

**INQUIRING INTO SPOUSES' CONSENT TO MORTGAGE A  
MATRIMONIAL HOME IN MAINLAND TANZANIA: A  
CRITICAL ANALYSIS OF THE LAW AND PRACTICE**

**BY**

**MASANDA, Marwa**

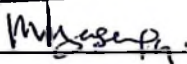
**A Dissertation Submitted In Partial Fulfilment of the Requirements for Award  
of the Degree of Masters of Laws (L.L.M) in Commercial Laws of Mzumbe  
University.**

**Mzumbe University**

**November 2012**


### CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by Mzumbe University, a dissertation titled **Inquiring into Spouses' Consent to Mortgage a Matrimonial Home in Tanzania Mainland: A Critical Analysis of the Law and Practice**, in partial fulfilment of the requirements of award of Degree of Master of Laws of Mzumbe University.

  
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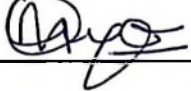
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## **DEDICATION**

This work is dedicated first and foremost to God who gave me the strength to do this work. The work is also dedicated to my beloved family, father, mother and siblings.

## ABBREVIATIONS

A.C	Appeal Cases
All ER	All England Law Reports
C.A	Court of Appeal
Cap	Chapter (used in relation to citation of laws)
EA	East African Law Reports
Ed./ eds.	Editor/ editors
G.N	Government Notice
Hon.	Honourable
i.e.	<i>id est</i> (that is)
J.	Judge
J.A	Justice of Appeal
LL.M	<i>Legum Magister</i> (Master of Laws Degree)
No.	Number
Op. cit	<i>Opera citato</i> (in the work cited)
p.	Page
pp.	Pages
R.E.	Revised Edition
TLR	Tanzania Law Reports
v.	Versus
Vol	Volume

## **ABSTRACT**

This study examined the law and practice of inquiring into spouse's genuine and informed consent to mortgage a matrimonial home in Tanzania mainland. The study focused mainly on bankers and their practices in advancing a loan facility on the security of a matrimonial home.

The study was conducted in Morogoro and Dar es Salaam regions in which a survey design was adopted. Random and purposive sampling technique was employed, a sample of 50 respondents was considered in the study. Questionnaires and unstructured interviews were used in soliciting for primary data while secondary data was obtained through review of various documents, both local and international. Descriptive statistical method was used to summarise data obtained, and in the end, data was presented descriptively using percentages so as to reflect the reality of the law and practice of obtaining a spouse's free, genuine and informed consent to mortgage a matrimonial home in Tanzania mainland.

The study reveals that the laws in Tanzania are quite clear on how a spouse's consent is to be obtained; the problem is on the practice of bankers doing business in Tanzania. Currently, bankers are only concerned with obtaining a spouse's signature on a standardised consent form. They are not bothered to inquire on how such signature was obtained. Whether the spouse received an independent advice, or was forced to sign, or there was undue influence, or misrepresentation, forgery of signature and the like is not within the ambit of practices of our banks.

In the end, the study recommends that banks should adopt standard reasonable procedures in inquiring into spouse's genuine and informed consent to mortgage a matrimonial home. Banks should also make use of independent advice to spouses and acknowledgement of an advocate that a spouse have been informed and consented to mortgage a matrimonial home. Banks should further be cautious in keeping all the records regarding the inquiry of a spouse's genuine and informed consent to mortgage a matrimonial home rather than relying on the consent form alone.

## **TABLE OF STATUTES**

### **Local statutes**

The Constitution of United Republic of Tanzania, 1977, as amended from time to time

The Land Act, Cap 114 R.E 2002

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

The Law of Marriage Act, Cap 29 R.E 2002

The Magistrates Courts Act, Cap 11 R.E 2002

The Mortgage Financing (Special Provisions) Act, 2008

### **Foreign statutes**

The Dower Act, R.S.A, 1980, Canada

Statute of Frauds, 1667, England

## TABLE OF CASES

### Local decisions

*Aida Kyenkungu v. John Kyenkungu and Two Others*, High Court Civil Case No. 57 of 2001, Dar es salaam Registry (Unreported)

*Barclays Bank v O'Brien* [1993] QB 109, CA

*Hadija Mnene v Ally Mabere Mbagala and National Bank of Commerce*, High Court Civil Appeal No. 40 of 1995 at Mwanza (Unreported)

*Idda Mwakalindile v NBC Holding Corporation and San Saijen Mwakalindile*, Court of Appeal of Tanzania Civil Appeal No. 59 of 2000 at Mbeya (Unreported)

*Kezia Violet Mato v. National Bank of Commerce and Others*, High Court Commercial Case no. 176 of 2002 (Unreported)

*Khadija Hemed Salum v. CRDB Bank Limited, Mazrui Commission Agent & 3 Others*, High Court Commercial Case No. 97, 2002 (Unreported)

*National Bank of Commerce Ltd v. B & E Investment Limited and Doreen Francis Kanemile*, High Court Commercial Case No. 14 of 2002 (Unreported)

*Samwel Olung'a Igogo and Two Others v Action Trust Fund and Others* [2005] TLR 343

### Foreign decisions

*CIBC Mortgages v Pitt* [1994] 1 AC 200

*Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144

*Coomber v Coomber* [1911] 1 Ch 723

*Mortgage Corporation v. Shaire and Others* [2001] 4 All ER 364

*Royal Bank of Scotland v Etridge* [2002] 2 AC 773

*Stanley v. Wilde* [1899] 2 Ch. 474

*Western Trust & Saving Ltd v. Rock* (1993) NPC 89

## TABLE OF CONTENTS

<b>DECLARATION .....</b>	<b>iii</b>
<b>COPY RIGHT .....</b>	<b>iii</b>
<b>DEDICATION .....</b>	<b>v</b>
<b>ABBREVIATIONS.....</b>	<b>vi</b>
<b>ABSTRACT .....</b>	<b>vii</b>
<b>TABLE OF STATUTES.....</b>	<b>viii</b>
<b>TABLE OF CASES .....</b>	<b>ix</b>
<b>TABLE OF CONTENTS .....</b>	<b>x</b>

### CHAPTER ONE

<b>GENERAL INTRODUCTION .....</b>	<b>1</b>
1.1 Introduction .....	1
1.2 Background of the problem .....	2
1.3 Statement of the problem.....	7
1.4 Literature review .....	8
1.4.1 Theoretical literature .....	8
1.5 Justification of the study.....	12
1.6 Scope and limitations of the study.....	13
1.7 Research questions .....	13
1.8 Objectives of the study .....	13
1.9 Significance of the study .....	14
1.10 Research design and methodology .....	14
1.10.1 Research design .....	14
1.10.2 Area of the study .....	15
1.10.3 Study population.....	15
1.10.4 Population sample and sampling techniques .....	15

1.10.5	Sources of data .....	15
1.10.6	Methods of data collection .....	16
1.10.7	Methods of data processing, analysis and interpretation.....	17
1.11	Organization of the study .....	18

## **CHAPTER TWO**

### **COMMON LAW JURISPRUDENCE ON INQUIRY INTO SPOUSE'S CONSENT .20**

2.1	Introduction .....	20
2.2	Development of common law jurisprudence on inquiring into a spouse's consent ....	20
2.3	Obtaining a genuine and informed consent of a spouse .....	22
2.4	Contribution of the decision of Royal Bank of Scotland v. Etridge.....	23
2.5	Bankers duty of inquiry .....	25
2.6	How can a bank discharge its duty of inquiry .....	26
2.7	Duties of a solicitor who is advising a spouse.....	28
2.8	Conflict of interests .....	30
2.9	Conclusion.....	30

## **CHAPTER THREE**

### **CONCEPTUAL AND LEGAL FRAMEWORK OF MORTGAGE OF A MATRIMONIAL HOME IN TANZANIA .....**

3.1	Introduction .....	32
3.2	The concept of a mortgage .....	32
3.3	The concept of a matrimonial home .....	34
3.4	Institutional framework of mortgages of matrimonial homes .....	35
3.5	Legal framework of mortgage of matrimonial homes in Tanzania .....	37
3.5.1	The Constitution of United Republic of Tanzania.....	37
3.5.2	The Law of Marriage Act .....	37

3.5.3	The Land Act and its regulations.....	42
2.3.4.1	The Land Act.....	42
2.3.4.2	The Land (Amendment) Act, 2004, and Land (Mortgage) Regulations, 2005..	46
2.3.4.3	The Mortgage Financing (Special Provisions) Act, 2008, and the Land (Mortgage Financing) Regulations, 2009.....	49
3.6	Conclusion.....	50
<b>CHAPTER FOUR</b>		
<b>PRESENTATION OF FINDINGS AND ANALYSIS.....</b>		
4.1	Introduction .....	52
4.2	Obtaining a spouse’s consent .....	53
4.3	Spouse’s signatures .....	55
4.4	Inquiry into a spouse’s consent .....	58
4.6	Conclusion.....	62
<b>CHAPTER FIVE</b>		
<b>CONCLUSION AND RECOMMENDATIONS.....</b>		
5.1	Introduction .....	64
5.2	Conclusion.....	64
5.3	Recommendations .....	66
<b>REFERENCES .....</b>		
		<b>69</b>

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Introduction

Two or more persons are said to consent when they agree upon the same thing in the same sense.<sup>1</sup> All agreements are contracts only if, among other requirements, are made with free consent of the parties.<sup>2</sup> Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistakes as per *section 14* of the Law of Contract Act.

When a borrower wants to take a loan facility on the security of a matrimonial home, there is a legal requirement that his/her spouse must consent.<sup>3</sup> The borrower has a responsibility of obtaining his/her spouse's consent to such mortgage, while on the other hand, the lender has a responsibility of ensuring that the consent given is free, genuine and informed one.<sup>4</sup> The lender has a duty in law of making an inquiry into how the said consent was obtained.<sup>5</sup> He will have to satisfy himself that the spouse was independently advised as to the terms of the mortgage, consequences in case they default to pay and the spouses' right to either withhold or give the consent. Failure to do so will render the mortgage invalid, that is, with no legal force.<sup>6</sup>

This study will examine the law and practice relating to mortgage of a matrimonial home in Tanzania mainland. In particular, it will examine the requirement of a spouse's genuine and informed consent in mortgaging a matrimonial home and the mortgagee's duty of making an inquiry into the said consent. The study will offer a critique of the protection afforded by the Law of Marriage Act<sup>7</sup> in line with the statutory regime introduced by the Land Act<sup>8</sup> and its amendments of 2004 and 2008 focusing on, among others, what the Act sought to address, its effectiveness,

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<sup>1</sup> The Law of Contract Act, Cap 345 R.E 2002 c.s 3

<sup>2</sup> *Ibid*, section 10

<sup>3</sup> The Law of Marriage Act, Cap 29 R.E 2002 c.s 59 and The Land Act, Cap 113 R.E 2002 c.s 114

<sup>4</sup> The Land Act *op cit* c.s 114(1)

<sup>5</sup> *Ibid* C.s 161(3)

<sup>6</sup> *Ibid* C.s 114 (1)

<sup>7</sup> The Law of Marriage Act, Cap 29, R.E 2002

<sup>8</sup> The Land Act, Cap 113, R.E 2002

achievements, and weaknesses regarding spouses genuine and informed consent and the mortgagee's duty of inquiry in mortgaging a matrimonial home.

## 1.2 Background of the problem

The concept of a matrimonial home has attracted considerable critical attention in recent decades across a broad range of social science disciplines. Analysis of 'matrimonial home meanings' provides important evidence of the values which people attach to property that they occupy as a matrimonial home.<sup>9</sup> This evidence could be utilised to argue that matrimonial home represents a site of special significance, deserving some additional protection in law, over and above other property type.<sup>10</sup>

It is a common place that a high proportion of privately owned wealth in Tanzania is invested in the matrimonial home.<sup>11</sup> For most home-owning couples, whether in monogamous or polygamous marriages, their matrimonial homes are the most valuable asset. It is also becoming increasingly common for the matrimonial or cohabitation home to be used as security for business debts of one of the parties, usually the husband or male partner.<sup>12</sup>

Bank finance is in fact by far the most important source of external capital for small businesses in Tanzania. Therefore, in order to raise finance for the business enterprises of one or other of the spouses, the jointly owned home has become a main source of security. The provision of such security requires the consent of both spouses. When a bank is owed money by a customer, their natural inclination is to recover it or to find some method of guaranteeing its repayment. Given the fact that most peoples' greatest economic asset is the matrimonial home, banks usually seek a charge over that home in order to guarantee that debt.<sup>13</sup> The paradox here is that that

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<sup>9</sup> Available at <http://onlinelibrary.wiley.com> visited on 8<sup>th</sup> September 2011

<sup>10</sup> Fox (2005). *Creditors and the Concept of Family Home: A Functional Analysis*, p 13. See also section 59 of the Law of Marriage Act, cap 29 (RE. 2002)

<sup>11</sup> Binamungu and Ngwilimi (2006). *Regulation of Banking Business in Tanzania*, p 115. See also Clements (1995). *Lending on the Security of Co-owned Homes, Suretyship and Undue Influence*

<sup>12</sup> Mugalula (2010). *Mortgaging a Matrimonial Home: Unveiling the Law and Practice of Banks and other Financial Institutions in Uganda*, p 9

<sup>13</sup> *ibid* p 3

the matrimonial home is often owned jointly by the debtor's spouse or partners and they will have to consent to any mortgage if the banks security is to be effective. <sup>14</sup>

However, there is a great fear originating from the historical and traditional position in which title in the matrimonial home vested absolutely in the husband who could deal with the home on behalf of the other spouse. The requirements underscore the need of the law to protect vulnerable parties, in most cases wives, against dealings in matrimonial home by their husbands without their knowledge or consent. The possibility of the husband abusing his strong position to the prejudice of his wife is what the law seeks to protect. The law needs to strike a balance making sure that matrimonial home remains available as securities without prejudicing interests of weaker parties residing in the matrimonial homes.<sup>15</sup>

The concept of mortgage of a matrimonial home, as it is known today, was not there during the pre colonial era. Land tenure system was communal, communities shared land under the authority and advice of community elders, clan heads or kings. Private ownership of land was not a concern during this era; the main concern was on the use and control of land.<sup>16</sup>

Mortgages of matrimonial home started to emerge during the period of colonialism.<sup>17</sup> The colonial policy of plantation economy necessitated the introduction of private ownership of land. The colonialists introduced the ownership concept at the peril of well-cherished land control and communal ownership.<sup>18</sup> Land ownership was to be evidenced by a registered title deed. With the individualisation of tenure, freehold titles, leases or occupancy rights to land and/ or housing was in most cases registered in the name of the head of the household, notably male partners. Again, with the introduction of private ownership of land, the concept of

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<sup>14</sup> Mugalula (2010) *loc cit* p 5

<sup>15</sup> Mwaiondola (2007). *The Modern Law of Mortgages in Tanzania: The Role of the Land Act, 1999*, p.143

<sup>16</sup> Toulmin and Quan (2002). *Evolving Land Rights, Policy and Tenure in Africa*, p. 182

<sup>17</sup> Mwaiondola (2007) *op cit*

<sup>18</sup> German Imperial Decree, 1895 declared that all land in Deutsch Ost Africa, whether occupied or not was to be regarded as "not owned". The lands were to be vested in the Empire as Crown lands. Again, the Britains Land Ordinance Cap 113 declared all lands whether occupied or unoccupied to be public vested in the Governor.

mortgaging a matrimonial home gradually started to immerse within Tanganyika. However, the concept, to a large extent, was limited only to the European population as the colonialists introduced a dual system of law, one legal system for the European population and another for indigenous inhabitants.<sup>19</sup>

On the other hand, the development of the law of mortgages of matrimonial homes among the Africans customary laws was substantially stagnated by the colonial dual system of laws. This dual system resulted in an almost complete isolation of the African Courts and customary law in the colonial era. Furthermore, there appeared to have been a general lack of interest by the colonial governments in the problems arising from the content and application of customary law, the principles of which were treated as a matter of fact and not law. There was a notable stagnancy in the development of customary law due to the fact that customary law was not the province of the professional lawyer because advocates could not appear before the African courts. Marriages between indigenous inhabitants were also a subject of the dual system of laws. Thus, the law which governed marriages between indigenous was, to a large extent, either customary or Islamic laws.<sup>20</sup>

After its independence in 1961, Tanganyika inherited the British legal system and laws governing land matters, family law and in particular mortgage of matrimonial homes. The Magistrates Courts Act 1963 and 1984<sup>21</sup> abolished the dual system of law and established a unitary three-tier court system in Tanganyika.<sup>22</sup> Alongside with this development there was a movement for unification of the marriage laws. The movement was most pronounced in the area of family law, which had been

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<sup>19</sup> Germany created a judicial system that was closely tied to executive authority. Colonial District Officers in charge of military stations could delegate adjudication of disputes to local leaders. They were instructed to decide cases using customary law.

On the other hand, Britains established the Tanganyika Order in Council, 1920, as the basic law for the territory. They further enacted the Courts Ordinance to 'regulate the administration of justice in the territory'. The Courts Ordinance maintained the previous system of separate adjudication for foreigners and the indigenous population although the appeals from native courts could be sent to the colonial High Court.

<sup>20</sup> Edward et al (2006). *Legal Pluralism and Women's Rights: A Study in Post-Colonial Tanzania*

<sup>21</sup> The Magistrates Courts Act, Cap 11 (RE. 2002)

<sup>22</sup> The first tier consist of the primary courts, district courts and resident magistrates courts. The High Court follows in the system and exercises over Tanzania mainland only. The Court of Appeal is the Highest Court and is competent to hear appeals from both Tanganyika mainland and Zanzibar.

particularly beleaguered by the choice of law problems created by the plural legal system inherited from the British.<sup>23</sup> In 1971, Tanzania mainland enacted the Law of Marriage Act<sup>24</sup> as An Act to regulate the law relating to marriage, personal and property rights as between husband and wife, separation, divorce and other matrimonial reliefs and other related matters. The Act replaced the multiple systems of law that hitherto governed marriage and the status of children. The Act was therefore at integrating religious and customary laws and the English common law, while at the same time reflecting the government policies of equality and fairness between the sexes and the protection of children.

Notable here are the provisions of *section 59* of the Law of Marriage Act which are special provisions relating to matrimonial home. The provisions provide for powers of a spouse to protect his or her interests in a matrimonial home by way of a caveat, caution or otherwise<sup>25</sup> and occupational rights to a spouse whose interests has been unlawfully alienated.<sup>26</sup> In the light of these provisions, a higher duty is imposed on the part of mortgagees to conduct a detailed inquiry about the existence of a spouse and his or her interests in a matrimonial home before advancing a loan facility.

Implementation of the provisions of the Law of Marriage Act relating to mortgage of matrimonial homes was paralysed by various independent government land policies which brought about a total confusion in the land tenure and the constitution which for a long time did not include the bill of rights i.e. the right to own property and the equality of spouses in ownership and disposition of a property.

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<sup>23</sup> In order to untangle the competing bodies of family law, the African Conference on Local Courts and Customary Law was held in Dar es Salaam in 1963. This conference inspired the government of Kenya to create the Commission on Law of Marriage and Divorce in 1967, which issued a report the following year and urged reform and intergration of the disparate systems of religious, customary, and statutory law via a proposed Law of Matrimony Act. Ultimately, the Commissions efforts stalled in Kenya, where the draft bill was rejected by the legislature multiple times, were adopted by Tanzania mainland in overhauling its family law system.

<sup>24</sup>The Law of Marriage Act, cap 29 (RE.2002). Vide Mapendekezo ya Serikali Juu ya Sheria ya Ndoa (Government Proposals on Uniform Law of Marriage), Government paper No. 1 of 1969, which incorporated most of the reforms advanced by the Kenya Draft Bill.

<sup>25</sup> Ibid, c. s 59 (1)

<sup>26</sup> Ibid, c. s 59 (2)

The independent government inherited the land tenure adopted by the British colonialists. The principles of the land tenure system as established through the Land Ordinance of 1923 were only slightly changed after independence. Until 1999, the Land Ordinance remained the basic land tenure and land use law in Tanzania mainland. A difference continued to exist between customary land rights (or deemed occupancy rights) and statutory land rights (or granted right of occupancy). Granted right of occupancy (mostly held by the immigrants in colonial times) were more clearly defined than deemed or customary right of occupancy (which had been seen as public lands at the disposal of the colonial authorities) and constituted a stronger legal status. It remained unclear what legal regime should be applied to land under different customary regimes. With this diversity, mortgage of matrimonial homes was only confined to land with granted right of occupancy, mostly held by the immigrants, which was more secure than the customary or deemed right of occupancy.<sup>27</sup>

The Arusha Declaration of 1967 introduced the policy of African Socialism, self reliance and rural development which had the effect of nationalizing all of the land within the country. The Villages and Ujamaa Villages Act<sup>28</sup> gave powers to village governments to acquire and plan land within their boundaries. Again, the Villages and Ujamaa Villages (Registration, Designation and Administration) Act<sup>29</sup> did not contain any provision on land tenure and the question of possessory rights to land was not part of the programme. Under this Act, the Village Council of the Ujamaa Village Government was obliged to take such measures as may be necessary to acquire rights of occupancy in respect of land within the limits of the village and no other person should have any right, title or interest in or over any land within such limits. Under directives published in the Government Gazette No. 168 it was intended that anyone living in a village would not receive title to land. In other words, customary tenure would cease to exist. Another confusion with the land

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<sup>27</sup> Fimbo (1992), Essays in Land Law Tanzania

<sup>28</sup> The Villages and Ujamaa Villages Act, Act No. 21 of 1975

<sup>29</sup> The Villages and Ujamaa Villages (Registration, Designation and Administration) Act, Act No. 21 of 1975

tenure came with the Regulation of Land Tenure (Established Villages) Act<sup>30</sup> which was instrumental in re-location of peasants during operation vijiji without compensation hence a cause of numerous disputes in Tanzania mainland.<sup>31</sup>

Implementation of the provisions of the Law of Marriage Act, 1971 requiring consent of a spouse in mortgaging a matrimonial home could only be successfully invoked after the enactment of the Land Act, 1999.<sup>32</sup> The Land Act came into force following the recommendations of the Presidential Commission of Inquiry into Land Matters: Land Policy and Tenure Structure (Commonly known as the Shivji Commission 1992-1994) and the subsequent adaptation of the National Land Policy of 1995.

At this level, one can confidently argue that a set of the laws currently governing consent of spouses in mortgaging matrimonial homes in Tanzania mainland was thus completed in 2001 (forty years after independence and thirty years after the Law of Marriage Act) when the Land Act came into force. The Act provides clearly for the requirement of a spouse's consent<sup>33</sup> in mortgaging a matrimonial home and a duty of the lender to make an inquiry<sup>34</sup> into the said consent before issuing a loan. The issue here is on the inquiry a mortgagee is supposed to make before issuing a loan, how far does the mortgagee's duty of inquiry into a spouses consent to mortgage a matrimonial home goes taking into account the fact that the word 'inquiry' is not defined anywhere in the Land Act and its regulations.

### 1.3 Statement of the problem

A mortgage of a matrimonial home can only be valid if a spouse or spouses of the borrower has consented to the disposition.<sup>35</sup> The standard of consent required by law here is the one which is free, genuine and an informed consent of a spouse to

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<sup>30</sup> Regulation of Land Tenure (Established Villages) Act, Act No. 22 Of 1992

<sup>31</sup> This continued until the clause was held to be unconstitutional and struck out of the statute book by the Court of Appeal of Tanzania at the instance of two peasants in *Attorney General v. Akonaay and Lohay*.

<sup>32</sup> Cap 113, R.E 2002

<sup>33</sup> The Land (Amendment) Act, Act No.2 of 2004 c. s 114

<sup>34</sup> The Land Act, Cap 113, RE. 2002, C.s 161 (3) (a)

<sup>35</sup> Land Act, Cap 113 R.E 2002 as am. by Act No. 2 of 2004 and Act No. 17 of 2008 c. s 114

mortgage the matrimonial home.<sup>36</sup> in this context, several scenarios can arise in which lack of free, genuine and informed consent becomes an issue: the spouse might both wish to mortgage a matrimonial home, but some element of compliance with the consent rules may be missing; the matrimonial home might be mortgaged without regard to the spouse's consent at all; the consent document may be forged; and the spouse might be misled as to the effect of the consent.

In this regard, and for the protection of a spouse's interests in a matrimonial home, the Mortgage Financing (Special Provisions) Act<sup>37</sup>, the Land Act<sup>38</sup> and the Law of Marriage Act<sup>39</sup> provides for the duty of inquiry and the procedures through which a mortgagee is supposed to follow before advancing a loan facility on the security of a matrimonial home. The mortgagee is supposed to make sure that the transaction has met compliance requirements for a requisite consent to mortgage a matrimonial home.

However, despite the presence of these clear provisions of the law on how a mortgagee is supposed to go about before issuing a loan facility on the security of a matrimonial home, still there is a mushroom of cases in our courts in which spouses of the borrowers objects the validity of a mortgage transaction disposing off their matrimonial homes. to a large extent, these objection proceedings stem from the grounds that either the spouse did not consent, there was forgery, or that the consent given was not free, genuine and an informed one.

## **1.4 Literature review**

### **1.4.1 Theoretical literature**

Mortgage of land can be created using a matrimonial home. Mortgage of a matrimonial home is not a discrete form of mortgage, but rather a distinct mortgage created using a matrimonial home.<sup>40</sup> It can be an ordinary mortgage or an informal

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<sup>36</sup> Law of Contract Act, Cap 345 R.E 2002, c. s. 13 and 14

<sup>37</sup> Act No. 17 of 2008

<sup>38</sup> Cap 113 R.E 2002, as am. by Act No. 2 of 2004 and Act No. 17 of 2008, c. s. s 114 and 161(3)

<sup>39</sup> Cap 29 R.E 2002 c. s. 59

<sup>40</sup> The Land Act; Cap 113 R.E 2002 (as amended in 2004 and 2008) c. s 114

mortgage by deposit of document or a customary mortgage executed using a matrimonial home.<sup>41</sup> Significantly, the law imposes conditions when creating such mortgages. To be valid, the law requires that the signature of the mortgagor and spouse or spouses of the mortgagor living in that matrimonial home be obtained to signify their consent to the use of the home as security.<sup>42</sup>

When a spouse, at the behest of a partner, sign documents which could affect security of occupation of the home, there are important issues of social and economic policy at stake and these cannot be ignored. There are good policy reasons for treating a spouse living in a matrimonial or quasi-matrimonial relationship as a class deserving of the law's special treatment. These are based on what happens in practice in many marital or quasi-marital relationships. Many wives or female cohabitees are placed under pressure from male partners when financial matters are involved so that it is easy for the male to take advantage of a woman's fear that her opposition will destroy the wider emotional and sexual relationship between them. Furthermore, the wife's trust and confidence in the man in matters of business and finance, existing independently of the emotional bonds between couples, leads to a strong possibility of undue influence by the man.<sup>43</sup>

**Binamungu and Ngwilimi (2006)**<sup>44</sup> urges that the Land Act and its Regulations provides little guidance on what parties (mortgagor and mortgagees) should do prior to executing mortgage contracts. Their methodology involved documentary review and unstructured interviews and they finally came to a conclusion that one would not know what preparations should be done before applying for a loan. They further noted that one of the fundamental activities that mortgagees are required to perform before entering into contractual arrangements with a mortgagor is carrying physical verification of the subject offered as collateral. The Land Act imposes a duty on the lender to inquire about spouses in case the proposed landed property is a matrimonial home. It demands that lenders obtain a signature or evidence from the

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<sup>41</sup> The Land Act-Loc cit c. s 114 (1)

<sup>42</sup> Ibid, section 114 (1) (a) and (b)

<sup>43</sup> Clements (2010) Loc cit p. 2

<sup>44</sup> Regulation of Banking Business in Tanzania

documents used in application for a loan from any spouse.<sup>45</sup> This study will use questionnaires and structured interviews on top of documentary review and structured interviews used by Binamungu and Ngwilimi to investigate on how bankers conduct an inquiry into a spouse's genuine and informed consent to mortgage a matrimonial home.

Clements (1995)<sup>46</sup> argues that the above factors lead to a protectionist approach ('protection theory') in which spouse living in a relationship where loyalty, trust and confidence in the other partner is to be expected, should receive special treatment by the law. Vulnerability of the female in the above situations leads to a social policy argument in favour of special protection. Scott L.J in *Barclays Bank v O'Brien*,<sup>47</sup> pointed out that the tendency for married women to leave business decisions to the husband still persists. This situation and the resultant likelihood of influence by the husband and reliance by the wife was the original justification for the approach of equity towards a married woman who gave her property to secure her husband's debts. According to Scott LJ, that justification is still valid. Feminists might argue that women ought not to be in situations of vulnerability, but that one has to recognise that there are situations in which women are vulnerable and deal with those accordingly. Women who are asked to sign security documents in relation to the home are vulnerable and are therefore deserving of special treatment to protect them from the consequences of signing.<sup>48</sup> This study will investigate whether the same has been considered by our laws when a matrimonial home is to be mortgaged.

Mugalula (2010)<sup>49</sup> acknowledges the fact that world over, the issue of equality in owning a matrimonial home between spouses and later on mortgaging the same with the consent of either spouse has been a subject of intense discussion and a great deal of jurisprudence is emerging. He notes that in Uganda, the promulgation of the 1995 constitution for the first time recognized the equality of a husband and the wife in

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<sup>45</sup> Binamungu and Ngwilimi *Loc cit*

<sup>46</sup> Lending on the Security of Co-owned homes, Suretyship and Undue Influence

<sup>47</sup> [1993] QB 109, CA

<sup>48</sup> Clements *op cit* p. 2

<sup>49</sup> Mortgaging a Matrimonial home: Unveiling the Law and Practice of Banks and other Financial Institutions In Uganda

having equal rights in marriage, during marriage and at dissolution.<sup>50</sup> This study will investigate whether the law and practice in Tanzania do presume equality of spouses in ownership and disposition of matrimonial property, especially when the property is to be mortgaged.

On the other hand, **Carlos (2007)**<sup>51</sup> says that the Tanzanian mortgage market is well underway, and developing along market based and competitive principles. While the existing legal framework appears to be adequate for the current nascent market, where only a few banks make mortgage loans to a small number of carefully selected borrowers, several key legal and regulatory issues will impede future growth of a more robust market, and a more fully developed and cohesive legal framework is needed. There is widespread concern that the current laws will not adequately meet the demands of rapid growth, especially if the future market is to include low-middle and middle income persons as well as wealthier borrowers. This concern is expressed by bankers who are active in mortgage lending, and is cited by other lenders as the reason their banks have not entered the mortgage market. This study will identify the gaps and inadequacies of the legal framework in mortgaging a matrimonial home within the country.

#### **1.4.2 Empirical literature**

**Mwaisondola (2007)**<sup>52</sup> notes that most homes in Tanzania are registered in the names of the husbands who sometimes deal with the homes without the knowledge of their wives. He stresses on the importance of lenders to make thorough inquiry in places more than land registries in order to satisfy themselves whether the landed property is a matrimonial home or otherwise.<sup>53</sup> His study was very broad to cover all aspects of Land Law in Tanzania. He did not deal much with the specifics of inquiring into a spouse's free, genuine and informed consent to mortgage a matrimonial home in Tanzania. This study will go further into the details of how

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<sup>50</sup> Mugalula *Loc Cit* p. 9

<sup>51</sup> Tanzania: *Action Plan for Developing the Mortgage Finance Market*. Report on the Legal and Regulatory Issues in the Mortgage Market in Tanzania. Retrieved on 22<sup>nd</sup> August 2011 from a world wide web [www.hofinet.org/documents/docs.aspx?id](http://www.hofinet.org/documents/docs.aspx?id)

<sup>52</sup> The Modern Law of Mortgages in Tanzania: The Role of the Land Act

<sup>53</sup> *Ibid* p. 142

banks discharge their statutory duty of inquiry into spouse's free, genuine and informed consent to mortgage a matrimonial home.

### **1.5 Justification of the study**

World over, the issue of equality in owning a matrimonial home between spouses and later on mortgaging the same with the consent of either spouse has been a subject of intense discussion and thus a great deal of jurisprudence is emerging. However, despite this feministic approach, still there is a fear originating from the historical and traditional position in which title in the matrimonial home vested absolutely in the husband who could deal with the home on behalf of the other spouse. This underscores the need of the law to protect the vulnerable parties, in most case wives, against dealings in the matrimonial home by their husbands without their knowledge or consent.

Looking into it carefully, while offering such a protection to spouses, the law imposes a higher duty to the bankers to make a thorough inquiry into the spouses free, genuine and informed consent to mortgage a matrimonial home. In the end, bankers, if not careful, are the ones to suffer the negligence, fraud, coercion or misrepresentation of a spouse's failure to obtain consent of the other in mortgaging a matrimonial home.

There is a mushroom of cases before our courts involving mortgage of matrimonial homes. In most of these cases spouses comes up and objects the exercise of mortgagees' remedies in a property offered as security urging that the property in question is a matrimonial home and insisting that they never consented to the disposition. Again, the borrower may have two spouses: one consented and the other raises dust that she didn't. Circumstances however may clearly show that a spouse was aware of the transaction but capitalizes on technical lack of consent. It is a common practice for a borrower to team up with a spouse during the objection to attachment and declares that he never secured the spouse's consent.

This study aimed at providing an analysis of how a banker can successfully inquire into the spouse's consent so as to satisfy itself that consent to mortgage a

matrimonial home by a spouse was given and such consent was free, genuine and an informed one.

### **1.6 Scope and limitations of the study**

The study dealt with the law and procedure of inquiring into a free, genuine and informed consent of a spouse in mortgaging a matrimonial home within Tanzania mainland only. The study also limited itself to banks as mortgagees in this respect. Accessibility to data involving bankers' practices of inquiring into spouse's consent was a major setback in this study. There are a lot of bureaucracies on the same basing on the bankers duty of confidentiality and fear of competition from other banks once their practices are revealed. In circumventing this setback, the researcher had to use a lot of time and energy convincing the bankers to cooperate and educating them that the study was only for and limited to academic purposes.

### **1.7 Research questions**

1. What the bankers are doing in satisfying themselves as to the procurement of a spouse's free, genuine and informed consent in mortgaging a matrimonial home?
2. What are the effects of bankers' failure to make a thorough inquiry of a spouse's free, genuine and informed consent in mortgaging a matrimonial home?
3. What bankers should do to safeguard their interests when inquiring into a free, genuine and informed consent of a spouse in mortgaging a matrimonial home?

### **1.8 Objectives of the study**

#### **1.8.1 General objective**

General objective of this study was to examine the law and practice of inquiring into a spouse's free, genuine and informed consent in mortgaging a matrimonial home.

### **1.8.2 Specific objectives**

1. To examine the statutory regime on mortgaging a matrimonial home in Tanzania.
2. To examine relevant documents and procedures adopted by banks in inquiring into a spouses free, genuine and informed consent in mortgaging a matrimonial home.
3. To suggest for possible solutions in strengthening the bankers position when inquiring for a spouses free, genuine and informed consent in mortgaging a matrimonial home.

### **1.9 Significance of the study**

The study provides a critical analysis on the law and practice of obtaining a spouse's genuine and informed consent in disposing off a matrimonial home through mortgage transactions in Tanzania mainland. The study will help various stake holders such as bankers, borrowers and policy makers to realise proper procedures to be followed in obtaining a spouse's consent to mortgage a matrimonial home and how a successful inquiry into such consent can be made by the bankers. The study will also help to increase literature so far as inquiring into a spouse's free, genuine and informed consent to mortgage a matrimonial home in Tanzania mainland is concerned.

### **1.10 Research design and methodology**

#### **1.10.1 Research design**

The study was conducted using a survey design. The researcher surveyed in various banks looking into documents and procedures used when inquiring into a spouse's consent in mortgaging a matrimonial home. This went along with unstructured interviews with loan officers, borrowers, spouses and advocates aiming at retrieving information on the real practice of bankers on the procedures and documents they are using in inquiring into a spouse's genuine and informed consent to mortgage a matrimonial home.

### **1.10.2 Area of the study**

The study was conducted in Morogoro Municipality and Dar es salaam region. The study area was chosen basing on the fact that the area has a large number of banks which advances credits basing on security of matrimonial homes. Also, the High Court and its Commercial Division are situated within the research area. Furthermore, the area is well known to the researcher and hence it was thought that this would easy the task of getting required information.

### **1.10.3 Study population**

The researcher employed a purposive population sampling. The sample size was neither too big nor too small but medium for the researchers dissertation. The population covered the bankers (managers, legal officers and loan officers), borrowers, spouses, advocates, law makers, land and commercial law experts and judicial officers.

### **1.10.4 Population sample and sampling techniques**

In this study, random and purposive sampling technique was employed. A sample of 50 respondents was considered in the study. It included 30 respondents from 10 different banks. From each of the 10 banks, one bank manager, one legal officer and one loan officer were interviewed. Ten borrowers who were presented to the researcher by the respondent banks were also interviewed together with their spouses. Again, 10 different advocates were also randomly selected using a snow ball technique. Each item in the universe was regarded to have an equal opportunity of being selected in the sample and this selection was in no way influenced by personal bias and prediction of the researcher. No item was selected on account of likes or dislikes of the researcher and the selection was left entirely to chance. This helped to provide to each and every targeted population in this study fair and equal chance of being selected.

### **1.10.5 Sources of data**

Both primary and secondary sources of data were used in the study. Secondary data were obtained through studying previous published works in libraries and the internet. Primary data were obtained from the field through various research methods, such as experience survey and unstructured interviews.

The researcher employed both library as well as field research. Library research was mainly conducted at Mzumbe University library, University of Dar es Salaam library, and the High Court Commercial Division archives. Practical research was conducted in selected banks including the National Microfinance Bank, the National Bank of Commerce, Bank of Africa, CRDB Bank and International Commercial Bank (Tanzania) Limited.

#### **1.10.6 Methods of data collection**

##### **1.10.6.1 Methods of primary data collection**

The most prominent method of data collection which was used in this study was the triangulation method, this entails the use of multiple methods of data collection over the same problem so as to test the accuracy of data obtained. Questionnaires and interviews were employed in the research area to obtain respondents responses on the law and practice of obtaining spouse's consent to mortgage a matrimonial home in Tanzania mainland.

Interviews were the main research method used to tape inner feelings of the respondents on the subject matter. Data was collected using structured and unstructured interview guides. These were instrumental in soliciting relevant information to the study from the advocates, borrowers and their spouses. During the interviews, the researchers also used a tape recorder. This helped the researcher to use less time in interviewing and simplified retrieval of data during data analysis and interpretation.

Questionnaires were used mainly to obtain information from bank officials on how an inquiry into spouse's genuine and informed consent of a spouse is made. Open-ended, closed-ended and multiple choice questions were used in the study. Open-ended questions were used for breaking the ice in an interview; when respondents'

own words were important; when the researcher didn't know all the possible answers. Closed-ended questions were used in collecting rank ordered data; when all response choices were known by the researcher; when quantitative statistical results were desired. On the other hand, multiple choice questions were used when there was a finite number of options and a great caution was taken to instruct respondents as to the number of answers to select.

Questionnaires were used to obtain responses from some of the bank officials and other respondents whose time schedules were very tight to conduct an interview. Interviews were conducted with respondents who were readily available and had an ample time for discussions with the researcher.

#### **1.10.6.2 Methods of secondary data collection**

Secondary data were collected through documentary review. In the first place, documentary review was used to collect data on the background and historical context of the research problem. An analytical approach of context analysis was used in the selected documents in determining which data was relevant and which was to be included in the study.

On the other hand, various documents from different banks used in the whole process of mortgaging a matrimonial home were reviewed. The study also reviewed standard forms provided under the Land Act, and its regulations relating to mortgage of a matrimonial home. By way of caution, the researcher, before using secondary data, ensured himself that available data are reliable, suitable and adequate. The researcher understood well the risks of using already available data. Secondary data which has been used in this study were only such data readily available from authentic sources, suitable and adequate for the study in reducing time and energy to be spent in field surveys for collecting information.

#### **1.10.7 Methods of data processing, analysis and interpretation.**

Firstly, bulky data from unstructured interviews, questionnaires, documentary review and the researcher's diary were summarized manually to a single sheet of

paper. In summarizing the data great care was taken to ensure that its accuracy reflects the original meaning of the statements made. Then, the processed data were examined, numerical data was summarized using descriptive statistics of mean and percentages to facilitate assessment of the laws, methods and procedures of obtaining spouse's consent and its inquiry in mortgaging a matrimonial home in Tanzania. In the end, data was presented in this work descriptively using percentages so as to reflect the reality of the law and practice of obtaining spouse's genuine and informed consent to mortgage a matrimonial home.

### **1.11 Organization of the study**

This report is divided into five chapters. Chapter one is about general introduction relating to the law and practice of obtaining a spouse's free, genuine and informed consent in mortgaging a matrimonial home. This chapter includes background to the research problem, justification of the study, scope and limitation of the study, significance and objectives of the study, type of research applied in the study, research questions and research methodology.

Chapter two discusses the law and practice of obtaining spouse's free, genuine and informed consent to mortgage a matrimonial home in other jurisdictions. The chapter identifies notable developments in common law which calls for an investigation into our system as to whether the laws and practice of the banks on inquiring into a spouse's free, genuine and informed consent are up to date.

The legal and institutional framework of the law regulating an inquiry of spouses consent in mortgaging a matrimonial home is set out in Chapter three. The chapter recognises the fundamental importance of a family home and policy considerations behind its protection. It lays down a development of the laws regulating an inquiry of a spouse's consent in historical perspectives and in the end establishes the current position of the law regarding inquiring into a spouse's consent in mortgaging a matrimonial home in Tanzania mainland.

Chapter four is the core of this study. It contains the research findings and analysis of the law and practice of obtaining spouse's free, genuine and informed consent to mortgage a matrimonial home in Tanzania mainland. The chapter generally acknowledges that the practice of banks in inquiring into spouses free, genuine and informed consent is far from the requirements set out by the law and practices from other common law countries. The chapter further tries to make a comparative analysis of the law and practice of our banks in Tanzania and other common law countries. In the course of doing so, the chapter identifies some weaknesses of the practices by our banks and tries to show the consequences they are up to by failing to adhere to the consent provisions.

The summary, conclusions and recommendations are made in chapter five. In the conclusion an account is made of what the study identified on the practice of banks on the inquiry of spouse's free, genuine and informed consent to mortgage a matrimonial home. Finally the researcher makes recommendations on the reasonable steps to be adopted by bankers when conducting an inquiry into spouse's consent to satisfy themselves that the consent so given is free, genuine and informed one.

## CHAPTER TWO

### COMMON LAW JURISPRUDENCE ON INQUIRY INTO SPOUSE'S CONSENT

#### 2.1 Introduction

To a large extent the law of mortgages in Tanzania is borrowed from other common law countries. In this regard, this chapter will examine the law and practice of inquiring into spouse's genuine and informed consent to mortgage a matrimonial home in other common law countries. The Chapter intends to build a foundation for a comparative analysis in chapter four of what are the standard procedures to be followed by our banks considering the law and practices in common law in comparison with the law and practices in Tanzania.

#### 2.2 Development of common law jurisprudence on inquiring into a spouse's consent

Common law jurisprudence developed the concept of matrimonial home protection and the requirement of a spouses consent through what is called dower law. Dower law prohibited disposition of matrimonial home without a spouse's consent. The common law model of dower law took precedence over the claims of the creditors; the refusal of a spouse to release her dower interest often functioned to prevent dispositions.<sup>54</sup>

The requirement of spouse's consent is the central feature of the law governing matrimonial homes in common law. No disposition of the matrimonial home can be made by the owner without the consent of the other spouse, unless an order has been obtained dispensing with that requirement, or the rights have been previously waived.<sup>55</sup>

The primary purpose of the consent requirement is straightforward. The disposal of a matrimonial home can undermine spouse's rights. To prevent this, one of the

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<sup>54</sup> The provision which the law makes for the support of a widow during her lifetime out of income produced by the real estate owned by her husband during the marriage. This provision for the support of a widow is usually favoured over the claims of her deceased husband's creditors.

<sup>55</sup> Dower Act, R.S.A. 1980, c. s 38

incidents normally associated with property -the right to alienate- is curtailed, or at least, this proprietary incident is shared between the spouses. The law also seeks to ensure, to the extent that the law can do so, that the consent is given voluntarily with knowledge of the rights being surrendered.

The current provisions governing consent, which are detailed and technical, date back to the 1948 Canadian amendments of the Dower Act. The law now requires that a special form must be signed by the non-owning spouse. The Act provides that;

*Consent in writing ... shall, in the prescribed form, state that the spouse consents to the disposition of the homestead and has executed the consent for the purpose of giving up the life estate of the spouse and other dower rights of the spouse in the homestead to the extent necessary to give effect to the disposition.*<sup>56</sup>

The consent must be contained in or attached to the instrument giving effect to the disposition, and when that instrument is presented for registration the consent must also be produced and registered. When the consent is contained in the instrument, the signature to the instrument is sufficient for the consent (as well as for the instrument). However, if the consent is annexed to the instrument, the spouse must sign both documents.<sup>57</sup>

Every mortgage in common law undertaken by an individual raises the possibility that the property is a homestead and that consent by a spouse is therefore required. As a result, a disposition that does not contain a spouse's consent, or is not accompanied by an order dispensing with consent, cannot be registered unless it is accompanied by an affidavit stating either that the owner is not married; that the property is not a matrimonial home; that a release of spouse's rights has been registered; or that a judgment of damages (for a wrongful disposition) has been registered. When the property is owned by the spouses as joint tenants or tenants in

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<sup>56</sup> The Dower Act, *Loc cit*, c.s 4

<sup>57</sup> *Ibid*, c.s 4 (1)

common, the execution of a disposition by them constitutes the necessary spouse's consent.<sup>58</sup>

The law also requires that the consent must be acknowledged by the non-owning spouse; this must be done apart from the other spouse. The consenting spouse must acknowledge that he or she is aware of the nature of the disposition; is aware that the Dower Act grants a right to prevent a disposition of the matrimonial home by withholding consent; consents to the disposition to the extent necessary to give effect of the disposition; and is executing the document freely and voluntarily without any compulsion. The acknowledgment must be made before a person authorized to take proof of the execution of documents, that person signs the acknowledgment form.<sup>59</sup>

When a proper consent and acknowledgment have been given to an agreement to mortgage, no additional consent is needed for the consequent mortgage of the matrimonial home. Furthermore, no acknowledgement is needed if the spouses are co-owners. The Act also contains a curative provision. If the court is satisfied that there has been due execution of the consent and acknowledgment, the court may authorize the registration even if the proof of the execution of the consent or acknowledgment is defective.<sup>60</sup>

### **2.3 Obtaining a genuine and informed consent of a spouse**

The question of undue influence in mortgages has recently been raised in a large number of cases as a symptom of the increase in matrimonial home repossessions which occurred in the early 1990s when interest rates were high and the value of the property were falling. In a typical undue influence case, a lender seeks to repossess a matrimonial home because of arrears and one of the joint borrowers then claims to have signed the mortgage deed or stood surety for the loan under the undue influence of the other, claiming that she (generally) was unaware of the implications of her actions. In this situation, the question for the court is not whether one party

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<sup>58</sup> The Dower Act, *Loc cit*, c. s. 7

<sup>59</sup> *Ibid*, s. 8

<sup>60</sup> *Ibid*, s. 9

acted towards the other unconscionably or in breach of trust; it is whether the lending institution had notice of the undue influence or was in some way responsible for it. If the lender did not take steps to ensure that the signature was properly obtained without any undue influence, the mortgage will be invalid as far as the injured party is concerned.<sup>61</sup>

The facts of two House of Lords cases are typical of the kind of situations where a lender might be fixed with the undue influence of the borrower. In the first of the cases, *Barclays Bank plc v. O'Brien*<sup>62</sup>, Mr O'Brien was a sole legal owner of a matrimonial home, but his wife had an equitable share in it. He told her he was borrowing £60 000 on a mortgage for three weeks to save his business, so she signed all the surety forms at the bank without reading any of them and without any independent advice. In fact, the loan was for £135 000; within six months the repayments were seriously in arrears and the bank sought possession. Mrs O'Brien successfully argued that the mortgage had been induced by her husband's undue influence and that the bank had constructive notice of this, giving rise to her right to set the mortgage aside.

In the second case, *CIBC Mortgages v Pitt*<sup>63</sup>, the facts were fairly similar but here Mrs Pitt, the wife, was a joint legal owner of the home. As a joint legal owner she could be presumed, on the facts, to be benefiting financially from the mortgage loan (its purpose was expressed to be to pay off an outstanding mortgage and to buy a second home, but the husband really wanted the money in order to pay the stock market) and therefore the bank was not put on notice to take steps to protect her position.

#### **2.4 Contribution of the decision of Royal Bank of Scotland v. Etridge**

Following *O'Brien* and *Pitt*, and after a series of undue influence cases which have exercised the minds of the judges in recent times, the House of lords, in what is now the leading case on undue influence, *Royal Bank of Scotland v Etridge (No 2)*<sup>64</sup>, had

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<sup>61</sup> Clements, L.M *supra* p 22

<sup>62</sup> [1994] 1 AC 180

<sup>63</sup> [1994] 1 AC 200

<sup>64</sup> [2002] 2 AC 773

another opportunity to review the law in this area. The issues were these: firstly, under what circumstances is a lender put on notice that there may have been undue influence; and secondly, if the lender is on notice, what steps might it take to avoid any subsequent claim by the innocent joint borrower or surety. Until *Etridge*, a lender would be placed on inquiry in situations where the surety trusted the debtor to deal with her financial affairs or where both were living together in close emotional relationship. After *Etridge*, however, the lender will be on inquiry in all cases where the relationship between the debtor and the surety is non-commercial. In such circumstances:

*The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open as far as the basic elements of the transaction are concerned.*<sup>65</sup>

The House of Lords in *Etridge (AP)*<sup>66</sup> has provided a guidance as to when a bank will be put on notice, that a spouse's relationship with a debtor gives rise to a heightened risk of undue influence, and the steps to be taken in the future by the bank and solicitors in these circumstances.

Eight appeals were heard together before the House of Lords<sup>67</sup> In seven of them, the appellant was a wife who agrees to subject her property, usually her interest in the matrimonial home, to a charge in favour of a bank in order to provide security for the payment of her husband's debts or the debts of a company in which her husband carries on business. In each case the bank commenced proceedings for possession of the mortgaged property with a view to its sale and the wife defended the claim by alleging that either her agreement to grant the charge was brought about by undue

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<sup>65</sup> Lord Nicholls at para. 54

<sup>66</sup> [2001] UKHL 44

<sup>67</sup> The cases of *Etridge*, *Harris*, *Wallace Gill and Moore* are summarized at *Royal Bank of Scotland v Etridge (NO.2) & Other Cases* (1998) 2 FLR 843. The other cases are reported at *Barclays Bank plc v Coleman & Anor* (2000) 3 WLR 405; *Bank of Scotland v Bennet* (1999) 1 FLR 1115; and *Kenyon-Brown v Desmond Banks & Co* (2000) PNLR 266.

influence or misrepresentation, or both, on the part of her husband; and in the circumstances, the charge bank ought not to be allowed to enforce the charge against her.<sup>68</sup>

The question arose as to whether the bank should be treated as having had notice of the impropriety or alleged impropriety of the husband. The bank had some reason to believe that a solicitor has acted for the spouse in the transaction and thus the question also arose as to the extent to which the solicitor's participation, had absolved the bank of the need to make any further inquiries about the circumstances in which the spouse was persuaded to agree to grant the charge or to take further steps to satisfy itself that the spouse's consent to do so was true and informed.<sup>69</sup>

The eighth appeal<sup>70</sup> was a case in which the wife was suing a solicitor for damages who advised her before she entered into a guarantee obligation in similar circumstances to the other appeals. Their Lordships sought to indicate minimum requirements for the procedures followed when obtaining the security, with the aim that these requirements should be clear, simple and practically operable. These procedures are discussed below:

### **2.5 Bankers duty of inquiry**

In *Royal Bank of Scotland v Etridge (No 2)*,<sup>71</sup> the Court of Appeal held that it was necessary to prove in each case, before the bank was put on inquiry, that the transaction was on its face not to the financial advantage of the spouse and that there was a substantial risk that, in procuring the spouse to act as surety, the borrower has committed a legal or equitable wrong that entitle the spouse to set aside the transaction. The House of Lords in *Etridge* stated that the Court of Appeal had erred and held instead that a bank is simply put on inquiry whenever a wife offers to act as surety for her husband's debts. The position is likewise if the husband acts as surety for his wife's debts or in case of unmarried couples - whether heterosexual or homosexual - where the bank is aware of the relationship. The bank is also put on

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<sup>68</sup> Available from [www.lawgazette.com/sg/2002-2/Feb02-focus.htm](http://www.lawgazette.com/sg/2002-2/Feb02-focus.htm) visited on 7th Nov. 2011

<sup>69</sup> *Ibid*, p 4

<sup>70</sup> *Kenyon-Brown*

<sup>71</sup> [1998] 4 All ER 705

inquiry where the wife acts as surety for the debts of the company whose shares are held by her husband and her, even when the wife is a director or secretary of the company.<sup>72</sup>

In fact, the House of Lords went much further to lay down the principle, after a review of *Barclays bank plc v O'Brien*<sup>73</sup> and *Credit Lyonnais Bank Nederland NV v Burch*<sup>74</sup>, that a bank will be put in inquiry in every case where the relationship between the surety and the debtor is non-commercial. In its opinion, there could not be a rational cut-off point with certain types of relationships being susceptible to an increased risk of undue influence and others not. This principle, the House of Lords held, were simple, coherent and eminently desirable and did not go beyond the reasonable requirements of present times. It would prove a modest burden for banks and other lenders which is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual.<sup>75</sup>

## 2.6 How can a bank discharge its duty of inquiry

The bank's responsibilities as previously set out in *Barclays Bank v O'Brien*<sup>76</sup> have been significantly widened. The House of Lords held that once a bank is put on inquiry, it has an obligation to take reasonable steps to satisfy itself that the practical implications of the proposed transaction have been brought home to the spouse.

While it is open to give advice to the spouse directly, ordinarily, it would be reasonable for a bank to rely upon confirmation from a solicitor, acting for the spouse, that he has advised the spouse appropriately. However, the position is different if the bank knew that the solicitor has not advised the spouse or if the bank knew facts from which it ought to have realised that the spouse had not received the appropriate advice. In such situations the bank would proceed at its own risk.<sup>77</sup>

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<sup>72</sup> Etridge, *Loc cit*, p 23

<sup>73</sup> [1993] 4 All ER 417

<sup>74</sup> [1997] 1 All ER 144

<sup>75</sup> *Ibid*, p 40

<sup>76</sup> [1997] 1 AC 180

<sup>77</sup> Etridge, *op cit* p 30

Most importantly, the House of Lords held that in future where the bank is put on inquiry and for its protection, the bank should take reasonable steps to ensure that the spouse has been independently advised by a solicitor:

At the start of the proposed transaction, the bank should communicate directly with the spouse, requesting that he/she nominate a solicitor to act independently for him/her. The bank should inform the spouse that for its own protection it would require written confirmation from the solicitor that he fully explained to him/her the nature of the documents and its practical implications. The spouse should be told that the purpose of that requirement is to preclude the spouse from disputing that he/she was legally bound by the documents once he/she has signed them. The spouse should be informed that the solicitor might be the same solicitor as the one acting for the other spouse in the transaction, unless he/she states otherwise. The bank should not proceed until it has received an appropriate response directly from the spouse.<sup>78</sup>

The bank should provide the solicitor with the financial information he needs to properly advise the spouse. What information will be required will depend on the facts of the case. Ordinarily, that would include information on the purpose of the proposed new facility. If the bank's request for security arose as a result of written application by the borrower for a facility, a copy of the application should be sent to the solicitor. The bank, in this case, will need to obtain the consent of the borrower to that circulation of confidential information and if not forthcoming, the transaction will not be able to proceed.<sup>79</sup>

Where the bank believes that the spouse has been misled by the borrower or is not entering into the transaction of his/her own free will, the bank has to inform the spouse's solicitor of the facts which gave rise to its belief or suspicion. The bank shall in every case obtain from the spouse's solicitor, a written confirmation to the effect mentioned above.

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<sup>78</sup> Etridge, *Loc cit*, p 31

<sup>79</sup> *Ibid*, p 32

Some observations may be made at this point. The procedures previously adopted by banks may not afford them adequate protection in the wake of *Etridge*. It is also simply not the solicitor's duty to obtain financial disclosure, the onus being on the bank to provide the spouse's solicitor with the relevant financial information and to notify him of any suspicions that the spouse might have been misled. It is, therefore, foreseeable that these areas will be contested in court if the bank gets this wrong. Under the circumstances it is important for the bank to establish adequate measures and procedures to ensure that all the correct information is sent to the spouse's solicitor and a record of what has been sent is maintained.

## 2.7 Duties of a solicitor who is advising a spouse

The House of Lords<sup>80</sup> held that as a general proposition, the scope of the solicitor's duties was dictated by the terms, whether express or implied, of his retainer. As a first step, the solicitor will need to explain to the spouse the purpose for which he is involved. He should explain that should it ever become necessary, the bank will rely on his involvement to counter any suggestion that the spouse was overborne by the borrower or that the spouse did not properly understand the implications of the transaction.<sup>81</sup>

The solicitor will then need to obtain confirmation from the spouse that he/she wishes for him to act in the matter and advise him/her on the legal and practical implications of the proposed transaction. The typical advice a solicitor will be expected to give should, as a core minimum, cover the following matters:<sup>82</sup>

The solicitor will need to explain the nature of the documents and its practical consequences if the spouse signs them, that is, the spouse could lose the matrimonial home if the borrower's business fails.<sup>83</sup>

The solicitor will need to point out the seriousness of the risks involved. The spouse should be told the purpose of the proposed new facility, its amount and principal

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<sup>80</sup> *Royal Bank of Scotland v Etridge*, *Loc cit*

<sup>81</sup> Available from [www.webjcli.nc.ac.uk/articles3/clements3.html](http://www.webjcli.nc.ac.uk/articles3/clements3.html) visited on 8th September 2011

<sup>82</sup> *Ibid*, p 7

<sup>83</sup> *Etridge, supra*, p 35

terms and that the bank may increase the amount of the facility, change its terms or grant new facility, without reference to him/her. The spouse should also be told the amount of his/her liability. The solicitor should discuss the spouse's financial means, including his/her understanding of the value of the property being charged. The solicitor should also discuss whether the spouse or the borrower had any other assets out of which repayment could be made if the borrower's business should fail.<sup>84</sup>

The solicitor will need to clearly state that the spouse had a choice and that the decision he/she made was the spouse's alone in the light of the proposed facility and the current indebtedness of borrower. The spouse need not agree to the transaction.<sup>85</sup>

The solicitor should check whether the spouse wishes to proceed. The spouse should be asked whether he/she consented to the solicitor's written confirmation to the bank that he had explained to the spouse the nature of the documents and the practical implications it might have for him/her, or whether, for instance, the spouse would prefer him to negotiate with the bank on the terms of the transaction. Matters of negotiation could include the sequence in which the various securities would be called upon or a specific or lower limit to the spouse's liabilities. The solicitor should not give any information to the bank without the spouse's authority.<sup>86</sup>

The solicitor's discussion with the spouse should take place at a face-to-face meeting, in the absence of the borrower, and should be couched in suitably non-technical language. The solicitor should obtain from the bank any information he needs. If the bank fails, for any reason, to provide information requested, the solicitor should decline to provide information requested by the banks.

Further observations on the obligation of solicitors may also be made. By implication, the 'core minimum' standards applicable to solicitors should also

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<sup>84</sup> Etridge, *loc cit*, p 36

<sup>85</sup> Clements (2010), *loc cit*, p 18

<sup>86</sup> *Ibid*, p 21

provide the standards to be observed by a bank that has decided to take on the role of advising the wife.<sup>87</sup>

Evidently, the scope of a solicitor's duties in advising a spouse in such transactions has also been dramatically reduced since the Court of Appeal decision in *Etridge* (supra). There the Court of Appeal held that the solicitors had to satisfy the court that the borrower has not brought undue influence to bear on the spouse's decision. This involved investigations into issues such as financial state of business and the state of the marriage. With the House of Lords' decision in *Etridge*, the solicitor's role is reduced to ensuring that the spouse understands the nature and effect of the transaction.<sup>88</sup>

## **2.8 Conflict of interests**

The House of Lords also dealt with this novel point and held that the solicitor advising the spouse does not need to act for the spouse alone, provided he is satisfied that it is in the spouse's best interest and it will not give rise to any conflicts of duty or interest. Further, when accepting instructions to advise the spouse, the solicitor assumes responsibilities directly to him/her, both at law and professionally.<sup>89</sup> These duties are owed to the spouse alone and, in advising the spouse, the solicitor is acting for the spouse alone. If at any stage the solicitor becomes concerned that there is a real risk that the other interests or duties might inhibit his advice to the spouse, he should cease acting for him/her.<sup>90</sup>

## **2.9 Conclusion**

In common law, the standard procedure is for a banker to take all reasonable steps to inquire into a spouse's consent whether it is genuine and an informed one. The banker is supposed to make sure that a spouse obtain independent legal advice on the terms and conditions of the intended mortgage of a matrimonial home from an independent solicitor and eventually signs a declaration to this effect. A banker is supposed to co-operate with an independent solicitor in providing all relevant

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<sup>87</sup> Clements (2010), *loc cit*, p 22

<sup>88</sup> *Ibid* p 23

<sup>89</sup> *Royal Bank of Scotland v Etridge*, *loc cit*

<sup>90</sup> Mugalula (2009), *loc cit*, p 8

information concerning the applied mortgage for the solicitor to advise the spouse. In the next chapter, chapter three, the study will analyse the conceptual, institutional and legal framework on the inquiry of a spouse's free, genuine and informed consent to mortgage a matrimonial home in Tanzania.

## **CHAPTER THREE**

### **CONCEPTUAL AND LEGAL FRAMEWORK OF MORTGAGE OF A MATRIMONIAL HOME IN TANZANIA**

#### **3.1 Introduction**

At the core of this chapter lies an important assumption: the matrimonial home is a place of special significance. This premise can be understood at both philosophical and practical levels. Among the theories that justify a system of private property, there are two that help explain the centrality of the matrimonial home. One justification of private property is that it promotes freedom, autonomy and privacy. Closely connected with these ideas is the notion that private property encourages the development of the human personality. Private property allows for a manifestation and projection of individuality into the material world. Along with this, a degree of attachment to the objects of property often develops. These ideas help to explain why matrimonial home is so important to many people. It is perhaps with regard to the matrimonial home that the values of autonomy and personhood are most evident. Typically, the matrimonial home is the hub of one's life. For many couples, it represents the asset of greatest value and importance. This, in turn, raises expectations about entitlement.

This chapter will examine the institutional framework of mortgages in Tanzania, the law of mortgage of matrimonial homes in Tanzania, its development and its judicial interpretation in balancing the interests of spouses on one hand and the mortgagees on the other. It recognizes that mortgage of matrimonial homes can lead to loss of one's place of residence. The importance of the home and the principles affecting spouses consent in mortgaging a matrimonial home are blended together in the law that is examined below.

#### **3.2 The concept of a mortgage**

Mortgage is a conveyance of title to property that is given as security for payment of a debt or the performance of a duty, and that will become void upon payment of a debt or the performance of a duty and that will become void upon payment of a debt

or performance according to the stipulated terms.<sup>91</sup> In *Stanley v. Wilde*<sup>92</sup> Lord Justice Lindley defined the concept as 'a transaction under which land or chattels are given as security for the payment of a debt or the discharge of some other obligations'.<sup>93</sup>

The word mortgage is a Law French<sup>94</sup> term meaning "death contract," meaning that the pledge ends (dies) when either the obligation is fulfilled or the property is taken through foreclosure.<sup>95</sup> According to Anglo-American property law, a mortgage occurs when an owner (usually of a fee simple interest in realty) pledges his or her interest (right to the property) as security or collateral for a loan. Therefore, a mortgage is an encumbrance (limitation) on the right to the property just as an easement would be, but because most mortgages occur as a condition for new loan money, the word mortgage has become the generic term for a loan secured by such real property.<sup>96</sup> All types of real property can be, and usually are, secured with a mortgage and bear an interest rate that is supposed to reflect the lender's risk.<sup>97</sup>

The Land Act defines a mortgage as an interest in a right of occupancy or a lease securing the payment of money or money's worth or the fulfilment of a condition and includes a sub-mortgage and the instrument creating a mortgage.<sup>98</sup> It is a legal agreement that conveys the conditional right of ownership on an asset or property by its owner (the mortgagor) to a lender (the mortgagee) as security for a loan.<sup>99</sup> Mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money.<sup>100</sup> A mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the

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<sup>91</sup> Black's Law Dictionary (7<sup>th</sup> Ed) p. 1027

<sup>92</sup> [1899] 2 Ch. 474

<sup>93</sup> *Ibid* p. 14

<sup>94</sup> The great jurist Sir Edward Coke, who lived from 1552 to 1634, has explained why the term mortgage comes from the Old French words mort, "dead," and gage, "pledge." It seemed to him that it had to do with the doubtfulness of whether or not the mortgagor will pay the debt. If the mortgagor does not, then the land pledged to the mortgagee as security for the debt "is taken from him for ever, and so dead to him upon condition, and if he doth pay the money, then the pledge is dead as to the [mortgagee]."

<sup>95</sup> [www.wikipedia.org/wiki/mortgage\\_loan](http://www.wikipedia.org/wiki/mortgage_loan) visited on 13th January 2012

<sup>96</sup> *Ibid* p. 7

<sup>97</sup> *Ibid* p. 6

<sup>98</sup> *Ibid* p. 10

<sup>99</sup> <http://www.businessdictionary.com/definition/mortgage.html> visited on 13th January 2012

<sup>100</sup> *Ibid* p5

owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower.<sup>101</sup>

A mortgagee means a person in whose favour a mortgage is created or subsists.<sup>102</sup> A mortgagee is an investor who lends money secured by a mortgage on real estate.<sup>103</sup> And, a mortgagor means a person who has mortgaged a right of occupancy or a lease and includes a transferee of a right of occupancy or lease subject to a mortgage and a person to whom such right of occupancy or lease so subject has passed by transmission.<sup>104</sup>

A mortgagor is the borrower in a mortgage agreement; he owes the obligation secured by the mortgage.<sup>105</sup> A mortgagor is a person who has borrowed money and pledged his/her real property as security.<sup>106</sup> Simply stated, a mortgagor is the one who makes a mortgage, he is the one that mortgages the property.<sup>107</sup>

### 3.3 The concept of a matrimonial home

*The Land (Amendment) Act*<sup>108</sup> and the *Law of Marriage Act*<sup>109</sup> offers a similar definition to a matrimonial home. It is the building or part thereof in which the husband and wife ordinarily reside together. This would apply to cases where a building and its cartilage are occupied for residential purposes; and where a building is on or occupied in conjunction with agricultural land or pastoral land allocated by the husband or the wife, for her or his exclusive use. Mortgages of matrimonial

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<sup>101</sup> Business dictionary, *loc cit*, p 56

<sup>102</sup> The Land (Amendment) Act, Act No. 2 of 2004, c.s 112 (2) (b)

<sup>103</sup> [www.thefreedictionary.com/mortgages](http://www.thefreedictionary.com/mortgages) visited on 13th January 2012

<sup>104</sup> *Ibid*

<sup>105</sup> Moris et al (2002), p 28

<sup>106</sup> [www.thefreedictionary.com/mortgagor](http://www.thefreedictionary.com/mortgagor) visited on 5th November 2012

<sup>107</sup> [www.investorwords.com/3146/mortgagor/html](http://www.investorwords.com/3146/mortgagor/html) visited on 5th November 2012

<sup>108</sup> Act No. 2 of 2004

<sup>109</sup> The Law of Marriage Act, *loc cit*

homes now require the lenders or mortgagees to take reasonable steps to ascertain whether the applicant for a mortgage has a spouse or spouses.<sup>110</sup>

Regardless as to whose name it is in, both spouses have equal rights to the possession of the matrimonial home.<sup>111</sup> That right continues until the parties are no longer spouses or until there is a court order or agreement providing otherwise. No one can "throw out" the other spouse just because the "thrower" owns the house.<sup>112</sup> That is, one spouse may legally own the home, but, nevertheless, both spouses will be equally entitled to live in it. This entitlement to equal possession can be varied only by court order or agreement.<sup>113</sup>

At this juncture, it is important to distinguish between matrimonial home and matrimonial property. Matrimonial property is all assets acquired by either or both spouses before or during their marriage. This includes the home and all other real and personal property.<sup>114</sup> This work is concerned with matrimonial homes, which in real sense may not be matrimonial properties. Thus, a matrimonial home in this work will be construed according to the definition of a matrimonial home above.

### **3.4 Institutional framework of mortgages of matrimonial homes**

There are various institutions in Tanzania which regulate mortgage of matrimonial homes. Generally, three institutions come into play: the central government, ministries, departments and agencies; local government authorities, and; banks and financial institutions.

The Ministry of Finance and Economic Affairs manages the overall revenue, expenditure and financing of the Government of the United Republic of Tanzania and provides the Government with advice on the broad financial affairs of Tanzania in support of the Government's economic and social objectives.<sup>115</sup> The ministry has

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<sup>110</sup> <http://www.afrika.no/Detailed/6406.html> visited on 14th January 2012

<sup>111</sup> The Law of Marriage Act, *op cit*, c.s. 59

<sup>112</sup> <http://www.familylawcentre.com/equalpay.html> visited on 20th January 2012

<sup>113</sup> <http://maxinemkerr.ca/matrimonial.html> visited on 14th January 2012

<sup>114</sup> [http://www.ehow.com/facts\\_6854001\\_definition-matrimonial-property.html#ixzz1klrLs06L](http://www.ehow.com/facts_6854001_definition-matrimonial-property.html#ixzz1klrLs06L) visited on 23<sup>rd</sup> January 2012

<sup>115</sup> [www.mof.go.tz](http://www.mof.go.tz) visited on 31<sup>st</sup> October 2012

a role of developing regulatory policy for the country's financial sector in cooperation with the Bank of Tanzania.

The Bank of Tanzania (BOT) is the central Bank of the United Republic of Tanzania. The bank is a body corporate established under section 4 of the Bank of Tanzania Act.<sup>116</sup> The principal functions of the Bank includes: to exercise the functions of a central bank and to formulate, implement and be responsible for monetary policy, including exchange rate policy, to issue currency, to regulate and supervise banks and financial institutions including mortgage financing, development financing, lease financing, licensing and revocation of licences and to deal, hold and manage gold and foreign exchange reserves of Tanzania.<sup>117</sup> With this mandate, the Bank has a duty to control money/currency circulation in the market. In doing so, the Bank adopts different financial policies which either encourages or discourages lending by other banks and financial institutions. For example, the Bank may decide to raise interest rates on borrowed amounts so as to discourage the number of borrowers who are about to take more money into the circulation.

On the other hand, the Ministry of Lands, Housing and Human Settlements Development has been mandated to administer land and human settlement in Tanzania. It therefore provides various land related services to individuals and institutions in the country.<sup>118</sup> It is responsible for policy, regulation and coordination of matters pertaining to lands in Tanzania. The Ministry administers the Land Acts, which to a large extent, are the ones which regulates inquiring into a spouse's consent to mortgage a matrimonial home in Tanzania.

The judiciary, which includes the Court of Appeal of Tanzania, the High Court and courts subordinate thereto, is responsible for adjudicating disputes relating to the interpretation and application of laws in the country.

On the bottom line there are banks and financial institutions. Banks and financial institutions are established and regulated by the Banking and Financial Institutions

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<sup>116</sup> The Bank of Tanzania Act, Act No. 4 of 2006 c. s. 4

<sup>117</sup> The Bank of Tanzania Act, Act No. 4 of 2006 c. s. 5

<sup>118</sup> [www.ardhi.go.tz](http://www.ardhi.go.tz) visited on 31<sup>st</sup> October 2012

Act<sup>119</sup> together with the Bank of Tanzania Act.<sup>120</sup> These are the ones which directly deal with the borrowers and their spouses.

### **3.5 Legal framework of mortgage of matrimonial homes in Tanzania**

There is no straight forward definition of “mortgage of a matrimonial home”. However, from the above discussion mortgage of a matrimonial home can simply be taken to mean an agreement between a borrower (mortgagor, in this case a spouse) and lender (mortgagor, in this case a bank) to secure a certain sum of money or money’s worth by giving an interest on the building or part thereof in which the husband and wife ordinarily reside together on a promise to pay the secured money and interest in a specified period of time, and in case of default the latter (lender) to resort to the property offered as security.

#### **3.5.1 The Constitution of United Republic of Tanzania**

*Constitution of United Republic of Tanzania, 1997*<sup>121</sup>, is the source of all laws within the country. The Bill of Rights under *Article 13* of the constitution prohibits any discrimination on the basis of sex while *article 29* guarantees equal protection under the laws of United Republic of Tanzania. *Article 16* of the constitution entitles every person to respect and protection for his person, the privacy of his own person, his family and his matrimonial life. It follows therefore that, a spouse’s rights to a matrimonial home are protected under the constitution regardless of the spouse’s sex or status.

#### **3.5.2 The Law of Marriage Act**

The Law of Marriage Act<sup>122</sup> requires that where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise

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<sup>119</sup> Banking and Financial Institutions Act, No. 5 of 2006

<sup>120</sup> The Bank of Tanzania Act, *Op cit*, c.s 5

<sup>121</sup> As amended from time to time

<sup>122</sup> The Law of Marriage Act, *loc cit*

under any law for the time being in force relating to the registration of title to land or of deeds.<sup>123</sup>

The Act further asserts that where any person alienates his or her estate or interest in the matrimonial home without the consent of the other, the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until the marriage is dissolved; or the court on a decree for separation or an order for maintenance otherwise orders, unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.<sup>124</sup>

The analysis of case law in Tanzania today shows very clearly that there is a huge flow of cases by spouses trying to avoid mortgage transactions based on matrimonial home on ground of failure by banks to seek their consent. The Courts have been in alert not to act on sympathy; they have maintained a balance of interests always for both parties and for public interests. In *Aida Kyenkungu v. John Kyenkungu and Two Others*<sup>125</sup>, the applicant did not protect her interests by caveat and did not reside in the mortgaged property. In dismissing the suit, Justice Muro held that no courts should be used as avenues of convenience whose duty is to render support to family schemes carefully tailored to frustrate the noble duties of banks. Considering the fact that the business climate has now changed with privatization and liberalization unlike in the past where the majority of borrowers took loans as a fashion, mortgaging their properties right and left without considering the consequences, hence, misusing credit facilities received; courts are being suffocated by actions instituted by financial institutions who are naturally eager and struggling to realize their money back if they are to survive and be able to issue further developmental credit facilities.<sup>126</sup>

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<sup>123</sup> The Law of Marriage Act, *loc cit*, c. s. 59 (1)

<sup>124</sup> *Ibid*, c. s. 59 (2)

<sup>125</sup> High Court Civil Case No. 57 of 2001, Dar es salaam Registry, Muro,J (Unreported)

<sup>126</sup> Justice Kalegeya in *Mrs Grentina Kabisa Mwakyami v. CiRDB Bank & 4 Others*, High Court Commercial Case No. 51 of 2000 (Unreported)

In *Hadija Mnene v Ally Mabere Mbaga and National Bank of Commerce*<sup>127</sup> the appellant instituted a suit in the Resident Magistrates' court of Musoma alleging that the husband (first respondent) mortgaged their matrimonial home to the National Bank of Commerce (second respondent) without her consent contrary to the provisions of *section 59 (1) of Law of Marriage Act, 1971*. The first respondent defaulted in paying off the loan and the bank was meanwhile endeavouring to sell the house.

The issues before the court were whether the appellant/plaintiff consented to the mortgage and whether the bank could proceed with the sale. The court observed that since the appellant's interests was not secured by a registered caveat, the bank was not precluded from entering into a mortgage agreement with the first respondent or from selling the mortgaged property as it was authorised to do so by the terms of the mortgage. The court went on to note that a caveat is an encumbrance to an estate and ought therefore to be registered in order to be operative. A bare interest in an estate would not operate to prevent its alienation where registered land is involved.

*...a prudent spouse would seek to protect that interest by actually causing a caveat to be registered... the owner of any estate holds the same free from all estates and interests... other than encumbrances registered...a bare interest in an estate would not operate to prevent its alienation...It is therefore incorrect to think that the mere existence of section 59(1) is sufficient to prevent an estate from being sold...or mortgaged...<sup>128</sup>*

The court went on to favour the mortgagees by qualifying the applicability of *section 59 (2)* of the Act in relation to a right of a spouse who has not consented to remain in occupation of the house. Lugakingira, J had these to say;

*...further, it is clear to me that section 59 does in fact contemplate the possibility of an estate being unlawfully alienated without the consent of another spouse. Hence sub-section (2) provides for this eventuality, namely, the right of the other spouse to continue reside in the matrimonial home until*

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<sup>127</sup> High Court Civil Appeal No. 40 of 1995 at Mwanza (Unreported).

<sup>128</sup> Lugakingira, J in *Hadija Mnene loc cit* p. 3

*the marriage is dissolved or the court on a decree for separation or an order of maintenance otherwise orders. These factors would fail if the person acquiring the property can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.*<sup>129</sup>

Thus, the appeal was dismissed with costs in favour of the NBC bank simply because the matrimonial interests of a spouse were not registered by way of caveat. And since the interests were not registered, and the bank was not aware of the existence of a spouse, the right of a spouse who has not consented to reside in the said matrimonial home until the marriage is dissolved was also denied.

Again, in *Idda Mwakalindile v NBC Holding Corporation and San Saijen Mwakalindile*<sup>130</sup> the plaintiff filed a suit for a declaration that the mortgage deed entered into between the first and second defendants is illegal for contravening *section 59 (1)* of the *Law of Marriage Act, 1971*. This was an appeal from the High Court decision in which the learned Judge held that the provisions of *section 59 (1)* of the *Law of Marriage Act* did not apply. The Judge also held that the second respondent had a right to mortgage the house without the consent of the plaintiff and that the first respondent also had the right to sell the mortgaged house.

The Court of Appeal observed that under the provisions of *section 59 (1)* of the *Law of Marriage Act, 1971* it is beyond dispute that a matrimonial house owned by the wife or husband ought not be alienated by way of sale, mortgage, lease or gift without the consent of the other spouse. The court noted that;

*...in this case, the mortgagee, the bank was not aware that the house was a matrimonial property. It was registered in the name of the respondent and not in the names of both the appellant and the second respondent. For that reason, the bank, the first respondent, had no reason not to believe that the house belonged to the first respondent. We agree that the appellant had a registrable interest in the house, which, as provided under this section, could*

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<sup>129</sup> Hadija Mnene, *loc cit*, p. 4

<sup>130</sup> Court of Appeal of Tanzania Civil Appeal No. 59 of 2000 at Mbeya (Unreported).

*be protected by caveat. The appellant did not register a caveat with the registrar of titles. The caveat would serve as a warning to the second respondent that the house was a matrimonial property.<sup>131</sup>*

*...in the circumstances, there being no caveat to protect the registrable interest of the appellant, there was no way in which the first respondent could know that the house was a matrimonial property. The second respondent said nothing more than confirming that he did not inform the appellant about the mortgage. He added further that he did not know under the law, he had to involve the appellant for her consent in obtaining the loan, the second respondent voluntarily mortgaged the house which was registered in his name. The house as mortgaged provided the security for the repayment of the loan. Therefore, the transaction took place in such circumstances that we agree with the learned judge that that the mortgaging and alienation of the house was not null and void in contravention of section 59 (1) of the Law of Marriage Act, 1971.<sup>132</sup>*

An important development in this decision as distinguished from *Hadija Mnene's* case was that the Court of Appeal recognised the occupational rights of a spouse who has not consented to a mortgage of a matrimonial home. The court noted that;

*...however, it is to be observed that sub section (2) of section 59 of the Act takes care of the interests of the spouse whose interests have been affected under sub section (1). Under sub section (2) it is provided to the effect that where an estate or interest in a matrimonial home is alienated or mortgaged contrary to sub section (1), the estate or interest so created shall be subject to the right of the other spouse to continue to reside in that matrimonial home until the marriage is dissolved. In the instant case, as the marriage is still subsisting, the repercussion is that the interest of the appellant is*

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<sup>131</sup> *Idda Mwakalindile v NBC Holding Corporation and San Saijen Mwakalindile (Supra)* p. 5

<sup>132</sup> *Idda Mwakalindile, Loc cit*, p. 6

*protected under this subsection of the Act until dissolution of the marriage.*<sup>133</sup>

Therefore, after the decision in *Idda Mwakalindile* a matrimonial home which has been mortgaged without the consent of a spouse could be validly sold subject to occupational rights of a spouse in that home until the marriage is dissolved.

Trading on the above analysis, there is one important point to note before going any further. The decisions in *Hadija Mnene* and *Idda Mwakalindile* were made before the Land Act<sup>134</sup> came into force. The Courts' judgements were based only on *section 59* of the Law of Marriage Act. The Land Act introduced some new provisions which, together with *section 59* of the Law of Marriage Act, imposes a duty on the mortgagee to verify that a spouse or spouses of a mortgagor has consented to the mortgage of a matrimonial home.

### **3.5.3 The Land Act and its regulations**

The fundamental principles of the *National Land Policy, 1995*, have been incorporated under *section 3* of the Land Act. This is a feature peculiar to the Land Act as compared to other legislations in which policy objectives are usually set in preambles or schedules to the Act which in effect makes them unenforceable as per the rules of statutory interpretation. The drafters of the Land Act incorporated the objectives of the National Land Policy in the body of the statute to give a legal effect to the policy objectives. *Section 3 (2)* of the Act requires that the right of every woman to acquire, hold, use and deal with land, shall to the same extent and subject to the same restrictions be treated as a right of any man. It is on this foundation that the right of a spouse to consent in a disposition of a matrimonial home through mortgage transaction accrues within the Act.

#### **2.3.4.1 The Land Act**

*The Land Act*, provided for powers to create mortgages under its *section 112*. The power to create mortgages under the act also included the power to mortgage a

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<sup>133</sup> Hadija Mnene, *loc cit*, p. 3

<sup>134</sup> The Land Act, cap 113 R.E 2002

matrimonial home.<sup>135</sup> A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home could only be valid if 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 borrower and any spouse of the borrower living in that matrimonial home.<sup>136</sup> Again, such mortgage could be valid if any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the borrower living in that matrimonial home.<sup>137</sup>

The Land Act, also enacted *section 161* which deals with co-occupancy and other relationships between spouses. The Act requires that where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then, where that disposition is a mortgage, the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage in accordance with the provisions of *section 59* of the Law of Marriage Act.<sup>138</sup> Again, where that disposition is an assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with *section 59* of the Law of Marriage Act.<sup>139</sup> The provisions further requires that where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b), the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition. Recently, in *National Bank of Commerce Ltd v. B & E Investment Limited and Doreen Francis Kanemile*<sup>140</sup>, the High Court extended the duty of inquiry to banks to conducting physical verification of the owner of the property and the property itself before advancing a credit facility to borrower. The bank is expected to exalt due diligence in knowing with whom they are contracting. The bank is expected to explore all the

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<sup>135</sup> The Land Act, *loc cit*, c.s. 112 (3)

<sup>136</sup> *Ibid*, c.s 112(3) (a)

<sup>137</sup> *Ibid*,c.s 112 (3) (b)

<sup>138</sup> The Land Act, *loc cit*, c.s 161 (3) (a)

<sup>139</sup> *Ibid* c.s 161 (3) (b)

<sup>140</sup> High Court Commercial Case No. 14 of 2002, Kalegeya,J (Unreported)

circumstances of the security being offered for the facility and ascertain the condition of the property itself and its value.

The provisions of *section 112 (3)* of the Land Act did not remedy much the situation which existed with regard to mortgage of matrimonial homes before the Act came into force into 2001, the provisions of *section 112 (3)* of the Act failed to reconcile with *section 59* of the Law of Marriage Act.<sup>141</sup> This was due to various reasons which stems from the inadequacy of the Land Act, to address thoroughly the law on mortgage of matrimonial homes.

Some of the prominent inadequacies of the Land Act, include the following: The Act failed to provide a definition of a matrimonial home. Matrimonial home was not defined anywhere within the body of the statute, there was no even cross referencing in the statute to another law which provides the definition of a matrimonial home. Again, there were no regulations to provide a guide on how consent of a spouse residing a matrimonial home was to be obtained. The manner of obtaining spouse's consent and inquiring into the same was not specifically provided by the law. Duties of the borrower and the lender in relation to obtain a spouse genuine and informed consent and its inquiry were not certain. The Act failed to specify who had a duty to obtain a spouses consent to mortgage a matrimonial home i.e. a lender or the borrower. The Act also failed to provide for sanctions against a borrower who intently neglects to disclose on whether the property is a matrimonial home. On the other hand, the Act failed to provide on how a duty to obtain spouse's genuine and informed consent is to be discharged. Lastly, the Act failed to provide a consenting position of a spouse(s) in a polygamous marriage.

Courts of law had to invoke its powers in filling the lacunas left by the Act, as a result, this lead to conflicting decisions and uncertainties as to what is the exact position of the law. In *Khadija Hemed Salum v. CRDB Bank Limited, Mazrui Commission Agent & 3 Others*<sup>142</sup>, the Court was invited to make an investigation to the objection on the propriety of the intended attachment of the matrimonial home of

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<sup>141</sup> *Loc cit*

<sup>142</sup> High Court Commercial Case No. 97, 2002, Kimaro,J (Unreported)

the applicant and issue an order for the permanent injunction restraining attachment and sale. The main reasons given in the supporting affidavit is that the house is a Matrimonial house which was mortgaged to the respondent without the consent of the applicant who is the lawful wife of the third respondent. The husband of the applicant who is the third respondent did not file any counter affidavit and he is the one who has been appearing in the proceedings with the Advocate for the Applicant. Ever since the application was filed, the applicant has never entered appearance. In reaching his ruling, Kimaro, J, had these to say;

*The observation which I have is that the application has been designed for purposes of denying the Creditor its rights in having the judgment be executed. I commented before that since the filing of this application, Khadija Hemed Salum, the applicant, has not been seen in this court. It is only the third respondent who has been attending the court together with the Advocate for the applicant. The third respondent has not even filed any affidavit. This kind of attitude leaves rooms for suspecting either collusion between the applicant and the third respondent, or a manipulation by the third respondent geared towards evasion in complying with the decree of this court. He is trying to hide behind matrimonial property to avoid satisfying the decree.<sup>143</sup>*

In *Kezia Violet Mato v. National Bank of Commerce and Others*<sup>144</sup> the mortgaged property was a matrimonial home of a polygamous marriage (two spouses). The bank obtained consent of only one of the spouses. The other spouse filed objection proceedings objecting the property to be sold by the decree holder basing on the grounds that the attached property their matrimonial home and that she contributed almost 50% in its acquisition, that she did not give my consent to my share of ownership of the property to be mortgaged to the decree holder and that the mortgage of the property was done fraudulently in the essence that she was not involved, not asked for her consent. The Court ruled out that the co-wife having consented to the mortgaging of the property, the decree holder had no obligation to

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<sup>143</sup> Khadija Hemed Salum v. CRDB Bank Limited, Mazrui Commission Agent & 3 Others (Suppra) p 5

<sup>144</sup> High Court Commercial Case no. 176 Of 2002, Bwana, J

“search” or “know” how many wives the mortgagor had and whether they all consented thereto. It was further held that in such a polygamous marriage, the objector should have taken the necessary precaution and registered a caveat to the property so as to protect her interests thereto. That, registration should have been effected prior to the mortgaging of the property, not at the stage and time the objector claims to have taken such steps.

#### **2.3.4.2 The Land (Amendment) Act, 2004, and Land (Mortgage) Regulations, 2005.**

Following the above inadequacies, amendments of the law on spouse’s consent to mortgage a matrimonial home was inevitable. In 2004, the *Land (Amendment) Act* was enacted; it repealed and substituted part X of the Land Act, which dealt with mortgages. The amendments introduced a new provision, *section 114* of the Land (Amendment) Act, which is a separate section in the Act dealing exclusively with mortgage of matrimonial homes. The new provision provides that a mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if 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 spouses or spouses of the mortgagor living in that matrimonial home;<sup>145</sup> or any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.<sup>146</sup>

The *Land (Mortgage) Regulations, 2005*<sup>147</sup>, were enacted to support the implementation of the provisions of the Land (Amendment) Act, 2004. *Regulation 4* provided for reasonable steps by a mortgagee to ascertain matrimonial status of an applicant for a mortgage. A mortgagee shall require an applicant to sign a form stating that he or she is either married or not; if the applicant states that he or she is married, requiring that applicant to state the names and address of his or her spouse or in the case of a male applicant, the names and addresses of his spouses if he has

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<sup>145</sup> The Land (Amendment) Act, *loc cit*, c.s 114 (1) (a)

<sup>146</sup> *Ibid*, c.s 114 (1) (b)

<sup>147</sup> Government Notice No. 43 published on 12/5/2006

more than one; and if the applicant states that he or she is not married and the mortgagee has reason to believe that, the statement might be incorrect, the mortgagee may require that applicant to produce an affidavit to the effect that the applicant is not married. A mortgagee is at liberty to take such other steps in addition to the steps set out in regulation 4, as he considers necessary and desirable to satisfy himself as to the matrimonial status of an applicant and these steps shall be made known to the applicant when he or she applies for a mortgage.

On the other hand, *regulation 5* requires that where a matrimonial home is the subject of a mortgage, a mortgagee may satisfy himself that the assent of a spouse referred to in *section 114* of the Act is an informed and genuine consent and this duty shall be deemed to have been complied with if the mortgagee has, in writing, advised the applicant for a mortgage that he or she should ensure that his or her spouse, or in the case of a male applicant with more than one spouse, his spouses, receive independent advice on the terms and conditions of the mortgage which is being applied for; and the spouse or spouses, as the case may be, provide a signed and witnessed document to the effect that they have received independent advice on the mortgage which is being applied for and have understood and assented to the terms and conditions of the mortgage or that they have, notwithstanding the advice from the firm, waived their opportunity to take independent advice. Again, a mortgagee may take such other steps in addition to the steps set out in regulation 5, as he considers necessary and desirable to satisfy himself that the assent of the spouse or spouses is informed and genuine.

The notable improvements in the law of mortgage of matrimonial homes after the Land (Amendment) Act, 2004, and its regulations of 2005 include the following: The amendments offered a definition of a matrimonial home, which is *pari materia* to the definition of a matrimonial home under the Law of Marriage Act.<sup>148</sup> The amendments also impose a duty to the mortgagee to take reasonable steps to ascertain whether the applicant for a mortgage has a spouse or spouses.<sup>149</sup>

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<sup>148</sup> The Land (Amendment) Act, *loc cit*, c.s 112 (2)

<sup>149</sup> *Ibid*, c.s 114 (2)

*Regulation 4, 5 and 6* of the Land (Mortgage) Regulations, 2005, provides for how such a duty is to be carried out.

The decision in *Samwel Olung'a Igogo and Two Others v Action Trust Fund and Others*<sup>150</sup> summarises the position of the law on mortgage of matrimonial homes after the Land (Amendment) Act, 2004. The brief facts of this case were to the effect that the wives of the mortgagors instituted objection proceedings against sale of land by the mortgagee on the grounds that the attached properties were matrimonial homes and that they had not given their consent, as the spouses, to the mortgage:.

In reaching his decision, Kalegeya, J considered the provisions of *section 59* of the Law of Marriage Act together with *section 114, 161 (3) and 118* of the Land Act to hold that a lender is now required not only to conduct a search in the Land Registry but also has a duty to make inquiries whether the borrower's spouse has consented to the mortgage. The mortgage of any matrimonial home will only be valid if any document or form used in applying for such mortgage is signed or there is evidence from the document that it has been assented to, by the spouse of the borrower living in the matrimonial home. A mortgage of a matrimonial home entered into without a spouse's consent is not valid.

In challenging the decision in *Mwakalindile's case*, the court noted that under *section 161 (3) (a)* of the Land Act, the lenders are now aptly netted. The buoyancy they enjoyed under *section 59 (2)* of the Law of Marriage Act is taken away. They are duty bound to inquire of the existence of the spouses consent or otherwise. Under *section 59 (2)* of the Law of Marriage Act, lenders could simply urge that there was no way they could have been aware of the existence of the spouse's interest as they did not see any encumbrance in the Land Registry upon due search. Now however, search in the Land Register alone is not enough. The lender has to go further and inquire about the existence of spouse and inquire whether due consent has been secured.

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<sup>150</sup> [2005] TLR 343

However, apart from this development, still the Land (Amendment) Act, 2004, failed to address some of the matters which were still of great importance on the law relating to spouses consent to mortgage a matrimonial home. The Act imposed a higher duty on the mortgagee to ascertain the genuineness of a spouse's consent and left a borrower free with no duty to disclose that he has a spouse or not. The whole burden of ascertaining whether a property which forms a subject of a mortgage is a matrimonial home and the genuineness of the spouse's consent was left to the mortgagee alone.

The Land (Amendment) Act still mentioned about a form to be used in an application of a mortgage of a matrimonial home but in reality there were no such form under the Land (Forms) Regulations 2001 or the Land (Mortgage) Regulations, 2005. 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. It was not clear as to which document the law envisages here and at what stage of the life of the mortgage transaction the spouse's consent should be sought.<sup>151</sup>

The Act also failed to establish an offence against an applicant who knowingly gives false information to the mortgagee in relation to the existence of a spouse(s). In the same line, the Act failed to address the position of a spouse who colludes with an applicant of a mortgage to misdirect the mortgagee on the true matrimonial status of the applicant so as to come up with objection proceedings at the end of the day.

#### **2.3.4.3 The Mortgage Financing (Special Provisions) Act, 2008, and the Land (Mortgage Financing) Regulations, 2009.**

Despite the amendments of the mortgage provisions in the Land Act in 2004, still it was uncertain as to what are the duties of a mortgagee and a mortgagor in mortgage of matrimonial homes. The law did not posit clearly the duty of the mortgagor to disclose whether he has a spouse or not. In this regard, there was no penalty provided for a mortgagor who knowingly gives false information to the mortgagee in relation to the existence of a spouse or any third party who is interested.

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<sup>151</sup> Binamungu and Ngwilimi (2006)., *loc cit*, p 112

The *Mortgage Financing (Special Provisions) Act, 2008* attempted to cure this lacuna. *Section 8* of the Act amends *section 114* of the principal Act by repealing subsection (2) and substituting it with new provisions. The new provision establishes a responsibility on a mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under responsibility to take reasonable steps to verify whether the applicant for a mortgage have or docs not have a spouse.<sup>152</sup>

A mortgagee shall be deemed to have discharged the duty of ascertaining the marital status of the applicant and any spouse identified by the applicant if, by an affidavit or written and witnessed document, the applicant declares that there was spouse or any other third party holding interest on the mortgaged land.<sup>153</sup>

The Act also establishes an offence against an applicant who by an affidavit or a written and witnessed document knowingly gives false information to the mortgagee in relation to existence of a spouse or any third party and upon conviction shall be liable to a fine not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.<sup>154</sup>

### 3.6 Conclusion

The law is very clear on the requirement of a banker to conduct an inquiry into spouse's consent when mortgaging a matrimonial home. *Section 59* of the Law of Marriage Act, *Section 114* of the Land Act, reading with *section 161 (3) (a)* of the Land Act establishes clearly that a lender has a duty to inquire and to satisfy himself that a spouse's consent is free, genuine and an informed one as it was observed by Kalegeya, J in *Samuel Olung'a Igogo and Two Others v Action Trust Fund and Others*. The Land (Mortgage Financing) Regulations, 2009, provides clearly on the reasonable steps that a banker should adopt to satisfy itself that the consent given was genuine and an informed one. The issue then is on the practice; do bankers really adhere to these legal requirements? The answer to this question will be provided in the subsequent chapters. In the next chapter, chapter four, the study will analyse the law and practice of banks in Tanzania on inquiry of a spouse's consent

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<sup>152</sup> The Mortgage Financing (Special Provisions) Act, *loc cit*, c.s 8 (2)

<sup>153</sup> The Mortgage Financing (Special Provisions) Act, *loc cit*, c.s 8 (3)

<sup>154</sup> *Ibid*, c.s 8 (3)

so as to satisfy themselves that it is genuine and informed while comparing it with what have been discussed herein above.

## CHAPTER FOUR

### PRESENTATION OF FINDINGS AND ANALYSIS

#### 4.1 Introduction

Under the *Land Act*,<sup>155</sup> it appears that a spouse/spouses of the applicant for a mortgage needs to sign a number of documents. Examples of such documents may include an application for a mortgage, grant of a mortgage, signed and witnessed document to the effect that they have received/waived independent advice on the mortgage among others. Mortgagees or banks are supposed to take reasonable steps to ascertain whether an intending mortgagor is married and whether or not the property to be mortgaged is a matrimonial home. Secondly, an intending mortgagor is supposed to make full disclosure to the intending mortgagee as to his or her marital status and whether or not the property to be mortgaged comprises the matrimonial home. It will be sufficient or the mortgagee shall be deemed to have discharged the duty if he obtains a marriage certificate issued in accordance with the laws of Tanzania and in absence of it, a statutory declaration from the spouse or spouses of the mortgagor as proof of marriage.

The current consent rules provided under the Land Act and the Law of Marriage Act was designed to serve several complementary functions. First, they provide a check on the ability of an owner to dispose of the matrimonial home in a way which will frustrate the purposes of spouse's protection, principally, the right to a homestead. Second, indirectly, they preserve occupancy rights under *section 59(2)* of the Law of Marriage Act. Third, the use of a standard consent form, together with the acknowledgement, seek to ensure that the consent is given by a spouse voluntarily with knowledge of the effect of the transfer on the rights contained in the Law of Marriage Act and the Land Act.

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<sup>155</sup> Cap 113 R.E 2002

This chapter will consider the consent requirements under the law, the practices by bankers and probable consequences in case a banker fails to inquire into a genuine and informed consent of a spouse in mortgaging a matrimonial home. The discussion will further consider various decisions, both in Tanzania and other Common Law countries, on what the court says about a banker's failure to inquire into a spouse's consent and the manner in which it was obtained.

#### **4.2 Obtaining a spouse's consent**

The law requires that for a mortgage of a matrimonial home to be valid, a spouse must consent to a disposition.<sup>156</sup> The borrower is the responsible person to make sure that the free, genuine and informed consent of a spouse is obtained. In this respect, the study tried to establish the percentage of borrowers who are ready and willing to seek for their spouses free, genuine and informed consent to mortgage their matrimonial homes.

Twenty borrowers were interviewed, ten husbands and ten wives. The main theme was whether they understand the implications of borrowing on the security of matrimonial homes in case they fail to pay back and whether they notified their spouses and asked for their consent to mortgage the homes before applying for the facility. 70% of the husbands were the sole owners of the matrimonial homes and they responded by saying that over their dead bodies they could not ask for their wives' consent to mortgage the houses they built out of their own sweat. 20% of the husbands said that they could only notify their wives but could not ask for their consent to mortgage the homes since a husband is the head and a master planner of all of the affairs of the family. 10% responded by saying that they could ask for the consent of their wives but they could proceed with the transaction even if their wives refused to consent.

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<sup>156</sup> The Land Act, *loc cit*, c.s 114

**Table 4.1 Obtaining spouse's consent by borrowers**

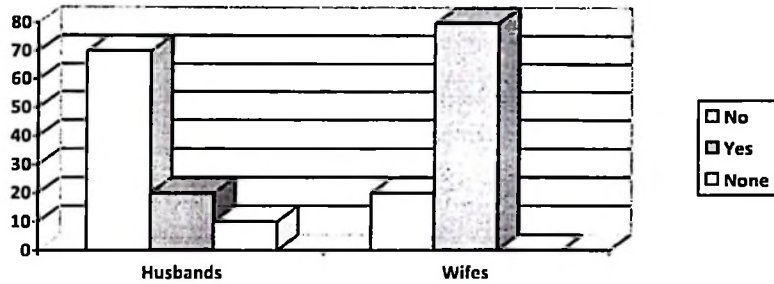


Table 4.1 above shows the summary of findings on the question whether the borrowers, husbands and wives respectively, do ask for a spouse's consent to mortgage a matrimonial home or not.

In summary, table 4.1 shows that most husbands in our societies are not ready to seek for the consent of their wives to mortgage a matrimonial home. The role of a banker, as an impartial third party, to inquire on whether the free, genuine and informed consent was given becomes more important here. Historically, traditional and religious beliefs in most of our societies put wives in a lower position compared to husbands. A wife has no voice in the affairs and decisions of the family, including acquisition, use and disposition of properties such as a matrimonial home.

On the other hand, 80% of the female borrowers who were the owners of the matrimonial homes responded by saying that they would involve their husbands, and in fact seek for their consents to mortgage the matrimonial homes. In case the husband refuses they would not proceed with the transaction for the fear of disrupting their marital life. 20% of the wives responded by saying that they would notify their husbands but would not seek for their consent to mortgage the homes.

In reality, there are only few wives who own matrimonial homes in Tanzania. Most of the matrimonial homes are either owned by husbands alone or jointly by a husband and a wife. And in such few cases where the wife is the sole owner of the matrimonial home, still the husband has a final say on how the home should be dealt with. Generally, the duty to obtain a free, genuine and informed consent is casted

upon husbands who are regarded as the ones with a final say in mortgage of matrimonial homes.

#### 4.3 Spouse's signatures

The law requires a spouse to sign in a number of documents to verify that she/he has been informed, understand and freely consent to mortgage a matrimonial home.<sup>157</sup>

These documents include an application form, a mortgage deed, consent form and an acknowledgment form. Thirty respondents were interviewed on whether their banks require a spouse to sign in one, some or all of the said documents. The sample included bank managers, loan officers and legal officers randomly selected from ten different banks which are issuing loans on the security of matrimonial homes.

When asked on whether their banks require a spouse to sign on an application form or not, ninety percent of the respondents said that their banks do not require a spouse to sign in an application form. Six percent responded by saying that their banks do require spouses to sign in an application form. A thorough review of the application forms of most of banks reveals that the forms have no space for a spouse to sign contrary to the requirements of *section 114(1) of the Land Act*.

**Table 4.2 Spouse's signature on an application form**

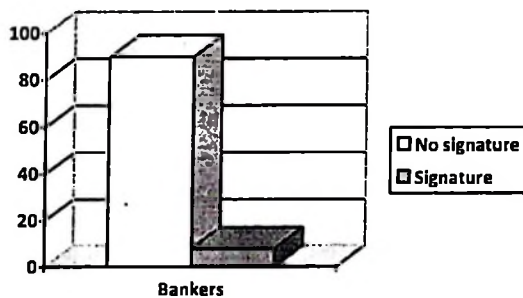


Table 4.2 above summarises responses of the bankers on whether they do require a spouse to sign on an application for a mortgage or not.

<sup>157</sup>The Land Act, op cit, c.s 114 (1)

Bank officials were also asked on whether they require spouses to sign in an instrument creating a mortgage, a mortgage deed, or not; 95% of the respondents said that they are not requiring spouses to sign in a mortgage deed. This is simply because the specified formats of mortgage instruments do not have a space for a spouse to put his/her signature. Reference to form No. 40 under the Land Forms Regulations,<sup>158</sup> which is a sample of a mortgage deed, revealed no place for a spouse to affix his/her signature on it. This means that the practice is contrary to the law which requires a spouse to sign on an instrument creating a mortgage.

**Table 4.3 Spouse's signature in a mortgage deed**

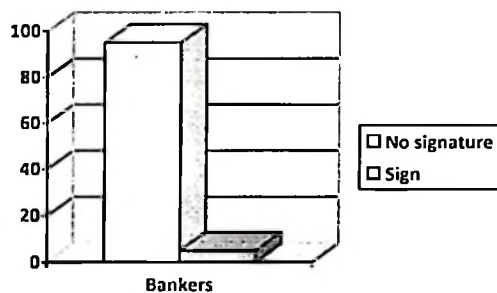


Table 4.3 shows a summary of bankers' response on whether they require a spouse to sign on a mortgage deed or not.

In response of the question about standardised forms, all of the respondents said that their banks have standardized forms for a spouse to sign before a facility is issued to the borrower. When asked about the manner in which the forms are signed, 80% of the respondents said that they hand over the forms to the borrower to present them before their spouse(s) for a signature. 20% responded by saying that they require a borrower to bring along his/her spouse and sign the forms before the bank officials. This means that in most of the mortgage transactions involving a matrimonial home, bankers are not concerned with how the consent is obtained. All they need is a signature to be affixed in a space reserved for a spouse. It doesn't matter to them as to who really signed the form and the situation in which the form was signed i.e. if

<sup>158</sup> Government Notice No. 71 of 2001

the consent given was free, genuine and informed. This practice left out some lacunas for forged signatures, undue influences, misrepresentations, frauds and duress in inquiring into a genuine and informed consent of a spouse to mortgage a matrimonial home.

**Table 4.4 the manner of signing standardised forms**

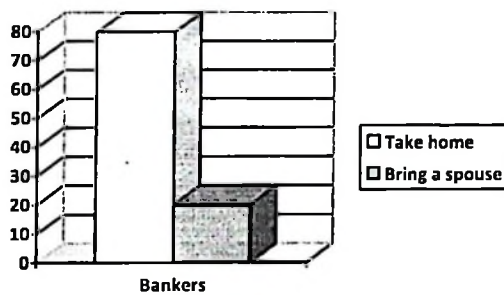


Table 4.4 shows a summary of bankers' responses on the manner they are procuring a spouse' signature in a standardised forms, that is, whether they a just handing over the form to a borrower for him/her to go and obtain a spouse's signature or if they require a spouse and the borrower to sign the form in the presence of bank officials.

Basing on these responses, the researcher opted to review the said standardised forms. Seventy percent of the reviewed standardized forms for obtaining a spouse's consent were found to be defective in content for the forms failed to cite the relevant enabling provisions of the law. Most of the forms are still referring to *section 112 of the Land Act* which is a dead law. This defect in law renders the whole form invalid, for the form does not in the first place exist since the current *section 112 of the Land Act* does not provide for such powers. As a result, banks may find themselves in a hard situation under objection proceedings for inquiring into a spouse's genuine and informed consent through defective consent forms.

The forms aims at only obtaining a spouse's signature as evidence of his/her consent to mortgage a matrimonial home. There is nothing within the forms which show that the spouse has been independently advised and thus the consent thereto is genuine and an informed one. Wordings of the forms are only to the effect that a spouse is

aware of intended mortgage of a matrimonial home and has consented to mortgage it. There is nothing within the forms which shows that the wife enters into a transaction with her eyes open as far as the basic elements of the transaction are concerned.

The language used in 80% of the forms was English, which is a third language to most of the Tanzanians. In simple terms, consent to mortgage a matrimonial home has to be given voluntarily with the knowledge of the rights being surrendered. There is a great possibility that majority of the spouses are signing the forms without understanding what they are getting themselves into. Again, the language used in the forms is a legal language with a lot of legalese which cannot be easily comprehended by an ordinary man.

#### **4.4 Inquiry into a spouse's consent**

Lender has a duty to inquire into a spouse's consent to mortgage a matrimonial home and to satisfy itself that the consent given was free, genuine and an informed one.<sup>159</sup> Thirty bank officials, managers, loan officers and legal officers, from ten different banks were interviewed on this aspect. Together with these, 10 advocates from different law firms were also interviewed to establish whether spouses of the borrowers are seeking for independent advice before mortgaging a matrimonial home and the extent to which this advice is given.

Out of the interviewed advocates, seventy percent responded by saying that they have never rendered an independent advice to a spouse who wishes to give her consent to mortgage a matrimonial home. Thirty percent of the advocates have experienced spouses wishing to mortgage their matrimonial homes appearing before them for an independent advice. When asked on how the advice is given, they said that basically a spouse is usually advised in accordance to the instructions given to the advocate. Specifically, a spouse is advised independently away from the borrower on the terms, conditions, possible consequences of the mortgage and the spouse's right to either consent or reject.

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<sup>159</sup> The Land Act, *loc cit*, c.s 114 together with Regulation 4 and 5 of the Land (Mortgage Financing) Regulations, 2009

**Table 4.5 Independent advice by advocates**

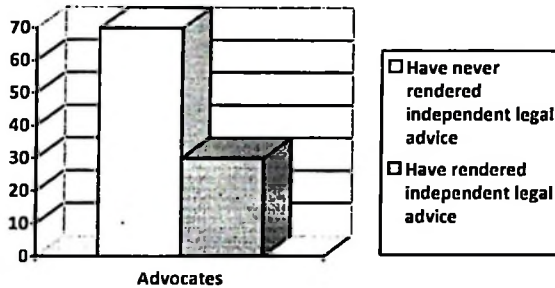


Table 4.5 shows a summary of responses by advocates on the question whether they have been approached by bankers, borrowers or spouses seeking for an independent legal advice to mortgage a matrimonial home.

Eighty percent of the advocates said that after rendering an independent legal advice there is no any legal document which is given to a spouse. Twenty percent of the advocates said that they require a spouse to sign an acknowledgement form to the effect that they have been independently advised, understands their right in mortgaging a matrimonial home and consented to the terms of the mortgage. This roughly shows that about eighty percent of the banks doing business in Tanzania have no written evidence that consent given by spouses of borrowers in their banks was free, informed and genuine. They can only prove that a spouse's consented to a disposition via the consent forms but they cannot prove that the consent given was free, genuine and an informed one for failure to demand acknowledgment forms by spouses from advocates.

Along the same lines, sixty percent of the advocates blamed the bankers that they fail to co-operate with them effectively when advising spouses on whether to consent or withhold their consent to mortgage matrimonial homes. They urge that bankers refuse to give them some important information about the borrower such as the application form, amount to be borrowed and financial status of the borrower on the grounds of confidentiality. This means that even if the spouses are independently

advised by an advocate, still their consent will not be free, genuine and an informed one for failure to understand clearly on the terms of the mortgage.

Out of the thirty banks in the sample, seventy percent of the bankers said that they are not rendering an independent advice to spouses on the terms, conditions, possible consequences and a spouse's right to give consent to the mortgage or reject. Twenty percent of the respondents said that they do issue independent advice to spouses through their legal officers and loan officers so that a spouse may be in a position to decide whether to sign a consent form or not. Ten percent of the respondents said that they are not rendering an independent advice but rather advice a borrower to his/her spouse before an advocate for an independent advice and bringing back to the bank an acknowledgement form signed by an advocate that a spouse has been independently advised and consequently consented to mortgage the home.

**Table 4.6 Bankers' independent advice to spouses**

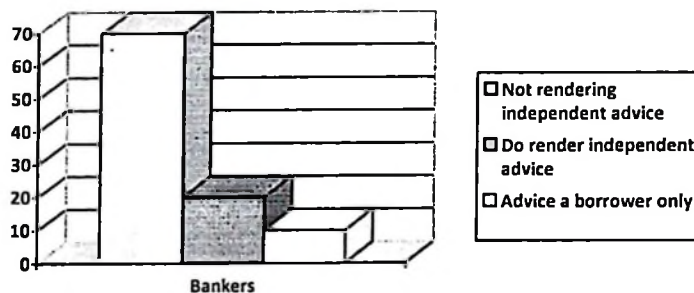


Table 4.6 above shows bankers' responses on the question whether they are offering independent advice on the terms and effects of a mortgage of a matrimonial home to spouses or not.

#### 4.5 Effects of failure to inquire

At common law, the *Statute of Frauds, 1677*, introduced certain contractual formalities in dispositions involving land. That Statute provides, among other things, that a contract for a disposition of land must be evidenced in writing and that

the writing and that the writing must be signed by the party against whom enforcement is sought.<sup>160</sup> The purpose of the Statute was to avoid fraud and uncertainty in transactions by requiring a written record of the agreement.<sup>161</sup> Therefore, as with all formal requirements, including those now mandated for spouses' consent in mortgaging a matrimonial home, the Statute channelled conduct by requiring a written document to serve evidential and cautionary functions.<sup>162</sup>

What then is the effect of failure to comply with this mandatory requirement of the law? The law is somehow not certain on this issue. It is not clear as to whether a mortgage of a matrimonial home in contravention of *section 114* of the Land Act is invalid for all purposes, or only as regards the wife's occupational rights over the matrimonial home. The Land Act requires such an agreement to be treated as being invalid i.e. it will not be valid for failure to comply with the requirements of *section 114(1)* of the Land Act. The 2008 amendments of the Land Act provides for a quasi-criminal penalty for a spouse who misleads a lender in an affidavit or a written and witnessed document on whether there is a spouse/spouses or any third party interested with the property. On the other hand, the Law of Marriage Act under *section 59(2)* requires such an agreement to be treated as being void against the interests of a spouse to occupy a matrimonial home; the Act does not provide explicitly that a mortgage in contravention of the act is invalid. This again raises a range of possibilities as to how the law should be read. One view is that the direct prohibition, together with the provision for a penalty, makes the agreement unenforceable at the instance of a spouse. Another opinion is that a formal defect does not invalidate the agreement at all. However, the provisions of *section 181* of the Land Act are of a notable importance here, the Act requires that:

*On and after the commencement of this Act, notwithstanding any other written law to the contrary, this Act shall apply to all land in Mainland Tanzania and any provisions of any other written law applicable to land*

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<sup>160</sup> The Statute of Frauds, 1677, c.s 38

<sup>161</sup> Ibid, c.s 35

<sup>162</sup> Ibid, c.s 39

*which conflict or are inconsistent with any of the provisions of this Act shall to the extent of that conflict or that inconsistency cease to be applicable to land or any matter connected with land in Mainland Tanzania.*<sup>163</sup>

It follows therefore that the prevailing position, considering the above provisions, is that a mortgage of a matrimonial home which does not adhere to consent requirements under the Land Act is void. Accordingly, an order for specific performance of a mortgage of a matrimonial home that violates the consent provisions of the Land Act will be refused. So will a claim for damages. A mortgagee withdrawing from a transaction owing to the failure to obtain the necessary spouse's consent is entitled to a return of the advanced money. In *Samvel Olung'a Igogo and Two Others v Social Action Trust Fund and Others*<sup>164</sup> the mortgage documents were never signed by the spouses nor was there evidence on the face of the documents that they assented as required by *section 114* of the Land Act. The High Court held that this alone makes the mortgage documents invalid. In resolving the conflicting position of law between *section 59* of the Law of Marriage Act, Kalegeya, J held that the provisions of the Land Act on this does not contradict with *section 59* of the Law of Marriage Act. They simply supplement. But even if they had contradictory elements, *section 181* of the Land Act provides the cure.

#### **4.6 Conclusion**

Most of the banks doing business in Tanzania are not adhering to the legal requirements on inquiring into a spouse's genuine and informed consent to mortgage a matrimonial home. The banks are still up to the requirements of the Land (Amendment) Act, 2004, which required only a signature of a spouse in a specified consent form. The amendments of the Land Act of 2008 through the Mortgage Financing (special provisions) Act provides for a number of requirements which are not practiced in Tanzania. However, these requirements have not yet been put onto test by our Courts of law since the law is still somehow new. In a near future, comparing with the practice in other common law countries, banks in Tanzania are

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<sup>163</sup> The Land Act, *loc cit*, c.s. 181

<sup>164</sup> *ibid*

due to face a number of objection proceedings on new grounds rather than the traditional common one of lack of consent on the part of a spouse they are used to. Challenges on the grounds of undue influence, misrepresentations, forgery of signature, lack of independent legal advice and the like are around the corner for bankers' failure to adhere with legal requirements of inquiring into a spouse's consent.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

The previous chapters were trying to analyse the law and practice of inquiring into a spouse's genuine and informed consent to mortgage a matrimonial home in Tanzania. A lot has been exposed in relation to their strengths and weaknesses. It is now a high time to walk the talkie; this chapter will provide for conclusions of what the study has observed and eventually spell out some recommendations to remedy the situation.

#### 5.2 Conclusion

In this work an attempt has been made to analyse the law and practice of inquiring into spouses genuine and informed consent in mortgaging a matrimonial home in Tanzania. In doing so, relevant laws, practices and various decisions from Tanzania and other common law countries have been considered.

Inquiring into a spouse's genuine and informed consent to mortgage a matrimonial home in Tanzania was not a mandatory requirement until 2008, when for the first time the requirement of inquiring into a spouses consent was introduced vide the *Mortgage Financing (Special Provisions) Act*. The regulations made under this Act, the *Land (Mortgage Financing) Regulations, 2009*, provided for how an inquiry into spouse's genuine and informed consent to mortgage a matrimonial home is to be made.

Practice of most banks doing business in Tanzania is not up to the standards required by the said statute and the practices in other common law countries. The primary intention of the law was to strike a balance between the interests of lenders on one hand and the interests of spouses residing in matrimonial homes. Through the analysis it became apparent that mortgage of a matrimonial home is a subject matter/concept alien to most Tanzanians. Majority are not in full knowledge of transactions conducted in its respect. Only a privileged few, mainly those in the

financial sector are in full knowledge of it. Mortgage applications on a security of matrimonial home are very often done without close scrutiny of the contents of the documents issued for the purpose. Most applicants are desperate for financial assistance and will hurriedly sign wherever they are told to. Banks at such times are noted to play passive roles in providing professional advice in respect of the mortgage.

Independent legal advice to a spouse is a key point for obtaining a spouse's genuine and informed consent. However, the analysis reviewed that this is hardly done in Tanzania. Spouses are signing consent forms without understanding their contents and effects. No inquiry is made as to whether a spouse understood and assented to the terms and conditions of the mortgage or that they have, notwithstanding the advice from an advocate, waived their opportunity to take independent advice.

Standard forms which are used to obtain spouse's consent vary to a great extent from one bank to another. They contain complex legal language which cannot be easily comprehended by an average person. Some of the forms are citing dead laws, i.e. *section 112* of the Land Act which was repealed and replaced through introduction of a new section, *section 114* vide the Land (Amendments) Act, 2004. The forms are structured with a limited purpose of only obtaining a spouses consent to mortgage a matrimonial home.

At this juncture, one can be in a confident position to observe that the cases discussed herein show, in general, that it is easier for banks to ensure that their securities will be enforceable. However, where the simple safeguards are not complied with, the courts will continue to protect the spouses who have not given their genuine and informed consent to mortgage a matrimonial home. Bankers are due to face objection proceedings on new grounds rather than the traditional one of lack of consent of a spouse. New developments reveals that the consent may itself be challenged on the grounds of undue influence, duress, misrepresentation, forgery and the like thus high probabilities of the defence of *non est factum* to accrue.

### **5.3 Recommendations**

It cannot be denied that banks in Tanzania are not adhering to the consent requirements in inquiring into a spouse's consent to mortgage a matrimonial home. In view of the foregoing concluding observations which are based on the findings of the study, some recommendations are made hereinafter as a way to remedy the situation. The recommendations address the best practice of inquiring into spouses' genuine and informed consent to mortgage a matrimonial home in Tanzania.

In the first place, a spouse's signature should evidently be seen in the application form, the consent form and the instrument creating the mortgage (the mortgage deed) as required by section 114 of the Land Act. Bankers should also adopt a uniform standardized form for inquiring into a spouse's consent. Currently, banks use different consent forms which do not clearly show that a spouse has received independent advice, understood the implications and consented to mortgage a matrimonial home. The present practise does not reflect/display professionalism. If possible, a format for the prescribed documents under the Land Act, the consent form and an acknowledgement should be provided in the regulations in order to have a uniform practice in inquiring into a spouse's genuine and informed consent to mortgage a matrimonial home. The form should be detailed enough to acknowledge that the property is a matrimonial home, the spouse has been independently advised and further that the spouse is giving his/her consent to mortgage a matrimonial home freely and genuinely after being well informed on the terms of the transaction and the effects of the transaction over the matrimonial home just in case they fail to live to their promises contained in the loan agreement.

On the other hand, bankers should play an active role into inquiring into a spouse's consent by insuring that a spouse is involved from early stages of the mortgage agreement and every advice they render to a spouse is kept in writings for the record. Bankers should strive to meet face-to-face with a spouse, explain the terms and conditions as well as consequences of an intended mortgage and advice her to take an independent legal advice from an advocate in the absence of the borrower or loan officers.

Banks has to strive hard to educate their customers (borrowers) on the importance of independent legal advice to a spouse. Borrowers must be in a position to understand the implications of concluding a mortgage agreement without free and genuine consent of their spouses. This will help the borrowers to freely and voluntarily waive their right of confidentiality and release requisite financial information to advocates for independent advice to spouses.

On the other hand, bankers should also educate their managers, loan officers and other officials on the legal aspects of mortgages of matrimonial homes. Generally, the bank should not proceed with the transaction until it has received an appropriate response from the spouse. The bank shall in every case obtain from the spouse's solicitor a written confirmation to the effect that a spouse has been independently advised and has understood and assented to the terms of the proposed mortgage of a matrimonial home.

The bank should provide to the advocate, who is independently advising a spouse, the financial information he needs to properly advise the spouse. Where the bank believes or suspects that the spouse is misled by the borrower or is not entering into the transaction of her own free will, the bank has to inform the spouse's advocate of the facts which gave rise to its belief or suspicion.

Advocates are regarded as one of the key component to an inquiry of a spouse's genuine and informed consent to mortgage a matrimonial home. Bearing in mind ethical principles governing the conduct of legal profession, advocates are supposed to render independent legal advice to spouses. An advocate should explain to the spouse the purposes for which he is involved. He should explain that, should it ever become necessary, the bank will rely on his involvement to counter any suggestion that the spouse was overborne by the borrower or that the spouse did not properly understand the implications of the transaction.

The advocate will have to explain the nature of the documents used and its practical consequences if a spouse signs them, that a spouse could lose the home if the borrower fails to repay the loan. The advocate will have to clearly state that the spouse had to agree or not to agree to the transaction. The advocate's discussion

with the spouse should take place at a face-to-face meeting in the absence of the borrower and should be couched in suitably non-technical language. The advocate must ensure that the spouse understands the nature and effect of the transaction.

At last, the advocate will have to draft a written confirmation to the effect that the advocate has fully explained to the spouse the nature of the transaction, the documents and the practical implications they will have to the spouse. The acknowledgement should be sufficient to show that the spouse is aware of the nature of the disposition, is aware of the rights granted by the Law of Marriage Act to either give her/his consent or withholding it, has consented to the disposition to the extent necessary to give effect to the disposition and is executing the documents freely and voluntarily without any compulsion.

The law should be amended to include a presumption that every property in a mortgage transaction is a matrimonial home, and that the consent of a spouse is therefore required. Every application for a mortgage transaction should contain a spouse's consent or an order dispensing with the consent. A mortgage without a spouse's consent should not be registered unless it is accompanied by an affidavit stating that: the owner is not married, the property is not a matrimonial home, or that a release of a spouse's rights has been registered.

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