

**ACCESS TO LOANS IN MICROFINANCE INSTITUTIONS BY
USE OF UNSURVEYED LAND AS SECURITY:
ANALYSIS OF THE LAW AND PRACTICE IN TANZANIA
MAINLAND**

By

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**A Dissertation Submitted in Partial Fulfillment of the Requirements for Award
of the Degree of Master of Laws (LL.M) in Commercial Laws of Mzumbe
University**

2016

CERTIFICATION

The undersigned certify that he has read and hereby recommends for the acceptance of this work entitled **Access to Loans in Microfinance Institutions by use of Unsurveyed Land as Security: Analysis of the Law and Practice in Tanzania Mainland** of the for award of the degree of Masters of Law requirements for the (L.L.M) Mzumbe University

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DEDICATION

This work is dedicated to my Beloved Mother Ester Eliudy and my family, for sending me to school.

ABBREVIATIONS AND ACRONYMS

ALLER	All England Law Reports
CAP	Chapter
CBOS	Community Bank
DSM	Dar es Salaam
ED	Edition
FINCA	Foundation for International Assistance
GDP	Gross of Domestic Product
GN	Government Notice
H.C	High Court
Http	Hypertext Transfer Protocol
i.e.	id est
Ibid	ibidem
LLM	Master of Laws (Legum Magister)
Ltd	Limited
MD	Managing Director
MFIS	Micro-Finance Institutions
MKURABITA	Kiswahili acronym for ‘ <i>MPANGO WA KURASIMISHA RASILMALI NA BIASHARA ZA WANYONGE TANZANIA</i> ’ (the National Strategy for Growth and the Reduction of Poverty)
NABARD	National Bank for Agriculture and Rural Developments
NBC	National Bank of Commerce
NGO	Non-Governmental Organization
NMB	National Microfinance Bank
NO	Number
OECD	Organization of Economic Corporation Development
ORG	Organization
P	Page

R.E.	Revised Edition, 2002
S	Section
SACCOS	Savings and Credit Cooperative Societies
SEDA	Small Enterprise Development Agency
SHG	Self Help Groups
SIDO	Small Industries Development Organization
SME	Small and Medium Entrepreneurs
TAMFI	Tanzania Association of Microfinance Institutions
TLR	Tanzania Law Reports
UNO	United Nations Organization
US	United States
UTT	Unity Trust of Tanzania
V	Versus
WEF	World Economic Forum
WWW	World Wide Web

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Principal Legislation

The Bank of Tanzania Act, 2006

The Banking and Financial Institutions Act, 2006

The Banking and Financial Institutions Act, No. 12 of 1991

The Cooperative Societies Act, No. 15 of 1991 [Cap 211 R.E 2002]

The Cooperative Societies Act of 2003

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

The Land [Amendment] Act, No. 2 of 2004

The Land Act, No 4 of 1999 [Cap 113 R.E.2002]

The Village Land Act, No. 5 of 1999 [Cap 114 R.E 2002]

The Land Registration Act, [Cap 334 R.E. 2002]

The Law of Marriage Act, No 5 of 1971 [Cap .29 R.E.2002]

Subsidiary Legislations

The Banking and Financial Institutions (Microfinance Activities) Regulations, 2014

GN No.298 of 2014

The Land Regulation (forms) Regulations GN .No 71 of 2001

Land (Small Mortgages) Regulations, GN .No 75 of 2001

Land (Mortgage) Regulations, GN, No 43 of 2005

The Village land Regulations GN. No. 86 of 2001

Policies

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Maria Goreti Katura Mutarubukwa v. NBC, Innocent Chacha Magoti Nshoya and Leonce Benedict Mutarubukwa, Land case No.28 Of 2004, HC, Land Division DSM (unreported)

National Bank of Commerce Ltd v. B&E Investment Limited and Dorein Francis Kanemile Commercial Case NO.14 of 2002 High Court of Tanzania Commercial Division at Dsm(unreported)

National Bank of Commerce v. Dar es Salaam Education and Office Stationary [1995] TLR 275

NBC v. Walter T Czun Civil Appeal No. 31 of 1995 ,Court of Tanzania at Dar es salaam(Unreported)

Pearse v. Morns (1869) 5 CH. APP 227, 229.

Royal Bank Scotland plc v. Etridge Case No.28 of 2004, High Court of Tanzania Land Division at DSM (Unreported).

Santley v. Wilde (1899) 2 Ch 474

Selton v. Slade (1802) 7 VES 265 AT 273

ABSTRACT

This dissertation is intended to be an analysis of the law and practice on accessing loans from microfinance institutions by use of unsurveyed land as security in Tanzania Mainland, and to identify various legal problems facing the borrowers and lenders when unsurveyed land is accepted as security to the loan transactions.

Unlike any other Dissertation this work comprises five chapters, beginning with Chapter One, which is the introductory chapter. Chapter Two discusses the conceptual framework of mortgage creation over unsurveyed land. Chapter Three addresses the legal regime governing the creation of a mortgage in Tanzania by using unsurveyed land. Chapter Four is Data presentation, analysis and discussion of findings while Chapter Five concludes the study with recommendations on what can be done so as to reap the expected benefits.

This study was motivated by the fact that the Government of Tanzania has worked hard to ensure that citizens access loans from Microfinance Institutions through enabling them to create mortgages by using both surveyed and unsurveyed land. This has been affected through making various legal and policy reforms.

Despite those efforts some of the lending institutions are still reluctant to accept unsurveyed land as security for loans, occasioning this research to find out the legal reasons (both substantive and procedural) why some of lending institutions are reluctant to accept unsurveyed land as security of loans .

The study has found out that laws are not adequately framed. There are no clear provisions which address issues of unsurveyed land, and the lack of regulations that regulate mortgages on unsurveyed land leave a lot of loopholes and gaps on the existing stipulated provisions.

Finally come recommendations and conclusions on the findings, where the researcher advises the Government, the Parliament, and the stakeholders on the steps to be taken in order to facilitate and enact laws and rules which will properly govern the procedures, rights and duties of parties who involve themselves in transactions of unsurveyed land to create mortgages in Tanzania.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

A ‘microfinance institution’ means a bank or financial institution which is licensed by the Bank of Tanzania to undertake banking business mainly with individuals, groups or micro and small enterprises in the rural or urban areas¹

Microfinance institutions are very important in the economic growth of Tanzania, but despite the existence of institutions like Finca, Pride, Tujjenge and similar institutions, the majority of Tanzanians are yet to enjoy access to these microfinance institutions and their services toward growth of the economy².

Most Tanzanians have never reaped any benefits from their land as collateral for loans due to the kind of collateral preferred and accepted by the microfinance institutions as security for loans. Indeed, the preferred type of security and kind of land they accept is surveyed land rather than unsurveyed land. Clearly it is the type of land which the microfinance institutions choose as security which is one of the major problems that preclude the majority of citizens from accessing the available opportunities for the loan facilities offered by those institutions³.

At the outset most of the targeted groups when these microfinance institutions were established were people in the lower income brackets. The majority of these people reside in villages where they own village land⁴. Since nearly all the village land plots are unsurveyed, it goes without saying that most villagers own unregistered land which may be made available as collateral under Rule 50 of the Banking and

¹ World Population with access to finance Retrieved from the (<http://worldbank.org>) accessed on December 16 ,2015

² *ibid*

³ *ibid*

⁴ See Item 2.2 of the National Microfinance Policy: Ministry of Finance, United Republic of Tanzania, May 2000 at P 8

Financial Institutions (Microfinance Activities) Regulations, 2004. This Regulation provides that-

*“An institution engaged in microfinance activities may extend credit accommodations secured against unregistered collateral or non-traditional security or collateral substitute, such as personal guarantees, contractual pledging of home or business assets, compulsory savings or group guarantees where members jointly guarantee each other’s loans”.*⁵

The above regulation provide for unregistered collateral among the Collateral includes unsurveyed land (unregistered land), Unregistered land ‘is defined by section 2 of the Land Registration Act as-

*“Unregister land other than registered land, the title of land is unregistered, except interest which are to be registered as land charges on the land register where the detail of ownership do not appear on any central record of register”.*⁶

Unsurveyed land (unregistered land) , its fact that for the people who own unsurveyed land own under Customary right of Occupancy⁷. Therefore it should be known that most of owners of unsurveyed land own land under Customary right of occupancy. The word unsurveyed land and unregistered land are synonymous.

The low income earning citizens were targeted by the Government in the National Microfinance Policy of 2000 and the MKURABITA Policy of 2007 to improve their life standards by facilitating for them access to loans from Microfinance Institutions. This is due to the fact that they own unregistered collateral and non-traditional security instruments as provided under Rule 50 of the Banking and Financial Institutions (Microfinance Activities) Regulations⁸ Due to nature of their collaterals they own other documents apart from a formal title deed as evidence of ownership of their land since the land has not been surveyed. It is due to this ground that some of financial institutions have refused to honor their documents such as

⁵ Rule 2 of GN. No 298 of 2014

⁶ S. 2 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

⁷ S. 115(1) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

⁸ See Rule 2 of GN. No.298 of 2014

sales agreements, residential licenses and any other documents apart from title deed as the evidence to prove their ownership of the land⁹.

However some initiatives have been taken by the government to make the life standards of their citizens improve, Pertinent reforms in the financial sector which among other things were initiated in the microfinance policy have led the Government to enact laws which will fit the requirements of the policy in order to improve economic growth of the country to allow and promote the acceptance of unsurveyed land as security for loans offered by the microfinance institutions.

Those of the low income brackets who could not afford to access loans from commercial banks and this objective is achieved by establishing Microfinance institutions and institutions to offer loans to them by accepting their non-traditional collateral as security. Through different schemes the Government has devised MKURABITA and National Microfinance Policy in order to change the fiscal system to enable the microfinance institutions to issue loans to people within the low income brackets.¹⁰

1.1 Background to the Problem

In the year 2000, the Tanzania Government adopted the National Microfinance Policy as a means to reduce poverty and spur economic growth .The policy came at a time when the microfinance sector was underperforming due to a disjointed legal and regulatory framework. Microfinance institutions were poorly managed and different laws were being applied to different microfinance schemes¹¹.

⁹ Lusaga, J.M. (2009). Issuing Residential License to Land owners in Unplanned Settlements in Dar es Salaam Tanzania: Report by Un-Habit, Shelter branch, Land and Tenure pp 9-31.

¹⁰ Bikki R, Joselito G.(2003). Microfinance Regulation in Tanzania: Implications for Development and Performance of the Industry Africa Region Working Paper Series No.51 pp. 1-5

¹¹ Peter K. and Teresa P. (2015) A new microfinance law for Tanzania? Retrieved at www.clyde.com on 22/1/2016 at p1

There are several reforms in financial institutions which have occasioned changes in the laws regulating the loan system in the country, which provide for the creation of the mortgage on both surveyed and unsurveyed land.

The laws regulating the mortgage system in Tanzania were enacted in order to meet the goals set in the MKURABITA Program (The Property and Business Formalization Program for Tanzania which is known in Kiswahili as *Mpango wa Kurasimisha Rasilimali na Biashara za Wanyonge Tanzania*) as well as to fulfill what is provided in the National Microfinance Policy).

Among the laws amended was the Land Act which was amended in the year 2004¹², and so was later the Village Land Act¹³ and Land (Mortgage) Regulations¹⁴ was issued for the purpose of protecting the interests of the user and the occupiers of the land. In the result, both the Village Land Act¹⁵ and the Land Act¹⁶ allow the creation of mortgages on both surveyed and unsurveyed land. This is evidenced in S. 31(4) b of the Village Land Act¹⁷. In both cases the law provides for the creation of mortgages on unsurveyed land. S. 115(1) The Land (Amendment) Act¹⁸ also provides that a mortgage can be created on unsurveyed land.

The National Microfinance Policy addresses the provision of financial services to households, small holder farmers, and micro enterprises in rural areas as well as in the urban sector.¹⁹ The current situation is quite different from that of the previous

¹²The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

¹³The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

¹⁴GN. No. 43 of 2006.

¹⁵ See Rule 2 of GN. 298 of 2014

¹⁶S.2 of The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

¹⁷Bikki R, Joselito G.(2003) Microfinance Regulation in Tanzania: Implications for Development and Performance of the Industry Africa Region Working Paper Series No.51 pp. 1-5

¹⁸Peter K. and Teresa P. (2015) A new microfinance law for Tanzania? Retrieved at www.clyde.com on 22/1/2016 at p1

¹⁹National Microfinance Policy, item 2.2 Ministry of Finance: United Republic of Tanzania, May 2000 P 8

situation whereby there was no any financial institution which provided loans to the citizens who wanted to put their unsurveyed land as security to the said loan.

Despite the considerable support given by government in recent years, unsurveyed land being recognized by law as Mortgage still the Microfinance Institutions are not ready to comply with those laws²⁰.

By considering what has been started above it appears that there is a problem in enforcing law that regulate unsurveyed as Mortgage. That when customers apply for loans they find difficult conditions which are not easy to access loans from these Microfinance institutions.

Most of Tanzanians living in rural areas depend on small and medium enterprises as well as small scale farming activities to run their daily life, and majority of these people reside mostly in rural areas and their main asset capable of forming collateral is land but land in the rural areas is mostly unsurveyed²¹.

Hence this research find out why microfinance institution is reluctant to accept unsurveyed land as security for their loans despite provided by the law and to find out what are the legal reasons or challenges which lead to lender's reluctance to accept customary right of occupancy on unsurveyed land as security for granting loans.

²⁰Kenneth, M (2014) Hati za kimila: Mwananchi Newspaper Retrieved on 16th November 2014 from the, World Wide Web
http://www.ippmedia.com/frontend/index.php/itm.c/2.au/articles107818/javascript/page_home.js?l=69252

²¹ See item 2.2 of the National Microfinance Policy: Ministry of Finance, United Republic of Tanzania, and May 2000. P8

1.2 Statement of the Problem

The Government in Tanzania has worked hard to ensure that life standards of the citizens improve²², and to this end pertinent reforms in the financial sector, among other things were initiated through microfinance policy initiatives which have led the Government to enact laws which will fit the requirements of the policy to improve economic growth of citizens, by allowing access loans from microfinance institutions through enabling them to create mortgages by using both surveyed and unsurveyed land. This has been through making various legal and policy frameworks and reforms. This includes the passing of the Banking and Financial Institutions Act²³, Land Act²⁴, the Village Land Act²⁵ and their respective Regulations.

The position in the National Microfinance Policy²⁶ and MKURABITA Policy²⁷ emphasizes the provision of financial services to the households, small holder farmer, and micro enterprises in rural areas as well as in the urban sector, this puts emphasis on the sound development of microfinance institutions for economic growth²⁸

S. 113 (1) of the Land Act²⁹ provides that, “an occupier of land under a right of occupancy may by an instrument in a prescribed form create mortgage by use of that right of occupancy”. For the mortgage created to be effective, it must be

²²Bikki R, Joselito G.(2003) Microfinance Regulation in Tanzania: Implications for Development and Performance of the Industry Africa Region Working Paper Series No.51 Retrieved on 6th September 2015 from World Wide Web

<https://www.google.com/search?q=Bikki+R%2C+Joselito+G.%282003%29+Microfinance+Regulation+in+Tanzania%3A+Implications+for+Development+and+Performance+of+the+Industry+Africa+Region+Working+Paper+Series+No.51++pp.+1-5&ie=utf-8&oe=utf-8&client=firefox-b> pp. 1-5

²³ Act No. 5 Of 2006

²⁴ The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

²⁵ The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

²⁶See item 2.2 of the National Microfinance Policy: Ministry of Finance, United Republic of Tanzania, and May 2000. P8

²⁷Tanzania Property and Business Formalization Program, 2007 retrieved on 6th December 2015 from WorldWideWeb<https://www.google.com/search?q=Tanzania+Property+and+Business+Formalization+Program%2C++2007&ie=utf-8&oe=utf-8&client=firefox-b-ab> p2

²⁸ See item 2.2 of National Microfinance Policy, Ministry of Finance, United Republic of Tanzania, May 2000 p 8

²⁹ The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

registered.³⁰ Further the Act adds that, “nothing shall operate to prevent a borrower from offering and a lender from accepting a deposit of among others a certificate of a customary right of occupancy”.³¹ This provision shows that a mortgage can be created by using among other things, the customary right of occupancy.

With the same effect, the Act also provides that the governing law shall be customary law which will be applicable to the land in respect of which the customary mortgage is created.³² S. 31 (4) b of The Village Land Act also provides that, a mortgage can be created on village land³³

Despite the above reforms of laws and policies, practice shows that some of microfinance institutions are reluctant to accept customary right of occupancy so as to use them as security for mortgage creation. One of such instances was reported in Mwananchi Newspaper showing how the use of customary right of occupancy impedes the move to access loans from lending institutions. This was reported as:-

“Njia ya kuwa fanya wakulima wakopesheke ni kuwa dhamini, lakini mkopaji kutakiwa kuwa na dhamana za mali zisizo hamishika ,hati za viwanja na masharti mengine ni mambo ambayo yamekuwa na mchango mkubwa kwa wananchi wanaotumia ardhi ya vijiji kushindwa kupata mkopo”³⁴

Which is literally interpreted as, the only way to help people living in the rural areas to access loans is by guaranteeing them through immovable property and title deeds to their land. However these conditions have been hard to fulfill for people living in rural areas since they have customary right of occupancy which is granted on unsurveyed land.

³⁰S.113 (4) The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

³¹ S. 113(5) b The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

³²S.115 (1) The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

³³The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002

³⁴Joseph. Z (2015) Njia ya kuwa fanya wakulima wakopesheke ni kuwa dhamini, Mwananchi Newspaper retrieved on 27th August 2015, from World Web Wide <https://www.google.com/search?q=mwananchi+news+paper+link>.

Again it was reported that;-

“Wananchi wamejaribu kuomba mikopo kutoka taasisi za kifedha ikiwemo za taasisi hizo za microfinance lakini kila wanapofika wana ambiwa sera za mabenki hazitambui hati za kimila kwa wale wenye nazo kuwa hatimiliki halali kwa wakopaji ambao wanatumia ardhi ya kijiji kama dhamana³⁵”

Which can be literally interpreted as citizens have been trying to access loans from microfinance institutions but are denied for a reason that banking policies do not recognize customary right of occupancy? As such most of people who intend to use customary right of occupancy to access loans from microfinance institutions are left without such facility.

Thus, if the laws and policy advocate for lenders to accept a customary right of occupancy as security for the creation of a mortgage, the question arises as to why some of lending institutions are reluctant to accept access to loans in Microfinance institutions by applicants who pledge unsurveyed land as security. This research aim to find reasons (substantive and procedural reasons) will which lead some of lender's reluctance to accept unsurveyed land as security for granting loans.

1.3 Research Questions

The research conducted is based on a number of questions as shown here below:

- i. Can unsurveyed land attain the basic qualifications of a good mortgage?
- ii. What are the legal requirements for credit facilities to be secured by unsurveyed land?
- iii. What are the legal challenges facing unsurveyed land as a loan security?
- iv. What are the improvements /recommendations to be adopted in promoting and improving unsurveyed land as security?

³⁵Kenneth, M (2014) Hati za kimila; Mwananchi Newspaper on 16th November 2014 WorldWideWebhttp://www.ipppmedia.com/frontend/index.php/itm.c/2.au/articles107818/javascript/page_home.js?l=69252

1.4 General Objectives

The research is aimed at understanding the reasons behind the reluctance of some of the Microfinance institutions to accept unsurveyed land as security for granting loans. It also intended to suggest ways to overcome the legal challenges facing the microfinance institutions.

1.4.1 Specific Objectives

- i. To examine the current framework of land law and to find whether what provided by the law for unsurveyed land in respect of mortgage is practically working out.
- ii. To examine the legal challenges associated with mortgage provisions with regard to unsurveyed land.
- iii. To explore the legal requirements for credit facilities to be secured by unsurveyed land.
- iv. To recommend reforms on mode of obtaining loan from unsurveyed land.

1:5 Significance of the Study

This study has a number of advantages to researchers, the Legislative arm of the state, the Government, as well as the service providers and the public at large.

- i. To meet the basic requirements /fulfillments of the award of Degree of Masters of law as per Mzumbe University Education Standard.
- ii. The study will help researchers to open their minds on the legal requirements for lending against securities and especially for credit facilities to be secured on unsurveyed land.
- iii. The research's recommendations will be based on how to overcome legal challenges facing microfinance institutions when granting loans to people who use unsurveyed land as security to a mortgage.
- iv. The Government and the legislative arm of the state also can adopt these recommendations to overcome the objections of some Microfinance Institutions which are reluctant to accept unsurveyed land as security and

to meet the legal challenges by harmonizing and amending appropriately the existing laws on the one hand.

However on the other hand this research is generally intended to be used by members of the public and for academic purposes.

1.6 Literature Review

This section provides for the important discussion on the topic researched as provided by various authors of different books through several writings that have been used in this same study. Most authors have written topics on the creation of mortgages but have not explained in depth the difficulties and complications facing these microfinance institutions when accept credit applications on unsurveyed land.

Alphonse, M.A.U, and Janeth, F.U. (2011)³⁶ the authors in their work tried to discuss a lot concerning the aspect of microfinance law within Tanzania. As their first concern the authors provide for the concept of security where they discussed land as security and cite the good attributes of a land security. In this work they consider different concepts of security. One among them is that land is immovable security and the above good attributes are difficult to be attained by the owner of unsurveyed land, on the other hand the authors in their work did not suggest how those good attributes can be attained in respect of unsurveyed land.

The authors only discuss the main aim of policy (National Microfinance Policy) and the advantage of land as security but they have not shown the reasons why some of these microfinance institutions are reluctant to accept unsurveyed land collateral to be security for their loans.

³⁶Alphonse, M.A.U, Janeth, F.U. (2011) *.Aspects of Banking and Microfinance Law* :(1St Ed) pp.44-49

It is the object of the researcher in this work to find out and to suggest procedures for accessing loans by using unsurveyed land as security from the microfinance institutions. But also the main issue is to discover why the microfinance institutions are adamantly reluctant to accept unsurveyed land as security for loans despite the provisions available under the law.

Tenga W, Sist, J (2015)³⁷ Authors in their joint work have argued that registered rights of occupancy can only be mortgaged in institutions that are approved by the government. Private money lending is illegal and, that the applicant may access loans from financial institution which are registered to provide such services instead of private persons on the basis of their agreement. In case the borrower defaults to pay back the loan the mortgagee may exercise remedies on the property the right to sell but with no right to retain the property because their aim is to return back their money by following the requisite procedures of the laws.

The Authors in their work build their argument on the basis of a mortgage created on surveyed land by recognized institutions allowed by the laws such as banks, and they proceed from that premise to the case where an applicant owns unsurveyed land who also should be enabled to access loans from the same financial institutions by putting unsurveyed land as security since those institutions are recognized by the laws and allowed to do banking activities This research goes further and looks why some of these microfinance institutions are reluctant to accept unsurveyed land as security for loans despite the fact that they are registered to assist applicants own unsurveyed land .

³⁷Tenga W., Sist, J. (2015). *Theoretical Foundations of Land Law in Tanzania*: Law Africa Publishing (T) Ltd, Dar-es-Salaam P. 287

Ernest B (2013),³⁸ the author in his paper states that “whenever a financial institution advances money to its clients, it has to take collateral so as to reduce and/or prevent a total loss of funds and revenue in case the borrower defaults. Thus collateral offered serves as a protection to the financial institution. Generally security accepted by financial institutions includes mortgages, pledges, stocks and shares, land, buildings, guarantees and life assurance policies. Traditionally, banks and non-banking financial institutions preferred the use of landed property as security for their loans, even though they find it difficult and long procedure to realize this security.

Author explains that when financial institutions advance loans they accept security of land but they find it a difficult and long procedure to realize this security; but the author in his work did not explain what those difficulties and long procedures are.

Therefore the researcher goes further in this research find why some of the microfinance institutions are reluctant to accept unsurveyed land as security for loans and what obstacles the Microfinance institutions are facing in accepting unsurveyed land as security for a mortgage in spite of the laws which provides creation of loans on both surveyed and unsurveyed land.

Binamungu, C.S & Ngwilimi, G.S (2006)³⁹ Authors focus on the regulation of mortgages based on registered land. Three steps have to be taken by the mortgagee which is provided for a baseline for all mortgagees in order to protect their positions. Each step taken prevents a harm that would befall the mortgagee and any failure to observe the steps attracts harm to the mortgagee in case there is default and the mortgagee wishes to execute the mortgage.

³⁸Ernest B (2013). Assessment of the Acceptability of Personal Guarantees and Life Assurance Policies as Collateral for Loans in Ghana: Research Journal of Finance and Accounting: ISSN 2222-2847 Vol.4, No.12, p. 1

³⁹Binamungu, C.S ,Ngwilimi,G.S.(2006). *Regulation of Banking Business in Tanzania*: Mzumbe Book Project,Morogoro.pp.110-119

The requirements of consent of the spouse for matrimonial houses, conducting a physical verification of the landed property as well as other contractual procedures, if all of them are well observed, will put the mortgagee on the safe side. This will not be true when the steps are not observed. All these steps are conducted on surveyed land or registered land.

The author has shown the procedure to be followed and this is in surveyed lands. But the author has not spoken on unsurveyed land while in his title provide on regulations of banking business in Tanzania and Microfinance institutions are one among of the institutions conduct banking activities for example issue loans, therefore authors they only look banking activities on bases of commercial banks but they had not discussed on Microfinance institution since these are also regulated by the same laws.

Therefore this research goes further to look into the regulations governing microfinance institutions to ascertain whether or not these institutions are protected by the laws. And if yes why are some of these microfinance Institutions reluctant to provide service to the customers whose unsurveyed land is pledged as security. This is what the researcher is striving to determine.

Tenga W, Sist, J (2008),⁴⁰ focused his writings concerning the same issue of land as a security for mortgages, hence any good security must have the following attributes; its value must be readily ascertainable and reasonably stable over the years. In this case, the land which can be stable for a long period should be readily realizable in all conditions with a simple title which is transferable without undue trouble and it must be easy for the bank or any other financial institution to obtain a safe and unquestionable title without trouble and expense.

⁴⁰Tenga W., Sist, J. (2008). *Manual on Land and Conveyancing in Tanzania*: Law Africa Publishing (T) Ltd, Dar-es-Salaam P. 256

On the other hand, land as a good security must be free from liabilities to third parties arising out of its title and consequently only certain securities should qualify as security for mortgage. Therefore such qualifications should cover the interests of the financial institutions in case the borrower defaults to pay back the loans or any other dispute arising between the parties. Nevertheless, these qualifications are only found in registered lands.⁴¹

Whenever Microfinance institutions advance loans to their clients in exchange to their collaterals, their argument always is to reduce and/or prevent a total loss of funds and revenue in case the borrower defaults. Thus collateral offered serves as a protection to the financial institution. Hence security accepted by financial institutions includes land. Traditionally, financial institution preferred the use of land as security for their loans; even though they find it difficult and long procedure to realize this Security especially unsurveyed land.⁴²

The author has explained clearly the qualities of good security, however these qualities are easy to realize in surveyed land than in unsurveyed land. Again author is silent on how unsurveyed land can attain those attributes of good security, in his work he did not show on the problems faced by these finance institutions when they accept security which does not cover the above attributes.

Hence this research looks at legal challenges/problems facing unsurveyed land as a security in Tanzania and how unsurveyed land can attain those qualities of good security.

⁴¹Tenga W., Sist, J. (2008). *Manual on Land and Conveyancing in Tanzania*: Law Africa Publishing (T) Ltd, Dar-es-Salaam P. 257

⁴²*ibid*

Us aid Country Profile Property Rights And Resource Governance⁴³The authors provides that “The most common means of obtaining both formal and informal access to land are through inheritance, gifts, borrowing from family members, land allocations from village councils, informal land transactions in urban areas, allocation from a municipality in an urban , land purchase and squatting.”

The Land Act recognizes the validity of customary rights of occupancy without the need to issue and register a formal certificate. Theoretically, the certificates are required to mortgage the land right to secure a loan.

The Village Land Act provides a process for village councils to issue certificates for customary rights of occupancy. According to the Act, the steps for obtaining a certificate of customary right of occupancy to village land are:

- i. Application for a certificate to the village council by the landholder.
- ii. Council review of the application.
- iii. Issuance of a letter of offer stipulating development conditions, yearly rent and other conditions.
- iv. The land owner’s written agreement to these conditions on a prescribed form.
- v. Issuance of the certificate.

Certificates have been issued for village land. Notwithstanding these efforts to provide for title security and creditor protection, due to the sharp limitations on its transferability, village land is not suitable for as collateral for lending. Moreover, there is a widespread lack of confidence in the validity of many certificates.

⁴³Us aid Country Profile: Property Rights And Resource Governance. Retrieved on 11th January 2016 from World Web Wide https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Egypt_Profile-1.pdf p.10

However the authors try to discuss in their paper that the government is trying to create a favorable condition which could enable the owner of unsurveyed land to access loans, by using their land and that is the main aim of the government.

The government provides to these kinds of people, certificates and permits which prove that they are legal owners of those lands (unsurveyed) by issuing a residential license etc. But still some of Microfinance institutions are reluctant to accept the application of loans from these people using unsurveyed land as security for their loans. But this research found out on why some of these financial institutions are doing that? And under what legal challenges they are facing of which the authors above did not discuss it?

Fidelis, K. M.(2006)⁴⁴. Author therein has stated that the Land Act and the Village Land Act of 1999 as amended conserve the leasehold tenure through the right of occupancy system, but aim to provide facilities that enable an increased land security for villagers and pastoralists, as well as possibilities for investments in small holding farms. The implementation of the land Acts are making progress, albeit slowly, and the main concern seems to be the question of financing. Other critical issues are, whether the banks are going to respond to the mortgaging possibilities and thereby fulfill the strategic visions of investments in the agriculture.

Therefore this research is determined to discover why some of these Microfinance institutions are reluctant in providing grants/loans, despite the law which provides creation of mortgage on unsurveyed land. And also seeks to know what the legal challenges are facing these Microfinance institutions when granting loans for those who use unsurveyed land as security for mortgages.

⁴⁴Fidelis, K. M. (2006). The Challenging Tanzanian Land Law Reform: A study of the Implementation of the Village Land Act: Retrieved on 10 May 2015 from World Web https://www.kth.se/polopoly_fs/1.158660!/Menu/general/column-content/attachment/EX-06-160.pdfEX-06-160/2006, p 5

Author in his work he only discussed on the aim of the amendments of the Land Act and the Village Land Act but in his work never touched on the legal reasons which cause some of these Financial Institution to be reluctant to accept unsurveyed land as security for loans despite of amendment of both laws Land Act and Village Land Act.

K.G. Karmakar (2009),⁴⁵The Author discussed on the purposes of establishing these Microfinance institutions. The main purposes are to shape the poor people to scale up their operations in an affordable manner. Microfinance is not for charity, it is there to make business.

According to the author, “the poor cannot be left to the tender mercies of those who look down upon them by subjecting them to microfinance as ‘discretionary’ funding and the members of SHGs as ‘beneficiaries’. Truly, they are all partners in all common endeavors. Microfinance in the form of bank SHG linkage model has been able to inspire hope to the lives of thousands of rural people; women and youths in particular, also enabling them to elevate their family livelihood in a way of alleviation of poverty through savings and entrepreneurship. For banks, it is a business opportunity and for bank officials, it is an opportunity to extend their rural client without much risk, as the recovery levels exceed 95 per cent. ⁴⁶The SHG members of today could turn out to be clients for several financial products over the years. For the NGOs/NABARD officials, policies have to be developed to harness market forces and yet help the poor to survive and advance. The United Nations (UN) celebrated 2005 as the year of Microcredit and our Endeavour.

The Author addresses the aims of establishing the microfinance institutions as geared to enable people who live in low standard of life to access loans from Microfinance institutions. Most of these people living in the village land have their only security to secure loans from this financial institution is land .When these

⁴⁵Karmakar, K.G.(2009).*Microfinance in India* :New Delhi SAGE Publication India Pvt Lt, p43

⁴⁶*ibid*

people seek for loans from these Microfinance institutions, some of these financial institutions are reluctant to grant loans services to these people who live in village land whom their credit facilities secured by unsurveyed land⁴⁷. Anyhow, the responsibility of these microfinance institutions is to consider such kind of people when they ask for loans than any other clients.

Although the work is not based in Tanzania nor does it explain the problem, it is still relevant because of the way it helps the researcher to understand the main aim of establish this microfinance institutions despite the author has not touch on the reasons behind this Microfinance institutions are slow to grant loans to these people use un surveyed land as security for their loans.

This research has conducted and has found out why some of these Microfinance institutions are reluctant to provide or grants/loans, despite their presumed main objective of extending loans in order to eradicate poverty. The research also seeks to know what are the legal challenges facing these microfinance institutions when granting loans for those who use unsurveyed land as security for a mortgage.

MKURABITA REPORT, (2007)⁴⁸The main idea is that many people living in poor conditions as well possess wealth in the form of land, minor businesses and other domestic agricultural properties, but this wealth is not legally recognized or formalized. If such kinds of people do not have access to secure title to land, or work in unregistered and unregulated business, they may have little access to capital to be able to expand their economic activities beyond their own local area. Therefore, the main idea of MKURABITA is to make it possible, affordable and desirable for these kinds of people to operate within the formal, legal system so that they can be assured

⁴⁷Karmakar, K.G.(2009).*Microfinance in India* :New Delhi SAGE Publication India Pvt Lt, p43

⁴⁸Tanzania Property and Business Formalization Program, 2007 retrieved on 6th December 2015 from World wide web [https://www.google.com/search?q= Tanzania+Property+and+Business+Formalization+Program%2C+ +2007&ie=utf-8&oe=utf-8&client=firefox-b-ab](https://www.google.com/search?q=Tanzania+Property+and+Business+Formalization+Program%2C++2007&ie=utf-8&oe=utf-8&client=firefox-b-ab) p.2

on the use of their assets to increase their participation in not only local markets, but also national and global ones.

The overall goal is to reduce poverty by an idea of giving them formal title to their property to help them improve their business and/or agricultural activities for better and brighter economic opportunities. The idea focuses on people who live in village land which is not surveyed and conduct minor business and/or agricultural activities. Thus in order to achieve these goals, the government should start issuance of a residential title which could work as the identification of the ownership of the land and these should focus on those who live in the villages whose lands are not yet surveyed.

There are citizens who believe that, those lands they live in (and own) are eligible for applications of loans from the Microfinance institutions but, these institutions have refused to accept residential licenses, sales agreements and letters of offer.⁴⁹ Thus these people are not allowed to access loans against unregistered land, but the problem here is why these Microfinance institutions refuse to accept documents apart from a title deed as evidence to prove the ownership of land, while resident licenses are undeniably issued by the government? This research seeks to find out why it is so difficult to some of these microfinance institutions to accept unsurveyed land as security despite provided by the laws.

MKWAWA, E.P.⁵⁰. The author describes the position and the extent to which financial services in Tanzania have been integrated into poverty reduction strategies. That Microfinance institutions have several branches but the majority of potential

⁴⁹Tanzania Property and Business Formalization Program, 2007 retrieved on 6th December 2015 from World wide web <https://www.google.com/search?q=Tanzania+Property+and+Business+Formalization+Program%2C++2007&ie=utf-8&oe=utf-8&client=firefox-b-ab> p.2

⁵⁰Mkwawa. E.P. (CEO Dar es Salaam community Bank Limited) Integrating Financial Services into Poverty Reduction Strategies in Tanzania Retrieved 1st December 2016 World Wide Web <https://www.google.com/search?q=Mkwawa+E%2CP+Chief+Executive+Officer+Dar+es+salaam+community+Bank+Limited+Integrating+Financial+Services+Into+Poverty+Reduction+Strategies+In+Tanzania.&ie=utf-8&oe=utf-8&client=firefox-b-ab> P. 4

borrowers fail to utilize the services due to the fact that access to loans by the rural communities are limited because of lack of preferred collateral.⁵¹

Efforts have been made by the Government to make sure that the people who live in village land can attain loans just like those live in surveyed land, and to this effect has issued a policy dubbed ‘MKURABITA, National Microfinance policy and has set up a regulatory framework which will encourage microfinance institutions to issue loans to persons who tender unsurveyed land as security for their loans (mortgage).⁵² Unfortunately the microfinance institutions are still reluctant to issue loans to people who live in village land who use the said land as collateral.

In this work the author discusses the aim of establishing these Microfinance Institutions for the targeted groups. The author also takes trouble to explain the efforts made by the Government. However some Financial institutions are still reluctant to accept to grant loans to the applicants. So this research goes deeper into the matter by looking the legal reasons which face this Microfinance to accept unsurveyed land as security for loans which the author has not bother to consider in his discussion.

OECD REPORT (2013)⁵³. This Report describes the financial sector on its growth that has occurred quickly over the last few years, it remains highly concentrated and dominated by over-liquid banking institutions. 56% of the population, and in

⁵¹Mkwawa. E.P. (CEO Dar es Salaam community Bank Limited) Integrating Financial Services into Poverty Reduction Strategies in Tanzania Retrieved 1st December 2016 World Wide Web <https://www.google.com/search?q=Mkwawa+E%2C+P+Chief+Executive+Officer+Dar+es+salaam+community+Bank+Limited+Integrating+Financial+Services+Into+Poverty+Reduction+Strategies+In+Tanzania.&ie=utf-8&oe=utf-8&client=firefox-b-ab> P. 3

⁵²Mkwawa. E.P. (CEO Dar es Salaam community Bank Limited) Integrating Financial Services into Poverty Reduction Strategies in Tanzania Retrieved 1st December 2016 World Wide Web <https://www.google.com/search?q=Mkwawa+E%2C+P+Chief+Executive+Officer+Dar+es+salaam+community+Bank+Limited+Integrating+Financial+Services+Into+Poverty+Reduction+Strategies+In+Tanzania.&ie=utf-8&oe=utf-8&client=firefox-b-ab> P. 9

⁵³ OECD. (2013). OECD Investment Policy Reviews: Tanzania 2013: Overview of progress and policy challenges in Tanzania. OECD Publishing. Retrieved on June , 2015 from World Web Wide <http://dx.doi.org/10.1787/9789264204348-6-en> p 42

particular small businesses in rural areas, remain excluded from any financial service. In 2011, only 8% of the rural population had access to formal financial institutions (banks and insurance companies).

According to the Global Competitiveness Report 2013-14, access to financing is cited as the most problematic factor for doing business in Tanzania, closely followed by infrastructure (WEF, 2013). Credit from commercial banks has increased significantly over the last five years but only 12% of this credit went to agriculture. Only 8% of the domestic lending to agriculture went to agricultural production, with the rest channeled to agricultural trading. Despite the considerable support given to microfinance in recent years, the impact of microfinance on access to financial services has been negligible⁵⁴.

Microfinance institutions have been lending at higher interest rates than the commercial banks, averaging 30%. Savings and Credit Cooperative Societies (SACCOS) may have the greatest potential to expand credit supply to agriculture but also they are reluctant to accept farms to use their lands as securities when they are looking for advancing loans.⁵⁵

While their number has been growing, it remains too limited to meet demand in rural areas. Furthermore, they remain largely unregulated, resulting in high variations in service quality and management practices. The lack of collateral represents a critical issue to access both formal and semi-formal credit. Commercial banks require legal collateral covering of the credit amount⁵⁶.

This research looks on why some of these Microfinance institutions are reluctant to accept the use of unsurveyed land as security for loans as evidenced in the report

⁵⁴ OECD. (2013). OECD Investment Policy Reviews: Tanzania 2013: Overview of progress and policy challenges in Tanzania. OECD Publishing. Retrieved on June , 2015 from World Web Wide <http://dx.doi.org/10.1787/9789264204348-6-en> p 42

⁵⁵ *ibid*

⁵⁶ *ibid*

above. The number of the applicants who access loan services is still low, and therefore the researcher in this research look for the reasons behind the reluctance of some of these microfinance institutions which are reluctant despite the provisions of the law to accept such security.

Romanus S, (2009).⁵⁷. The National Land Policy recognizes the importance of land in poverty reduction, that land registration enhances tenure security, increases access to credit and finally stimulates agriculture investment. The Tanzania Government is progressing with the implementation of the pro poor land titling project; the main purpose is to enable the farmers to obtain loans from financial institutions. Because most of the land is unsurveyed or village land, villagers who applies loan however face banks which impose conditions that make the majority of farms fail to get loans. Mortgage lending is by itself a business in some other countries lucrative and well secured. The author adds that in Tanzania, few people secure loans to run their business even if the prospects of the loan present a credible outcome to the business loan or borrowing for investment purposes. It is widely held in financial institution circles that Tanzanians have a culture of defaulting therefore banks and lenders cannot rely on information provided by the mortgage applicants and therefore lenders require collateral securities, and actually for the case of real estate financing the most preferred collateral is land with a title deed.⁵⁸

The author has explained how inefficiency of land sector regarding land development provision of occupancy hinders mortgage financing, from this point of author's view researchers goes further and looking the issues and legal challenges facing Microfinance institutions when consider credit facilities to be secured by

⁵⁷Romanus S. (2009).Assessing the impact of Customary Land Rights Registration on credit accessibly farmers in Tanzania. Retrieved on 13th October 2015, from World Web Wide <https://www.google.com/search?q=Romanus+S%2C+%282009%29.+Assessing+the+impact+of+Customary+Land+Rights+Registration+on+credit+accessibly+farmers+in+Tanzania.&ie=utf-8&oe=utf-8&client=firefox-b> pp1-8

⁵⁸*ibid*

unsurveyed land in order to come up with proper and desirous way of financing people who own unsurveyed land.

Tanganyika Law society (June 2015)⁵⁹In this context the authors focus on the use of land stating that-

Rehani ni dhamana ya mkopo kwa kutumia ardhi kama kitu cha usalama kwa mkopeshaji wa mkopo. Mmiliki wa ardhi huweza kuomba mkopo katika taasisi za kifedha kama vile benki kwa kuweka hati ya miliki ya ardhi yake kama dhamana ya mkopo aliochukua. Rehani Katika Ardhi Tanzania ni nchi iliyo kwenye mikakati ya maendeleo endelevu. Maendeleo endelevu hutoka katika vyanzo mbalimbali ikiwemo maliasili Kama ardhi.Taasisi za kifedha pia zinachangia katika maendeleo kwa njia ya kuwapatia wananchi mkopo wa fedha kwa riba. Kutokana Na nia ya kuhakikisha uwepo Wa maendeleo, Serikali ilionelea Ni vyema kurekebisha baadhi ya vipengele katika Sheria za Ardhi, 1999 na Sheria ya Usajili wa Ardhi (Sura 334) kupitia kutungwa kwa Sheria ya Rehani. Sheria ya Rehani inatumika kuongoza taasisi za fedha katika kukopesha fedha kwa wananchi.

The authors look on several reforms in financial institutions through changes which were enacted in the laws regulating the loan system in the country, which allowed creation of the loans on both surveyed land and unsurveyed land .That land can be used as securities for loans, land is given as a gate to be forfeited in default, because land is a security which can be stable, for a long period and be readily realizable in all conditions with a simple title which is transferable without undue trouble.

The authors provides the aim of land that land can be used as security for loans regardless the kind of land and the author in their work they father state that the several reforms was made including the amendment of Land Act and Village Land Act in order to enable citizens to use land as security but in their work they had never spoken on how the applicant can use unsurveyed land as security and the legal

⁵⁹ Tanganyika Law society (June 2015).Ijue Sheria Ya Ardhi n a Taratibu Zinazohusika Kupata, Kumiliki Na Kuuza Ardhi Vijijini Na Mjini p. 20

challenges that facing these Microfinance Institution when they accept such kind as security for loans .

Hence researchers are interested to go further and look why some of microfinance institutions are reluctant to accept unsurveyed land as security for loans .

1.6 Research Methodology

This part covers the methodological aspects applied in conduct research. This are covered sampling, and the methods to be employed in data collection analyzing it and presenting the findings.

1.6.1 Research Design

The study uses the Descriptive design because this method helped the research to collect data on the Access to Loans in Microfinance Institutions by use Unsurveyed Land as Security. The research prepared questionnaire and interviewing loans officers from Microfinance institutions selected, lawyers from different firms who are expert on mortgage issues, lecturers from different institutions and lastly to the Tanzania Association of Microfinance Institutions (TAMFI).⁶⁰

1.6.2 Area of study

The researcher collected data mainly in Dar es Salaam, Mwanza, and Tarime –Mara. The researcher decided to select these places due to the fact that the Microfinance institutions within these places are facing such issues including land disputes.

1.6.3 Unity of inquiry /Sampling size

In collecting primary data the researcher used random sampling. That being the case the researcher aimed to consulting Forty (40) respondents but was able to meet thirty (30) respondents comprising of loan officers working at different

⁶⁰ Kothari, C.R (1999). *Research Methodology: Methods & Techniques*, 2nd Ed; New Delhi: New Age International (P) Limited Publisher, p 39.

Microfinance Institutions, lawyers from different firms who are expert on mortgage issues, lecturers from different institutions and lastly the Tanzania Association of Microfinance Institutions (TAMFI).

1.6.4 Sample design

The researcher use both probability and non probability sampling. This method helped to obtain data from representatives of these different groups including loan officers working at different Microfinance Institutions, lawyers from different firms who are expert on mortgage issues, lecturers from different institutions and lastly the Tanzania Association of Microfinance Institutions (TAMFI). Again the researcher also selected sample respondents who were easy to access during the data collection. The reason for the choice of this sample design is due to the nature of the study area. The area is very busy such that is difficult to access the earlier specified respondent. So in order to facilitate the exercise of data collection, the same would be interviewed by the guide questionnaire.

1.6.4 Methods of data Collection.

The researcher also used both primary data and secondary data to collect data whereby in Primary data the researcher use interview and questionnaire, and in secondary data collection the researcher based on literature review, case laws, and reports and from different sources include library, internet source and report.

1.6.4.1 Primary data

This is first hand data which the researcher used directly from the field .The researcher employed interviews and Questionnaires.

i. Interview

The researcher used both structured and unstructured interviews in order to collect data from respondents. The researcher was able to interview respondents from Tarime, Mwanza and Dar es Salaam .The researcher managed to interview loan

officers working at different Microfinance Institutions, lawyers from different firms who are expert on mortgage issues, lecturers from different institutions and lastly the Tanzania Association of Microfinance Institutions (TAMFI).

Structured interview was conducted to seek specific information while unstructured interview was also preferred because they allowed a greater flexibility in the questioning process and therefore the researcher was able to get the concrete and relevant information which in turn helped him in getting good and fruitful results.

ii. Questionnaire

The researcher prepared questions both open-ended and closed-ended questionnaires used and supplied to the respondents. The researcher able to distribute questionnaire to ten(10) loan officers and email two lawyers who are experts in these areas.

This was an advantageous method because respondents had adequate time to answer and also method was used for those respondents who could not be easily reached.

1.6.4.2 Secondary Data

The researcher based on literature review, case laws, and reports from different sources include library, internet source and news papers.

1.6.5 Data Analysis

This involves examining and analyzing data which have been collected from field research by making deductions and inferences. As far as this research is concerned, qualitative methodology was employed to analyze data collected from field research. This is normally a method of data analysis examining the data acquired in terms of quality and variety. Thus such method was used by this researcher to make clarity of some points in this report.

1.6.6 Scope of Study

The study is limited to examine on Access to Loans in Microfinance Institutions by use Unsurveyed Land as Security in Tanzania Main Land. The financial institutions selected to represent others are TAMFI, Tujijenge ,UTT,NMB, FINCA, Access Bank, Sacco's since these Financial institutions are among the top financial institutions dealing much with the provision of secured loans to small businessmen in Tanzania Mainland .

1.7 Chapterization

This Research comprises five chapters; the first chapter is the introductory chapter, which includes all the parts in the research proposal. The second chapter discusses the conceptual framework for the research, assumptions, expectations and theories that supports the topic at hand. The third chapter analyses the legal implication on the creation of mortgage. Fourth chapter deals with the analysis of the data collected from different sources. The collected data analysed and interpreted in this chapter. Finally in chapter five are included Conclusion and Recommendations of the study.

CHAPTER TWO

CONCEPTUAL FRAMEWORK ON MORTGAGE CREATION ON UNSURVEYED LAND

2.0 Introduction

This chapter gives out the conceptual framework on mortgage creation on unsurveyed Land. The main focus in this chapter is the trend of granting loans under the current laws in Tanzania. There have constantly been great reforms in the laws and amendments before having the current laws in Tanzania. These reforms have led to the new laws and policies especially on how to grant loans on surveyed land and unsurveyed land as well as on the qualities of a good mortgage in Tanzania.

2.1 Mortgage

The term ‘mortgage’ is not easy to delineate, neither is it easily comprehensible. However, it has been defined as a conveyance of land or assignment of chattels as security for the payment of a debt or the discharge of some other obligation for which it is given. Mortgage has been defined as the most important form of security. Its essential nature is that it is a conveyance of a legal or equitable interest in property with provision for redemption.⁶¹

On the other hand the concept of ‘mortgage’ has been explained as a legal agreement that conveys the conditional right of ownership on an asset or property by its owner (the mortgagor) to the lender (the mortgagee) as security for a loan.⁶² Additional mortgage is the transfer of an interest in the specific immovable property of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

⁶¹ Violet, A (2011). land law : Published by National Open University of Nigeria P 131

⁶² [Http://Legal-dictionary.the-freedictionary.com/mortgage](http://Legal-dictionary.the-freedictionary.com/mortgage) Retrieved on 15/5/2016

The term ‘mortgage’ may simply be understood to mean a conveyance of interest in property which designed to secure payment of money of discharge some other obligations⁶³

Mortgagor is referred to the borrower who grants a mortgage over freehold or leasehold land belong tom him. The bank, as the lender, who has the benefit of mortgage is known as the “mortgagee”⁶⁴

General the concept mortgage have been explained by different authors but the key concept the concept mean that a loan where the borrower place a property as security for his loan and most preferred is land that a borrower default to pay back the financial institution may exercise remedies provided in the law including sell and others.

2.2 History of mortgage

Tanzania is amongst countries in the world which adopted the ‘common law system’ and the legal history of mortgage in Tanzania was mainly influenced by the early English position. The country also adapted those former English laws and conveyance practices which were in force in England. For example the property laws of Tanzania Cap 114on mortgages applicable currently are those which were in force in England in 1922. Remarkably is the application of the conveyance and law of property Act.⁶⁵ This is due the fact that Tanzania is amongst the countries in the world which adopted the common law system. Prior to the law of property in

⁶³Rwegasira A. (2012). *Land as a Human Right*: Mkuki na Nyota ,Dar es Salaam p .181

⁶⁴Mark, H. (2011).*Banking law* :Published by Lexis Nexis P 337

⁶⁵Mwaisondola, G.N(2007).The modern law of mortgage in Tanzania ,the role of Land Act,1999:School of Law the University of Birmingham. Retrieved on 2nd March 2016 from World wide web

<https://www.google.com/search?q=Mwaisondola%2C+G.N%282007%29.The+modern+law+of+mortgage+in+Tanzania+%2Cthe+role+of+Land+Act%2C1999%3ASchool+of+Law++the+University+of+Birmingham.+&ie=utf-8&oe=utf-8&client=firefox-b.p> 108

Tanzania⁶⁶ the repealed Land Ordinance⁶⁷ made applicable among other laws relating to real and personal property.

Conversely, the imperative guide on the law and practice of mortgage in Tanzania is due the past Law of Property Act of 1925. Eventually the position was also referred to the Law of Property Act in application along with recent common law and mortgage principle rightly provided in the Tanzania.

2.2.1. Current Practice of Granting Loans in Tanzania

The Government of Tanzania has made several changes to make sure that they assist low income gain citizens to access financial assistance from financial institutions. Among those changes and efforts have led to amendments of laws which they believe could be sufficient to achieve those goals. The changes were enacted for the purpose of protecting the interest of the user and occupier of the landed properties.

The Land Act ⁶⁸ and Village Land Act⁶⁹ were the main laws enacted; the said enactments allow creation of mortgage in the land (village land and surveyed land). Accordingly the aforesaid legislative revolution brought changes which were not there before the enactment of the same. The current situation is that a borrower can be granted loan by warranting his or her unsurveyed land as security, also procedures to be followed before granting loans are differently curbed as well as matters relating to matrimonial consents.⁷⁰

The enactment of land laws in Tanzania brought changes in respect to use and ownership. Land under the new regime is used as security for mortgages and as well charges constitute the use of land as security. Also land can be used as lien or pledge for a loan of money.⁷¹ The basis of use of land as security is to the effect that land is

⁶⁶ The Law of Property Act of 1925

⁶⁷ Ordinance No. 5 of 1999

⁶⁸ The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

⁶⁹ The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

⁷⁰ S.114 of The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

⁷¹ Onalo, P.L(n.d) *Land law and Conveyancing in Kenya*: Law Africa Publishing (Kenya) Ltd.p 127.

used as a gauge to be forfeited in default of payment. Eventually the rationale behind the enacted land law is to effect protection to the interest of the user and occupier of land.

Principally land stands as the locomotion of commercial and financial transactions. It takes on sophisticated economy. Development of the human community can be revealed from its traditional use of land for subsistence economy, cash economy and then to use land as security.

With the use of land as security, the land transaction transcends the use of land for only subsistence and simple cash economy. Land takes on a sophisticated aspect. It in fact behaves as a chattel.⁷²

2.2.2 Creation of mortgage

A mortgage is created by execution of a titl deed or customary deed which must be executed in accordance with the law⁷³. If mortgage deeds over land created between a company and another company must be sealed by the company in the presence of two directors or one director and the company, if the mortgage deed over land is executed by an individual it must be signed by that individual, it must be signed by that individual before the notary public. There are prescribed forms for execution by and by companies and individual in land related security interests.⁷⁴ The mortgage deeds executed by companies which do not involve land are not required to be sealed though most authority demands sealing.

2.2.3 Types of Mortgage

There are different types of mortgages, but the main issue is such that, the kind of mortgage should be in accordance with the laws governing the said mortgage, if parties contravene the required elements then that mortgage shall be null and void,

⁷² Onalo, P.L(n.d) *Land law and Conveyancing in Kenya*: Law Africa Publishing (Kenya) Ltd.p 127.

⁷³ Tenga W, Sist, J (2015)*Theoretical Foundations of Land Law in Tanzania*: Law Africa Publishing (T) Ltd, Dar-es-Salaam P. 287

⁷⁴ Legal Mortgage in Tanzania retrieved from <http://www.castles.com/general.php?category=syndicates> on 12/December 2015

for example they are kind of mortgage where borrower can use movable property as security and there is a limit amount of money that can be issued to him, that some of financial institutions may agree to construct house (house mortgage) to their customers as loans. Therefore the following are types of mortgage as explained hereunder.

2.2.3.1 Legal Mortgage

This is among of the types of mortgage where recognized by the laws applicable. It created by execution of a deed(deed of transfer). The mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgage property absolutely to the mortgagee subject that the mortgagee will transfer it to him on repayment of the mortgage money.

The mortgagor has the right to redeem his property not only in the absence of default but also on default provided he can pay up the amount due before his right is debarred. This right is known as the equity of redemption also known as right of redemption. It exists as soon as a mortgage is created. The borrower keeps the mortgaged land with the mortgagee subject to redemption upon payment. Equity of redemption is a mortgagor's right of ownership of the property subject to the mortgage and is an interest in land which can be granted, devised or otherwise⁷⁵.

2.2.3.2 Legal mortgage under registered land

If there is no entry on register limiting his ability to make such a disposition ,the registered proprietor, or a person entitled to be registered as a proprietor, of an estate in land has power to create a charge by way of legal mortgage .

The charge must be executed as a deed. Normal this are mortgage which are created on the land which are surveyed or registered .⁷⁶

⁷⁵Legal Mortgage in Tanzania Retrieved from World Web Wide
<http://www.castles.com/general.php?category=syndicates> on 12/December 2015

⁷⁶Mark ,H. (2011).*Banking law* :Published by Lexis Nexis P 339

2.2.3.3 Legal Mortgage and charge of unsurveyed land

A mortgage of unsurveyed land can be created by customary deed, either granting a long term of years or as a charge by the way of legal mortgage, and in either case the mortgagee is entitled to possession of the documents of title to the land, as if it had actually been conveyed to him.

As can be concluded, the creation of a legal mortgage over unsurveyed land is a way of assisting those who own unsurveyed land, and which is to be effected by depositing a document of title. In the case of an applicant who own unsurveyed land use is made of residential licenses, sales agreements and other documents as evidence of ownership of property since their land is not surveyed but they do own other document apart from a formal land title. However despite the clear statutory endorsement some of microfinance institutions are reluctant to accept those documents as evidence of ownership of unsurveyed plots of land.

2.2.3.4 Simple Mortgage

This is the type of mortgage where by there is no delivery of possession but the mortgagor binds himself to personally pay the mortgage money and agrees that the mortgaged property will be sold upon his default and the proceeds thereof applied towards discharging the mortgage debt.⁷⁷

That simple mortgage without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and all the required proceeds of sale the property shall be followed or applied, so far as may be necessary, in payment of mortgaged money.

⁷⁷Tom, O. (2008). *Conveyancing Principle & Practice*, Publish Law Africa Publishing (T) Ltd, Nairobi: P. 166

Therefore the whole transaction from beginning up to the end is called simple mortgage because does not include a lot of procedures as other, its simple to access loans.⁷⁸

2.2.3.5 Legal charge

This does not convey the estate. It simply intends to charge the land for the repayment of the loan advanced. It can be either legal or equitable charge⁷⁹

2.2.3.6 Equitable mortgage

An equitable mortgage is created by delivering to the lender of the document of the title relating to the borrower's land provided there is intention to treat the land as security⁸⁰. Initially at common law there was no need for writing, the deposit of the title deeds could suffice⁸¹ due to necessity of first, proving intention it became necessary to make the borrower sign some memorandum to the effect that the document of the title were deposited to create security by way of equitable mortgage, otherwise the deposit of the document could bring about the intention, second, the borrower had deposited the document of title with the view to create an equitable right on the land by security without transfer of the legal estate and lastly, the borrower had deposited the document of title as an act of the part performance consisted of an agreement to execute the legal mortgage.

2.2.3.7 Informal mortgage

Mortgage can be created in different ways be it formal or informal whereby informal is among the types of mortgage whereby they lack formality, casual, not drafted or executed in manner that complies with accepted legal form but this kind of mortgage is provided under the Land Act whereby most of Microfinance prefer to

⁷⁸Tom, O. (2008). *Conveyancing Principle & Practice*, Publish Law Africa Publishing (T) Ltd, Nairobi: P. 166

⁷⁹*ibid*

⁸⁰P. L (n.d) Land law and Conveyancing in Kenya: Law Africa Publishing (Kenya) Ltd.p 131.

⁸¹Tenga W, Sista, J. (2008), *Manual on Land and Conveyancing in Tanzania* :Law Africa Publishing(T) ltd, Dar-es-Salaam P 256

use in order to issue loans for applicants, For example NMB prepares certain forms which are used by those who asking loans but they did not meet requirements of other types of mortgage. This form can be due to the kind of collaterals they have or other things. Whereby the Land Act provides that, a borrower can access loans from a financial institution upon written agreement and witnesses by parties⁸².

Therefore, the above explained are among the types of mortgage where a borrower can choose on which type he or she can be able to fulfill its requirements, in this case each type of mortgage has its own requirements in order to access it, for example others don't accept un surveyed land as security especially commercial banks like Barclays' PLC, and Standard Charter, while another only dealing with those who had registered collateral and big companies loans.

2.3 Qualities of good mortgage in Tanzania

Land is the most preferred object among security assets in mortgage transactions in spite of the availability of other property which can also be accepted as collateral. The land that is suitable to have been treated as security includes village land and surveyed land in Tanzania. Mortgage therefore is another form of disposition that affects land. All the regulations that pertains to dispositions is definitely applicable to mortgage accordingly.⁸³

It is worth to consider generally that, paying back the sum advanced or an assurance as to do so is indeed a necessary lending requirement. In order to ensure such a repayment, lenders do ensure that the sum advanced is secured by some form of securities. Such securities include a pledge, pawn, charge, lien, mortgage, hypothecation, debenture and other Security guarantees the safety of the advance, suitability of the purpose of the advance and profitability of the project.⁸⁴

⁸² Goo S.H (2002) *Land Law* (3rd Edition); Publishing Hong Kong. P .820.

⁸³Tenga W Sista, J.(2008).*Manual on Land and Conveyancing in Tanzania* :Law Africa Publishing(T) Ltd, Dar-es-Salaam P 256

⁸⁴*Ibid.*

Hence any good security must have the following attributes:-

- i. Its value must be reasonable and stable over the years.
- ii. A good security should be realizable in all conditions with a simple title which is transferable without undue incumbrances.
- iii. Must be easy for the financial Institutions to obtain a safe and unquestionable title.
- iv. Must be free from liabilities to third parties.⁸⁵

Therefore, whenever a Microfinance advances money to its clients, it has to take property as security and they prefer Land as good security so as to reduce and/or prevent a total loss of funds and revenue in case the borrower defaults. Thus, collateral offered serves as a protection to the financial institution. Generally, security accepted by financial institutions includes land. Traditionally, financial institutions preferred the use of land property as security for their loans, though they prefer mortgage which have above qualities.

3.4 Purposes of mortgage

According to the law on mortgage in Tanzania and at common law, mortgage has the effect of security only. Security for loan means the acquisition of right over property to support a borrower's personal undertaking to repay a loan, property which can be exercised should the borrower default. This come in consideration that, the lender is not sure if the borrower will pay the money back, so he asks for a property as a security.

Under the provisions of section 112(1) of the Land Act the mortgage is created by the mortgagor to secure loan, that means a mortgage transaction is intended for a security only and not a transaction for transfer of title to land.

⁸⁵Tenga W .Sist ,J.(2008).*Manual on Land and Conveyancing in Tanzania* ,Law Africa Publishing(T) ltd: Dar-es-Salaam P 256

Again section 115(1) clearly provides that; a mortgage transaction shall have effect of a security only and shall not operate as a transfer of any interest on the right in land from borrower to the lender. This provision implies the availability of borrower's right to redeem his property.

If the transaction is entered without the right of redemption, then that could be a transaction for transfer of land and not a mortgage. In other words, the expression that "Once a mortgage always a mortgage" implies that once it is established or proved to be a mortgage it is therefore redeemable notwithstanding agreement to the contrary. An agreement given to the mortgage to purchase the property is void⁸⁶.

In this respect, the mortgagor is entitled to redeem his/her property regardless of the expiry of due date. However, this does not mean that the mortgagee has no remedy at all if the mortgagor defaults.

2.5 Securities

The word "security" means an interest which the debtor confers on the creditor in an item of property owned by himself or, by arrangement in the property of some third party such as a surety. The arrangement in the property of the third party may be in the form of a guarantee or an indemnity. Guarantees and indemnities are arrangements in which a third party, the surety, agrees to assume liability if the debtor defaults or causes loss to the creditor.

Security is a term which, in banking law means the acquisition of rights over property taken to support the borrowers undertaking to repay which can be exercised if the borrower does not⁸⁷.

Security is insurance against foreseen and unforeseeable circumstances. The banker with security acquires some rights over and above the basic contractual right to sue the customer if repayment is not made.

⁸⁶ *Howard v. Harris (1683)1 Vern 33*

⁸⁷ Alphonse M.A.U and Janeth F.A.U (2011). *Aspect of Banking and Microfinance law*: 1st Edition p. 44

We have different kinds of securities which a banker or that Microfinance Institutions may accept as securities, it only depends on their respective policies. For example some of the financial institutions like Finca or Pride do accept household assets like television, tables to be used as security but other like NMB (National Microfinance) prefers land as security, and so differ from others lenders.

Therefore it depends on the policy of the financial institution but the only preferred by many financial institutions is land since land has a stable value, apart from other securities.

2.6 Land as securities

Land is treated as security when it is warranted in terms of mortgage and charges. Furthermore land can be used as a lien or pledge for a loan of money. The land is given as pledge to be forfeited in default of payment. This is the basis of the use of land as security, and in this capacity land is at the very heart of commercial and financial transaction. It takes on a sophisticated economy.⁸⁸

In law, land can be used as mortgage or charge. A pledge occurs when the lender advances money to the borrower who in turn delivers to the lender the possession of goods. Under the same pledge; the lender has power of sale if the borrower defaults in repayment. This occurs notwithstanding that the borrower at the time of default the ownership as a right is subrogate to the lender; under a lien there is no right to sale.

⁸⁸Onalo, P.L(n.d) *Land law and Conveyancing in Kenya*: Law Africa Publishing (Kenya) Ltd P 127.

Most of financial institutions prefer to use land as securities for mortgage. Basing on the finance sector reforms 2000,⁸⁹ financial institutions prefer the use of surveyed land than village land (unsurveyed land) as securities for mortgage.

2.6.1 Mortgagee's right of enforcing his security

There are some conditions precedent to the exercise of the mortgagee's right to sell. First there must be breach of covenant on the mortgaged deed. The mortgager must have breached the covenant as per section 127 of Land (Amendment) Act.

Secondly, the mortgagee must give notice of not less than 30 days to the defaulting mortgagor. In the case of *NBC v. Walter T Czun*⁹⁰ the mortgagee sold the mortgaged property. It was held that the sale of the mortgaged property was illegal. Since Mortgagee failure to delivery notice of sale property.

Thirdly, there must not be any outstanding query or any un discharged obligation. This means that the mortgagor might be claiming that he has already discharged his obligation or part of it. Therefore the mortgagee must make sure that there is no query in order to justify the sale of mortgaged property.

Fourthly, the mortgagee is duty bound to exercise care in the sale exercise of the mortgaged property. The mortgagee should obtain the best price obtainable at the time of the sale. The right is taken to be breached by the mortgagee if by looking at the value the court forms opinion that it is below the average price⁹¹. Evaluation of that property should be made. In *Iabela Industries Ltd, Gulabila Cheyo and another v. Tanzania Investment Bank*⁹²; the house property of the mortgagor claimed that the

⁸⁹See item 2.2 National Microfinance Policy, Ministry of Finance, United Republic of Tanzania, May 2000 p 8

⁹⁰*Nbc v. Walter T Czun* ,Civil Appeal No. 31 of 1995 ,Court of Tanzania at Dar es salaam(Unreported)

⁹¹*Nbc v. Walter T Czun* ,Civil Appeal No. 31 of 1995 ,Court of Tanzania at Dar es salaam(Unreported)

⁹² *Iabela Industries Ltd, Gulabila Cheyo and another v. Tanzania Investment Bank* ,Appeal No. 27of 2002,Court of Appeal of Tanzania at Dar es salaam (unreported)

sale of the mortgaged house by the auction mart was 25% below the average price. The court held that the mortgagor has failed to prove that his house has more value than the price sold.

Another right of the mortgagee is taking possession of the mortgaged land. This is a non financial remedy and it is exercised by the mortgagee subject to a number of restrictions as provided under section 130(5) of Land Act which provides that; a mortgagee shall not otherwise than through the execution of an order of the Court enter into or seek to enter into possession by taking physical possession land.

2.6.2 Right to redeem

This is the right reserved with the mortgagor to pay back the loan to the mortgagee, it comes from the maxim that '*once a mortgage always a mortgage*'. It was the holding in the case of, *Selton v. Slade*⁹³ that the reason why the mortgagor obtained the loan was that the mortgagee accepted the land to use it as security for the loan granted. Therefore this kind of relationship will result in a situation where neither the mortgagee nor the mortgagor is in a disadvantage inferior position to recover what belongs to him.

2.6.2.1 The equity of redemption

'Equity of redemption' is defined as the mortgagor's right of ownership of the property subject to the mortgage and is an interest in land which can be granted, devised or entail. This means the right to redeem that the mortgagor bears or carries once he secures the loan from the mortgagee. In other words the mortgagor becomes the holder of an equitable interest in the land as it was held in the case of *Casborne v. Scarfe*⁹⁴. Normally this equitable interest starts as soon as the agreement between the mortgagor and the mortgagee has been concluded. If the mortgagor dies this passes to anyone who is interested in the equity of redemption.

⁹³ *Selton v. Slade* (1802) 7 VES 265 AT 273.

⁹⁴ *Casborne v. Scarfe* (17371) 1 ALK 603

Another term is the equitable right to redeem; this is what came with the maxim *'once a mortgage always a mortgage.'* it gives the mortgagor the right to at least to delay repaying the loan regardless of who had been expressly agreed between the two. The rationale of this is the fact that the property mortgage was merely a security for the money lent and that it was unjust that the mortgagor should lose his property merely because he was late in repaying the loan.

However the late payment will not leave the mortgagor without remedy against the mortgagee for example to leave the loan outstanding and continue to receive interest on it from mortgagor. The remedies will be there, this only protect the mortgagor from losing his property for late payment.

2.7 Remedies available when borrowers default

That, the main objective of mortgage is to provide security for a loan therefore if mortgagor fail to pay back loan mortgagee, like any other lender, can always take matter to the court for default of mortgagor to pay back loans as one of the step but this may be long process in which enforcement of judgment is obtained can be difficult. Therefore the mortgagee institution, therefore has developed several remedies for mortgage including the right to use mortgaged, charged land to repay loan, often without the need for any court proceeding.

These remedies they are different in way of exercise them, it depend with types of mortgage and types of land which borrower has put as security as explained down here under the law.

S.115 (2) of the Land Act⁹⁵ provides

S. 115 (2) Where the mortgagee under a customary mortgage seeks to exercise any customary remedy which involves or may involve the mortgagor being disposed or permanently deprived of the occupation of the mortgaged land, the mortgagee shall, after using the services of the

⁹⁵ The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

Village Land Council, try and mediate on the application of the proposed or any other remedy, make an application to the Village Land Council for an order authorizing the exercise of that remedy”

Law is clear for a banker or any financial institution before seek any remedy including those remedy after the mortgagor default to pay back loans the law require them to seek Village Land Council and to try to mediate before exorcise any remedy.

Addition exercise of remedy from the mortgagor under customary right of occupancy you should follow the requirement of above law is different under granted right of occupancy.

2.8 Discharge of Mortgage

According to section 121 (1) and (2) of the Land Act⁹⁶, upon payment of all moneys and the performance of all other conditions and obligations secured by mortgage, the mortgagee shall at the request and costs of mortgagor discharge the mortgage instrument. Furthermore some section provide upon any agreement or provision in the mortgage instrument or otherwise which requires that a mortgagor wishing to obtain a discharge of the mortgage under the subsection (1) shall be required to pay to the mortgagee, as well as paying all other monies secured by the mortgage, additional amount in excess of month’s interest at the rate at which interest is payable on the principal sum secured by mortgage shall be void.

After borrowers acquire loans from this Microfinance and upon payment of all moneys and performance of all other conditions and obligations in the mortgage, the mortgage must be discharged from liability.⁹⁷ The discharge is made at the instance

⁹⁶ The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

⁹⁷ See for No. 44 of GN. No. 71 of 2001.

of the mortgagor requesting such a discharge at any time⁹⁸ should the mortgage contained provisions which:-

Purport to deprive the mortgagor of his right of redemption or seek to fetter the exercise of the right to redeem or provide for any collateral advantage which is unfair and unconscionable and inconsistent with the right to discharge, the mortgage is deemed to be void⁹⁹.

It is only when there is default, that the lender can exercise the stated remedies. Before exercising such remedies the lender must comply with certain requirements, that is to say, sending a notice of not less than thirty days default, a statement of the amount to be paid to rectify the default (in case of non-payment, of not less than three months arrears), if it is a covenant the need to rectify it within two months, and an indication of his intention to exercise the remedies. Where the Minister has prescribed the form and content of a notice, failure to comply with such a format will make the notice void¹⁰⁰

2.9 Advantage of taking land as security

Land is among the preferred security forms for these financial institutions regardless the nature of land, in this case can be surveyed or unsurveyed due to the provisions of the law.

Therefore the advantage of taking land as security is that;

That land never completely loses its value¹⁰¹

In this case land is among the good security medium since the day to day value of land tends to increase and not to decrease due to needs of people and it is for this reason that financial institutions normally prefer land because it is the kind of security which they can transfer easily. Moreover as the market value of such

⁹⁸ S. 121 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

⁹⁹ S. 68 and 71 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004

¹⁰⁰ See form No 54 A of GN. No. 71 of 2001

¹⁰¹ Alphonse, M.A.U, Janeth, F.U. (2011) .*Aspects of Banking and Microfinance Law* :(1St Ed) p 51.

property is stable, they can sell and return back their money on time in case of default of the borrower to pay back loans.

The second advantage of the use land as security for these Microfinance is that-

*Land has historically been appreciating in terms of value*¹⁰²

In this regard land is different from other forms of security, in that whereas other security forms can change their value due to the current situation and so can unpredictably rise and fall, the history proves that the value of land is reliable since it is a kind of security which always rises up, in sharp contrast with other forms of security.

This explains why most of the micro-financial institutions and other financial lenders they do prefer land as security for their loans since the market is stable as compared with other forms of security and because landed assets are subject to wild fluctuations in their market value, it is easy to transfer land.

The prime object of the Microfinance Policy was to establish Microfinance or banks which will help the majority of citizens to get opportunities to raise their economic status. The microfinance entities include saving, credit, payment facilities which are provide under the National Microfinance Policy of 2000¹⁰³.

2.9.1 Unsurveyed Land as security

Most of lender they prefer to receive Land as security despite of opportunity of taking other kind of properties may be used as collateral .Among of the Land recognizes by the Laws to be accepted as security is unsurveyed Land (unregistered Land) in this since the main aim of the Government is to make sure they improve the life standards of their citizens especially to assist them to access loans from financial institutions in order to develop or improve their business .Majority of this

¹⁰²Alphonse, M.A.U, Janeth, F.U. (2011) .*Aspects of Banking and Microfinance Law* :(1St Ed) p 51.

¹⁰³ National Microfinance Policy, item 2.2 Ministry of Finance: United Republic of Tanzania, May 2000 P 8

low income gain they own unsurveyed Land they are ones who targeted by Government to get assistance , therefore due to this The government accept unsurveyed Land to be among of the security for loans¹⁰⁴.

2.9.2 Advantage of unsurveyed Land as security

Since the Law recognize unsurveyed Land as security for loans has its advantages to both Mortgagee and Mortgagor in the following grounds ,That it easy for applicant since he or she use what he posses to help him to ask loans from Financial institutions , rather than starting to look for other property as security. It's easy to own unsurveyed Land other than surveyed Land.

2.9.3Disadvantages of unsurveyed land as security

In this context, unsurveyed land as one of the types of security found under the types of immovable security has its advantages and also disadvantages, regarding its status as follows.

*Land is not an easily realizable security it is not slow moving security*¹⁰⁵

Under this context land as immovable security is not easy or simple as other to realize. As security for example it needs a documents to show the right ownership, but not only title deed, a banker should make an estimate value of the land apart from other security like movable (motor vehicle) and other where it's easy to recognize the value.

*Land is at times difficult to value.*¹⁰⁶

In case the value of unsurveyed land as security depends on its location it may change from time to time. Therefore a banker before accepting unsurveyed land as security is required to find its value in order to decide whether the estimated value is reasonable for the property being mortgaged.

¹⁰⁴ Alphonse, M.A.U, Janeth, F.U. (2011) .*Aspects of Banking and Microfinance Law* :(1St Ed) p 51

¹⁰⁵*ibid*

¹⁰⁶*ibid*

If a mortgage is taken by deed, the equitable mortgagee must seek the court's sanction in any action for realization of the security. In case of equitable mortgage which a banker wants to exercise as security they must seek court sanctions since this kind of security is and the right on the property not like legal where deed is taken. Therefore important fact is that the interest acquired by a creditor must confer on him a right to satisfy the debt out of the proceeds of the property in question.

The Government of the United Republic of Tanzania has made different efforts in order to help its people, whereby it has introduced different policies in order to assist economic growth of their people by introducing Microfinance Policy, MKURABITA; for the purpose of these policies is to enable the Microfinance to grant loans to the people living on village land where the only securities they have is village land¹⁰⁷.

Therefore, financial institutions prefer the use of land as securities since the value of land normally increases day to day. They prefer to accept securities which have the above qualities, but since the establishments of the Microfinance for purpose small business persons who live in villages, their only securities consist of unsurveyed land.

2.10 Microfinance (microfinance Institution)

Different authors not only provide the meaning and origin of the term 'microfinance' in Tanzania ,but also on how microfinance institutions are connected to unsurveyed land :

Microfinance refers to;

*An array of financial services, including loans, savings and insurance, available to poor entrepreneurs and small business owners who have no collateral and wouldn't otherwise qualify for a standard bank loan*¹⁰⁸

¹⁰⁷Alphonse, M.A.U, Janeth, F.U. (2011) .*Aspects of Banking and Microfinance Law* :(1St Ed) p 51

¹⁰⁸<http://www.businessnewsdaily.com/4286-microfinance> Retrieved on 2/2/2016.

Most often, micro-loans are given to those living in still-developing countries who are working in a variety of different trades, including carpentry, fishing, farmer and other low income gains.

Microfinance (microfinance institution) means:-

*a bank or financial institution which is licensed by the Bank to undertake banking business mainly with individuals, groups and micro and small enterprises in the rural or urban areas.*¹⁰⁹

A microfinance institution: is an organization that offers financial services to the low income segment of the population in a given country.

In Tanzania Micro-finance institutions (MFIs) offer loans and other financial services for micro and small enterprise development and their loan conditions are not as stringent as those given by the commercial banks. In this regard, they are better placed to serve informal sector operators. And like in many developing countries, the micro-finance industry in Tanzania is still young. For instance NGOs and SACCOs (Savings and Credit Cooperative Organizations) in 1995 had grown stringently and continued to grow with the increased success of Microfinance internationally¹¹⁰

A microfinance institution is still a relatively new concept in Tanzania. Beginning in 1995, it was mainly linked to women and poverty alleviation. The government tried to convince commercial banks to support small and medium businesses. Once the National Microfinance Policy was implemented in 2001, microfinance was officially recognized as a tool for poverty eradication and with its increased use and exposure to the country; banks have taken an interest in offering microfinance.¹¹¹

The National Microfinance is an institutional provider of microfinance services, and the AKIBA Commercial bank and CRDB Bank are also two big supporters of microfinance. There are additional organizations involved in microfinance in

¹⁰⁹ World population with access to finance (<http://worldbank.org>) Retrieved on 2/2/2016.

¹¹⁰ <http://www.businessnewsdaily.com/4286-microfinance> Retrieved on 2/2/2016

¹¹¹ *ibid*

Tanzania, including FINCA, PRIDE and SEDA as well as the Tanzania Postal Bank. Community banks and small banks have taken an interest in this, as well as many NGOs and non-profit organizations.

Initially the main Microfinance can be categorized as non-governmental organizations (NGOs), Cooperative based institutions namely SACCOS and SACCAs. The major players in the NGOs category include PRIDE Tanzania, FINCA (Tanzania), Small Enterprise Development Agency (SEDA) and Presidential Trust for Self-Reliance (PTF). Others, which are relatively smaller in size, include Small Industries Development Organization (SIDO), Tanzania Gatsby Trust and Poverty Africa.¹¹²

Additionally there are tiny programs scattered throughout the country mainly in the form of community-based organizations (CBOs) Banks that are actively involved in microfinance services delivery include the National Microfinance (NMB), CRDB bank, Akiba Commercial Bank (ACB) and a few Community/regional banks namely, Dar es Salaam Community Bank, Mwangi Community Bank, Mufindi Community bank, Kilimanjaro Cooperative Bank, Mbinga Community Bank and Kagera Cooperative Bank.¹¹³

2.11 Conclusion

This Chapter focused on the conceptual framework on mortgage creation. Hence, it looks at meaning of different terms accordance with different authors since creation of mortgage involve different procedures and different institutions.

Therefore in this chapter, a discussion focused on meaning on the concept Mortgage, history of mortgage accusations, qualities of good mortgage and further look on current trend of granting loans in Tanzania in general in other hand discussion touch

¹¹²<http://www.businessnewsdaily.com/4286-microfinance> Retrieved on 2/2/2016

¹¹³*ibid*

these concept security, land as security, registered land and un registered land (un surveyed land) and lastly microfinance institution since you cannot talk about mortgage without involve financial institutions.

CHAPTER THREE
THE LEGAL REGIME GOVERNING CREATION OF MORTGAGE BY
USE OF UNSURVEYED LAND IN TANZANIA MAIN -LAND

3.1 Introduction

This chapter focuses on Legal regime that governs creation of mortgage in Tanzania by use of unsurveyed land as security. Since the legal regime includes both policies and statutory laws which are applicable. Therefore this chapter provides in detail Policies, statutory law applicable and the legal procedures for creating mortgage on unsurveyed land.

3.2 The policy position

Tanzania has several policies and few of them concern or touch's area of Microfinance (banks) which among of them is National Microfinance Policy of 2000¹¹⁴ and MKURABITA of 2007¹¹⁵.

The main aim of the National Microfinance Policy of 2000 is to uplift the life standard of the people by providing financial services to the poor who are traditionally not served by other types of finance institutions. The majority of this targeted group comprises small holder farmers and small businesses. The majority of these people live on unsurveyed land, and the only security which they possess is land which is not surveyed or registered.

Therefore the Government introduced this policy for purpose of enabling this people to access loans by use their land as security in order to eradicate poverty. This was achieved by introducing the Microfinance (banks) to issue loans or to accept applicants who use unsurveyed land as security for loans.

¹¹⁴See item 2.2 of National Microfinance Policy, Ministry of Finance, United Republic of Tanzania, May 2000 p 8

¹¹⁵Tanzania Property and Business Formalization Program, 2007 retrieved on 6th December 2015 from World WideWeb<https://www.google.com/search?q=Tanzania+Property+and+Business+Formalization+Program%2C++2007&ie=utf-8&oe=utf-8&client=firefox-b-ab>

The MKURABITA Policy of 2007 was also created in Tanzania with the basic objective of eradicating poverty by making it easier for people to borrow money from Microfinance institutions by using as security what the majority possess in the nature of unsurveyed land¹¹⁶ .

The creation or introduction of the twin policies (the National Microfinance Policy and MKURABITA) have led to changes of legislation for implementation, including the Banking and Financial Institutions (Microfinance Activities) Regulations, 2014 (GN 298 of 2014), the Banking and Financial Institutions (Microfinance Companies and Microcredit Activities) Regulations 2005. The Land Act was amended in 2004 in order to provide for the creation of mortgages on surveyed land. The Village Land Act and their regulations were also adjusted accordingly.

Hence the introduction of the above policies which relate on the Microfinance sector and creation of mortgage on unsurveyed land. The promulgation of these policies is one of the factors which have led to changes in the laws in Tanzania to meet the demands of the policies or to fulfill the requirements because policies cannot be implemented without laws.

The following hereunder are some of the laws that regulate the microfinance sector within Tanzania Mainland.

3.3 The Statutory Laws Applicable

3.3.1 The Land Act No.4 of 1999 (As amended by the Land (Amendment) Act No.2 of 2004

Provides that, customary mortgage can be created on unregistered land subject to the provisions of the Land Act .This shows that the Land Act recognizes validity of a mortgage on unsurveyed land. The Act provides further for remedies over a

¹¹⁶Tanzania Property and Business Formalization Program, 2007 retrieved on 6th December 2015 from World WideWeb<https://www.google.com/search?q=Tanzania+Property+and+Business+Formalization+Program%2C++2007&ie=utf-8&oe=utf-8&client=firefox-b-ab>

mortgage in case of default. The procedure begins with accessing the services of a Village Land Council to try to mediate¹¹⁷. The mortgagor may use any remedies created by Part X of the Land Act¹¹⁸.

The position under unsurveyed land is different from surveyed, whereby in case a Mortgage defaults to pay back loans, the Mortgagor after accessing the service of Village Land Council may then invoke any of the remedies under S.126 of the Land Act, as follows:

3.3.2 Appoint of a receiver of the income of the mortgaged land

Since it is permitted to create a mortgage on unsurveyed land, the mortgagee has the right to appoint a receiver after submitting to the services of the Village Council as per requirements of the Land Act¹¹⁹. It is the Land Act under Part X which confers on the mortgagee the power to appoint receiver.

A receiver is an independent and impartial agent appointed by the mortgagee to accept or receive income arising from mortgaged property. The Land Act¹²⁰ provides that it shall be an implied condition in every mortgage, that the mortgagee shall have power to appoint a receiver of the income of the mortgaged land.

Land Act¹²¹ provides for the manner of appointing a receiver, the appointment of the receiver shall be in writing signed by the mortgagee. Moreover the powers and duties of the receiver are provided for under the Land Act¹²².

This procedure is also relevant and may be used by a mortgagee of unsurveyed land in case the borrower defaults to pay back loans. A mortgagee has right to appoint a receiver on a mortgage created on unsurveyed land.

¹¹⁷S. 115 (2) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹¹⁸See Part X, The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹¹⁹S. 115 (2) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹²⁰S. 128 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹²¹S. 128(3) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹²²S.128 (5) (6) and (7) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

3.3.3 Sell the mortgaged land

Where the mortgagor defaults, the mortgagee may sell the mortgaged property. But if such mortgaged land is held under the customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 (1) and (2) Village Land Act,¹²³ that An assignment of a customary right of occupancy may be made to a person or group of persons not ordinarily resident in a village if and only if qualify the requirement of the village Land Act.

Sale shall be made to any person or group of persons referred to in The Village Land Act.¹²⁴ the mortgagees has the power of sell under S. 132 of the Land Amendment Act¹²⁵ which provides that, a mortgagee may after the expiry of thirty days, from the date of receipt of a notice under section 127, sell the mortgaged land. There are two ways to sell the mortgaged property, which is selling by public auction and by private contract. Sell by public auction is provided for under section 132(4) of Land Amendment Act as amended by Mortgage financing (special provisions) Act, 2008 and sell by private contract is provided for under section 133(3) of the Land amendment Act of 2004 as amended by Mortgage financing (special provisions) Act, 2008.

The general rule is that, In selling the mortgaged property, the court will never interfere however where there are fraud or corruption, this can be seen as in the case of *National Bank of Commerce v. Dar es salaam Education and Office Stationary*,¹²⁶ in this case it was held inter alia that, where a mortgagee is exercising its power of sell the mortgaged property, the court cannot interfere unless there was corruption or collusion.

¹²³ S.30(1) and (2) of The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

¹²⁴ The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

¹²⁵ S.132, of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹²⁶ *National Bank of Commerce v. Dar es salaam Education and Office Stationary (1995)TLR 275*

Therefore Mortgagee has the rights to sell mortgage property this includes mortgage on unsurveyed land but after follow the procedure provide under the land Act and The village Land Act, where it require the Mortgagee to issue notice to Mortgagor and before issuing notice Mortgagee Must try to mediate with village council before exercise any remedies on mortgage created under customary right of occupancy.

3.3.4 Lease the mortgaged land

The law allows the mortgagee to lease or sub-lease the mortgaged property if the mortgagor defaults to loan. Section 129(1) (a) (b) of the Land Amendment Act¹²⁷ provides for mortgagee's power of leasing, that a mortgagee shall unless the mortgage instrument expressly provides to the contrary, have power, subject to the provisions of this Act and any other law applicable to the leases of land to grant leases in respect of the mortgaged land or any part thereof, to accept a surrender of any lease so granted and of any lease affecting the mortgaged land. According to section 129(5) of the Land Amendment Act provides for the manner of creation of lease or sublease of mortgaged property, where the mortgagee lease or sublease the mortgaged property the mortgagee need to serve notice to the mortgagor. Moreover the powers and duties of mortgagee in lease or sublease the mortgaged property are provided for under section 129(3) (a-d) of the Land amendment Act.

3.3.5 Enter into possession of the mortgaged land

Since these remedies includes mortgage created on unsurveyed land, after mortgagee fulfill the requirement of Land Act and Village Land Act.

Section 130 of the Land Amendment Act, 2004 allows the mortgagee to enter into the possession of the mortgaged property. However entering into possession is subject to any formalities and the formality is there must be court order. Also there is manner of entering into possession of the mortgaged property, this is provided for under the Land Act¹²⁸.

¹²⁷ The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹²⁸ S.130 (1) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

3.4. Village Land Act Cap 114

Village Land Act has in it provisions which provide creations of Mortgage within village Land S.2 of the Act provide the meaning of the term Mortgage¹²⁹ .But on other hand Section. 31 (4) (b) the village land Act¹³⁰ allows the creation of mortgage on village land where it provides that

(b) The creation of–

- i. a small mortgage; or*
- ii. a mortgage for an amount equal to or less than the amount for which a small mortgage may be created; or*
- iii. a mortgage, reasonable sale or pledge under and in accordance with customary law in favour of a person ordinarily residing in the village by a person ordinarily residing in the village for a sum not greater than the sum which may be obtained by a loan through a small mortgage;*

Unsurveyed lands are areas of land which are not surveyed and this type are regulated by Village land Act since such land fall under the scope of village land Act. The main purposes this Act is to regulate all land situated within the village boundaries, and unsurveyed land is within the jurisdiction. The Act provides for the creations of small mortgages on the land as well as also the register for the recording of such transactions.

3.5. The Village Land Regulations. GN No. 86 of 2001

This regulations are there for purposes of regulate village land and for this purpose under the village land , they own Customary right of occupancy and for this reason for those own this right they land are not registered into centre system of registered land therefore its known as unsurveyed Land.¹³¹

¹²⁹ S.2 of [Cap 114 R.E 2002] “an interest in a right of occupancy or a lease securing the payment of money or money's worth or the fulfillment of a condition and includes a sub mortgage and the instrument creating a mortgage”

¹³⁰ S. 31(4),(b) of The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

¹³¹ GN No. 86 of 2001

3.6 The Banking and Financial Institutions (Microfinance Activities) Regulations, G.N. No. 298 of 2014

The law was made for the purposes of regulating the microfinance industry within the country.

Rule 3 (C) of the said Regulations defines microfinance institution in the following terms:

*Microfinance bank means a bank or financial institution which is licensed by the Bank to undertake banking business mainly with individuals, groups and micro and small enterprises in the rural or urban areas*¹³²

On other hand the law proceeds to provide the definition of Microfinance Institutions under

Rule 3 (c) as follows;

*Microfinance institution” means an institution engaged in provision of microfinance loans and which is not regulated by the Bank;*¹³³

The Regulations cited above do stipulate how Microfinance institutions must operate within the country by providing on how to get licenses, the kind of collateral they should accept and the main activities of microfinance institutions. But despite the existence of these regulations the law is silent on how the applicant can access loans against their collateral in the form of unsurveyed land. This falls under Rule 50 of the Regulations which stated as follow;

“An institution engaged in microfinance activities may extend credit accommodations secured against unregistered collateral or non-traditional security or collateral substitute, such as personal guarantees, contractual pledging of home or business assets,

¹³² Rule 3 (c) of GN. No.298 of 2014.

¹³³ *ibid*

*compulsory savings or group guarantees where members jointly guarantee each other's loans.*¹³⁴

3.7 Law of Marriage Act, No 5 of 1971

S.59 This Law governs dispositions of property which includes the creation of Mortgage. The Law requires before mortgaging land which is owned jointly between husband and wife, there must be consent obtained. The law does not make distinction between surveyed or unsurveyed land; hence any mortgage must proceed only when there is consent.¹³⁵

3.8 Registrations of Documents Act. Cap 117

The registrations of documents Act S. 8 of Registration of Documents Act¹³⁶ provides for the documents which must be registered , whereby among the documents which mentioned which involve in assignments and for this purposes the law is not categorize on whether assignment on surveyed or unsurveyed and for that reasons for any disposition on unsurveyed land must be registered ,this read together with S. 9 of the same Act ¹³⁷which provide for any document which will not registered will not recognized .Registration of documents involve in mortgage involve unsurveyed land according require to be registered Rule 34 of The village Land Regulations¹³⁸ provides that any disposition involve unsurveyed Land Must be registered ,Where by the law require any land dispositions and transactions of any type must be registered .

3.9 Consequences of failure to register Mortgage

Its requirement of law that all transaction involves land should be registered, S. 8 and 9 of Registrations of documents Act¹³⁹ provides for requirement of registration of documents and for documents which not registered will not recognized, S.62(2) of

¹³⁴ Rule 50 of GN. No.298 of 2014

¹³⁵ S.59 of the [Cap 29 R.E 2002]

¹³⁶ S. 8 of Registrations of Documents Act. Cap 117

¹³⁷ S 9 Registrations of Documents Act. Cap 117

¹³⁸ Rule 34 of GN. No. 86 2001

¹³⁹ S. 8 and 9 of Registrations of Documents Act. Cap 117

the Land Act¹⁴⁰ this section cemented that any transactions which also involve mortgage should be registered under the registry specified by the law concern and the law go further and start that for any transactions which involve land and not registered shall not have security since did not meet the requirement of the law and due to above section it's clear that a mortgage on un surveyed land is fall under this provision therefore a mortgage of un surveyed land its mandatory to be registered.

3.10 Legal Procedure for Creation of Mortgages on unsurveyed Land

The Law explained above together with regulations made there to the procedure to be followed by Both Mortgagee and Mortgagor before grating loan to the applicants .These procedure are likely the same from surveyed but they only different due to the status of the Land.¹⁴¹There are three main recognized procedures followed by Mortgagee and Mortgagor for creation of mortgage on unsurveyed land, these are Preliminary stage, Drafting and equations of documents.

3.11 Preliminary investigations

A very big part of the preliminary investigations is dominated by the process of carrying out inquiries which is mainly done by the mortgagee (financial institutions) before entering into contractual arrangements with the mortgagor. Generally, there are no specific provisions of the law which specifically provides for the step by step procedures of conducting inquiry. Even the Land Act ¹⁴²and the regulations made there under, provide guidance on what the parties (mortgagor and mortgagee) should do prior to executing mortgage contracts.¹⁴³ Perhaps the task is left to mortgagees to guide their customers.¹⁴⁴ The following are some of the very important inquiries which should be made by the mortgagees before entering into contractual arrangements with the mortgagors.

¹⁴⁰S. 62(2) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁴¹*ibid*

¹⁴² *ibid*

¹⁴³ Binamungu, C.S. and Ngwilimi, G.S (2006) *Regulation of Banking Business in Tanzania*: Mzumbe Books Project, Morogoro P.110.

¹⁴⁴S. 115 (2) of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

3.12 Carrying out Physical verification

In this case a banker as financial institution has obligations to make sure that before accepting property as security for loans they must view the property to be assured that property is in existence. But apart from conducting a search, the laws provides that before entering into contractual arrangements mortgagees are required to perform a physical verification of the subject property. In the case of *National Bank of Commerce Ltd v B&E Investment Limited and Dorein Francis Kanemile*.¹⁴⁵:

It was held that a banker has the duty of inquiry and to conducting physical verification of the owner of the property and the property itself before advancing a credit facility to the borrower.

Apparently, the statement imposes a duty that goes beyond the parameters covered under the Land Act on inquiry.¹⁴⁶ .

Therefore the duties ascribed to the banker are to make sure that they carry out physical verifications to observe if the property exists, however not only that, also a chance for a financial institutions to ask people who surrounding the loan applicant like the owner has a wife or husband in order to avoid any cheating, this stage put both parties in position that if conflict arise they will know which party has not discharged his duty since a borrower has a duty to disclose all the information he has relevant to the disposition of the property.

Generally this procedure can used by both surveyed land and unsurveyed since before these microfinance Institutions accept applicant who use unsurveyed land as security, they must find all information concerning respective property to avoid cheating or any encumbrances, the message is that financial institution must collect data from different sources and triangulate the same in order to avoid later conflict between financial institution and customers.¹⁴⁷

¹⁴⁵ *National Bank of Commerce Ltd v B&E Investment Limited and Dorein Francis Kanemile No.14 of 2002 High Court of Tanzania Commercial Division of at Dar es salaam.(Unreported)*

¹⁴⁶ See, Part X of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁴⁷ See, Part X of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

3.13 Securing informed consent from spouse/spouses

The law of Marriage Act, S.59 This Law governs dispositions of property which includes the creation of Mortgage. The Law requires before mortgaging land which is owned jointly between husband and wife, there must be consent obtained¹⁴⁸. The law does not make distinction between surveyed or unsurveyed land; hence any mortgage must proceed only when there is consent from other spouse ,therefore a borrower must submit evidence that , he she already obtained consent from his or her fellow.

But also under S.161 (3) (a) of the Land Act¹⁴⁹, provides that any dispositions involve matrimonial property, must be accordance with the Law of Marriage, where the position of the law for other spouse to obtain consent from other spouse.

That both provisions impose a duty on the lender to inquire about spouses in case the proposed landed property is a matrimonial home. The law requires the lender to obtain a signature or evidence from the document used in application for a loan from any “spouse”. It is a responsibility of the mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for mortgage has or does not have a spouse.¹⁵⁰ It shall be responsibility of mortgagee to take reasonable steps to ascertain whether the applicant for mortgage has a spouse or spouses.

Furthermore under section 114(a) and (b) of the Land (Amendment) Act¹⁵¹ requires *inter alia* that,

- S. 114. A mortgage of matrimonial home including a customary mortgage of a matrimonial home shall be valid only if:*
- i. any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouse or*

¹⁴⁸ S.59 of the Law of Marriage Act, No 5 of 1971[Cap .29 R.E.2002]

¹⁴⁹ The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁵⁰ S. 8 of the Mortgage Financing (Special Provisions) Act, No 17 of 2008.

¹⁵¹The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

- ii. *Any form or document used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.*

From the wording of the statutory provisions cited above, it is mandatory that the signature of a spouse be put on documents used to secure a credit under a mortgage and the laws does not categorize the specific land due to this for the ones who create mortgage by use of unsurveyed land a Lander has a duty also to know if there is spouse consent if is matrimonial property.

The similar position was maintained in a number of precedents for instance in *Royal Bank Scotland plc v. Etridge*¹⁵² where Lord Hob holds that:

Once on inquiry, the bank must ensure that the spouse has independent advice and a certification that they have formed a truly independent judgment.

However some of the jurisdictions were against the requirement of the consent from other spouse as explained here in above in the case of *Caunce v. Caunce*¹⁵³ in this case the husband mortgaged the house without inform her wife. The Banker never inquired about it, unfortunately the husband failed to pay back loan, but when the fact came to hand of wife the court said that “the wife is mere shadow to the husband no need a banker to inquire about the land”. Therefore from the above case the court provides no need of consent from spouse.

However that legal position never lasted long in the case of *Hodgson v. Max*.¹⁵⁴ It was about one old Lady who lived alone in her personal house and later she took Mr. X and started to live with him as a man of substance, later she decided to transfer her property to him (Mr. X) with intention to remain as an equitable owner afterwards the gentleman sold the property to someone else. Then Later Hodgson filed case against Max, the Court of Appeal made judgment in favor of the lady and said that a

¹⁵² *Royal Bank Scotland plc v. Etridge No 2 (2001) UKHL 41*

¹⁵³ *Caunce v. Caunce (1969) 1 ALL ER 722*

¹⁵⁴ *Hodgson v. Max (1971) CH .892*

buyer has duty to inquiry on history of the occupation of the Land. Due to the reason above banker has a duty to inquiry on mortgage property.

Where the mortgage concerns a matrimonial home¹⁵⁵, it will only be valid in the following circumstances:

*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: Or any document used to grant the mortgage is signed by the mortgagor and the spouses (s) living in that matrimonial home or there is evidence that both or all of them have assented.*¹⁵⁶

Despite the two steps the mortgagee may devise some other steps as he may deem appropriate and desirable to satisfy himself that the assent was genuine and informed¹⁵⁷ For example, in the Decision of *Royal Bank Scotland plc v. Etridge*¹⁵⁸

Lord Hob -house argues as follows:

Once on inquiry, the bank must ensure that the spouse has independent advice and a certification that they have formed a truly independent judgment.

Microfinance institution has no option in conducting a comprehensive research about property and borrower whenever they take part in mortgage arrangements. A genuine informed spouse's consent must be secured before disbursement of funds is effected; otherwise, the mortgage transaction is rendered invalid.¹⁵⁹

The court's interpretation of S.59 (1) of the Law of marriage Act,¹⁶⁰ in favors of mortgagees is now gone, in *Maria Goreti Katura Mutarubukwa v. NBC, Innocent*

¹⁵⁵See Form No 42 of GN. No. 43 of 2005

¹⁵⁶S. 114 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁵⁷GN. No. 43 of 2005

¹⁵⁸*Royal Bank Scotland plc v. Etridge No 2 (2001) UKHL 41*

¹⁵⁹Binamungu, C.S. and Ngwilimi, G.S (2006) *Regulation of Banking Business in Tanzania: Mzumbe Book Project*, Morogoro P. 117.

¹⁶⁰The Law of Marriage Act, No 5 of 1971[Cap .29 R.E.2002]

*Chacha Magoti Nshoya and Leonce Benedict Mutarubukwa, Land.*¹⁶¹ The provision entitles a spouse's consent in disposition of matrimonial properties.

In the case of *Idda Mwakalindile v. N.B.C.Holding Corporation and San Saijen Mwakalindile*¹⁶² the appellant was neither aware nor did she consented to the house being mortgaged but the court ruled in favor of the respondent the banks because of what the court argued that there was no caveat to protect the registrable interest of the appellant and thus there was no way in which the first respondent could know that the house was matrimonial property and thus the case was dismissed.

3.14 Contractual arrangements

In this arrangement once a mortgage is clear about the security to be offered as security, the next procedure is drafting of contractual document takes off. The documents are prepared in line with principles of the law of Contract Act.¹⁶³ However they said law does not tell a person explicitly as to what should be done, but it impliedly informs a knowledgeable person the principles to bear in mind when considering the contractual parties and their position in life, terms of contract, and object of the said arrangements.

3.15 Drafting Contractual Documents

There is no specific number of documents that make a set of documents for a single mortgage arrangement¹⁶⁴. In practice, a mortgage arrangement entails execution of a loan agreement, mortgage deed, and document to prove consent where property is matrimonial property.

¹⁶¹ *Maria Goreti Katura Mutarubukwa v.NBC, Innocent Chacha Magoti Nshoya and Leonce Benedict Mutarubukwa, Land Case No.28 of 2004, High Court of Tanzania Land Division at DSM (Unreported).*

¹⁶² *Idda Mwakalindile v. N.B.C.Holding Corporation and San Saijen Mwakalindile Civil Appeal No. 59 of 2000, Court of Appeal of Tanzania at Mbeya (unreported).*

¹⁶³ The Law of Contract Act ,[Cap. 345 R.E.2002]

¹⁶⁴ S.113 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

The land Act leaves a room for the mortgagee to provide guidance to borrower.¹⁶⁵ Also leaves everything to mortgagees to fix terms of the contract saves for the covenants, conditions and powers implied in mortgages¹⁶⁶. The key aspect, which is central to mortgage contract is aspect of interest rate. It is crucial to the mortgagees because this is their main interest in the whole matter of mortgage.¹⁶⁷ The law does not guide mortgagees on how to fix the interest rate.¹⁶⁸ Further there is no ceiling of such interest rate.

Lastly for these Microfinance they don't have specific forms which they can use during contractual stage rather than they decided to use their own forms ,Fore stance when you go Finca and Nmb you will find each institutions use their own form , apart for those who ask loans by use of surveyed land .Therefore the presence forms in Land forms they are relevant for those who use surveyed land rather than unsurveyed land this give room for this Microfinance institutions to come with their own form for those applicant use unsurveyed land as security of loans.

3.16 Registration of Mortgage Created On Un surveyed Land

The registrations of documents Act S. 8 of Registration of Documents Act¹⁶⁹ provides for the list of documents which must be registered , whereby among the documents which mentioned which involve in assignments and for this purposes the law is not categorize on whether assignment on surveyed or unsurveyed and for that reasons for any disposition on unsurveyed land must necessarily be registered ,this read together with S. 9 of the same Act¹⁷⁰which provide for any document which will not registered will not recognized .Registration of documents involve in mortgage involve unsurveyed land according require to be registered Rule 34 of The village Land

¹⁶⁵ S.113 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁶⁶ S. 124 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁶⁷ Binamungu, C.S. and Ngwilimi, G.S (2006) *Regulation of Banking Business in Tanzania: Mzumbe Book Project*, Morogoro P. 118.

¹⁶⁸ S. 120 and 124 of The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁶⁹ S. 8 of Registrations of Documents Act. Cap 117

¹⁷⁰ S 9 of Registrations of Documents Act. Cap 117

Regulations¹⁷¹ provides that any disposition involve unsurveyed Land Must be registered ,Where by the law require any dispositions and transactions must be registered.

This means that for a mortgage involving land which is compulsorily registered. S. 62 (2) of the Land Act¹⁷², provide that: registered¹⁷³

S. 62(2) no instrument effecting any disposition under this Act shall operate to sell or assign a right of occupancy or create, transfer or otherwise affect any right of occupancy, lease or mortgage until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.

Also S.21 of the Village land Act¹⁷⁴, provides that:

S. 21. The Village Land Council shall maintain register of village land in accordance with any rules which may be prescribed by the Minister and Village executive officer shall be responsible for keeping register.

Due to the above requirement of the Laws any disposition of the land including mortgage shall registered in the respective register.¹⁷⁵ A mortgage created on village land is required to be registered under village respective register S.113 (4) of Land Act¹⁷⁶,provide that in respect of a mortgage other than a mortgage of land registered under the Land Registration Ordinance¹⁷⁷,it shall take effect only when it

¹⁷¹ Rule 34 of GN. No. 86 of 2001

¹⁷² The Land Act, No.4 of 1999 as amended by Act No. 2 of 2004.

¹⁷³ S. 8 and 9 of Registrations of Documents Act Cap 117

¹⁷⁴ The Village Land Act, No. 5 of 1999 [Cap 114R.E 2002]

¹⁷⁵ Mwaisondola, G.N(2007).The modern law of mortgage in Tanzania ,the role of Land Act,1999:School of Law the University of Birmingham. Retrieved on 2nd March 2016 from World wide web

<https://www.google.com/search?q=Mwaisondola%2C+G.N%282007%29.The+modern+law+of+mortgage+in+Tanzania+%2Cthe+role+of+Land+Act%2C1999%3ASchool+of+Law++the+University+of+Birmingham.+&ie=utf-8&oe=utf-8&client=firefox-b>. p 171

¹⁷⁶ *Ibid* ,P148

¹⁷⁷ Land Registration Ordinance (Cap 334).

is registered in prescribed register and a mortgagee shall not be entitled to exercise any of his remedies under that mortgage if it is not so registered.

One may opt under S. 11 of registrations of document Act to register in the register of documents a mortgage of unregistered land.¹⁷⁸ Thus upon registered Mortgage shall have effect as security and shall not operate as transfer of estate there by mortgaged but the lender shall have all the powers and remedies in the case of default and he subject to all the obligations that will be conferred or implied in a transfer of the land subject to redemption.

3.17 Conclusion

This chapter is centered at legal regime governing creation of Mortgage in Tanzania. It first looks at the policies which are created for the purposes of eradicating poverty and only to enable the low income earners to access loans from Microfinance by use of their collaterals commonly being land.

Majority of these people live in villages and the main or sole collateral they have is land and which is not registered (it is unsurveyed land). This chapter discuss on the laws which was enacted to implement the policies which are which regulate whole procedures of access of loans from Microfinance by use of unsurveyed land as securities for their loan applications.

¹⁷⁸Land Registration Ordinance (Cap 334).

CHAPTER FOUR

DATA PRESENTATION, ANALYSIS AND DISCUSSION OF FINDINGS

4.0 Introduction

This study is with the purpose of Analysis of Law and Practice on Access to Loans in Microfinance Institutions by Use of Unsurveyed Land as security and why some of these microfinance institutions are reluctant to accept mortgages on unsurveyed as security for their loan applications. With these objectives in mind the researcher has interviewed different groups of people based on a questionnaire as primary data and has achieved success in data collection from loan officer working at different Microfinance Institutions, lawyers from different firms who are experts on mortgage issues, lecturers from different institutions and lastly to the Tanzania Association of Microfinance Institutions (TAMFI).

This Researcher has also managed to collect data from literature review, case law, and reports from different sources including library, internet sources and reports.

During the research period the Researcher was able to meet with four(4) respondents who work at TAMFI (the Tanzania Association of Microfinance Institutions), twelve (12) loan officers working at different Microfinance Institutions, nine (9) lawyers from different firms who are experts on mortgage issues, five (5) lecturers from different institutions and these institutions have responded in the manner set out in the paragraphs below.

4.1 Unsurveyed Land as Security for a Mortgage

To understand whether unsurveyed land can attain the quality of good mortgage to access loan from this Microfinance institutions, respondents among of those asked said that unsurveyed cannot attain qualities of good Mortgage and give their

reasons, namely that:- Some of Microfinance Institutions are reluctant to accept unsurveyed land as good collateral One interviewee prove that¹⁷⁹

Kaka ni vigumu mtu kupewa mkopo akiweka dhamana ardhi ambayo haijapimwa ama kusajiliwa, kwa kuwa ni vigumu kujua kwamba hilo eneo analoombea mkopo je likipimwa kwa baadaye litakuwa eneo la barabara, eneo la wazi, ama matumizi ya kijiji ama serikali. Hivyo basi, tunachelea kumpa mkopo mtu wa jinsi hiyo ingawa sheria inaruhusu kupewa mkopo.

This can be literally interpreted as; It is difficult for a person to be granted a loan if he pledges unsurveyed land as security, because it is difficult to verify whether the land against which he is seeking the loan, in the event that land is surveyed will turn out to have been intended as a road reserve, an open space, or allocated to a village or to government use. On this ground we are disinclined to advance a loan to an applicant although the law permits such a grant.

Another respondent on the same as whether unsurveyed land can attain quality of good security respondent that the purposes of Financial institutions is to return back their money if mortgagor default to pay back loans and for case of unsurveyed land is not easy to exercise remedy of sell by mortgagee since the attribute of the property , because you may found the land found far away from urban center and due to this will take a time to lender to return back their money but on the same it's not easy to estimate the value of unsurveyed land un like surveyed land¹⁸⁰ .

Despite of the position concern unsurveyed land as not good collateral still unsurveyed land can be a good collateral if there will be the law in place that recognize and harmonize as good collateral for example Land which under customary right of occupancy, Residential licenses and sales agreement and the law should provide on what remedy a financial institution will resort to. If one day the

¹⁷⁹A lawyer who was previously worked with Finca head quarter was conducted on 12 January 2016 in Dar es salaam

¹⁸⁰ A lawyer who works at UTT, during an interview conducted on 16/11/2015at Dar es Salaam.

land be surveyed, it might be revealed that the space is reserved for use as passage (road), village reserve, government reserve or public utility land and therefore such land is will be reliable for use as security for a loan.

4.2 Ownership proof of unsurveyed land

The researcher inquired from the respondents whether it's easy to prove ownership of unsurveyed land. Regarding the above respondents, respondent that is not easy to prove ownership under unsurveyed land unlike the one who own surveyed land and gives reasons that :-

One respondent lamented that the major stumbling block when it comes to unsurveyed land pledged by an applicant to secure a loan is how to prove ownership, because unsurveyed land is always unregistered. So it becomes difficult for them to prove title because they have no title deeds for the said property.¹⁸¹.

Respondents on the same as whether it's easy to prove ownership of unsurveyed land? The respondent stated that since it is the duty of the lender to do search, he must among other things find out information on whether the applicant is the right owner of the said land. In respect of surveyed land the loan applicant will be required to bring his title deed and the lender can further go on for a document search in the Land Registry. If the land was registered it is easy to access information on the said land while for unsurveyed land information related to such land cannot always be searched in one centre. You can only get information which may help you to reasonably believe from available documents whether in a particular case one piece of land is owned by different people. Different documents may be

¹⁸¹Loan Officer who works at FINCA during interview was conducted on 6th January 2016 at Tarime

made available, one person will have a sale agreement and another may produce a residential license¹⁸².

The respondents which this researcher managed to interview base on their reasons that in order to prove ownership of the land should have a document and the only document which can be easy to proof is only title deed since any one can access and have the status of the land a part of unsurveyed land which is not easy to determine if there is any encumbrance.

4.3 Procedure for creating mortgage on unsurveyed land

Respondents who were asked as to whether the procedure for creating a mortgage on unsurveyed land is clear, said that procedure for the creation of a mortgage on the basis of unsurveyed land has a lot of uncertainties varying from one institution to another and is typically not regulated and respondents have given an explanation in the following terms:-

Hawa Micro-finance benki mfano ukiangalia FINCA na PRIDE, fomu ambazo wanatumia uombaji wa mikopo kwa kutumia ardhi ambayo haijasajiliwa kama dhamana, mahitaji ya hizo fomu ni tofauti na wale ambao wanaomba mikopo kwa kutumia ardhi iliyosajiliwa (surveyed land). Kuna fomu maalumu ambazo zinatumiwa na kila taasisi ya kifedha ambazo ni mortgage form. Hivyo basi ni kweli kabisa hakuna fomu maalumu ambazo waombaji wa mikopo kwa kutumia ardhi ambayo haijasajiliwa watumie kama ambavyo waombaji kwa kutumia surveyed land. Fomu maalumu zipo katika land regulations¹⁸³

Which is liberally translated means that:

“As regards micro-financial institutions like FINCA and PRIDE, the forms used for loan applications in respect of unsurveyed land to secure loans, the conditions for these application forms are different from those applicable to borrowers who use surveyed land as security. There are specific forms for each financial institution

¹⁸² Lecture of work at Tumaini University Dar es salaam Branch department of Law, interview made on 29 March 2016 at Dar es salaam, and During interview with Loan officer working with Pride in Mwanza interview was conducted on 8th December 2015.

¹⁸³ During interview with Loan officer who works at Pride in Mwanza interview¹⁸³ was conducted on 8th December 2015

which operate as mortgage forms. It is therefore quite true that there are no special forms which are available to loan applicants in respect of surveyed plots which can be used for applicants with unsurveyed plots. The special forms are contained in the land regulations”.

On this same aspect, (4) four respondents were asked on whether the procedure for creating mortgage on unsurveyed land is clear, Land to operate as good security should have the following qualities namely, it should maintain a reasonably stable value throughout the year, should readily be realizable in all conditions with a safe and unquestionable title, without pending controversial claims and expense and should be free from liabilities to third parties. Such qualifications are necessary for the purpose of protecting the interests of financial institutions. However these qualifications are only found in registered lands¹⁸⁴.

The Government of Tanzania has not put in place adequate regulations to protect micro-finance institutions from defaulters especially borrowers using unsurveyed lands to secure loans, mainly because such defaulters are always only pestered to repay loans through peaceful negotiations rather than through such penalties as transfer of their lands¹⁸⁵.

To access loans from these institutions using unsurveyed land you need a letter from the clan-head and two (2) neighbours who own bordering plots of the said land as witnesses. But are all these requirements necessary considering the fact that the person who needs a loan from the microfinance institution may corrupt all these people in order to get their certifications that he is the right owner of the property,

¹⁸⁴Executive Director of Tanzania Associations of Microfinance institutions found in Dar es Salaam, the interview based on questions found in questionnaire conducted on 30th March 2016 at Dare es salaam.

¹⁸⁵MD, Crest attorneys in Dar es Salaam work as lawyer of Advance banks, interview conducted on 7th April 2016 at Dar es salaam

and if he or she later defaults to pay back loans and runs away it will take the financial institution time in order to trace the person concerned¹⁸⁶.

He also lamented that, to access loans from these institutions using unsurveyed land you need a letter from the court of law or a commissioner for oaths proving the physical address of the said land and other supporting documents from the clan-head.¹⁸⁷

This clearly proves that there is no uniformity in the whole process, that is why the micro-finance institutions are complaining of improper regulations and therefore the dangers of systemic credit risk in which default borrowers worsen the whole system apart from those who use surveyed land as security since the law is not clear on which are the forms required forms to be filled.

4.4 Laws regulating microfinance institutions in Tanzania

Respondents were asked as whether the present laws regulating microfinance are adequate to promote and protect access to loans by use of unsurveyed land. Eight (8) respondents responded to the above question, and one report came from a Member of Parliament. They are saying that the present laws are not adequate in promoting and protecting access to loans from microfinance institutions by use of unsurveyed land. The respondents give their reasons quoting section 115(2) of the Land Act which provides that-

Where the mortgagee under a customary mortgage seeks to exercise any customary remedy which involves or may involve the mortgagor being disposed or permanently deprived of the occupation of the mortgaged land, the mortgagee shall, after using the services of the Village Land Council, try and mediate on the application of the

¹⁸⁶Lecture, work at University of Dar es salaam interview made on 29th March 2016 at Dar es Salaam.

¹⁸⁷During interview with Loan officer working with NMB in Tarime interview was conducted on 13st December 2015 at Tarime , During interview with Loan officer working with Tujijenge in Mwanza interview was conducted on 10th December 2015

proposed or any other remedy, make an application to the Village Land Council for an order authorizing the exercise of that remedy¹⁸⁸”

In reliance on the above section when a borrower defaults to pay back loans obtained from a Microfinance institution or banking institution, the mortgagor who is a bank may seek to exercise customary mortgage remedies, such as the appointment of a receiver of the income of the mortgaged land, or leasing the mortgaged land or where the mortgaged land is of a lease, to sub-lease the land, to enter into possession of the mortgaged land; and to sell the mortgaged land. But the bank as the mortgagee is required by this section to approach a Village Council and try to mediate on the issue concerning the defaulted loan.

The main aim of these financial institutions is to receive profit on time. However due to above legal requirements of consulting with the Village Council and mediate when the borrower defaulted to pay back monies he received as a loan, the banks will expend a lot of their time to mediate on the default of a client. It must be noted on other hand that the said section does not disclose or limit the speed track of the said mediation so the process can take a long time in which to the Financial Institution is incurring a loss to that effect.

The Microfinance Regulations of 2005 which were expected to guide the industry are not friendly to microfinance services providers, since regulations provides only how to get incense for the one who want to open microfinance institution but the Regulations is silent on how this Microfinance into customer , fore stance the law does not disclose on how this microfinance will provides banking activities since this is their main activities for stance on how to access loans by use of unregistered

¹⁸⁸This question was answered by six (6) respondents, four Loan officer and two (2) Lawyers working with different institutions at Mwanza, Tarime and Dare es salaam at different day they address the same issue.

collateral, the rule only provides that this Microfinance suppose to accept unregistered collateral but the law is silent on how to provides the service¹⁸⁹.

Another respondent lamented that the government has indeed introduced the Microfinance Policy and the MKURABITA Policy, but since 2000 up to date the government has been silent on the microfinance law, Therefore the lacuna of laws which regulate microfinance institutions have led each institution to have its own way of issuing loans and this has led some of the microfinance institutions being reluctant to issue loans for those who use unsurveyed land as security for loans for example when you go Pride they have their own way of regulate the trend unlike surveyed land where by the procedures are clearly and there is forms which used to create mortgage¹⁹⁰. One Member of Parliament in the National Assembly has stated that-

Serikali sasa inatakiwa kutengeneza sheria ya hizi Microfinance kwa maana tangu mwaka 2000 mpaka leo hakuna sheria za kueleweka na zinazo ongelea jinsi gani wapewe mkopo wajasiria mali wadogo wadogo ambao ndiyo walengwa.

Which interpreted that government had took a lot of time to prepare microfinance law now it's time for government to come with the law¹⁹¹.

The majority who responded to the questions as whether the present laws are adequate on protecting and promote access to loan in microfinance by use of unsurveyed land from the questionnaire and through oral interviews have lamented that it is not easy for applicants who look for loans from microfinance institutions to obtain the requested loans, despite the provisions of the law, since the lawmakers have not yet put in place the procedural law which will guide the microfinance

¹⁸⁹Executive Director of Tanzania Associations of Microfinance institutions found in Dar es Salaam, the interview based on questions found in questionnaire conducted on 30th March 2016 at Dare es salaam.

¹⁹⁰Executive Director of Tanzania Associations of Microfinance institutions found in Dar es Salaam, the interview based on questions found in questionnaire conducted on 30th March 2016 at Dare es salaam

¹⁹¹One of Member of Parliament when addressing Parliament on the contributions of Microfinance institutions toward economic growth on 24 may 2016

institutions to grant loans to those who desire their unsurveyed land to be used as security .

4.5 Search or inquiring of unsurveyed land

Respondents were asked as to whether it's easy to access information on unsurveyed land. These Respondents said that it is not easy to access information on unsurveyed land. Four (4) of the respondents have lamented that it is not easy to access information on unsurveyed land and they support their view based on the reasons that:-

“information based on registered land is easy to access since all information was centralized while data on unsurveyed lands are not preserved in any formal records and are not in any government archives so it is not easy to determine whether or not such lands have any encumbrances .This state of affairs makes it very difficult to trace relevant information pertaining to the land and thus it is not easy for lenders to give loans to applicants on the security of such un-recorded lands¹⁹².

The problem is where can one verify all the information or data stated by the client who pledges unregistered land as security for loans? The Respondent continued to explain that for the registered land it is an easy and simple task to conduct a search, but not for unregistered (unsurveyed land).If you conduct search on surveyed land the registry will give out any encumbrances attached to the said registered land, which will enable the Microfinance institutions to decide whether or not to grant loans to the borrower depending on the nature and existence of encumbrances¹⁹³.

Also this institution will be able to check every entry and other documents, then will compare with the information received from client. Evidently all information

¹⁹² Lawyer who works at UTT, during an interview conducted on 16/11/2015 at Dar es salaam.

¹⁹³ Loan Manager who works at Access Bank Mwanza branch, an interview conducted on 6 January 2016 at Mwanza Region , the same was responded by , Loan Manager who works at Access Bank Mwanza branch, an interview conducted on 6 January 2016 at Mwanza Region.

concerning surveyed land is centralized in a single system where a bank may search easily, which is not the case for unsurveyed land for which you cannot easily find the relevant data and information together as codified and organized as is the case in the land registry¹⁹⁴.

It is due to this situation some of Financial Institutions are reluctant to accept some lands to be used as security since they lack enough information to accept them for security. Therefore based on argument from different respondents it's a fact that it's not easy to access information on unsurveyed land as surveyed since the information of unsurveyed land is not centralized as surveyed land.

4.7 Applicability of other document apart from title deed as evidence of ownership.

Respondents were asked as to whether financial institutions may accept other documents apart from a title deed as evidence of ownership, three (3) respondents replied to the effect that it's not easy to recognize a sales agreement, a residential license and other documents apart from a title deed as enough evidence to prove ownership of land. It is contended by the respondents that-

Serikali imeanzisha mpango wa kuwapa watu hati za makazi za muda mfano Dar es Salaam ili waweze kutambulika, lakini kuna changamoto ya kuwa unakuta mtu anamiliki hati ya makazi, hati ya kimila pamoja na hati halali na anatumia kuomba mkopo na zinakubalika mfano Dare es salaam ilishatokea mtu akaomba mkopo sehemu mbili tofauti kwa kiwanja kimoja. Hivyo sheria haijatoa ukomo wa kutumika na ni mazingira yapi unaweza kutumia hati ya kimila, hati ya makazi na hati kama hati, hivyo inatuwia vigumu kama taasisi ya fedha kumpa mkopo mtu kama huyo anaweza kukuingiza kwenye matatizo.”¹⁹⁵

¹⁹⁴ Loan Manager who works at Access Bank Mwanza branch, an interview conducted on 6 January 2016 at Mwanza Region, the same was responded by, Loan Manager who works at Access Bank Mwanza branch, an interview conducted on 6 January 2016 at Mwanza Region

¹⁹⁵ One of Lecturer who works at University of Dar es Salaam, an interview conducted at Dar es Salaam on 24 February 2016. MD, Crest attorneys in Dar es Salaam working as a lawyer of Advance banks, interview conducted on 7th April 2016 at Dar es Salaam, During interview with Loan officer working with Finca in Tarime interview was conducted on 7th January 2016 at Tarime, That on applicability of Residential licenses, offer and other document issued for those own unsurveyed land, on their effects and the same on applicability of the Land law on mortgage transaction.

This is substantially translated as follows:

The Government has introduced a system of issuing temporary residential licenses, for example in Dar es Salaam, for the purpose of identification, but there are challenges as you may come across a person who possesses a residence permit, a customary title as well as a title deed. In respect of a person who asked for a loan which was approved by two institutions in respect of the same plot. This shows that the law has not laid down a limitation of use or the under which circumstances one can use the customary title, residence permit, so it makes it difficult for us as financial institutions to advance a loan to such person, who can cause you problems.”

A person applying for a loan is charged with the responsibility to produce a residential permit issued by the land authority but such permits are not automatically recognized by the loaning institutions, and this makes it very difficult to acquire loans by producing a residential permit.

4.10 Due diligence conducted by local government authorities

To understand whether the intervention of the local government authorities can assist a lender to ascertain whether the plot of land in question has any encumbrances, five (5) respondents among those asked said that some of local governments authorities provide false information.

In addition, it is further argued, since some of the local government leaders do are conducting due diligence, a financial institution may require the client to come up with a letter from the local government authority with proof that he is resident of that area, and also a letter to show that he is the owner of the subject land. A client may bring a letter to show that he is the owner of the said farm¹⁹⁶.

¹⁹⁶Loan Manager who works at Access Bank Mwanza branch, an interview conducted on 6 January 2016 at Mwanza Region and Lawyer who works at UTT, during an interview conducted on 16/11/2015 at Dar es salaam

Then as lender since you do not have any place to go for further search, since the land is not registered you decide to ask a client go before the court law to swear or affirm in order to prove his or her ownership of the unregistered land in question. Since the due diligence is conducted by the local government, that individual may attain all the evidence anyway. But when the borrower defaults to pay back loans on the stipulated time and when the financial institution wants to sell properties or to exercise any remedy to recover the loan, another person may appear and say that he is the true owner of the said property. If this happens it will be difficult for the financial institution concerned to exercise its rights quickly¹⁹⁷.

Surely the absence of a coordination system to prove the right owner of the land causes a hard time for a bank to know the right owner and it may decide to believe this local government leader with the risk of receiving false information. These are some of the legal challenges facing microfinance institutions and banks if they dare to accept unsurveyed plots of land as security for mortgages since the law does not provide a comprehensive or sufficient procedure to follow before, when and after issuing loans. Further for the avoidance of false information the micro finance institutions sometimes refuse to grant loan based on unsurveyed land, in which case the situation affects borrowers who want loans in good faith. So the government and Parliament should look upon this area so that they can enact laws which help Tanzanians put use their unsurveyed land as security for mortgage¹⁹⁸.

Complications arise for enforcing remedies in case the borrower has defaulted. The process of seeking the leave of the court is complicated and time wasting. Therefore the recovery of possession shall take time different from enforcing a legal mortgage.

¹⁹⁷Executive Director of Tanzania Associations of Microfinance institutions found in Dar es Salaam, the interview based on questions found in questionnaire conducted on 30th March 2016 at Dare es salaam

¹⁹⁸Lawyer who was previous work at Tujijenge at Mwanza , an interview conducted on 8 january 2016 at Mwanza

4.11 Conclusion

From the data collection , which have depended on the research questions, the majority who responded to the questions from the questionnaire and through oral interviews have lamented that it is not easy for applicants who look for loans from microfinance institutions to obtain the requested loans, despite the provisions of the law, since the lawmakers have not yet put in place the procedural law which will guide the microfinance institutions to grant loans to those who desire their unsurveyed land to be used as security. It is not be surprising that the majority of citizens have never attained the requirements of the financial institutions in the absence of appropriate laws which will protect the interests of all parties to the loans

CHAPTER FIVE

CONCLUSIONS RECOMMENDATIONS AND OF THE RESEARCH

5.2 Conclusions

This dissertation examines Access to loans in Microfinance institutions by use of unsurveyed land as security Analysis of laws and practice in Tanzania Mainland. It is observed that the laws are not adequately framed. There are no clear provisions which address issues of unsurveyed land.

The low income gain in Tanzania are living within villages and they own plots or tracts of land which are almost invariably all unregistered (unsurveyed). There is an exceptional need of formalizing the existing land tenure of the villagers in order to uplift their economic life standards, nothing specifically that by far the biggest portion of the population of Tanzania live in villages, and the glaring need is balancing the interests between the financial institutions, the villagers and other relevant stakeholders.

All in all this research covers a large area of unsurveyed land in respect to mortgage types of mortgages legal requirements, rights and obligations of parties together with recommendations to be adopted by stakeholders be it the Government, Parliament, the Judiciary and members of the society at large. This is also a call to those authors who forget to address mortgages in relation to unsurveyed land.

5.1 Recommendations

Laws that provide for the creation of such services to provide loans to people using unsurveyed land but without specific laws which provides on how microfinance institutions will provide loans for those who use unsurveyed land therefore presence laws are only to regulate the transaction. The microfinance institutions need documents which prove ownership of properties, but unfortunately unsurveyed lands

have no clear documentation which they may present before these financial institutions to prove ownership.

During fiscal study we found out that it is not easy to conduct a search on unsurveyed land since all data concerning unsurveyed land are not pooled in one centre or codified like those for surveyed land where you may go to the Land Registry, and verify whether there are any encumbrances or not. This is not an easy task to do in respect of unsurveyed land.

In case a borrower defaults payment of a back loan most of the time these financial institutions find challenges in exercising remedies because the law requires the lender to consult with the village council and to try to mediate before exercising any remedy which is very difficult to the microfinance side. The financial institutions only have an option to sell property and get back their money. This procedure is likely a waste to their time and the treatment is different to those who possess title.

The study is intended to demonstrate how the government can revisit the Microfinance institutions legal and regulatory regime with the object to effectively promote the availability of loans to those who would pledge unsurveyed land as security. It is urged that the government enact laws which will enable microfinance institutions to boost the living standards of the people and ultimately contribute towards the economic development and prosperity of the country. Also the Government should come up with rules and regulations that will minimize default risks to those who rely on unsurveyed land as security for the purpose of protection for both lender and borrower.

Provisions are very stringent to the applicants who offer unsurveyed land as security for their loans as opposed to surveyed plots. For example under unsurveyed land the applicant requires to consult village officers to prove that he/she is the owner of the

said property. It must be verified before the court and there may be additional requirement depending on the policy of the particular financial institution.

5.1.1: Recommendations to the government of Tanzania

Government should speed up the survey and registration of unsurveyed land, and this could be only way out for financial institutions like FINCA, NMB, UTT, Pride, Access Bank, Tujijenge and others to expand the scope of their lending to the people. Universal land survey and mapping will also speed up the provision of loans by these financial institutions since all the land will be safe position for use as collateral.

But mean while the government should create an alternative method to make sure that all information related to land, are easy to access as in surveyed land. That is to say, when you want to access information whether there are any encumbrances or not, you should be able to the land registry search for and find all information necessary to the particular land, which is at present impossible to do in respect of unsurveyed land.

The Government and the policy makers should come with laws which will facilitate access of loans by use the said land and not only provisions of law but should state a clear procedure which these two parties should follow. Financial institutions (lenders), borrowers should make use of a procedure that each part is in a good position in case of default or any fraud between these two sides and the only way to rescue this situation if only the government to come with proper laws regulating the whole transaction.

A large number of Tanzanians live in villages and indeed most of them own landed properties which are almost invariably unsurveyed. There is an exceptional need of formalizing such kind of landed assets for recognition as good loan security to uplift their economic standards.

This study is recommending the government to give consideration to the Microfinance institutions law and regulations which regulate allocation of loans for those who use unsurveyed land as security.

Hence the government should enact laws to enable microfinance institutions to boost the living standards of people and ultimately contribute towards the economic development and prosperity of the country. Let also the government come up with rules and regulations to prevent default risk on those who use unsurveyed land as security for protecting both lender and borrower.

There exists no procedure to coordinate tracking and analysis of microfinance operation.

The government has the duty to provide an environment and protect both financial institutions and customers by enacting relevant laws and making appropriate policies, which will enable microfinance institutions to give loans to customers without any fear when the procedures founded are clear to those who use unsurveyed land as security for loans.

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APPENDIX
QUESTIONNAIRE

MZUMBE UNIVERSITY MAIN CAMPUS, as partial fulfillment of Masters in Commercial Laws, do hereby require to conduct research and in that respect, I would like to request you fill in the questionnaire on the topic ***“ACCESS TO LOANS IN MICROFINANCE INSTITUTION BY USE OF UNSURVEYED LAND AS SECURITY : ANALYSIS OF THE LAW AND PRACTICE IN TANZANIA MAIN LAND”***.

Please respond to all questions, even if you do not know precise information requested.

Provide your best estimate.

Note that, any information you provide will be kept strictly confidential.

Name of the respondent.....

Place of work.....

Occupation.....

Gender.....

QUESTIONS

1. Are you sufficiently experienced and knowledgeable about Microfinance institutions in Tanzania?

a) YES b) NO

2 . Microfinance institutions are relevant in accepting un-surveyed land as security for creation of mortgage in Tanzania.

a) YES b) NO

If “no “why

If “yes” How

.....
.....

3. What services do they offer?

.....
.....

4. Is the credit facility asked by the borrower equivalent to unsurveyed land?

a) YES b) NO

5. What is the viability of unsurveyed land as security?

.....
.....

6. What are the legal requirements for credit facilities to be secured by unsurveyed land?

.....
.....

7. Microfinance institutions are they protected by laws?

a) YES b) NO.....

How.....
.....

8. Though Land does not depreciate, is it possible to purchase the unsurveyed land of defaulter of credit facility?

a) YES b) NO

If “no “why
.....
.....

9. Is it easy to conduct search on unsurveyed land?

.....
.....

10. Is it easy to know the encumbrances on unsurveyed land?

.....
.....

11. How many of these applications succeeded in acquiring the loan? And what are the reasons not giving the loans

.....
.....

12. What are the major constraints imposed by legal and regulatory frame work on Microfinance institutions in Tanzania and is relevant?

.....
.....

13. What are the legal challenges facing un-surveyed land as a loan security?

.....
.....
.....

14. What are the improvements/recommendations to be adopted in promoting and improving un-surveyed land as security?

.....
.....
.....

** Please explain where possible or where you think it necessary.*

** Thanking you for your cooperation and be blessed**