

**A CRITICAL ANALYSIS OF THE MORTGAGE ACT 2009: POSSIBLE  
IMPLICATIONS TO MORTGAGE BUSINESS IN UGANDA.**

**BY**

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**LLB/30081/111/DF**

**A DISSERTATION IN PARTIAL FULFILMENT OF THE REQUIREMENTS  
FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS.**

**KAMPALA INTERNATIONAL UNIVERSITY.**

**FEBRUARY, 2015**

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## DECLARATION

I Luvuno Lung'anzi Chai hereby declare that the work presented in this book is my original. It has never been presented before in any institution of learning either in part or full, for academic award.

The report is hence submitted for the award of the bachelors Degree of law of Kampala International University, Kampala, Uganda.

NAME

LUVUNO LUNGA'NZI CHAI

DATE

21.3.2015.....

SIGNATURE

  
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### **APPROVAL**

This is to certify that the research of Luvuno Lunga'nzi Chai has been under my supervision and is now ready for submission to the faculty of law of Kampala International University.

Signature.......... Date 03/03/2015.....

MADAM NYACHIEO.N. MARY

## **DEDICATION**

I give thanks to Almighty God for giving me strength to go through my bachelors well. I dedicate this book to my beloved Mum Ms Pricilla Mlongo Lung'anzi and Dad Lung'anzi Chai Mangale who stood by me all my campus life and supported me both emotional and financially until the end of the course.

And also my beloved friends who stood by me throughout my campus life.

## **ACKNOWLEDGMENT**

I give thanks to the Almighty God, for the knowledge, wisdom and understanding that has enabled me to complete this book: for bringing me this far, It has not been easy but God has been with me through out.

I am very grateful for my academic staff of my faculty of law in Kampala International University for their maximum support during my studies, most especially my supervisor Madam Nyachio N. Mary for her tireless support and guidance.

## **ABSTRACT**

The generation of this dissertation is divided into four chapters. Chapter one of the dissertation will contain, general introduction, statement of the problem, objectives of the study, methodology, hypothesis, literature review chapterization, significance of the study and research question. Chapter two will be focusing on literature review; I will be able to handle the review in accordance to the research questions raised. They include to explain the current state and shortfalls of the law relating to mortgage, the effect of implementing the mortgage law and what are the recommendations to improve mortgage transactions. This will be categorized in accordance to international level, regional and finally in Uganda. Chapter three will look at Mortgage law in Uganda, Mortgagors rights under Uganda laws, Mortgagors right of redemption, Mortgagees' right under Uganda law. Appointment of a receiver, taking possession and the right to sell. It will also look at a comparative analysis of the laws on mortgages in Uganda with selected jurisdictions, Mortgages on customary land, the right to sue, appointment of a receiver and the right to possession. Chapter four will look at a critical review of the Mortgage Act , protection of the matrimonial home, validity of spousal consent, variation of a mortgage, need for regulation for interest rate, Mortgagee exercising power of sale, mortgaging of customary land, reinforcement of equity of redemption and general power of court to grant relief. Chapter five will carry the final part, which are the recommendations, regulation of interest rates, loading of a caveat by the spouse on the matrimonial home, guidelines for mortgaging of customary land, formula determining quantum of compensation upon payment, provisions of customers mortgages and commercial mortgages, professionalization of the valuation, mortgagees remedy against employee.

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the Study

The elemental value of land makes it a fragile and irreplaceable source on which we so utterly depend since it is definite and limited in supply.<sup>1</sup> Therefore, majority of mortgages are on land and the great need to access credit is the reason that mortgages are so imperative. A mortgage is still the most widely used form of security in commonwealth jurisdictions.<sup>2</sup> The mortgage operates as a vital means of injecting capital investment into commercial enterprise.<sup>3</sup> It provides for the ready transferability of land and for the improvement or working of that land by those unable to buy the property with their current resources.<sup>4</sup> For the reason that mortgages are relevant, there is need to maintain a conducive atmosphere for this relationship between mortgagee and mortgagor.

It is no surprise therefore that it was declared that it has been the policy of the law for over a hundred years to simplify and facilitate transactions in real property.<sup>5</sup> It is of great importance that persons should be able to freely and easily raise money on the security of their property. Similarly, banks need to be protected when they give out their credit on such security as this is certainly one of the cornerstones for economic development of any country.

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<sup>1</sup> Per Lord Browne Wilkinson in *Linden Gardens Trust Ltd V. Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 107D

<sup>2</sup> In Encyclopædia Britannica. Accessed at: <http://www.britannica.com/EBchecked/topic/393166/mortgage> on 7/4/2009

<sup>3</sup> K. Gray, S. F. Gray. *Land Law* (2007) Oxford University Press at p. 1616.

<sup>4</sup> *Ibid* at p. 1616

<sup>5</sup> Per Lord Upjohn in *National Provincial Bank Ltd V. Ainsworth* [1965] AC 1175 at 1233G-1234A

Under Ugandan law, the legal provisions affecting a mortgage transaction are found in the Mortgage Act 2009, the Registration of titles Act<sup>6</sup>, and the Land Act<sup>7</sup>. The relationship between these legislations is the fact that they all relate to land.

Mortgages in Uganda are offered on both registered and unregistered land<sup>8</sup> but mainly on registered land with the law governing such mortgages being the Mortgage Act 2009. These provisions nevertheless seem to be inadequate as they leave out a number of issues like it does not give a full protection of the mortgagee, the Mortgage Act came into existence to replace the former Mortgage Act Cap 229. In other words the Mortgage Act was made to consolidate the laws relating to mortgages, repeal and replace the Mortgage Act and certain provisions relating to mortgages in the Registration of Titles Act.

As analyzed in chapter 3, the Mortgage Act 2009<sup>9</sup> has raised considerable controversy<sup>10</sup> and is contentious considering that, while some provisions of the Act are acceptable and encompass various issues in relation to mortgages; others appear incomplete, impracticable, and insufficient.<sup>11</sup> It is imperative therefore that the Parliament of

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<sup>6</sup> The Registration of Titles Act Cap 230.

<sup>7</sup> The Land Act Cap 227.

<sup>8</sup> Section 9 (2) of the Land Act allows mortgaging of customary land.

<sup>9</sup> The Mortgage Bill was first read on 5<sup>th</sup> April 2007 by the Minister for Lands, Housing and Urban Development Hon. Omara Atubo. The second reading on 17<sup>th</sup> March 2009 as per *Parliamentary Debates (Hansard) Official Report Third Session – Second Meeting Tuesday, 17 March 2009* and the third reading on 25<sup>th</sup> March 2009 as per *Parliamentary Debates (Hansard) Official Report Third Session – Second Meeting Wednesday 25<sup>th</sup> March 2009*. At the time of writing this paper a new Mortgage Act was passed into law on 25<sup>th</sup> March 2009 and awaits Presidential assent as per E. Kiggundu, “Ten MPs pass Mortgage Bill while others watch” in *The Observer*, March 30<sup>th</sup>-April 1<sup>st</sup> 2009, at p. 6, and J. Namutebi and C. Bekunda. “Mortgage Bill passed” *The New Vision*, 26<sup>th</sup> March 2009 at p. 13.

<sup>10</sup> The Bill for instance contains provisions relating to mortgaging customary land yet it is unregistered without a criterion of how this is to be done under *clause 7* an issue which has raised a lot of controversy especially among holders of customary land.

<sup>11</sup> *Infra* Chapter 3

Uganda should adequately debate the Mortgage Act as they are responsible for passing laws which ought to protect the citizens of Uganda. This is premised from Jean Jacques Rousseau's<sup>12</sup> contention that under the social contract, the sovereign (in this case the Parliament of Uganda) owe a duty to each of its neighbors, and, as a citizen, to the sovereign people as a whole and thus a duty to facilitate and enhance the citizens' self-fulfillment and advancement.<sup>13</sup> The Parliament of Uganda thus needs to pass and actually owes Ugandans a law that will support rather than destroy mortgage business as the country needs a law that promotes and fosters rather than constrains access to credit.<sup>14</sup>

## **1.2 Statement of the Problem**

The Mortgage Act 2009 appears to raise critical concerns in comparison with other commonwealth jurisdictions. Another problem is evident in the manner mortgage business is handled in general, the mortgages in Uganda tend to take advantage of the poor mortgagors who borrow money using their lands as a security not knowing the implication of what they are putting their signatures on, this problem is evident in the way procedure is not adhered to in situations where the mortgagor fails to pay the money when time is due a good example is seen on how the rights of the mortgagee are provided for and how they are applied in the mortgage business. The mortgage act provides the right of a mortgagee to sell land in case the mortgagor has failed to pay,

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<sup>12</sup> See J. J. Rousseau adapted from Lloyd's *Introduction to Jurisprudence* 6<sup>th</sup> Edition M. D. A. Freeman London Sweet & Maxwell Ltd (1994). *On the Social Contract* p.141.

<sup>13</sup> E. Gyezaho 'Government Should Be Criticized' The Monitor, Thursday, February 12, 2003 at p. 10

<sup>14</sup> A. Nandutu 'Mortgage Bill Irks Bankers' quoting Mr. Emmanuel Turyamuhika, the UBA Executive Director, The Daily Monitor, 20<sup>th</sup> December 2007. Assessed at; <http://www.monitor.co.ug/artman/publish/business/index.shtml>

and in accordance to *section 26(2) mortgage Act*<sup>15</sup>, before exercising the power to sell the mortgaged land, the mortgagee shall serve a notice to sell in the prescribed form on the mortgager and shall not proceed to complete any contract of sale of the mortgaged land until 21 working days have lapsed from the date of service of the notice to sell. This period come after the first 21 days that are provided for under Section 19(3) Mortgage Act <sup>16</sup>which provides for a period of 21 days for time to be given to the mortgagor for him to have completed the payment of the land, but in most cases this procedure is not followed. Also the provisions on the Act seem to jeopardize the lending portfolios of banks and may place depositors' funds at risk. The Act tends to protect the mortgagor and reduce the risk of losing the property of the mortgagor, but a different situation is in the practice. In fact the practice does not protect but deprives the mortgagor. As much as the Act is concerned it is contradicting in a number of ways. What is in writing is not what is in practice. For purposes of this paper, focus will be laid on India and Tanzania. A number of researches have been carried out in this particular topic an example is a research that was made by Nagadya Zuria in Makerere university. The research brought out the problems in the Act but did not suggest solutions to the problems that are faced by both the mortgagor and mortgagee.

The inconsistency of the provisions of the Act with the mortgage practice of lenders and borrowers in Uganda is the reason at the nub of the problem this paper will scrutinize.

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<sup>15</sup> The mortgage Act 2009

<sup>16</sup> Ibid

### **1.3 General Objectives of the Study.**

The overall objective of the study is to investigate into a logical study of mortgage law in Uganda comparing with selected common wealth jurisdictions while examining the adequacy of implementing the Mortgage Act and exploring the most plausible means of improving mortgage law in Uganda.

### **1.4 Specific Objectives of the Study**

The more specific objectives of this study are three fold namely;

1. To study the prevailing law relating to mortgages in Uganda, identifying the shortfalls therein in comparison with selected common wealth jurisdictions specifically India and Tanzania.
2. To examine the provisions, the likely effect and adequacy of implementing the Mortgage Act 2009 to mortgage transactions in Uganda.
3. To investigate the most tenable means of improving the law on mortgages and make the necessary recommendations to the law on mortgages aimed at promoting mortgage business in Uganda.

### **1.5 Research Questions**

- What is the current state and shortfalls of the law relating to mortgages in Uganda?
- What is the effect and adequacy of implementing the proposed Mortgage Act 2009 to mortgage transactions in Uganda?
- How may the law on mortgages be improved to promote mortgage transactions in Uganda?

### **1.6 Significance of the Study**

It is hoped that this study will:

- Contribute to the current debate on the mortgage law in Uganda contributing to the existing literature with ideas to keep the study on mortgages developing.
- Make general recommendations to the different provisions of the law that can help promote mortgage business in Uganda.
- Help law reformers in Uganda, law students, financial institutions and the wider reading public in understanding mortgage law in Uganda which will in turn improve the transparency of mortgage business in Uganda.

### **1.7 Scope of the Study**

This study will examine the prevailing law of mortgages in Uganda showing how the provisions there in affect mortgage transactions and the relationship between the lenders especially banks and their customers. These laws will be compared with legislation concerning the law of mortgages in some of commonwealth jurisdictions precisely India and Tanzania. Specific focus will be made on the Mortgage Act 2009 and the possible consequences and giving a detailed analysis of the anatomy of the provisions of the Mortgage Act 2009. The Proposal will conclude by making recommendations for the most efficient and effective framework for amending and improving the provisions of the Act.

### **1.8 Methodology**

The study will be investigative in nature and it will take a qualitative design. The researcher will adopt documentary and library research and broadly scrutinized the

existing literature on the subject including textbooks, journal articles and encyclopedia. To accomplish this many sources will be included. The parliament library, the High court library and the internet.

### **1.10 Synopsis of Chapter**

Chapter 1 will cover the introduction and will cover aspects of this proposal.

Chapter 2 will cover the literature review. The literature review will explain in details of the mortgage business internationally, regionally and in Uganda. Also this will be in relation to the objectives of the topic, the research question.

Chapter 3 will cover the current law on mortgages in Uganda. This chapter will also cover the state of mortgage law in selected common wealth countries.

Chapter 4 will critically examine the mortgage Act 2009 and its effect on the Mortgage business in Uganda.

Chapter 5 will cover conclusions and recommendations.

## CHAPTER TWO

### LITERATURE REVIEW

#### 2.1. History and revolution of mortgage law.

Although almost all mortgage agreements contain a promise to repay a debt, a mortgage in itself is not a debt; it is the lender's security for a debt. It can be better characterized as evidence of a debt.<sup>17</sup> The term comes from the Old French words mort, "dead," and gage, "pledge." It had to do with the doubtfulness of whether or not the mortgagor will pay the debt. If the mortgagor does not, then the land pledged to the mortgagee as security for the debt "is taken from him for ever, and so dead. Apparently, the pledge ends (dies) either when the obligation is fulfilled or the property is taken through foreclosure."<sup>18</sup>

In most jurisdictions mortgages are strongly associated with loans secured on real estate rather than on other property (such as ships) and in some jurisdictions only land may be mortgaged.<sup>19</sup>

Mortgage Law originated in the English feudal system as early as the 12th century.<sup>20</sup> At that time the effect of a mortgage was to legally convey both the title of the interest in

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<sup>17</sup> L.Frascati, *Fundamentals of Mortgage Law*. (2006, March 17). Assessed at; <http://ezinearticles.com/?Fundamentals-of-Mortgage-Law&id=163130> on March 13, 2009

<sup>18</sup> C. Edward, *Commentaries on the Laws of England* "If he doth not pay, then the Land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead to him upon condition. And if he doth pay the money, then the pledge is dead as to the Tenant" Assessed at; [http://en.wikipedia.org/wiki/mortgage#cite\\_ref-0](http://en.wikipedia.org/wiki/mortgage#cite_ref-0) ^ Coke, Edward on 13<sup>th</sup> March 2009

<sup>19</sup> Assessed at; <http://en.wikipedia.org/wiki/mortgage#column-one> on 30<sup>th</sup> March 2009. It should however be noted that, under section 1(b) of the Mortgage Act Cap 229 defines a mortgage to include a debenture and in Company law and insolvency law, security may either be a mortgage or a debenture but in land law, depending on the jurisdiction, the security involving real property is mortgage. *Standard Chartered Bank v. Walker and Another* [1982] 1 WLR 1410 illustrated a debenture being used as security where a company issued a debenture to the plaintiff bank giving them charge over the company's assets in respect of any sums then or in the future owing to the bank. *Cuckmere Brick Co. Ltd and Another v. Mutual Finance Ltd* [1971] Ch 949 on the other hand illustrates a mortgage of land as security and here the plaintiffs charged their land to the defendants by way of legal mortgage with payment of 50,000 pounds and other money.

land and possession of the land to the lender. This conveyance was absolute, that is subject only to the lenders promise to re-convey the property to the borrower if the specified sum was repaid by the specified date. If, on the other hand, the borrower failed to comply with the terms, then the interest in land automatically became the lenders and the borrower had no further claims or recourses at law.<sup>21</sup>

The forms of mortgage capable of being created at common law have changed from time to time to suit the need of time.<sup>22</sup> Initially mortgage transactions were influenced by usury laws which were against lending at interest or controlled the interest which could be charged.<sup>23</sup>

However, over the last three centuries, the English law of mortgage has practiced a cautious regulation of credit transactions relating to land and the jurisdiction of equity

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<sup>20</sup> *Op.cit* note 35

<sup>21</sup> *Supra* note 40.

<sup>22</sup> George Nathan Mwaisondola *The Modern Law Of Mortgages In Tanzania; The Role Of The Land Act, 1999* School of Law, The University of Birmingham December 2007

<sup>23</sup> As from the 13<sup>th</sup> century, at common law, mortgage transactions were shaped by the law against usury. Usury described as an act of taking anything beside or above the money lent was regarded by the church as contrary to natural justice. It was argued that the law of God did not allow lending of money at interest at all; the church was therefore to act against usury. See Jones N. *God and the Money Lenders: Usury and Law in Early Modern England* 1989, Basil Blackwell at p. 47-48. The initially inflexible rule of the Church prescribed that no man might lawfully charge money for a loan. To do so was contrary to scripture as noted by K. Gray and S.F. Gray *Land Law* Oxford University Press (2007) at p. 1618. Some of the books in the Holy Christian Bible referred to were Exodus 22:25, Deuteronomy 23:29, Ezekiel 18:7-8, 13, Psalms 15:5 et cetera, *Supra* (Jones). In the famous words of R H Tawney, he noted that "contrary to nature, for it is to live without labour; it is to sell time which belongs to God, for the advantage of wicked men; it is to rob those who use the money lent, and to whom, since they make it profitable, the profits should belong." See R.H. Tawney *Religion and the Rise of Capitalism* (Harmondsworth 1938) at p.55. Jones further asserts at p. 47-65 that; however, with the enactment of usury statutes, the position was relaxed. Lending at interest was possible, but the laws fixed the maximum interest rate upon which the lender could charge for the loan advanced. For instance the Usury Act 1571(Henry VIII) forbade charging of a rate greater than 10%. It was noted that the lender entered into a community of risk with the borrower and therefore rightly took his 'fair share' of the profits according to the degree in which God has blessed him by whom the money is used. W Ames, *De Conscientia et eius iure vel Casibus, Libri Quinque* (Amsterdam 1630), Book V, at p. 289 (Chapter XLVI, xiv, R. I), *De Contracto Usurario*.

The rationale for this relaxation was given by Laycraft JA in *Canada Permanent Trust Co v. King Art Developments Ltd* (1985) 12 DLR (4<sup>th</sup>) 161 at 222 that "two things are to be reconciled: the one that the tooth of the usurie be grinded, that it bite not too much; the other that there be left open a means to invite moneyed men to lend to the merchants for the continuing and quickening of trade. "

has played a role of pivotal importance.<sup>24</sup> Equity has always been prepared to intervene on grounds of conscience in the relationship of the mortgagor and mortgagee, with the object of preventing any exploitation of the former by the latter as the lender may abuse his superior bargaining strength and economic capacity by imposing on the borrower oppressive or unconscionable terms of dealing.<sup>25</sup> Thus the balance of legal protection in the mortgage transaction has tended in favor of the mortgagor rather than the mortgagee.

Reynolds LJ further stated that it was inevitable that the rigor of the common law approach to mortgage would prove unacceptable to the practitioners of equity.<sup>26</sup> It should thus be noted that right from the 17<sup>th</sup> century the courts of chancery began to grant significant relief to the mortgagor and although the mortgagee was entitled to enjoy physical possession of the land, equity compelled him to account to the mortgagor in respect of any profit derived from the land in excess of the interest due under the contract of loan.<sup>27</sup> Thus there ceased to be any material advantage for the mortgagee in the exercise of his right to possess the land and the mortgagor (although he retained no legal title) was commonly left in possession.<sup>28</sup>

In the modern mortgage transaction equity's protective influence still overshadows the law of mortgage despite the fact that the social and commercial role of mortgagee has

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<sup>24</sup> Equity was in effect beginning to take over the jurisdiction covered by the law against usury although usury legislation was not finally abolished until 1854. (See Usury Laws Repeal Act 1854) as asserted by K. Gray and S.F. Gray *Land Law* (2007) Oxford University Press at p. 1620.

<sup>25</sup> K. Gray and S.F. Gray *Land Law* Oxford University Press (2007) at p. 1620.

<sup>26</sup> Per Reynolds LJ in *Stocks and Enterprises Pty Ltd v. Mc Burney* (1977) 1 BPR 9521 (NSW Court of Appeal)

<sup>27</sup> Section 7(3) Mortgage Act Cap 229

<sup>28</sup> *Op.cit* note 42 at p. 1621.

changed over time. A case in point is the fact that modern legislation relating to the law of mortgage has concentrated on the protection of the residential utility enjoyed by the mortgagor and his family.<sup>29</sup> The protective impulse of Equity gave rise to the concept of Equity of Redemption in which the mortgagor retained 'an equity to redeem' long past the expiry of his legal right to redeem on the contractually specified date.<sup>30</sup> The mortgagor's equity was soon recognized as a distinct proprietary interest in the land which the mortgagor could sell or mortgage.<sup>31</sup> The right to redeem is thus an inseparable incident of any mortgage<sup>32</sup> and the mortgagor can insist that he gets back his security upon redemption by payment.<sup>33</sup> This principle has also been put into application in the recent mortgage Act in Uganda. Where the Court stop the mortgagee, an employee of the mortgagee or an immediate member of the family , an agent of the mortgagee of any person capable of influencing the matter directly or indirectly from purchasing the mortgaged land without leave of court. By doing this the court will make that the mortgagor does not waive his right of redemption.

<sup>29</sup> *Ibid* at p. 1620. And Section 31(2) of the mortgage Act 2009

<sup>30</sup> R H Tawney *Religion and the Rise of Capitalism* (Harmondsworth 1938) at p. 54

<sup>31</sup> Per Arden LJ in *Buhr V. Barclays Bank Plc* [2001] BPIR 25

<sup>32</sup> Walker J in *Browne V. Ryan* [1901] 2 IR 653 at 676 declared that when a transaction is declared to be a mortgage, the mortgagor is entitled to get back his property as free as he gave it, on payment of the principal, interest and costs and provisions inconsistent with that right cannot be enforced. The equitable rules, 'once a mortgage always a mortgage,' and that the mortgagee cannot impose any 'clog or fetter on the equity of redemption', are merely concise statements of the same rule. Similarly, in *Vernon V. Bethel* [1935] Ch 314 at 401, Northington LC noted that "This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And, therefore, I take it to be an established rule that a mortgage can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men is not, truly speaking free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them. "

<sup>33</sup> Lord Browne Wilkinson in *Cheah V. Equiticorp Finance Group Ltd* [1992] 1 AC 472 at 476G that the mortgagor cannot by contract waive or set aside his equitable right of redemption.

## **2.2. What is the current state and shortfalls of the law of mortgages?**

### **2.2.1 International.**

There are different Articles that explain Mortgages internationally. Mortgages internationally are not restricted to only land and house also to other properties. This is in accordance to the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (*Brussels, 27 May 1967*) Article 1

Mortgages and "hypothèques" on sea-going vessels shall be enforceable in Contracting States provided that: (a) such mortgages and "hypothèques" have been effected and registered in accordance with the law of the State where the vessel is registered;. This is evident that mortgages are also on vessels.

. A W B Simpson in his work *"A History of the Land law"* explains the nature of early mortgages in England and asserts that prior to 1926 the classic method of mortgage involved a transfer of the mortgagor's entire freehold or leasehold estate to the mortgagee, subject to a covenant for re-transfer on repayment of the loan money and non payment triggered the permanent forfeiture of the estate to the lender the ultimate 'crystalline' rule of property<sup>34</sup>. Carol Rose in her work *Crystals and Mud in Property law* clarified this further by stating that early common law mortgages were very crystalline indeed and that they had the look of pawnshop transactions. These views were very

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<sup>37</sup> A W B Simpson, *A History of the Land law* 2<sup>nd</sup> Edition, 1986 Oxford, p.242-243

helpful in understanding the nature of early mortgages and gives the rationale for the current state of mortgages operating only as security.<sup>35</sup>

In reference to redemption, Kevin Gray and Susan Francis Gray, in their work *Land Law* further state that the essence of the modern mortgage is that full legal title to the mortgaged estate remains in the mortgagor throughout the mortgage term. The borrower retains an equity of redemption, a term used to encapsulate the totality of his rights in equity. They further state that modern legislation relating to the law of mortgage has concentrated on the protection of the residential utility enjoyed by the mortgagor and his family.<sup>36</sup>

Harman LJ in his judgment in *Grangeside Properties Ltd Vs Collingwoods Securities Ltd* further contends that this entails the maxim, once a mortgage always a mortgage and nothing but a mortgage and it has been a principle for centuries.<sup>37</sup> Both views show that a mortgagor does not lose rights in his property once mortgaged and thus the courts should ensure fairness when dealing with disputes in regard to mortgage transactions so this maxim is kept alive at all times.

In relation to foreclosure, there has been a board established a Foreclosure Consultant Registration where it regulates all foreclosures, it is illegal to operate as a mortgage foreclosure consultant in California unless the foreclosure consultant has obtained from the Department of Justice a Certificate of Registration as a Mortgage Foreclosure

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<sup>35</sup> C M Rose, 'Crystals and Mud Property Law' 40 Stan L Rev (1987-88) 577 at 583 in

<sup>36</sup> K. Gray, S.F. Gray. *Land Law* Oxford University Press (2007) at p. 725

<sup>37</sup> *Ltd* [1964] See Harman LJ in *Grangeside Properties Ltd v. Collingwoods Securities*]1 WLR 139 at 142-143

Consultant. In order to obtain the Certificate of Registration required by California Civil Code section 2945.45, a foreclosure consultant must complete the application and provide all required documents to the Department of Justice.

Hence this is an advantage in mortgages business international.

### **2.2.2. Regionally.**

Moses Michira who wrote an article on Thursday August 2,2012"New mortgage laws tie down spouses"

A marriage certificate is now a critical document for anyone applying for a mortgage loan thanks to new land laws that require the involvement of spouses in property acquisition. So dire are the consequence of missing this documentation that a mortgage charge is deemed to be incomplete and would be actually declared null and void by a court of law in the event that a husband or wife feels overlooked in the initial negotiation with the lender. And for the prospective home buyers still in the singles' club, a sworn declaration of their status would be required as new legislation - intended to protect the interests of the borrowers' spouse, takes effect. The demand that the spouse is involved in the acquisition of property financed by a lender, as envisaged in the Lands Act, is aimed at ensuring that the immediate family is aware of any loans sought to either acquire matrimonial property or where the property has been given as security for a loan. For the longest time, lenders did not require borrowers to disclose their marital status, a provision that opened an avenue for either spouse to access to loans to acquire property independently. A much bigger concern for borrowers who

had kept their spouses in the dark over such loans, is that the new laws will apply to existing and new mortgages, meaning less obscurity about financial dealings in the family setting. So far, mortgage lenders have said that thousands of home loan borrowers will be required to re-draft their loan agreements to comply with the regulations which make a spouse's consent critical in accessing credit. "All mortgage charges will be re-drafted to ensure that spouses assent to the borrowing," said Frank Ireri, the managing director at mortgage lender Housing Finance.

"Borrowers will have to file their marital status while applying for home loans," he added, citing that the new laws may render mortgage charges where such paperwork is not filed null and void. Though information of the social profiles of home buyers remains scanty, developers have noted a growing trend where women are increasingly participating in property acquisition; a trend linked to a growing number of female professionals across different careers and in business. In the event of default while one of the interested parties, including a spouse, did not consent to mortgage arrangement or where there's a charge on matrimonial property, the lenders would be heavily exposed to losses of the unpaid amounts.

Mr Ireri explained that the laws were aimed at protecting the borrowers, where lenders have had a free hand in dealing with the mortgaged property with little regard to the interests of the borrowers and the immediate dependants. "Financiers and banks have to fully explain the implications and costs of the borrowing," he said in My 15 minute

chat with a bank CEO- an interactive session between bank clients and banking executives ran by the Kenya Bankers Association. It is the reality of losses presented by the new regulation that will prompt the lender to draw up new mortgage charges on all home loans, which the Central Bank of Kenya estimates at about 16,200 as at December last year. Before this, all a borrower needed to qualify for a home loan was to show the ability and commitment to service the mortgage while the lender retained the title deed until the loan was fully recovered.

The raft of changes introduced by the new laws, however, place a requirement that is over and above the ability to service the home loan, where the spouse has to consent to the borrowing, while both partners need to understand what defaulting on the home loan would mean. That means that the loan application forms will now have every detail in full print, including what steps the bank will take in the event that the borrower is not able to settle the loan in full, eliminating the 'dangerous clauses' contained in the fine details that most borrowers do not need. HF reckons that the details in fine print are often overlooked even though their ramifications are obviously disastrous to the borrower. Other regulations introduced in the new laws make it a requirement for banks to find

### 2.2.3. Mortgage Business in Uganda

A mortgage is a temporary, conditional pledge of property to a creditor as security for performance of an obligation or repayment of a debt.<sup>38</sup> To understand this concept of mortgages in Uganda, there is need to understand the history of this concept. In Uganda, the Mortgage Act defines a mortgage to include any charge or interest over land in Uganda securing payment of a debt or performance of an obligation and includes second or subsequent mortgages. The position at common law is certainly different from the current situation in Uganda under the Bill which strictly mentions that it operates only to secure payment of a debt and not as a transfer as required at common law.

There are different kinds of mortgages; Legal and Equitable mortgages. In relation to the former, Ezekiel Tuma in his work "*Taking Security Over Real Property in Uganda*",<sup>39</sup> contends that a legal mortgage in Uganda is created when the owner of land under the Registration of Titles Act<sup>40</sup> commonly known as the Torrens system<sup>41</sup> signs a mortgage complying with a format provided by the Act.

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<sup>38</sup> The American Heritage Dictionary of the English Language, Fourth Edition 2007, Published by Houghton Mifflin Company.

<sup>39</sup> E. Tuma Article on '*Taking security over real property in Uganda*' 2005 Edition, Shonubi Musoke & Co Advocates, Kampala. Uganda National Chamber of Commerce. Assessed at; [www.legalmediagroup.com](http://www.legalmediagroup.com) on 12<sup>th</sup> April 2009.

<sup>40</sup> Section 114 of the Registration of Titles Act cap 230 which empowers a proprietor of land registered under the Act to create a mortgage by signing a mortgage instrument in the prescribed form.

<sup>41</sup> *Manor Investments v. Ross* 31 Real Property Reports 3d 104 (ABQB, 2000), describes the Torrens system with approval from *Fels v. Knowles* 1906 26 New Zealand Law Reports 604 as: the cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest. *Torrens Land Registration System*. Assessed at; [E:\TorrensLandRegistrationSystem.aspx.htm](http://E:\TorrensLandRegistrationSystem.aspx.htm) on 7<sup>th</sup> April 2009.

In reference to the equitable mortgage, John Mugambwa states in his book "*A Source Book of Uganda's Land Law*", that an equitable mortgage is a transfer of land enforceable in a court of equity.<sup>42</sup> An equitable mortgage also under the Registration of Titles Act, is created when the registered owner of land deposits his certificate of title with the intent to create a security, whether accompanied by a note of deposit or not.<sup>43</sup> In view of both types of mortgages, the legal mortgage is the preferred form of mortgage because it involves the creation of legal rights and is easier to enforce in the event of default. This view was relevant in understanding the different kinds of mortgages that can be created in Uganda keeping in mind that land to be mortgaged has to be registered under the Registration of Titles Act.

Concerning the state of mortgage business in Uganda, the PMAU Briefing Paper 8, *The Prevalence and Effects of Mortgaging and Caveating in Uganda* contends that land mortgaging in Uganda has been rising steadily in urban areas but has remained static in rural areas due to limited financial intermediaries and high prevalence of land conflicts. The mortgages are mainly medium size short-term loans and borrowed funds that are mostly invested in business and real estate.<sup>44</sup> This paper, however, does not explain the reason for this trend. This is attributed to the fact that most of the land in urban areas

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See also H. M. West *Land Policy in Buganda* as he gives a brief history of the Torrens system of land registration in Uganda as having been introduced by the Registration of Titles Act Cap 230, which was enacted in 1922 by Ordinance No.22 of 1922 and came into effect on 1<sup>st</sup> May 1924. It repealed the Registration of titles Ordinance 1908 and the Equitable Mortgages ordinance 1912 and is based on the Transfer of Land Act, 1915, of the Australian State of Victoria.

<sup>42</sup> J.T. Mugambwa, *A Source Book of Uganda's Land Law*, Fountain Publishers, 2002 at p.231

<sup>43</sup> Section 138 of the Registration of Titles Act Cap 230 enables the creation of an equitable mortgage under the Act by deposit of a certificate of Title.

<sup>44</sup> PMAU, *The Prevalence And Effects Of Mortgaging And Caveating In Uganda*. PMAU Briefing Paper 8. This is most prevalent in the districts of Kampala, Masaka and Mbarara

is registered as opposed to rural areas where most of the land is customary land. Although under section 8(2) of the Land Act 1998 customary land can be mortgaged, there is no procedure for the creation of a mortgage over land owned under customary tenure.

Similarly, Joyce Namutebi in her article "*Mortgage Bill is a progressive law*" This came up after the introduction of the mortgage bill 2007 that was finally passed and brought up the mortgage Act 2009, quotes Lands minister Omara Atubo, to have said that the Mortgage Act would help the mortgage industry to grow, by encouraging development, especially for those who want to mortgage their land. He further states that the Act is a progressive legislation and this was certainly pertinent to help appreciate the importance and relevance of the Mortgage Act<sup>45</sup> Although this may bear some truth with regard to the pros that the Act has, it falls short as it has allowed mortgaging of customary land yet with the current situation of mortgage business in Uganda, very few banks would consider lending to customary land owners since there is no clear registration and thus no protection for their money which leaves questions as to whether this Act is actually a progressive law.

Contrary to Omara Atubo's positive views, some people have a rather different analysis of the Act; Joyce Namutebi and Catherine Bekunda in their article *Mortgage Bill Passed* in the New Vision quote Abdu Katuntu who highlights that, "allowing the mortgaging of

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<sup>45</sup> J. Namutebi, "*Mortgage Bill is a progressive law*" Sunday Vision 29<sup>th</sup> March 2009at p.16

customary land Under *Section 7 of the mortgage Act*, would cause social unrest. He said that, most of the citizens who own land customarily would be vulnerable. Unscrupulous individuals will mortgage tribal or family land and fail to pay banks. The result will be banking institutions taking over family and tribal land, thus denying the whole community its valuable asset" an opinion which explains the unreliable nature of the Mortgage Act<sup>46</sup>. Most of customary land is owned communally and this shows need to clarify exactly how these mortgages can actually be executed on communally owned land without affecting the co owners of the land.

Joyce Namutebi in her article *Bad Mortgages Hinder Housing Sector* quotes Michael Werikhe, State minister for housing who said that "lack of affordable housing finance has hindered the growth of the housing sector." He further contends that, "it is time the financial institutions, through research and experience, initiate suitable mortgage packages with special attention to be given to the needs of the poor in both rural and urban areas, whose quality of housing was poor."<sup>47</sup> There is thus need for a suitable mortgage law to help facilitate mortgage transactions and in turn home ownership in Uganda. This recommendation too provoked an investigation into the best possible means to improve the state of mortgage law in Uganda which would in turn make possible home ownership whose results are seen in chapter 4.

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<sup>46</sup> C. Bekunda and J. Namutebi "Mortgage Bill Passed' The New Vision, 25<sup>th</sup> March 2009 at p. 13

<sup>47</sup> J. Namutebi "Bad Mortgages Hinder Housing Sector" Assessed at; <http://www.allafrica.com> on 31<sup>st</sup> March 2009.

The above reviewed literature on the main aspects of this research certainly shows the relevance of this issue to Uganda's mortgage business especially with regard to the fact that most of the authors criticize the current state of the mortgage Act. This induced this study which will be inventive in its advance of proactively drawing a structure for the shape of reform provisions of the Mortgage Act.

## **2.3 Effect o laws of implicating mortgage laws.**

### **2.3.1. International.**

The Mortgage law in its current state international does not have much literature on the effect that will be felt if implemented. Due to the introduction of the foreclosure regulations, it is of advantage to the consumer. Especially the desperate mortgagor. This is because the mortgagee will not go ahead to foreclose until it is proved by the board.

### **2.3.2.Regional.**

Frank Ireri, the managing director at mortgage lender Housing Finance.

"Borrowers will have to file their marital status while applying for home loans," he added, citing that the new laws may render mortgage charges where such paperwork is not filed null and void. Though information of the social profiles of home buyers remains scanty, developers have noted a growing trend where women are increasingly participating in property acquisition; a trend linked to a growing number of female professionals across different careers and in business. In the event of default while one of the interested parties, including a spouse, did not consent to mortgage arrangement or where there's a charge on matrimonial property, the lenders would be

heavily exposed to losses of the unpaid amounts. This makes it difficult for the consumers. Especially with the current state of people having more than one wife.

There is a high chance of one consenting and one refusing. In this situation the wife who is not consenting will be disadvantaged because the man can still go ahead to get a mortgage with the consent of the other wife.

### **2.3.3. Uganda.**

If the Act is implemented, in relation to spousal consent, *Agnes Nandutu* in her article *Mortgage Act risk Bankers* states that the Act does not allow a spouse to mortgage the matrimonial home without the consent of their partners and goes further to mandate bankers to establish whether the borrower is married and if married to explain to the spouse the terms of the mortgage.<sup>48</sup> She quotes *Michael Mugabi* who states that "it would be erroneous for the law to impose such a burden on the mortgagees and he then suggests that the provision was impractical and should be amended."<sup>49</sup> This would put banks in a rather vulnerable position as establishing who the right spouse is may be hard. Considering that Uganda has different forms of marriages and no ample registers, it would become almost impossible to determine who the true spouse is especially if he has more than two wives as he could easily collude with one to mortgage their house.

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<sup>48</sup> A. Nandutu "*Mortgage Act risk bankers*", Assessed at; <http://www.monitor.co.ug/artman/publish/business/index.shtml> on Dec 20, 2007 - 7:17:25 PM

<sup>49</sup> A Nandutu "*Mortgage Act risk bankers*" The Daily Monitor, 20<sup>th</sup> December 2007 quoting M. Mugabi, Housing Finance Company of Uganda Secretary Assessed at; <http://www.monitor.co.ug/artman/publish/business/index.shtml> on 29<sup>th</sup> March 2009

She further quotes *Mr. Emmanuel Turyamuhika*, who said that the provisions in the new Act are inconsistent with current banking practice and largely "unworkable" and noted that the provisions in the Act will jeopardize the lending portfolios of banks and place depositors' funds at risk."<sup>50</sup> These views show that the Mortgage Act certainly falls short in a number of areas and provoked an investigation into possible ways of remedying and recommending reforms that would help improve the current state of the Mortgage Act which was reached by the results of chapter 5.

## **2.4 .How the law of mortgages can be improved to promote the mortgage transaction;**

### **2.4.1. International.**

Professor Brian clain of Washington University in his Article of " change in mortgage business, " explained the following recommendations.

He explained that the financial institutions should give affordable rates to the clients so that a bigger scope of people may be able to access s a loan.

And at the same time an ample period of time should be given to the client when making payments. This has been put into application in different countries like America and United Kingdom , where a person who has a mortgage is given a period of thirty years for repayment. And also during that time there is a holiday. Where he will be given a break and will not pay. This is to enable the client to leave a comfortable life though he or she has a mortgage.

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<sup>50</sup> *Op.cit* note 30 Mr. Emmanuel Turyamuhika, the UBA Executive Director in the Daily Monitor 20<sup>th</sup> December 2007

### **2.4.2 .Regional.**

With regard to mortgage of a matrimonial home, there is in need of a provision which imposes a duty on the mortgagor to show proof of his marriage and a requirement for a statutory declaration from the spouse or spouses of the mortgagor to avoid situations of impersonators.

The provision should further create an obligation upon a spouse to lodge a caveat on the property comprising the matrimonial home. This would reduce on the number of cases where spouses mortgage their matrimonial homes as the caveat would be clear caution to the mortgagee that someone else has claims to that property.

### **2.4.3.Uganda**

Mary Karugaba in her article *Mutebile warns on Mortgage Act* mentions remarks by Emmanuel Mutebile who warned "that the Mortgage Act could cause a credit crunch in the country if not handled well and if it's passed in its current form which allows courts to re-write terms of contracts, there would be more sub-prime prices in the country because the risk in the mortgages would change."

He further spelled out that the Mortgage Act should promote rather than hinder access to credit.<sup>51</sup> This holds some water as sub-prime prices in the US were caused by mortgages being resold and re-written without reference to the original mortgage and despite the fact that the economy of the US was built on a different background this

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<sup>51</sup> M. Karugaba "*Mutebile Cautions on Mortgage Bill*" The New Vision, Tuesday 9<sup>th</sup> December 2008 at p.

could easily occur here if court is allowed to re-write the mortgage terms of contract. If the US economy which has proper regulatory laws was crippled, it would be no much for an economy like Uganda's. This view incited a study into the mortgage laws of some other jurisdictions in comparison with Ugandan mortgage law to help make well informed opinions to assist in making constructive recommendations for reform of the Mortgage Act which was realized by the results of the next chapter.

In relation to what has been highlighted about court's interference in mortgage contracts, David A Bridewell in his work *Mortgage Law and Mortgage Lending* rightly asserts that the present deplorable state of mortgage and foreclosure law is probably due to the persistent desire of the courts and judicature to better the position of the helpless borrower against the supposed greed of the money lender.<sup>52</sup>

This without a doubt is consistent with the mortgage law in Uganda in particular the Mortgage Act which emphasizes equity's protection of a mortgagor as it gives the courts general power under *section 34* to grant relief against a mortgagee realizing a mortgage and is likely to yield similar results as in the US if passed in its current state. Judges should thus be cautious and ensure that they are fair in administering justice and fairness between the mortgagee and mortgagor as it would in the end help to improve the deplorable nature of our mortgage law.

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<sup>52</sup> D.A. Bridewell '*Mortgage Law and Mortgage Lending*,' Journal of land and Public Utility Economics (August, 1938)

## CHAPTER THREE

### COMPARATIVE STUDY OF THE LAW ON MORTGAGES IN UGANDA WITH SELECTED COMMON WEALTH JURISDICTION

#### 3.1 Mortgage Law In Uganda.

Mortgage law is currently dotted between the Mortgage Act<sup>53</sup>, The Registration of Titles Act<sup>54</sup> and the Land Act<sup>55</sup>. Legal mortgages are provided for under section 115 of the Registration of Titles Act, where a proprietor of land registered under the Registration of Titles Act is allowed to mortgage such land and such mortgage is protected under section 64 that whoever deals with the land does so subject to the mortgage.<sup>56</sup>

Equitable mortgages are provided for under *section 129* of the Registration of Titles Act and are made by deposit by the registered proprietor of his or her certificate of title with intent to create a security for the repayment of a loan.<sup>57</sup>

The Land Act<sup>58</sup> under *section( 7)* allows a holder of a customary certificate of ownership of land to mortgage his or her land. The Act however doesn't describe the procedure for the creation of such a mortgage. Nevertheless, Ssekandi LJ stated in

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<sup>53</sup> The Mortgage Act Cap 2009

<sup>54</sup> The Registration of Titles Act Cap 230 Laws of Uganda 2000 Edn

<sup>55</sup> The Land Act Cap 227 Laws of Uganda 2000 Edn

<sup>56</sup> *Op.cit* note 53 *section 115*

<sup>57</sup> Per Sir Kenneth O'Connor P in *Barclays Bank V. Gulu Millers Ltd* [1959] E.A. 540 stated that "a deposit of deeds by way of security was taken to be equivalent to an agreement to execute a legal mortgage and carry with it all the remedies incidental to a legal mortgage. "

<sup>58</sup> *Op.cit* note 54 *section( 7)*

*Matambulire V. Yosefu Kimera* that in the case of unregistered interests in land the applicable law is the common law and doctrines of equity.<sup>59</sup>

### **3.1.1 Mortgagor's rights under Ugandan Law**

The Registration of Titles Act provides for rights of the mortgagor which are all ancillary to one right; the right of redemption which can be implied from *section 116* of the Registration of Titles Act that a mortgage shall only operate as security and not transfer of land thereby mortgaged.<sup>60</sup>

### **3.2.1 Mortgagor's right of redemption**

A mortgage is not an absolute conveyance of land but rather a conveyance for a specific and restricted purpose, namely that of securing the payment of a debt or performance of some other contractual obligation.<sup>61</sup> The position is more clearly put in the Registration of Titles Act under *section 116* which contends that a mortgage shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged; This principle was explained in by Lord Macnaghten in *Samuel V. Jarrah Timber and Wood Paving Corporation Ltd* where he stated that a mortgagee can never provide at the time if making the loan for any event or condition on which the equity of redemption shall be discharged.<sup>62</sup>

In Uganda this equity of redemption was considered in *Matambulire V. Yosefu Kimera* where Ssekandi Ag.J stated that the equity of redemption is inviolable and the

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<sup>59</sup>CA No.37 of 1972 (High Court of Uganda); [1975] HCB 150

<sup>60</sup> See *Erieza Wamala V. Musa Musoke* (1920-29) ULR 120. See *Santley V. Wilde* [1899] 2 Ch. 474 where Lindley MR defined a mortgage as "a conveyance of land or an assignment of Chattels as a security for the payment of debt or the discharge of some other obligation for which it is given. This certainly shows that a mortgage can only act as security."

<sup>61</sup> G.P. Mukubwa, *Essays in African Banking law and Practice* Uganda Law Watch 1998 at P. 373

<sup>62</sup> [1904] AC 323 at 327

respondent was entitled to redeem his kibanja on payment of the debt in full at anytime even after the expiration of the repayment date.<sup>63</sup>

Similarly in *Erieza Wamala V. Musa Musoke*, Gurthrie Smith. J. stated that "It is an old established rule that if money is lent on the security of land, the lender will get security and nothing more. He will not be allowed to take advantage of the necessities of the borrower so as to get the land for himself. Therefore if the borrower wished to redeem the land within a reasonable time, he will always be allowed to do so even if the due date is passed."<sup>64</sup>

In essence the essential nature of a mortgage is that the mortgagor has two distinct rights in the land; first is the legal right to redeem on the due date and secondly, the equitable right to redeem any time after the date set for repayment of the debt.<sup>65</sup>

### **3.2.2 Mortgagees Rights under Ugandan Law**

The Mortgage Act under *section 19* provides for the rights of the mortgagee in continuance to the obligations of the mortgagor and gives remedies upon breach of covenant and a mortgagee may sue the mortgagor<sup>66</sup> or realize his or her security under the mortgage as per *section 20* of the Mortgage Act which provides for; a) appointment of a receiver, b) taking possession, c) foreclosure.<sup>67</sup>

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<sup>63</sup> CA N0 37 of 1972 (High Court of Uganda); [1975] HCB 150.

<sup>64</sup> (1920-29) ULR 120

<sup>65</sup> J.T. Mugambwa, *Source Book of Uganda's Law*, Fountain Publishers 2002 at p. 247

<sup>66</sup> The mortgage Act 2009 and The mortgagee may enforce judgment against the mortgagor's general assets if the action is successful even though they are not comprised in the mortgage per Burn, Cheshire & Burn's *Modern Law of Real Property* 14<sup>th</sup> ed, London, Butterworths, 1988 at p. 655. Further in *Rudge V. Richens* (1873) CP 8 LR 358 it was stated that if the mortgagee sells the mortgaged land, and the proceeds are not sufficient to discharge the costs of the sale and the mortgage debt, the mortgagee may bring an action against the mortgagor based on the personal covenant to recover the balance of the debt.

<sup>67</sup> *Op.cit* note 52 *section 20 Mortgage Act 2009*.

### **3.2.2.1. Appointment of a receiver**

Under *section 22* of the Mortgage Act, a receiver may be appointed by mortgagee in writing under power expressly provided in the mortgage or by court upon application for such appointment.<sup>68</sup> Further, under *section 22 (3)* of the Mortgage Act it's mandatory for such appointment to be in writing as in *Grindlays Bank (U) Ltd V. Edward Boazi*, where Manyindo CJ noted that a verbal appointment of the receiver by the mortgagee's lawyers was void as the appointment had to be in writing.<sup>69</sup>

### **3.2.2.2. Taking Possession**

*Section 24* of the Mortgage Act allows a mortgagee to take possession after giving the mortgagor at least 60 days notice of his intention to do so.<sup>70</sup> *Section 116* of the Registration of Titles Act provides that this notice should be one month or any other period expressed in the mortgage as the period of default.

It was suggested in *Mubiru v. Uganda Credit & Savings Bank* (1978) HCB 109 that a mortgagee takes possession by physically entering and taking control of the mortgaged land from the mortgagor. Where tenants occupy the mortgaged property, the mortgagee takes possession by serving them notice to pay rent directly to him as under *section 24 (2) (b)* of the Mortgage Act.

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<sup>68</sup> *Section 22 of the Mortgage Act 2009*

<sup>69</sup> CA No.23 of 1992

<sup>70</sup> *Section 24 of the mortgage Act 2009*

Section 24(5) of the Mortgage Act has set out different obligations of a mortgagee in possession whose duty is clearly laid down by Lord Denning in *Standard Chartered Bank V. Walker*.<sup>71</sup>

Lord Templeman in *Downview Nominees Ltd v. First City Corp. Ltd*, then qualifies the different powers of the mortgagee by the general requirement that they must be exercised in good faith.<sup>72</sup> This qualification applies to the exercise of the mortgagee's right to take possession of the mortgaged land. On this, Lord Denning stated in *Quennell V. Maltby* that "a mortgagee will be restrained from getting possession except where it is sought bonafide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose."<sup>73</sup>

### **3.2.2.3 Mortgagee's power to sell**

Section 26 of the Mortgage Act Cap 2009 provides for sale where the mortgagor is in default of his or her obligations under a mortgage and remains in default at the expiry of the time provided for the rectification of the default in the notice served on hi, or her under section 19(3), a mortgagee may exercise his or her power to sell the mortgaged land.<sup>74</sup> Such sale shall be by public auction unless the mortgagor consents to sale by a

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<sup>71</sup> "That if a mortgagee enters into possession and realizes a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances permit. He owes this duty not only to himself, to clear off as much debt as he can but also to the mortgagor so as to reduce the balance owing as much as possible and a lot to the guarantor so that he is made liable for as little as possible on the guarantee." Per Lord Denning MR in *Standard Chartered Bank V. Walker* [1982] 1 WLR 1410, [1982] 3 ALL ER 938 at pg 1415 citing Salmon LJ in *Cuckmere Brick Co. Ltd and Another V. Mutual Finance Ltd* [1971] Ch 949 at p. 968.

<sup>72</sup> 1993] A.C 295 at 312.

<sup>73</sup> 1979] 1 ALLER.568 at 571

<sup>74</sup> *Barclays Bank of Uganda Ltd V. Livingstone Katende Lutu* CA No 22 of 1993(unreported Supreme Court of Uganda) where the mortgage agreement provided that the debt was payable on demand and in event of default, the mortgagee has a right to sell the land without a court order and this was upheld by Manyindo DCJ, Odoki and Platt JJ.SC in their joint judgment.

private treaty.<sup>75</sup> This sale is subject to a written notice under *section 116* of the Registration of Titles Act.<sup>76</sup>

### **3.3 A comparative analysis of the law on mortgages in Uganda with selected jurisdictions.**

For purposes of this section, the mortgage law in Uganda is discussed and compared to that of India and Tanzania.

In India under *section 5(f)* of the Transfer of Property Act<sup>77</sup> an equitable mortgage is called a mortgage by deposit of title deeds. Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds. This when compared to Uganda is similar and not in anyway different from the equitable mortgage under *section 129* of the Registration of Titles Act<sup>78</sup> as it is made by deposit by the registered proprietor of his or her certificate of title with intent to create a security for the repayment of a loan.

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<sup>75</sup>Section 28(1) (d)

<sup>76</sup> *Yosiya Sajjabbi V. Musa Umar Amreliwalla and Wamala* (1956) 22 EACA 71 where it was contended that such notice must be given by the mortgagee or his duly recognized transferee.

<sup>77</sup> Transfer of Property Act, 1882 [Act No. 4 of Year 1882]

<sup>78</sup> *section 129 Registration of title s Act cap230*

### 3.3.1 Mortgages on Customary Land

With regard to mortgages on customary land, in Tanzania *section 115 (1)* of the Land Act of 1999 provides that 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>79</sup> It is important to note that customary law is not uniform, and so neither are customary mortgages. 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.<sup>80</sup>

This is somewhat similar to the position in Uganda under *section 7* of the Mortgage Act, which allows a holder of a customary certificate of ownership of land to mortgage his or her land as already discussed.<sup>81</sup>

In jurisdictions like Tanzania, these different forms of customary mortgages may have some common traits and as a result it is possible to assume that a particular established customary mortgage practice represents general customary mortgage practices in the country. However, following this criterion in Tanzania is risky and not very applicable to Uganda as Uganda is a country of diverse cultures and that if we were to follow the criteria in Tanzania, we would find problems. In Buganda for instance, land was almost individually held<sup>82</sup> while in communities like the Itesots, the Lugbara and the Acholi, in

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<sup>79</sup> The Land Act, 1999

<sup>80</sup> George Nathan Mwaiondola, *The Modern Law Of Mortgages In Tanzania; The Role Of The Land Act, 1999* School of Law, The University of Birmingham December 2007 at Pg 136

<sup>81</sup> Op. cit note 51 section 7. Mortgage Act 2009

<sup>82</sup> The 1900 Uganda Agreement between the British and the Baganda engaged with local land custom. The *Kabaka*, other royals and notables, and the *bakungu* chiefs gained mailo (freehold) estates over half the land in Buganda whilst the remainder was vested in Her Majesty's Government and was called Crown Land. On mailo land there were two forms of landholders, one being the chiefs with their title deeds, and the other being the *bibanja* (*Bibanja* is the plural of *kibanja*. *Kibanja* was a plot of land granted by a chief to a follower. The term is now used more generally to refer to land where an occupant has usufruct rights.) holders or occupants. Crown land was either leased

eastern and northern Uganda<sup>83</sup> it was communally held and thus reconciling the cultural differences that have existed for decades may be impossible and such a provision certainly cannot apply to Uganda.

It should be noted that in Uganda a legal mortgage is created where one owns land registered under the Registration of Titles Act and signs a mortgage complying with the format provided by the Act<sup>84</sup> and customary land not being registered certainly cannot fall under this category. So it is not clear how a mortgage can be legally created on customary land under the Registration of Titles Act yet such land is not registered as such.

Further, the application of customary systems and rules on land has been grossly affected by the enactment of our laws like the Registration of Titles Act which only

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to tenants or occupied under customary tenure. See R.I. Porter, *Contested Land: The Buganda Experience. 1900 – 1999*. Unpublished.

Opportunities for mailo owners to escape the economic limits of the *Busuulu* and *Envujo* Law of 1928 arose through greater demand for residential and commercial land use from Ganda workers (such as clerks) who desired titled land to enter the bottom of the class of landed gentry as Land ownership provided the right to participate in local politics and to become part of the Buganda Government. See A. W. Southall, *Determinants of The Social Structure of African Urban Populations, With Special Reference To Kampala (Uganda)*. (1956), New York, John Wiley & Sons. So great was the demand for mailo that land purchases and inheritance increased the number of landowners in Buganda from less than 4,000 in the initial mailo allocation after the turn of the century, to approximately 112,000 in 1967 (from less than 1.0 to 6.1 per cent of the population) See H. W West, *The Transformation of Land Tenure in Buganda Since 1896*. (1971) Cambridge, University p.196

<sup>83</sup> In the Northern and some parts of Eastern Uganda customary land holding was the norm. Land in Eastern Uganda in districts like Kumi, Soroti, Katakwi and Kaberamaido and Northern Uganda i.e. Gulu, Kitgum and Pader was communally held by tribes, clans or families.

The Chief or a recognised traditional leader was entrusted with the overall division and supervision of the land on behalf of the community. Once the land had been allocated to a family by a clan chief or a tribal leader, that land came to be looked at as belonging to that person or family. This type of tribal communal ownership of land no longer exists because of fragmentations of the land due to migrations, work and education. What has remained is, to small extent clan lands units. The clan leader/head has power to allocate land to individual clan members and families. Sometimes land may be allocated to a stranger who gets assimilated into the clan. Communal ownership of land happens in villages where several clans may be living. See Lady Justice M. I.D.E. Maitum comments on *Challenges in Implementing The Land Act*. Unpublished

<sup>84</sup> Section 115 of the Registration of Titles Act Cap 230 which provides that the proprietor of any land under the operation of this Act may mortgage that land by signing a mortgage of the land in the form in the Eleventh Schedule to this Act.

allows mortgages to be created on land registered there in as stated and this is upheld by Katureebe JSC in *Fredrick J.k Zaabwe v. Orient Bank Ltd and 5 Others*.<sup>85</sup> The learned justice agreed with the decision in *General Parts (U) Ltd v. Npart*<sup>86</sup>, as authority for the proposition that where the mortgage is not executed in accordance with *section 148* of the Registration of Titles Act it is not valid. All this leaves customary mortgages in jeopardy as their application is more or less not proper and a very risky venture to get into as it has no clear protection under the law.

### **3.3.2 The right of redemption.**

The right of redemption was in Tanzania included under the Land Act, under *section 121(1)* which states that "subject to the provisions of this section, on payment of all moneys and the performance of all other conditions and obligations secured by the mortgage, the mortgagee shall at the request and cost of the mortgagor discharge the mortgage at any time..."<sup>87</sup> This is a wide provision which provides for the possibility of redeeming a mortgage not only before the contractual date, but afterward as well<sup>88</sup>

The spirit of the doctrine of the equity of redemption in Uganda is reflected under *section 116 (1)* of the Registration of Titles Act<sup>89</sup> which on default confers powers and remedies on the mortgagee but subject to the right of redemption as a mortgage acts only as security and nothing more.

In Uganda however, we only apply the common law equitable right to redeem which is only discretionary. Therefore this right is only available within the extra time frame

<sup>85</sup> (Civil Appeal No.4 of 2006) [2007] UGSC 21

<sup>86</sup> (S.C) Civil Appeal No.5 Of 1999

<sup>87</sup> *Op.cit* note 85 *section 121(1)*

<sup>88</sup> *Op.cit* note 63 at Pg 189

<sup>89</sup> *Op.cit* note 52 *section 116(1)*

given or agreed between the parties after which a mortgagee can then exercise his rights as further explained by Romer J in *Biggs v. Hoddinott* where he stated that on a mortgage you cannot by contract clog an equity of redemption so as to prevent the mortgagor from redeeming on payment of principal, interest and costs.<sup>90</sup> *Of course I mean redeeming at the time agreed upon between the parties for redemption.*

The position in Uganda which is similar to the common law position is fair to both the mortgagor and mortgagee as the right to redeem. Section 15 of the mortgage Act 2009, where it provides that upon payment of all moneys and the performance of all other conditions and obligations secured by the mortgage, and upon the payment of any costs and expenses, the mortgagee shall at the request and cost of the mortgagor release the mortgage at any time. The position in Tanzania is a little bit too wide as even after the given period a mortgagor may be allowed to redeem but this could easily be taken for granted and as such sabotaging the rights of the mortgagee under the mortgage and following it would be risky therefore the position in Uganda should be maintained as it is sufficient in this regard as it considers favorably the rights of all parties to the mortgage.

### **3.3.3 Mortgagee's Remedies**

#### **3.3.3.1. The right to sue**

As regards the remedies for breach of covenant, the Mortgage Act under *section 20*, allows the mortgagee to sue the mortgagor, when there is a default by the mortgagor in the terms of the contract. Both India and Uganda provide for almost similar rights ,

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<sup>90</sup> Per Romer J in *Biggs V. Hoddinott* [1898] 2 Ch 307 at 314 where he stated that on a mortgage you cannot by contract clog an equity of redemption so as to prevent the mortgagor from redeeming on payment of principal, interest and costs. *Of course I mean redeeming at the time agreed upon between the parties for redemption*

in India the rights are more elaborate and covers all the perspective of mortgage. Section 20 of the mortgage Act provide for instances where one can be sued in case of default. (a)Where the mortgage deed provides that if there is default by the mortgagor, the money secured by the mortgage becomes payable in full. (b)the mortgagor, is personally bound to repay the money. (c) Where a surety has agreed to be personally liable to repay the money in the circumstances that have arisen. (d) where the mortgagee is deprived of the whole or part of his or her security through or in consequence of the wrongful act or default of the mortgagor. In India it is provided for under *section 68(1)* of the Transfer of Property Act<sup>91</sup>

(a) where the mortgagor binds himself to repay the same; (b) where, by any cause other than the wrongful act of the mortgagor or mortgagee, the mortgaged property is destroyed, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security and the mortgagor has failed to do so; (c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor; (d) the mortgagor fails to deliver the possession of mortgaged property to entitled mortgagee, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor.

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<sup>91</sup> *Op.cit* note 83 *section 68(1)*

In Tanzania, the Land Act<sup>92</sup>, contains a provision for a suit by the mortgagee to recover the mortgaged money under *section 125(3) (a)* and it states in effect that the lender can sue the borrower for the monies dues under the mortgage.<sup>93</sup>

This right to sue is well stated in the Indian law as already shown and this is the position that ought to be adopted by the Ugandan mortgage law. It is really elaborate providing for different situations when this right can be exercised unlike the Ugandan and Tanzanian law which only state the right to sue without stating the particular situations when this right can be exercised and as such, there is need for amendment of our law to reflect the position in the Indian law under *section 68(1)* of the Transfer of Property Act.<sup>94</sup>

### **3.3.3.2. Appointment of a receiver**

With regard to appointment of receiver in Uganda it is stated under *section 22* of the Mortgage Act<sup>95</sup>, that a receiver may be appointed in writing either by the mortgagee himself or herself under a power expressly provided in the mortgage in that behalf, or by the court upon application for the appointment by the mortgagee.

This is more extensively explained in India giving who may appoint, how and who may be appointed for that purpose. It is provided for under *section 69A* of the Transfer of Property Act<sup>96</sup> which states that;

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<sup>92</sup> *Op.cit* note 85 *section 125(3)*

<sup>93</sup> *Op.cit* note 86 at Pg 258.

<sup>94</sup> *Op.cit* note 83 *section 68(1)*

<sup>95</sup> *Op.cit* note 51 *section 22*

<sup>96</sup> *Op.cit* note 83 *section 69A*

(1) A mortgagee having the right to exercise a power of sale shall be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee. If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the court for the appointment of a receiver, and any person appointed by the court shall be deemed to have been duly appointed by the mortgagee.

This position in India is extended as it provides for agreement by the mortgagor of the appointed receiver failure of which, recourse to court is sought something that is not mentioned by the Mortgage Act<sup>97</sup>. Such agreement is really important as such mortgagee is deemed to be agent of the mortgagor as stated under *section 22(6)* of the Mortgage Act and in essence, he is going to deal with the property of the mortgagor so it is essential that the mortgagor agrees to such appointment.<sup>98</sup> This calls for an amendment of our law to include this provision as it is really relevant and important that a mortgagor consents to the appointment of the receiver.

However, appointment of a receiver in Tanzania is vague as such power to appoint a receiver is merely implied in any mortgage under *section 128(1)* of the Land Act and its exercise is appropriate where the mortgaged property is capable of generating

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<sup>97</sup> The Mortgage Act Cap 229 Laws of Uganda 2000 Edition

<sup>98</sup> *Ibid* section 22(6)

income.<sup>99</sup> Basically, the receiver appointed will receive the income of the mortgaged land and apply it to satisfy the debt.<sup>100</sup>

The Ugandan Mortgage Act however does not provide for the standard of duty required of a receiver. Scott V-C however contended in *Medforth v. Blake* that the receiver owes a duty to the mortgagor to manage the property with due diligence, subject to the primary duty to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid and this duty is further owed to anyone else who has an interest in the equity of redemption to manage the property with due diligence.

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Similarly Lord Moulton stated in *McHugh v. Union Bank of Canada* that it is well settled law that it is the duty of a mortgagee when realizing the mortgaged property to behave as a reasonable man would behave in the realization of his own property.<sup>102</sup>

Lord Denning in addition sets out in *Standard Chartered Bank v. Walker* that a receiver owes a duty both to the company and guarantor to exercise reasonable care in the disposal of the assets. This standard of duty is not reflected in our law and thus ought to be included in our law.

He further suggests some remedies that if property is sold at an undervalue and both the receiver and the company deny liability, the creditor should give the company a reduction in the debt of the value sold at and what should have been sold at.<sup>103</sup> This however is not very practical as it would mean that banks or mortgagees would have to

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<sup>99</sup> *Op.cit* note 85 section 128(1)

<sup>100</sup> *Op.cit* note 86 at p. 237.

<sup>101</sup> [2000] Ch 86 at 102F-H, [1999] 3 ALL ER 97

<sup>102</sup> [1913] AC 299

<sup>103</sup> [1982] 1 WLR 1410 at 1416

lose their money in such situations. In such a case, I would recommend that banks adopt the appointment of a receiver in Indian law where consent of the mortgagor is sought so that if he consents to such appointment, he is then precluded from denying liability and there upon the bank can personally sue the mortgagor for the sums due under the mortgage. This thus ought to be included in our law so that the banks can easily apply it with ease and assured of protection under the law.

### **3.3.3.3. Right to Possession**

With regard to the right to enter possession by the mortgagee, *section 24* of the Mortgage Act provides that a mortgagee may for purposes of realization of his or her security in the mortgage, enter into possession of the mortgaged land after giving at least 60 days notice of his or her intention to do so to the mortgagor.<sup>104</sup> However, the different rights and obligations to be carried out by a mortgagee in possession are not properly laid out in our law.

In India on the other hand, the law has clearly laid out the different rights and obligations imposed on a mortgagee in possession under *section 72* of the Transfer of Property Act<sup>105</sup> which requires a mortgagee in possession to spend such money as is necessary to preserve the mortgaged property from destruction, forfeiture or sale; to support the mortgagor's title to the property; to make his own title thereto good against the mortgagor and to renew the lease when the mortgaged property is a renewable leasehold.

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<sup>104</sup> *Op.cit* note 51 *section 24*

<sup>105</sup> *Op.cit* note 83 *section 72*

The section further states that where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property.

Such duties and obligations imposed on a mortgagee help to keep the mortgaged property in good shape like the requirement for insurance under *section 72* of the Transfer of Property Act as such property ought to be maintained since it is the subject of the mortgage transaction.

Ugandan law should thus specifically spell out the duties and obligations of a mortgagee in possession clearly laying down the standard which ought to be exercised by such mortgagee as this would help to preserve the value of the mortgaged property and if realized, would be able to obtain a fair price for the property that would benefit both the mortgagee in obtaining the monies on the debt and the mortgagor to help clear up his debt.

The Ugandan Mortgage Act further made no mention of the duties of a mortgagee during sale. Nevertheless, these duties of a mortgagee during sale are clearly laid out in Tanzania under *section 133* of the Land Act<sup>106</sup> which states that:

(1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of the court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of sums advanced to the

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<sup>106</sup> *Op.cit* note 85 *section 133*

mortgagor, [and] any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.

Nourse L.J. summarized these duties in *AIB Finance Ltd V. Debtors* as “first, that a mortgagee, although he may exercise his power of sale at any time and for his own choice, owes the mortgagor a duty to take reasonable care to obtain a proper price for the mortgaged property at that time; secondly, that the duty is not tortious in nature but one recognized by equity as rising out of the particular relationship of between mortgagee and mortgagor.”<sup>107</sup> Our law ought to emulate Tanzanian law to include these duties so that it is clear on how they exercise the particular roles and duties conferred upon them.

The Mortgage Act under *section 24(5)* provides for liabilities of a mortgagee in possession and states that in accounting, a mortgagee in possession (a) shall be liable for any failure to be diligent in realizing any sum due to him or her from the mortgaged property, (b) shall be liable at the fair market value for any reasonable injury to or neglect of the mortgaged land caused by his or her willful or negligent act or omission, (c) shall be liable for any unreasonable injury to or neglect of the mortgaged land caused by his or her willful or negligent act or omission;<sup>108</sup>

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<sup>107</sup> [1998] 2 ALL E.R 929 at 937

<sup>108</sup> Section 24 (5) of the mortgage Act 2009

These liabilities are extended in Indian law under, *section 76* of the Transfer of Property Act<sup>109</sup> which is to the effect that; (a) he must manage the property as a person of ordinary prudence would manage it if it were his own; (b) he must try his best endeavors to collect the rents and profits thereof; (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the government revenue, all other charges of a public nature; (d) he must in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits; (e) he must not commit any act which is destructive or permanently injurious to the property; (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy; (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee. These are a must and failure to comply with any of them, the mortgagee would be liable.

Ugandan law is very limited in this regard leaving out liabilities like keeping of full accurate accounts of all sums received and how he appropriates them as mortgagee, application of money received under insurance policies for such purposes, managing the property as if it were his own, collecting of rents among others which if included in our law would make it easy to monitor such transactions ensuring transparency and proper management of mortgaged property as a mortgagee would be held liable upon failure on any of the liabilities if included in our law.

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<sup>109</sup> *Op.cit* note 83 *section 76*

With regard to improvements to mortgaged property, *section 24 (5)(a)* of the Mortgage Act<sup>110</sup> provides that in accounting the mortgagee shall be allowed the cost of any reasonable repairs or improvements made by him to protect the value of the mortgaged land or to maintain or increase the income from that land and to the mortgaged land, they shall be secured with the same priority as the mortgage and shall where the mortgage secures the payment of money be added to the principal sum with interest at the same rate as on the principal sum.

This is broadened in India under *section 63A* of the Transfer of Property Act which provides for improvements to mortgaged property and contends that;

(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the

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<sup>110</sup> *Op.cit* note 51 *section 24 (5)(a)*

principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.<sup>111</sup>

Therefore Ugandan law is lacking and there is a loophole as it is not mentioned whether the mortgagor is entitled to such improvements and repairs as clearly laid out in Indian law and further a specific rate ought to be included just in case there is no fixed rate as stated in Indian law.

#### **3.3.3.4 Power of sale**

With regard to the power of sale, in India under *section 69* of the Transfer of Property Act<sup>112</sup>, such power is only valid without court intervention in particular situations. The section provides that;

(1) A mortgagee, or any person acting on his behalf, shall, have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely; (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist or a member of any other race, (b) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed.

*Section 69(1) (b)* of the Transfer of Property Act is similar to *section 26* of the Mortgage Act<sup>113</sup> which requires that the mortgage deed expressly stipulates and gives power to

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<sup>111</sup> *Op.cit* note 83 *section 63A*

<sup>112</sup> *Ibid* *section 69*

<sup>113</sup> *section 26 of the 2009 Mortgage Act.*

the mortgagee to sell without applying to court but it doesn't mention or cater for situations where the mortgage is between foreigners in Uganda as is the case with Indian law above under *section 69(1) (a)* of the Transfer of Property Act. The Ugandan law does not mention whether foreigners are subjected to the same law or should be treated differently with regard to mortgages and is wanting in this regard. The framers of the Act should thus have considered including a provision in this regard.

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. Notice should give the recipient a reasonable time to rectify the default. As a result, failure to issue a notice before sale would be equivalent to ambush.<sup>114</sup> Notice should therefore intimate to the mortgagor what needs to be done to avoid the consequences.

This is provided in the requirement under *section 116* of the Registration of Titles Act which provides that the mortgagee or his or her transferees may serve on the mortgagor or his or her transferees notice in writing to pay the money owing on the mortgage or to perform and observe the aforesaid covenants, as the case may be.

On the other hand, Tanzanian law is more extensive as *section 127 (1)* of the Land Act, requires the mortgagee to issue a notice before he can exercise his remedies under the mortgage. It states that; "where there is a default in the payment of any interest or any other payment or any part thereof or in fulfillment of any condition secured by any mortgage or in performance or observation of any covenant, express or implied, in any

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<sup>114</sup> George Nathan Mwaisondola *The Modern Law Of Mortgages In Tanzania; The Role Of The Land Act, 1999* School of Law, The University of Birmingham December 2007 at p. 269

mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.”<sup>115</sup>

*Section 127(2)* of the Land Act (1999) further provides for the contents of the notice. It states that the notice issued should inform the recipient of; (a) the nature and extent of default, (b) that the mortgagee may proceed to exercise his remedies against the mortgaged land, (c) that, after the expiry of thirty days following the receipt of the notice by the mortgagor, the mortgagee may exercise the right to sell the land.

Ugandan law doesn't make mention of what exactly should be included in the notice as it is in Tanzania and this ought to be included or incorporated in our law for better clarification and understanding of the purposes of this notice.

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<sup>115</sup> *Op.cit* note 85 *section 127(1)*

## CHAPTER FOUR

### CRITICAL ANALYSIS OF THE PROVISIONS OF THE MORTGAGE ACT 2009: PITFALLS AND LANDMARKS.

#### 4.1 Introduction

The prevailing law; the Mortgage Act 1974 did not address some of the changes that have occurred in the land laws as well as considered the rapid economic growth and the expansion of the banking sector and thus the need for a new mortgage law and thus the Mortgage Act 2009. For this Act to spur real estate and money lending institutions to invest in the mortgage sector there is need to critically scrutinize the provisions of the Act to ensure that they are archiving the intended objectives.

#### 4.2 Critical Review of the Mortgage Act 2009.

The Mortgage Act 2009, gives a very narrow definition of a mortgage restricting it to only land. *Section 2* defines a mortgage to include any charge or lien over land or any estate or interest in land in Uganda or partly in Uganda and partly elsewhere 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. This definition is narrow and constrains the understanding offered to mortgages elsewhere.

A mortgage is a temporary, conditional pledge of property to a creditor as security for performance of an obligation or repayment of a debt.<sup>116</sup> Mortgages can therefore be on

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<sup>116</sup> The American Heritage Dictionary of the English Language, Fourth Edition 2007, Published by Houghton Mifflin Company.

any property<sup>117</sup> and not necessarily land and historically in return for making the loan, the lender would expect the borrower to transfer ownership of the property being used as security to the lender.<sup>118</sup> This could be any property and not necessarily land as per Lindley MR in *Santley v. Wilde*<sup>119</sup> who defined a mortgage to be a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. In Uganda, especially with regard to money lenders, who are also subject to this Act, a mortgage extends to include chattels like cars, houses and even animals like cows goats among others.<sup>120</sup> The Act should thus have considered this and included other chattels or property and not restrict it to only land.

#### **4.2.1 Protection of the Matrimonial Home.**

*Section 2* gives the interpretation of matrimonial home to mean a building or part of a building in which a husband and wife or as the case may be, wives, and their children if any, ordinarily reside together and includes; a building and its cartilage occupied primarily for residential purposes, a building occupied in conjunction with agricultural

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<sup>117</sup> It should be noted that, under *section 1(b)* of the Mortgage Act Cap 229 defines a mortgage to include a debenture and in Company law and insolvency law, security may either be a mortgage or a debenture. *Standard Chartered Bank v. Walker and Another* [1982] 1 WLR 1410 illustrated a debenture being used as security where a company issued a debenture to the plaintiff bank giving them charge over the company's assets in respect of any sums then or in the future owing to the bank. Further in *Bradley v. Carritt* [1903] A.C. 253, the holder of the majority of shares of a company mortgaged his shares as security for an advance of money and at the same time covenanted that he would always thereafter use his best endeavors to secure that the mortgagee should be employed as a broker for the sale of the company's teas and that, in the event of any of such teas being sold otherwise than through the mortgagee, the mortgagor should pay to the mortgagee the commission which the mortgagee would have earned if the teas had been sold through him. This shows that even shares can be mortgaged and therefore mortgages are not restricted to land.

<sup>118</sup> J. Stevens & R.A. Pearce *Land Law* 2000 London Sweet and Maxwell at p. 390

<sup>119</sup> [1899] 2 Ch. 474

<sup>120</sup> Per Ms Betty Amongi Parliamentary Debates (*Hansard*) *Official Report Third Session – Second Meeting* Wednesday 18<sup>th</sup> March 2009 at p. 7568

land or pastoral land, any land allocated by one spouse to his or her spouse or in case of a husband to his spouses for his, her or their exclusive use;

The Act is commended for recognizing and honoring the sanctity of a 'matrimonial home,' as a highly regarded, placed and respected entity in the different and diverse cultural arrangements in Uganda something which the former Mortgage Act did not put into consideration. The Act, however, is restrictive and does not cater for other land other than that defined in it. Explicitly, the Act does not provide for land where the family derives its sustenance as mentioned in *section 39* of the Land Act.

The Act, after recognizing the sanctity of the matrimonial home (which is in conformity with the fact that modern legislation relating to the law of mortgage has concentrated on the protection of the residential utility enjoyed by the mortgagor and his family<sup>121</sup>) then seeks to protect such inviolability. This the Act has done by making a special requirement for spousal consent of the party mortgaging the matrimonial land under *Section 5 and 6* which allow the validity of the mortgage of the matrimonial home only when there is spousal consent which should be informed and genuine. This requirement is in furtherance of *section 39* of the Land Act, which prohibits the mortgaging of family land without prior consent of the spouse but it attempts to limit this requirement only to matrimonial home as family land is a little too wide<sup>122</sup>. This would help to protect the home since such consent being a requirement may not be

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<sup>121</sup> Op cit note 20 '*The Modern Mortgage Transaction*' at p. 1620.

<sup>122</sup> The Land Act Cap 227

given by a spouse who then will not lose their home in case of failure to pay back the mortgage debt.

It however doesn't state how a spouse is to be determined and it becomes almost impossible to determine whether one is the true spouse or not given the fact that we have different forms of marriages without comprehensive marriage registers. *Article 31* of the constitution, merely provides for rights of the family contending that men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.<sup>123</sup>

A marriage is thus not defined which means that all marriages as long as one is above eighteen are considered. Under normal circumstances a marriage should be registered with the couple possessing a marriage certificate but customary marriages don't require such certificates and such marriages are also recognized in our communities. So establishing a mortgagor's marital status and his or her rightful spouse would prove rather difficult and cases of impersonation are feared.

Therefore any such spouse may give consent to such mortgage and ascertaining who the spouse is may be almost impossible if a man marries more than two women. If they all stay in the same home and he gets consent of just one of them, the rights of the other wives are put at risk and in case of default they would be thrown out yet they had no knowledge of the transaction. The Act is thus in need of a provision which

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<sup>123</sup> Article 31 of the 1995 Constitution of Uganda

imposes a duty on the mortgagor to show proof of his marriage and a requirement for a statutory declaration from the spouse or spouses of the mortgagor to avoid situations where one chases his wife picks up anyone, puts them in the home and tells them to sign or consent which would jeopardize the rights of the true spouse.

#### **4.2.2 Validity of Spousal Consent.**

*Section 6* requires that such consent be both informed and genuine which is vague as does not put a test to be followed in ascertaining whether such consent is really genuine. The Mortgage Act 2009 lacks a clause to the effect that if such consent is due to misrepresentation or undue influence, then such contract may be set aside<sup>124</sup> since undue influence and misrepresentation are grounds in equity by a complainant as against the dominant party to set aside the transaction.<sup>125</sup> As regards informed consent, the House of Lords in *Barclays Bank v. O'Brien*<sup>126</sup> set down the principle that undue influence may be presumed if the relationship 'was such that the wife reposed confidence and trust in her husband in relation to their financial affairs'.

The doctrine of undue influence was further considered in *First National Bank Plc v. Achampong*<sup>127</sup> and *Yorkshire Bank PLC v. Tinsley*<sup>128</sup> where Mrs. Tinsley and her

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<sup>124</sup> J. Stevens and R.A. Pearce. *Land Law* (2000) London Sweet and Maxwell. 'Setting Aside a Mortgage for Undue Influence or Misrepresentation' at p. 399

<sup>125</sup> Per Lord Browne Wilkinson in *Barclays Bank Plc v. O'Brien* [1994] 1 AC 180 at 191C-D, 195E

<sup>126</sup> [1993] 4 ALL ER 417, [1994] AC 180. Here a wife joined with the husband in executing a second mortgage of their jointly owned matrimonial home as security for the bank overdraft of her husband's company and she was not made aware by the bank of the nature of the relevant documents which she signed without reading acting in reliance on her husband's false representation that the security was limited to 60,000 pounds rather than 135,000 pounds. The bank then sought possession of the home only to have its claim rejected by the House of Lords.

<sup>127</sup> [2004] 1 FCR 18 where a wife claimed undue influence by her husband to enter into a legal charge on their home, title to which was held in beneficial half-shares. Payments on this mortgage fell into arrears and the mortgagee bank sought an order for possession. The Court of Appeal held that the bank had been put on inquiry and

husband jointly executed two mortgages over their matrimonial home as security for the husband's current and future business debts. Mrs. Tinsley acted under the undue influence of her husband who told her that the mortgage only covers 5,000 pounds of which the bank had constructive knowledge yet it covered more. However, the business failed and the bank is seeking foreclosure of the house. The wife contested the foreclosure on the ground that the mortgage was obtained through undue influence. The court held that there was presumption of undue influence and the bank has the burden of proof to prove that the transaction was in order. The presence of a solicitor does not prove acquiescence by the wife because the solicitor may have the role of enforcing the agreement and not to give advice. The wife was also vehement that had she known about the nature of the mortgage she would not have agreed to the risk. The bank's security over the home was therefore unenforceable against her.

Lord Nicholls in *Royal Bank of Scotland PLC v Etridge*, went back to first principles in analyzing the modern law of undue influence. He expressed the founding principle developed by the courts of equity as a court of conscience stating that "*The law will investigate the manner in which the intention to enter into the transaction was secured:*

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had, therefore, to take reasonable steps to satisfy itself that the wife's consent had been properly obtained following *Royal Bank of Scotland v. Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773,. However, it was not in general enough that the bank knew merely that the wife had a solicitor acting for her. On the facts the Court of Appeal upheld the trial judge's finding that the bank had not done sufficient to avoid having constructive notice of the undue influence or other misconduct in the obtaining of the wife's consent to the mortgage and execution of the legal charge. Thus the legal charge was ineffective against the wife and the bank had a charge over the husband's half share only. (Had the wife and husband been joint tenants, severance would have occurred.)

<sup>128</sup> [2004] EWCA Civ 816 [2004] 1 WLR 2380.

"*how the intention was produced*"<sup>129</sup>, in essence he restated the words of Lord Eldon LC, from as long ago as 1807 in *Huguenin v. Baseley*.

If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."<sup>130</sup>

Stuart LJ, concurs with this as he lays down the circumstances under which pressure to guarantee a debt would amount to undue influence stating that;

"Legitimate commercial pressure brought by a creditor, however strong coupled with a proper feelings of family loyalty and a laudable desire to help a husband in financial difficulty, may be difficult to resist and sufficient to induce a wife to agree to charge her home by way of collateral security, particularly if accompanied by family pressure or emotional scenes. This may justify setting aside a transaction if the wrongdoers importunity has left her with no will of her own. It should be noted that it isn't necessary to show any wrongdoing on the part of the defendant or any wrongdoing at all."<sup>131</sup>

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<sup>129</sup> (No.2) [2001] UKHL 44, [2002] 2 AC 773, (at Para 7):

<sup>130</sup> 14 Ves 273, 300 1807

<sup>131</sup> *Hammond v. Osborne* [2002] WTLR 125

Therefore the Mortgage Act 2009 falls short in this regard and ought to include a clause to the effect that a mortgage transaction may be set aside if prior spousal consent is proved to have been got through undue influence or misrepresentation. The Act should further create an obligation upon a spouse to lodge a caveat on the property comprising the matrimonial home so mortgaging such land would be impossible for a party who has not sought consent of their spouse.

A critical provision that relates to spousal consent is *Section 4* which provides for a duty to disclose information where a mortgagee and mortgagor shall act in good faith and disclose all relevant information relating to the mortgage. This section is certainly relevant as it imposes a duty to act in good faith which is an application of the general duty of care to your neighbor.<sup>132</sup>

Under *Section 4(2)*, there is a penalty on conviction of refusal, neglect or failure to disclose information relevant to a mortgage as being a fine of not less than 48 currency points but not exceeding one hundred twenty currency points of imprisonment of not less than 24 months but not exceeding 60 months or both. This penalty should depend on the circumstances of each case and with regard to spousal consent; it ought to be made more severe. Also, since there are many forms of marriages existing in Uganda, it would be of utmost difficulty for the mortgagee to establish the rightful spouse(s) of the mortgagor mostly if he or she claims to be customarily married this is not likely to be the case if the mortgagee knows where each spouse lives. The penalty should thus

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<sup>132</sup> Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562

depend on the value of the home rather than a specific amount such that obnoxious situations as impersonators could be avoided.

#### **4.2.3 Variation of a Mortgage.**

*Section 12* provides for variation of a mortgage empowering a mortgagee to vary the interest rate on the mortgage arrangement, provided a 15 day notice of variation is served personally to the mortgagor of any change of interest rates under a mortgage. The current market practice has been to peg the interest rate to the bank's base lending rate and to advertise any changes in the base rate, coupled with provisions in the mortgage deed giving validity to such interest rate changes.<sup>133</sup>

Personal service to the mortgagors will certainly prove expensive and onerous and thus a constraint to the mortgagees and the fact that this notice does not re-open negotiations on the mortgage but is simply a formality, it is a most likely result that the borrower will be at the mercy of the mortgagee as and when the interest rates are revised or not.

#### **4.2.4 The Need for regulation of Interest Rates.**

The Act makes no mention of who sets the interest rate and with deregulation of the Ugandan financial sector in 1990; the government no longer takes part in setting interest rates.<sup>134</sup>

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<sup>133</sup> P. Karugaba MMAKS Advocates, '*A Critical Review of the Mortgage Bill 2007*' July 2007. Assessed at; [www.ugandachamber.com](http://www.ugandachamber.com) on 10<sup>th</sup> March 2009

<sup>134</sup> In 1987 when the NRM government adopted a definitive and comprehensive Economic Recovery Program (ERP) designed to restore economic growth in a more deregulated financial environment as required by IMF and World Bank through the stimulation of policies that would completely deregulate the "fixed exchange rates system" and "currency management system."

In view of this background the government cautiously but successively deregulated the foreign exchange management system; exchange controls were progressively relaxed through the establishment of the Open General License (OGL) which was the first step in a very long road to completely deregulating the financial sector.

Despite the fact that deregulation has been successful in Uganda, it left discretion to banks and other financial institutions that set interest rates which suit them and not the mortgagor. The fact that such discretion is left to the mortgagee and the rates of interests that a lender can charge are not limited, there is likelihood of exploitation of mortgagors who are in most cases vulnerable and need the money for which a mortgage is secured. A mortgagor may end up servicing just the debt for quite some time if a rate so high is set by the mortgagees as is often the case.<sup>135</sup> The mortgagees benefit a lot as through high interest rates, they are able to recover the principal sum lent out in a short period thus endangering the security given by the mortgagor.

In the case of the US for example, in 1999, Bill Clinton deregulated the financial system.<sup>136</sup> This deregulation is said to account for the current economic recession. As a result, the Obama administration is proposing the broadest changes in financial regulation since the Great Depression, calling for the elimination of some bank regulators and giving the Treasury Department and Federal Reserve vast new authority.

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The final lag in the deregulation of the financial sector was brought into effect with the legalization of the parallel market in July 1990. This sanctioned the establishment of Foreign Exchange Bureaux, which were permitted to buy and sell foreign exchange at rates freely determined by market forces. As a result of such deregulation of interest rates and the overall liberalization of the financial market in the 1990s, room was made for innovative approaches for the operations of the registered banks in rural and microfinance as they could favorably compete in the financial sector. See S. Agarwal 'Financial Sector Deregulation As A Response To Stabilization And Structural Adjustment Policies In Uganda' Journal of Sustainable Development in Africa Vol.2, No.2 at p. 5-7. See also Dr. J. Ruotsi, *Ugandan Commercial Banks in Rural and Microfinance: Turbulent Markets, Innovative Approaches* at p. 9.

<sup>135</sup> See S. Juuko "Interest Rates to Remain High" as states that the rates show that some banks charge as high as 24%. The New Vision, 4<sup>th</sup> June 2009. See also S. Juuko, "Commercial Banks Increase Interest Rates" The New Vision 30<sup>th</sup> January 2009 where Standard Chartered bank increased its shilling prime lending rate to 19.5 % from 18.5%, while Stanbic bank, which had the lowest rate in the sector, has also revised the rate upwards to 18.5% from 16% and DFCU from 19% to 20%. Assessed at; <http://allafrica.com> on 23<sup>rd</sup> June 2009. This shows the very high interest rates charged by the banks.

<sup>136</sup> M. McLaughlin, "Clinton, Republicans Agree to Deregulation of US Financial System" Published by the International Committee of the Fourth International (ICFI) 1 November 1999 Top of Form. Assessed at; <http://www.wsws.org/index.shtml> on 17<sup>th</sup> June 2009.

He said, "We are going to put forward a very strong set of regulatory measures we think can prevent this kind of crisis from happening again."<sup>137</sup> The situation in the US shows clear effects of deregulation and therefore caution should be taken by the Ugandan government to set some regulatory measures and at least set a maximum interest rate not to be exceeded by the banks when issuing loans and since banking business plays a crucial role in the performance of the economy, it is imperative that the sector be controlled and regulated to ensure that it is properly organized and run on sound commercial principles.<sup>138</sup>

The Act prescribes 5 different remedies for a mortgagee upon the default of a mortgagor. Firstly, the Act prescribes a 21 working days notice coupled with five to 15 working days additional notice depending on the remedy pursued by the mortgagee if the mortgagor remains in default. Section 21(2) provides for notice to the mortgagor before instituting a suit for the debt, Section 22(2) provides for notice to mortgagor before appointment of a receiver, Section 23(2) provides for notice to mortgagor before proceeding with the granting of a lease, Section 24(1) which provides for power of a mortgagee to take possession only after the period stated in Section 19 has expired together with notice of not less than 5 working days and Section 26(2) which provides for notice to the mortgagor before exercise of his power of sale. These increased notice periods are of benefit to the mortgagor who is given more time in which to pay up his

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<sup>137</sup> K.G. Hall, "Obama to Propose New Financial Regulator, Stronger Fed" McClatchy Newspapers – Tue Jun 16, 8:11 pm ET Assessed at; [http://news.yahoo.com/mcclatchy/20090617/pl\\_mcclatcy/3253921](http://news.yahoo.com/mcclatchy/20090617/pl_mcclatcy/3253921) on 17th June 2009.

<sup>138</sup> G.P. Mukubwa, "Essays in African Banking Law and Practice" (1998) Uganda Law Watch at p. 2

debt. However, the Act doesn't take into account the period of advertising in the event of sale of mortgaged property by public auction. Further, the Act is silent on postage of notices as provided for in *section 202* of the Registration of titles Act<sup>139</sup> suggests that such notices will have to be served personally which may become onerous.

*Section 28(2)* further provides that the mortgagee should ensure that the sale is publicly advertised in advance of the sale by auction but it doesn't state how long the adverts should run. There should be a 30 day advertising period for sale by public auction<sup>140</sup>. With this mortgagees may take advantage of the situation and advertise just a few days before the auction and thus jeopardize the mortgagor's right to redeem before concluding the sale and it should be noted that a list of options should be available to the mortgagor to remedy any default and to redeem mortgaged property.<sup>141</sup>

#### **4.2.5 Mortgagee Exercising Power of Sale**

*Section 27* provides for the duty of a mortgagee exercising power of sale as owing a duty of care to the mortgagor, any surety of sums advanced to the mortgagor, any subsequent mortgagee to obtain the best price reasonably obtainable as at the time of sale. This duty was clearly set out by Lord Denning<sup>142</sup> (in citing *Cuckmere Brick Co Ltd*

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<sup>139</sup> *Section 202 of The Registration of Titles Act Cap 230* on service of notices under that Act which include notices like that to the mortgagor to pay money owing under the mortgage under *section 116*.

<sup>140</sup> Manyindo, D.C.J contended in *Grindlays Bank (U) Ltd v. Edward Boaz* Civil Appeal 23/92 at p.8 that a sale not advertised could not be said to be a sale by public auction.

<sup>141</sup> This is in line with the aphorism set out by Ssekandi AG.J: in *Matambulire v. Kimera* CA No 37 of 1972 (High Court of Uganda); [1975] HCB 150 'Once a mortgage, always a mortgage' which emphasizes the essential nature of the right to redeem in a mortgage

<sup>142</sup> *Standard Chartered Bank v. Walker* [1982] 1 WLR at 1415

*v. Mutual Finance Ltd*<sup>143</sup>) that a mortgagee in possession has a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself but also to the mortgagor and guarantor.<sup>144</sup> Salmon LJ further stated in the same case that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it.

This duty requires the mortgagee to act as a reasonable man would in the realization of his own property so that the mortgagor may receive credit for the fair value of the property sold.<sup>145</sup> The Act under *section 27(1)* restates the common law duty owed by a mortgagee and is lauded for codifying this common law principle. It is hoped that interpretation and application of this provision will stretch to the duty to take reasonable steps to obtain the best possible price.

Further, the Act has not mention of the liability of a mortgagee for under value sales. A mortgagor's liability for any shortfall is diminished in the presence of equitable delinquency in the mortgagee's exercise of the power of sale.<sup>146</sup> In *Scandinavian Pacific Ltd Vs Burke* there was a sale at a gross undervalue and it was stated that any claim which the mortgagor may have in respect of a negligently achieved undervalue may be

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<sup>143</sup> [1971] Ch. 949

<sup>144</sup> In exercising this duty the burden of proof is on the mortgagor to prove that the mortgagee has breached the duty to take reasonable precautions to secure a proper price. It only shifts to the mortgagee if the sale is made to himself or to a company in which he is interested. Per Lord Templeman in *Tse Kwong Lam v. Wong Chit Sen* [1983] 1 WLR 1349 at 1356G-H. If property is sold at an undervalue due to breach of duty, the mortgagor is entitled to recover from the mortgagee the difference between the true market value of the property and the value realized from the sale at an undervalue per *Mubiru v. Uganda Credit & Savings Bank* (1978) HCB 109.

<sup>145</sup> Lord Moulton in *Mc Hugh v. Union Bank of Canada* [1913] AC 299, P.C at Pg 311

<sup>146</sup> K. Gray, S. F. Gray. *Land Law* (2007) Oxford University Press at Pg 1680

raised as an equitable set off to any subsisting debt alleged by the mortgagee in a bankruptcy petition<sup>147</sup>. The Act should therefore have made provision for mortgagees being liable to mortgagors for undervalue sales as stated in equity.<sup>148</sup>

The Act is incomplete as it provides for various notices to be in the form prescribed as seen in *Section 19(3), 13(1), 23(2)* among others. The Act makes no reference at all to the form of the notices. With these deformities in the Act it tends to make the Act in competent and fails to serve the people in the mortgage business.

#### **4.2.6 Mortgaging of Customary Land**

The Act further extends to mortgages on customary land as stated under *Section 7*. A mortgage may be legal, equitable or customary. Legal mortgages are currently restricted to land registered under the Registration of Titles Act.<sup>149</sup> Equitable mortgages are also recognized by the Registration of Titles Act under *section 129*.<sup>150</sup> The Act is commended in this regard considering the fact that customary tenure is the most common form of land holding in agricultural areas and the bulk of this country's

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<sup>147</sup> (1991) 5 BPR 11848-11849

<sup>148</sup> However in *Corbett v Halifax plc* [2003] 2 All ER (Comm.) 384 it was stated that equity will not intervene to set aside a conveyance by a mortgagee under the statutory power of sale of a secured legal estate unless there was some element of impropriety or bad faith on the part of the mortgagee in the exercise of that power and the mere fact that the sale was at an undervalue would not be enough to set it aside. Only if the purchaser had knowledge of or participated in an impropriety in the exercise of the power would the sale be vulnerable. Circumstances of which a mortgagee had no knowledge would not give rise to improper or irregular exercise of the statutory power. Briggs Ag VP noted in *Sajabi v Amrelivalla and Wamala* (1956) 22 EACA 71 that where a mortgage sale is unlawful, the selling mortgagee and the purchaser may be held liable in damages and the measure of damages is the value of the land at the time of the unlawful sale, less the amount of money due on the mortgage at that date.

<sup>149</sup> Section 115 of Cap 230 to the effect that the proprietor of any land under the operation of this Act may mortgage that land by signing a mortgage of the land in the form in the Eleventh Schedule to this Act.

<sup>150</sup> Section 129 of the RTA provides that an equitable mortgage of land may be made by deposit by the registered proprietor of his or her certificate of title with intent to create a security.

agricultural production occurs on land held under customary tenure as over 75% of land in Uganda is held customarily<sup>151</sup> as 80% of the land in Uganda is unregistered.<sup>152</sup>

Most of the land in urban areas is registered as opposed to rural areas where most of the land is customary land but which under *section 8(2) (c)* of the Land Act<sup>153</sup> can be mortgaged. Both the Constitution and the Land Act recognize customary holding.<sup>154</sup> The definition of customary land in the Land Act is very clear and basically this land is unregistered and governed by the custom where the land is located but also allows registration of such land through acquiring a certificate of customary ownership.<sup>155</sup>

A certificate of customary ownership can be obtained at three levels: individuals, family or community as stated in *section 5* of the Land Act and this certificate is primary evidence of customary occupation. Once acquired, it will enable the holder to undertake various land transactions like sale, mortgage or transfer land to a third party. The provisions for a certificate of customary ownership are yet to be operationalised and by implication that this very certificate is convertible to a freehold title,<sup>156</sup> also shows that it is inferior to a land title and may be treated with contempt by lending

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<sup>151</sup> H. Busingye, Coordinator Uganda Land Alliance; International Symposium On Communal Tenure Reform, *Customary Land Tenure Reform in Uganda; Lessons for South Africa*, Paper presented in Johannesburg, on 12<sup>th</sup>-13<sup>th</sup> August 2002 by Programme for Land And Agrarian Studies (PLAAS) at p. 1

<sup>152</sup> Parliamentary Debates (Hansard) Official Report Third session – Second meeting Wednesday, 18<sup>th</sup> March 2009 at p. 7581

<sup>153</sup> The Land Act Cap 227.

<sup>154</sup> Article 237 (3) which provides that; land in Uganda shall be owned in accordance with the following land tenure systems: customary, freehold; mailo, and leasehold which is similar to *Section 2* of the Land Act.

<sup>155</sup> Under *Section 5* any person, family or community holding land under customary tenure on former public land may acquire a certificate of customary ownership in respect of that land in accordance with the provisions of this Act and *section 7* provides for the procedures for application for certificate of customary ownership.

<sup>156</sup> Article 237 (4) allows land under customary tenure to be converted to freehold land ownership by registration.

institutions.<sup>157</sup> The Land Act, however, does not prescribe any procedure or formalities for the creation of a mortgage over land owned under customary tenure.

This is similar to *Section 7* of the Act which allows mortgages on customary land to continue to be in accordance with customary law applicable to the land in respect of which the mortgage on customary land is created. It still does not provide for a procedure to be followed in creating a customary mortgage and thus making it uncertain. Customary land is at present, a subject of commercial transactions. Many financial institutions in Uganda have been reported to deal in mortgage in respect to customary land like Centenary Rural Development Bank (CERUDEB).<sup>158</sup> Land mortgaging does take place on customary land without titles, where individuals lend money for emergency needs, with the land serving as collateral, and the use of the land by the lender functioning as the interest. Little is known about such mortgages, or how the system could be supported.

Customary land remains very difficult to sell or transfer, yet the law seems to indicate a very simple system that will easily be market worthy without setting out standards and measures to be followed in such sell or transfer. Communal land owners are not willing to let any single individual demarcate their own share of land. This is especially true in Northern Uganda where most land is dry and the pastoral communities have to move

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<sup>157</sup> Op.cit note 35 at p.

<sup>158</sup> The Parliament of Uganda; Report of The Committee on Physical Infrastructure on The Mortgage Bill, 2007 February 2009 at p. 5

around looking for greener pastures. For such a community individualization of land may not be a matter for choice.<sup>159</sup>

Families occupying customary land may not be protected once such land is subjected to a mortgage transaction since no criteria has been set for creation of such mortgages and they are therefore prone to fraud and it is in dispute whether the customs of the community will allow for the land to be mortgaged or even sold. It is in doubt that customary owners will be able to enjoy these privileges; there will be very few customary land tenure systems that will permit these privileges. It remains to be seen that customary land will meet the challenges of the land market and not be found wanting in many respects considering that no particular criterion has been laid out to ensure enjoyment of such privileges and as noted, mortgaging of customary land could cause social unrest.<sup>160</sup>

Generally, it should be noted that though the law purports to recognize customary tenure, it is treated as a transitionary and secondary tenure that will one day cease to exist after every community or individual has converted their land holding to freehold, this is clear since there is only provision for conversion to freehold<sup>161</sup> and there is no reverse process of transforming freehold into customary tenure. This renders the

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<sup>159</sup> *Op.cit* note 35 at Pg 9

<sup>160</sup> Per Abdu Katuntu, Article by C. Bekunda and J. Namutebi “*Mortgage Bill Passed*” *The New Vision*, 25<sup>th</sup> March 2009 at Pg 13

<sup>161</sup> Article 237 (4) which provides that all Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and land under customary tenure may be converted to freehold land ownership by registration. Similarly, *section 4* of the Land Act provides for acquiring of a certificate of customary ownership and *section 9* provides for conversion of such land into freehold tenure.

provision allowing for the mortgage of customary land migratory to the customary land owners with the end result being that they will have to convert their land to freehold tenure.

The Act under *Section 17* provides for transfer of mortgages by both the mortgagor and more importantly the mortgagee. A mortgagor may do so by transferring his or her obligations under the mortgage to another person. Similarly, the mortgagee may deal in the mortgage by transferring his or her entire mortgage portfolio including that of a particular mortgagor to another financial institution. The transferee of the charge having paid the market price for the security in question thereafter collects all payments due under the mortgage.<sup>162</sup> These can only be exercised with notice to both parties which is not provided for in the Act and is intended to allow growth and development of the mortgage industry in Uganda. Hopefully, this will pave way for securitization to take our finance industry to another level.<sup>163</sup>

There is however no mention of how a mortgage can be transferred by the mortgagor and it is really curious how one would allow to take up someone's obligations under a mortgage without benefiting in any way.

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<sup>162</sup> Young J in *Silkdale Pty Ltd v. Long Leys Co Pty Ltd* (1995) 7 BPR 14414 at 14415 that the bona fide purchaser who takes a legal transfer of the mortgage at a discount is entitled to be repaid the full face value of the mortgage debt.

<sup>163</sup> Supra note 97.

#### 4.2.7 Reinforcement of the Equity of Redemption

*Section 32* codifies the equity of redemption, keeping it alive at all times until an agreement for the purchase of the property has been reached.<sup>164</sup> Where the mortgagor raises the money for the repayment of a mortgage and a sale is not yet concluded by the mortgagee, the mortgagor may stop the sale by paying to the mortgagee the money secured by the mortgage or so much of it as remains unpaid.<sup>165</sup>

This is in line with the principle in *Cheltenham & Gloucester Building Society v. Norgan* which provides for the rules and remedy in applying the option given to the mortgagor to seek payment instead of continuing with foreclosure<sup>166</sup>. In suspending the possession proceedings, the court should be satisfied that the mortgagor is able to pay the arrears within the period agreed upon for completion of payment. If the court sees the ability to pay then the installment payments will commence. However, if the court deems the mortgagor unable to pay, the latter is given the option to seek the court's permission to

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<sup>164</sup> The Equity of Redemption is an expression used to encapsulate the totality of the borrower's rights in the property, subject to obligations imposed by the mortgage as per J. Stevens and R.A. Pearce, *Land Law* 2000 London Sweet and Maxwell at pg 395. The mortgage should be capable of redemption while the asset subject to mortgage still has some genuine residual value. This is illustrated by two contrasting cases; In *Fairclough v. Swan Brewery Co. Ltd* [1912] A.C. 565 a 172-year lease was mortgaged on terms that it could not be redeemed until six weeks before the lease expired. The Privy Council held that this contractual fetter on redemption was invalid since it made the mortgage for all practical purposes impossible and there would have been almost no residual value. By contrast, *Knightsbridge Estates Trust Ltd v. Byrne* [1939] Ch. 441 a commercial mortgage provided that the loan could not be redeemed or called in for a period of 40 years. The property was freehold and would still have some significant residual value at the end of the mortgage period. In the view of the Court of Appeal, there was no reason to set the mortgage aside. It could not be seen "as anything but a proper business transaction." This equity of redemption is too recognized in Ugandan law. In *Matambulire v. Yozefu Kimera* CA No. 37 of 1972 (High Court of Uganda); [1975] HCB 150, Ssekandi Ag. J lays down the principle that the equity of redemption is inviolable.

<sup>165</sup> Walker LJ in *Browne v. Ryan* [1901] 2 IR 653 at 676 contended that when a transaction is declared to be a mortgage, the mortgagor is entitled to get back his property as free as he gave it on payment of principal, interest and costs and provisions inconsistent with that right cannot be enforced. The equitable rules, 'once a mortgage always a mortgage,' and that the mortgagee cannot impose any 'clog or fetter on the equity of redemption', are merely concise statements of the same rule.

<sup>166</sup> [1996] 1 ALL ER 44 (CA)

acquire possession of the mortgaged property to put it up for sale. This is in line with the principle of equity of redemption which should never be set aside.

This right to redeem is an inseparable incident of any mortgage.<sup>167</sup> Gurthrie Smith J stated that it is an old established rule that if money is lent on the security of land, the lender will get security and nothing more and if the borrower wishes to redeem the land within a reasonable time, he will always be allowed to do so even if the due date is past.<sup>168</sup>

#### **4.2.8 General Powers of Court to Grant Relief.**

The Act under *Section 34* gives the court general powers to grant relief against a mortgagee realizing a mortgage. The court may cancel, vary, suspend or postpone the remedy sought by the mortgagee for a period it considers reasonable or extend the time for a mortgagor's compliance with the default notice. This jurisdiction by court provides a temporary form of relief which may allow hard-pressed mortgagors to resolve their financial difficulties and repay the overdue mortgage money.<sup>169</sup> The Act is lauded for this provision as mortgagors have no where else to seek refuge if their rights are being infringed by the mortgagees who usually have the upper hand except from court which is usually inclined to protecting the mortgagor's security through the equity of redemption.

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<sup>167</sup> Per Cory JA in *Re Shankman and Mutual Life Assurance of Canada* (1986) 21 DLR 131 at 134.

<sup>168</sup> *Erieza Wamala v. Musa Musoke* (1920 – 29) ULR 120

<sup>169</sup> Per Clauson LJ in *Redditch Benefit Building Society v. Roberts* [1940] Ch 415 at 420 contended that 'in proper cases, the wind was tempered to the shorn lamb, time being given for payment and so forth'

However, it should be noted that no specific grounds are set out for exercising these powers and court exercises unfettered discretion. It is important to point out that in such cases the court's duty is to act judiciously. The end result is that justice may more likely than not be done even if such justice impinges an individual's right to exercise freedom of contract and such a provision is contrary to the principle of freedom of contract since court is empowered to re-write the entire contract and no limit has been set out to the number of applications for relief that a mortgagor can make.

#### **4.3 Conclusion**

The main reason why the Mortgage Act came into existence was to consolidate the laws relating to mortgages in Uganda, repeal and replace the Mortgage Act with the rationale being to cover up the gaps in the prevailing law. The Mortgage Act has however fallen short on a number of provisions as it has many red flag issues which will evidently cause unrest with among different communities in Uganda and force lenders to review their whole approach to mortgage business most probably negatively if provisions of the Act are left as they are. The provisions of the Act are thus in urgent need for reform so as to heighten rather than destroy mortgage business in Uganda.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Introduction**

The purpose of this thesis was to critically analyse the provisions of the Mortgage Act 2009 indicating the possible implications to mortgage business in Uganda. The provisions of the Mortgage Act can be said to settle on the premise that the framers of the Act did not take into much account the social and economic situation in Uganda like the fact that Uganda is a country of diverse cultures. Some provisions of the Act are controversial, unsatisfactory and are likely to be intolerable by the Ugandan community once they are presented.

A comparative analysis was made of the law of mortgages in India and Tanzania with that of Uganda in an effort to find out where Ugandan law on mortgages falls short in comparison to the afore mentioned jurisdictions keeping in mind the different economic and social conditions of those countries. The prevailing Mortgage Act fell short on a number of principles and recommendations were made for Ugandan law to adopt some of the provisions in these jurisdictions.

From the analysis of the provisions of the Mortgage Act, many of them are controversial, impracticable and some appear incomplete. Provisions on spousal consent under *Section 5 and 6* appear impracticable and so do the provisions on mortgaging of customary land under *Section 7*. Similarly, the forms of the prescribed notices in the Act are not stated. Such provisions could negatively affect the

performance of mortgagees and mortgage business generally in Uganda. It is therefore imperative that law reformers join the other players in the economic transformation of the country to improve the current state of the provisions of the Act.

There is thus need for steps to be taken by the government and law reformers addressing some of the problems highlighted to enable the law to cope with the ever-changing circumstances and respond to modern growing needs for the development of Uganda's economy. This is premised from Aeschylus' contention that "*the laws of a state change with the changing times from generation to generation*"<sup>170</sup> It is critical that those efforts are enhanced until a stage where it is clear that the law will improve and boost the performance the mortgage industry in Uganda making it beneficial and helpful to all the parties involved.

Studying law relating to mortgages has resulted to a split decision on its legal significance. On one hand, the ideal and purpose enshrined in mortgage law balances the rights of the parties, provides limits and rules in the exercise of these rights, and offers remedies. The law allows people to use their property to secure loans on the premise that the elements of a valid contract are present and the transaction expresses fair dealings. Ideally, the law is as simple as this. On the other hand, a consideration of the actual cases shows that the application of the law is not as simple as it looks as mortgage law is subject to the particular circumstances of the case. Care thus ought to

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<sup>170</sup> Aeschylus, assessed at: [http://www.giga-usa.com/quotes/authors/aeschylus\\_a001.htm](http://www.giga-usa.com/quotes/authors/aeschylus_a001.htm) on 28th June 2009.

be taken in both framing and implementing these laws to avoid prejudice of any of the parties.

## **5.2 Recommendations**

The current position of the Mortgage Act is disputed on many levels. It is pertinent to make some recommendations for reform of the provisions of the Mortgage Act to make them suitable for the mortgage industry in Uganda.

### **5.2.1 Regulation of Interest rates**

There is need to regulate the interest rates set by banks and it is imperative that the sector be controlled and regulated to ensure that it is properly organized and run on sound commercial principles.<sup>171</sup> Interest rates on mortgages need to come down to give an impetus to the real estate industry in Uganda. There are no set limits imposed by the Central Bank for lending. Banks generally set their own lending limits. Each bank follows its own guidelines. The Central Bank is not too stringent and it is generally variable in the market. A drop in the current interest rates that are so high<sup>172</sup> could have a minor impact on inflation, as reduced interest rates make borrowing more attractive, and stimulate the population to spend more but lower interest rates could help develop and revamp the mortgage industry.

However, as noted by Emmanuel Mutebile prudent and flexible macroeconomic management together with smarter financial market regulation and risk-based banking

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<sup>171</sup> G.P. Mukubwa, "Essays in African Banking Law and Practice" (1998) Uganda Law Watch at p. 2

<sup>172</sup> See S. Juuko "Interest Rates to Remain High" as he states that the rates show that some banks charge as high as 24%. The New Vision 4<sup>th</sup> June 2009. See also S. Juuko, "Commercial Banks Increase Interest Rates" The New vision 30<sup>th</sup> January 2009 where Standard Chartered bank increased its shilling prime lending rate to 19.5 % from 18.5%, while Stanbic bank, which had the lowest rate in the sector, has also revised the rate upwards to 18.5% from 16% and DFCU from 19% to 20%. Assessed at; <http://allafrica.com> on 23<sup>rd</sup> June 2009.

supervision will enable Uganda to maintain sound economic fundamentals and to adjust to the current harsh global environment.<sup>173</sup> Therefore the operation of bankers ought to be supervised by the government or the central bank to help boost the performance of mortgage business in Uganda and similarly avoid situations like that in the US.

### **5.2.2 Lodging of a caveat by the spouse on the matrimonial home: Viable option to impersonators.**

With regard to mortgage of a matrimonial home, the Act is in need of a provision which imposes a duty on the mortgagor to show proof of his marriage and a requirement for a statutory declaration from the spouse or spouses of the mortgagor to avoid situations of impersonators. The provision should further create an obligation upon a spouse to lodge a caveat on the property comprising the matrimonial home. This would reduce on the number of cases where spouses mortgage their matrimonial homes as the caveat would be clear caution to the mortgagee that someone else has claims to that property.

### **5.2.3 Guidelines for mortgaging of customary land.**

For the provision on mortgaging of customary land, little is known about such mortgages, or how the system could be supported and for this, clear guidelines should be included in the Act to show how these mortgages can be practically done. In framing this provision as study ought to be carried out among the different communities and tribes in Uganda to get a comprehensible picture of the situation on

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<sup>173</sup> Prof. Emmanuel Tumusiime Mutebile: *The Global Financial Crisis – Impact On Uganda And The Policy Response*. Speech at the EABC Workshop, Arusha, Tanzania, 4 March 2009. Assessed at; [www.bis.org/review/r090512d.pdf](http://www.bis.org/review/r090512d.pdf) on 23rd June 2009

the ground and all their cultures and practices ought to be put into consideration. For instance, the different cultural practises of the different tribes in Uganda as in some places land is communally owned while in others it is held on an individual basis. This would help to cater for the problems likely to be associated by subjecting diverse cultural practices and tribes to a similar law.

#### **5.2.4 Formula determining quantum of compensation upon prepayment.**

The Act under Section 14(2) provides that a discharge shall be made in the prescribed form which form is not stated. A formula thus should be included in determining the value of repayment in case of early repayment to avoid any uncertainty. This formula should represent the amount of the difference between the amount the lender would have earned under the security agreement and the amount he would earn at the current market rates in a substituted investment.

#### **5.2.5 Provisions for consumer mortgages and commercial mortgages.**

The Act should specifically provide for consumer mortgages and commercial mortgages. A consumer mortgage is a loan secured by real property through the use of a note which evidences the existence of the loan.<sup>174</sup> A commercial mortgage on the other hand is one secured by real estate and in which the real estate is used for business purposes.<sup>175</sup>

With this different terms should be put on these mortgages and better terms ought to be given to consumer loans to enable many Ugandans to own homes.

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<sup>174</sup> Assessed at: [http://en.wikipedia.org/wiki/Consumer\\_mortgage](http://en.wikipedia.org/wiki/Consumer_mortgage) on 23rd June 2009

<sup>175</sup> Assessed at: [http://www.investorwords.com/960/commercial\\_mortgage.html](http://www.investorwords.com/960/commercial_mortgage.html) on 23rd June 2009

#### **5.2.6 Professionalization of Valuation.**

There is need for professionalization of valuation. The capacity of valuers should be built to enable them do a more professional job and provisions should be included in the Act to give a standard criteria and guidelines for valuation and personal liability and responsibility of valuers for acts of under valuing or over valuing.

#### **5.2.7 Mortgagee's remedy against employees.**

With regard to valuation of the land, there is a high likelihood of valuers to collude with clients when valuing the mortgaged property which in turn would cause losses to the banks and there is no provision for a remedy for the mortgagee against their employees. A provision should be included to effect to enable mortgagees and bankers to bring legal proceedings against their employees like valuers who may recklessly or intentionally cause loss to the banks.

### **5.3 Conclusion**

The proposal to improve the law relating to mortgages in Uganda with the framing of the Mortgage Act was a significant step in consolidating the prevailing laws. The Act, however, falls short as a number of provisions were framed without regard to the social and economic situation in Uganda. For the Mortgage Act to achieve its intended objective there is need to amend the provisions with consideration to the proposed measures in this study.

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