the issue of polygamy regarding the matrimonial home addressed and genuine consent of the spouses.
4. Recommendations on areas that need reforms in the current Mortgage Act.
5. The law relating to mortgages has particularly placed the Mortgagee at the mercy of the mortgagor as the law seems to over protect the mortgagor and thus interfering with the sanctity of a legal contract.

### **1.9 LITERATURE REVIEW**

John T Mugambwa, in his book Principle of Land Law in Uganda<sup>11</sup> has tried to explain the Uganda's position as regards to mortgages. He basically defines a mortgage as a transaction whereby an interest in land is given as security for the repayment of a loan. He further provides the definition of a mortgagor to mean a debtor or proprietor of a mortgaged land and the creditor is the mortgagee while the secured sum with interest is the mortgage debt. Mugambwa discusses most of the issues relating to mortgages but doesn't seem to discuss the issues surrounding the matrimonial home.

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<sup>11</sup> Page 114-128

The provision in the Mortgage Act, 2009 concerning the matrimonial home gives a heavy burden to the mortgagee in trying to discover the marital status of a potential mortgagor and the names of his spouse or his spouses will simply protect lenders against a possible action by an excluded spouse in the future. Actually the steps won't guarantee the discovery of the matrimonial status of the applicant, but will only act as a proof that the mortgagee did take steps to discover whether the applicant was married or not.

More still, in discovering whether the house offered as a security is a matrimonial home that is a building or part of building and adjacent land if any in which the husband and a wife live together is not easy<sup>12</sup>. The responsibility is on the mortgagee to take steps to ascertain whether the home offered as a security is a matrimonial home in other words investigate whether the Mortgagor has a spouse or spouses<sup>13</sup>.

Despite this favored position in the hierarchy of creditors, the mortgagee has not been spared the perplexities which have attended the debt collection during the past decade; Foreclosure and sale of the mortgaged property in atmosphere of declining land values has frequently yielded less than the secured debt. Bankruptcy has provided a refuge for many defaulting mortgagors, while others resorted to "milking"<sup>14</sup> the pledged asset in order to buy off threatening creditors. Rents often represent the only liquid asset which a mortgagee can reach to supplement or to avoid levying immediately upon the shrinking value that the pledged security still retains. The right to rent uniformly has been held to follow possession of the mortgage property. Mugambwa does not discuss strategic default and the inadequacy of the Mortgage Act.<sup>15</sup> This is perhaps because he wrote his book before the tabling of the Mortgage Bill and the subsequent enactment of the Mortgage Act, 2009.

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<sup>12</sup> Section 2 of the Mortgage Act, 2009 defines matrimonial home to mean a building or part of a building in which a husband and a wife or, as the case may be, wives, and their children, if any, ordinarily resides together and includes- (a) where a building and its curtilage are occupied primarily for residential purposes, that curtilage and outbuildings on it; and (b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her spouse or in the case of a husband, to his spouse for his, her, or their exclusive use.

<sup>13</sup> Section 5(3) Cap 8

<sup>14</sup> "milking" has become a standard term denoting spoliation of the mortgaged property, rent reductions and lease cancellation granted by the mortgagor for cash consideration, and prepayments of rent-all devices by which the hard pressed mortgagor saps the value from the pledged assets.

<sup>15</sup> 1974

Essien, in his book “Law of Credit and Security in Nigeria”,<sup>16</sup> gave a description of the problems of the use of land as security in Nigeria as ranging from legislative to judicial and from social to political. His description suits the Ugandan situation well as land administration faces many problems. On legislation, there is a feeling in the society that the laws which are in place do not facilitate borrowing and lending, since either they do not provide enough or lean too much on one side or simply they are not good enough. Regarding the judiciary the courts have to play a central role in interpreting the law. However, Essien also does not discuss the inadequacy of the remedies awarded to the mortgagee. He discusses the challenges that the banks set in debt collection faced. Borrowers sometimes take advantage of improper or invalid mortgages to defeat the enforcement process. A typical example involves mortgages of matrimonial homes. Sometimes failure by the lenders to obtain a spouses consent is used as an excuse to prevent the realization of the home. Despite the problems mentioned above, courts have to play a decisive role. The duty and expense of the bank to recover his money of the secured property seems unfair when the principles of a valid contract are put into play. He does not seem to mention or suggest any recommendations to improve the current mortgage laws to ensure that the mortgagee also feels protected. However, Nigeria and Ugandan land law are different owing to the fact that Nigeria is Federal Republic with some states practicing shariah law of which remedies available under shariah law are different from the common law remedies applicable in Uganda.

E.L.G. Fisher and Lightwoods Law of Mortgage<sup>17</sup>, describes a charge stating that “there can be no doubt that where in a transaction for value both parties evidence an intention that property, existing or future shall be made available as security for the payment of the debts, and that the creditor shall have a right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right of possession, but only get a right to have security made available by an order of the court.” A charge therefore does not pass either an absolute or a special property in the subject of the security, nor does it pass any right of possession, but merely confers on the creditor a right of realization by judicial process. Fisher and Lightwoods does not discuss the matrimonial home as a big challenge in enforcing the rights and

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<sup>16</sup> page 2

<sup>17</sup> Page 4

remedies available to the mortgagee in the case of default. They consider the terminology security and charge plainly not giving special attention to the special properties that can be given as collateral but subject to courts intervention or consent of third parties who consent contrary<sup>s</sup> to the principle of privity of contract. People have the right to deal with their properties as they wish so the burden on the mortgagee on issues relating to matrimonial, customary, pastoral or agricultural land is unnecessarily heavy and negates equality of the parties contracting.

#### **1.10 ARRANGEMENT OF CHAPTERS**

The researcher intends to include in his study relevant chapters of the entire study. This research is divided into five chapters;

1. Chapter one is the general introduction, objectives of this work and highlights the research methodology. It is stressed in chapter one that this work is basically a theoretical analysis of the law.
2. Chapter two discusses the forms of mortgage before the enactment of the Mortgage Act, 2009.
3. Chapter three discusses the forms of mortgages which are capable of being created under the Mortgage Act, 2009.
4. Chapter four discusses the rights of the parties under a mortgage in addition to enforcement of mortgages.
5. Chapters five and six discuss recommendations and conclusion.

#### **1.11 LIMITATIONS OF THE STUDY**

The researcher has met the following limitations:

1. Financial inconsistencies have been the major stumbling block for the researcher to accomplish his research for example frequent transportation to places where research has been carried out, photocopying relevant materials for his research.
2. Time management is one of the aspects which must be managed efficiently. The research has been amidst a back log of coursework and preparation for the final examinations. Balancing work with research has also not been easy at all.
3. Accessing some people whom i wished to consult proved a bit problematic as many of them had a lot of commitments hence leading to some delays in completion of this work.

## CHAPTER TWO

### INTRODUCTION

#### 2.0 NATURE OF MORTGAGES BEFORE THE ENACTMENT OF THE MORTGAGE ACT, 2009.

##### 2.1 General remarks on mortgage

The last chapter provided an analysis of the general concept of security in land. Attention was paid to the investigation of interests in land which can be used as security and the inadequacy of the provision of the Mortgage Act in protecting the rights of the mortgagor and the mortgagee. This chapter focuses on the forms of mortgages which could be created in Uganda under the Mortgage Act, 2009 and the rights which can be awarded to a person.

Before the Mortgage Act, 2009 came into force, mortgage transactions were regulated by the Registration of Titles Act which provided for the creation of mortgages or charges of land in the country. In addition to this piece of legislation, reliance was made on English law. The said English Laws were to apply in the like manner as they applied in England.<sup>18</sup> As a result of this provision, the English law relating to mortgage became applicable in the country.

However, the nature of a mortgage under the Mortgage Act (cap 8) differs from the common law mortgage. A mortgage created under the act takes effect as a security over the mortgaged land but shall not operate as a transfer of any interest or the right to the land from the mortgagor to the mortgagee.<sup>19</sup> The mortgagee shall have subject to this Act, all the powers and remedies in case of default by the mortgagor and the subject to all the obligations conferred and or implied in a transfer of an interest in land subject to redemption.<sup>20</sup>

In *Re- Forest Trust Trustee's Executors & Agency Co. Ltd v Anson*<sup>21</sup>, Herring CJ, described the effect of a mortgage created under the corresponding provision of the transfer of Land Act (Victoria), that 'it confers to the creditor merely a group of powers to secure the money lent.' The debtor (mortgagor) remains the owner of the land subject to fulfillment of his or her obligations under the mortgage agreement.

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<sup>18</sup> Section 46 of the Judicature Act

<sup>19</sup> Section 8 of the Mortgage Act, 2009

<sup>20</sup> John T. Mugambwa, Principles of Land Law in Uganda at page 114

<sup>21</sup> [1953] VLR 246

## **2.2 Mortgage at common law**

The forms of mortgage capable of being created at common law have changed from time to time to suit the needs of the time. Initially, mortgage transactions were influenced by usury laws which were against lending at the interest or controlled the interest which could be charged. This prompted the need to craft the mortgage contract to avoid the laws. Then equity intervened and shaped the current mortgage transactions.

### **2.2.1 Legal mortgage**

The legal mortgage is basically a mortgage of the legal interest in land or property. It is the most secure and comprehensive form of security interest. It transfers legal title to the Mortgagee and prevents the mortgagor from dealing with the mortgaged asset while it is subject to the mortgage. The forms of legal mortgage depends on the nature of the title of the property holders, that is; whether it was a Freehold, Leasehold, Mailo or Customary title. Equity has played a decisive role in influencing the forms of mortgages. Also the changes in the legal framework as a result of the enactment of new laws and the change in practices caused by demand of time have shaped the forms of mortgages.

#### **2.2.1.1 Mortgage of leasehold**

In case the mortgagor's interest in the property was not the free simple, but leasehold, the lessor could create a mortgage by subleasing the property.<sup>22</sup> A discussion of the mortgages of leaseholds is important in Uganda because of the very fact that the right of ownership of Kibanja holder under Mailo tenure system which is the main form of land tenure in Buganda resembles leasehold.

### **2.2.2 Equitable mortgage**

There may be cases where certain documents appear to convey land to other people. "Equity will admit parole or oral evidence to show that what appears like a conveyance is in fact a mortgage. Similarly, if at common law, a mortgagor failed to repay a loan on the date fixed by the mortgage agreement, she or he lost the right to redeem the property. In equity, a mortgage is regarded as a

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<sup>22</sup> Re Sir Thomas Spenser Wells [1933] Ch. 29

mere security and the date for repayment, a mere formality. Thus a mortgagor could redeem the property even after the redemption date had passed.”<sup>23</sup>

A mortgagor who has only an equitable interest in a piece of property can only create an equitable mortgage over it when he borrows money and uses that interest as security. Similarly, a beneficiary under a trust can only create an equitable mortgage over his equitable interest under the trust if he or she uses it as security for a loan advanced to him or her.

Furthermore, a mortgagor who has created a legal mortgage over a piece of land or property retains an equitable interest in the land which he can subsequently mortgage to subsequent mortgages.

An equitable mortgage as described by Buckley LJ in *Swiss bank corporation v Lloyds bank ltd*<sup>24</sup> “is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favor of the mortgagee, or in other words evidences a contract to do so.”

#### 2.2.2.1 Contract to create a legal mortgage

An equitable mortgage may arise where the owner of a legal estate in land executes an informal or imperfect charge over the estate or where the charge fails to comply with the requirements provided by law. If such a contract to mortgage is enforceable, it will be regarded as a mortgage in equity.<sup>25</sup> Such a charge operates in equity upon the conscience of the mortgagor.<sup>26</sup> In such circumstances, if the mortgage is enforceable, equity looks at as done which ought to be done and in accordance with the rules in *Walsh v Lonsdale*,<sup>27</sup> Treats the transaction as a valid equitable mortgage of the legal estate.<sup>28</sup>

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<sup>23</sup> Equity and Trust in Uganda by David J Bakibinga at page 28

<sup>24</sup> [1982] AC 584

<sup>25</sup> In *Swiss Bank Corporation v Lloyds Bank Ltd*, Buckley LJ stated that “a contract of mortgage property, real or personal, will, normally at least, be specifically enforceable, for a mere claim of damages or repayment is obviously less valuable than a security in the debtor’s insolvency. If it is specifically enforceable, the obligation to confer the proprietary interest will give rise to an equitable charge upon the subject matter by way of mortgage.” Also in *United Bank of Kuwait v Sahib & Others* [1997] Ch. 107

<sup>26</sup> *Windella v Hughes* [1999]

<sup>27</sup> [1882]

<sup>28</sup> *Parker v Housefield* 39 ER 1004, *Swiss Bank Corporation v Lloyds Bank Ltd*. The incomplete instrument is regarded in court of equity as evidence of an agreement to create a mortgage. See *Mestaer v Gillespie* [1803-13] ALL ER Rep 594 at 595F-G per Lord Eldon LC.



#### **2.2.2.2 Deposits of title deeds (deposits of documents of title)**

Under the old rule in *Russel v Russel*,<sup>29</sup> a mortgage could be created through the mere deposit by the land owner of his title deeds or land certificates as the case may be.<sup>30</sup> In this, other contractual formalities, such as the need for writing could be dispensed with.

At common law, a contract creates an equitable mortgage if especially enforceable. In case of mortgage, deposits of title deeds constituted an act of part performance in which equity enforced the contract.<sup>31</sup> The deposit signified an intention on the part of the depositor that the lender should hold the document as his security for a loan of money.<sup>32</sup> Chadwick J. Stated “an equitable or charge may also arise out of specifically enforceable contract to create security.”<sup>33</sup>

The current position is that the equitable mortgage cannot be created only by an act of deposit of a title deed. A valid written contract of loan must accompany the deed. This is to comply with the stringent requirements of section 3(1) of the Mortgage Act Cap 8 which in effect provided that a contract for a mortgage of or charge on any interest in land can only be made in writing.<sup>34</sup> Therefore, that a contract for a mortgage of or charge on any interest in land or proceeds of sale of land can only be made in writing and only if the written document incorporates all the terms which the parties have expressly agreed.

### **2.3 The influence of equity on mortgages**

Equity is a body of rules or principles based on conscience. In its original application, and still today, it intervenes to remedy the injustice of the law. Injustice could be occasioned by having a

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<sup>29</sup> 28 ER 1121

<sup>30</sup> G & G. Page. 601

<sup>31</sup> Section 129 of the Registration of Titles Act Cap 205

<sup>32</sup> This was the case in *Re Richardson* [1885] Ch. 30, in which Fry LJ regarded a deposit of deeds to secure an overdraft without any memorandum of deposit as creating an equitable mortgagee. The same position was in *Harrold v Plenty* [1901] and *Stubbs v Slater* [1910] in which a deposit of title deeds amounted to an agreement to execute a mortgage in equity. For more recent decisions see *Swiss Bank Corporation v Lloyds Bank Ltd.*

<sup>33</sup> John T. Mugambwa, *Principle of Land Law in Uganda* at p. 115

<sup>34</sup> *United Bank of Kuwait PLC v Sahib and others* at pages 137-139; G & G. page 602

strict or rigid laws or laws with loopholes or one which does not provide an appropriate remedy to the wronged party.<sup>35</sup> Snell's Equity put forward the role of equity in the following words;<sup>36</sup>

### 2.3.1 EQUITY OF REDEMPTION

“Before the advent of equity, the common law attached a lot of importance to the use of correct forms or procedures in relation to an act. Failure to comply with such forms invalidated actions whether these were suits or agreements. Equity developed with the aim of achieving justice rather than sticking to forms. This approach to technicalities has constitutional backing which requires courts to administer justice without undue regard to technicalities.<sup>37</sup> It is intended to examine instances where equity has intervened to ensure that the substance is upheld over formalities.”<sup>38</sup> This is in line with the maxim “equity looks at substance rather than the form”.

The most important influence of equity on mortgages is the application of the equity of redemption.<sup>39</sup> As shown above, the initial practice in mortgages was that the mortgagor could lose the mortgaged property if he fails to redeem it on the contractual date. In equity, it was inconceivable that the mortgagor should lose the mortgaged property simply by failing to repay the loan plus interest on the contractual date.<sup>40</sup>

Initially, equity intervened to give relief in the case of accident, mistake or special hardship etc., but then relief was extended in all cases.<sup>41</sup> Time was not of essence in the mortgage transaction and thus the mortgagee's position vis-a-vis the mortgaged property was only regarded as a security for the payment of money advanced.

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<sup>35</sup> Sir Nathan Wright in *Lord Dudley and Ward v Lady Dudley* [1705], as quoted in Snell's Equity. 30<sup>th</sup> edition, page 4 “Equity isn't part of law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness, the edge of the law, and is a universal truth; it does not assist the law where it is defective and weak in the constitution... and defends the law from crafty evasions, delusions and new remedies... Equity therefore does not destroy the law, nor create it, but assist it”.

<sup>36</sup> Snell's Equity, 30<sup>th</sup> edition, at page 4

<sup>37</sup> Constitution of Uganda 1995 Article 126 (2)(e) approved and applied in *Uganda Revenue Authority v Stephen Mubosi* (1995) Supreme Court of Uganda (unreported)

<sup>38</sup> Equity and Trust in Uganda by David J Bakibinga at page 27

<sup>39</sup> Section 8 of the Mortgage Act, 2009

<sup>40</sup> *Kreglinger View Patagonia Meat and Cold Storage Co. Ltd* [1914] AC 25

<sup>41</sup> *Salt v Marquess of Northampton* [1892] AC 1

In *Re Sir Thomas Spencer Wells*,<sup>42</sup> it was stated that “the position of a mortgagee of land whether freehold or leasehold is well established. In equity the right of the mortgagee is limited to the money secured and he holds that land only as security for his money, therefore although he has a legal estate in the land, yet in equity he has a mere charge for the amount due to him.”

In this, equity compelled the mortgagee to regard the property as a security for the money advanced. As a result, the mortgagor was given an equitable right to redeem after the contractual date even when the mortgage contract vested an absolute title in the mortgagee upon failure by the mortgagor to pay the money on the specified date.<sup>43</sup>

Thus, the intervention of equity gave equitable rights to redeem to the mortgagor. An equitable right to redeem is a right conferred on the mortgagor to redeem the property at any time after the contractual date. The equity of redemption is the sum total of the mortgagor’s rights in the property including the equitable right to redeem.<sup>44</sup>

The equity of redemption is an equitable interest in the property. In *Kreglinger View Patagonia meat and cold storage co. Ltd*,<sup>45</sup> Lord Parker gave a clear distinction between two equitable rights and the role they play in safeguarding the interest of the mortgagor and mortgagee. The practice was on paying the money on specified date, equity would compel the mortgagee to recover the property. However, when the mortgagor fails to pay the money on the date specified, the property conveyed becomes at law an absolute interest in the mortgagee. His lordship proceeded stating; “equity however, did not treat time as of essence of the transaction, and hence on failure to exercise what may be called the contractual right to redeem, there arose an equity to redeem, notwithstanding the specified date had passed”

Till this date had passed, there was no equity to redeem; which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which from the first, remains in the mortgagor, and is sometimes referred to as an equity of redemption. Megarry and Wade described the position in the following words; “although at the law he (mortgagor) has parted with his land and has only a limited right to recover it, in equity he

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<sup>42</sup> [1933] CH. 29

<sup>43</sup> M & W at p. 1173

<sup>44</sup> M & W at p. 1174

<sup>45</sup> [1914] AC 25

(mortgagor) is the owner of the land, though subject to the mortgage;<sup>46</sup> the mortgagee, on the other hand, is at law the owner but in the equity a mere encumbrancer".<sup>47</sup> Therefore, the equitable rights to redeem cannot be clogged or fettered by any stipulation contained in the mortgage or entered into as part of the interest shall be conveyed and any stipulation which prevents conveyance is null and void.<sup>48</sup>

The only way in which a person could override the equitable right to redeem was by obtaining an order of court.<sup>49</sup> This was an order of the court instigated by the mortgagee's application to extinguish the equitable right to redeem. This had the effect of leaving the mortgagee with an absolute title to the property.<sup>50</sup> However, if the property was more valuable than the debt owed, the court would order a sale of the property out of which the mortgagee would receive the money due to him and the balance would devolve to the mortgagor.<sup>51</sup>

In itself, the equity of redemption is an interest which can be dealt with like any other property. It can be mortgaged, assigned or dealt with otherwise.<sup>52</sup>

## **2.4 The forms of mortgages in Uganda before the enactment of the land act, 1998**

After the discussion on the forms of mortgages at common law, the next discussion focuses on the forms of mortgages which existed in the country before the enactment of the Land Act, 1998. The forms of mortgage in Uganda before 1998 were substantially influenced by the early English position.

### **2.4.1 Mortgage of right of ownership under customary tenure and lease**

Until the implementation of the 1995 Constitution of Uganda and the enactment of the Land Act 1998, customary tenure was not recognized under the laws of Uganda. Only three types of tenure were acknowledged, namely Freehold, Leasehold and Mailo. Customary tenants were regarded as occupiers of crown land. As such, they were merely tenants at sufferance from the state who could evict them after a three month notice period and compensation for any developments on the land.

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<sup>46</sup> Re Sir Thomas Spenser Wells

<sup>47</sup> M & W at page 1174

<sup>48</sup> Salt v The Marquess of Northampton, Biggs v Hoddinott [1898]

<sup>49</sup> Section 27 of the Mortgage Act Cap 8

<sup>50</sup> M & W at page 1173

<sup>51</sup> Section 31 of the Mortgage Act Cap; M & W at page 1173

<sup>52</sup> Section 17 of the Mortgage Act Cap 8

All land had been vested in the state under the Uganda Land Commission<sup>53</sup> and it was common for politicians and government officials to award themselves leases of large portions of land to the detriment of customary occupiers who were given neither notice nor compensation. Under these circumstances, customary tenants faced extreme insecurity.

The 1995 Constitution of the Republic of Uganda brought about fundamental changes in the land holding arrangements in Uganda. The Constitution began by vesting all land in Uganda in the citizens of Uganda according to four land tenure systems. It is ideal that mortgage transactions are conducted where registered land or property is subject to or presented as collateral security. Whereas this is the requirement, customary land (which is unregistered) is at present, a subject of commercial transaction. A number of banking/financial institutions have been reported to deal in mortgage financing in respect to customary land; a case in point Centenary Rural Development Bank (CERUDEB) and other microfinance institutions operating in the rural countryside where land is majorly customarily held.

The Mortgage Act Cap 8 sets forth a form of registered mortgage.<sup>54</sup> It does not create a new type of mortgage, but governs the formalities relating to contract to mortgage or other transfer of registered land estate or interest in land. It provided that a mortgage has to contain, among others the names of the parties, description of the land to be mortgaged and the statements of mortgage. It is common to insert covenants in the mortgaged deed. However some covenants are implied in any mortgage. These covenants are set out under section 18 of the mortgage act cap 8.

In principle, a form of mortgage is said to be inconsistent with the statutory form not when it adopts a verbal difference but among others, when it is calculated to give a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the prescribed form or when it is designed to mislead those whom it is the object of the law to protect.<sup>55</sup>

#### **2.4.2 Defect of form**

As shown above, the registration of titles act provided a particular form which had to be observed before one could create a legal mortgage. To pass the legal title by way of mortgage, the Mortgage

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<sup>53</sup> Land Reform Decree

<sup>54</sup> An expression registered mortgages point to the fact that a mortgage of a registered estate or interest has to be registered to have legal force

<sup>55</sup> Woodward v Heseltine [1891] 1 Ch. 469

Act (Cap 8) required that parties should use the proper form thereby providing, among others, description of the parties, the description of the description of the mortgaged land, etc. The Registration of Titles Act provided for the manner in which deeds had to be executed; in such a case if the mortgage was not executed in the prescribed manner, or is defective in form, may result in an equitable mortgage once the intention of the parties to create a mortgage is established.

## **2.5 A comparison between mortgages and charges over land**

The practice of mortgage of land has not been without difficulties. Apart from the difficulties of identifying the forms of mortgage, it's sometimes difficult to state in clear words whether a transaction created a mortgage at all or a mere charge over the property.

“Land may be treated as security for a loan without an agreement to create a legal mortgage or the deposit of title deeds. “This type of arrangement is called an equitable charge which can be enforced against everybody except a Bonafide purchaser of the legal estate without notice of the charge”.<sup>56</sup>

The basic principles of mortgages and charges are similar in English law and in Uganda. This discussion will base on that generalization.

Differences in Judicial opinions are apparent on mortgages.<sup>57</sup> The differences are not necessarily a result of lack of rules governing mortgage transactions, but probably arise from the appreciable difficulties of applying well established mortgage rules to different sets of facts.

The concepts mortgages and charges have been used loosely as if they refer to exactly the same thing.<sup>58</sup> In many cases, transactions were regarded as resulting in an equitable mortgage or equitable charges as meaning the same.<sup>59</sup> Indeed, in some enactments, a mortgage has been stated to include any charge on any property for securing money or money's worth.

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<sup>56</sup> Equity and Trust in Uganda by David J Bakibinga at page 38

<sup>57</sup> comments by Halsbury LC in *Cloakes & Co. Ltd v Rice* [1902] AC 24

<sup>58</sup> Sometimes even an express contract to create a charge is presumed to be a contract to make a mortgage subjecting the contract to the rules of an equitable mortgage; See *F & L* at page 24. Also *Montagu v Earl of Sandwich* (1886) 32 Ch. D 525

<sup>59</sup> In *Guaranty Discount Co v Credit Finance Ltd*, the term mortgage and charge have been used interchangeably. In *Re Richardson* (1885) 30 Ch. D. 396, Fry LJ used the expression equitable mortgage, equitable security, and equitable charges.

As already defined, a mortgage is a security created by contract whereby the creditor acquires an interest in the property of the debtor. The interest has to be conveyed to the debtor or automatically determined on payment of money or performance of some other obligations upon which the security is given.<sup>60</sup> On the other hand, a charge is a security whereby property is expressly or constructively made liable for the discharge of a debt or any other obligation.<sup>61</sup>

The act of passing an interest in the land draws a line between mortgages and charges over land generally. While for a mortgage the mortgagor conveys his interest in the property to the mortgagee, for charges, it is unnecessary that a charger convey his interest to the charge. It is enough only if a particular land whether already in the charger's possession or acquired afterwards is mentioned in the agreement as made liable.<sup>62</sup> For instance, a charger may indicate that he is charging his land to secure an overdraft,<sup>63</sup> if no land is mentioned, but the charge was given for value, the charge will be attached to the chargers' land at the time of agreement.<sup>64</sup>

One feature which mortgages and charges have in common is that both have to be registered. As discussed below,<sup>65</sup> mortgages of registered land are registered by virtue of the Registration of Titles Act (Cap 205) and , or Companies Act (Cap 110) Mortgages of unregistered land maybe registered by virtue of the Registration of Documents Act. However, charges on land are not compulsorily registrable under the Act. It must be noted that charges created by a company must be registered under the Companies Act (Cap 110).

Mortgages and charges attract different consequences with mortgages attracting more extensive remedies than charges. Some of the remedies available to a charge are sale and the appointment of

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<sup>60</sup> F & L at page 4. described a charge stating "... there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for payment of the debt, and that the creditor shall have the right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right of possession, but only gets a right to have security made available by an order of court". A charge therefore does not pass either an absolute or a special property in the subject of the security, nor does it pass any right of possession, but merely confers on the creditor a right of realization by judicial process.

<sup>61</sup> In *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431

<sup>62</sup> F & L at page 24

<sup>63</sup> In *Jones v Woodward* 116 L.T 378 quoted in *London County and Westminster Bank v Tompkins* at 526, a builder gave a charge on certain dwelling houses to secure all money due and to become due. It was held that such an agreement as did not convey the property out were only enforceable in equity.

<sup>64</sup> *Jones v Woodward* case

<sup>65</sup> Chapter Five, part 5.6.3

a receiver. Significantly, in law, a charge cannot directly enforce these remedies; he must apply to the court for an order of sale or for the appointment of a receiver.<sup>66</sup> Assistance of the court is necessary because charges (equitable charges) were regarded as equitable securities, securities made in an informal way which needs equitable assistance to enforce them and therefore they needed a court's control in their enforcement.<sup>67</sup>

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<sup>66</sup> *Tennant v Trenchard* (1869); Also *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at page 450 per Atkin LJ Under the Law of Property Act, 1925 if the charge is by deed, the charge will have the statutory power of sale or appointment of receiver.

<sup>67</sup> *London County and Westminster Bank v Tompkins* [1918] 1 KB 515



## CHAPTER THREE

### MORTGAGE UNDER THE MORTGAGE ACT, 2009

#### 3.1 Introduction

This chapter discusses the forms of mortgages capable of being created under the Mortgage Act, 2009. It discusses how the Mortgage Act affects other matters incidental to the creation of mortgages. The discussion in this chapter is an attempt to examine the adequacy of the Mortgage Act, 2009 in the protection of the mortgagor's and mortgagee's right in the mortgage transaction.

#### 3.2 The impact of the Mortgage Act, 2009 on the law of property

The Mortgage Act, 2009 has an enormous impact on the law and practice of property. Apart from the fact that it is the main source of law in the overall administration of land matters. The forms mortgages such as ordinary mortgages,<sup>68</sup> customary mortgages,<sup>69</sup> informal mortgages<sup>70</sup> and lien by deposit of certificate of title,<sup>71</sup> are retained in the 2009 Mortgage Act. Also the amended provisions introduced a new section providing for the manner of creating mortgages of the matrimonial home.<sup>72</sup> As will be shown below, a new section cast light on some issues such as identification of a matrimonial home and consent of spouse(s) when the home is subjected to a mortgage.<sup>73</sup>

The Mortgage Act, 2009 also provide elaborate remedies to a mortgagee upon default by the mortgagor.<sup>74</sup> As will be seen below, the enforcement provisions of the Mortgage Act 1974 created room for delays in the enforcement of the mortgage by the mortgagee, but the Mortgage Act, 2009 has tried to simplify the enforcement procedures especially on contentious issues such as the length of notices.<sup>75</sup> Once the mortgagee has served the mortgagor with a default notice, he may exercise the remedies without further delay. Despite the fact that the amendment was aimed at encouraging lending, the government was keen to ensure that the interest of those who give their land as security

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<sup>68</sup> Section 3(1) of the Mortgage Act Cap 8

<sup>69</sup> Section 7 of the Mortgage Act Cap 8

<sup>70</sup> Section 3(8) (a) of the Mortgage Act Cap 8

<sup>71</sup> Section 3(8) (b) of the Mortgage Act Cap 8

<sup>72</sup> Section 39 of the Land Act, 1998 and Section 5 of the Mortgage Act Cap 8

<sup>73</sup> Section 6 of the Mortgage Act Cap 8

<sup>74</sup> Section 20 of the Mortgage Act Cap 8

<sup>75</sup> Section 19 of the Mortgage Act Cap 8, the mortgagee may serve on the mortgagor a notice in writing of the default and allow the mortgagor to rectify the default within forty five (45) working days.

are protected, especially securities concerning domestic dwellings, agricultural land and pastoral land. The court will be central to the balance of the interests of the mortgagor and mortgagee.

### **3.3 Forms of Mortgages under the Mortgage Act, 2009**

The Mortgage Act, 2009 contains specific provisions for the creation of Mortgages. In this Part, the discussion of the forms of mortgages capable of being created under the Mortgage Act, 2009 is based on the transaction where a borrower (mortgagor) whether a company or an individual with a house or land secure bank financing by mortgaging that property as opposed to the practiced of home purchases funded by a mortgage. The practice of home purchases funded by a mortgage is uncommon in Uganda.

A mortgage is defined under the Mortgage Act, as “any charge or lien over land or any estate or interest in land in Uganda for securing the repayment of an existing or future or a contingent debt or other money or money’s worth or the performance of an obligation and includes a second or subsequent mortgage, a third party mortgage and a sub mortgage”.<sup>76</sup> The forms of mortgages under the Mortgage Act, 2009 range from ordinary (formal) mortgages to a form of mortgage referred to as a lien by deposit of documents. The Mortgage Act, 2009 also provides for the creation of informal mortgages.<sup>77</sup>

The following are the forms of mortgages under the Mortgage Act, 2009:

#### **3.3.1 Ordinary Mortgage**

The ordinary (formal) mortgage is the main form of mortgage under the Mortgage Act, 2009.<sup>78</sup> It is a form of mortgage which any person holding land under any form of land tenure, may, by an instrument in the prescribed form, mortgage his or her interest in the land or part of it to secure the payment of an existing or future or a contingent debt or other money or money’s worth or the fulfillment of a condition. This form of mortgage is called ordinary (formal) mortgage as the Mortgage Act, 2009 doesn’t provide for its name.

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<sup>76</sup> Section 2 of the Mortgage Act Cap 8

<sup>77</sup> Section 3(8) (a) of the Mortgage Act Cap 8

<sup>78</sup> Section 3(1) of the Mortgage Act Cap 8

The power to create an ordinary mortgage includes the power to create third party mortgages and second and subsequent mortgages.<sup>79</sup> However, the general power to create mortgages under section 3 is subject to prohibition or limitation imposed by section 44 of the Mortgage Act, 2009. In addition to that, the power to create a mortgage under section 3 is subject to any restriction imposed on the conditions in the right of ownership or lease and condition contained in any encumbrance or burden already affecting the interest in the land to be mortgaged<sup>80</sup>. For this case, the mortgagor needs to be aware of the restrictions if any contained in the mortgage when he seeks to create a secondary mortgage.

### **3.3.2 Informal Mortgage**

Another form of mortgage capable of being created under the Mortgage Act 2009 is an informal mortgage. Section 3(5) provides that notwithstanding subsection (4), an unregistered mortgage shall be enforceable between the parties. This section operates to prevent a borrower from offering and a lender from accepting a written and witnessed undertaking, the clear intention of which is to charge the borrower's land with the repayment of money or money's worth obtained from the lender.

An informal mortgage is in fact a charge which is employed to carry out a mortgage transaction. No special form is provided and that means the parties may devise a simple document, using simple and clear words charging the property for the payment of money.

### **3.3.3 Lien by deposit of documents**

Before the enactment of the Mortgage Act, 2009, the deposit of the documents would result in the creation of an equitable mortgage.<sup>81</sup> Under the Mortgage Act, 2009, an act of deposit of documents would convey a legal title in the property. This new form of mortgage is called a lien by deposit of document. A lien by deposit of documents means the deposit of any documents referred to in section 3(8) (b).<sup>82</sup>

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<sup>79</sup> Section 3(2) of the Mortgage Act Cap 8

<sup>80</sup> Section 3(3) of the Mortgage Act Cap 8

<sup>81</sup> Section 129 of the Registration of Titles Act Cap 230

<sup>82</sup> Section 2 of the Mortgage Act Cap 8

It is not clear from the wording of section 3(1) whether a naked deposit of document would suffice to convey the legal title or the deposit has to be accompanied by a memorandum. Section 3(8) provides that “nothing in this section shall operate to prevent a borrower from offering and a lender from accepting an informal mortgage or a deposit of a certificate of customary ownership, certificate of title issued under the Registration of Titles Act. However, the mortgages created under section 3 of the Mortgage Act, 2009 are subject to the prohibition and limitation imposed by the Act or any other written law. One of the prohibitions is contained under Section 3(1) of the Mortgage Act, 2009. It requires a contract for a mortgage to be in writing by an instrument in the prescribed form.

Similarly, when mortgaging a matrimonial home under Section 5(1)(a) of cap 8, that a mortgage of a matrimonial home, including mortgage on a customary land of a matrimonial home is valid if any document or form used in applying for the mortgage is signed by or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in the matrimonial home and that any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in the matrimonial home.

In addition, an informal mortgage is defined to mean “a written and witnessed undertaking, the clear intention of which is to charge the mortgagor’s land with the repayment of money or money’s worth obtained from the mortgagee and includes an equitable mortgage and a mortgage on unregistered customary land.”<sup>83</sup> This suggests that a deposit of document should be accompanied by a memorandum of deposit charging the documents with the payment of money.

### **3.3.4 Customary Mortgage**

It has always been possible to create a customary mortgage in Uganda. This customary practice is recognized and was allowed to continue by the Mortgage Act, 2009. The creation and operation of customary mortgages of land shall continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created<sup>84</sup>. A person holding

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<sup>83</sup> Section 2 of the Mortgage Act Cap 8

<sup>84</sup> Section 7 (1) of The Mortgage Act, 2009

land under any form of land tenure may by an instrument in the prescribed form; mortgage his or her interest in the land or part of it to secure the payment of an existing or future or a contingent debt or any money or money's worth or the fulfillment of a condition.<sup>85</sup>

It is important to note that customary law isn't uniform, and so is customary mortgage. The difference in customary laws and practices means rights and burdens imposed by customary mortgages will depend on the locality in which the mortgage transaction took place. However, these different forms of customary mortgages may have some common traits. As a result, it is possible to assume that a particular established customary mortgage practice represents general customary mortgage practices in the country.

A brief observation regarding mortgages under customary law will be in order particularly in respect of rights of a third party or the community or redeem the mortgaged land. In some societies, if land held under rules of family tenure or clan control is mortgaged or pledged to a stranger without the consent of the family or clan, any member of the family or clan can redeem it by repaying the mortgage debt. The redeemer of the land does not become the owner of the land, but will be entitled to recover from the owner of the money he has paid plus compensation for improvements effected on the land while he was in possession. In such a situation, a mortgagor or pledger may redeem the land from the clan member after paying the redemption price of compensation for the improvements effected on the land. This right does not arise when an individual is the sole owner of the mortgaged land but where the land is owned by the community.<sup>86</sup>

However, if a clan or family land is mortgaged subject to the provision that it becomes the property of the creditor if the loan is not repaid by a fixed date; a relative who redeems the property becomes the absolute owner of the property.<sup>87</sup> The effect of the redemption by the clan or family members is to extinguish the interest of the mortgagor or the pledger in the land.<sup>88</sup>

The involvement of the third party is a peculiar feature of customary mortgage. But the customary mortgage develops and in the process it assumes some elements common in mainstream mortgages. This may create some difficulties. The Mortgage Act, 2009 provides that in case of a

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<sup>85</sup> Section 3 of the Mortgage Act, 2009

<sup>86</sup> Section 7(5) of the Mortgage Act Cap 8

<sup>87</sup> *Martin Bikonyoro v Celestin Kaokola* (1968)

<sup>88</sup> *Didas Rwakalila & 3 Others v Thomas Matondane* [1992] TLR 314,

lacuna in the customary law applying to a particular mortgage, and if no other system of customary law makes adequate or any provision for the matter in question be guided by the relevant provision of this Act, the common law and the doctrines of equity.<sup>89</sup>

### **3.5 Salient features of mortgages**

There are conditions which must be followed before a disposition of the right of ownership can be effected. Among the requirements of formalities to be followed in effecting any disposition under the Registration of Titles Act (Cap 230) is the requirement that no disposition shall be registered unless is effected by deed and the consent of the commissioner of Income tax has been sought and obtained.<sup>90</sup>

#### **3.5.1 The requirement of writing in a mortgage**

Section 3 of the Mortgage Act, 2009 provides for the requirement of writing in creating a mortgage contract. Subsection (1) provides that a contract for the disposition of a right of occupancy, any derivative right in it, or a mortgage is enforceable in a proceeding if it is in the prescribed form thus giving a direction that the contract is in writing or there is a written memorandum of its terms. This provision would probably bring a presumption that an unwritten contract would therefore be void. So, the immediate question is what is the position of the law in respect to an unwritten contract of mortgage?

A similar situation has been the subject of court decisions at common law. Early court decisions held that a deposit of title deeds alone without a written contract creates an equitable mortgage.<sup>91</sup> Notably, in *united bank of Kuwait v Sahib*,<sup>92</sup> Peter Gibson L.J observed that since 1783 a deposit of title deeds relating to a property by way of security had been taken to create an equitable mortgage of that property without any writing.<sup>93</sup> Under this, the deposit of title deeds was taken as an act of part performance and thus the doctrine of part performance was invoked to enforce such a contract.

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<sup>89</sup> Section 7(4) of the Mortgage Act Cap 8

<sup>90</sup> Section 43C of the Finance Act 1982

<sup>91</sup> *Russel v Russel* 28 ER 1121; *In Re Richardson* (1885); *Harrold v Plenty* (1901); *Stubbs v Slater* (1910)

<sup>92</sup> [1997] Ch. 107

<sup>93</sup> Section 3(5) of the Mortgage Act Cap 8

Now the stringent requirement is that a contract for a mortgage of or charge on any interest in land can only be made in writing.<sup>94</sup> This requirement goes to the root of the contract by stating that an unwritten contract of mortgage is no contract.

The Ugandan situation is identical with the pre 1989 position in England. The Mortgage Act 2009, (Cap 8) simply sets the condition to be fulfilled before a contract for a mortgage can be registered. It does not legislate on the validity of an unwritten contract of mortgage. Such an unwritten contract which may not be registered for lack of writing is a valid contract. The effect of such an unwritten contract of mortgage under Section 3 flow from the consequences of an unregistered but valid contract of mortgage.

Similarly, the Mortgage Act, 2009, simply states that a contract for a mortgage be enforceable in writing. However, the irregularity of unenforceable contract of mortgage for lack of writing is cured by section 3(5) of the Mortgage Act Cap 230.

This means that an unwritten contract of a mortgage will still be valid and may be enforced. However, it is desirable that a contract of mortgage should be in writing in compliance with Section 3 of the Mortgage Act, 2009. Apart from the fact that writing makes it easy to ascertain the terms of the contract, it facilitates matters related to attestations and execution of instruments. In case there is unwritten contract and a party has acted upon such a contract, such a contract will bind the parties and the doctrine of part performance is available to assist the injured party.

### **3.5.2 Registration of Mortgage**

Registration of dealings in land whether by way of mortgage, lease or sale of the right of ownership is provided for under different laws. A mortgage shall have effect as a security only and shall not operate as a transfer of any interest of right in the land from the mortgagor to the mortgagee; but the mortgagee shall have, subject to this Act, all the powers and remedies in case of default by the mortgagor and be subject to all obligation conferred or implied in the transfer of an interest in land subject to redemption.<sup>95</sup>

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<sup>94</sup> United Bank of Kuwait v Sahib

<sup>95</sup> Section 8 of the Mortgage Act, 2009

The registration of a mortgage is the final requirement in the process of creating a mortgage. Registration completes a mortgage transaction and makes it effective. It is important to note that there is a special registration requirement on companies for mortgages or charges created by them. The requirements are imposed by the Companies Act Cap 110, thus requires companies to register with the registrar of companies all the charges created by them over their land. The charges have to be registered within forty-two days of their creation otherwise they become void against the liquidator or creditor of the company. This provision applies, inter alia, to charges of immovable property wherever situate or any interest therein, which includes mortgages of land.

The requirement to register charges created by companies, means a mortgage of land created by a company must first be registered with the registrar of companies under the Companies Act Cap 110, and then such a mortgage must be registered in the Land Register.

### **3.5.3 Effects of failure to register a mortgage**

As already observed, a mortgage of registered land must be registered to have legal effect. Failure to register a mortgage of registered land at the land register will render such a mortgage ineffectual to create, transfer, vary or extinguish any estate or interest in any registered land. A mortgage which is otherwise proper but becomes ineffectual for lack of registration retains all the attributes of a valid mortgage and therefore will bind the parties. However, failure to register a mortgage or charge created by a company renders such a charge void. In *Guaranty discount co. v Credit finance Ltd*,<sup>96</sup> it was held that the effect of failure by the company to register a legal mortgage renders such a charge void against the liquidator.

In circumstances where the mortgagor created the second or subsequent mortgages, they should all be registered. The law stipulates that upon registration, mortgages shall rank according to the order in which they are registered and not according to the order in which they are created.<sup>97</sup> As for the informal mortgages and liens by deposit of documents, they shall rank according to the order in which they are made provided that where an informal mortgage is registered under section 3(6) of the Mortgage Act, 2009; it shall take priority over any unregistered informal mortgage or

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<sup>96</sup> [1963] EA 345

<sup>97</sup> Section 48 of the Registration of Titles Act and Section 9 of the Mortgage Act.



lien by deposit of documents as the case may be.<sup>98</sup> The rules applicable to priority of informal mortgages apply to customary mortgages.<sup>99</sup>

A mortgage once registered will attach to the land. It will be an encumbrance against the title to the land thus any transferee of such an estate will be deemed to have an actual notice of a charge. In addition, the act of registration is proof that all the requirements of law under which registration is required have been fulfilled.<sup>100</sup> However, this doesn't mean that the act of registration turns a bad mortgage into a good one, as was stated in *Guaranty discount co. v Credit finance ltd*,<sup>101</sup> or that a defective mortgage becomes good with registration.

However, in the absence of fraud, once registered, a mortgage passes the legal title it intended to convey. A certificate of title shall be admissible as conclusive evidence of several matters therein contained.

In *National provincial and union bank of England v Chanley*,<sup>102</sup> Atkin LJ gave the position the position of the law as to the registration stating that "it appears to me to be the true view that once a certificate has been given by the registrar in respect to a particular specified document which in fact creates a mortgage or charge, it is conclusive that the mortgage or charge so created is properly registered, even though the particulars put forward by the person applying for registration are incomplete, and the entry in the register by the registrar is defective."

The above statement is relevant in Uganda as it complements some of the provisions of the law as shown above. Both the statement and the foregoing provisions underlie the principle of the sanctity of the register. The principle is that, "except in the case of actual fraud, the court will not go behind the register."

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<sup>98</sup> Section 9 of the Mortgage Act Cap 8

<sup>99</sup> Section 9 (2) of the Mortgage Act Cap 8

<sup>100</sup> In *Harshad Ltd v Globe Cinema Ltd & Others* [1960] EA 1046, it was held that the law provides that variation in the forms contained in the schedules not being matters of substance, shall not affect the validity of the mortgage. The court went on to state that "once registered then the rights conferred by the law proceed to flow otherwise it would defeat the whole purpose of the ordinance if, in absence of fraud, a litigant could go behind the fact of registration..."

<sup>101</sup> page 351

<sup>102</sup> [1924] 1 KB 431

### **3.4 Extinction of the subject matter of the mortgage**

The discussion of the consequences of the extinction of the subject matter of the mortgages is relevant in Uganda because of the nature of the mortgaged interest. The discussion above shows that what is mortgaged is the estate or the interest of the right of ownership and that the right of ownership is a mere right to own and use land in accordance with the tenure system in Uganda. Revocation of the right of ownership is one of the factors which may result in the extinction of the subject of a mortgage. Other acts such as the surrender of a right of ownership may not extinguish a subject of a mortgage because surrender is not allowed where the land is subject to a mortgage.

## CHAPTER FOUR

### RIGHTS OF A MORTGAGOR AND A MORTGAGEE

This chapter discusses the rights of parties under a mortgage. These rights are both legal and equitable. In addition, parties may stipulate in the mortgage deed terms suitable for the circumstances of their mortgage. These later stipulations need not be contrary to the clear terms of the law.

As discussed below, some rights are implied in any mortgage contract while others become exercisable only if contained in the Mortgage Deed.

#### 4.2 Rights of the mortgagor

A mortgage is a contract. The agreement to lend money is a simple contract transaction. This makes the general principles of contract such as; a man should abide by his contract applicable. In addition, some contractual remedies may be available to parties under a mortgage. For instance, the debt or obligation under the mortgage may be impeachable for misrepresentation, undue influence, or fraud.<sup>103</sup> But the act of conveying an interest or estate in land or property to secure the payment of the money advanced is a property transaction. This act makes a mortgage a property transaction as well. As a result, the mortgagor is also entitled to legal and equitable rights incidental to mortgages. Contractual rights in certain circumstances are overridden by legal or equitable rights. In this situation, a mortgagor may contract away his right and yet equity may disregard clear terms of the contract and grant him relief. These rights especially ones based on equitable consideration may seem to interfere with the general contractual principles.<sup>104</sup>

A mortgagor has a range of legal and equitable rights available to him. He may create a second or subsequent mortgage over the same land. The mortgagor in possession of the mortgaged land subject to qualification may deal with the land in the sense that he may dispose of the land by contract or in compliance with the requirement of the law.<sup>105</sup> The mortgagor may also transfer his rights under a mortgage to a third party.<sup>106</sup> One important right is the power to transfer the equity of redemption.

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<sup>103</sup> Santley v Wilde [1899] 2 Ch. 474

<sup>104</sup> Biggs v Hoddinott [1898] 2 Ch. 307

<sup>105</sup> Section 3(1) of the Mortgage Act Cap 8

<sup>106</sup> Section 17 of the Mortgage Act Cap 8

#### 4.2.1 Creation of second and subsequent mortgages

The mortgagor can create a second and subsequent mortgage over the land.<sup>107</sup> This happens when the mortgagor is in need of further advances either from the same mortgagee or lender. Despite the fact that the mortgagee has the right to go into possession at any time because he has a legal term (estate) of years in the property, business convenience and legal limitation makes it unnecessary to enter into possession. The mortgagee in the possession will have to account for the profit accrued while in possession.<sup>108</sup> As a result, the mortgagor is left in the possession of the mortgaged property.

To begin with, Section 3 of the Mortgage Act, 2009 provides for the creation of an ordinary (formal) mortgage and the power to create second and subsequent mortgages is provided for in subsection (2). It states that the power to create a mortgage under subsection (1) shall include the power to create second and subsequent mortgages. In that sense, the second and subsequent mortgages would necessarily follow the original formal mortgage created under section 3 of the Mortgage Act 2009. The ordinary (formal) mortgage might be assignment of the term in the right of ownership or lease, or transfer of a lesser term in the right of ownership or lease, would, unless the mortgagor assigns the whole of his term means that any subsequent mortgages over land to be for a term longer than the previous mortgage or mortgages. This will give the subsequent mortgagee or mortgagees a nominal chance of possession of the mortgaged land.

The second or subsequent mortgages created in favor of the same mortgagee may be by way of tacking.<sup>109</sup> To determine the effect of this requires an examination of priority of the mortgages especially if there are intermediary mortgages executed in favor of different mortgagees. In general, if the mortgage creates a right to tack, subsequent mortgages created in favor of the same mortgagee would have priority against intermediate mortgages to different mortgagees.<sup>110</sup>

It is important to note that the mortgagor needs the consent of the mortgagee in writing before he can create second and subsequent mortgages. That is the effect of the implied covenant under section 18 of the Mortgage Act, 2009, which prevents the mortgagor from transferring or assigning the right of ownership or lease or part of it without the consent of the mortgagee. The need for consent is a control mechanism afforded by law to the mortgagee. The power enables the

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<sup>107</sup> Section 3(2) of the Mortgage Act Cap 8

<sup>108</sup> Section 24 (5) of the Mortgage Act Cap 8

<sup>109</sup> Section 10 of the Mortgage Act Cap 8

<sup>110</sup> Section 10 (4) of the Mortgage Act Cap 8

mortgagee to control the activities of the mortgagor especially those dealings which may prejudice his interest. However, the law directs that the consent of the mortgagee should not be unreasonably withheld.<sup>111</sup>

Section 3(2) of the Mortgage Act, 2009, which gives powers to create secondary and subsequent mortgages, is unnecessarily tied to subsection (1), a provision conferring power to create ordinary (formal) mortgages.<sup>112</sup> This casts doubt as to the possibility of creating secondary and subsequent mortgages of other forms of mortgages by relying on subsection (2). For instance creating a secondary mortgage of informal mortgage under section 3(5) (a).<sup>113</sup>

In principle, one can create second and subsequent mortgages of an informal mortgage.<sup>114</sup> In the like manner, a mortgagor of a mortgage by deposit of title deeds can create second or subsequent mortgages by charging the property as a security for the money advanced. But it is doubtful if a mortgagor of a mortgage created by deposit of title deeds can create second and subsequent mortgages by depositing the deed. This is because the original deposit of the title deed will have the effect of requiring him to literally hand over the custody of the deed to the mortgagee. The only possibility of creating second and subsequent mortgages by re-deposit of the title deeds is for the mortgagor to obtain a deed from the original mortgagee so that second and subsequent mortgagees can inspect the deed and obtain a copy to effect the deposit.<sup>115</sup>

#### **4.2.2 Right of redemption**

The mortgage is executed under the assumption that the transferred interest or estate will be conveyed after the payment of the money owed or performance of the conditions upon which the mortgage is given. The right to demand conveyance of the transferred interest or estate is the right of redemption or the right to redeem.<sup>116</sup> The right to redeem whether legal or equitable depends on

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<sup>111</sup> Section 18 (1) (f) and (g) of the Mortgage Act Cap 8

<sup>112</sup> Section 3 (2) of the Mortgage Act Cap 8

<sup>113</sup> Section 3 (2) of the Mortgage Act Cap 8 should read “the power to create mortgage under this section shall include the power to create third party mortgages, second, subsequent mortgages and sub mortgages”.

<sup>114</sup> Section 3 (8) of the Mortgage Act Cap 8

<sup>115</sup> Section 9 (3) of the Mortgage Act Cap 8, informal mortgages shall rank according to the order of the date and time when they are made.

<sup>116</sup> Section 8 (1) of the Mortgage Act Cap 8

the contractual date.<sup>117</sup> The legal right to redeem is the right which arises on the contractual date. However, if the mortgagor fails to redeem on the contractual date, he is entitled to the equitable right to redeem which is part of the equity of redemption. The equity of redemption is a total of mortgagors' rights in the mortgaged land or property. It is a general right which arises as soon as the mortgage is created. The equity of redemption includes the equitable right to redeem.<sup>118</sup> The exercise of the equitable right to redeem is the main concern of this part.

A proprietor of the land or any other property who is in need of the money may, among other transactions raise some money by either selling the property or obtaining a loan and mortgaging the property. A sale conveys the property to the buyer without the possibility of getting the property back, while a mortgage entitles the mortgagor to redeem on performance of the conditions upon which the mortgage was given. However, a sale or mortgage transaction may sometimes be worded in a way which makes it difficult to distinguish between the two. This is a common phenomenon under customary mortgage or customary pledge. In principle a sale is a sale and a mortgage will remain a mortgage and therefore a court will not set aside a genuine sale of land dressed as a mortgage.

To be entitled to the equitable right to redeem, it is important first to establish whether a transaction in question is indeed a mortgage transaction or not. As already observed, some of the transactions in which the right of redemption is said to vest are not mortgage transactions but sales or charges over land.<sup>119</sup> These other transactions may not strictly fall under a category entitled to relief based on equity inherent in transactions in the nature of mortgages.

The equitable right to redeem is the right conferred on the mortgagor by equity to redeem the mortgage at any time after the contractual date.<sup>120</sup> This equitable doctrine which has its roots at common law is not given by the terms of the agreement, but by equity. As a result, parties could not do away with it by contracting that the mortgage shall be irredeemable.<sup>121</sup> The right of redemption was available even before the enactment of the Mortgage Act, 2009. Its application

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<sup>117</sup> Section 9 (3) of the Mortgage Act Cap 8

<sup>118</sup> Section 8 (1) of the Mortgage Act Cap 8

<sup>119</sup> Equity has looked at the intention of the parties and not necessarily forms to establish whether a transaction is a mortgage or not.

<sup>120</sup> M & W at page 1174

<sup>121</sup> Section 8 (2) of the Mortgage Act Cap 8

was based on the application of the rules of common law and the doctrine of equity in the country. The doctrine is now legislated. It was included under the Mortgage Act, 2009.

Section 14(1) of the Mortgage Act, 2009 states that “subject to the provisions of this section and section 15, on payment of all moneys and the performance of all other conditions and obligations secured by the mortgage, and on payment of any costs and expenses properly incurred by the mortgagee in exercising his or her rights under the mortgage, the mortgagee shall at the request and cost of the mortgagor release the mortgage at any time and any agreement or provision in the mortgage instrument or otherwise...” This is a wide provision which provides for the possibility of redeeming a mortgage not only before the contractual date, but afterwards as well. The spirit of the doctrine of equity of redemption is also reflected under Section 20 which on default confers powers and remedies on the mortgagee but subject to the right of redemption. Now parties may peg their arguments on the exercise of the equity of redemption both in law and equity.

The equity of redemption is inviolable. The applicable maxim is “once a mortgage, always a mortgage” or “a mortgage cannot be made irredeemable”. It means once it is established that parties intended to create a mortgage, any stipulation in the mortgage instrument which has the effect of interfering with the mortgagor’s right to redeem is unsustainable.

The House of Lords after concluding that the transaction was a mortgage with an option to purchase stated that once it was established that a transaction was a mortgage transaction, the mortgagee would have the mortgagor’s right. The court clarified the application of the doctrine “once a mortgage, always a mortgage”. It stated that the doctrine meant no contract between a mortgagor and the mortgagee made at the time of the mortgage and as part of the mortgage transaction, or on other words, as one of the terms of the loan, could be valid if it prevented the mortgagor from getting back his property on paying off what was due on security. Any bargain which had that effect was invalid, and was inconsistent with the transaction being a mortgage.<sup>122</sup> Earlier on, the House of Lords in *Salt v Marquess of Northampton*<sup>123</sup> clarified the position in regard to the agreement in the mortgage which had the effect of making the mortgage not redeemable. In this case, there was a mortgage of an insurance policy with a provision to the effect that in case of

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<sup>122</sup> It can be noted that Lord Macnaghten in *Samuel v Jarrah Timber* stressed the fact that the offending condition or covenant must have been included at the time in which the mortgage was made.

<sup>123</sup> [1892] 1 AC

the mortgagor's failure to pay the debt during his life time the policy would belong to the mortgagee. It was held that the mortgage could not be made irredeemable.<sup>124</sup> The conclusion reached seems an attempt to undermine the principle of sanctity of contract by holding that the parties of their free will could not stipulate terms which would put an end to the mortgagor's right to redeem.

For a long time at common law, the mortgage could not stipulate for a collateral advantage. But the position was altered and the established position is that collateral advantages may be stipulated by the mortgage provided they are not unfair, or oppressive, or unconscionable or have the effect of clogging the right to redeem.

#### **4.2.2.1 The termination of the equity of redemption**

The equity of redemption may be terminated by sale of the mortgaged land by the mortgagee in the exercise of the power of sale.<sup>125</sup> The equity of redemption can also be terminated by limitation where the mortgagor fails to redeem the land within twelve years.<sup>126</sup> And before the enactment of the Mortgage Act, 2009, the equity of redemption could also be extinguished by an action for foreclosure.

#### **4.3 Rights of a mortgagee**

A mortgagee has several legal and equitable rights under the mortgage. Probably, the most important one is his power of enforcing the mortgage or exercising the remedies under a mortgage upon default by the mortgagor.

Some of the rights are implied in a mortgage, while others are available only if they were included in the mortgage deed. It is important to look at the right of the mortgagee in regard to the original mortgagor and mortgagee, and when the mortgage was transferred to a third party. As a result, it is imperative that we investigate incidents related to the transfer of mortgages.

In principle, the mortgagee has the right of possession of the mortgaged land as a right and not as a remedy for default because he has a legal term (estate) of years in the property.<sup>127</sup> But in practice,

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<sup>124</sup> Noakes v Rice [1902]

<sup>125</sup> Section 27 of the Mortgage Act Cap 8

<sup>126</sup> The Limitation Act on causes of action relating to land matters is limited to 12 years.

<sup>127</sup> Four- Maids Ltd v Dudley Marshall Properties Ltd [1957]



he rarely exercises this power. The legal limitation would require the mortgagee in possession to account for the profit which accrued to him while in possession. Besides, business convenience makes entering into possession unrealistic. As a result, the mortgagor is normally left in possession of the mortgaged property.

#### **4.3.1 Right to consolidate**

Consolidation is a situation where a mortgagee in whom two or more mortgages of different lands are vested refuses to allow one mortgage to be redeemed unless the others are also redeemed.<sup>128</sup>

Consolidation is also defined to mean “the combination of two or mortgages or securities”.<sup>129</sup> The Mortgage Act, 2009 provides for right to consolidation.<sup>130</sup> However, the Chattels Security Act, 2014 Laws of Uganda does not provide for right to consolidation.

Chattel may also be used as security for a loan.<sup>131</sup> It is defined to mean “any movable property that can completely transferred by delivery, and includes machinery, book debts, stock and the natural increase of stock, crops, wool or property in respect of which a valid document of title exist but does not include title deeds, choses in action or negotiable instruments, shares and interest in the stock, funds or securities of any government or local authority; among others.”<sup>132</sup>

Different circumstances may prompt the mortgagee to exercise this power. It may happen when the value of one mortgaged land (land A) has fallen to the point that it may not satisfy the debt if the other mortgages (mortgaged land B) are redeemed. In the case where the mortgagor wants to redeem mortgaged land B, the mortgagee can consolidate the mortgages. The mortgagor would have to redeem both mortgages.<sup>133</sup>

Section 11 of the Mortgage Act, 2009, provides as follows;

(1) Unless there is an express provision to the contrary clearly set out in the mortgage instrument, where a mortgagee has more than one mortgage from a single mortgagor or where the mortgagee

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<sup>128</sup> M & W at page 1217

<sup>129</sup> Section 11(4) of the Mortgage Act, 2009

<sup>130</sup> Section 11 of the Mortgage Act, 2009

<sup>131</sup> The Chattels Security Act, 2014

<sup>132</sup> Section 2 of the Chattels Security Act, 2014.

<sup>133</sup> M & W at page 1217

has lent money or money's worth to a single mortgagor on two or more securities, the mortgagor may discharge any or some of the mortgages without having to redeem all mortgages or securities. In practice, once the right of consolidation is included in the mortgage, the mortgagee must apply to the registrar to have the right recorded in the appropriate register. Failure to register the right of consolidation will make it impossible for the mortgagee to defeat the rights of any person in occupation or use of the right of occupancy or lease. Similarly, failure to register the right of consolidation may act in favor of any person whose interest over the land was acquired before the recording of the right to consolidate in the prescribed register.

It can be noted that under section 11(1), consolidation is possible only if the power to consolidate is stipulated clearly in the mortgage deed. The provision also stresses the fact that the mortgagee can consolidate mortgages from the same mortgagor and not otherwise.<sup>134</sup> The immediate question is who is the same mortgagor for the purpose of consolidation? For instance, if A executes a mortgage in favor of C and then B a trustee for A executes a mortgage to C; can C consolidate the two mortgages? Or if X executes a mortgage to Z, then X and Y jointly create a mortgage to Z, are X and Y the same mortgagor? The Mortgage Act, 2009 does not clarify this issue, nor do Ugandan cases but some common law cases do.

In *Sharp v Pickards*,<sup>135</sup> the plaintiff was an assignee of the equity of redemptions in three different properties mortgaged to the respondent. The plaintiff then acquired another property which he leased to C who later mortgaged it to the respondent. C assigned his equity of redemption to the plaintiff. The respondent tried to consolidate the mortgage which was executed by C and of which the equity of redemption was assigned to the plaintiff, with the other plaintiff's mortgages. It was held that the right to consolidate can only arise when all the mortgages were originally made by the same mortgagor. In this case, even if equities of redemption came to be vested in the same mortgagor, the mortgagee could not consolidate the mortgages.<sup>136</sup> Furthermore, if a mortgagor executes a mortgage to T, there can be no consolidation.

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<sup>134</sup> *Cummins v Fletcher* [1888] 14 Ch. D 699

<sup>135</sup> [1909] 1 Ch. 109

<sup>136</sup> Note; *Vint v Padget* 2 De G. & J. 611 quoted in *Sharp V Pickards* [1909] 1 Ch. 109 in which it was held that where the equities of redemption of two estates mortgaged to different persons were vested in the same person by the same deed, and the mortgages afterwards came into the hands of the same mortgagee, he had the right of consideration against the owner of equity of redemption in both

The right to consolidate is a mortgagee's power, and as such can only be exercised if both mortgages are vested on him.<sup>137</sup> There can be no consolidation if one mortgage is vested in him and the other in another person or jointly with another person.<sup>138</sup>

In its original application, the right of consolidation was an equitable doctrine exercisable among others, between the same mortgagor and mortgagee and after the passing of the contractual debts of the mortgages subjects of consolidation. This was stated in *Cummins v Fletcher*,<sup>139</sup> where Cotton L.J stated that "in order to enable a mortgagee to bring an action and consolidate there must be two debts due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem or claim them back..." As such the court under equitable consideration thought it would be inequitable to allow the mortgagor to redeem from the mortgagee a sufficient estate and leave him with an insufficient estate as a security for a different debt. This is the main reason behind consolidation.

As already observed, the right of consolidation is now a creature of statute as it is provided for under the Mortgage Act, 2009. However, the Mortgage Act, 2009, re-enacted the doctrine stating that the rules of equity applicable to consolidation do not apply. One may wonder, by excluding the rules of equity under which the doctrine originates, what purpose the provision is trying to save. Is it trying to widen the rules by creating possibility of consolidation even before the contractual date most likely? The right to consolidate under the Mortgage Act, 2009 is possible only between the same mortgagee and mortgagor as was the case on its original application. But the law doesn't state whether mortgages can be consolidated only after the passing of the contractual debts of both mortgages. Restricting the rights to consolidate to mortgages which are due will defeat the purpose which consolidation is intended to serve, that's, to address a possible inequality where the mortgagor redeems the sufficient mortgage and leavers the mortgagee with insufficient. This will mean the mortgagee should be able to consolidate a mortgage which is due with the one which is not due. The possibility will be a relief to lenders in possession of undervalued security or property which has depreciated.

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<sup>137</sup> Section 11 (1) (a) of the Mortgage Act Cap 8

<sup>138</sup> Section 11 (2) of the Mortgage Act Cap 8

<sup>139</sup> [1888] 14 Ch. D. 699

#### 4.3.2 Right to tack

Tacking occurs when the mortgagee at a later date lends more money to the mortgagor on the same security.<sup>140</sup> It is a special right giving the mortgagor and the mortgagee alike the flexibility of using the same mortgage as a security for future advances (lending facilities).

If the mortgagor needs more money in the future, the right to tack will allow the mortgagee to increase the debt on the same security. The Mortgage Act 2009 provides for the right to tack.<sup>141</sup> It provides as follows:

(1) A mortgagee may subject to the provision of this section, make provisions in the mortgage instruments to give further advances or to give credit to the borrower on the current or continuing account.

From the above provision, the right to tack is exercisable only if it is provided for the mortgage instrument. Otherwise, there is no right to tack.<sup>142</sup> The mortgagee whose mortgage creates right to tack has a duty to apply to the registrar to have the right recorded in the land register otherwise the right may not be exercisable if its exercise will prejudice the interest of any subsequent mortgagor whose mortgage was registered prior to the inscription of such right in the land register. In any case, if the right to tack is included in the mortgage, the deed may contain a clause stating that “the security covers any further advance which the mortgagee may give” or words to similar effect.

The act of tacking impacts on the priority of mortgages created. The question of priority of mortgages arises where there is an intervening mortgage or mortgages between the first mortgage and further advances. The law provides that a further advance will not have priority to any subsequent mortgage unless the provision for further advances is noted in the register in which the mortgage is registered.<sup>143</sup> In the alternative, if the provision for further advances is noted in the register, it will rank in priority of any subsequent mortgages if the subsequent mortgagee has consented in writing to the priority of the further advance. However, it is provided by law that where a mortgage provides for the payment of the principle sum by way of installments, the payment of those installments shall not be taken to the further advances and therefore such payments shall have priority to all subsequent mortgages. The provision simply tries to cast out

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<sup>140</sup> Section 10 of the Mortgage Act Cap 8

<sup>141</sup> Section 10 of the Mortgage Act, 2009

<sup>142</sup> Section 10 (1) of the Mortgage Act Cap 8

<sup>143</sup> Section 10 (2) of the Mortgage Act Cap 8

doubt where the loan is made by installment. The provision creates room for controversy because the provision may also impose an assumption that if the mortgagee does not provide for payment of principle sum by installment, but nevertheless the mortgagee advances the money by installments those payments should not be taken as further advances and hence subject to the rules in regard to the right to tack. In this later scenario, payment by installment will be imputed to the agreed principle sum.

#### **4.4 Variation of mortgages**

The mortgagee and mortgagor alike may wish to change or vary the terms of the mortgage. The need for variation may be a result of a change in social, economic or business conditions which may make the observance of mortgage terms a burden.

Therefore, parties may agree to vary the mortgage. The Mortgage Act, 2009 provides that variations in a mortgage must be in writing, the memorandum of which must be signed by both the mortgagor and mortgagee signifying their consent to the variation.<sup>144</sup> Once the memorandum is signed, it must be endorsed or annexed to the mortgage instrument.<sup>145</sup> After it has been endorsed or annexed as the case may be, the memorandum is deemed to have varied the mortgage.<sup>146</sup>

Section 12(1) of the Mortgage Act 2009, provides that “the rate of interest payable under a mortgage maybe reduced or increased by a notice served on the mortgagor by the mortgagee...” The provision is worded on a negative sense. It doesn’t give the mortgagee the powers to vary the interest rate but directs the manner of exercise of such power if any. The power to vary the rights of interest must therefore be included in the mortgage deed. The power to vary interest rate if ill exercised will defeat commercial sense. This is because the mortgagor would certainly want to be certain of the rate of interest payable. To protect himself, the mortgagor would have to make sure that the power to vary the rate of interest if included in the mortgage deed is well clarified such as subject to a certain ceiling or exercised only on special occasion.

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<sup>144</sup> Section 12 (2) of the Mortgage Act Cap 8

<sup>145</sup> Section 12 (5) (a) of the Mortgage Act Cap 8

<sup>146</sup> Section 12 (5) (b) of the Mortgage Act Cap 8

#### **4.5 Transfer of interests under mortgage**

A party to a mortgage by agreement may wish to transfer the mortgage to another person. The mortgagee may wish to transfer the mortgage in the sense of the debt (as an asset) either in whole or in part, or the mortgaged land as security for the debt. On the other hand, the mortgagor may want to transfer the mortgaged land or the liability to pay the debt by signing the equity of redemption to another person. In both cases, it is necessary to discuss the possibilities and limitations imposed by the law. It is also important to analyze the relationship of the parties that is between the assignee or transferee of the equity of redemption and the mortgagee, or between the transferee of the mortgage and the mortgagor, or when both the mortgagor and the mortgagee transfers between the assignee of the equity of redemption and the transferee of the mortgage respectively.

Transfer is defined to mean the act of passing of a right of occupancy, lease or a mortgagee from one party to another by act of the parties and not by operation of the law.<sup>147</sup> The person to whom the transfer is made is called the transferee, while the person who makes the transfer is referred to as the transferor. As noted from the foregoing definition, the act of passing a mortgage from one party to another may be a result of the operation of the law. This form of passing of the mortgage known as transmission, takes place on death or insolvency of a party to the mortgage or more even otherwise necessitating the estate in question to devolve onto another person. Transmission is discussed in brief below.

##### **4.5.1 Transfer of equity of redemption**

The mortgagor may wish to transfer the mortgaged land either free from the mortgage or subject to the mortgage. The mortgagor may transfer the mortgaged land free from the mortgage if he redeems the land. If not he may still transfer the land free from the mortgage with the mortgagee's consent for some other arrangement. At common law, he may invoke section 50(1) and (2) of the Law of Property Act, 1925 by asking the court to declare the land free from the mortgage after paying the money owed into court.<sup>148</sup>

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<sup>147</sup>Section 2 of the Land Act, 1998 and the Amendment of 2009

<sup>148</sup> M & W at page 1257

Otherwise, he transfers the mortgaged land subject to the mortgage. At common law, a mortgagor could convey the land or property subject to the mortgage at any time with or without the consent of the mortgagee.<sup>149</sup>

When he does transfer, the mortgager [the transfer] still remains liable to pay the money due under the mortgage.<sup>150</sup> The mortgagor has to obtain a covenant from the transferee to pay the mortgage and indemnity in case he is sued on the covenant with the mortgagee. However, the mortgagee may choose to proceed against the mortgage and abstain from using the mortgagor. But if he decides to sue the mortgagor on the covenant to pay the money, upon payment by the mortgagor, the mortgagee has to re-convey the land to the mortgagor subject to the equity of redemption vested in any other person.<sup>151</sup> To protect himself against the risk, the mortgagor needs to extract a covenant from the transferee of indemnity and that the transferee will pay the mortgage off.<sup>152</sup>

The assignee or transferee of the equity of redemption in the absence of a covenant is not personally liable to the mortgagee or his transferee. However, in principle he steps into the position of the mortgagor and have to pay the principal sum plus interest so as to protect the land from foreclosure or an action by the mortgage which would have the effect of extinguishing the right of redemption.

The Mortgage Act, 2009 does not contain express provision in regard to the transfer of mortgaged land or equity of redemption. In *Re Errington*<sup>153</sup>, the mortgagor after executing a mortgage is entitled to the equity of redemption. It is the right to have the property conveyed on performance of conditions on which the mortgage is given. The equity of redemption is an interest in land which can be dealt with. In both cases what is needed is the consent of the mortgagee in writing before the mortgagor could transfer and the law directs that the consent of the mortgagee should not be unreasonably withheld.<sup>154</sup>

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<sup>149</sup> M & W at page 1257

<sup>150</sup> For the personal Liability of the mortgagor to pay the money

<sup>151</sup> *Kinnaird v Trollope* [1888]

<sup>152</sup> *Mills v United Countries Bank Ltd* [1912] 1 Ch. 231

<sup>153</sup> [1894] 1 QB 11

<sup>154</sup> Section 18 (1) (f) and (g) of the Mortgage Act Cap 8

#### 4.5.2 Transfer of the mortgage by the mortgagee

At common law, a mortgagee can transfer the mortgage either absolutely or by way of sub-mortgage and he may exercise his power with or without the consent of the mortgagor.<sup>155</sup> Despite this power, in practice, it is important that the mortgagor becomes a party in the transfer so that he can acknowledge the representation of the mortgagee [transferor] to the transferee.<sup>156</sup> If not made a party, the transferee will get the benefit of the sum actually due even if the mortgagee had represented that more money was owed.<sup>157</sup> The position was eloquently explained in *Turner v Smith*,<sup>158</sup> where it was stated that, where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the time of transfer. In addition, in the absence of collusion, if the mortgagor without the notice of the transfer pays the mortgagee, the payment will be allowed to the mortgagor as against the transferee. This reality necessitates the need of the mortgagor to be made a party in the transfer. In case the mortgagor was not made a party or informed of the transfer, the transferee has to inform him so that he knows to whom to pay the money.<sup>159</sup>

The transfer of the mortgage passes the debt, a security for the debt and other interest of the mortgagee subject to the equity of redemption.<sup>160</sup> The transferee would be bound by the covenants between the mortgagee and the mortgagor. He is also not in a better position compared to that of the transferor.<sup>161</sup>

##### 4.5.2.1 A particular instance of transfer by the mortgagee

There is a particular instance of the transfer of mortgage initiated by the mortgager or some other person. It is a form of transfer which was not common before the enactment of the Mortgage Act, 2009. This form of transfer can take place only if the mortgagee is not in possession of the mortgaged land.<sup>162</sup> To initiate the transfer, the mortgagor must in writing request the mortgagee to transfer the mortgage to a person named in the written request. Section 17 of the Mortgage Act

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<sup>155</sup> F & L at page 263

<sup>156</sup> F & L at page 263

<sup>157</sup> M & W at page 1258

<sup>158</sup> [1901] 1 Ch. 213. See also *Parker v Jackson* [1936] 2 ALL ER 281

<sup>159</sup> F & L at page 263

<sup>160</sup> F & L at page 264

<sup>161</sup> *Turner v Smith* [1901] 1 Ch. 213

<sup>162</sup> Section 17 (1) of the Mortgage Act Cap 8



2009 provides that the current mortgager or any person mentioned in sub section (3) may at any time other than a time when the mortgagee is in possession of the mortgage land in writing request the mortgagee to transfer the mortgage to a person named in the written request.<sup>163</sup>

#### **4.5.2.2 Sub- Mortgages**

A sub-mortgage is a mortgage of a mortgage.<sup>164</sup> It is a practice which enables the mortgagee to use a mortgage as a security for money he borrows.<sup>165</sup> The mortgagee will therefore transfer the mortgage subject to red  mption with a covenant to pay a sum advanced plus interest. A sub-mortgage transfers only part of the debt to a sub- mortgagee. At common law the effect of a sub-mortgage is to put the sub-mortgagee in the position of the transferee of the mortgage hence entitled to exercise rights under the principal mortgage.<sup>166</sup> For instance, he may exercise a power of sale under the principal mortgage there after distinguishing the rights of redemption both under the principal mortgage and the sub-mortgage. Alternatively, he may exercise rights under sub-mortgages such as a sale of the mortgage debt and the security on default by the mortgagee.<sup>167</sup>

#### **4.5.3 Transfer by operation of law (transmission)**

In mortgage of the registered land may devolve on the mortgagees legal representatives upon the death of the mortgagee. The same applies to the equity of redemption which upon the death of a mortgager devolves to his legal representatives. The position is that the person to whom the estate devolves must apply to the relevant register to have the mortgage or the interest in the land as the case may be registered in his name.<sup>168</sup> The provisions for the devolution of estates are provided for under the Registration of Titles Act (Cap 230). On the death of the owner of any estate or interest, his legal personal representatives on applications to the registrar shall be entitled to be registered as the owner in place of the deceased. After being registered as the owner, the legal representatives may dispose of the mortgage as an estate of the deceased, or deal with it in the market.

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<sup>163</sup> Section 17 (1) of the Mortgage Act Cap 8

<sup>164</sup> Section 2 of the Mortgage Act Cap 8

<sup>165</sup> Re Tahiti Cotton Company, Ex parte Sargent (1874)

<sup>166</sup> F & L at page 273

<sup>167</sup> F & L at page 273

<sup>168</sup> Farah Mohamed v Fatumah Abdallah [1992]

A different scenario arises in case of co-ownership of an estate. If there are more than one joint owners of the estate and one dies, his name shall be deleted from the land register on the application of any interested person.

The presumption is that if the interest in land is owned jointly by joint occupiers, on the death of one joint occupier, the interest will devolve to surviving joint owners. The joint owner will therefore be entitled to apply as an interested person and be registered as an absolute owner of an estate. Alternatively, if the interest is owned by occupier in common, on the death of one occupier his legal representatives will be entitled to apply to be substituted thereto. In general, the rules of co-occupation or co-ownership apply.

#### **4.5.3.1 Devolution by Bankruptcy**

The mortgage or equity of redemption may also devolve if the mortgage or the mortgager respectively becomes legally incapacitated through bankruptcy or insolvency. When a person is declared bankruptcy, all his property and rights vest in the official receiver or trustee.<sup>169</sup> The official receiver may need to serve on the registrar a copy of the adjudication order and there upon will be entitled to be registered as the owner of that estate or interest. In case the person responsible to oversee the estate of the person adjudged bankruptcy is a trusty, he may be required to serve a copy of the certificate of appointment and then will be entitled to be registered as the owner of that estate or interest. in the like manner, on the devolution of the company, all its properties and rights vest in the liquidator of the company. The liquidator once appointed is entitled to apply to the registrar to be registered as the owner of the estate or interest.

#### **4.5.4 Registration of a transferred mortgage**

This part discusses the requirement of the need to register on the relevant register a transfer of a mortgage. The discussion in the part focuses on registration of the transfer and not registration as a result of transmission. The requirements for registration of the passing of an interest by operation of law have already been mentioned. Besides, the rules regulating transfer by operation of law in general are not necessarily provided for under the Mortgage Act, 2009

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<sup>169</sup> Section 22 of the Mortgage Act, 2009

It must be noted that after a transfer of the mortgage by the mortgagee or a transfer of the equity of redemption by the mortgagor, the transferee must apply to the relevant register for the registration of his interest. The transfer of mortgage or equity of redemption is governed by the rules regarding disposition of interest in land.

As discussed above, transfer is the passing by agreement of the right of occupancy, a lease or a mortgage from one person to another. The passing of the mortgage by the mortgagee to another person is an act of transfer.<sup>170</sup> In connection to that, transfer of a mortgage is by disposition.<sup>171</sup>

Registration of a transfer is important as failure to register may defeat the whole purpose of the transfer. In addition, inscription in the register of the fact of transfer will serve as a notice to anyone who inquires about the status of an estate.

#### **4.6 Priority of Mortgages**

It is important to determine the question of priority of mortgages or changes created over land.

When a mortgagor has created several mortgages over the property sometimes well above the value of the property, questions will arise as to which mortgage or mortgages has priority. The issue of priority is pressing especially when the value of the mortgaged land (security) depreciates leaving the mortgages with a property of which the value is not enough to satisfy all the debts.

The determination of the ranking of mortgages becomes relevant when the mortgagees want to enforce the mortgages. The question is how the mortgages rank when the mortgagor creates several mortgages to the same or different mortgagees? The position differs in regard to the mortgages registered in the land register that in ordinary mortgages and for mortgages registered in the register of the documents or customary ownership registers, in this case informal mortgages and customary mortgages respectively.

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<sup>170</sup> The passing of the mortgage from the mortgagee or mortgagor to another party may be due to an act of transfer or transmission.

<sup>171</sup> The Land Act, 1998 defines disposition to include transfer; see the definition section of the Act.

#### 4.6.1 Priority of ordinary (formal) mortgages

It has been discussed that the law requires registration of mortgages or charges created over land.<sup>172</sup> Mortgages once registered are encumbrances which run with the lands. Section 9 of the Mortgage Act, 2009 provides that “in respect of mortgages of land registered under the Registration of Titles Act, Mortgages shall rank according to the order in which they are registered.”

As far as ordinary mortgages are concerned, one has to go back to the Registration of Titles Act Cap 230, it stresses that mortgages shall rank according to the order in which they are registered and not according to the order in which they are made. The provision which in principle incorporates section 9(1) and (10) of the Mortgage Act 2009, provides two exception to the general rule. First, the rule is inapplicable if a mortgage creates a right to tack further advances. If a mortgage creates a right to tack further advances, the further advances would have priority over intermediary mortgages created over the land.<sup>173</sup> The second exception is if the prior mortgagee agrees in writing to the priority of further advances.<sup>174</sup> Registration of the mortgages of registered land is an important factor in determining the priority of mortgages registered in the land register. Registration is part of the mortgage transaction.

#### 4.6.2 Priority of informal and other forms of mortgages

On the other hand, general informal mortgages rank according to the order in which they are made putting into consideration the date and time when they were made.<sup>175</sup> This rule came with the introduction of informal mortgages as a form of mortgage by the Land Act, 1998.

Determining priority was clarified in the case of *Rice v Rice*,<sup>176</sup> where it was held that time becomes important in determining the rights of the parties if upon an examination of their relative merits there is no other sufficient ground of preference between them, or, in other words, that their rights are in all other respects equal on the ground of priority of time. It was stated further that if upon examination it is found that one has a better right than the other, priority of time is immaterial.<sup>177</sup>

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<sup>172</sup> Section 3 (1) of the Mortgage Act, 2009

<sup>173</sup> Section 10 (2) of the Mortgage Act, 2009

<sup>174</sup> Section 10 (2) (b) of the Mortgage Act, 2009

<sup>175</sup> Section 9 (3) of the Mortgage Act, 2009

<sup>176</sup> [1854]

<sup>177</sup> *Capell v Winter* [1907] 2 Ch. 376

That can be illustrated in the case of two informal mortgages X and Z herein ranked according to the order in which they were made. If mortgage Z (made late) is registered, that act of registration is a better right which would give it priority.

The rules as to priority of informal mortgages apply to customary mortgages.<sup>178</sup> In the same manner therefore, customary mortgages rank according to the order in which they are made in the sense that if there are two unregistered customary mortgages, the one which was created first will take priority. However, where a customary mortgage is registered, that registered customary mortgage shall take priority over any unregistered customary mortgage. The rules as to priority of informal mortgages apply as far as circumstances permit to liens by deposit of documents.<sup>179</sup>

#### **4.7 Discharge of mortgages**

A mortgage will normally contain a covenant to repay the principal sum with interest on a fixed date and payment of interest on default. The covenant will also explain the manner of repayment. If no date of repayment is provided in the mortgage deed, the debt is repayable on demand. After the payment of the money owed, or performance of conditions upon which the mortgage is given, the mortgagee has to discharge the mortgage.<sup>180</sup>

The payment is normally made to the mortgagee, although much will depend on the terms of the mortgage. But in case the mortgagee cannot be found or is under a disability and there is not a person authorized to discharge the mortgage, the mortgagor can make the payment to the registrar for lands under the Registration of Titles Act cap 230. The registrar will receive the money in trust for the mortgagee or other person entitled thereof and will have to discharge the mortgage. However, in case the mortgagor fails to repay the principal sum with the interest on the contractual date or thereafter, the mortgagee may be entitled to remedies afforded to him.

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<sup>178</sup> Section 9 (2) of the Mortgage Act, 2009

<sup>179</sup> Section 9 (5) of the Mortgage Act, 2009

<sup>180</sup> Section 14 (1) of the Mortgage Act, 2009

## CHAPTER FIVE

### ENFORCING MORTGAGES BY THE MORTGAGEE

#### 5.1 Introduction

A mortgage is a contract. In exchange for money advanced, the mortgagee acquires a security and several remedies. Normally the mortgagee will have two sources of payment. He may decide to sue the mortgagor for the payment, or fall on the security.

However, where there is a surety, the arrangement gives the mortgagee an extra source of payment. The mortgagee can sue the mortgagor,<sup>181</sup> or the surety, or fall on the mortgaged security. All these causes of action can be exercised after default simultaneously or successively or not at all.

The power of enforcing a mortgage by the mortgagee is exercisable by taking into account some facts related to mortgage of land in the country. One situation is the fact that sometimes the mortgagor is not actually the borrower. This is the case of the third party mortgage where the mortgagor executes a mortgage to secure a debt of the borrower. In this situation, the borrower is the person who actually receives the credit facility from the bank, the bank relying on the mortgage executed by the mortgagor. This arrangement may pose some difficulties when it comes to enforcement of the mortgage because the mortgaged property which is liable is the mortgagor's while it is the borrower who is supposed to repay the money.

When the need to enforce the mortgage arises, the mortgagee may decide to sue the mortgagor to effect the payment. The suit will be based on the covenant to repay the money. But as far as the mortgage is concerned, because the mortgagor has executed a mortgage as security, recourse to the mortgaged property may be desirable. Yet, if there's a shortfall after realizing the security, the mortgagee can personally proceed against the mortgagor for the deficit.

As was observed in the field research, mortgagees do not rush to exercise their remedies. This is because it is not in their interest to have recourse to the powers of enforcing the mortgage. Normally they would renegotiate the contract by coming up with terms which would make it easier for the mortgagor to repay the debt. In most cases the mortgagee would afford the mortgagor more

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<sup>181</sup> There may be difficulties where the mortgagor is not the borrower as is the case in the party mortgages.

time to pay the debt.<sup>182</sup> This may be a good practice where circumstances point to the fact that the mortgagor needs more time to pay the money or different terms of payment. But its downside is the fact that by giving the mortgagor more time to make payment that might increase his burden beyond what would otherwise be the case. One may wonder what would be the consequence to the mortgagor who is not a borrower where the borrower's burden increased as a result of this scheme. Would the changes or insertion of new terms relieve or discharge the mortgagor in the third party mortgage or surety from liability, or would they be bound by the position before the changes were made?<sup>183</sup> The position isn't clear in Uganda, but it seems the mortgagor in the third party mortgage or surety would be bound by the new terms only if they were made party to the change. They will not be bound by the position before the change.<sup>184</sup>

The Mortgage Act, 2009 mentions some remedies which are available to the mortgagee. Section 20 provides that where the mortgagor is in default, the mortgagee may exercise any of the following remedies;

- (a) Require the mortgagor to pay all monies owing on the mortgagor;
- (b) Lease the mortgaged land or where the mortgaged land is of a lease, sub-lease the land;
- (c) Enter into possession of the mortgaged land or;
- (d) Sell the mortgaged land.

In general, all the remedies become available to the mortgagee after the default by the mortgagor. He may decide to first appoint a receiver and then sell. He may choose to enter into possession and then appoint a receiver or sell the land. As to what makes the mortgagee choose a remedy and not the other may depend on a number of circumstances.

On the other hand, the mortgagee will choose a remedy which will guarantee a full or maximum recovery of the outstanding debt. Legal limitations and its implications may influence the choice of remedies, as may the administration costs and, probably more important, the business environment of the time. The mortgagee must make a commercial judgment as to what cause of action is likely to yield good results. One may look at things such as housing prices at the time,

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<sup>182</sup> This fact was intimated to me by the officials of Centenary Bank and Stanbic Bank Uganda limited during my field research.

<sup>183</sup> Bolton v Buckenham [1891] QB 278.

<sup>184</sup> Chapter Six, part 6.4, for the discussion on the variations of mortgages.

recession, rent etc. The exercise of each of the powers is discussed in details below except with the power of sale which is discussed separately.

However, even before default the mortgagee may intervene to ensure the continuance of the good health of the mortgaged property. The mortgagee may intervene to stop activities which are likely to lower the value of the mortgaged property or jeopardize the mortgagor's title in the mortgaged property all together. For instance, the mortgagee may have to make sure that the mortgagor pays all rates, charges, rents, and taxes which are at all times payable in respect of the mortgaged land held for a right of occupancy.<sup>185</sup> He may also have to make sure that the mortgagor repairs all buildings and other improvements upon the mortgaged land.<sup>186</sup> The mortgagee may have to make sure that the mortgagor insures the buildings in the land to the full value or otherwise ensures that the resources will be available to make good any loss or damage caused by fire to all buildings on the land.<sup>187</sup>

To make sure that the mortgagor observes these conditions, the mortgagee must extract covenants from the mortgagor which would allow him to enter upon the mortgaged property from time to time to inspect the condition of the mortgaged property. Where the mortgagor fails to observe these duties, the mortgagee after giving notice to the mortgagor may spend any money which is reasonably necessary to rectify the breach and may add the money so spent to the principal money secured by the mortgage.<sup>188</sup>

The following parts, examines the remedies available to the mortgagee. Comments are made on the process of creation of mortgages especially its perfection and its effect in enforcement. General comments are also given on the role of the courts in enforcement and the mechanism of execution of a court decree.

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<sup>185</sup> Section 18 (b) of the Mortgage Act, 2009

<sup>186</sup> Section 18 (c) of the Mortgage Act, 2009

<sup>187</sup> Section 18 (d) of the Mortgage Act, 2009

<sup>188</sup> Section 18 (j) of the Mortgage Act, 2009



## **5.2 The general impact of the Mortgage Act, 2009 on the enforcement of mortgages**

The Mortgage Act, 2009 has more or less streamlined the notice requirements. Now upon default by the borrower in payment of any interest or any other payment or any part thereto or fulfillment of any condition secured by the mortgage or in performance of any covenant, express or implied, in the mortgage, the mortgagee shall serve notice in writing of such default.<sup>189</sup> The notice “shall” inform the recipient of; (i) the nature and extent of default, and (ii) that the mortgagee may proceed to exercise his remedies against the mortgaged land, and (iii) that after the expiry of forty five working days following the receipt of the notice by the mortgagor, the mortgagee may exercise the right to sell the mortgaged land. As a result, the mortgagee could proceed to sell the mortgaged land only forty five days after the default.<sup>190</sup>

This can be a bit worrying to the borrowers as there is a very short time before an actual sale can be effected. However, as was observed in the field research, the main interest of the mortgagee is to obtain his money back. He may not take the first opportunity to enforce the mortgage, for instance by selling the mortgaged land, to make a profit out of it because he is not allowed to take more than is due to him. He will decide to fall on the security only when other efforts to recover the money owed are futile.

## **5.3 Effects of enforcing mortgage**

The effect of enforcing mortgages on both the mortgagor and the mortgagee depends on the manner in which the mortgage is enforced. The remedies impact differently on the mortgagor and the property in question. Some remedies bring the security to an end, that is to say, they destroy the security. For instance, a sale destroys the security but not necessarily the loan transaction. If a sale results in a shortfall, the mortgagor remains personally liable for the shortfall. On the other hand, the appointment of a receiver or leases of the mortgaged land or entry into possession are not final remedies as they do not destroy the security. They tend to inconvenience the mortgagor and urge a prompt payment while allowing the mortgagee an opportunity to satisfy the debt from his control or appropriation of the proceeds from the property. The situation differs when the mortgagee appoints a receiver or enters into possession and then sells the mortgaged land.

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<sup>189</sup> Section 19 (3) of the Mortgage Act, 2009

<sup>190</sup> Section 19 (2) of the Mortgage Act, 2009

The decision on the part of the mortgagee to choose one remedy and not another, may be prompted by a number of factors. Mainly the mortgagee may prefer a remedy which is simple but still guarantee a complete recovery of the money due. Notable is the fact that some remedies are exercisable without the assistance of the court while others do require the involvement of the court. Each remedy and the mode of exercising it will be discussed herein.

#### **5.4 Some facts on lending and borrowing and the role of the court in mortgage enforcement.**

It is a fact that there is a huge demand for lending as individuals and companies try to access credit facilities offered by lenders. The demand for lending is on the increase but availability of suitable security is a problem.<sup>191</sup> The field research has revealed an uncomfortable reality in regard to lending and borrowing in Uganda. The huge demand for borrowing and lack of suitable securities has made borrowers come up with alternatives. It was revealed to me by bankers during my field research that some borrowers are too ambitious in such a way that they go to the length of forgoing cash books to show that they are sound financially. Some borrowers provide bogus project proposals or project proposals which may not work yet quality for loans advances. There are reports of borrowers colluding or bribing values in valuation of properties to be used as securities. Worse still there are reports that some borrowers borrow because they want to dispose of their properties. To achieve this mischievous intention they borrow and charge the properties they want to dispose of. They then default intentionally well aware that the bank will appropriate the mortgaged property.

#### **5.5 Appointment of a receiver**

The above discussion shows that the mortgagee has a range of remedies available to him. One of the remedies is the appointment of a receiver. The power to appoint a receiver is implied in any mortgage.<sup>192</sup> Its exercise is appropriate where the mortgaged property is capable of generating income. Basically, the receiver appointed will receive the income of the mortgaged land and apply it to satisfy the debt. As observed in the field research, the appointment of a receiver is not a

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<sup>191</sup> During my field research, officials of Stanbic Bank Uganda limited, Kenya Commercial Bank (KCB), Centenary Bank Uganda limited, all shared this fact to me.

<sup>192</sup> Section 22 of the Mortgage Act, 2009

popular remedy in Uganda because of the administration costs involved and the difficulties of realizing security in this manner.

The high cost of receivership is partly contributed by the fact that the receiver's remuneration is charged separately from the costs, charges and expenses of receivership. As a result the five per centum commission allowed under section 22 (8) is for the receiver's remuneration and not for his remuneration and costs and expenses incurred by him as a receiver. It was possible to frame the provision so that the commission charged was to be for the receiver's remuneration and costs, charges and expenses.

Furthermore, the manner of the exercise of the power to appoint a receiver varied with different forms of mortgages.<sup>193</sup> For some mortgages such as small mortgages, the mortgagee had to obtain an order of the court before he could appoint a receiver. But now the new provisions of the Mortgage Act, 2009 on the appointment of a receiver have tried to make it easy to appoint a receiver. The requirement of notice is now restricted to a single general notice issued under section 22(2) of the Mortgage Act, 2009. It is a notice which informs the mortgagor of the default, and after the lapse of the time given, the mortgagee can then proceed to appoint a receiver.<sup>194</sup>

Besides, there is no longer the requirement of the order of the court for certain forms of mortgages before the mortgagee could appoint a receiver. The only important thing is that the appointment of a receiver must be in writing and signed by the mortgagee.<sup>195</sup> And the receiver appointed may be removed at any time and a new one appointed in his place.<sup>196</sup>

#### **5.5.1 Powers and duties of a receiver**

The receiver is deemed to be an agent of the mortgagor for the purpose under which he is appointed. The set up unless otherwise provided in the mortgage deed, makes the mortgagor solely responsible for the acts and defaults of the receiver.<sup>197</sup> The main duty of the receiver under section 22 of the Mortgage Act, 2009 is to collect the income of the mortgaged property and use it to pay off the debt. He can also proceed to sell the mortgaged land.<sup>198</sup>

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<sup>193</sup> Section 3 of the Mortgage Act, 2009

<sup>194</sup> Section 19 of the Mortgage Act, 2009

<sup>195</sup> Section 22 (3) of the Mortgage Act, 2009

<sup>196</sup> Section 22 (4) of the Mortgage Act, 2009

<sup>197</sup> Section 22 (4) of the Mortgage Act, 2009

<sup>198</sup> Section 22 (7) of the Mortgage Act, 2009

One may wonder if the power of a receiver under section 22(7) of the Mortgage Act, 2009 is limitless. For instance, can he be asked to simply strip the property or cut the timber and sell if the mortgaged property is a forest? In practice, as was observed in the field research, receivers strip the property to satisfy the debt and then exit. There is a need for judicial interpretation of the extent of the exercise of the power of a receiver under section 22(7) of the Mortgage Act, 2009. The power to receive the income of the mortgaged land under section 22(7) is clear. It means diverting the income of the mortgaged land so that the money does not go to the mortgagor but to the mortgagee through the receiver (a third party).<sup>199</sup> Stripping the property is not what is envisaged under section 22(7).

### **5.6 Lease of mortgaged land**

Leasing of the mortgaged land is another remedy available to the mortgagee. It is a power which is available but may be excluded by express provisions in the mortgage deed. The power to lease the mortgaged land is provided under section 23 of the Mortgage Act, 2009.

In general, the leasing of the mortgaged land occurs out of court after the mortgagee has given a general notice. This means a mortgagee can proceed to grant a lease fifteen days after giving a general notice under section 19 of the Mortgage Act, 2009.<sup>200</sup>

The Mortgage Act, 2009 also standardized the lease requirements. There is no exception as to the different forms of mortgages such as small mortgages or for the mortgages of land held under customary laws. But there is still inconsistency in the provisions on the power to lease the mortgaged land. Unlike other remedies such as appointment of a receiver or entry into possession of the mortgaged land, where the law provides for the manner of application of profits which accrue from the land, the Mortgage Act, 2009 does not direct how the money obtained from the leasing of the mortgaged land should be applied. It is not clear whether the mortgagee has to use the rent to first satisfy his debt or not. That was an oversight.

But the provision of the Mortgage Act, 2009 on the application of the profits accruing to the mortgagee in possession are relevant to the application of the profits of lease. This is because leasing and possession are relevant to the application of the profits of the lease. This is because leasing and possession both require the direct management of the mortgagee. In that way, they are

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<sup>199</sup> White v Metcalf [1903] 2 Ch. 567

<sup>200</sup> Section 23 (2) of the Mortgage Act, 2009

both capable of being regulated by the same provision. But the appointment of a receiver requires the service of a third party that is the receiver. The receiver is appointed by the mortgagee but in law is an agent of the mortgagor. It follows that the mortgagee leasing the mortgaged land should be able to appropriate all the profits of the lease. He then has to apply the money first in payment of all the rents, taxes and charges in respect of the mortgage property. Secondly, he must make payments to secured creditors who have priority to his mortgage; thirdly, he has to pay reasonable expenses incurred by him in managing the mortgaged land; and lastly he has to apply the money to satisfy his debt.

#### **5.6.1 Classes of properties for which power to grant a lease is subject to prior conditions**

The first condition involves a category of properties the taking of physical possession of which would require an order of the court. The properties are listed to include a dwelling house in which any person is in residence or any land in actual use for agricultural purpose and any land in actual use for pastoral purposes. A quick diagnosis seems to point to properties on which one's livelihood or one's very existence depended. The law would therefore want supervision by the court when those kinds of property become a subject of mortgage disputes.

The second condition, provided under section 24 of the Mortgage Act, 2009 involves the situation where the mortgagee exercises the power to enter into possession by asserting management or control over the land by serving a notice in the prescribed form requiring any lessee or the mortgagor or any other occupier of the land to pay to him any rent or profits which would otherwise be payable to the mortgagor. In this situation, a mortgagee needs to seek and obtain an order of the court before he leases the property.

There is good sense in this latter requirement. If the property is already leased or there is an occupier of the land and rent or profits accrue from that land, indirect control and not the grant of a new lease would suffice. For a leased property, another lease by the mortgagee would achieve more or less the same result.

#### **5.7 Actions for possession (entry into possession)**

The mortgagee may take possession of the mortgaged land to enforce the mortgage. The act of entering into possession may be aimed at inconveniencing the mortgagor to effect a punctual payment of the money due or observance the conditions of the mortgage. The mortgagee may enter

into possession to ensure punctual payment by collecting income from the property himself. He may also enter into possession and then appoint a receiver or enter into possession as a preliminary step to an exercise of the power of sale.

A mortgagee may at any time after the service of a notice under section 19; enter into possession of the whole or part of the mortgaged land. The notice under section 19 is a forty five days' notice which informs the mortgagor of the default and states that the mortgagee may decide to exercise any of his remedies under the mortgage.<sup>201</sup>

The power to enter into possession discussed in this part is a statutory right to enforce the mortgage on default. This should be differentiated from entering into possession as a right. The above previous chapter discusses that at common law a legal mortgage gives the mortgagee a legal estate in the property. The fact of the mortgage, subject to agreement to the contrary, entitles him to take possession of the mortgaged property as soon as the mortgage is made with or without default on the mortgagor's part. This is a common law right of possession as a right and not as a remedy.<sup>202</sup>

The exercise of this right was described in *Maids Ltd v Dudley Marshalls (prop) Ltd*.<sup>203</sup> it was stated that "the right of possession in the absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property or its statutory equivalent. If there's atonement, he must give notice. If there is a provision that, so long as certain payments are made, he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course".

The right to take possession as a right and not a means of enforcing security enables a mortgagee to enter into possession to preserve the value of his security even if there is no default at all.<sup>204</sup> if the mortgagee is satisfied that the mortgagor either by absence from the property giving rise to the need to protect it from vandalism, or by his poor standards of management and maintenance

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<sup>201</sup> Section 24 of the Mortgage Act, 2009

<sup>202</sup> M & W at page 1200

<sup>203</sup> [1957] Ch. 317

<sup>204</sup> *Western Bank Ltd v Schindler* [1977]

(without amounting to breach of covenants), is not doing all the mortgagee would wish to see done, his common law right of possession is a valuable instrument of self-help.

Whether the mortgagee could enter into possession as a right in Uganda is not clear. In any case, if he can, then that power would not draw its basis from section 24 of the Mortgage Act, 2009. Possession may be taken directly in the sense that a mortgagee takes physical possession of the land or part of it peacefully.<sup>205</sup> In this way, the mortgagee will be regarded as being in possession on the date when he actually enters into possession.<sup>206</sup> Possession may also be exercised indirectly where the mortgagee asserts management or control over land by serving a notice in the prescribed form requiring any lessee or the mortgagor or any other occupier of the land pay him rent or profits which would otherwise be payable to the mortgagor.<sup>207</sup> If possession is effected in this manner, the mortgagee will be regarded as in possession from the date on which he first receives any rent or profits from the land.<sup>208</sup>

In addition, possession may be effected pursuant to an order of the court.<sup>209</sup> Possession whether physical or otherwise is normally obtained out of court. However, there is a category of land or property in which a mortgagee must seek and obtain order of the court before he can enter into physical possession. The properties are listed to include a dwelling house in which any person is in residence or any land in actual use for agricultural purposes and any land in actual use for pastoral purposes.

This might be the reason for the need of the court's supervision. If a court's supervision is necessary for the taking into possession of land in actual use for agricultural or pastoral purposes, then the law should have left the door ajar for similar activities to be fitted in.

#### **5.7.1 Mortgagee withdrawal from possession**

The mortgagee must withdraw from possession where he proceeds to exercise other remedies or where the mortgagor rectifies the defaults which led to possession or where the mortgagor becomes entitled to discharge of the mortgage.

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<sup>205</sup> Section 24 (2) (a) of the Mortgage Act, Cap 8

<sup>206</sup> Section 24 (3) of the Mortgage Act, 2009

<sup>207</sup> Section 24 (5) of the Mortgage Act, 2009

<sup>208</sup> Section 24 (3) of the Mortgage Act, 2009

<sup>209</sup> Section 24 (2) (c) of the Mortgage Act, 2009

Section 25 of the Mortgage Act, 2009 provides the circumstances in which a mortgagee has to withdraw from possession of the mortgaged land. It provides that the mortgagee shall withdraw from possession of the mortgaged land where a court makes an order directing him to withdraw.<sup>210</sup> Any person entitled to the mortgaged land and who feels he is wrongly deprived of the possession of the mortgaged land or who wishes to challenge the manner in which possession was effected can ask the court to order the mortgagee to withdraw from possession. In this case, where an order of the court directing the mortgagee to withdraw from the possession of the mortgaged land is issued, he shall be taken to have withdrawn from possession when the order of the court is made.<sup>211</sup>

### **5.7.2 The power and duty of the mortgagee in possession**

The underlying purpose of possession of the mortgaged land is to enforce the security either by simply inconveniencing the mortgagor to secure punctual payments or for the purpose of appropriating the profits from the property which would be applied to the discharge of the mortgage. Possession of the land may lead towards an appointment of a receiver, lease, or sale of the mortgaged land.

A mortgagee in possession of any mortgaged land by occupation shall be entitled to manage the land and take all its profits, but shall be liable to the mortgagor for any act by which the value of the land, or any building on, or other permanent improvements to the land are impaired or the borrower otherwise suffers loss.<sup>212</sup>

It is a power to appropriate the profits from the land which comes with a duty on the mortgagee to make sure that the property is not mishandled.<sup>213</sup>

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<sup>210</sup> Section 25 (1) (a) of the Mortgage Act, 2009

<sup>211</sup> Section 25 (1)(a) of the Mortgage Act, 2009

<sup>212</sup> Section 24 (5) of the Mortgage Act, 2009

<sup>213</sup> For the similar duty at Common Law, see *Palk v Mortgage Services Funding Plc.* [1993]



### 5.8 Actions to recover the loan

A mortgage is a loan contract. It is a contract where the mortgagee advances money based on the mortgagor's promise to repay in the future. The promise to repay may or may not be continued in the mortgage deed. But the mere fact of accepting a loan carries with it an implied promise to pay back. The nature of the personal obligation to repay the loan was well summarized in *Sutton v Sutton*.<sup>214</sup> Jessel M.R; gave a position in regard to the right to proceed personally against the mortgagor to recover the mortgage debt. He stated that the fact of accepting a loan by implication carries a mortgagor's promise to pay back the debt. He stated that "every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced." according to Jessel M.R, the personal liability is implied in the mortgage deed and not necessarily based on the statutory stipulations.

### 5.9 Abolished remedy: Foreclosure

Foreclosure was one of the mortgagee's remedies in Uganda. It is a remedy which is now abolished by the Mortgage Act, 2009 and hence the discussion about foreclosure is based entirely on the position at common law.

Foreclosure is done by the order of the court, not by any person, moved by the person seeking to foreclose. The court would make various orders; interim orders fixing a time for payment of the money. That was followed by the final order called foreclosure absolute, which in form meant the mortgagor was not allowed to redeem at all.<sup>215</sup> It extinguished the mortgagor's equity of redemption and left the mortgagee the owner of the property both at law and in equity subject to any prior encumbrance. Yet, even at common law, foreclosure as a remedy has lost its importance among others, due to its lack of finality. Even after the order of foreclosure absolute, the court can re-open the foreclosure in proper circumstances.<sup>216</sup> So instead of foreclosure, mortgagees choose to appoint a receiver or exercise their power of sale.

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<sup>214</sup> [1882] 22 Ch. 511

<sup>215</sup> Court simply lifts the bar it has put on the mortgagee's ability to extinguish the mortgagor's equity of redemption; See *Carter v Wake* (1877), per Jessel M.R.

<sup>216</sup> *M & W* at page 1188. In *Campbell v Holyland* (1877), Jessel M.R stated that "although the order of foreclosure absolute appeared to be a final order of the court, it was not so, but the mortgagee still remained liable to be treated as mortgagee and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the court".

The abolition of foreclosure by the Mortgage Act, 2009 will not have any significant impact on the development of the mortgage practice in the country. The remedy of foreclosure was part of legal practice but almost unknown. It is unattractive as a remedy. Indirectly, the abolition of foreclosure will cement the protection afforded to the purchaser of the mortgaged land because under foreclosure a purchaser of foreclosed land runs a limited risk of the opening or re-opening of the foreclosure order which led to the sale of the mortgaged land.<sup>217</sup> Lack of firm protection afforded to the purchasers of the mortgaged land, and fear of or stigma towards mortgaged land affect mortgage business in Uganda.

#### **5.10 Mortgagee's power of sale.**

The power of sale is important to the mortgagee because, unlike other remedies such as the appointment of a receiver or leasing of the mortgaged land a sale of the mortgaged land is relatively cheap and enables the mortgagee to effectively realize his security. However, sale when exercised has a far reaching impact on the mortgagor and the security as it extinguishes the security altogether. After the abolition of foreclosure, sale is the only remedy in Uganda which directly extinguishes the mortgagor's equity of redemption. As a result, when it is exercised, due processes have to be followed.

To answer the question as to whether a power of sale has arisen and or is exercisable necessarily requires an examination of the exercise of the power of sale, that is, the circumstances under which the mortgagee can sell the mortgaged land. Also an examination of the conditions which must be satisfied before sale and the mode of sale, the effect of sale to the mortgagee, mortgagor and the mortgaged land will be done below. An examination of the duties of the mortgagee who is selling, the protections afforded to the purchaser of the mortgaged land the manner in which the proceeds of sale have to be applied will be discussed in this part. A chattel or any other part of a chattel may be sold along with or separately from land which is mortgaged to secure payment of money secured by an instrument.<sup>218</sup>

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<sup>217</sup> The purchaser of the foreclosed estate is presumed to have some knowledge of the courts' discretion to open foreclosure; See *Campbell v Holyland* (1877).

<sup>218</sup> Section 86 of the Chattels Security Act, 2014

### **5.11 The exercise of the power of sale**

A power of sale arises on default by the mortgagor in payment of the money owed or performance of the conditions of the mortgage. The situation is the same on a third party mortgage. Despite the fact that a third party mortgage is necessarily a tripartite agreement in the sense that the mortgagor charges his property to secure the debt of another (borrower), upon default by the borrower, the mortgaged land becomes liable to be sold by the mortgagee. Now as to whether that power is exercisable depends on the statutory stipulations or terms in the mortgage providing for the fulfillment of the conditions precedent to the exercise of the power of sale. As is in the case with other remedies, where the power of sale has arisen, the mortgagee may decide not to exercise it. He may sit on it without forfeiting his power.

While selling the mortgaged land, the mortgagee may rely on either his express power of sale as provided in the mortgage deed or his statutory power as laid down in the Mortgage Act, 2009. Parties may say nothing in the mortgage or very little and rely on the statutory provisions of Mortgage Act, 2009. Parties may also rely on an express power of sale which incorporates statutory powers with or without amendments. The express power is more flexible as it can be expanded or modified, compared to its statutory counterparts. However, the express power of sale cannot replace the clear term of the law.

Section 26(1) of the Mortgage Act, 2009 provides that the mortgagee may sell the mortgaged land upon default by the mortgagor. The expression used is “may”, correctly importing the assumption that the mortgagee may choose not to go for sale, but rather pursue other remedies. He may appoint a receiver or enter into possession, effect payment then exit. He may appoint a receiver or enter into possession then continue to sell. Ideally sale would follow a possession of the mortgaged land as that would guarantee vacant possession of the land.

However, if the mortgagee decides to sell, he must observe some conditions before sale. The mortgagee must observe the requirement of the law including the need to issue a notice to the mortgagor before sale. The requirement of notice is discussed below. The mortgagee will also have to observe the legal requirements as to the mode of sale and conditions and duties of the mortgagee

selling. He will also have to make sure that the proceeds of sale are applied in the manner provided for in the Mortgage Act, 2009.

Before the enactment of the Mortgage Act 2009, effectively the exercise of the power of sale was based on the practice at common Law. At common law, long before the power of sale acquired statutory recognition; it was created by its insertion in the mortgage deed.<sup>219</sup> This was an express power of sale.<sup>220</sup>

Where the mortgagee decides to exercise the power of sale, that sale may be of the whole or part of the mortgaged land,<sup>221</sup> subject to or free of any mortgage or other encumbrance having priority to the mortgagee's mortgage,<sup>222</sup> by way of subdivision or otherwise.<sup>223</sup> The mortgagee may sell by private contract or public auction,<sup>224</sup> with or without reserve.<sup>225</sup>

#### **5.11.1 The requirement of notice before sale**

In the law of mortgages, a notice before sale is intended to protect the rights of the mortgagor by warning and notifying him of the default. It is an announcement containing information about a future event telling the recipient what he should do and warning him of the consequences of failure to do what he is directed to do. Time is essential when it comes to notice. Notice should give a recipient a reasonable time to rectify the default because it is not always possible for the mortgagor to know whether he is in default and or the extent of his default. As a result, failure to issue a notice before sale would be equivalent to an ambush. Notice should therefore intimate to the mortgagor what needs to be done to avoid the consequences.

In Uganda, In circumstances where there are substantial numbers of people who are illiterate living in urban or semi-urban but un-serviced areas, issuing of notices become a challenge. There is a real danger of not being able to locate the intended recipient. That creates the possibility of ambushing the mortgagor. However, as it was pointed out to me during the field research, despite the fact that the sale of the mortgaged land is preferred rather than other remedies such as

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<sup>219</sup> M & W at page 1191

<sup>220</sup> *Stevens v Theatres Ltd* [1903] 1 Ch. 857

<sup>221</sup> Section 28 (1) (a) of the Mortgage Act, 2009

<sup>222</sup> Section 28 (1) (b) of the Mortgage Act, 2009

<sup>223</sup> Section 28 (1) (c) of the Mortgage Act, 2009

<sup>224</sup> Section 28 (1) (d) of the Mortgage Act, 2009

<sup>225</sup> Section 28 (1)(e) of the Mortgage Act, 2009

appointment of a receiver, sale is normally preceded by communication and negotiations aimed at giving the borrower more time to meet his obligation. Sale becomes a last resort in that sense. That practice limits the possibility of ambushing the mortgagor. Section 19 of the Mortgage Act, 2009 requires the mortgagee to issue a notice before he can exercise his remedies under the mortgage.

The requirement of a notice in general, a notification which would prepare the recipient for the consequences of his conduct, conforms to the understanding of good conduct. A requirement of too long a notice is almost a denial of the right to sell, but too short may result in injustice. Even before the enactment of the Mortgage Act, 2009, a notice before a mortgagee could sell was necessary. The mortgagee relying on an express provision in the mortgage deed was required to give a notice and hence he could only sell after the expiry of the time specified in the notice.

Some cases which were decided before the enactment of the Mortgage Act, 2009 support this position. In the Tanzanian case of *Nbc v Walker T. Czum*,<sup>226</sup> a notice of sale was wrongly addressed so that it did not reach the mortgagor. It was held that the bank had no legal right to sell the mortgaged property and thus there was no sale at all. It was concluded that the mortgaged property sold prior to fulfillment of the condition precedent of issue of notice was not legally sold and therefore no title was passed to the purchaser.

The decision reiterated the need for notice before sale. It refutes the unfounded argument that the mortgagee need not give a notice after all because the mortgagor ought to know whether he was in default or not. In Ugandan circumstances, it is possible to have a mortgagor who is not aware whether he is in default, or if he is aware, the extent of his default. The mortgagor has a right to be informed of a course of action which will be taken by the mortgagee and, if the action is a serious remedy such as sale, the terms upon which the property would be sold.<sup>227</sup>

### **5.12 Sale of land under Customary Mortgage**

The Mortgage Act, 2009 creates the possibility of creating customary mortgages and by doing so; it promotes landed transactions under customary law. It also establishes a system of title deeds for holder of customary rights of occupancy entitled to a certificate of customary right of ownership.

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<sup>226</sup> Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 31 of 1995.

<sup>227</sup> Cockburn v Edwards (1881)

This development would make land under customary right of occupancy more marketable. However, as was observed in the field research, bankers are wary of customary rights of occupancy and hence mortgages executed under customary law. The Mortgage Act, 2009 provides a limited guide on the creation, administration and enforcement of customary mortgages. The act does not purport to overhaul the management of customary mortgages. The Mortgage Act, 2009 recognizes the diversity in customary law practices which would lead to different forms and manner of management. Section 7(1) of the Mortgage Act, 2009 stipulates that the creation and operation of customary mortgages of land shall, subject to the provision of this section, continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created.

### **5.13 Relief to the mortgagor**

The availability of relief to the mortgagor whose land is to be sold or has been sold is important because of the possibility of the conflicts of the facts leading to the sale or during sale. The mortgagor may therefore want to stop the sale from taking place or simply seek relief for injuries suffered from improper or irregular exercise of the power of sale. It is therefore important to examine when the mortgagor can stop the sale, if he can stop it all. In addition, an examination of relieves available to him after an improper or unauthorized exercise of the power of sale is important.

At common law, the power of the mortgagor to stop the mortgagee from selling the mortgaged land is essentially based on the propriety of the exercise of the power and the level of the exercise of the power. If the mortgagee is acting properly, he will not be restrained from exercising his power of sale because of a conflict on the amount due under the mortgage.<sup>228</sup> The mortgagee could only be restrained from selling where before there is a contract to sell the mortgaged land the mortgagor tenders to the mortgagee or pays into court the amount claimed to be due that is, the principal, interest and costs.<sup>229</sup>

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<sup>228</sup> F & L at page 391

<sup>229</sup> There must be impropriety for the court to stop the sale. See *Waring Ltd v London and Manchester Association Co. Ltd* [1935] 1 Ch. 310

Once the contract is entered pending completion of the sale by conveyance (pending sale), it would be late for the mortgagor to try to redeem. The only exemption from the requirement of paying into court the amount claimed to be due is when on the face of the mortgage, the amount claimed seemed excessive.<sup>230</sup> Short of that, if the mortgagee is acting properly, he may not be stopped from exercising his power of sale. On the other hand, if the mortgagee has exercised his power improperly and the purchaser has knowledge of the facts, the purchaser cannot obtain a right superior to the right of the mortgagor. The mortgagee and purchaser may both be restrained from completing the sale.

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<sup>230</sup> F & L at page 391; See also *Hickson v Darlow* [1883] 23 Ch. 690

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Observations

This research discusses the law of mortgages in Uganda following the enactment of the Mortgage Act, 2009. The study attempts to offer a critique of the statutory regime introduced by the act, its weakness and achievement.

##### 6.1.2 General observations

1. Mortgage is a subject matter/concept alien to most Ugandans. Majority are not in full knowledge of transactions conducted in this respect. Only a privileged few, mainly those in the banking/financial sector are in full knowledge of it.
2. Mortgage applications are very often done without close scrutiny of the contents of the documents issued for the purpose. Most applicants are desperate for financial assistance and will hurriedly sign wherever they are told to. Banks at such times are noted to play passive roles in providing professional advice in respect of the mortgage.
3. Most of the institutions dealing in mortgage financing are uncomfortable and sensitive to provisions relating to court intervention. Fear have been expressed that such provisions shall only benefit mortgagors, open flood gates of litigation and shall consequently coil and painfully stifle the young growing mortgage industry in the country.
4. There is a general public perception that the concept “mortgage” only deals with land. However, mortgages stretch to cover other properties such as houses, cars, among others.
5. Not many people are aware of the type of mortgages available to them and the right that accrue therein. They have always resulted to taking desperate measures when faced with economic problems and some have ended up losing their properties under the mortgages.



### 6.1.3 Specific observations

1. There is need to address the rights of the parties to a mortgage transaction such that the duties and obligations following a mortgage transaction such as the sanctity of contract is observed.
2. The law has always tried to protect the basic unit of the society which is the family and in addressing the rights of women through various legislations ranging from the constitution, the Land Act, 1998 on the land matters and now there is the Mortgage Act, 2009 addressing the issue of mortgages in relation to the matrimonial home as security.
3. The law does not make it easy for a spouse to use the matrimonial home as security for mortgages. The mortgagees have also been given statutory duties which they must first satisfy before they can enter into such a transaction, failure of which there are legal consequences.
4. In a family setting, most homes are registered in the names of the husbands who sometimes deal with homes without the knowledge of their wives. Polygamous marriage is common as well where one can find several wives living in the home and sometimes may be having other wives elsewhere who may not be discovered easily. Some men move from house to house visiting these 'wives' and thus the definition of a matrimonial home needs to be redefined.
5. Discovering whether the house offered as a security is a matrimonial home that is; a building or part of building and adjacent land if any in which the husband and wife live together is not easy.<sup>231</sup>

### 6.2 Mortgage of matrimonial home

As discussed herein, it is possible to create mortgages by using a matrimonial home. The law imposes extensive conditions on the lender while creating mortgages of matrimonial home. It is proper that protection be afforded to spouses especially wives against dealing in matrimonial homes without their knowledge and consent. This reflects reality because most of the problems associated with mortgages of matrimonial home come from the society. We still live in a society where husbands or men have more say in financial matters in the home and make most financial decisions for the family. As a result it is possible for a wife to find herself in a legal dispute against

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<sup>231</sup> Section 2 of the Mortgage Act, 2009 defines matrimonial home to mean the building or part of a building in which the husband and wife or, as the case maybe wives, and their children, if any, ordinarily reside together and includes; (a) where a building and its cartilage are occupied for residential purposes, that cartilage and outbuildings on it; and (b) where a building is or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her spouse or in the case of a husband to his spouses for his or her, or their exclusive use.

a bank or financial institution without her knowledge. However, these conditions and protection need to apply without distinction, that is, they should apply to both wives and husbands.

In addition, a lot of matrimonial homes are registered solely in the name of the husband as sole proprietor of the property. This maybe a result of the fact that a wife may acquire an interest in the property later in life or just leaves the property management to the husband. This necessitates the need to protect a spouse (wife) against the possibility of losing the home through no fault of theirs. Basing on the circumstances of each case, the law needs to strike a balance, that is, to protect the vulnerable party in a dealing involving the matrimonial home without making the home unattractive to lenders.

The conditions imposed are applicable to all forms of mortgages such as ordinary mortgages or informal mortgages using matrimonial home. But in practice, it is almost impossible for the lenders to know of the existence of the spouse especially when the name of the other spouse is not in the register or certificate of title. As long as wives interests in the home remain unregistered, the problem of the use of matrimonial home as security will remain. In this case wives have got to register their interest in the matrimonial homes (property).

The process of mortgage perfection (security perfection) if well conducted, could help to reduce the risk involved in lending. This involves lack of thorough assessment of the property offered as security against the financial position of the borrower. Probably competition in the lending market leads the bankers to be undisciplined. Sometimes it seems that the financial position of a potential borrower and his ability to repay the money determines the grant of the credit facility notwithstanding the unavailability of the suitable security. There is also a lack of inspection or proper management of the credit advanced. As a result there are reports of misapplication by borrowers of funds advanced either due to lack of knowledge or because borrowers simply use the money to fund other projects. These problems could easily be cured if bankers were disciplined and monitored closely the application of the loans.

When the lenders give credit facilities to bad borrowers, they do that at their own peril. Yet the social, economic and factual reality on the ground at present in Uganda makes it easy to choose a bad borrower and or accept unsuitable security. There is no credit information system and as a result the individual lender investigates on its own the financial history of each potential borrower.

At present, even where a bank proceeds against a particular borrower the other banks may never know.

However, still with no system of national identification to the extent that sometimes bankers have to rely on letters of identification from local leaders, which in some cases are unreliable; there is a lot to be done. Besides that, many urban dwellers live in areas with no streets, so it is clear that the banks will merely reduce the risks involved in lending. There is a feeling that to mitigate these risks and uncertainties, lenders make it difficult for borrowers by imposing punitive contractual terms. But the feeling one gets on the ground is that the lending business hinges on trusts rather than trust plus the effective machinery of loans recovery. Yet the lending and borrowing business seems to flourish despite the difficulties.

The smooth operation of lending and borrowing transactions does not only depend on the presence of a suitable legal framework and institutions which facilitate lending, but also a good disputes settlement mechanism. One would like to see a system where disputes are settled quickly and fairly. It is important that courts' decrees can be executed reasonably quickly. The field research has revealed that lenders complain about the fact that sometimes there is unnecessary delay in dispute settlement. They single out court injunctions as one of the serious problem they face. They complain that when they attempt to enforce mortgages, normally mortgagors rush to court to seek injunctions, requests which according to bankers are readily entertained by the courts. Injunctions delay and frustrate the enforcement process.

In Conclusion therefore, the Mortgage Act, 2009 has over protected the mortgagor in such a way which violates the principle of contract. Even in default, it still protects the mortgagor's property in that some of the remedies available are only subject to court's intervention. The families occupying customary land may not be protected once such land becomes a subject of mortgage transaction. The strategic default has also not been addressed by the Mortgage Act, 2009 and the burden given to the mortgagee to avoid liability is overwhelmingly heavy and thus the Act ought to be amended to share the rights and obligations in the mortgage contract. The Act should also expressly provide for the consequences of the strategic default.

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