

MZUMBE UNIVERSITY

FACULTY OF LAW

**ENFORCEMENT OF MORTGAGES BY COMMERCIAL BANKS IN
CIRCUMSTANCES INFLUENCED BY UNDUE INFLUENCE: ANALYSIS OF
THE LAW AND PRACTICE**

BY

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REQUIREMENT OF THE AWARD OF DEGREE OF MASTERS OF LAWS
(LL.M-COMMERCIAL LAW) OF MZUMBE UNIVERSITY**

2019

CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by Mzumbe University, a dissertation entitled: **Enforcement of Mortgages by Commercial Banks in circumstances influenced by Undue influence: Analysis of the Law and Practice**. In partial fulfillment of the requirements for award of Master’s degree in Commercial Law of Mzumbe University

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However, I remain personally responsible for the errors and omissions which might be appearing in this Dissertation.

DEDICATION

This Dissertation is dedicated to my beloved daughter Isabelle Mzamiru Sempiga surely she has been a great inspiration in life. To my precious parents Mr. & Mrs. Vitalis Mtui for their love, prayers, continuous encouragement and financial support which made it possible to accomplish this work.

LIST OF ABBREVIATIONS AND ACRONYMS

A.C.	Law Reports, Appeal Cases
ALL ER.	All England Law Reports
BOT	Bank of Tanzania
Cap	Chapter
CAT	Court of Appeal of Tanzania
Ch.	Law Reports, Chancery Division
CRDB Bank Plc	Co-operative Rural Development Bank Public Limited
Edn.	Edition
Et. All	And others
GN.	Government Notice
HC	High Court
HCD	High Court Digest
HL	House of Lords
Ibid	Ibidem
J	Judge
LJ	Law Journal
LL.M	Legum Magister
Ltd	Limited
NMB Bank Plc	National Microfinance Bank Public Limited
No.	Number
Pg	Page
R.E.	Revised Edition
S	Section
T.L.R	Tanzania Law Report
V	Versus
Vol.	Volume

LIST OF STATUTES AND REGULATIONS

Tanzania

Principal Legislation

The Bank of Tanzania Act, Act No.4 of 2006

The Banking and Financial Institutions Act, Act No.5 of 2006

The Land (Amendment) Act, No.2 of 2004

The Law of Contract Act [Cap 345 R.E.2002]

The Law of Marriage Act [Cap 29 R.E.2002]

The Land Act [Cap 113 R.E.2002]

The Mortgage Financing (Special Provisions) Act, No. 17 of 2008

Subsidiary Legislation

The Land (Mortgage) Regulation, GN.43 of 2006

The Land Forms Regulation, GN. 71 of 2001

Kenya

The Law of Marriage Act, No. 4 of 2014

The Matrimonial Property Act, No. 49 of 2013

The Land Registration Act, No. 3 of 2012

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Aida Kyenkungu v. John Kyenkungu, Equator International and N.B.C. Limited
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Magdalena Baruti v. New Century Construction Co. Limited & N.B.C, Civil Appeal No.54 of 1996, (HC), Mwanza Registry, (Unreported).

Maria Goreth Katura Mutarubukwa v.NBC, Innocent Chacha Magoti Nshoya and Leonce Benedict Mutarubukwa, Land Case no.28 of 2004, (HC) Land Division, Dar-es-salaam, (Unreported).

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ABSTRACT

This study aimed at determining how Commercial Banks enforce Mortgages in circumstances influenced by undue influence. The research was conducted in CRDB Bank Plc and NMB Bank Plc situated in Arusha city. The problem that prompted this study was a concern that with all favourable development of the law, the manner in which informed consent is obtained is not shown. Instead, practice shows that men mortgage matrimonial homes in exclusion of their spouse(s), or they unduly influence them to give consent. The study employed the survey research design whereby a sample of 30 respondents was selected through systematic and purposive sampling technique from a fairly limited study area. The study used both interviews and documentary review to collect primary and secondary data respectively. Secondary data was collected from unreported cases, dissertations and thesis related to the study. The data collected was presented and analyzed qualitatively and inferences were drawn.

The findings indicate that wives out of love, trust and confidence are alleviated to reach agreements which defeat their rights of occupancy in the matrimonial home. In addition, husbands knowingly unduly influence wives to the use of a matrimonial home as a security. Moreover, banks should take reasonable steps to ensure that the spouses understood what they were doing while entering into a proposed transaction and that the consent to do so was informed and genuine. Further, they should conduct an inquiry on the mortgaged property and the persons interested to the property.

In the light of the above findings, it is recommended that awareness should be raised to the public at large on registration of interests, opportunity to nominate a legal advisor and seek independent legal advice should be ensured. Further, commercial banks should be mobilized to institute strict policies that will enable both spouses to participate in the process of obtaining financial loan when one wants to use a matrimonial home as a mortgage to secure the loan

TABLE OF CONTENTS

CERTIFICATION	i
DECLARATION	ii
COPYRIGHT	iii
ACKNOWLEDGEMENT	iv
DEDICATION	v
LIST OF ABBREVIATIONS AND ACRONYMS.....	vi
LIST OF STATUTES AND REGULATIONS.....	vii
LIST OF CASES.....	viii
ABSTRACT	xi
CHAPTER ONE	1
INTRODUCTION AND BACKGROUND TO THE STUDY	1
1.1 Introduction	1
1.2 Background to the research problem.....	3
1.3 Statement of the problem	8
1.4 Research objectives	9
1.4.1 General objective	9
1.4.2 Specific objectives	10
1.5 Research questions	10
1.6 Significance of the study	10
1.7 Literature review	11
1.8 Research methodology	18
1.8.1 Research design.....	18
1.8.2 Scope and area of the study.....	19
1.8.3 Population and Sampling Design.....	19
1.8.3.1Population	19
1.8.3.2 Sampling Techniques	20

1.8.3.3 Sample size.....	20
1.8.4 Types of data and data collection methods	21
1.8.4.1 Types of Data	21
1.8.4.2 Methods of data collection	22
1.8.5 Data Analysis Techniques.....	23
1.8.6 Limitation of the study	24
1.9 Summary	24
CHAPTER TWO	25
CONCEPTUAL FRAMEWORK	25
2.1 Introduction	25
2.2 Capital	25
2.3 Bank	26
2.4 Loans and security.....	26
2.4.1 Mortgage	28
2.4.2 Mortgage of a Matrimonial Home	30
2.5 Undue influence	31
2.6 Conclusion	33
CHAPTER THREE	34
THEORETICAL AND LEGAL FRAMEWORK	34
3.1 Introduction	34
3.2 Principles of sound lending used by commercial banks	34
3.2.1 Safety	34
3.2.2 Liquidity.....	35
3.2.3 Profitability	35
3.2.4 Loan purpose.....	35
3.2.5 The amount required	36
3.2.6 Reliability of Security	36
3.2.7 Duration of risk/advance	37

3.2.8 Time limitation and source of repayment	37
3.3 Rationale behind requirement for security	38
3.4 Types/forms of securities and collateral acceptable by banks	39
3.4.1 Guarantee	40
3.4.2 Chattel transfer instrument (CTI).....	41
3.4.3 Letter of hypothecation	41
3.4.4 Life insurance policies	42
3.5 Economic importance of bank lending transactions.	42
3.6 Legal framework governing the enforcement of mortgages by commercial banks in circumstances influenced by undue influence in Tanzania.	43
3.6.1 The Law of Marriage Act.....	44
The Land Act, No. 4 of 1999	Error! Bookmark not defined.
3.6.2 The Land (Amendment) Act, no.2 of 2004.....	45
3.6.3 The Land (Mortgage) Regulations, 2005	45
3.6.2 The Mortgage Financing (Special Provisions) Act of 2008.....	46
3.7 Conclusion	46
CHAPTER FOUR.....	47
DATA PRESENTATION, FINDINGS AND DISCUSSION	47
4.1 Introduction	47
4.2 Data Presentation	48
4.3 Research Findings.	49
4.4 Data Analysis and Discussion.....	49
4.4.1 The Validity of the mortgage securing the financial loan.....	49
4.4.2 The Effectiveness of Legal framework governing enforcement of mortgages commercial banks in circumstances influenced by undue influence.....	50
4.4.3 Challenges facing Commercial banks in Enforcement of Mortgages in circumstances influenced by Undue influence.	52
4.4.4 Strategies to be followed by commercial banks so as to ensure smooth enforcement of mortgages.	55

4.5 Conclusion	57
CHAPTER FIVE.....	58
SUMMARY, CONCLUSION AND RECOMMENDATIONS.....	58
5.1 Introduction.....	58
5.2 Summary of important findings	58
5.3 General conclusion.....	59
5.4 Recommendations	60
REFERENCES.....	62
APPENDICES	Error! Bookmark not defined.

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

Commercial banks play an important role in economic development of the people, and foster economic growth of the country through their intermediation role and financial services that they provide to the community and nation.¹ The credit facilities that they offer facilitate the exploration and expansion of productive investment avenues by individuals and institutional investors.²

Commercial banks and financial institutions among their important activities is the advancement of credit facility to the public.³ During lending the bank accepts property as collateral to the credit advanced, the same may be movable or immovable property.⁴ Among the securities preferred by these banks is mortgage where land is used as security. The reason basically being on the convenience they obtain against other forms of security, for instance, appreciates in value over time. Hence, can be relied upon in case of market forces that make asset values to fluctuate.⁵

¹ As in the case of **Aida Kyenkungu v John Kyenkungu and 2 Others** Civil Case No. 57 of 2001, High Court of Tanzania, Dar-es-salaam Registry, (Unreported) where Muro J stated that banks are the major stimulant of the national economy and therefore of great public interest.

² I. Kaaya & D. Pastory, (2013), **Credit risk and Commercial Banks Performance in Tanzania**, Vol 4, No. 16

³ See S.24 (1) (b) of the Banking and Financial Institutions Act, No.5 of 2006. It is through lending that banks and financial institutions get profits. However, a bank as a lender of other people's money, it needs to be assured that the borrower will be able to use the money to the advantage and as such the borrower is able to repay the same together with interest as agreed at the agreed time.

⁴ S. R. Myneni, (2008), **Law of Banking**, 1st edn, S.P.Gogiah.u.f) p. 21, such securities may be gold, stocks and shares. Refer also to C.S. Binamungu & G.S. Ngwilimi, (2006), **Regulation of Banking Business in Tanzania** at p. 79 where he states that "in Tanzania a real security (landed property) is usually preferred which is mortgage. He states further at p. 82, that there are other forms of mortgages like customary mortgage, informal mortgage but in Tanzania it is the registered mortgage that predominates." Also see S. 113 of the Land Amendment Act, No.2 of 2004 "which allows the occupier of the land under a right of occupancy and leases to create a mortgage."

⁵ C. Sanga, (2004), **Land Sector as an Impediment to mortgage lending in Tanzania**, 3rd FIG Regional Conference Jakarta, Indonesia at P. 2. See also Tenga W.R & Mramba S..J, (2008), **Manual of Land Law & Conveyancing in Tanzania**, Dar-es-salaam. P.260 where they state that lenders accept lands which have adequate and stable value which are easily realizable.

In Tanzania, before mortgage is accepted as security, banks make sure that the borrower has good title to the property of which, in case of the research problem, will require the consideration of the type of interest the borrower has in the property.⁶ Generally, credits advanced on the security of land are accepted on registered and unregistered titles.⁷ It is common especially on land owned by spouses to find that the land is registered in husband's name. In this typical situation where the certificate bears the husband's name it is easier for him to obtain loan basing on that title so long as he obtains his spousal consent as the law requires.⁸ The same applies where the land property is a matrimonial home, the spouse or spouses residing in that matrimonial home must sign any document/form used in applying such a mortgage.⁹

The number of recent cases show that out of crafty of the husbands whom their desire is to finance their businesses¹⁰, take loan facility form the commercial banks using matrimonial homes as security; hence, defeating banks in the process of enforcement of mortgages when default occurs due to the love, trust and confidence reposed by wives to husbands. It is therefore the aim of the researcher to examine on how commercial banks enforce mortgages obtained under circumstances influenced by undue influence as the

⁶ That is why in any transfer of land, there are compulsory steps to be complied with by the purchaser or mortgagee to ensure himself that the mortgagor has a legal title and the land is free from encumbrances including whether the property is a matrimonial property. In the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] T.L.R 211, the husband obtained the title deed bearing solely his name by deceit and for the purpose of depriving the wife (respondent) of her rights in the suit premises. It was held that "the certificate of title jointly owned by the husband and wife. When one wants or disposes such a property has to obtain informed consent from the other."

⁷ See S. 113(4) of the Land Amendment Act, No.2 of 2004, where the law requires any mortgage to be registered in order to take effect. in case of mortgage of unregistered land it can take effect only when the transaction is registered in the appropriate register. i.e. Register of Documents. See also Tenga W.R & Mramba S.J (2008) **Manual of Land Law & Conveyancing in Tanzania**, Dar-es-salaam. P.260 where he states that failure to register renders the mortgagee helpless in case of default by the mortgagor.

⁸As provided under S.59 (1) of the Law of Marriage Act [Cap 29 R.E.2002]

⁹ See S.114(1)(a)(B) of the Land Amendment Act, No.2 of 2004. for the banks safety, S.114(2) of the Land Amendment Act, No.2 of 2004 provides that "it shall be the responsibility of a mortgagee to take reasonable steps to ascertain whether the applicant for a mortgage has a spouse/spouses."

¹⁰ See the case of **Tanzania Investment Bank & Eric Auction Mart & Court Broker v. M/S Ilabila Industries Ltd, John Momose Cheyo, Ngula Vitalis Cheyo & Mrs. Elizabeth Ngeleja Cheyo**, Commercial Case No. 27 of 2002, HC- Commercial Division, DSM Registry, (Unreported). where the wife consented to the matrimonial home to be used as a comfort factor and not the security to secure the loan as mislead by her husband.

banks and financial institutions are obliged to maintain stability, safety and soundness of financial system so as to reduce the risk of loss to the depositors.¹¹

1.2 Background to the research problem

Commercial Banks among other activities deal with lending money to the public so as to earn profit. Among the securities needed by the banks is landed property (mortgage)¹² of which in most cases they prefer registered property.¹³ Financial institutions and banks¹⁴ when lending money to financial seekers, accept collaterals given by the borrowers or guarantors¹⁵ supported at times by spousal consent.¹⁶ Spouse consent is basically demanded by the banks to rebut the defence normally put forward by the borrowers after default that the mortgaged property is a matrimonial home.¹⁷

During colonial period, the land titles were the popular securities demanded by the banks and because of this requirement most of the African farmers could not provide the security, since they did not own title deeds in the form of certificate of Right of

¹¹ See S.5 of the Banking and Financial Institution Act, No.5 of 2006

¹² Mortgage has been stated to mean "an arrangement in writing between a borrower (mortgagor) and lender (mortgagee that is a bank) to secure a certain sum in money or money's worth by giving an interest in a certain real property on promise to pay the secured money and interest in a specified period of time, and in case of default the lender to resort to the property offered as security." Refer to Binamungu, C.S.& Ngwilimi, G.S, (2006), **Regulation of Banking Business in Tanzania** at p.85

¹³ C.S. Binamungu and G.S. Ngwilimi, (2006), **Regulation of Banking Business in Tanzania** at p. 79 where he states that in Tanzania a real security (landed property) is usually preferred to red which is mortgage, he states further at p. 82, that there are other forms of mortgages like customary mortgage, informal mortgage but in Tanzania it is the registered mortgage that predominate. Also in a manual by Tenga W.R and Mramba S.J, (2008), **Land law and Conveyance in Tanzania** at p. 256 it is stated "that among the security that qualify as good security mortgage is one of them."

¹⁴ Under S.3 of the Bank of Tanzania Act, 2006 and The Banking and financial Institution Act, 2006, the term Bank has been defined "as an entity that is engaged in the banking business whereas financial institution has been defined to mean an entity that is engaged in the business of banking ,but limited to size, locations served ,or permitted activities as prescribed by the bank or required by the terms and conditions of its license."

¹⁵ C.S.Binamungu &G.S.Ngwilimi,(2006),**Regulation of Banking Business in Tanzania** at p. 93

¹⁶ Refer the case of **Maria Goreth katura Mutarubukwa v.NBC, Innocent Chacha Magoti Nshoya and Leonce Benedict Mutarubukwa**, Land Case no.28 of 2004,HC Land Division at DSM(Unreported) in the named case the mortgage transaction was declared invalid on account that the consent of the wife was not obtained by the bank.

¹⁷ C.S. Binamungu & G.S. Ngwilimi, (2006),**Regulation of Banking Business in Tanzania** at p. 93

Occupancy and not even in the form of Letters of Offer.¹⁸ The adopted English mortgage arrangements' principles were not changed before independence nor were they even after Arusha declaration when the banks were nationalised.¹⁹ Since 1985, the government has been reorienting and reforming the social economic policy framework towards the expansion role of private sectors in the economic development process. Due to various reforms in the financial and economic sector Tanzania established its own central bank [hereinafter referred to as Bank of Tanzania (BOT) (Cap 197 R: E, 2002)].²⁰ The Banking and Financial Institution Act no.12/1991²¹[cap 342 R:E, 2002] was enacted so as to modernise the regulatory framework for economic development and to provide a room for participation of private banks in the banking sector so as to enhance efficiency and competition.

These Banking and Financial institutions among other activities, deal with lending money to the public so as to earn profit. Among the securities needed by the banks is landed property (mortgage)²² of which in most cases they prefer registered property (mortgage).²³ In such situations there are instances where though the landed property is registered in the name of either one of the spouses, the other spouse has some beneficial interests in that land which are not seen physically; whereby the interest of the researcher is to examine on how these banking and financial institutions enforce

¹⁸ Binamungu, C.S. (1996), “**Land as Collateral for Loans in Tanzania: Some Complications**”, in Journal of Management Development, Vol. 8 Issue No. 1 April 1996, pp. 71-84

¹⁹Binamungu C.S and Majamba H.I, (1992), **the legal aspects of securities in the provision of credit: A case study of the Co-operative and Rural Development Bank (CRDB)-Dar-es-Salaam**, ”LLB Compulsory Research Paper, University of Dar-es-Salaam.

²⁰Act, No. 4 of 2006 which originated from Act, No. 12 of 1965

²¹Now Act, No. 6 of 2006

²²Mortgage has been stated to mean an arrangement in writing between a borrower (mortgagor) and lender (mortgagee that is a bank) to secure a certain sum in money or money's worth by giving an interest in a certain real property on promise to pay the secured money and interest in a specified period of time, and in case of default the lender to resort to the property offered as security. Refer to Binamungu, C.S.& .Ngwilimi, G.S. (2006), **Regulation of Banking Business in Tanzania**, at p.85.

²³Binamungu C.S and. Ngwilimi G.S,(2006), **Regulation of Banking Business in Tanzania**, at p. 79 where he states that in Tanzania a real security (landed property)is usually preferred to red which is mortgage, he states further at p. 82, that there are other forms of mortgages like customary mortgage, informal mortgage but in Tanzania it is the registered mortgage that predominate. Also in a manual by Tenga W.R and Mramba S.J, (2008), **Land law and Conveyance in Tanzania**, at p. 256 it is stated that among the security that qualify as good security mortgage is one of them.

mortgages in the circumstance where one of the spouse manipulates the consent of the other, especially the one whose interests are not seen physically.

In early 1990's a matrimonial home which was not protected by caveat entitled a mortgagee (commercial bank) to sell it in case of default but not evicting the innocent spouse as seen in the case of *Hadija Mnene v. Ally Maberu Mbaga and the National Bank of Commerce*²⁴ where Lugakingira, J (as he then was) was of the view that;

"A bare interest in an estate would not operate to prevent its alienation where registered land is involved. It is therefore incorrect to think that the mere existence of S.59 (1) is sufficient to prevent an estate from being sold or mortgaged."

so, for the commercial bank (mortgagee) to enforce a mortgage of a matrimonial home, inquiry must be carried out to secure consent of the spouse.

With time, there has been a huge flow of cases by spouses trying to avoid mortgage transactions based on matrimonial home on the ground of failure by the banks to seek their consent. For example, in *Magdalena Baruti v. New Century Construction Co. Limited, N.B.C*²⁵ the applicant (director of the company), second respondent (managing director) and the third person who was also a director of the company took an overdraft for the projects of the company they owned by mortgaging the matrimonial home at Block D Isamilo in Mwanza. The company defaulted, the applicant argued that she did not consent to the mortgaging of their house, suggesting that the signature on the application for the loan was forged. This can be elaborated by the fact that she consented as the director of the company, without taking into consideration her rights of occupancy in the matrimonial home in case of default. Masanche, J. observed that;

"The applicant has nothing to complain in the matter. If anything, she is trifling with the matter. It may be possible that she has been sent to trifle in the matter. This is seen by the clear evidence that the person who pledged the house knows that he

²⁴Civil Appeal, No. 40 of 1995, High Court of Tanzania, Mwanza Registry, (unreported).

²⁵ Civil Case, No.54 of 1996, High Court of Tanzania, Mwanza Registry, (Unreported).

has no case against N.B.C. For truly, he took the money and truly pledged the house."

Similarly, in the case of *Aida Kyenkungu v. John Kyenkungu & 2 Others*²⁶, the applicant jointly with the first respondent as husband and wife acquired properties situated on plots No. 479 Kawe and No. 273 Block 'A' Mikocheni. The two spouses agreed to register the said properties in the name of the second wife (Ashura Washokera) as the registered owner of the property situated in Mikocheni and the other property situated at Kawe was registered in the name of the first respondent. The applicant contended that being unaware, the first respondent and his second wife colluded and deposited to the third respondent the title deeds regarding the two properties as security for a loan which they obtained. It can be seen that wives out of love, trust and confidence are alleviated to reach agreements which defeat their rights of occupancy in the matrimonial homes especially when default occurs. Justice Muro was of the view that;

"No courts should be used as avenues of convenience whose duty is to render support to family schemes carefully tailored to frustrate the noble duties of banks."

However, there are situations where husbands use their power in making financial decisions to manipulate the consent of the wife for the purpose of obtaining loan, thereafter complications arise in the enforcement process where default occurs. For example in the case of *Tanzania Investment Bank & Another v. M/S Ilabila Industries Ltd, John Momose Cheyo and Ngula Vitalis Cheyo and Mrs Elizabeth Ngeleja Cheyo*²⁷ where the objector consented to a mortgage of a matrimonial home claiming that her husband informed her that the first respondent needed their house on plot No. 1472 Msasani Pennisular, Dar-es-salaam as a comfort factor and not a primary security. The court held that:

"Where a spouse consents to the mortgaging of a matrimonial house, she waived the benefits of protection under S. 48 (1) (e)

²⁶ Civil Case No.57 of 2001, High Court of Tanzania, Dar-es-salaam Registry, (Unreported).

²⁷ Commercial Case No.27 of 2002, HC-Commercial Division, Dar-es-salaam Registry, (Unreported).

of the Civil Procedure Code²⁸ and S.59 (1) of the Law of Marriage Act.²⁹"

Before the enactment of the Land Act of 1999, mortgage transaction had been regulated by a number of legislations. But that legislation did not outline the mechanism of processing loans under mortgage in an open and methodical manner.³⁰ The same legislation did not provide for mortgage of matrimonial property to the specificity. The enacted Land Act of 1999 introduced the concept of matrimonial mortgage including customary mortgage provided that the same has been assented by a spouse living in that matrimonial home.³¹ However, among the provisions that raised concern in that Act was on the requirement of genuine spousal consent which, among other things, necessitated the amendment of 2004.

Section 114 of the Land (Amendment) Act, no.2 of 2004 provides the conditions for the creation of matrimonial mortgage that the same shall be valid only if the other spouse signifies his consent to the mortgage by signing the documents or any forms used in the application of such mortgage. This section 114(2) has been repealed by s.8 of the Mortgage Financing (Special Provisions) Act of 2008 by requiring additional safeguards for spouses in the mortgage context in that now it is the responsibility of the mortgagor to disclose that he has spouse or not of which failure to do so is a criminal offence.

Furthermore, S.141(2)³² provides

" the mortgage applicant and any other third party having interest to the mortgage including any spouse identified by the mortgage applicant, of a signed and witnessed statement that they have understood and consented to the terms and conditions of the mortgage as their own free act and deed. No mortgagee shall be required to

²⁸ [Cap 33 R.E. 2002]

²⁹ [Cap 29 R.E. 2002]

³⁰ Binamungu, C.S. and Ngwilimi, G. S. (2006), **Regulation of Banking Business in Tanzania** at p. 81

³¹ Section 112(3) of the Land Act 1999

³² Of the Land (Amendment) Act, 2004 as amended by S. 19 of the Mortgage Financing (Special Provisions) Act, 2008

make further inquiry regarding such matters and no claim of undue influence shall be permitted as a defence against enforcement of a mortgage or exercise of a power of sale."

It is provided under the Law of Marriage Act³³ that

"where the interest in the matrimonial home is owned by either of the husband or wife, so long as the marriage subsists, the other spouse shall be deemed to have interest therein which is protected by either caveat, caution or otherwise under any other law relating to the registration of title to land."

Nevertheless where a person does not protect his or her interest by caveat, caution or otherwise, the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until; the marriage is dissolved or the court on a decree for separation or an order for maintenance otherwise orders, unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it. Therefore, the background of the research problem has facilitated the researcher to fill the gap of how commercial banks enforce mortgages in circumstances influenced by undue influence.

1.3 Statement of the problem

Bank loans in Tanzania are usually secured by matrimonial home.³⁴ In such circumstances, the wife has a beneficial interest.³⁵ For the husband to use such a

³³ S.59 (1) of the Law of Marriage Act, [Cap 29 R.E. 2002]

³⁴ As seen in the case of **Hadija Mnene v Ally Maberu Mbaga & NBC**, Civil Appeal No.40 of 1995, High Court of Tanzania, Mwanza Registry, (unreported), **Idda Mwakalindile v NBC Holding corporation & San Saijen Mwakalindile** Civil Appeal No.59 of 2000, Court of Appeal of Tanzania, Mbeya Registry, (Unreported) and **Aida Kyenkungu v John Kyenkungu and 2 Others** Civil Case No. 57 of 2001, High Court of Tanzania, Dar-es-salaam Registry, (Unreported).

³⁵ As stated in the case of **Bi Hawa Mohamed vs. Ally seif**, [1983] T.L.R 32, which recognised domestic services of a housewife as a contribution to the acquisition of matrimonial property. Also in the case of **Mohamed Abdullah v Halima Lisangwe** [1988] T.L.R 197, where the judge gave a bold decision to the

property as a security informed consent of the wife must be obtained, otherwise, the lender refrains to extend the facility.³⁶ Free informed consent will usually be impossible to obtain due to the emotional bonds between couples which lead to a strong possibility of undue influence by the husband.³⁷

With all favourable developments of the law, the manner in which the genuine consent is to be obtained, is not shown, instead the practice shows that men mortgage their matrimonial homes in exclusion of their spouses or unduly influence them.³⁸ Hence, when default occurs, it may encumber the process of enforcement of a mortgage due to wrongful exercise of influence by one party over the other.³⁹ Therefore, this research problem has prompted the prospective research to call into task the main objective, namely to examine how commercial banks enforce mortgages in circumstances influenced by undue influence.

1.4 Research objectives

The study was guided by both general and specific objectives.

1.4.1 General objective

To examine on how commercial banks enforce mortgages in circumstances influenced by undue influence.

effect that it does not matter whether what is being commented is direct monetary contribution or domestic service; that the respondent bore children, reared them and took care of the matrimonial home thus freed the husband for his economic activities. So, a woman needs not only capital contribution; performance in the domestic duty is to be treated as contribution for both present and future needs.

³⁶ S.114 of the Land Amendment Act, No.2 of 2004.

³⁷ As seen in the case of **Nakayaga v. Fina Bank Ltd & Anor** [2015] UGCOMMC 8 where the applicant did not consent to the loan facility obtained by the second respondent (his husband) nor did she acquired any independent advice from the bank and she did not understand english language as the contract and the offer letter was in english language.

³⁸ Mwaisondola G.N.(2007) "**The Modern Law Of Mortgages In Tanzania, The role of The Land Act ,1999**",A thesis submitted to the school of law of the university of Birmingham for the degree of doctor of philosophy p. 140.also case law have appreciated the same as was stated in the case of **Hadija Mnene v Ally Maberu Mbaga&NBC**, Civil Appeal No.40 of 1995, High Court of Tanzania, Mwanza Registry, (unreported), **Idda Mwakalindile v NBC Holding corporation &San Saijen Mwakalindile**, Civil Appeal No.59 of 2000 (CA), Mbeya Registry, (Unreported) and in the case of **Barclays Bank plc v. O'Brien [1994] 1 AC 180**

³⁹ J.Poole (2006) **Casebook on Contract Law** (8th Edn), Oxford University Press, Pg 643

1.4.2 Specific objectives

- i. To examine on the legal framework governing the enforcement of mortgages by commercial banks in circumstances influenced by undue influence.
- ii. To analyze the challenges facing commercial banks in enforcement of mortgages in circumstances influenced by undue influence.

1.5 Research questions

The study will be guided by the following research questions

- i. Is the legal framework governing the enforcement of mortgages effective enough to protect commercial banks in circumstances influenced by undue influence?
- ii. What are the challenges faced by commercial banks in the process of enforcement of mortgages in circumstances influenced by undue influence?
- iii. What are the strategies to be adopted by commercial banks in the process of enforcement of mortgages in circumstances influenced by undue influence?

1.6 Significance of the study

The findings obtained from this research were of the following importances;

- a) This research was prepared for academic purpose as a mandatory requirement for the fulfilment of an award of Degree of Masters of Laws (LL.M-Commercial Law). It will be useful in different aspects such as legal drafting, referencing and policy formulation.
- b) The study opens the door for the bankers to reform or press for reform in their lending policies as far as mortgage of a matrimonial home is used by married couples to secure loan so as to guarantee the process of enforcement of mortgages in case of default.
- c) To the general public, the findings of the study help to create awareness to the public especially wives to have their interest registered in the relevant register so

as to avoid complications in the process of enforcement of mortgages by commercial banks.

1.7 Literature review

Meso (2015)⁴⁰ in his paper the Requirement of Spousal Consent and Dispositions in Land, the author begins by making references to various laws including the Constitution of Kenya of 2010, the Law of Marriage Act of Kenya, the Matrimonial Property Act and the Land Registration Act of Kenya. According to matrimonial property Act, once the property is registered in the name of one spouse only, the registered spouse is presumed to hold the property in trust of the unregistered spouse. According to the author, scholars argue that matrimonial property is owned in common or co-tenancy that means both parties has shares in such property which has not been divided between them. According to the author, spousal consent is of essence when it comes to the division of matrimonial property. If at all the property appears to be registered by one spouse's name only, there exists a rebuttable presumption that the other spouse has some interest held by the registered spouse. Relying on that concept, the author has not clearly stated how spousal consent is to be obtained.

The author proceeds by providing the remedies to be adopted when spousal consent is sought through coercion or fraud; he provides three measures to be adopted, firstly, rescission of fraudulently obtained spousal consent. The lending institution upon discovering (through any means) that the borrower had fraudulently obtained the other spousal consent should immediately rescind that transaction at the option of the spouse whose consent was not sought. Second, to institute criminal proceedings for fraud against the borrower who obtained the spousal consent through coercion or fraud means. The author stated this as a plausible option as in practice is difficult to enforce. Lastly, is the apportion of the percentage of the property charged to the borrower, here the court

⁴⁰**Meso O. (2015).The Requirement of Spousal Consent and Dispositions in Land** (2015)accessedon05/03/2018 at https://www.academia.edu/19408730/REQUIREMENT_OF_SPOUSAL_CONSENT_AND_THE_DISPOSITIONS_IN_LAND-pdf

may apportion a percentage of the charged property to be the share of the borrower and the remaining share to be allocated to the aggrieved spouse.

The author has shown how important spousal consent is and he has shown the measures to be adopted when spousal consent is obtained through coercion or fraud. Further, the author has discussed on the measures to be adopted in case spousal consent is obtained through illegal means but he has only based on the protection of the aggrieved spouse, he has not clearly shown how banks can enforce mortgages in circumstances influenced by undue influence. Thus this research intended to fill the gap accordingly.

Mcfarlane B, Hopkins N & Nield S (2015)⁴¹ in their book entitled *Land Law: Texts, Cases and Materials*, describe the effect of undue influence to third parties. The authors posit that

"undue influence has been raised as a defence to enforcement proceedings where a collateral mortgage has been granted over the matrimonial home to secure a loan made for the benefit of the husband's business. The loan is made to the husband as a borrower but the wife's participation to create a mortgage is required where she is a legal beneficial joint owner of the matrimonial home. The danger is that the wife's consent to the mortgage is questionable, because, in the husbands desire to finance his business, he may have misrepresented or unduly influence his wife to mortgage her interest."

The author has cemented well on how spousal consent can be granted through a husband undue influence to the wife, further the author has shown that this is mostly caused by the desire of the husband to finance his business. However, the author has not elaborated on how banks can enforce a mortgage in such circumstances influenced by undue influence, thus the study was designed to address the problem accordingly.

⁴¹ Mcfarlane B .et. l (2015) **Land Law: Texts, Cases & Materials** (3rd Edn), Oxford University Press

Sirma V. J (2014)⁴² in his paper *Lending on the security of matrimonial property in Kenya: The issue of spousal consent*, the author in chapter four namely Spousal consent in lending of matrimonial property and the aspect of undue influence begins by stating that spousal consent is a critical element in as far as lending of the matrimonial property is concerned. It is the fulcrum upon which the entire disposition is pegged. It does not only empower women through ensuring that they are consulted during the disposition process but it also goes a long way in ensuring that women are actively involved in making crucial decisions about the usage and management of the matrimonial properties. The author appreciates the position of the law requiring the consent of the spouse of the mortgagor living in the matrimonial home for the mortgage to be valid but he does not show with clarity how spousal consent can be obtained.

The author went further by stating that consent may be obtained through some improper and excessive pressure exerted by one party over the other. This can be chiefly attributed to the patriarchal nature the society is and the general perception that men are the financial managers of their families. Men are thus able to effectively manipulate, coerce or threaten their spouses in order to obtain consent. At this point the author has looked on the spousal consent on the other side of the coin, where he has explain what causes spousal consent to be obtained through improper ways. However, the author has not provided on the remedies to be adopted and how the banks can enforce a mortgage in such circumstances influenced by undue influence.

Mugalula J (2010),⁴³ in his paper titled "Mortgaging Matrimonial Home: Unveiling the Law and Practice of Banks and other Financial Institutions in Uganda," the author explain that amongst other things, the Law require a mortgagee (bank) to take steps to inquire into the marital status of a mortgagor. The mortgagor must state by way of

⁴²Sirma V.J (2014) **Lending on the Security of Matrimonial Property in Kenya: the Issue of Spousal Consent**, University of Nairobi, Kenya

⁴³ Mugalula J (2010) "**Mortgaging Matrimonial Home: Unveiling the Law and Practice of Banks and other Financial Institutions in Uganda**", Occasional Paper No.3/2010

statutory declaration whether he or she is married or not. Where the mortgagor is married, his or her spouse is also required to make a statutory declaration to that effect.

The author went further by stating that the mortgagor and spouse are additionally required to attach a certified copy of their marriage certificate or other evidence of marriage to the declaration. Where the property being mortgaged is a matrimonial home, the consent of the mortgagor's spouse must be obtained in order for the mortgage to be valid. The author has explore well on the diligence to be taken by the banking institution in any mortgage transaction involving a matrimonial home, however the author has not observe spousal consent in clarity as he has not put in consideration where consent has been obtained through illegal means such as misrepresentation or undue influence, further despite the stated steps to be taken by the banking institution, the author has not elaborated on how the banking institutions can enforce a mortgage in circumstances influenced by undue influence.

Mwaisondola (2007),⁴⁴ in his PhD thesis work titled "The Modern Law of Mortgages in Tanzania: The Role of Land Act 1999," under chapter five and related to the aspect of mortgage of matrimonial home, the author cements on the legal notion that husband and wife hold undivided shares in the property as occupiers in common. So, once the property is registered in the name of one spouse, the other spouse acquires interest in the property by contributing to its improvements, developments or general upkeep. The author appreciates the position of the law requiring the consent of the spouse of the mortgagor living in the matrimonial home for the mortgage to be valid.

Furthermore, under chapter five, related to the aspect of mortgage of matrimonial home enter as a result of undue influence or misrepresentation cements on

"the position of the law in the event of a challenge by the wife to an attempt by the bank or any other creditors to enforce the mortgage or charge over a matrimonial home jointly

⁴⁴ Mwaisondola G.N.(2007) "**The Modern Law Of Mortgages In Tanzania, The role of The Land Act,1999**",A thesis submitted to the school of law of the university of Birmingham for the degree of doctor of philosophy

owned by the parties. In this regard, the wife may pray for the court's assistance pleading undue influence of the husband. The position is that a wife who has been induced to enter into a transaction by undue influence of her husband, in certain cases may be entitled to set aside that transaction against the wrongdoer husband, however this does not mean she can challenge the rights of the creditors over the charge created by her husband unless the husband was acting on behalf of the creditor or the creditors had notice of the fact giving rise to the objection. The possibility of the husband abusing his strong position to the prejudice of his wife is what the law seeks to control. The law needs to strike a balance making sure that the matrimonial homes remain available as security without prejudicing the interest of weaker parties residing matrimonial homes."

This work is vital to this study as it has extensively recommended on how commercial banks can enforce mortgages in circumstances influenced by undue influence by striking a balance between the rights of vulnerable (wives) and protection of creditors in using mortgage of a matrimonial home as security to secure loan.

Binamungu and Ngwilimi (2006),⁴⁵ in part two of the book entitled ‘‘Regulation of Banking Business in Tanzania,’ ’the authors stress on the essence of genuine spousal consent if banks issuing loan to the spouse on mortgaging transactions involving matrimonial property are to treat the property in consideration as adequate security. This is reflected under s.114 of the land amendment Act no.2 of 2004 and s.59 of the law of Marriage Act.

Failure to secure spousal consent, even if the mortgaged property is sold, will only keep occupancy rights of the spouse intact. This was observed in the case of *Hadija Mnene v. Ally Maberu Mbaga and NBC*⁴⁶ where the appellant alleged her husband, the first respondent, to have mortgaged their matrimonial home without her consent contrary to S.59 (1) of the law of Marriage Act 1971 but lost in both Trial Court and the High Court

⁴⁵C.S.Binamungu and G.S.Ngwilimi, (2006), **Regulation of Banking Business in Tanzania**, Morogoro; Mzumbe Book Project, 2006, p. 107.

⁴⁶Civil Appeal No.40 of 1995, High Court of Tanzania, Mwanza Registry, (unreported).

on ground that she did not protect her interests by way of caveat. The Court of Appeal was of the view that a bare interest in an estate would not operate to prevent its alienation where registered land is involved but the court observed further that although the mortgaged property was rightly sold, the occupancy right of the appellant was still intact under s.59 (1) of the Law of Marriage Act; thus the appellant continued to enjoy free accommodation simply because the banks failed to carry out an inquiry and therefore secure consent.

The same observation was made in the case of *Idda Mwakalindile v. NBC Holding Corporation and Sam Saijeu Mwakalindile*,⁴⁷ and the court added further that the purchaser of the mortgaged property took the same subject to the interests of the wife who was in actual occupation. Despite the efforts made by the authors on the importance of spousal consent in mortgage transaction involving matrimonial home, the authors have not shown the other side of the coin, that is what if spousal consent is obtained through undue influence? And if that happens how will the commercial banks enforce a mortgage in circumstances influenced by undue influence?

Poole J (2006)⁴⁸ in his book entitled "Casebook on Contract Law" the author begins by elaborating the meaning of undue influence, where he stated that "undue influence is an equitable doctrine allowing a contract to be set aside where there has been a wrongful exercise of influence by one party over the other." The author went further by identifying the sort of influence which the courts view as wrongful, where he outlined actual and presumed undue influence. Actual undue influence involves the commission of a wrong and there must be affirmative prove that there is clear evidence. Presumed undue influence requires one to establish the existence of a protected relationship such as doctor and client or that there is a relationship of trust and confidence between the individual parties, such as husband and wife or banker and customer.⁴⁹

⁴⁷Civil Appeal No.59 of 2000, Court of Appeal of Tanzania, Dar-es-salaam Registry, (unreported).

⁴⁸ Jill Poole (2006) **Casebook on Contract Law** (8th Edn), Oxford University Press, Pp 643-686

⁴⁹ **Macklin v. Downsell** (2004) EWCA Civ 904 where Lord Hoffmann made it clear that undue influence is based on the conduct of the defendant. it would seem that in the context of presumed undue influence

The author proceeds by quoting the case of *Barclays Bank Plc v. O'Brien*⁵⁰ where the Court of Appeal suggested that

*"A married woman could avoid such a contract as against the bank simply by stating that she did not understand the nature and effect of what she had signed and that the bank had failed in its duty to advise her. Further, Lord Browne-Wilkinson stressed on the policy considerations and the need to balance the desire to protect married women against losing their homes with the need to ensure that banks would be prepared to lend money on the security of a jointly owned home. The banks require some guidance (such as provision of legal advice to the wife without the presence of the husband on steps they needed to take in order to protect themselves against the risk of losing their security because of undue influence of a third party."*⁵¹

The author has elaborated well on undue influence, measures that should be adopted by women so as to avoid their matrimonial home to be taken as a mortgage without their consent and the reasonable steps to be adopted so as to provide a smooth process of enforcement of a mortgage. However, the author has elaborated only on one measure to be adopted i.e provision of a legal advice without putting into consideration the fact that the solicitor who would give independent advice, however could also be acting as a solicitor for the bank, or both a husband and wife as observed in the case of *Tanzania Investment Bank & Eric Auction Mart & Court Broker v. M/S Ilabila Industries Ltd, John Momose Cheyo, Ngula Vitalis Cheyo & Mrs Elizabeth Ngeleja Cheyo*.⁵² Therefore

the wrong is taking advantage of the position to prefer one's own interest whilst ensuring that the other party as exercising a free and informed choice in agreeing to the transaction

⁵⁰ (1994) 1 A.C. 180

⁵¹ Also observed in the case of **Royal Bank of Scotland Plc v. Etridge** (2002) 2 A.C. 773 where it was held that in order for banks to have a valid security interest, they must ensure that their customers have independent legal advice.

⁵² Commercial Case No.27 of 2002, HC-Commercial Division, Dar-es-salaam District Registry, (Unreported).

this research tended to cover such gap and provide more measures on how commercial banks can enforce a mortgage in circumstances influenced by undue influence.

1.8 Research methodology

This part shows the framework in which the research study was carried out. It includes research design, scope and area of the study, population, sampling techniques, sample size, methods of data collection, data analysis and limitations of the study.

1.8.1 Research design

This study employed survey research design so as to describe attitudes, opinions, behaviors or characteristics of the population. The researcher designed the study into two categories, namely data obtained through documentary review and interviews. The researcher began by reviewing dissertations and thesis related to the topic so as to establish the gap between the previous authors and what the research intended to cover. The researcher proceeded with reviewing of decided cases so as to fill the gaps left by authors in dissertations and thesis. Although in this presentation, the review exercise seems to have taken place in a consecutive manner, but in actual fact, at times, location of unreported cases and review of dissertations overlapped, hence, the researcher had to handle the two sources simultaneously. While unreported cases were prepared to thesis and dissertations because of being focused and reflecting settlement of conflicts between spouses when matrimonial homes are mortgaged without consent, they however missed some details. For instance, cases could not explain the opinion of respondents in a more relaxed manner. Hence, the researcher opted for interviews to different units of inquiry for purpose of filling the gap of how commercial banks enforce mortgages in circumstances influenced by undue influence. However, reviewing of dissertations and unreported cases tend to overlap depending on the problem and the time covered.

The interviews targeted bank official first. These interact with their customers and process term loans and overdrafts which are usually supported by collaterals including matrimonial homes. Then senior legal practitioners constituted the second category of

respondents interviewed. These were considered because they are involved in the process of enforcement of mortgages.

1.8.2 Scope and area of the study

The study was confined on enforcement of mortgages in circumstances influenced by undue influence, the study dealt with married couples who use their matrimonial home as collateral to secure loan from commercial banks. This was due to that they are the ones who encumber the process of enforcement of mortgages due to ignorance of wives in making financial decisions and unscrupulous behavior of husbands.

So as to make the study manageable in terms of the researchers aim, time, finance and facilities, the study was conducted in Arusha City, the major reason been the availability of a number of commercial banks and Courts of law which enabled to assist the researcher to come up with clear answers on how commercial banks enforce mortgages in circumstances influenced by undue influence.

1.8.3 Population and Sampling Design

A sampling design is a technique or procedure that the researcher adopted in selecting items from the sample. A sampling design also lay down the number of items included in the sample, which is the sample size. The study employed systematic and purposive sampling techniques in order to obtain the sample size.

1.8.3.1 Population

The population in the study was commercial banks' personnel of banks found in the Arusha Region, married couples in the Region, legal practitioners also operating in the Region, Senior Magistrates operating in the same area and the HC- Arusha Registry officer.

1.8.3.2 Sampling Techniques

A sample design is the arrangement on how a sample is selected and what size such sample should be. The sampling technique that was used made the use of the researcher's knowledge about potential sampling units relative to their relevance to the research problem. Therefore, only those perceived to have knowledge about variables related to the research problem were sampled. This is called 'purposive' or 'judgmental' sampling. Within the broad judgmental approach, however, the researcher respects the entire range of population areas constituting stake holders in the domain of enforcement of mortgages by commercial banks in circumstances influenced by undue influence.

In this study National Microfinance Bank Public Limited Company (NMB Bank Plc) and Cooperative Rural Development Bank Public Limited Company (CRDB Bank Plc) were found to be appropriate to the study since they operated within Arusha Region and each bank has its branches in every district. The loan and relation officers from the respective banks gave their relevant information for the purpose of understanding how commercial banks enforce mortgages in circumstances influenced by undue influence. Loan and relation officers, particularly, are the ones processing loans to borrowers; it was expected that they have knowledge with the conditions and financial implications involved in loan transactions. Legal practitioners (advocates) represent either customers or banks in various transactions as well as giving legal advices to them. Likewise, married men and women were related to the research problem as they are borrowers who use matrimonial homes to secure loan facility. Senior Magistrates have technical knowledge about the subject matter.

1.8.3.3 Sample size

The size of the sample which was used in the study to achieve the objectives comprised 30 respondents, which included the following;

- i. Twelve persons from the public (Married men and women).

- ii. Five Loan officers from CRDB Bank Plc and five Relation officers from NMB Bank Plc.
- iii. Four senior legal practitioners (advocates).
- iv. Three Senior Magistrates from Resident Magistrates' Court in Arusha.
- v. HC, Arusha Registry Officer.

1.8.4 Types of data and data collection methods

1.8.4.1 Types of Data

The word data is defined to mean and include all the information that the researcher collected and gather for this study.⁵³ There are two types of data, namely primary and secondary data. In this research, the researcher collected both types of data; primary and secondary.

Primary Data

Primary data was obtained from persons who were directly affected by the problem or information that was obtained through observation.⁵⁴ In this research, primary data was obtained from the CRDB Bank Plc and NMB Bank PLC. The researcher interviewed the loan and relation officers from the banks under study as they were officials who were direct related to the problem under the study. Further, the researcher also interviewed the Senior Magistrates, legal practitioner (advocates) and persons from the public (married men and women) as they provided more information which helped to fill the gap of the research as they tend to come across the problem under the study in their daily basis.

Secondary Data

Secondary data was obtained from Documentary sources such as, dissertations and thesis, unreported cases, bank policies and loan agreements. The researcher employed

⁵³ Mugenda, O. M. and Mugenda, A.G., (2003), Research Methods: Quantitative and Qualitative Approaches, Acts Press Nairobi p. 64

⁵⁴ Dr. Myneni, S. R., (2001) Legal Research Methodology, Allahabad Law Agency, Assian Offset Press, p.134

secondary data so as to know the research gap and the extent in which the problem of enforcement of mortgage by commercial banks in circumstances influenced by undue influence has been underscored by other writers. It also helped the researcher to verify the findings on primary data.

1.8.4.2 Methods of data collection

Since the research is qualitative in nature, the researcher employed methods that qualify the qualitative data. The data was collected by the use of two methods and one tool; that is, documentary review, interview and questionnaire.

Documentary review

Through documentary review, three types of documents were reviewed, namely dissertations and thesis⁵⁵ which enabled the researcher to get contribution, comments and remarks of different authors in the problem under the study, unreported cases⁵⁶ enabled the researcher to look on the problem in a more practical way. Bank policies⁵⁷ and loan agreements.⁵⁸

Interviews

Interviews involved both an interviewer and an interviewee to discuss the problem under the study. The interviewer pre-conceives certain questions and those questions are placed before the interviewee and on the basis of the answer given by the interviewee, conclusion is arrived at. In this study, interviews were carried out on a face to face

⁵⁵For example, Silvia. S, (2017), **Beneficial Interests in Matrimonial Landed Property in Tanzania: Are they capable of enabling women to secure loans from Banks?**, Mzumbe university, Morogoro and Mwaisondola G.N, (2007) "**The Modern Law of Mortgages in Tanzania, The Role of the Land Act, 1999**", P.H.D. Thesis, University of Birmingham

⁵⁶ For example, **Lucy Kiwelu v. Mexon John Kiwelu, Comrade Auction Mart & Court Brokers Ltd, Standard Chartered Bank** Land Appeal Case, No. 50 of 2010, High Court of Tanzania, Arusha Registry, (Unreported) and **Bank of Africa Tanzania Limited v. Rose Miyago Assea** Commercial Case, No.138 of 2017, High Court of Tanzania, Dar-es-salaam Registry (Unreported)

⁵⁷ Show how banks are regulated so as to achieve the economic objective of maintaining domestic price stability and a balanced and sustainable growth of the national economy of Tanzania.

⁵⁸ show the agreement between banks and prospective borrower which regulates the mutual promise made by each party.

encounter where questions construed in advance were being asked to the respondents; the questions were designed to suit the problem under the study. The researcher began to interview the persons from the public which were married men and women as they are the ones who were related to the problem under the study. Thereafter, senior magistrates followed as they come across cases dealing with enforcement of mortgages in circumstances influenced by undue influence

In case where interview method was inappropriate, the researcher resorted to questionnaire. The respondents who were involved in answering questionnaire survey were those who were not able to sit for interview due to time limit and the nature of their duties through their opinions and responses to the study at hand are considered very important such as loan officers from CRDB Bank Plc, relation officers from NMB Bank Plc and legal practitioners. The researcher formulated different sets of open ended questions relevant to the problem under study and distributed them to different categories of respondents depending on the type of information required from them.

1.8.5 Data analysis techniques

This process involved three concurrent flow of activities, namely (a) data reduction, whereby data collected through interviews was processed by selecting and transforming data into a meaningful information. Furthermore, during documentary review, the researcher selected dissertations and unreported cases which show the use of a matrimonial home obtained through undue influence:- (b) data display, in this stage, data obtained through interviews after being selected and transformed into a meaningful information was combined with data obtained through documentary review; for example, dissertations, unreported cases, bank policies and loan agreements, whereby what was reviewed in documents was supported by the practice which was elaborated from interviews;- (c) conclusion drawing and verification, the information collected from the field by documentary review and interviews methods, after having been processed and analyzed, the researcher was able to draw inferences and conclusions.

1.8.6 Limitation of the study

This study confined itself on mortgage transactions whose collaterals involve married people and cohabitees. This narrow area did not enable the researcher to review the law on mortgages widely.

1.9 Summary

This Chapter covers eight aspects. It introduces the problem under the study and explains its background from 1990's to the present time. In addition, it sets out the objectives and questions which governed the study. It further describes the contribution of various scholars and elaborates the research gap of the study. Thereafter, it describes the methodology used by the researcher; in particular it points out the research design, methods of data collection and data analysis techniques. The next chapter shows the conceptual framework of the study and describes how the variables in the study are connected and related.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1 Introduction

Chapter one identifies that female spouses complain of the act of male spouses obtaining loan facility from the banks by unduly influencing them to give consent on the use of a matrimonial home as security. This chapter covers description of various concepts that have been reflected in the study. It shows the reason why male spouses unduly influence female spouses to give consent on the use of a matrimonial home as security. It further describes on how they approach banks and not other avenues for the purpose of obtaining loan. The scope of the concepts include: capital, bank, security, mortgage, spousal involvement and undue influence.

2.2 Capital

Starting a business without outside capital is pulling yourself up by the bootstraps and is notoriously difficult.⁵⁹ The problem is that in any reasonably complex business there is a lag between the time people get together to work to build new business and the time that revenue or income gets generated from that business.⁶⁰ Due to various demands, spouses need capital for personal use, company projects and businesses.⁶¹ Moreover, getting capital involve obtaining loan from different avenues such as microfinance institutions, individual persons and banking institutions. However, most spouses prefer obtaining loan from banks since they are easily accessible.

⁵⁹ <https://www.dougsguides.com/content/labor-does-all-work-why-do-we-need-capital>, visited on 11/4/2019 at 12:01Pm.

⁶⁰ Ibid

⁶¹ <https://www.tutor2u.net/business/reference>, Why Businesses need finance (GCSE) visited on 11/4/2019 at 11:30 Am.

2.3 Bank

Banks have evolved so as to encompass a number of activities. Primarily, it involves the function of intermediation, accepting deposits and allocating credits. Through this, banks act as storage of wealth and liquidity, and finance investments.⁶² In addition, they are at the center of payment mechanism. They provide advice, references and guarantees. By the nature of their business, when taken together, banks are an important source of information for their national monetary authorities. In the course of their business, they mobilize funds from stakeholders in form of capital and reserves, and from the general public in the form of deposits, securities and other forms of borrowing.⁶³

It is on the basis of their intermediary function and dealing in money that banks form a very special and important part, not only of the financial system but also the entire economic system. This explains partly why they exist and differentiate themselves from other financial institutions.⁶⁴ Their deposits are capital; they are the principal means of making payments. However, their utilization is dependent upon depositors' confidence that they would be available on call. Banks although are easily accessible they never part with cash without security of some sort to cover the loan facility obtained by spouses.

2.4 Loans and security

Spouses approach banks for the purpose of obtaining loan so as to finance different activities, such as, business and company projects. Usually banks and financial institutions lends a sum of money to the needy/borrowers spouses) on which it is that sum of money which is termed as a loan, of which the borrower is supposed to repay back the loan given to him with interest depending on the terms and conditions agreed by the parties. The borrower (spouse) is required to give security for the loan advanced to him or not depending on the terms of the loan although in most cases secured loans are preferred. This is so because security acts as an assurance to the banks that the loan

⁶² Binamungu, C.S & Ngwilimi, G.S. (2006) Regulation of Banking Business in Tanzania p.8

⁶³Ibid

⁶⁴ Ibid

will be repaid back and the borrower by fearing for his property not to be taken to cover the debt/loan, the borrower will be obliged to pay back the loan as agreed.

Banks have a wide range of securities which it accepts when advancing loans. It is the responsibility of the legal department of the banks to ensure that no disbursements are effected without the borrower and the bank fulfilling all the legal formalities pertaining to, inter alia, the preparation of security documents.⁶⁵ After it is established that a customer has the legal capacity to contract and that the project for which the advance is to be made is feasible, a loan application form is filled and signed by the prospective borrower. It is then sealed, stamped and dated by the bank.⁶⁶

A loan agreement is then entered between the bank and the borrower. This agreement becomes a contract enforceable at law. The loan agreement form is prepared after a loan has been approved and the necessary security obtained. A promissory note is annexed to the loan agreement, which states that the borrower promises to pay an amount of money on a certain date. All security documents after being duly processed and executed are kept in the bank's safe custody so that should the need arise; they can be made use of, for example in foreclosure actions.⁶⁷

The assets which are offered by the borrowers and accepted as security must be tangible and are mainly of two types; namely movable and immovable assets. Movable assets include of motor vehicles, milling machines, animals and farm machinery which is not permanently fixed to the land. Immovable assets on the other hand include farms and building.

When creating a charge over the assets, the instruments or documents used by the bank depend on the type of borrower and types of assets. Where movable assets are concerned, the documents to be prepared will depend on whether the borrower is an

⁶⁵ Binamungu, C.S & Majamba, H.I. (1992) **The Legal Aspects of Securities in the Provision of Credit: A case study of Co-operative and Rural Development Bank (C.R,D,B)**, p. 16

⁶⁶ Binamungu, C.S & Majamba, H.I. (1992) **The Legal Aspects of Securities in the Provision of Credit: A case study of Co-operative and Rural Development Bank (C.R,D,B)**, p. 16

⁶⁷ Ibid.

artificial or a natural person. In case of artificial persons the documents used to create a charge over movable assets is called a debenture.⁶⁸ In case of natural persons, the document used is called a chattel transfer instrument. The document used to create a charge over immovable assets is called a mortgage.⁶⁹ Apart from these three documents, other relatively popular securities that the banks usually accept take form of guarantees and letters of hypothecation of stocks/goods.⁷⁰ With the underlying explanations, it would be appropriate at this juncture to look at the procedure underlying the handling and processing of the security instruments particularly mortgage of title deeds which is created over immovable properties.

2.4.1 Mortgage

A mortgage is a conveyance of a legal or equitable interest in property as security for the repayment of a debt or the discharge of some other obligation.⁷¹ In order to create a mortgage in favour of the bank, the borrower must have title to the property being mortgaged. Title here means ownership and is evidenced by possession or a certificate of title. Under the mortgage, the borrower transfers his legal estate in the property to the bank for the purpose of furnishing security. The bank retains the borrowers certificate of title duly registered and mortgaged, which it can resort to in case the borrower defaults. When the bank decides to accept a mortgage over immovable property it is supposed to ascertain the property to make sure it's value is equivalent to or greater than the amount it will advance. The valuation report is compiled by registered valuation officers assigned by the bank. It thereafter, on receipt of the borrower's certificate of title, satisfies itself that the borrower has good title to the property and that the certificate is free from encumbrances.

⁶⁸ Sheldon, H.P. (1962) **The Practice and Law of Banking** (9th Edn) p.386

⁶⁹ Binamungu, C.S & Ngwilimi, G.S. (2006), **Regulation of Banking Business in Tanzania**, p.83

⁷⁰ Supra footnote No.69

⁷¹ K. Green & J. Cursley (2004) **Land Law**, (5th Edn), Palgrave Macmillian, P. 80, where he states that "*a mortgage is an interest in land exchanged for the money and a borrowed money.*"

The mortgage deed prepared by the bank is given to the borrower who proceeds to register it with the registrar of titles at the appropriate zonal office where the property is situated. The registration is effected after paying stamp duty and registration fees. The borrower returns the mortgage deed duly registered to the bank. The bank retains the certificate of title as the borrower proceeds to execute the other documents. The execution involves stamping, sealing or signing and dating.

Various forms of mortgages both in Tanzania and at common law have evolved over time. They have been categorized as either legal or equitable mortgages. A legal mortgage arises

"where the mortgagor transfers to the mortgagee legal ownership or an interest (estate) in the property under the condition that the property shall be recovered or the estate transferred will automatically determine upon the performance of the condition on which it is given."

An equitable mortgage may be created

"when the mortgagor fails to fulfill the condition necessary for the transfer of legal estate in creating a legal mortgage. If a contract to make a legal mortgage is specifically enforceable, equity regards it as an equitable mortgage. Similarly, an equitable mortgage may be created involving the transfer of an equitable interest in land."⁷²

Apart from legal and equitable mortgage, there is another form of mortgage that is a mortgage of a matrimonial home (which is our main concern).

⁷²G.N. Mwaisondola (2007) **"The Modern Law of Mortgages in Tanzania: The Role of Land Act 1999"** PhD Diss., University of Birmingham p.92.

2.4.2 Mortgage of a Matrimonial Home

A mortgage of a matrimonial home is defined under the Law of Marriage Act⁷³ as well as under the Land (Amendment) Act⁷⁴ "as the building or part of the building in which the husband and wife ordinarily reside together" and includes;

(a) Where a building and its cartilage are occupied for residential purposes only, that cartilage and any outbuildings thereon; and

(b) where a building is on or occupied in conjunction with agricultural land, any land allocated by the husband or the wife ,as the case may be ,to his or her spouse for her or his exclusive use.

A mortgage of a matrimonial home is valid if any document used in applying for such a mortgage is signed by the mortgagor and his spouse (s) living in that matrimonial home or there is evidence from the document that all of them have assented.⁷⁵ Interests in a matrimonial home can be owned through joint occupancy, occupancy in common or interest wholly owned by one of the spouse. Joint occupancy arises where the matrimonial home is jointly owned by the spouse, and the parties have acquired the property at the same time and have the same interests in the right of occupancy.⁷⁶ Parties in joint occupancy have separate rights in the property as against everyone else in the position of a single owner. In this regard dealing with the property by joint occupiers would be void.⁷⁷

On the other hand, occupancy in common arises where occupiers hold undivided shares in the property which has not been divided among the occupiers. For example, where the

⁷³the Law of Marriage Act [Cap 29 R.E. 2002] , S.2(1) (a) and (b)

⁷⁴ The Land (Amendment)Act No.2 of 2004 Per S.112(2)

⁷⁵ S. 114 of the Land Act (Amendment), Act, No.2 of 2004

⁷⁶ S.159 (1) of the Land Act, 1999.

⁷⁷ S. 159 (4) of the Land Act, 1999. This can be seen in the case of **Zakaria Barie Bura v. Theresa Maria John Mubini** [1995] T.L.R 211 where the house jointly owned by spouses was sold by the husband without the consent of the wife. The court held that husband had no power to sell the house because it was jointly owned by the two spouses. Also see the case of **Mtumwa Rashid v. Abdalaah Idd and Salum Omari**, Civil Appeal No. 22 of 1993, Dar-es-salaam Registry, (Unreported).

land is registered in the name of one spouse and later the other spouse acquires an interest in the property by contributing to its improvements, developments or general upkeep, the spouse who contributed to the matrimonial home is entitled to an interest in the property in the nature of occupancy in common.⁷⁸ However, out of love, trust and confidence reposed by the wives, husbands knowingly unduly influence them to consent on the use of a matrimonial home as a security to secure loan. Hence, when default occurs, it encumbers the process of enforcement of mortgages by commercial banks.

2.5 Undue influence

Undue influence is the improper pressure on a person resulting in his being at a manifest disadvantage in relation to some transaction. Such transaction may be set aside by the law. The law requires that influence, however natural and however right, shall not be unduly exercised, that is shall be exercised only in due proportion to the surrounding circumstances and the strength of the person submitting to it.⁷⁹

The law will only intervene when 'influence' becomes 'undue'. In this context influence will become undue in two potential meaning: First, the influence is undue because it is illegitimate or unconscionable. This focus is on the conduct of the influencer. Second, the influence is undue because it is overbearing or too high and causes the influenced party to lose autonomy in deciding whether to enter into the contract. This focuses on the effect that the influence has on the influenced person's state of mind.⁸⁰

Undue influence is categorized into two forms; namely actual undue influence and presumed undue influence.⁸¹ Actual undue influence, sometimes known as 'domination' in this classification it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into a particular

⁷⁸ S.161 of the Land Act, 1999

⁷⁹ L.B. Curzon (2002) **Dictionary of Law**, (6th), Pearson Education Limited, P. 434

⁸⁰ R. Stone & R. Cunningham (2007) **Text, Cases and Materials on Contract Law**, Routledge-Cavendish, Pg.752

⁸¹ As observed in the case of **Barclays Bank plc v. O'Brien** [1994] 1 AC 180, that a person who has been induced to enter into a transaction by the undue influence of another (wrongdoer) is entitled to set that transaction aside as against the wrong doer. Such undue influence is either actual or presumed.

transaction which is thus impugned.⁸² This type of undue influence arises where there is no special relationship between the parties so that there is no abuse of a particular confidence.⁸³ In the case of *Bank of Credit and Commerce International SA v. Aboody*⁸⁴ Slade LJ stated that "a person relying on a plea of actual undue influence must show that the other art to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant, the influence was exercised, its exercise was undue and its exercise brought about the transaction"

Presumed undue influence falls into two classes; in the first class (2A) there is no requirement to prove that improper influence was actually exerted. Instead it must be established that there is a relationship which as a matter of law gives rise to a presumption of undue influence (such as parent-child, solicitor-client, doctor-patient and trustee-beneficiary).⁸⁵ The second class (class 2B) of presumed undue influence occurs where a person proves a relationship as a result of which he or she has generally reposed trust and confidence in the other party or in which the other party has acquired ascendancy.⁸⁶ Relationships that fall under this category are husband and wife, cohabitees, employer and employee. For example, in *Aida Kyenkungu v. John Kyenkungu & 2 Others*⁸⁷, the applicant jointly with the first respondent as husband and wife acquired properties situated on plots No. 479 Kawe and No. 273 Block 'A' Mikocheni. The two spouses agreed to register the said properties in the name of the second wife (Ashura Washokera) as the registered owner of the property situated in Mikocheni and the other property situated at kawe was registered in the name of the first respondent. The applicant contended that being unaware, the first respondent and his second wife colluded and deposited to the third respondent the title deeds regarding the two properties as security for a loan which they obtained. It can be seen that wives out of

⁸² P. Richards (2007) **Law of Contract**, (8th Edn), Pearson Education Limited, Pg. 281

⁸³ Ibid

⁸⁴ [1990] 1 QB 923

⁸⁵ R. Cranston (2006) **Principles of Banking Law** (2nd Edn), Oxford University Press, Pg. 214

⁸⁶ E. Peel (2007) **The Law of Contract** (12th Edn), Sweet & Maxwell Pg.450

⁸⁷ Civil Case No.57 of 2001, High Court of Tanzania, Dar-es-salaam Registry, (Unreported).

love, trust and confidence are alleviated to reach agreements which defeat their rights of occupancy in the matrimonial homes especially when default occurs.

2.6 Conclusion

This chapter describes the conceptual framework of the study, whereby the needy of capital by the spouses, facilitates them to approach banks for the purpose of obtaining loan to support their personal and business needs. Due to few means of securing loan, spouses use matrimonial home as security to secure loan. However, wives at times make decisions out of love, trust and confidence are alleviated to reach agreements which defeat their rights of occupation in a matrimonial home. Therefore, the next chapter deals with theoretical and legal framework of the study whereby, the theoretical and legal nature of the variable in the study will be described.

CHAPTER THREE

THEORETICAL AND LEGAL FRAMEWORK

3.1 Introduction

The previous chapter described that out of crafty of the husbands whom their desire is to finance their businesses obtain consent by unduly influencing wives. However, wives at times make decisions out of love, trust and confidence which alleviate them to reach agreements which defeat their rights of occupation in a matrimonial home. Thereafter, when default occurs, encumber the process of enforcement of mortgages by commercial banks.

This chapter therefore, deals with the theoretical and legal framework governing the study. The focus is on the principles of sound lending used by commercial banks, the rationale behind the requirement of collateral/security, the types of security required by banks, the economic importance of banking lending transactions and the legal framework governing the enforcement of mortgage by commercial banks in circumstances influenced by undue influence.

3.2 Principles of sound lending used by commercial banks

Lending business involves a lot of risks as there is no certainty of repayment due to various factors, as such a caution is to be taken by a banker before lending from the fact that the money lent does not belong to the bank instead belong to customers who deposited the same and are repayable on demand. Therefore, the main principles of sound lending have to be considered which include the following;

3.2.1 Safety

The loan must be safe, in the sense that the banker is handling other people's money which has been entrusted with its disposition. Therefore, the banker must be assured that

the money is given to the reliable borrower who can repay the same along with interests agreed within the agreed period. The repayment of the borrowers in turn depends upon the borrower's capacity to pay which as well depends upon his tangible assets and the success of his business, willingness to repay; the collateral security offered. Repayment depends also on the willingness to pay which as well depends upon the honesty and character of the borrower. The business in which the loan is being advanced for should be unquestionable and the safety requirement should be supported by the deposit of approved security which is worthwhile for recovery of the loan amount as an insurance against an unforeseen developments. The integrity, character and reputation of the borrower must be considered as well.⁸⁸

3.2.2 Liquidity

The liquidity of the advance in the ordinary course of business should be unquestionable. With this the bank has to ascertain whether the borrower is in a position and status to pay the advanced loan on demand. Things like the nature of assets owned by the borrower and pledged with the banker have to be examined carefully.⁸⁹

3.2.3 Profitability

The banks advance loans to earn profits by way of interest thereon. So the margin of profit which can be earned by the borrower on the advance is of paramount importance. A prudent banker cannot make advance towards a known loss thus the funds must be employed profitably.

3.2.4 Loan purpose

The purpose of the loan is important because this goes with the requirement of the law, government, public policy and the banker's policy. The purpose of the loan must be one which demands the support of financial institutions. The advance needed must be for a desirable purpose from lending institutions. Loan for speculation purposes should not be

⁸⁸Myneni, S.R. (2008), **Law of Banking**, 1stedn, S.P. Gogia, India, p.293

⁸⁹ Ibid, p.294

granted⁹⁰ and the banker should ensure himself that the purpose of the loan is legal and also that the intended use is reasonably likely to produce the sort of profitable result which both parties desire. If the banker lends money for unauthorized purpose then he will have no remedy in the event of default. In *Re introductions v. National province Bank*⁹¹ it was held that the fact that a company has an express or implied power of borrowing does not mean that a banker can lend the company for unauthorized purposes.

3.2.5 The amount required

This is another thing to be considered. This should go along with the purpose for which the overdraft is required in relation to the capital resources of the borrower. That could be done by preparing a finance budget by the borrower and analysed and criticised by the bank before deciding that the maximum overdraft needed to explore fully the whole purpose of the advance, which at the same time raises the question of the suitability of the project.

3.2.6 Reliability of Security

So as to minimize the chances of risk, the banker must accept the security whose value is readily ascertainable and reasonably stable over the years providing margin for depreciation.⁹² The security offered must be readily realisable .for instance, if the banker is to take land as security ,he must be satisfied that the borrower has a good title over the land and that it is in an attractive good site not on restricted areas. A banker must be able to obtain a safe and unquestionable title without undue trouble or expense. Usually it is much simpler and safer to accept a legal mortgage that an equitable mortgage because the former empowers the banker to exercise his remedy in the event of default without the court's assistance or the mortgagor.⁹³

⁹⁰ Myneni S.R (2008) **Law of Banking**, 1stedn, S.P.Gogiah, India pg.294

⁹¹ *Re introductions v. National province Bank* (1969) All E.R 887

⁹² Mather L.C. (1966), **Securities Acceptable to the Lending banker**, (2ndedn), Waterlow, London, p.13.

⁹³ *Ibid* P. 14.

3.2.7 Duration of risk/advance

This is another aspect in which banker has to consider whereby the banker must not forget that the money he is lending is generally speaking on short term deposits or in current account. It is therefore not sensible to commit it in long term loans which cannot be repaid quickly if the need should arise.⁹⁴ It is normal for the bankers to rely on the statistical improbability that at any given time enough depositing customers will demand repayment of their funds actually to cause him any embarrassment.

Also, in case of long term lending the banker must be aware of the possible effect of changing economic and political circumstances. There might be an occurrence of a coup or natural disaster which may alter the chances of repayment.⁹⁵

3.2.8 Time limitation and source of repayment

These are other important factors a bank needs to consider. The banker will wish to know for how long the advance is likely to remain outstanding and from what source it is to be repaid and eventually repaid. Knowing the source of repayment helps the banker to ensure that repayment proposals are clear and well thought. If the lending is not self-liquidating in that the item acquired or project financed does not, of its own, generate sufficient funds to repay the borrowing within a reasonable period of time, the lending banker must be satisfied that there are alternative sources of repayment either from salary or from profits.

From the above principles, it is imperative for a prudent banker to adhere to those principles so as to avoid unwanted difficulties in recovering loans advanced to customers and generally avoid the risk of incurring losses in unreasonable loans or bad debts. The next part shows why banks demand security for securing loans.

⁹⁴Filder, P.J.M, Sheldon, & Filder's., (1982) **Practice of the law of Banking**; Pitman London, P. 273.

⁹⁵Ibid

3.3 Rationale behind requirement for security

The money that the bankers lend to the public strictly speaking does not belong to them. Instead the money belongs to the depositors. Therefore, it is prudent that bankers as lenders of other people's money must be assured that those whom they lent are able to use the money to such advantage in that they are able to repay it according to the agreed terms and within time.⁹⁶In that regard, the banker usually require borrowers to give security for the loan received as a guarantee or assurance that the fund will be repaid.

Alongside with the requirement of security, the bankers have to ensure that the loan is advanced to the reliable borrower, for an approved purpose and in which, that customer has adequate experience. The lender must be assured that the money will be used as proposed by the borrower and repayment will be made within agreed period of time.⁹⁷

There are various security arrangements but essentially they all serve the same purpose of improving the creditors' chance of getting paid or realising what else the debtor is required to do by way of performance.⁹⁸

The taking of security may also improve the chances of the debtor performing his obligation. For example, a borrower who has mortgaged his residential home may be determined to repay the debt for fear of his house to be auctioned in case he default to pay the debt. Bearing in mind that in loan contract, if the debtor defaults the banks will enforce the security offered so the debtor will be obliged to pay the debt

Collateral strengthens lenders ability to collect. When a borrower defaults on a loan not secured by collateral, the unsecured lender⁹⁹ must go through the judicial system to make a general claim on the debtor's property which can be costly and with uncertain

⁹⁶Ibid p. 279.

⁹⁷Mather, L.C. (1966), **Securities Acceptable to the Lending banker**, 2ndedn, Waterlow,London p.13

⁹⁸Diamond, **A review of security interests in property** (1989)DTL paragraph 3.2; Report recommending reform of the existing law: company law review,1985(UK)

⁹⁹The lender is unsecure when he issue loans to the borrowers basing on the goodwill and reputation of the customer/borrower. Here the security is the personal obligation of the borrower; however the lender is in a dubious position because even a man of high esteem may turn dishonest thus the lender falling into troubles. Refer Myneni S.R (2008) **Law of Banking**,1stedn,s.p.Gogia (h.u.f)pg 411-412

results or outcome.¹⁰⁰ There might be many obstacles faced by the lender for example the borrower might have no assets or there are other lenders with claims against the borrower's debtor's property. On the contrary, the secured lender¹⁰¹ can be confident that the collateral will cover the loan whatever the state of the debtors other property is.

Collateral is required in order to meet the regulatory requirements. Banks are among the most highly regulated businesses, they are intermediaries linking depositors and borrowers. Regulators are therefore keen to ensure that banks remain stable with well protected interest of both the depositors and borrowers.¹⁰²

Moreover, the availability of collateral plays a major role in determining both the amount the bank is willing to lend and the interest rate it may charge. If there is adequate collateral to cover the full extent of the loan, then the effect of the collateral is to shift much of the risk to the borrower. The smaller the collateral the greater the risk to the lender and thus the higher will be the interest rate charged by the banks.

Thus from the above, it is apparent that the requirement of collateral or security as a cover for bank's advances is an important requirement that cannot be dispensed with. It is an essential feature in each commercial venture. The survival of credit institutions depends on the repayment of the funds advanced thus it is logical that loans should be secured.

3.4 Types/forms of securities and collateral acceptable by banks

In the course of business lending by a banker, there are different kinds and forms of securities accepted as a cover for the advances given as a loan to the borrower so as to reduce the risk that might arise in its dealing with the borrower once the loan has been

¹⁰⁰Fleising H. and e tal (2006), **Reforming collateral laws to expand access to finance** ,the world bank Washington D.C ,pg3

¹⁰¹The lender is said to be secured when the loan issued bases on security which is of tangible assets or property of which their market value is greater than the amount of the loan given that makes the lender to be on a sound and solid footing as there is no probability of his money to be lost. Refer Myneni, S.R. (2008) **Law of Banking**, 1stedn, S.P.Gogia (h.u.f) p. 411

¹⁰² Njuu, G. (2018), **Why do banks/lenders demand collateral?**, The Exchange, Tanzania

advanced. This part shows other types of securities acceptable by banks apart from mortgage of title deed.

3.4.1 Guarantee

A guarantee is a written undertaking by one person (guarantor) to be responsible for the debt of another.¹⁰³ It is the simplest form of security a banker may take. The whole arrangement is such that there are three parties and two distinct contracts. Three parties are involved in the transaction, that is the borrower (debtor), the lender (banker) and the guarantor and two distinct contracts that is contract between borrower and lender and the contract between the lender and the guarantor which is the guarantee.¹⁰⁴ A contract of guarantee is sometimes called a collateral contract so as to distinguish it from the main contract between the borrower and the lender. The borrower is the person primarily liable to repay the debt and is therefore called the principle debtor. The guarantor undertakes to discharge the debt of the borrower only if the borrower fails to pay as agreed with the lender under that main contract. His or her liability is thus secondary to that of the principal debtor.

When a banker proposes to accept a guarantee as a security for a loan, he must first of all do careful inquiries and satisfy himself that the guarantor will be able conveniently and without embarrassment to carry out his promise to pay if the borrowers default. However, financial status of the guarantor might change therefore a bank has to renew periodically his original inquiries.

For any guarantee to be accepted by the bank, it should be one issued by a willing, reliable and undoubtedly good third party who agrees to stand as surety for the debt of the borrower to the bank. Thus, the essence of guarantee is that the guarantor promises to pay the whole or an agreed part of the debt if the borrower fails.

¹⁰³ Paget's law of banking, (2007), thirteenth edition, lexisnexis butterworth, pg 825.

¹⁰⁴ S.78 of the Law of Contract Act [Cap 345 R.E.2002]

However, the implication of guarantee is that the one being guaranteed has no interests in the property which for instance if the husband is to enter guarantor for the wife whereas the wife has interests in that property it may appear to be a way of weakening this woman in one way or the other, or even it may act at woman detriment in future in case a dispute arise over the property between husband and wife. The husband may use that contract of guarantee against the woman to establish that the woman has no any interests in it that is why the husband has been guaranteeing the woman over the property in question. So the better way is to let the woman secure loan by pledging her own interests in that property with the consent of the husband.

3.4.2 Chattel transfer instrument (CTI)

This is a document used when security offered is a movable property. The instrument has to be executed by the borrower whose signature has to be attested by an advocate or magistrate. When executed by the borrower, it is then transferred to the bank which only possesses it until the loan has been repaid.

Before the bank accepts it as security, it must ascertain that the evaluation report on the property has been made. The particulars of the property used as security must be incorporated in the CTI; for example if the chattel is a motor vehicle particular like engine, chassis and registration numbers must be documented. When these particulars of the instruments are incorporated, the CTI is then registered with the registrar of documents. In case of default the bank through court will obtain attachment order which will enable attachment of the chattel specified in the instrument which could be sold to satisfy the loan.

3.4.3 Letter of hypothecation

This relates to the charge over goods or their proceeds. Ownership and possession of such goods remains with the borrower who is at liberty to deal with them in any manner that he wishes in ordinary course of business.

Before accepting the same as security, the banks consider various factors to wit, that the borrower is trustworthy, the borrower's turnover is good in relation to his line of business, the premises in which the borrower operates and the stocks and adequately insured.

3.4.4 Life insurance policies

Life insurance is a kind of saving scheme and with endowment policies of which the benefit are actually paid to the insured person, if he survives. It is a document of title that insures the bank to realize his loan in case the borrower dies. Most of the bankers prefer the document to be in the name of the borrower or his guarantor. They are considered as one of the most satisfactory form of tangible security for banks advances, this is because they are of stable value and usually appreciate annually provided premiums are paid regularly. However, there are precautions to be taken by bank before taking policy as a security, it must ensure that premiums are paid up to date by obtaining premiums receipts, and must ascertain the surrender value of the policy, reliability of the insurer and also to secure an undertaking in writing from insured that will pay future premium.

3.5 Economic importance of bank lending transactions.

Bankers play a very important role in the economic life of the nation; the health of the economy is closely related to the soundness of its banking system. Although banks create no new wealth, their borrowing, lending and related activities facilitate the process of production, distribution, exchange and consumption of wealth. In this way they become very effective partners in the process of economic development. Today modern banks are very useful for the utilization of the resources of the country. The banks are mobilizing the savings of the people for investment purposes. If there would be no banks then a great portion of the capital of the country would remain idle. Loan facility provided by banks works as an incentive to the producer to increase production.

Many difficulties in international payments have been overcome and volume of transactions has been increased.

Financial systems play an important role in economic development. The financial sector reforms play an important link between the country's macroeconomic policy and the rest of the economy. The basic role of the financial sector in development is resource mobilisation and allocation among productive sectors through financial intermediation large specialised function performed by specialized institutions and their agents.¹⁰⁵

Banks and financial institutions attract funds from savers in the surplus sector and channel these to borrowers for purpose of profitable investments. A repressed financial system fragments the domestic capital market with adverse effects on the quality and quantity of real capital accumulation.¹⁰⁶

The economic importance of lending and banking business generally cannot be achieved if the legal framework and the practice of lending do not support the same. The law should be framed in such a way that the business of lending becomes advantageous to lenders and to the bankers themselves so as to enhance economic development.

3.6 Legal framework governing the enforcement of mortgages by commercial banks in circumstances influenced by undue influence in Tanzania

A number of written laws recognize the enforcement of mortgages by commercial banks in circumstances influenced by undue influence. These relevant laws include, the Land Act, 1999 [Cap 113 R.E. 2002], the Land (Amendment) Act, 2004, the Mortgage Financing (Special Provisions) Act of 2008 (amending the Land Act of 1999 to require additional safeguards for spouses in the mortgage context) and the Law of Marriage Act [Cap 29 R.E.2002].

¹⁰⁵Inanga E and B, Ekpenyong, B; **Financial liberalisation in Africa: Legal and institutional framework and lessons from others developed countries**; IFM world economy outlook, October 1994; pg 3.

¹⁰⁶Inanga E and B ,Ekpenyong, B; **Financial liberalisation in Africa: Legal and institutional framework and lessons from others developed countries**; IFM world economy outlook, October 1994;pg 5

3.6.1 The Law of Marriage Act

It is provided under the Law of Marriage Act¹⁰⁷, that

"where the interest in the matrimonial home is owned by either of the husband or wife, so long as the marriage subsists, the other spouse shall be deemed to have interest therein which is protected by either caveat, caution or otherwise under any other law relating to the registration of title to land."

Nevertheless, where a person does not protect his or her interest by caveat, caution or otherwise, the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until; the marriage is dissolved or the court on a decree for separation or an order for maintenance otherwise orders, unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it. The Law of Marriage Act prevents any disposition involving a matrimonial home to take place without informed consent of the spouse having interest in that property.

The Land Act, 1999

Section 161 (3) (b) of the Land Act, 1999 provides that where a spouse who holds land or dwelling house for a right of occupancy in his/her name alone undertakes a disposition of that land or dwelling house; where the disposition is a mortgage, the lender shall be under a duty to make inquiries of the borrower in accordance to Section 59(1) of the Law of Marriage Act¹⁰⁸. Where the aforesaid spouse undertaking the disposition deliberately misleads the lender as to the answers to the inquiries, the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition. This provision of the law, allows the commercial banks to

¹⁰⁷ The Law of Marriage Act, Cap 29 R:E 2002. S.59(1)

¹⁰⁸ [Cap 29 R.E.2002]

enforce mortgages in circumstances where the spouse misinform the lender on the consent of the other spouses.

3.6.2 The Land (Amendment) Act, no.2 of 2004

Section 114 of the Land (Amendment) Act, no.2 of 2004 provides the conditions for the creation of a mortgage of a matrimonial home that the same shall be valid only if the other spouse signifies his consent to the mortgage by signing the documents or any forms used in the application of such mortgage. It further provides that it shall be the responsibility of a mortgage to take reasonable steps to ascertain whether the applicant for a mortgage has a spouse or spouse. However, the provision has not foreseen instances where a matrimonial home is registered in the name of one spouse. The question is how can commercial banks know that the security offered is a matrimonial home?

3.6.3 The Land (Mortgage) Regulations, 2005

It is provided that where the mortgage concerns a matrimonial home, it will only be valid, if any document used in applying for such a mortgage is signed by the mortgagor and his spouse (s) living in that matrimonial home or there is evidence from the document that all of them have assented.¹⁰⁹

It is further provided that the duty to ensure that the consent given is genuine is vested on the mortgagee. Such duty is deemed to be duly discharged if the mortgagee does the following:- first, the mortgagee has advised the applicant in writing that he should ensure that his or her spouse(s) receive independent advice on the terms and conditions of the mortgage which is being applied for. Second, the spouse(s) provide a signed and witnessed document indicating that they have receive independent advise on the mortgage which is being applied for and have understood and assented to the terms and conditions of the mortgage.¹¹⁰ The mortgagee may devise some other steps as he may

¹⁰⁹ See Land Form No.42 (2005) Land Regulations on Mortgage of a matrimonial home.

¹¹⁰ See Reg.5(2) of the Land (mortgage) Regulation, 2005

deem appropriate and desirable to satisfy himself that the assent was genuine and informed.¹¹¹

Despite the efforts that have been undertaken regarding mortgage of a matrimonial home, it would be seen that there is no provision that renders the mortgagor liable of any careless disclosure. This facilitated the enactment of the Mortgage Financing (Special Provisions) Act, 2008

3.6.2 The Mortgage Financing (Special Provisions) Act of 2008

S.8 of the Mortgage Financing (Special Provisions) Act of 2008 provides for additional safeguards for spouses in the mortgage context. It is now the responsibility of the mortgagor to disclose that he has spouse or not of which failure to do so is a criminal offence.

Furthermore, S.141(2)¹¹² provides the mortgage applicant and any other third party having interest to the mortgage including any spouse identified by the mortgage applicant, of a signed and witnessed statement that they have understood and consented to the terms and conditions of the mortgage as their own free act and deed. No mortgagee shall be required to make further inquiry regarding such matters and no claim of undue influence shall be permitted as a defence against enforcement of a mortgage or exercise of a power of sale. Despite the efforts shown by the law, the manner in which informed consent is obtained is not provided.

3.7 Conclusion

It is observed that banks and financial institutions in the course of lending to those in need observe the principles of sound lending which are; safety, liquidity, profitability, loan purpose, amount required, reliability of security, duration of the risk, time limitation and source of repayment. Despite the efforts made by the law governing

¹¹¹ See Reg.5(3) of the Land (Mortgage) Regulations, 2005

¹¹² Of the Land (Amendment) Act, 2004 as amended by S. 19 of the Mortgage Financing (Special Provisions) Act, 2008

enforcement of mortgages, the position of the law has not provided the manner in which informed consented is to be obtained. The law needs to strike a balance, making sure matrimonial homes remain available as security without prejudicing the interest of the weaker parties residing in the matrimonial homes. The next chapter presents, analyzes and discuss the findings obtained from the field.

CHAPTER FOUR

DATA PRESENTATION, FINDINGS AND DISCUSSION

4.1 Introduction

This chapter dwells on analysis of data collected directly from the field in respect of the enforcement of mortgages by commercial banks in circumstances influenced by undue influence. The researcher collected both primary and secondary data. Primary data was collected in form of conducting interview and distribution of questionnaires to the married couples, loan officers from CRDB Bank Plc, relation officers from NMB Bank Plc, senior magistrates and legal practitioners. The respondents were obtained through purposive and systematic sampling techniques as they were directed to the research

problem under the study. Secondary data was obtained by the assistance of the HC-Registry officers in the finding of unreported cases and research reports related to the problem under the study. Therefore, the presentation of the result, analysis and discussion of the findings are in the form of texts which are based on the research objectives and questions from the study.

4.2 Data Presentation

While collecting data the researcher used two methods, namely interview and documentary review. Whereby in the case where interview was inappropriate, questionnaires were distributed to respondents who due to time limit and the nature of their duties could not set for interview. In documentary review; dissertation, unreported cases, loan agreements and bank policies were reviewed. These methods were used simultaneously so as to draw conclusions and inferences. The researcher presented data according to the research questions governing the study. The first research question was, is the legal framework governing enforcement of mortgages in circumstances influenced by undue influence effective to protect commercial banks? Majority of the respondents (20 out of 30, forming 66%) replied in a negative form, pointing out, the manner in which informed consent is obtained is not provided.

Furthermore, the second research question was, what are the challenges facing commercial banks in enforcement of mortgages, the respondents pointed out ignorance by financiers in making follow ups, trust and confidence between couples, arrangement by spouses to avoid loan and ignorance of women to make financial decisions. Majority of the respondents (12 out of 30, forming 40%) pointed out that trust and confidence between married couples is the major challenge.

The third research question was what are the strategies to be adopted to ensure smooth enforcement of mortgages. suggested strategies were making inquiry, provision of independent advice to spouses, amendment of the law and creating awareness to the public. The respondents (10 out of 30, forming 33%) were of the view that banks should

make inquiries to the mortgaged property and the persons interested to the property. The following part shows the findings of the study.

4.3 Research Findings.

The findings indicate that the risk of undue influence affecting a voluntary disposition by a wife in favour of a husband is greater than in the ordinary run of cases where no sexual or emotional ties affect the exercise of the individual's will. This is due to the love, trust and confidence reposed by wives, which alleviate them to reach agreements which defeat their rights of occupancy in the matrimonial home. In addition, husbands knowingly unduly influence wives to the use of a matrimonial home as a security.

Moreover, the legal framework governing enforcement of mortgage of a matrimonial home has not provided for the manner in which informed consent is to be obtained. However, banks should take reasonable steps to ensure that the spouses understood what they were doing while entering into a proposed transaction and that the consent to do so was informed and genuine. Further, they should conduct an inquiry on the mortgaged property and the persons interested to the property. Thus, findings are analysed and discussed as follows;

4.4 Data Analysis and Discussion.

This part presents data analysis and discussion of the research findings. The data obtained under this part helps the researcher to discuss the findings from the field, and later make conclusions and recommendations of the research under the study.

4.4.1 The Validity of the mortgage securing the financial loan

The researcher began by what commercial banks should do after receiving an application for loan. The first and foremost step the banks were impliedly required to do after receiving an application for loan supportable by security is 'carrying out an

inquiry'¹¹³, investigating the title of the potential borrower and inspecting the property to discover if at all there are any potential physical or title defects. This is to be done at two levels. First, making an official search at the land Registry¹¹⁴ within which the property proposed to be is situated in order to collect detailed information regarding the status of the subject matter.¹¹⁵ Second, locating the property in its physical location for the purpose of knowing where the property is and more importantly to establish 'interested parties' in the actual occupation of the said premises.¹¹⁶ This thrust the researcher to look on the legal framework governing the enforcement of mortgages by commercial banks in circumstances influenced by undue influence as follows below.

4.4.2 The Effectiveness of Legal framework governing enforcement of mortgages commercial banks in circumstances influenced by undue influence.

With regard to the first specific objective, to examine the legal framework governing the enforcement of mortgages by commercial banks in circumstances influenced by undue influence; it is pointed out in the third Chapter that Law of Marriage Act [Cap 29 R.E.2002] the Land Act, 1999 [Cap 113 R.E.2002], the Land (Amendment) Act, No.2 of 2004, the and the Land (Mortgage) Regulations, GN. No. 43 of 2005 and the Mortgage Financing (Special Provisions) Act, 2008 govern the enforcement of

¹¹³ In practice, banks do rarely comply with this requirement. As quoted from the conference held by the Regional Commissioner of Iringa to the people of Iringa Region, where people were addressing their various complaints, in the conference there was a complaint by a certain woman who complained that her house was sold by NMB Bank Plc by the reason that her house was used as a mortgaged property. Where it was seen that the bank accepted a photocopy of the letter of offer and not the original document and it was photocopied by the boyfriend of that woman, as his husband died since 1999 to be used as a security for the loan facility of 5,000,000/=. [emphasis on me] millardayo.com, visited on 23. march 2019 at 2:50pm

¹¹⁴ See, S.97 of the Land Registration Act [Cap 334 R.E.2002], any person may require an official search in respect of any parcel and shall be entitled to receive particulars of the subsisting memorials appearing in the land register relating thereto.

¹¹⁵ Binamungu, C.S. & Ngwilimi, G.S. (2006), **Regulation of Banking Business in Tanzania**, p.90 the authors argued that search at land registry reveal registrable interests which include the description of the subject matter, ownership details and encumbrances, if any.

¹¹⁶ In **Simon Mapolu Ngeleja v. N.B.C**, Civil Case No. 154 of 1991, HC-Mwanza Registry before Lugakingira J. (as he then was) observed that the defendant had two wives residing in the mortgaged house, the mortgagee never bothered to inquire about occupiers. The mortgagee therefore took the property subject to the right of the two wives (Hatari Magongo and Hadija Selemani) to continue to reside in the suit premises and the purchaser took subject to the same right. (decision on 20th June 1997)

mortgages in circumstances influenced by undue influence as they were enacted to maintain stability, safety and soundness of financial system in the law of mortgages so as to reduce the risk of loss of depositors.

However, the data collected from the field show in practice how the legal framework governing enforcement of mortgages in circumstances influenced by undue influence is attacked by the problems in the reality. From field, bank officers were of the view that how informed consent is obtained is a question of fact. The fact that consent is obtained in the agreement between spouses poses dilemma. It can be observed in Regulation 4 of the Land (Mortgage) Regulations¹¹⁷ which provides for the steps to be taken to discover the matrimonial status of the applicant have shortcomings, asking the applicant to sign a form stating that he/she is either married or not is not a sufficient factor to ensure that the wife will be involved to give consent, as seen in the case of *CRDB Bank Limited, Kassim Mwalongo v. Jenifa Barakael Lyimo*¹¹⁸ where it was found that the respondent was not the legal wife of the husband and yet there was no any presumption as they were living together.

Furthermore, legal practitioners commented that discovering whether the house offered as security is a matrimonial home, that is, a building or part of the building and adjacent land if any, in which the husband and wife live together, is not an easy task.¹¹⁹ This is contributed by the fact that most homes are registered in the names of the husbands who sometimes deal with their homes without the knowledge of their spouses or in case of the involvement of the wife, due to trust and confidence reposed on them, they tend to unduly influence their wives.¹²⁰

In addition, Section 114(2) of the Land (Amendment) Act, 2004, has been repealed by s.8 of the Mortgage Financing (Special Provisions) Act of 2008, requiring additional

¹¹⁷ Gn. No.43 of 2006

¹¹⁸ Land Case Appeal No.12 of 2007 (Unreported)

¹¹⁹ See also, S. 122 (2) of the Land Act, 1999.

¹²⁰ data obtained during interview. where the researcher was interviewing loan officers from CRDB Bank Plc.

safeguards for spouses in the mortgage context, it is now the responsibility of the mortgagor to disclose that he has spouse or not of which failure to do so is a criminal offence. From the field, legal practitioners argue that this provision has perpetuated to the raise of undue influence circumstances, as the spouse who wants to obtain loan from the bank do any means so as to ensure he gets consent from his wife.¹²¹ Commercial banks demand consent of all spouses in order to rebut the defence normally put forward by borrowers after default that the mortgaged property is a matrimonial home, however, the manner in which informed consent is obtained is a question of fact.

4.4.3 Challenges facing Commercial banks in Enforcement of Mortgages in circumstances influenced by Undue influence

As the first objective aimed at examining the legal framework governing enforcement of mortgages by commercial banks in circumstances influenced by undue influence. This part deals with what challenges do commercial banks come across in the process on enforcement of mortgages in circumstances influenced by undue influence as follows;

First, the senior magistrates were of the view that experience show that the problem of loan recoveries and enforcement of mortgages by commercial banks do not revolve around the court's laxity but related to some flaws created by banks in granting of loans. For example, the banks officers in the process of granting loans are not lien enough in cross checking the documents to support the loan application, such as certificate of right of occupancy.¹²² This can also be seen in the case of *Stanbic Bank (T) Ltd v. Mwamba*

¹²¹ This can be observed in the case of **Tanzania Investment Bank & Another v. M/S Ilabila Industries Ltd, John Momose Cheyo and Ngula Vitalis Cheyo, and Mrs. Elizabeth Ngeleja Cheyo**, Commercial Case No. 27 of 2000, HC-Commercial Division, DSM Registry (Unreported), in which the objector consented to the mortgage of her matrimonial home as a comfort factor and not a primary security. The court held: where a spouse consents to the mortgaging of the matrimonial home, she has waived the benefits of protection under S.48 (1) (e) of the Civil Procedure Code [Cap 33 R.E.2002] and the Law of Marriage Act [Cap 29 R.E.2002]

¹²² As quoted from the conference held by the Regional Commissioner of Iringa to the people of Iringa Region, where people were addressing their various complaints, in the conference there was a complaint by a certain woman who complained that her house was sold by NMB Bank Plc by the reason that her house was used as a mortgaged property. Where it was seen that the bank accepted a photocopy of the letter of offer and not the original document and it was photocopied by the boyfriend of that woman, as his

*Enterprises Ltd & 7 Others*¹²³, where it was found in evidence that the certificate of title which was used to secure the said loan was processed and issued two years after the death of the property owner, further, it was purported to be signed by the deceased. The administrator of the estate was not aware of the whole transaction and had in his custody a letter of offer over the said suit premises which was tendered and admitted in court. The court observed:-

"In this case if the plaintiffs were not part to the fraud, then they ought to be more vigilant in handling matters related to mortgages and particularly on the identity of the mortgagor".

Moreover, the senior magistrates went further by explaining that bank officers are ignorant of making follow up of the requirement of spousal consent. In an interview with the senior magistrates and advocates, they said that commercial banks believe that what is signed or written in the documents for spousal consent is correct and true without making any investigation to the documents signed and the spouse who signed the documents. Hence it brings complications on the enforcement stage in case of default by the borrower. Furthermore, the believe trend by commercial banks in the value of the properties mortgaged to secure the loan facility is not backed with any tangible evidence. For example, in the case of *Bank of Africa Tanzania Limited v. Rose Miyago Assea*¹²⁴, where it was held that;

"it is high time now for the banks to be aware that once they decide to exercise their statutory power of sale under the mortgage agreement and the sale does not realize the amount secured they cannot come to court with the view of having recovered the unrealized amount by attaching and auctioning other properties of the mortgagor".

husband died since 1999 to be used as a security for the loan facility of 5,000,000/= . [emphasis on me] millardayo.com, visited on 23. march 2019 at 2:50pm

¹²³ Commercial Case No. 18 of 2002, (HC) Dar-es-salaam Registry

¹²⁴ Commercial Case No. 138 of 2017, (HC) Dar-Es-Salaam (Unreported)

This case gives a reminder to the commercial banks to investigate on the value of the mortgaged property and not to undervalue the security because they cannot come back to the court for their own wrong doing.

Second, commercial banks are faced with the problem of arrangement by the husband and wife to avoid the loan. For example, in the case of *Lucy Kiwelu v. Mexon John Kiwelu, Comrade Auction Mart & Court Brokers Ltd, Standard Chartered Bank*¹²⁵ where the appellant alleges that she was not aware that the piece of land was surveyed and certificate of title issued. The learned trial chairperson rightly argued in her reasoned judgment that "the process of surveying the area and installing the beacons were sufficient to inform her that there were some acts leading to the acquiring of the certificate of title. Furthermore, the first respondent (the borrower and mortgagor) though duly served by alternative or substituted services he never made appearance in court which forced us to proceed ex-parte against him". It can be a carefully arranged move to avoid liability to pay the loan and negatively affect the bank. This was observed also in the case of *Aida Kyenkungu v. Kohn Kyenkungu, Equator international & N.B.C Limited*¹²⁶ that

"Courts should not be used as avenues of convenience whose duty is to render support to family schemes carefully tailored to frustrate the noble duties of banks."

To add on that one of the interviewee stated that;

"kumbe kama mume wangu amekopa na nyumba yetu imewekwa rehani, ni bora ni kimbilie mahakamani ilikusogeza muda wa kulipa mkopo huku tukitafuta hela".

Lastly, during an interview with banks officers, the issue of love, trust and confidence reposed to husbands is a challenge to commercial banks, because wives are alleviated to reach agreements which affect their right of occupation in the matrimonial home. This can be evidenced in the case of *Tanzania Investment Bank & Another v. M/S Ilabila*

¹²⁵ HC, Land Appeal No.50 of 2010 (Unreported)

¹²⁶ HC, Dar-es-salaam, Civil Case No.57 of 2001,(Unreported)

*Industries Ltd, John Momose Cheyo and Ngula Vitalis Cheyo and Mrs Elizabeth Ngeleja Cheyo*¹²⁷ where the objector (wife of the first respondent) consented to a mortgage of a matrimonial home claiming that her husband informed her that the first respondent needed their house on plot No. 1472 Msasani Pennisular, Dar-es-salaam as a comfort factor and not a primary security. The court held that:

*"Where a spouse consents to the mortgaging of a matrimonial house, she waived the benefits of protection under S. 48 (1) (e) of the Civil Procedure Code*¹²⁸ *and S.59 (1) of the Law of Marriage Act.*"¹²⁹

In addition, bank officers also pointed out, ignorance of women in financial matters as the major problem which contribute mostly to undue influence circumstances since most men take advantage of that factor to dominate the will of their wives as they believe that a husband as the head of the family is the only one who deals with financial issues.

4.4.4 Strategies to be followed by commercial banks so as to ensure smooth enforcement of mortgages.

This part answers the third research question of what strategies are to be adopted by commercial banks in the process of enforcement of mortgages in circumstances influenced by undue influence?.

The legal practitioners suggested that inquiry should be done by the commercial banks on the mortgaged property which secure the loan facility. The rationale for an inquiry is to enable the lender to make an informed decision as to whether to take the security or to avoid it and ask for another one, or take it subject to occupiers waiving their rights to occupy the premises at the time of default. This was observed in the case of *Samwel*

¹²⁷ Commercial Case No.27 of 2002, HC-Commercial Division, Dar-es-salaam Registry, (Unreported).

¹²⁸ [Cap 33 R.E. 2002]

¹²⁹ [Cap 29 R.E. 2002]

*Olung's Igogo and two others v. Social Action Trust Fund and others*¹³⁰ where it was held that

*"A lender is now required not only to conduct search in the land registry but also has a duty to make inquiries whether the borrower's spouse has consented to the mortgage".*¹³¹

Demanding an inquiry to be conducted by banks, is mainly for the purpose of protecting the interests of depositors i.e. banks' customers who maintain accounts with the respective banks. This is so because unless the law changes, mortgagees stand a chance to lose their money by not carrying out an inquiry. It is therefore misleading, as some lawyers tend to put it that mortgage transactions could be conclusively processed without carrying out inquiry.

In addition, senior magistrates pointed out that awareness should be provided to the public at large on registration of interests. As it is almost impossible for the lender to know of the existence of the spouse especially when the name of the other spouse is not in the register or certificate of title. As long as wives interests in the homes remain unregistered, the problem of the use of matrimonial home as security will remain unsecured. Further, banks and financial institutions should mobilize to institute policies that will make both spouses to participate in procedures of obtaining loan whenever a matrimonial home is used as a mortgage to secure loan so as to enable commercial banks to enforce mortgages in a proper manner.

¹³⁰ [2005] T.L.R 343. Also in the case of **Bank of Africa Tanzania Limited v. Rose Miyago Assea**, Commercial Case No. 138 of 2017, (HC) Dar-Es-Salaam (Unreported) where it was stated that "it is high time now for the banks to be aware that once they decide to exercise their statutory power of sale under the mortgage agreement and the sale does not realize the amount secured they cannot come to court with the view of having recovered the unrealized amount by attaching and auctioning other properties of the mortgagor. This case gives a reminder to the commercial banks to investigate on the value of the mortgaged property and not to undervalue the security because they cannot come back to the court for their own wrong doing.

¹³¹ See also the case of **National Bank of Commerce Ltd v. B & E Investment Limited & Dorein Francis Kanemile**, Civil Appeal No.14 of 2002, High Court of Tanzania, Commercial Division, DSM (Unreported) where it was held that a banker has the duty of inquiry and to conduct physical verification of the owner of the property and the property itself before advancing a credit facility to the owner.

4.5 Conclusion

It has been seen that the problem of undue influence cannot be solved by tightening of the laws but rather by raising awareness in the society on the importance of registering interests in the properties. But this will only be achieved by the seriousness of the commercial banks in making inquiry, provision of independent advise to spouses who use their matrimonial homes to secure loan and mobilization of banks and financial institutions in instituting policies that will enable both spouses to participate in procedures of obtaining loan whenever a matrimonial home is used as a mortgage to secure loan.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter presents summary, conclusion and recommendations drawn from the study. The major purpose of the study was to determine how commercial banks enforce mortgages in circumstances influenced by undue influence. Data for this study were collected by the use of questionnaires and interview, the sample was taken from Tanzania mainland specifically within Arusha City by way of purposive and systematic sampling techniques.

The problem that prompted this study was a concern that with all favourable development of the law, the manner in which genuine consent is obtained, is not shown. Instead practice show that men mortgage their matrimonial home in exclusion of their spouse or they unduly influence them to give consent. Hence, when default occurs, it encumbers the process of enforcement of mortgages by commercial banks due to the wrongful exercise of influence by one party over the other.

This chapter present the summary of the study findings, draw conclusions and make recommendations for the present and future research basing on the findings.

5.2 Summary of important findings

The objective of this study was to determine how commercial banks enforce mortgages in circumstances influenced by undue influence. Specifically, the first objective was to examine the legal framework governing enforcement of mortgages by commercial banks in circumstances influenced by undue influence. From the findings it is concluded that the legal framework governing the enforcement of mortgages in circumstances influenced by undue influence is attacked by the problem in the reality. It has some shortcomings such as asking the applicant to sign a form stating that he/she is either

married or not is not a sufficient factor that the other spouse will be involved. Further discovering whether the mortgaged property is a matrimonial home is not an easy task especially where the certificate of title is in the name of one spouse, for example; a husband's name. Lastly, the provision of S. 8 of the Mortgage Financing (Special Provisions) Act, 2008 has perpetuated to the raise of undue influence circumstances as the spouse who wants to obtain loan from the bank may do any means to ensure he/she acquires consent from the other spouse.

The second objective was to analyze the challenges facing commercial banks in enforcement of mortgages in circumstances influenced by undue influence. From the findings it is seen that flaws are created by commercial banks themselves during granting of loans, they are not lien enough in cross checking the documents supporting loan applications. Also, there is ignorance of bank officers in making follow ups of the requirement of spousal consent and the mortgaged property itself. Lastly, is the arrangement among spouses to avoid loans, trust and confidence between spouses and ignorance of women in making financial decisions.

5.3 General conclusion

On the whole process, the study sought to determine how commercial banks enforce mortgages in circumstances influenced by undue influence. From the findings it can be seen that the risk of undue influence affecting a voluntary disposition by a wife in favour of a husband is greater than in the ordinary run of cases where no sexual or emotional ties affect the free exercise of the individual's will.

The findings indicate that commercial banks may enforce mortgages in circumstances influenced by undue influence; if they took reasonable steps to ensure that the spouses understood what they were doing while entering into a proposed transaction and that the consent to do so was informed and genuine. Further, commercial banks may enforce mortgages in circumstances influenced by undue influence if they took an inquiry on the mortgaged property and the persons interested to the property and on the face of the case

they had no notice, actual or constructive of the circumstances leading to the suit in question.

5.4 Recommendations

Based on the findings, this study basically makes recommendations on how commercial banks enforce mortgages in circumstances influenced by undue influence. The study recommendations are as follows;-

First, it is almost impossible for the lender to know of the existence of the spouse especially when the name of the other spouse is not in the register or certificate of title. As long as wives interests in the homes remain unregistered, the problem of the use of matrimonial home as security will remain unsecured. In this case wives are recommended to register their interest in the matrimonial home.

Second, the spouse should have the opportunity to nominate her own legal advisor and seek independent legal advice. The legal advisor should hold a separate meeting with the wife without the husband or the lender present. The bank should provide the wife's solicitor with the necessary financial information relating to the mortgage transaction. For example, details of the amount and terms of the facility, the purpose of the facility and the potential amount of the husband's indebtedness. The bank should obtain a written confirmation from the wife's solicitor stating that the nature and effect of the security documents have been fully explained to her together with their practical implication. This will keep the commercial banks in a safe place in case the borrower defaults, as the process of enforcement of mortgage will take place in a peaceful and clear manner since it was exercised in a reasonable and diligence care.

Third, Banks should be mobilized to institute strict policies that will enable both spouses to participate in the process of obtaining financial loan when a spouse wants to use a matrimonial home as a mortgage to secure loan.

Lastly, the government within its function of maintaining the legal framework, it has to amend the laws so as to strike a balance, that is to protect the vulnerable party in transactions involving a mortgage of a matrimonial home without making the home unattractive to lenders.

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APPENDICES

APPENDIX I: QUESTIONNAIRE

QUESTIONNAIRES

Dear respondent,

I am **Yustawinnie Vitalis Mtui**, a student of Mzumbe University-Main campus, Morogoro Region carrying out a research study. I am undertaking academic research for partial fulfillment of the Master's Degree in Law.

The study aims at examining on how commercial banks enforce mortgages in circumstances influenced by undue influence. In order to achieve the objectives of the study, I kindly request you to fill the questionnaires attached herein as honestly as possible. I assure you that your responses shall be treated with utmost confidentiality.

You are kindly requested to fill the questionnaire using a pencil/pen by putting a tick (✓) in the boxes after the phrase or by filling the space provided in dotted lines by your own words. In case the space provided is not enough, please feel free to use an extra paper and attach it to the questionnaire.

Thank you

Section A: **Background information**

1) Gender

- a) Male
- b) Female

2) Age of the respondent.....

3) Education of the respondent

- a) Std VII

- b) Form Four
- c) Form Six
- d) Diploma
- e) graduate
- f) other specify

4) Occupation of the respondent.....

5) Martial status of the respondent

- a) Married
- b) Single

6) For how long have you been working with the bank?

- a) 0-5yrs
- b) 6-15yrs
- c) 16yrs-above

7) Contact address

P.O. Box.....

Mobile No.....

Email Address.....

Section B: Enforcement of Mortgages in Circumstances influenced by Undue influence

8) A mortgage is regarded sufficient for securing a financial loan based on:

- a) The borrower has good title to the mortgage
- b) The mortgage will maintain its financial market value over the credit period
- c) The substance of the mortgage is covered by an insurance policy

- d) The borrower pledging the mortgage is generally financially strong
- e) The mortgage is physically and technically sound

9) What are the remedies available where the borrower defaults?

- a) Sale of a mortgaged property
- b) appointment of a receiver
- c) leasing or sub-leasing of the mortgaged property
- d) entry of possession by the mortgagee
- e) others

10) Are you aware of the existence of circumstances influenced by undue influence which prevent the enforcement of mortgages by commercial banks?

- a) Yes
- b) No

11) Is the legal framework governing the enforcement of mortgages by commercial banks effective and efficiency enough?

- a) Yes
- b) No

12) What are the challenges facing commercial banks in enforcement of mortgages?

- a) Ignorance by banks officers in making follow ups
- b) arrangement among spouses to avoid loan
- c) ignorance of women in making financial decisions
- d) unawareness of the requirement of spousal consent
- e) others

13) Are the institutional framework equipped enough in handling enforcement of mortgages in circumstances influenced by undue influence?

- a) Yes

b) No

14) To what extent have undue influence circumstances affect the process of enforcement of mortgages by commercial banks?

a) maximum

b) minimum

15) What are the strategies for enhancing smooth enforcement of mortgages in circumstances influenced by undue influence?

a) carrying out of investigation

b) law provision

c) creation of awareness

d) provision of independent advise

e) others

THANK YOU FOR YOUR COOPERATION