A CRITICAL ANALYSIS OF THE IMPACT OF MORTGAGE TRANSACTION ON UGANDA'S ECONOMY

BY

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JUNE, 2019

Declaration

I do hereby declare that the work presented in this dissertation arises out of my own research; I certify that it has never been submitted or examined in any university as an academic requirement for any award.

Sign Date

.... 29th/06/2019 ....

NYABWONGO APOLLO

Approval

This dissertation has been submitted with the approval of Dr. Magnus Chima as the university supervisor.

Signed

Dr Chima

.... (Supervisor)

Date of Approval

29th/06/2019

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Dedication

This research is dedicated to the Almighty God, my dear beloved parents. I also dedicate this work to the people who have been so close to me and also not forgetting all my classmates whom we have endeavored to accomplish this journey together.

Thank you All!

Acknowledgement

I am deeply indebted to my supervisor Dr. Magnus Chima for his overwhelming support and supervision in the compilation of this research; you have not only been a supervisor to me but also a role model.

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Lastly but not least, I would love to acknowledge all my former classmates and everyone who has been of great importance to the conclusion of this research.

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Abstract

This study was conducted in Central Uganda with the research entitled 'A critical analysis of the impact of mortgage transaction on Uganda's development. Uganda economy is smallholder agro-based employing over 80% of the population which is mostly rural. Women contribute the bulk (over 70%) of the agricultural labour force. Traditionally proceeds from these activities mostly accrue to men as they perceive themselves as owners of the land which women cultivate and as heads of households. On the other hand, a substantial proportion of men engage in either the informal self - employment or as wage earners in urban centres. This situation notwithstanding, the changing trends such as rapid urbanization, poverty and increasing number of femaleheaded households has also contributed to an increasing number of women joining the commercial sector both formal and informal. Currently the proportion of women in the informal sector particularly in urban centres is almost the same as that of men. An increasing number of women are involved in trade, real estate and service sector; yet, the chances of accessing credit both in the formal banking and the informal sectors is premised on possessing tangible collateral in form of immovable and/or movable property. Mortgaging enables the individual property owner to raise other forms of capital mainly credit to undertake or continue with other economic activities because of its impact on capital accumulation (Mugume: 2004). Access to formal credit is premised on the existence of negotiable security and availability of a reliable stream of income to service the loan. In Uganda's context, the most suitable negotiable security is a title deed arising out of registered land

Abbreviations/Acronyms

ARM:	Adjustable-rate mortgages
BOA:	Bank of Africa
BOQ:	Bill of Quantities
BOU:	Bank of Uganda
CRB:	Credit Reference Bureau
DTB:	Diamond Trust Bank
FRM:	Fixed-rate mortgages
HOA:	Homeowner's Association
LC1:	Local Council one (1)
MLHUD:	Ministry of Lands, Housing and Urban Development
MSMEs:	Micro, Small, and Medium-Size Enterprises
NEMA:	National Environmental Management Authority
NHCC:	National Housing Construction Company
NSSF:	National Social Security Fund
PSC:	Private sector credit

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

This chapter presents the general introduction which includes the background of the study, the statement of the problem, the purpose of the study, the research objectives, research questions, scope of the study, significance of the study, the methodology and the literature review.

1.1 Background of the Study

A mortgage is a conveyance of a legal or equitable interest in property, with a provision for redemption, that is to say that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be conveyance.[1] A mortgage is defined under **section 2**[2] to include any charge or lien over land or any estate or interest in land in Uganda for security for securing the payment of an existing or future or a contingent debt or other money or money's worth of the performance of an obligation and includes a second or subsequent mortgage , a third party mortgage. In the case of **MUTAMBULIRE V KIMERA**[3] a mortgage was defined as a transaction whereby an interest in land is given as ***security*** for the repayment of a loan. The debt/ proprietor of the mortgaged land is called the mortgagor and the creditor is the mortgagee. The secured sum with interest is the mortgage debt.[4]

1 Sir Robert Meggary and H.W.R Wade, the law of Real Property, 5th edition, Stevens & Sons Ltd at page 913.

2 Mortgage Act 2009.

3 CA No. 37 of 1972

4 In Uganda a mortgage is the common form of security

such a way that it is a conveyance of a legal or equitable interest in property with a provision for redemption, that is to say upon repayment of a loan, or the performance of some other obligation, the conveyance shall become void or the interest shall be re-conveyed.[6] Possession of the property mortgaged remains with the mortgagor (the borrower), while the mortgagee (the lender) obtains some or all of the rights of ownership, or the right to obtain ownership, if the borrower defaults in payment.[7] Land is the form of property most usually mortgaged , but choses in action(rights to property as opposed to actual physical property itself), for instance a life assurance policy can be mortgaged by assigning, and goods by a conditional bill of sale , both subject to a condition that on repayment the property shall be reassigned to the mortgagor. A mortgage of goods is rare.[8]

The borrower is called the mortgagor otherwise defined under **section 2**[9] as a person who has mortgaged land or an interest in land and includes any person from time to time deriving title under the original mortgagor or entitled to redeem the mortgage according to his or her estate or right in the mortgaged property. The lender on the other hand is referred to as the mortgagee; also defined to mean the person in whose favour a mortgage is created or subsists and includes any person deriving title under the original mortgage.

The nature of a mortgage under the Mortgage Act[10] under **section 8** differs from the common law mortgage. It thus provides that a mortgage created under the Act takes effect as a security over the mortgaged land but shall not operate as a transfer of land thereby mortgaged. This was emphasised in **RE: FORREST TRUST TRUSTEE'S**

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6 Ibid.

7 **Swiss Bank Corporation v Llyods Ltd and others**. Buckley LJ stated that "the essence of this transaction by way of mortgage is that a mortgagor confers upon the mortgagee's proprietary interest in the property of the mortgagor,or undertakes in a binding manner to do so, by the realisation or appropriation of which the mortgagee can procure the discharge of the mortgagor's liability to him, and that the proprietor y interest is redeemed, or the obligation to create transfer of proprietor y interest is redeemable, or the obligation to create it is defeasible, in the event of the mortgagor discharging his liability. If there has been no legal transfer of proprietary interest but merely a binding undertaking to confer such an interest that obligation, if specifically enforceable, will confer propitiatory interests in the manner in equity.

8 Ibid.

9 Mortgage Act 2009

10 Act No. 8 of 2008

EXECUTORS & AGENCY CO. LTD V ANSON[11] ***Herring CJ.*** Described the effect of a mortgage created in this case confers on the creditor merely a group of powers to secure the money lent. The debtor(mortgagor) remains the owner of the land subject to fulfillment of his or her obligation under the Mortgage agreement.[12] Therefore it should be noted that although a mortgage created in the mortgage Act does not transfer ownership of the land to the mortgagee, it creates in the mortgagee's favour a separate and district interest in the mortgaged land.[13] At common law a mortgage took the nature of a conveyance of the debtor's title to the creditor on condition that upon repayment or performance of some other obligation the creditor should re convey the title to the mortgagor.[14]

Land law in Uganda recognises two distinct interests in property that is legal and equitable interests. The former are enforceable in any court and against any person, the latter are personal rights against a particular individual or individuals. Legal interests can only be created in the correct form for a particular type of property involved for instance a deed in the case of land. An equitable interest is either the result of an informal creation like a conveyance of land otherwise than a deed, or the result of a transfer of an existing equitable interest[15]

There are quite a number of ways of effecting a legal mortgage for instance by a lease to the mortgagee for a term of years,keeping the mortgage deed; But this paper will greatly concentrate on the a legal charge created by statutory law.[16] Bank mortgages are not intended to be investments and, therefore , they must possess as far as

11 [1953] VLR 246,at 256

12 John T. Mugambwa, Principles of land law in Uganda, Kampala, fountain, Publishers,2002

13 Ibid.

14 Matambulire v Kimera CA No. 37 of 1972 also see Meggary and Wade, The Law of Real property at page 913.

15 Ibid. at page 134

16 Mortgage Act 2009, RTA Cap 230 and the Land Act cap 227.

possible the same degree of liquidity found in other forms of security (such as pledges, liens and charges) taken by bankers to realise the security with a minimum of formality on the mortgagor's default in payment.

Section 3(1)[17] empowers a person (a proprietor of land) registered or under any form of land tenure, may by an instrument in the prescribed form, mortgage his or her interest in the land or a part of it to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition. **Subsection (4)** further provides that a mortgage created under subsection (1) shall only take effect when registered/. however, notwithstanding subsection (4) an unregistered mortgage shall be enforceable between the parties.

It should be noted that **section 3** does not operate to prevent a borrower from offering and a lender from accepting an informal mortgage or a certificate of customary ownership, certificate of title issued under RTA, a lease agreement; any other document which may be agreed upon evidencing a right to an interest which are referred to in **subsection(1)**[18]generally, in creation of a mortgage , there is always a duty of a mortgagee and mortgagor to act honestly and in good faith and to disclose all relevant information relating to the mortgage.[19] refusal or failure to disclose the relevant information commits an offence and is liable on conviction to a fine not less than 48 currency points but not exceeding 120 currency points or imprisonment not less than 24 months but not exceeding sixty months or both.

This legal mortgage is protected by sending to the Land Registry the Land certificate, the original charge certificate and a duplicate[20], an application form and the Land

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17 Mortgage Act 2009

18 Section 3(8) Mortgage Act ,2009

19 Section 4 Mortgage Act 2009

20 Section 49 provides that any lease or mortgage presented for registration may be in triplicate, and upon registration of that lease or mortgage shall be delivered to the person presenting the same for registration

Registry fee. In practice[21], an intending mortgagor picks a mortgage instrument (execution form) from the bank(mortgagee)[22] and fills in the information of the land which is the consideration of the the sum to be borrowed. This form also requires the mortgagor to state the amount he/she needs for the loan and the interest therein after stated/stipulated by the mortgage.[23] This form is brought back to the bank accompanied with supporting documents, a land title inclusive and this is always duplicated.[24] It is essential to ensure that the prospective mortgagor has a good title to the property that he/she offers as security. If there is any doubt, or the process of investigation could prove to be complicated, the investigation should be entrusted to a solicitor. This is more likely to be the case where the title to the property offered is not registered.[25]The intending mortgagor hands in his documents to the mortgagee(bank) and usually, its bank that takes the extra step to register a legal mortgage at the Land Registry in Kampala. With the original title and triplicates of the original owner's title., a bank official presents them at the Land Registry.[26]

1.2 Statement of the Problem

The value of property to be mortgages must be sufficient to cover the advance[27]. If a banker is considering taking a second mortgage on the property, it is essential to ensure that there is sufficient equity in property after the first mortgage has been repaid in full. The valuation is often undertaken by the manager or a senior member of staff, but a professional surveyor may be employed particularly when business or

21 Kiirya Charles, Risk Manager, Stanchart Bank, Kampala Head office.

22 Form 1 schedule 2 Mortgage Regulations, 2012 S.I No. 2

23 Regulation 17, Mortgage regulation 2012

24 Kiirya Charles, Risk Manager, Standard Chartered Bank, Kampala head office

25 David Palfreman,law of banking, M&E HandBooks,1980 at page 140

26 A fee of 15,000 uganda shillings is paid for the process.

27 Most banks work with independent valuers such as Knight Frank, East African Valuers and many more. ntending clients normally pay for these services separately and it depends on the location of the property.

unusual property is offered as security.[28] It should be noted that if he property to be mortgaged is vested in the names of joint tenants for instance husband and wife, both must execute the mortgage. If the signature of one party is forgery, the charge is wholly ineffective and does not even create a charge over the signatory's interest or in the proceeds of the sale of property.[29] **Section 5(1)**[30] provides that a mortgage of a matrimonial home including a customary piece of land is valid if any document for the application for the mortgage is signed by the spouse or spouses of the mortgagor living in that matrimonial home or if any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in the matrimonial home. For purposes of subsection(1) an intending mortgage shall take reasonable steps to ascertain whether an intending mortgagor is married and whether or not the property is a matrimonial home . On the other hand, and intending mortgagor shall make full disclosure to the intending as to his or her marital status and whether or not the property is the matrimonial home.

The above is also envisaged in the Land Act under **Section 38A(1)**[31] provides that every spouse enjoy security off occupancy on family land. **Subsection (3)** goes on to stipulate that the spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred to in **section 39** (sell, exchange, transfer,pledge, mortgage or lease and family land). The same is further discussed in **section 6**[32] to the effect that where a matrimonial home is the subject of the application for a mortgage shall satisfy himself or herself that the consent of a spouse if the mortgage is explained to the spouse or spouses in the presence of an

28 David Palfreman,law of banking, M&E HandBooks,1980 at page 140

29 Cedar Holdings Ltd v Green(1979) 3 ALL E.R 704

30 Mortgage Act No. 8/2009.

31 Land Act 227 .

32 Mortgage Act No. 8 of 2009

independent person[33]. To this end , the spouse or spouses may provide a signed and witnessed document to the effect that they have received independent advise on the mortgage which is being applied for and have understood and assented to the terms and conditions of the mortgage or that they have , notwithstanding the advise from the mortgagee , waived their right to take independent advise.

1.3 Purpose of the Study

The purpose of the study is to critically analyze the impact of the mortgage transaction on Uganda's economy.

1.4 Objectives of the Study

I. To assess the nature and requirements of a mortgage transaction in Uganda's legal framework.

II. To examine the necessity and rights of the parties involved in mortgage transaction in Uganda.

III. To investigate the impact of mortgage transaction on the economic development of Uganda.

1.5 Research Questions

I. What is the nature and requirements of a mortgage transaction in Uganda's legal framework?

II. What are the necessities and rights of the parties involved in mortgage transaction in Uganda?

III. What is the impact of mortgage transaction on the economic development of Uganda?

33 Section 6(2)

1.6 Scope of the Study

The research was carried out in Uganda, it investigated the legal and institutional framework governing mortgage transactions in Uganda, the study further carried out a comparison with other countries.

The study was carried out in a period of four to six months, this time period enabled the researcher to gather the required information for research drafting and presentation.

The research investigated the nature and requirements of a mortgage transaction in Uganda, it further investigated the necessity and rights of the parties involved in mortgage transaction in Uganda and further established the impact of the mortgage transactions.

1.7 Significance of the Study

The study is of importance to the Government of Uganda as it aims to investigate the impact of mortgage transaction to the economic development of the country and further assess the loopholes affecting the transaction of mortgages in the country.

The research is relevant to the parties involved in mortgage transactions in Uganda as it aims to avail all the necessary requirements and nature of mortgages in Uganda.

The research is also important to the researcher and other academic fraternity that aim to carry out a similar study in the law course as it brings in new information that is helpful to the academia.

1.8 Methodology

In order to achieve the objectives of the study successfully, a doctoral research was carried out with a qualitative approach with a combination of secondary sources of information including journals, articles, review of the legal laws of Uganda to help achieve the goal of the study. The study was finalized in a period of 4 months and in this time period the researcher drafted and analyzed the various journals and articles that have the relevant information to achieve the research objectives.

1.9 Literature Review

The study of Mortgage finance encompasses a substantial body of literature on a number of issues such as supply and demand factors (affordable housing supply, barriers to homeownership and property provision, measuring affordability), housing policy, and infrastructure concerns (e.g. presence of House Price Index). The research effort is anchored on the theory of demand and supply and on the modern portfolio theory posited by Harry Markowitz (1952) as an optimal framework to analyze the level of mortgage finance.

The theory of demand and supply has been focused on as the research problem is essentially one of studying the demand-supply equation of housing supply in Uganda, and its trend over the 2013-2016 period. The modern portfolio theory has been focused on as housing presents an investment opportunity for investors who are assumed to make rational choices when making investment decisions, hence the level of housing finance in Kenya depends on the extent to which the investors, in this case lenders and borrowers, perceive housing to be a profitable investment opportunity.

Mortgage markets have become important in economic analysis and macro-economic policy-making. Aguko (2012) concludes that mortgage debt changes may have macroeconomic consequences in addition to interest rate setting on mortgage debt having implications for monetary policy.

Njongoro (2013) sought to establish the effect of mortgage interest rate on the level of mortgage financing and a strong negative relationship was realized between mortgage interest rates and level of mortgage financing. However, there could be many more factors hindering the growth of mortgage finance in Uganda other than the interest rates in the economy and this research aims to study other factors at play. The main objective of this study was to examine the impact of the selected economic determinants to the level of mortgage financing in Uganda. The study focused on the effect of four specific factors. The factors are the lender loss rates experience, market structures, business cycles and funding considerations taken by mortgage finance providers in Uganda.

The rationale behind the above consent requirement is that women are a vulnerable group as they have a unique status when it comes to issues of property ownership. The 1995 constitution[34] and the republic of Uganda provides for the emancipation of women and this is reflected in the land(Amendment) Act, **section 38A**...this clause is designed to protect women's right over family land, to accord them security of tenure and an uninterrupted livelihood.[35]It should be noted that the above provisions of the law laud the recognition and honour the sancity of a matrimonial home as a highly regarded, placed and respected entity in the different and divert cultural arrangements in Uganda. Similarly, land is a very important source of livelihood for Ugandans. Women usually cultivate land, produce food both for sale and home consumption, they are greatly affected when deprived of this source.[36]

It should be noted that before registration any charge, a search of the Register Book is carried out to ensure that the proposed security and the customer's title to it are not subject to unacceptable encumbrances.[37]To this end, **section 201(1)** provides that any person may , on payment of the fee for the time being payable in that behalf inspect the Register Book during the hours and upon the days of business on payment of a fee and certificate copy signed by commissioner and authenticated by the seal of the office of titles shall be received in evidence in any evidence as prima facie proof of

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34 Article 26

35 Ibid.

36 Dorothy N. Kabugo; Assessing the implementation of the spousal consent clause of the land Act 1998 and upscaling advocacy for women's rights to access and control of land; A case for Kayunga District.

37 Standard Chartred Bank charges up to 50,000 Uganda shillings for searches, Kiirya Charles; Risk Manager.
(supra)

the original certificate of title, caveat or instrument and of all the matters contained or recited in or endorsed thereon respectively.[38]

The registry gives a Bank Advice Form (BAF)with the amount to be paid which one takes to the bank to pay. This consent form has a dual purpose that is to say it is used to pay for searching and also Stamp Duty.[39] Stamp duty is paid at a designated commercial bank.[40] It should be noted that for every procedure in which fees are paid,one first begins the procedure at the land registry obtains a BAF, Pays that amount due, takes the BAF to the bank, pays the amount plus bank fees and obtains a receipt that will later be presented against the land registry to complete the procedure.

The registrar will register the charge, retain the duplicate and the cover of the land certificate, and return the charge certificate to the bank. This consists of the remainder of the original land certificate sewn in with the original charge form. The mortgagee then retains the original and issues a duplicate title to the mortgagor and the normal procedure of obtaining a loan will be followed thereafter.

The registered mortgage is to this point protected by **section 54**[41] which provides that no instrument until registered in the manner provided by the act shall be effectual to pass any estate or interest in any land under the operation of the RTA or to render the land liable to any mortgage but upon registration of the same. Further **section 60**[42] is to the effect that whenever any certificate of title or any duplicate registered or issued under any of the provisions or otherwise under the operation of the Act contains any

38 Standard Chartered Bank Charges the client up to 50,000 Uganda Shillings for purposes of carrying out a search. However it should be noted that different banks charge different amounts for the same purposes

39 The Stamp Act stipulates that it has to be 1% of the value of the property being registered

40 Stamp Duty Act

41 Registrations of Titles Act cap 230

42 Ibid.

easement specified in the certificate, the statement shall be received in all courts of law as conclusive evidence that he or she is so entitled.

It should be noted that a mortgage is redeemed by the mortgagor repaying the advance. Once the mortgagee acknowledges receipt of the money the mortgage automatically terminates. **Section 14**[43] provides for the right to discharge on payment of all moneys and the performances of all conditions and obligations. **Section 15**[44] of the same Act obliges the mortgagor to sign s form prescribed discharging wholly or in part the land or any portion of the land from the mortgage.[45] This is further provided for under **Regulations 20.**[46] Alternatively but rarely, the discharge may be affected by a receipt for the money due in the form of reconveyance.[47]

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43 Mortgage Act 2009

44 Ibid.

45 Form 3 Schedule 2 of the Mortgage Regulation of 2012

46 Mortgage Regulations, 2012

47 David Palfreman,law of banking, M&E HandBooks,1980 at page 154

CHAPTER TWO

NATURE AND REQUIREMENTS FOR MORTGAGES IN UGANDA

2.0 Introduction

A mortgage is defined as a transaction where a land owner uses his or her land or interest in land as security for a loan. It is also defined in the case of MUTAMBULIRE V KIMERA as a transaction whereby an interest in land is given as security for the repayment of a loan. The debtor/proprietor of the mortgaged land is called the *'mortgagor'* and the creditor is the *'mortgagee'*. The secured sum with interest is the *mortgage debt*. The transaction is normally effected by means of a *mortgage deed*, in which the borrower promises to pay the debt at a specified rate of interest throughout the loan term. It also sets out the terms of the transaction, amount of the debt, the mortgage due date, rate of interest, and amount of monthly payments, among others. Throughout the mortgage, the mortgagor retains the right to recover his land from the charge created by the mortgage deed on the repayment of the loan sum advanced. This is referred to as *equity of redemption*. The rules applying to mortgages are defined in both common and statutory law.

2.1 Nature of the mortgage

Under the early English law, a mortgage took the nature of a conveyance of the debtor's title to the creditor on condition that upon repayment or performance of some other obligation the creditor should reconvey the title to the mortgagor. While the mortgagee held the legal title, the mortgagor retained the equity of redemption. The creditor was entitled not only to payment of interest on the loan but also to the rents and profits of the real estate. This meant that as far as the borrower was concerned, the real estate was of no value, that is, dead until the debt was paid in full.

The nature of a mortgage under the Registration of Titles Act[48] differs from the common law mortgage. Section 116 of the RTA[49] provides that a mortgage created under the act takes effect as security over the mortgaged land 'but shall not operate as a transfer of the land thereby mortgaged', therefore, it creates in the mortgagee's favour a separate and distinct interest in the mortgaged land, that is, He or she is a proprietor of a mortgage while the mortgagor is the proprietor of the mortgaged land[50].

The debtor remains the owner of the land, subject to his or her ability to pay off the loan, repair the property and grant the creditor the right to inspect the property at any reasonable time. Where the debtor breaches these terms the creditor is entitled to take possession of the property, appoint a receiver, sell the property or foreclose the loan. He or she can also seize other assets of the debtor if this is necessary to recover the loan's original value[1] This was emphasised in **RE: FORREST TRUST TRUSTEE'S EXECUTORS & AGENCY CO. LTD V ANSON Herring CJ** described that the effect of a mortgage created in this case confers on the creditor merely a group of powers to secure the money lent. The mortgagor remains the owner of the land subject to fulfilment of his or her obligation under the Mortgage agreement. Therefore it should be noted that although a mortgage created in the mortgage Act does not transfer ownership of the land to the mortgagee, it creates in the mortgagee's favour a separate and distinct interest in the mortgaged land.

Section 116 of the RTA[51] also states that 'if default is made in payment of the principal sum or interest secured or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or hereby declared to be implied in a mortgage, and the default is continued for one month or for such other period of time as is for that purpose expressly fixed in the mortgage, the mortgagee or his or her transferees may serve on the mortgagor or his or her transferees notice in

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[48] Cap 230
[49] Ibid
[50] Registration of Titles Act 1924, section 115
[51] Ibid

writing to pay the money owing on the mortgage or to perform and observe the aforesaid covenants, as the case may be.'

2.2 Mortgage requirements

Since a mortgage conveys an interest in real estate, it must be in writing. The actual wording of the document may conform to rather broad guidelines, but should contain essentially the same elements as the deed. The basic mortgage should contain the following elements: The mortgagor's legal name must appear. This implies that the mortgagor is of legal age for contracting. The mortgagee's name must also appear in the mortgage. The mortgage must contain words of conveyance or granting from the mortgagor to the mortgagee. The instrument must contain a legal description of the mortgaged property that adequately identifies it. Reference is usually made to the promissory note, in lieu of the amount of consideration that is found in a typical deed. The mortgage must be signed by the mortgagor. Although it is not essential for mortgagees to sign documents, they usually do.

Ugandan law does not impose any duty of care on a creditor exercising his or her powers of sale of a mortgaged property. However, the common law rules that the property should be properly advertised and publicly sold. Uganda's courts, according to the case of Mubiru v Uganda Credit and Saving Bank[52] have ruled that one advertisement, which specified the land for sale but omitted to mention that it had been developed and contained a house had the effect of under-valuing it. In another case the selling of a property through private treaty rather than public auction also led to it fetching less than its market value. In both cases damages were awarded to the debtor.

2.3 Creation of mortgages

Land law in Uganda recognises two distinct interests in property that is legal and equitable interests. The former are enforceable in any court and against any person, the latter are personal rights against a particular individual or individuals. Legal interests

[52] CS567/65

can only be created in the correct form for a particular type of property involved for instance a registered title in the case of land. An equitable interest is either the result of an informal creation like a conveyance of land other than a registered title, or the result of a transfer of an existing equitable interest.

2.4 Registered/ legal mortgage

Section 115[53] of the Registration of Titles Act empowers a proprietor of land registered under the Act to create a mortgage by signing a mortgage instrument in the prescribed form. The prescribed form is in the Eleventh Schedule of the Act. Upon the registration of the instrument, the land becomes liable as security in a manner set forth in the instrument. The mortgage is protected by section 61 of the Registration of Titles Act and whoever deals with land does so subject to the mortgage as an exception to the principle of indefeasibility of the title. In spite the registration of the mortgage instrument, it doesn't infer transfer of title.

This legal mortgage is protected by sending to the Land Registry the Land certificate, the original charge certificate and a duplicate, application form and the Land Registry fee. In practice, an intending mortgagor picks a mortgage instrument which is an execution form from the mortgagee and fills in the information about the land which is the consideration for the sum to be borrowed. This form also requires the mortgagor to state the amount he/she needs for the loan and the interest therein after stated/stipulated by the mortgage. This form is brought back to the mortgagee accompanied with supporting documents like the land title.

The intending mortgagor hands in his documents to the mortgagee who then takes the extra step to register a legal mortgage at the Land Registry in Kampala, with the original title and triplicates of the original owner's title.

[53] Cap 230

The registered mortgage is to this point protected by section 54 of the RTA[54] which provides that no instrument until registered in the manner provided by the act shall be effectual to pass any estate or interest in any land under the operation of the RTA or to render the land liable to any mortgage but upon registration of the same.

2.5 Equitable Mortgage

An equitable mortgage is a mortgage whereby the mortgagee does not acquire the legal estate in the property which is the subject of the mortgage but acquires an equitable interest in the property. All mortgages which are not legal mortgages are equitable. Thus an instrument creating a mortgage which does not satisfy the requirements of the Law or because the instrument does not satisfy formal requirements for a legal mortgage will be equitable.

As a general principle, any real or personal property which is able to be made the subject of a legal charge is able to be the subject of an equitable charge and also carries with it all the remedies incident to a legal mortgage.

2.6 Creating Equitable Mortgages

An equitable mortgage may be created by handing the deeds of title in property to another person in exchange for a loan, provided there is some writing evidencing the transaction. The lender may thereby acquire an equitable mortgage over the property specified by the deeds of title. There is no writing in such a transaction, and therefore the transaction cannot satisfy the formal requirements for a legal mortgage. Also, a beneficiary to a trust may only grant an equitable mortgage over trust property.

These mortgages are recognized under the **Registration of Titles Act** as shown of the Act[55]. There section gives three important provisions as shown below.

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[54] Ibid

[55] ***section 129***

Notwithstanding anything in this Act, 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 thereon whether accompanied or not by a note or memorandum of deposit subject to the provisions hereinafter contained. Every equitable mortgage as aforesaid shall be deemed to create an interest in land. Every equitable mortgagee shall cause a caveat to be entered as provided for by section 139. These provisions where shown in the case of **Barclays Bank DCO v GULU Millers Ltd**[56]

The company was the registered proprietor of a lease, it deposited its certificate of the title with the bank and at the same time executed a memorandum in which it stated that it had deposited the title deeds with the intent to create an equitable mortgage upon the property comprised therein as security for mortgage due to the bank payable on demand. When the respondent defaulted, the appellant sued for a declaration inter alia that had a right to sell the mortgaged property. The presiding judge dismissed the action on the ground that the appellant being an equitable mortgage could not in the first instance seek an order for sale. ***His Honour held that before an equitable mortgagee could seek an order for sale, it must in the first place ask the court to order the equitable mortgagor to execute a legal mortgage.*** However the bank appealed against the decision.

After a thorough analysis, **Sir Kenneth O'Connor P** suggested that he was not impressed with the argument of Mr. James that the company had been dragged through the court unnecessarily and that the court even if it had the power to order a sale, should in the first instance order a legal mortgage to be executed. It was the duty of the debtor to pay his creditor on demand. Failure to pay on demand is admitted. The company should have paid what was due, whether by arranging a transfer to a new mortgagee or otherwise, and if it didn't do so, it should have not complained when the bank sought to realize its security in any way open to it. He went on to say that since the ordinary way of enforcing an equitable mortgage is by foreclosure or sale under the

[56] **(1959)**

order of court and to him he saw no reason refusing the court to make such an order in that case. The other judges **Forbes VP and Windham JA** also agreed with him.

It is also important to note that an equitable mortgage could arise in a number of ways apart from the depositing of deeds of title. For example it could arise from a contract to grant a mortgage or an attempt to create a legal mortgage which does not comply with legal with legal formalities. However, it would seem that the Act only recognizes an equitable mortgage if created by way of a title deposit and protected by a caveat.

Therefore a mortgage is a conveyance of a legal or equitable interest in property, with a provision for redemption that is to say that upon repayment of a loan or the performance of some other obligation, the conveyance shall become void. A mortgage is defined under to include any charge or lien over land or any estate or interest in land in Uganda as security for the payment of an existing or a contingent debt.

2.7 Remedies of a mortgage.

The Mortgage Act[57] is An Act formed to amend the law relating to mortgages and for other matters connected therewith or incidental thereto. A mortgage is a transaction where one party, the mortgagor grants an interest in his property to another party the mortgagee as security/ collateral for a loan.

A covenant is defined by the oxford dictionary as 'a formal agreement or contract in writing.' it can be by lease deed or other legal contract.

2.7.1 Covenants to be implied in every mortgage.

This is in Section 18 of the Mortgage Act[58]; in every mortgage made under Section 118 of the Registration of Titles' Act there shall be implied covenants with the mortgagee

[57] Mortgage Act of Uganda
[58] Mortgage Act of Uganda

and his or her transferees by the mortgagor binding the latter and his or her heirs, executors, administrators and transferees that

He or she or they will pay the principal money mentioned in the mortgage on the day appointed in the mortgage deed, and will so long as the principal money or any part of it remains unpaid pay interest on it or on so much of it as for the time being remains unpaid at the rate and on the days and in the manner specified in the mortgage.

He or she or they will repair and keep in repair all buildings or other improvements which have been or are erected or made upon the mortgaged land; and that The mortgagee and his or her transferees may at all reasonable times until the mortgage is redeemed enter into and upon that land with or without surveyors or others to view and inspect the state of repair of those buildings or improvements.

2.7.2 Remedies upon breach of covenant

Section 20 of the mortgage Act 2009 clearly articulates the available remedies upon breach of covenant. Breach of covenant occurs when the mortgagor defaults to pay the mortgage installments as agreed in the mortgage deed or defaults in one way or another any of the conditions in the mortgage act.

The covenants implied in a mortgage that can be breached include;- Payment of the principle sum on the day appointed or agreed in the mortgage act, Payment of the rates charges, rent and any other outgoings as may be stated in the mortgage deed, Repairing and keeping all the buildings in a reasonable state of repair and any other improvements upon the mortgaged land, insuring by either insurance or any other means as may be appropriate that all resources will be available to make good any loss caused on the buildings on the land, making the good use of the land or property, leasing or sub leasing of the land etc.

In case there is breach of any of the covenants as per the mortgage deed, and the money secured by the mortgagor is made payable on demand, a demand in writing shall create a default in payment and where the mortgagor is in default of any obligation to pay the principle sum on demand, interest, or any other periodic payments or any part of it due under the mortgage, or conditions, express or implied in any mortgage, the mortgagee may serve the mortgagor a notice in writing of the default and require the mortgagor to rectify the default within 45 working days and this notice shall adequately inform the mortgagor of the nature and extent of the default made by the mortgagor and where the default consists of non-payment of money due under the mortgage, the money should be paid within a period not exceeding 21 days.

If the defaults are not rectified by the mortgagor with in the time specified under this act, the mortgagee can proceed to exercise some of the remedies as provided for in section 20 of the mortgage act as amended; The mortgagee may require the mortgagor to pay all the money owing on the mortgage. This can be done as per the mortgage deed i.e. if the deed specifies that breach of any terms specified therein will lead to full settlement of the amount outstanding on the mortgage.

The mortgagee may sue the mortgagor or obligor if any on the covenant. The mortgagee may realise his/her security under the mortgage which may be done by appointing a receiver, taking possession of the mortgaged land and foreclosure. A receiver is any person appointed by the mortgagee to collect money on behalf of the mortgagee. This 'person' can be a debt collection company or a lawyer and the mortgagee reserves the right to retain or dismiss the receiver at any time. The receiver may be appointed in writing by the mortgagee herself under a power expressly provided in the mortgage in that behalf, in which case he/she shall be an agent. A receiver is a person appointed to receive income of the mortgaged land and to use the proceeds to reduce the mortgage debt. A receiver may also be charged with a duty to manage the land by, for example, making necessary repairs or carrying out improvements where so directed in writing by the mortgagee with the consent of the mortgagor or the court. The mortgagee may appoint a receiver if the power to appoint is expressly reserved in the mortgage agreement. In the absence of such powers, the mortgagee may apply to the court to appoint a receiver. The Mortgage Act provides that the appointment of a receiver is null and void unless made in writing and in accordance with the provisions of the section. It is submitted that the power to appoint a receiver does not arise unless the mortgagor is in default for a period of at least one month and fails to make payments following a written demand notice. Where mortgaged debt is payable on demand, a written demand for payment is equivalent to notice. In that case the mortgagee may proceed to appoint a receiver without further notice. Primarily, a receiver is employed to protect the mortgagee`s interest. He or she directly receives the proceeds from the land instead of the mortgagor receiving them. After payment of rates, taxes and other outgoings relating to the mortgaged land, the receiver must pay the mortgagee what is due under the mortgage debt and hand over the net balance, if any to the mortgagor. From a legal point of view, the main advantage to the mortgagee of appointing a receiver is that, although the mortgagee appoints the receiver to protect his or her interest, the receiver acts as an agent of the mortgagor irrespective of any agreement to the contrary. The effect is that the mortgagee is not liable to the mortgagor or secondary mortgagees for the receiver`s negligence or willful misconduct. It is mainly for this reason that mortgagees appoint a receiver instead of entering into possession. The drawback is that a receiver has to be paid a commission for his or her work out of the income of the mortgaged property. Indeed, the receiver`s remuneration has priority over any other payment due from the income collected. Therefore, where the property does not generate any income, for example, where the mortgaged land is a residential house occupied by the mortgagor, appointment of a receiver may not be economical except as a step towards the sale of the property.

The receiver has the following powers; Power to enter into possession of the mortgaged land. Power to collect by demand or action in the name of the mortgagor or mortgagee, all income accruing to the mortgaged land. Where a mortgagor is in breach of any covenant, the mortgagee may enter into possession of the mortgaged land for the purpose of realizing his or her security. The right of possession is enforceable not only against the mortgagor but also against any person who derived title from the mortgagor subsequent to the mortgage, for example, a lessee and an assignee of the mortgaged land. Prior to taking possession the mortgagee must serve the mortgagor notice of not less than sixty days of his or her intention to enter. The Act does not state how possession may be effected. It is suggested that the mortgagee takes possession by physically entering and taking over control of the mortgaged land from the mortgagor. Where tenants occupy the mortgaged premises, the mortgagee takes possession of the premises by serving them an unequivocal notice to pay rent directly to the mortgagee.

Where a mortgagee enters into possession he or she by law assumes certain powers and duties. The mortgagee`s power include collecting any income from the mortgaged land, including arrears which the mortgagee would have been entitled to had he or she been in possession from the date of the mortgage. The principle duties of a mortgagee in possession are to account not only for income (whether in cash or in kind) he or she actually receives from the mortgaged property but also that which he or she ought to have received by exercise of due diligence. Any such benefits must be set-off from the debt due. Where the mortgagee uses the mortgaged premises for own personal purposes for example, as an office, he or she will be held accountable for the market rental of the property. In addition, the mortgagee is accountable for unreasonable damage or neglect of the property due to his or her negligent to any remuneration for personally managing the mortgaged land. However, the mortgagee is entitled to reimbursement for the costs of repair and improvements he or she carries out to protect or increase the value of the mortgaged land. To the extent that the expenses incurred exceed the income from the mortgaged land, they become part of the mortgage debt at the same level of priority as the principal debt and earn the same interest.

Due to the heavy responsibilities imposed upon a mortgagee who enters into possession, it is not advisable for a mortgagee to exercise this remedy except as a preliminary step towards selling the mortgaged property. Alternatively, a mortgagee may avoid this responsibility by appointing a receiver to enter into possession. Power to give valid receipt for all income collected. Power to do any other act necessary or proper to manage the land including repairs as agreed upon in the mortgage deed. The mortgagee can enter into possession of the mortgaged land or can even choose to sell off the land so as to mitigate the loss or any other monies. Foreclosure is a legal process in which a mortgagee attempts to recover the balance of a loan from a mortgagor who has stopped making payments to the mortgagee by forcing the sale of the asset used as collateral for the loan.

Formally, the mortgagee obtains a termination of the mortgagor's equity right of redemption either by court order or by operation of law (after following a specific statutory procedure). The mortgagee may lease the mortgaged land or where the mortgage is of a lease, sublease the land. The period of the sublease should not be longer than the lease term.

2.8 Remedies of an Equitable Mortgagee

An equitable mortgage refers to an unregistered mortgage created upon land. In Equity, a contract to create a mortgage was treated as a promise by the debtor to execute a legal mortgage when called upon to do so. Since Equity considers as done that which ought to be done, such an agreement created an equitable mortgage. In Barclays Bank D.C.O V. Gulu Millers Ltd, Sir Kenneth held that the law applicable to equitable mortgages is to be found in the doctrines of Equity.

In Barclays Bank (U) Ltd V. Northcote and another, basing on the principles laid down in Barclays Bank V. Gulu Millers Ltd, Ssekandi Ag J held that:...all remedies available to a legal mortgagee are also available to an equitable mortgagee but they would have to apply to the court in order to exercise them. The following procedure must be followed by the aggrieved equitable mortgagee; First, the mortgagee sues the mortgagor and obtains an order for an account of the outstanding mortgage debt.

He then seeks a declaration that he/she is entitled to a charge on the property in question to secure the amount outstanding plus interest and costs. This is then followed by an application that if payment is not made within a specified time, the mortgagee may realize the security by pursuing any or all of the remedies provided for in the Mortgage Act Cap 229.

CHAPTER THREE

NECESSITIES AND RIGHTS OF THE PARTIES INVOLVED IN MORTGAGE TRANSACTION IN UGANDA

3.1 Risks involved with customary mortgages

Mortgages on customary land have a number of risks since the land is by its nature not registered. Some of the major risks involved include the following. It is very difficult to ascertain the actual owner of the Land since there is no proof to show the rightful owner. It also makes it difficult to properly determine the boundaries of the land in question. As such, it would be a great risk to grant a mortgage on such land because it can hinder recovery in case of default.

In addition, it would practically be impossible to ascertain whether the land has any encumbrance. In essence, you can run a risk of having land which has already been sold to another person. In most cases, customary land is mainly inherited. As such, the land mortgaged might be family land which under section 7(6)[59] is prohibited from being mortgaged without the consent of the children or the spouse.

Customary land is land governed by customary rules which are limited in their operation in a particular class of persons. The rights to use, control and own is derived from being a member of a given community and are retained by performance of certain obligations.

3.2 Use of Customary Land as Security to acquire a Mortgage in Uganda

Section 3(1) of the Mortgage Act[60], 2009 provides that a person holding land any land tenure in Uganda may, by an instrument in the prescribed form, mortgage his or her interest in land or part of it to secure payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition.

[59] The mortgage Act, 2009
[60] Ibid

Under Article 237(3) (a) of the Constitution[61], Customary. Land tenure is one of the recognized Land tenure systems in Uganda. As such, a person with an interest in customary land can rightly mortgage it.

Customary Tenure is defined under Section 1(l) of the Land Act[62] to mean a system of tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which are described in section 3 to the Act.

The incidents of customary tenure are stated under section 3(1) of the land Act Cap 227. It states that customary tenure is a form of tenure applicable to a specific area of land, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies among others.

3.3 Registration mortgage under customary land

According to Section 3(8) of the mortgage Act, 2009[63], a mortgage can be created by deposit of documents of title or interest in land to the intending mortgagee. These documents may be any of the following; a certificate of customary ownership, a certificate of title, a lease agreement or any other document which may be agreed upon evidencing a right to an interest in land

The Applicant presents the full set of original documents and a photocopy of the same, to the same, to the Office of Titles for processing. The photocopy is stamped 'Received' and returned to the Applicant. The Applicant checks with the Office of Titles after 10 working days to confirm entry of the Mortgage upon the Register

The Applicant upon presentation of the photocopy stamped 'Received' collects the Duplicate Certificate of Title together with a Mortgage Deed. The Photocopy is stamped 'Returned' on completion. Documents Required: Two sets of Mortgage Deeds and

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[61] Constitution of the Republic of Uganda, 1995
[62] Land Act Cap 227
[63] Mortgage Act, 2009

Duplicate Certificate of Title. Set of Passport photographs and General receipts of payment Fees paid at the Ministry/District. Stamp duty 0.05% of the value of the Mortgage. Registration fees- UGX 15,000/=. If it is a company, an additional UGX 5,000/= is paid for perusal of company records. If the Mortgage affects more than one Title, UGX 5000/= is paid for each extra plot.

3.4 Remedies of mortgagee of customary land and tenancy by occupancy

In Jakana v Senkaa, it was held that the remedies under the mortgage Act[64] apply only where a mortgage is created under the registration of titles act. In that case the plaintiff advanced to the defendant a sum of money. As security for the loan the defendant deposited the title deeds of his land with the plaintiffs advocate. Under the terms of the contract, if the defendant failed to repay the money within one year from the date of the contract, the plaintiff was entitled to sell the land. When the defendant defaulted, the plaintiff brought proceedings for a court order that the defendant pays the outstanding amount or, in the alternative, that the land be transferred into the plaintiff's name. It was held that there was a binding contract and that the plaintiff was entitled to judgment for the amount of money claimed. With respect to the mortgage, it was held that for a mortgagee to enforce his or her remedies under the mortgage decree, the mortgage had to be registered under the registration of titles act, as either a legal mortgage or equitable mortgage. In the instant case, there was no evidence that the mortgage was registered under the act. It follows from this judgement that the mortgagees remedies under the decree do not apply to a mortgage over customary land or to a mortgage of a tenancy by occupancy. In that case, the mortgagee must resort to common law for his remedies. It is submitted that the common law remedies are the same as in the decree, except that a mortgagee will require a judicial order to realise his or her security. In addition, the mortgagee may enforce a foreclosure, which as we have seen is no longer available under the decree.

[64] Ibid

Clearly, there is a need for the legislature to harmonise the law of mortgage. In particular, the mortgage decree needs to be amended to bring it into line with the land act. For example, at present it is not clear as to the notices and their length that a mortgagee of customary land or tenancy by occupancy must give prior to enforce a sale. Since the decree does not apply to such mortgages, the mortgagee is not bound to follow the procedure prescribed by all the decree. However, it is suggested that the mortgagee should, as much as possible, use the procedure as a guideline.

3.5 Equity protection of a mortgagor

In Uganda, the laws applicable to mortgages are; the Registration of Titles Act, the Mortgage Act, the Land Act common law and the doctrines of equity. The latter applies to unregistered interests in land. Courts of equity have always sought to protect the mortgagor from being exploited through emphasizing his/her rights. It should be noted that all rights that accrue to a mortgagor are ancillary to one major right of redemption. Section 116 of the mortgage act provides that a mortgage shall have an effect as a security but shall not operate as a transfer of the land thereby mortgaged.

In short, the mortgagor has a contractual right to redeem at the agreed date and an equitable right to redeem within a reasonable time thereafter, which is the equity of redemption as seen in the case **Wamala v Musoke**.

The rights of the mortgagor include;

a) Right of redemption: This is a right to petition the courts of equity to compel the mortgagee to transfer the property back to the mortgagor once the secured obligation had been performed. Historically, a mortgagor (the borrower) and a mortgagee (the lender) executed a conveyance of legal title to the property in favour of the mortgagee as security for the loan. If the loan was repaid, then the mortgagee would return the property; if the loan was not repaid, then the mortgagee would keep the property in satisfaction of the debt. As the purpose of the agreement was merely to provide the mortgagee with security for the loan, equity took view that, as long as the advance and any interest was paid, the mortgagee should not be able to object to redemption. It is also an established doctrine that an equity of redemption is inseparably connected with the mortgage, that is to say, as long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon repayment of the loan and this right cannot be waived.

The right of redemption includes; a right to return of all documents relating to the mortgaged property, including the mortgage deed, in possession of the mortgagee, to obtain delivery of possession of the mortgage property from the mortgagee in case it is in his/her possession. Originally equity intervened only in cases of fraud by the mortgagee but soon came to recognise a general right to redeem in all cases as seen in **Salt v Marquess of Northampton.** Thus, equity allows the mortgagor to redeem even after the date fixed by the mortgage agreement for repayment has passed. However, once an order of foreclosure is made by the court, the mortgagee could take possession of the land and the mortgagor's rights in the property would come to an end.

Since the right of redemption is enforceable in equity only, it is subject to the general principle that equitable remedies are discretionary in nature and all the equitable maxims (particularly the 'clean hands' doctrine) will apply. Furthermore, in deciding whether redemption is possible, equity will look at the substance of the agreement, not its form.

b) There should be no clogs on the equity of redemption.

Traditionally, the courts of equity have ensured that the mortgagee did not introduce any artificial stipulations into the contractual arrangements to impede a mortgagor's ability to satisfy obligations and reclaim the property. Such impediments are clogs on the equity of redemption and they are regarded by law as void as seen in **Vernon v Bethell**. The principle of law is "once a mortgage, always a mortgage" which means that the mortgage shall not make any stipulation which will prevent a mortgagor who has paid principal, interest and costs from getting back his mortgaged property in the condition in which he parted with it.

c) Redemption should not be excluded.

A condition converting a mortgage into a sale, on failure to repay on the due date is unacceptable, as provided for in the Registration of Titles Act for example in **Samuel v Jerrah Timber and wood paving Corpn Ltd** where the mortgagee at the time of creating the mortgage was given an option to purchase the mortgaged property. This option if exercised would extinguish the mortgagor's right to redeem and was accordingly held to be void.

d) No postponement of the right to redeem

A condition postponing the right of redemption for a particular period, if repayment is not made on the due date may be rendered void as seen in the case **James Fairclough v Swan Brewery Co. Ltd** whereby the stipulations as to redemption were held to be void because the lessee could only redeem at a time when the lease was at the point of expiring. A stipulation for a penalty in case of default is regarded as a clog and is relieved against.

The modern mortgage is more likely to provide for repayment by instalments, spread over a number of years. However, it usually will contain a provision that if the mortgagor defaults on the payment of one instalment the whole sum will become due. In law, the mortgagor will then have to redeem the mortgage or lose his property forever, but equity will moderate the rigour of this in the way already described.

e) Collateral advantages

Where terms exist in a mortgage which secure for the mortgagee secures collateral benefits, it is question of fact in each case, whether it is a clog or not. Clauses that confer a collateral advantage in the context of a mortgage contract, thereby clogging or fettering the mortgagor's equitable right to redeem, are susceptible to being struck down by the court. On the other hand, neither a collateral advantage nor postponement of the redemption date provided it is within a reasonable duration of time necessarily amounts to a clog on the equity of redemption. However if the collateral benefit extends beyond the term of the mortgage, e.g. as permanent lease, it would be void. upon similar principles it was held in **Reeve v Lisle** that a mortgagor and mortgagee may by an independent transaction subsequent to the mortgage make a valid agreement which gives the mortgagee the option of purchasing he mortgaged property. If the mortgagee receives a collateral advantage in some other character than as mortgagee, he is not compelled to account for it as seen in the case White v London Brewery Co.

Discharge of a mortgage.

A mortgage is discharged when the equity of redemption is made actual. The discharge always takes place after the mortgagor has paid off the principal loan and interest, as well as any charges that may exist. Mortgages are discharged according to section 125 of the RTA Section 125 of the RTA includes, The release form is in the12th schedule of the act. The form has got to be signed by the mortgagee and attested by a witness. The form should mention that the land has been discharged. An entry of the date of discharge is made on the original and duplicate of the certificate of title. After it has been discharged, the land immediately ceases to be a mortagage.

Equitable mortgages are discharged by withdrawal of the caveat under section 139 of the RTA. The duplicate of the certificate of title is then handed over to the proprietor of the land where the release has been registered upon.

Where the land is unregistered.

Where the mortgage is upon land that is unregistered, it is discharged according to the terms that have been set out in the document creating the mortgage. Where there's no applicable law, the doctrine of common law and equity will apply.

CHAPTER FOUR

FINDINGS

4.1 Impact of Mortgaging to Uganda's economy

The Ugandan National Development Framework, the National Development Plan (NDP) provides a direct channel to accessing credit to both small and medium enterprises (SMEs). With the adoption of liberalization policies in Uganda, the expectation was that financial mortgaging would increase. But this study carried out almost a decade after economic liberalization revealed a formal mortgaging rate of 8% of titled land[65].

Ozlem (2014) attributes low rates of using land as collateral to two basic factors; one is the high interest rates associated with mortgaging (above 20% in Uganda) and which borrowers cannot afford. In other words, high interest rate makes it too costly for title owners' to sacrifice their land. The second is the uncertainty of returns to service the loan which is exacerbated by a business culture where rampant corruption makes business transactions too risky for the title owner to pledge the land. To many land title holders, mortgaging is analogous to sacrificing not only the land but also the premium.

The third endemic factor for Uganda and indeed in other developing countries is the cost of bringing the land under legal title. In Uganda, land holding is still under customary tenure; that is, it bears no legal or technical description. Consequently, less than 30% of the land in the country is presumed to be titled.

Thomson and Buckle (2015) argued that subprime mortgage loans are highly priced because they have high administrative costs. Lending firms register losses due to high default rate and long redemption duration. Existences of subprime markets enable people to acquire houses other than being in rental properties. Mortgage financing enables acquisition of mortgage properties by able potential homeowners through scheduled repayment and to the lender, it is an avenue of revenue generation since

[65] Sebina-Zziwa et al. 2004

there are interest charges. Saxton (2017) proved that due to default rate, mortgage institutions have resorted to help their clients to reduce the incidences of default. These include advancing capital payment holidays where clients are allowed to repay their interest alone for a specified period, moratorium which involves deferment of repayment of principle and interest for a specified period during shortfall or decline of income of homeowners, by extending the repayment period which enable clients to pay less or little monthly repayment.

CBK (2009) surveyed the housing supply in Kenya and documented that 1.5 percent of homeowners acquired their houses through mortgage financing credit while a third of homeowners acquired their houses through inheritance; half of Nairobi homeowners bought their houses while the percentage is negligible at 2 percent for other provisions. In Nairobi, 70.3 percent of real estate properties are permanent and 23.7 percent of homeowners are willing to use their property to access loans.

In their paper, Hilbers et al., (2011) concluded that real estate development markets should be regulated and monitored on various occasions since unbalanced prices of real estate property lead to economic financial distress. Due to the international financial crisis experienced, property market tends to be controversial since studies have shown that banks and mortgage institutions engage in predatory lending practices by providing loans to borrowers who are unable to service the loans. This eventually leads to high default rates and seizure of collateral assets.

On the other hand, subprime mortgage institutions provide credits to borrowers who couldn't have accessed the credit market due to high interest rates. There are variety of ways from which one can secure loan. Loan can be secured on range of assets ranging from real estate, business stock, financial instruments, motor vehicle, equipment, or receivables (Chukwuma, et al., 2013).

While movable properties are highly used as collateral in developed countries, in developing and emerging countries of Africa real estate is pointed as highly preferred (Fleisig, 2016). The prevention of movable properties from the same countries have been contributed by three main barriers like the difficult, uncertainty and high cost of creating security interest, the slow and expensive process of enforcing security interest as well as the flaws in the perfection of security interest.

Binswanger & Rosenzweig (2016) provide that financial institutions frequently prefer land and other real estate as collaterals for credit operations because among other reasons, land is immobile and therefore is difficult to move or hide, its depreciation is small and its value is not eroded by inflation, the value of real estate reflects its location and attached investments and that; its physical properties are less amenable to destruction and abuse than other properties such as machinery and livestock. Although real estate is highly preferred security by Banks and Non-banks financial institutions, the right to the same asset has to be adequately documented (Bruce-Trum & Adu-Darko, 2013).

Desoto referred undocumented assets as dead capital of which one to be able to benefit from it must revive by having a title deed once the same is registered. Fader et al.,(2018) underlines that the registered land title as collateral reduce transaction costs because the property rights over it are clearly defined and guaranteed by the state. It also reduces information costs as it enables both lender and borrower to gain access to the same information in the land registry, and infact often with lender receiving guarantees about the aunthecity of the registered information on land. From the foregoing then banks' preference of land titles as collateral is highly related to the reduced transaction and information cost and certainty of property rights associated with registered land titles.

Nevertheless, Dower and Potamites, (2005) added that Lenders needs for land titles is not only for their collateral value but also for the informational value. Having a land title provides information about unobservable circumstances such as ones degree of intergation into the formal rules, business minded characteristics or condition of the property as it is regulated by building rules. Possessing land title signals creditworthiness due to its lengthy and cost process of acquisition. This implies that, land titles are used because of what they signal to the bank about the loan.

Feder & Raparla, (2018) stresses that on any case where foreclosure is problematic due to political, social, legal or institutions reasons the practice of using the same assets as loan collaterals would vanish. The same has also been supported by Markowitz (2012) on his theory of investment which centered on the idea that "Individuals are utility maximizers, they will always switch from one investment to another which has the same expected return but less risk, or one which has the same risk but greater expected return or one which has both greater expected return and less risk". Having the same in mind, given the market constraints any property of which its disposition is difficult due to any reasons as pointed above, its use as loan collateral; is expected to vanish or else harsh conditions will be introduced by lenders to cover the market constraints.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The creation of mortgages is an essential part of the banking industry in Uganda and plays a vital role in the financial sector as it is the creation of securities, such as mortgages which forms the backdrop of financing transactions. The changes introduced by the Regulations, especially in relation to creation of mortgages over matrimonial property and the court's powers to adjourn or stop the exercise of the statutory power of sale by financiers have a resounding effect on the industry. The new Regulations create additional obligations of diligence on the part of financiers to ensure that that there are no factors which could invalidate their security or act as a fetter to enforcement and banks and financial institutions should take note of the new developments.

Real Estate Development in Mukono district is at a very high speed of which this have called out a lot of researchers to come out so as to find what the sources of finances are for the investors. There are two ways of funding real estate development projects that is through equity and debt financing of which equity financing is referred to mostly to mean personal savings and is always considered first before opting for debt financing. This have left a lot of real estate developers to remain in business for a long period of time as they have decided to use the little they have to get the loans from the banks. This is as the result of the banks and other financial institutions taking a lot of time to process the approvals and when getting the approved plans from the Ministry of Lands, Housing and Urban Development (MLHUD). In addition, it requires a lot of time to follow up which always makes it one month or more depending on the financial institution. Therefore, this has made people of the study to always forget about mortgage financing whenever they want to develop housing units.

5.2 Recommendations

This is to be done by the financial institutions such as Barclays, Equity, Centenary and Housing Finance Banks with the help of the government to set the standard interest rates that is favourable to the citizen of Uganda who wishes to go for mortgage financing so as to raise funds to develop real estate in Uganda.

The banks such as Centenary Bank has to come up and raise the number of the staff in the mortgage department so as to reduce on the congestion in the banks and reducing the time that is spent when processing Mortgage loans.

The financial institution should go ahead and put a strong and capable expert in the department that will ease the process of mortgage loan processing.

The government of Uganda should work in hand with the financial institutions to reduce on the chain that is passed through so as to get your plan approved and if it is done, it will provide confirmable situation for the borrowers to go for mortgage financing as it will reduce on bureaucracy thus an advantage to both parties.

The government of Uganda together with the financial institutions should work together to set up seminars that will be focusing on the discussions concerning the importance of owning a home so as to attract more people to get mortgage loans from the banks and micro finances in the country and if this is done real estate development will be at its highest point.

The financial institutions should reduce the equity needed to be deposited into borrower's bank account before requesting for the mortgage loans so as to ease the way to get mortgage loans, this can be done by the government as they will have to subsidize to reduce on the money needed before the mortgage loan is processed.

Too many fees and charges serve only to increase the confusion clients suffer. Respondents suggested that in as far as it is possible, the number of different fees should be reduced. Multiplicity of fees makes the product seem very expensive in the mind of the client and could constitute an entry barrier.

Banks that offer mortgages should ensure promptness of the authorization and approval process of mortgage loans and appropriateness of the approval process.

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