REAL ESTATE MANUAL

– THE MAWALLA WAY –



MAWALLA

ADVOCATES

TAKING CARE OF BUSINESS

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PART ONE

1.0 CONVEYANCE

1.1 DISPOSITION OF THE RIGHT OF OCCUPANCY

The disposition of land in Tanzania is regulated by following principal legislations:

- The Land Act (CAP 113 R.E. 2002)
- The Village Land Act (CAP 114 R.E. 2002)
- The Land Registration Act (CAP 334 R.E. 2002)
- The Registration of Documents Act (CAP 117 R.E. 2002)

There are also four subsidiary legislations which are crucial for the disposition of land. They are:

- Land Regulations, 1948
- Land (Forms) Regulations, 2001
- Land (Disposition of Right of Occupancy), 2001
- Village Land Regulations, 2001

In considering the sale of land in Tanzania, one needs to be clear as to what is the legal position on matters pertaining to the land value, the sale of vacant land, and the legal requirements of conveyance.

1.2 LAND VALUE

The Land Act stipulates that there is no land market for unexhausted land. It is clear that there is no sale of land without unexhausted improvement. Section 37(8) and (9) provides as follows:

(8) Unless otherwise provided by this Act, no sale of land without unexhausted improvements shall be approved, and such shall be deemed to have no value.

(9) Any disposition in contravention of subsection (8) of this section shall be void ab initio.

This position, however, goes contrary to the land policy as stipulated in section 3 (1) (a), which recognises that land has value. The sale of vacant land is, however, legal if it is through auction and tender, or sale of mortgaged land. If a conveyancer comes across land that appears to be vacant, they should devise a mechanism to prove that that land has value. If that is not the case, they can take recourse to tender or auction, or sale of mortgaged land.

1.3 LAND CONVEYANCE

The Land Act, which is the controlling law, stipulates that all dispositions of the right of occupancy shall only be legal and lawful if carried in accordance with that Act. Section 61 provides as follows:

61. Dispositions and dealings affecting land

(1) No right of occupancy, lease, or mortgage shall be capable of being disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any right of occupancy, lease or mortgage otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any right or interest in land, or in the right of occupancy, lease or mortgage.

One of the basic rights that an occupier has is that of disposition of a right of occupancy. The word “transfer” is a general one and may include assignment, sale and other forms of conveying

property. The technical description of the term is that given under the Land Act which defines it as follows:

S.2 "transfer" means the passing of a right of occupancy, a lease or a mortgage from one party to another by the act of the parties and not by operation of the law and includes the instrument by which such passing is effected.

The Act defines also the critical parties to the process, ie the "transferor" and "transferee", the former being a person who receives the right of occupancy, lease or mortgage passed by an act of transfer, and the latter being the person who passes the right of occupancy, lease or mortgage by an act of transfer. The passing of a right of occupancy, a lease or a mortgage from one person to another by operation of law on death or insolvency or otherwise is known as "transmission". The Land Act defines further what a "disposition" is and states:

"*Disposition" means any sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the creation of an easement, a usufructuary right, or other servitude or any other interest in a right of occupancy or a lease and any other act by an occupier of a right of occupancy or under a lease whereby his rights over that right of occupancy or lease are affected and an agreement to undertake any of the dispositions so defined.*

The Act seems to imply that the term "disposition" is wider than that of "transfer". However, the Act defines further the term "dealing" to be an act that includes disposition and transmission.

Note that it is important for any practitioner to make sure any disposition concerning the right of occupancy, lease or mortgage is only carried in accordance with the prescriptions of the Land Act. Failure to do so means that the disposition carries with it the potentiality of being declared void, under section 61(1).

1.4 DISPOSITION INSTRUMENTS

Instruments to effect the sale of land should be as prescribed under the Land Act or other laws. Other laws in this context mean the Land Registration Act and the Registration of Documents Act. The applicable forms under the Land Act are in the schedule to the Land (Forms) Regulations, 2001. The prescribed forms for sale or transfer of land are Forms No. 35 and 38. Form No. 35 is for the Transfer of the Right of Occupancy, while Form No. 38 is for the contract of Transfer of the Right of Occupancy (see the attached Land Forms).

Note that the coming into force of the Land Act has not repealed the Land Registration Rules, made under the Land Registration Act. There are now two forms which serve the same purpose; eg Land Form No. 35: Transfer of the Right of Occupancy serves the same purpose as Form LR 5: Transfer of the Right of Occupancy that is made under the Land Registration Act. Practitioners are advised to use the Land Forms as stipulated under the Land Act.

1.5 EXECUTION OF INSTRUMENTS

The Act provides that the instrument effecting any land disposition should be in writing and where the parties are individuals the same should be signed; whereas if they are body corporate, then the instrument should be sealed. Section 63 of the Land Act stipulates as follows:

63. Execution of instruments in writing

(1) Without prejudice to the provisions relating to attestations and execution under the Land Registration Act (CAP 334 R.E. 2002) and Registration of Documents Act (CAP 117 R.E. 2002) every instrument effecting any disposition under this Act shall, subject to the provisions of this Act, be executed in accordance with the provisions of this section by each of the parties consenting to it.

(2) The execution of any instrument referred to in subsection (1) by a person shall consist of his signing it or affixing a thumbprint or other mark which shall evidence his personal acceptance of that instrument.

(3) The execution of any instrument referred to in by a corporate body, an association, a co-operative society or any other like organisation shall be effected in any manner authorised by the constitution of those organisations or by any law for the time being in force.

The Act also requires that any contract affecting the disposition of land should be in writing. Section 64 stipulates as follows:

64. Writing required for enforcement of contracts relating to land

(1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if–

(a) the contract is in writing or there is a written memorandum of its terms;

(b) the contract or the written memorandum is signed by the party against whom the contract is sought to be enforced.

(2) A contract for a disposition referred to in subsection (1) may be made using a prescribed form.

This provision, however, does not apply to the following disposition, as so stipulated in subsections 4 and 5 of section 64 of the Land Act, which provides as follows:

(4) This section shall not apply to–

(a) a short term lease;

(b) a disposition by order of a court;

(c) a disposition by operation of laws.

(5) This section shall not affect–

(a) the creation or operation of a resulting, implied or constructive trust;

(b) the making or operation of a will;

(c) an arrangement, recognised by customary law, for the temporary disposition of a customary interest in land.

Note that the Land Act does not replace the provisions on attestation and execution of documents under the Land Registration Act and the Registration of Documents Act. The provisions under these statutes are left intact and they do apply to the fullest degree.

1.6 NOTIFICATION REQUIREMENTS FOR DISPOSITION OF THE RIGHT OF OCCUPANCY

The Land Act requires that certain dispositions cannot be lawfully carried out without the notification of such disposition to the Commissioner for Land. Section 36(3) of the Land Act provides that this requirement is mandatory. It stipulates as follows:

(3) Any person proposing to carry out a disposition, other than a disposition to which section 38 applies, ***shall*** *send or deliver a notification in the prescribed form to the Commissioner or an authorised officer before or at the time the disposition is carried out together with the payment of all premia, taxes and dues prescribed in connection with that disposition.*

The penalty for failure to comply with this requirement is provided for in subsection 5. It reads as follows:

(5) The Registrar ***shall not*** *make any entry on the register in respect of any disposition or any right of occupancy transferred as a result of a disposition to which subsection (3) applies unless and until he is in receipt of a copy of a notification endorsed in accordance with subsection (4).*

The dispositions which are saved under section 38 require the direction of the Commissioner for Land. Where such directions or instructions are not complied with, the effect is to render the disposition void.

38. Supervisory powers over dispositions

(1) The Commissioner may on receipt of a notification of a disposition under subsection (3) of section 36 issue a notice in the prescribed form to the parties requiring them not to proceed with the disposition until–

(a) they have sent or delivered to him any additional information and documentation about the disposition which is specified in the notice; or

(b) they have applied for and received approval for that disposition.

(2) Where the Commissioner has reasonable cause to believe that a disposition is about to take place or has taken place of which he has not received a notification under subsection (3) of section 36 of the parties to the transaction of which he has knowledge requiring them–

(a) to comply with section 36;

(b) not to proceed with the disposition until–

(i) they have sent or delivered to him any additional information and documentation about the disposition which is specified in the notice; or

(ii) they have applied for and received approval to the disposition.

(3) Where the Commissioner has reasonable cause to believe, either of his own motion or as a result of representations made to him by or on behalf of one of the parties to the disposition, that a disposition has been or is in the process of being or is likely to be affected by fraud, or undue influence, or lack of good faith, or the fact that one party appears to have taken unfair advantage over another party to the disposition or that the disposition, not being a gift, is not for value, he may–

(a) where the disposition has taken place and not more than two years have elapsed since the conclusion of the formalities necessary to complete the disposition, apply to the Registrar of Titles to enter injunction under section 79 of the Land Registration Act (CAP 334 R.E. 2002) for rectification of the land register;

(b) where the disposition has not yet taken place–

(i) apply to the Registrar to enter an injunction to prevent the disposition from taking place; or

(ii) issue any notice that he can issue under subsection (2); or

(iii) issue a notice requiring the parties to the disposition to appear before him and give an explanation of the circumstances of the disposition.

1.7 THE APPROVAL REQUIREMENT

The Land Act attempts to do away with the approval requirement as a condition precedent for the disposition of the right of occupancy. The Act categorises dispositions into those which require the consent of the Commissioner before disposition and those which do not require such consent. Section 36 (2) of the Land Act enacts as follows:

(2) Unless otherwise provided for by this Act or regulations made under this Act, a disposition of a right of occupancy shall not require the consent of the Commissioner or an authorised officer.

The Land (Disposition of Right of Occupancy) Regulations, GN. No. 74/2001, rule 3 stipulates the dispositions which require approval or consent of the Commissioner. That rule stipulates as follows:

3. The following dispositions shall require approval under the Act–

- *(a) assignment of a right of occupancy which was granted to the assignor less than three years before the proposed assignment is to take effect;*
- *(b) a loan granted on the security of every mortgage of a right of occupancy or mortgage of a lease;*
- *(c) partition of land granted under a right of occupancy;*
- *(d) creation of an easement;*
- *(e) transfer;*
- *(f) sale;*
- *(g) grant;*
- *(h) surrender.*

The procedure for approval for disposition of the right of occupancy is provided for under section 39 of the Land Act and in the Land (Forms) Regulations, G.N. No.71/2001 on the schedule for approval of dispositions. Section 39 provides as follows:

39. Application for grant of approval for disposition

(1) An application for a grant of approval for a disposition shall be–

- *(a) made on a prescribed form;*
- *(b) signed by all the applicants;*
- *(c) accompanied by any other information which is prescribed or which may be required by the Commissioner;*
- *(d) accompanied by any fees which may be prescribed.*

[See Land Form No. 33 to the Land (Forms) Regulation, GN. No.71/2001.]

Note that rule 3 of the Land Regulations, 1948, which demanded that any disposition which has been carried out without obtaining the approval of the Commissioner shall be inoperative is now

rendered not controlling because if there is any disposition which does not fall in the categories stipulated in rule 3 of GN 74/2001, then the same would require the consent/approval of the Commissioner.

Note further that under the Land Act, any disposition which is carried without the approval of the Commissioner, if approval is required, the same will be ***inoperative***. But if the disposition is carried out not in accordance with the Land Act, then the disposition will be regarded as ***ineffectual.*** Section 61 provides as follows:

61. Dispositions and dealings affecting land

(1) No right of occupancy, lease, or mortgage shall be capable of being disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any right of occupancy, lease or mortgage otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any right or interest in land, or in the right of occupancy, lease or mortgage.

These terms, ***inoperative*** and ***ineffectual***, are interchangeably used and both mean the disposition affected remains unenforceable until such a time when approval is sought and either is given or refused. Thus, any purported registration of a deed of conveyance without consent does not complete the conveyance.

Note also that for situations where the Act categorically provides for the consequences such as inoperative or ineffectual, the fulfilment of the legal requirements is mandatory for the legal enforcement of the deed, without which no rights can legally be enforced.

In another scenario, however, the Land Act holds certain disposition to be void. Where the Act so provides, then the disposition is defectively incurable. The following provisions specifically declare certain dispositions as void. See sections 36(1) (b) and 37(9) of the Land Act and sections 30(6) and 31(2) (b) of the Village Land Act.

Thus, any disposition which the Act requires furnishing the notice of disposition, if it is not issued, then the disposition will be rendered void; or where the disposition has been carried contrary to the supervisory powers of the Commissioner under the Act, such a disposition is void; or where a disposition is carried without approval or consent as required, the same would be rendered void.

1.8 REGISTRATION OF INSTRUMENT

It is a condition precedent to register an instrument effecting the sale or transfer of the right of occupancy if the same had to be enforceable at law. Unless the instrument is registered in accordance with the laws affecting land disposition, the document shall not operate to sell, assign or transfer the right of occupancy. Subsection 2 of section 41 of the Land Registration Act (CAP 334 R.E. 2002) is clear on the registration of instruments. It stipulates as follows:

41. Disposition of land

(1) No disposition shall be registered unless there is furnished to the Registrar, a certificate in writing by the Commissioner for Lands signifying his approval to the disposition.

(2) No disposition unless registered shall be effectual to create, transfer, vary or extinguish any estate or interest in any registered land.

In the same spirit, the Registration of Documents Act (CAP 117 R.E. 2002) provides that any document which purports to dispose land, without first being registered, cannot transfer the said land. Section 9 provides as follows:

9. Unregistered document affecting land is deemed invalid

No document of which the registration is compulsory shall be effectual to pass any land or any interest therein or render such land liable as security for the payment of money, or be received as evidence of any dealing affecting such land unless and until it has been registered.

The Land Act, in section 62, provides for the same requirement. We see that there is harmonisation of all statutes affecting disposition of the right of occupancy. Section 62 provides as follows:

62. Instruments of disposition

(1) Every instrument effecting any disposition under this Act shall use any of the prescribed forms which is specified in relation to that disposition under this Act or any other law.

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

(3) The provisions of subsection (2) shall not apply to any dispositions exempt from registration.

(4) This section shall not apply to or affect the operation of any contract for a disposition under this Act.

1.9 ACQUISITION OF LAND BY FOREIGNERS

Note that under the Land Act, all land in Tanzania belongs to the State. By virtue of section 20(1), non-citizens are prohibited from being allocated land in Tanzania. This section reads as follows:

(1) For avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act (CAP 38 R.E 2002).

Professor Mgongo Fimbo maintains that the import of this provision is strictly limited to direct allocation and grant by the government only. It does not go further to restrict a purchase from an individual or private person. There is no a single provision in either the Village Land Act or the Land Act which says an individual shall not sell his land to a foreigner. He argues that the Land Act does not restrict foreigners to acquire land by other means, like purchase in the market, or by buying shares in companies which are holding rights of occupancy; or by purchase from the government through tenders and auctions, by virtue of Land Act section 52 and GN.No.73 of 2001; or purchase from the Parastatal Sectoral Reform Commision (PSRC). He further argues

that a foreigner can acquire land by means of a derivative right from a village council, by virtue of section 32 of the Village Land Act: see: Fimbo, G.M., Land Law Reforms in Tanzania, 2004, at pg. 33.

It is true that there is no provision in either the Land Act or the Village Land Act which stipulates that a foreigner cannot purchase land in the open market. However, with the advent of the 2004 amendment to the Land Act, the Land (Amendment) Act, 2004, Act No. 2 of 2004, one has to be cautious. Section 19(2) has brought enormous change to the issue of ownership of land by non-citizens. This section enacts that a non-citizen may only obtain a right of occupancy through the Tanzania Investment Centre (TIC).

As a conveyancer, the position of Prof Fimbo is very precarious. No practitioner should rely on it. Fimbo's position may hold water for the case of a foreigner buying land through the PSRC. There is nothing in either the Land Act or the Village Land Act which suggests that a foreigner can buy land in an open marketplace, or through tenders and auction. Section 52 of the Land Act, which is cited by Prof Fimbo and GN. No. 73/2001 suggests nothing to the effect that a non-citizen can buy land. Even the so-called derivative right under section 32 of the Village Land Act is not determinative. Dr Tenga supports this position. He argues that if there was a restriction on an individual's ability to sell his land to a foreigner, the mortgage market in Tanzania would have been impossible. This is the case because most banks in Tanzania are foreign, yet they are legally accepted as mortgagees. Now, because mortgage carries with it the power of sale, any bank which is a mortgagee has the power of sale. And if the bank is foreign, and since there is nothing in the land laws to bar an individual from selling land to foreigners, then an individual can lawfully do so. Only the government is barred from allocating land to foreigners. Note that

land allocation is only one way or method of acquiring land. Other methods include gifts and purchases. Since the two are not prohibited by any provision, then it is lawful according to Dr Tenga for a foreigner to buy land from a citizen.

That position, however, in my considered opinion, is made untenable by the provisions of section 19(2). [Note that this provision came vide 2004 amendment in Land (Amendment) Act, 2004, Act No. 2 of 2004]. This provision provides as follows:

(2) A person or a group of persons whether formed into a corporate body under the Companies Act or otherwise who are non-citizens, including a corporate body the majority of whose shareholders or owners are non-citizens, ***may only obtain:***

(a) a right of occupancy for purposes of investment approved under the Tanzania Investment Act, 1997, or

(b) a derivative right for purposes of investment approved under the Tanzania Investment Act, 1997, or

(c) an interest in land under a ***partial transfer of interest by a citizen*** *for purposes of investment approved under the Tanzania Investment Act, 1997 in a joint venture to facilitate compliance with development conditions.*

The emphasised phrases here are ***may only obtain*** and ***partial interest by a citizen***. The amendments which were effected in 2004 have sealed an opportunity which was in place before then. It is true that before the amendment the Act simply restricted allocation but not any other means of acquiring the land. Thus, it was possible for a foreigner to buy land from a citizen. Now, in light of section 19(2), it is difficult to see how a foreigner can purchase a right of occupancy from a citizen, and simply ignore section 19(2). I believe that the phrase ***may only obtain*** is not without a meaning. The difficulty faced is that it seems it was the purpose of the framers of the Land Act for the TIC to have the land bank, which would cater for the purposes of investment. That is not in place today. In that vacuum, the position of Prof Fimbo may hold

water. But before advising your client, you have to warn yourself of the danger inherent in that position. Carefully analyse section 19(2) before you embark on that route.

Note that it is a fundamental principle of statutory interpretation that statutes should be interpreted as a whole to give it its true intended meaning. Reading sections 19 and 20 of the Land Act, there is no doubt that the meaning intended is that a foreigner should not own land in Tanzania, and can only do so by means of buying through the TIC. This is so because the Act clearly has put in place the mechanism through which a foreigner can acquire land. This is clearly stated in section 20 of the Land Act, which reads as follows:

20. Occupation of land by non-citizen restricted

(1) For avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act (CAP 38 R.E. 2002).

(2) Land to be designated for investment purposes under subsection (1) of this section shall be identified, gazetted and allocated to the Tanzania Investment Centre which shall create derivative rights to investors.

(3) For purposes of compensation made pursuant to this Act or any other written law, all lands acquired by non-citizens prior to the enactment of this Act, shall be deemed to have no value, except for unexhausted improvements for which compensation may be paid under this Act or any other law.

(4) For the purposes of this Act, any body corporate of whose majority shareholders or owners are non-citizens shall be deemed to be non-citizens or foreign companies.

(5) At the expiry, termination or extinction of the right of occupancy or derivative right granted to a non-citizen or a foreign company, reversion of interests or rights in and over the land shall vest in the Tanzania Investment Centre or any other authority as the Minister may prescribe in the "Gazette".

This is coupled to other restrictions found in section 19 of the Land Act, which enacts as follows:

19. Rights to occupy land

(1) The rights to occupy land which a citizen, a group of two or more citizens whether formed together in an association under this or any other law or not, a partnership or a corporate body, in this Act called "right holders", may enjoy under this Act are hereby declared to be–

(a) a granted right of occupancy;

(b) a right derivative of a granted right of occupancy, in this Act called a derivative right.

(2) A person or a group of persons whether formed into a corporate body under the Companies Act or otherwise who are non citizens, including a corporate body the majority of whose shareholders or owners are non-citizens, may only obtain:

(a) a right of occupancy for purposes of investment approved under the Tanzania Investment Act, 1997, or

(b) a derivative right for purposes of investment approved under the Tanzania Investment Act, 1997, or

(c) an interest in land under a partial transfer of interest by a citizen for purposes of investment approved under the Tanzania Investment Act, 1997 in a joint venture to facilitate compliance with development conditions.

Thus, the thrust of the Act is that land can only be allocated to non-citizens for purposes of approved investment projects and not otherwise. This is the clear intention of the framers of both the Land Act and the Village Land Act. Recourse has been taken to section 32 of the Village Land Act as a way of acquiring land by foreigners. But that section is not determinative in light of sections 19 and 20 of the Land Act.

In this manual we would suggest that the best way to advise a foreigner to own land in Tanzania is by way of lease. Note that all rights of occupancies are leases (However a Granted Right of Occupancy is independently distinguished from a lease in the ordinary sense). A foreigner can lawfully and legally own land in Tanzania by entering into a lease for the whole period of the right of occupancy, less one day. Here, however, there is a problem of reversionary right to the lessor and the fear of breaching the terms of the lease that the lessor might turn against the lessee. This, however, can be solved through correct drafting of the lease agreement. Another way of owning land would be by establishing a trust in Tanzania. Any trust established in Tanzania is legally recognised as a Tanzanian, and therefore can legally own land.

1.10 LAND ACQUISITION THROUGH THE TANZANIA INVESTMENT CENTRE

The foreigner who does not wish to go this route can be advised to go through the TIC. Note that generally land can be owned under three categories, namely government granted right of occupancy; TIC derivative rights; and sub-leases created out of granted right of occupancy. Note further that rights of occupancy and derivative rights are granted for a short-term and a long-term period. Long-term rights of occupancy range from five to 99 years and are renewable, but not for more than 99 years; whereas short-term derivative rights of occupancies and leases range from five to 98 years.

Under the TIC route, the following are the requirements for application of a right of occupancy:

(a) duly filled Form No. 19;

(b) passport-size photograph;

(c) application fees;

(d) any other information requested by the Commissioner for Land seconded to the TIC;

(e) declaration of all rights and interests in land in Tanzania which the applicant has at the time of application of land to the TIC;

(f) consent of local authority or other body where any law requires that consent should be sought and obtained by the applicant (this applies to citizens, whereas for non-citizens the TIC is supposed to do this on their behalf);

(g) Application by a non-citizen or foreign company should be accompanied by a certificate of incentives granted by the TIC.

Acceptance of offer of a right of occupancy shall be by fulfilling the following conditions:

(a) by filling and signing Land Form No. 20 (for urban land) or Land Form No. 21 (for farmland) and signed by the applicant or his authorised representative or agent;

(b) accompanied by payment of necessary fees.

A certificate of occupancy shall be issued, ie Land Form No. 22 for urban land and Land Form No.23 for farmland.

CITIZEN INVESTORS

Under the Land Act, citizen investors can acquire land by a granted right of occupancy or a derivative right or by obtaining a sub-lease from the private sector. For non-citizens, occupation of land is restricted to land for investment purposes under the Tanzania Investment Act. Under the Land Act, a foreigner investor can acquire land through:

(a) derivative rights under section 20(2) of the Land Act;

(b) application to the Commissioner for Lands for grant of right of occupancy under section 25(1)(h) and (i) of the Land Act;

(c) sub-leases from the private sector (note: this will be by concluding a contract between the individuals concerned);

(d) purchases from other holders of the granted right of occupancy.

Procedure to acquire farmland:

(a) application to be submitted to the District Land Authority;

(b) consideration by the District Land Allocation Committee for land up to 500 acres; in cases where the land sought exceeds 500 acres, a recommendation by the District Land Commission shall be made to the Minister for Lands;

(c) application approval for land up to 500 acres (the Minister for Lands does this);

(d) district land officer should be notified about the approval, or the rejection of the approval;

(e) application notified; with the notification to the applicant;

(f) letter of offer will be issued stipulating the fees to be paid, Land Form No. 21;

(g) certificate of occupancy will be prepared, Land Form No. 23;

(h) certificate registration;

(i) duplicate of certificate will be given to the occupier.

Fees to be paid:

(a) survey fee;

(b) registration fee;

(c) preparation fee;

(d) stamp duty.

Note that the investor will also have to pay land rent.

Procedure to acquire urban land:

(a) application to be submitted to urban authority, Land Form No. 19;

(b) application to be submitted to the Urban Allocation Committee;

(c) application approved;

(d) letter of offer issued, will stipulate fees to be paid;

(e) certificate of occupancy prepared, Land Form No. 22;

(f) certificate registered by registrar of titles;

(g) Duplicate certificate will be given to the occupier.

Fees to be paid:

(a) Survey fees;

(b) Registration fees;

(c) Preparation fee;

(d) Stamp duty;

(e) Industrial plots.

Procedure to acquire derivative right and farmland:

(a) Land identification;

(b) Land gazettement by the Ministry;

(c) Land designation to TIC by the Commissioner for land: Form No.1;

(d) Submission of application to the Executive Director, TIC;

(e) Application approved by the TIC;

(f) Preparation of derivative rights;

(g) Derivative title registered;

(h) Duplicate derivative title given to the occupier.

1.11 ACQUIRING LAND IN VILLAGES

One can acquire land in a village through application to the Village Council with jurisdiction to determine land matter in the village. Under section 32 of the Village Land Act, the Village Council has powers and mandate to grant derivative rights. Derivative rights are defined in section of the Village Land Act in the following terms:

"derivative right" means a right to occupy and use land created out of a right of occupancy and includes a lease, a sublease, a licence, a usufructuary right and any interest analogous to those interests;

The Village Land Act requires the applicant of land in a village to follow certain instructions, failure of which will make the disposition void. Section 31 of the Village Land Act enacts as follows:

31. Approval required for private disposition of derivative right

(1) This section applies to the disposition, by the holder of a certificate of occupancy or right of occupancy, of a derivative right in the land held for a customary right of occupancy.

(2) A disposition of a derivative right to which this section applies shall–

(a) comply with the provisions of this section and the sections 32 and 33;

(b) be void if the provisions of the sections referred to in paragraph (a) are not complied with.

The first condition is that the applicant should seek and obtain the approval of the Village Council. Section 31(3) of the Village Land Act enacts as follows:

(3) Unless otherwise provided for by this Act or regulations made under this Act, a disposition of a derivative right shall require the approval of the village council having jurisdiction over the village land out of which that right may be granted.

Thus, it is a prerequisite condition that the approval of the Village Council should be sought and obtained. The consequence of failure to do so, the Act declares, is to render the disposition void, as stipulated in section 31(2) (b).

The Act further enacts that the application for approval of the disposition of the village land should be done in a prescribed form. Section 31(5) stipulates as follows:

(5) An application for approval to a grant of a derivative right shall be–

(a) made to the village council on a prescribed form;

(b) signed by the applicants;

(c) accompanied by a simple plan showing the location and boundaries of the land and any further information which may be prescribed;

(d) accompanied by any fees which may be prescribed.

An approval of the derivative right shall be personal to the applicant and non-assignable, as per section 31(8) of the VLA. The other important conditions for the derivative rights are detailed in subsection 9 of section 31 which provides that:

(9) An approval of a derivative right shall be–

(a) in the prescribed form to be known as a "certificate of approval to a derivative right" with the specific derivative right for which approval has been given named in brackets;

(b) Signed by the chairman and secretary of the village council;

(c) Accompanied by a demand for any premium, rent, taxes or dues which may be prescribed or which may be determined by the village council;

(d) Delivered or sent by registered letter to the holder of the certificate of customary right of occupancy to his last known abode or his usual place of business;

(e) Entered in a register of appeals to be kept by the village council.

Note: the derivative right is capable of being registered in the register of the village land and the same shall have priority over unregistered derivative rights created out of the same customary rights of occupancy. Section 31(12) provides as follows:

(12) A derivative right may be registered in the register of village land and that registration shall–

(a) Constitute notice of the existence and content of that derivative right;

(b) confer priority on that derivative right as against any derivative right created out of the same customary right of occupancy before the registered derivative right which has not

been registered, whether or not that prior created derivative right was known to the grantee of the later created derivative right.

The prescribed form under which an application for derivative rights should contain or meet the following conditions is stipulated in section 32(2) of the VLA:

(2) An application for a grant of a derivative right shall be–

(a) made to the village council on a prescribed form;

(b) Signed by the party applying for the derivative right or his duly appointed agent or representative;

(c) Accompanied by simple plan showing the location and boundaries of the land and any other information which may be prescribed or which may be required by the village council;

(d) Accompanied by any fees which may be prescribed;

(e) Notified to the members of the village by any means of publicity which will bring the matter to their attention.

1.12 CHECKLIST FOR TRANSFER OF A RIGHT OF OCCUPANCY

Stage	Task
1.	Take the seller's instructions to act including details of the proposed sale, for example, easement, ie water right, road right, pathway right, pipeline, telephone and electricity poles. Then if the fee is paid or terms of instructions are agreed, the first step is to conduct a search in the office of the Registrar of Titles. Normally the procedure is to write to the Registrar requesting his office to provide you with the information as it appears in the register of a certain right of occupancy. The letter should include the number of the title, plot number and where the same is located.
2.	The Land Register is also known as the mirror, because it shows anything which is legally on the title of a particular land. The letter of the Registrar in answer to your queries will show the standing of the title. If your search discloses an encumbrance, eg mortgage, on the title that is the subject of disposition, then the third step, before moving on to any meaningful discussion, should be to ask the vendor to remove the encumbrances. Alternatively, you may go ahead with the purchase if you agree on the status of the buyer in case land is bought subject to encumbrances. However, it is prudent to do the following before any meaningful discussion: (a) Obtain redemption statement from mortgagor;

Stage	Task
	(b) Upon redemption, obtain discharge.
3.	Having been satisfied with the status of the title as it appears in the register, it is always prudent to make a site survey, or site inspection. This is important to enable the purchaser to form an opinion about state of repair and value of the property. It is also important to establish whether easements will be required or whether the title is within the requirements of the Town and Planning Act in the case of titles in urban areas.
4.	Draft a sale agreement specifying date of completion. Alternatively you can adopt Land Form No. 38, the Land (Forms) Regulations, 2001, which is a Contract for Disposition of the Right of Occupancy.
5.	Then comes the most important part of disposition. Ask the following: is the contemplated disposition falling in the category of dispositions which requires the approval of the Commissioner or not? If the disposition contemplated falls in the category of those which require the approval of the Commissioner, then do the following: first adopt Land Form No. 29 which is a Notification of Disposition of a Right of Occupancy; then Land Form No. 30 which is an Approval for Disposition of the Right of Occupancy; and finally Land Form No. 35 which is a Transfer of the Right of Occupancy. In cases where the contemplated disposition does not fall in the category of those which require the approval of the Commissioner, you will be required to adopt Land Form No. 35 only. If the land is a village land, then note that any disposition needs the approval of the Village Council. The first step, however, is to hold meetings with the Village Council until their consent is obtained. If consent is given, the prescribed forms for that purpose should be adopted. In this respect, you will need Land Form No. 18 which is an Application for Customary Right of Occupancy. If you are seeking a derivative right, adopt Land Form No. 26 which is an Application for Approval to Create a Derivative Right, and then Land Form No. 28 which is an Application for Grant of Derivative Right in Village Land.
6.	Advise parties to execute the engrossed sale agreement and deed of transfer simultaneously..
7.	If at the execution of deed of transfer and sale agreement the transferee deposits a sum towards purchase price: (a) Draw a receipt for the deposit; (b) If deemed appropriate, lodge a caveat.
8.	Obtain Certificate of Clearance of Land Rent in respect of the property sold.
9.	Establish the cost of construction of the property by reference to actual cost or market cost.

Stage	Task
10.	Complete a Capital Gains Tax Questionnaire.
11.	Submit the Capital Gains Tax Questionnaire to the Income Tax Department with the following annexes: (a) Assessment of cost of construction; (b) Valuation report; (c) Sale agreement as executed; so as to facilitate assessment of capital gains tax.
12.	Pay capital gains tax and obtain a Capital Gains Tax Clearance Certificate.
13.	(a) Seek registration of the relevant right of occupancy in the transferee's name by tendering to the Registrar of Titles the deed of transfer as approved in duplicate, the Certificate of Occupancy and one copy of each of Certificate of Clearance of Land Rent and Capital Gains Tax Clearance Certificate. (b) Pay registration fees.
14.	Ensure that parties observe their obligations between date of execution and completion date.
15.	Compile completion statement and ensure that the transferor surrenders the Certificate of Occupancy to the transferee.
16.	Prepare and submit to the client a statement of account showing the fees due to the advocates(s).

1.13 LAND FORMS FOR DISPOSITION OF A RIGHT OF OCCUPANCY

Land Form No. 29

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

NOTIFICATION OF A DISPOSITION

[Under Section 36]

(To be submitted in triplicate)

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

TO COMMISSIONER FOR LANDS/

AUTHORISED OFFICER

I/WE …… OF P.O. BOX …… HEREBY NOTIFY you of the disposition which is intended to be made in favour of …… …… of P.O. Box……...…… in respect of a right of occupancy registered under the above reference.

I/WE HEREBY present the following particulars:-

1. Nature of disposition ……
2. Particulars of purchaser/assignee/mortgagee/lessee
3. The following documents are enclosed ……... ……
4. Other particulars ……

Date: ……

APPLICANT(S)

Fee: ……

SEAL/OFFICIAL STAMP

COMMISSIONER FOR LANDS/AUTHORISED OFFICER

DATE:……. PLACE ……..

Copy: The Registrar

Land Form No. 30

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

APPLICATION FOR APPROVAL OF DISPOSITION (S)

[Under Section 39]

C.T. NO. 45146

L.O. NO. 162161

L.D. NO. 177069

We …….. of P.O. Box ……(hereinafter referred to as "the Applicant") HEREBY APPLY for APPROVAL of disposition(s) of a right of occupancy registered under the above reference on the ……. day of …… Nature of disposition- ……(state nature of the disposition).

1. Particulars of purchaser…… (if not a prescribed lender) ……..

2. WE the Applicant(s) supply the following information and or documentation:

a) …….

b) ……..

c) ……..

3. Date: ……..

…….

APPLICANT (S)

For Official Use Only

a) Approved/Refused
b) Remarks
……

_____

Commissioner for Lands/Authorized Officer

Date: ……

Served upon me/us

_____

Signature of Applications

Date: ……

Fee: ……

Land Form No. 35

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

TRANSFER OF RIGHT OF OCCUPANCY

[Under Section 62]

C.T. NO. ……

……. IN CONSIDERATION OF NATURAL LOVE AND AFFECTION/THE SUM OF Tshs. …… I, …… HEREBY TRANSFER to …….. the Right of Occupancy registered under the above reference.

……

SIGNED and DELIVERED by the said

……

who is known to me personally/identified to me by

……

the latter being known to me personally

this …….. day of ……. 20……

……...

TRANSFEROR

(Witness)

Signature ……

Qualification ……

Postal Address: ……

……

SIGNED and DELIVERED by the said

…… ……..……...

who is known to me personally/identified to me by TRANSFEREE

……. *(Stamp Duty on Original and*

the latter being known to me personally

this …….. day of ……. 20…… *ERV. No.* ……...

(Witness)

Signature …… *Consent fees paid vide*

Qualification…… *ERV*
No……...Postal Address: ……*of Tshs.* …….

……

*Where applicable

IN EXERCISE THE POWERS VESTED IN ME I UNDER SECTION 37 OF THE LAND ACT 1999 …….. COMMISSIONER FOR LANDS/AUTHORISED OFFICER HEREBY APPROVE THIS DISPOSITION

_____

Commissioner for lands/authorized officer

Date: ……

Land Form No. 38

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

CONTRACT FOR A DISPOSITION OF A RIGHT OF OCCUPANCY

[Under Section 64]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I, …… of …… HEREBY AGREE to dispose to ……. the right of occupancy registered under the above reference:

1. Type of intended disposition ……..
2. Consideration …….
3. Mode of payment of consideration ……
4. Date of execution of the deed of disposition …….
5. Date of delivery of possession of the property and necessary documentation …… ……..
6. Covenants binding upon the vendor/transferor …… ……
7. Covenants binding upon the purchaser/transferee …… ……

Dated at …… this ……. day of …….. 20….

_____	_____
Signature of the Vendor	Signature of the Purchaser
Witness	Witness
1. Name: …….	1. Name ……
2. Signature: …….	2. Signature: ……..

Village Land Form No. 18

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999

(No. 5 of 1999)

APPLICATION FOR CUSTOMARY RIGHT OF OCCUPANCY

(Under Section 22)

Part I: (To be filed by the applicant(s)

1. Name of Applicant*:
   A. Full name of individual applicant(s): (family name first)
      (i) ……
      sex/age

      (ii) ……..
      sex/age

   B. Full name of members of the applicant family: (family name first)
      At least two members of the family must make the application

      (i) ……
      sex/age

      (ii) ……..
      sex/age

      (add as necessary)

   C. Name of the body or organisation which is making the application
      ……

* ***Fill in the section which applies to your application***

2. Address (if not ordinarily resident in the village)
   /Location in the village ……
3. Nationality ……..
4. Marital status (applicable only to A and B) ……..
5. Children, and ages (applicable only to A and B) …….
6. Location of land the subject of application:
   Area of the village …….

   Village ……..

District ……..

7. Approximate area of land ……
8. Use or occupation of land at present e.g. farming, grazing cattle, housing ……
9. Proposed use or occupation of land (if different to present use and occupation) ……
10. (a) Do you want to occupy the land as a family?* YES/NO
    (b) Do you want to occupy the land as a community?* YES/NO
    (c) Do you want to occupy the land as individuals?* YES/NO

* ***State divisions of interest in the land (fractions or percentages) if you want to occupy the land jointly or in common***

Signature/Thumbprint(s) of applicant(s)

……

……

……

At least TWO members of a family unit; or

TWO leaders of a traditional group; or

TWO authorised officers of an organisation

Must sign the application

Date of application

Where an application is made by a person or persons not ordinarily resident in the Village, the application must be signed by FIVE Villagers:

Signature/Thumbprint of five villagers (where relevant)

……

……

……..……..

PART II: (For official use only)

Remarks and recommendations of Village Council*/District Council*

(delete where not applicable)

Names and Signatures of members of Village Council:

…… Date ……

…… Date ……

…… Date ……

…… Date ……

…… Date ……

Village Land Form No. 26

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999

(No. 5 of 1999)

APPLICATION FOR APPROVAL TO CREATE A DERIVATIVE RIGHT

(Under Section 31 (5))

PART I

I/WE …….
HEREBY APPLY FOR APPROVAL to create a derivative right out of the customary right of occupancy registered in the village register under the above reference:

1. Nature of disposition …… (state name of the disposition) ……..
2. Particulars of purchase/assignee/mortgage (if not a prescribed lender) …… ……
   Signed ……

   …… (Applicants)

   Date: ……

PART II

For Official Use Only

NB: If this application for a lease, you must refer to section 32(5) of the Village Land Act in order to known how to deal with it. For leases, go to 2 below.

1. For applications other than leases

(a) Approval/Refused
(b) Reasons for refusal ……
Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

2. For application for leases
Class A Application: section 32(5)(a)

(a) Approval/Refused
(b) Reasons for refusal ……..
Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

Class B Application: Section 32(5) (b)

(a) Approved/Refused

(b) Reasons for refusal ……

Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

(c) Approved/Refused by the Village Assembly
(d) Reasons for refusal …….
Signed, on behalf of the Village Assembly: ……..

Date: …….

Served upon me/us

Signature of Applicant(s) ……

……

Date: …….

Class C Application: Section 32(5) (c)

(a) Approved/Refused
(b) Reasons for refusal ……
Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

(c) Approved/Refused by the Village Assembly
(d) Reasons for refusal ……
Signed, on behalf of the Village Assembly ……

Advice by the Commissioner of Lands:

……
……

Signed …….

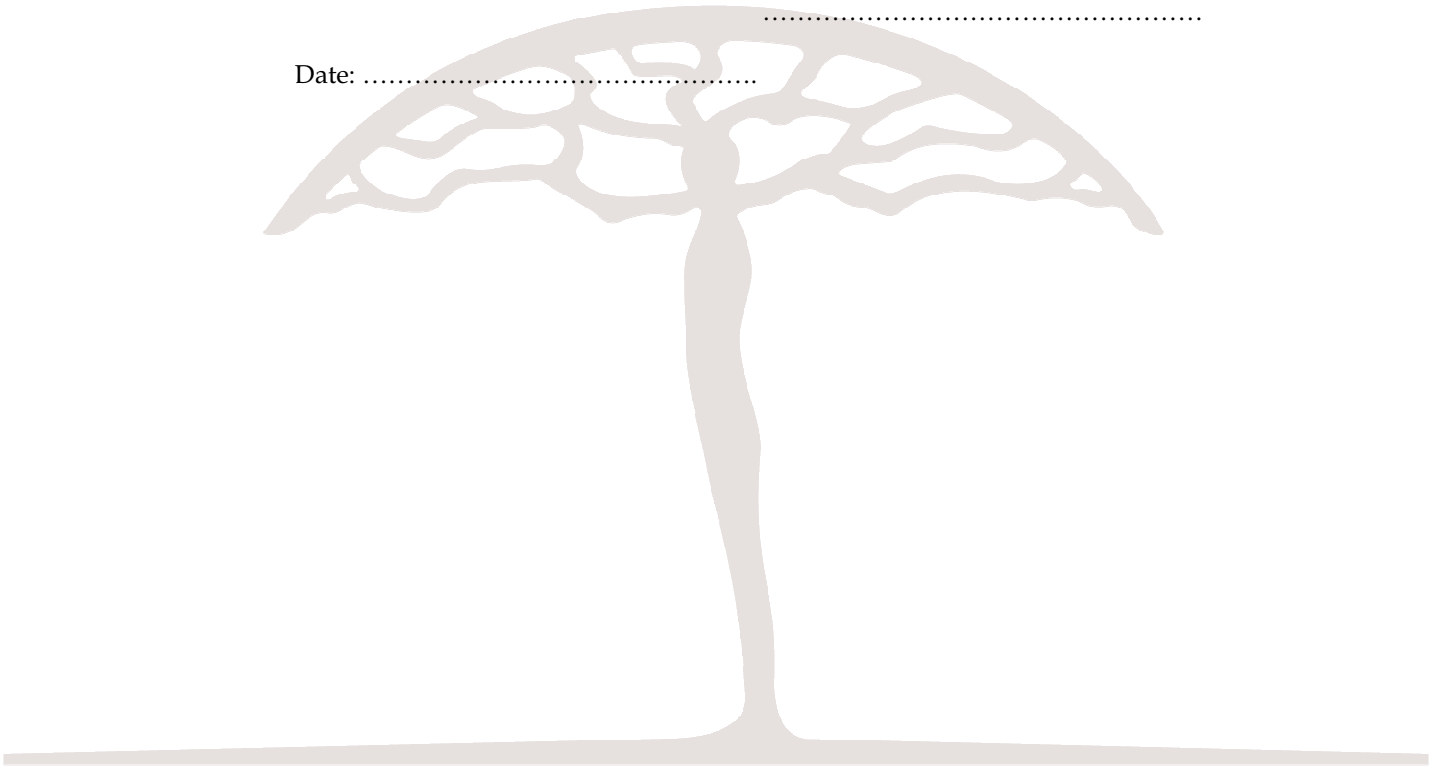
Date …….....

Served upon me/us

Signature of Applicant(s) ……

……

Date: …….



Village Land Form No. 28

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999

(No. 5 of 1999)

APPLICATION FOR GRANT OF A DERIVATIVE RIGHT

IN THE VILLAGE LAND

(Under Section 32)

Ref. No. ……

PART I

I/WE …….
HEREBY APPLY FOR a GRANT of derivative right in the village land under the above reference:

1. Nature of derivative right …….. (state name of the disposition) ……..……..
2. Particulars of purchase/assignee/lessee/mortgage (if not a prescribed lender) …… ……
   Signed ……

   …… (Applicants)

   Date: ……

PART II

For Official Use Only

NB: ***If this application for a lease, you must refer to section 32(5) of the Village Land Act in order to known how to deal with it. For leases, go to 2 below.***

1. For applications other than leases

(a) Approval/Refused
(b) Reasons for refusal ……
Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

2. For application for leases

Class A Application: section 32(5)(a)

(a) Approval/Refused
(b) Reasons for refusal ……..
Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

Class B Application: Section 32(5) (b)

(a) Approved/Refused

(b) Reasons for refusal ……

Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

(c) Approved/Refused by the Village Assembly
(d) Reasons for refusal …….
Signed, on behalf of the Village Assembly: ……..

Date: …….

Served upon me/us

Signature of Applicant(s) ……

……

Date: …….

Class C Application: Section 32(5) (c)

(a) Approved/Refused

(b) Reasons for refusal ……
Signed ……..

Chairman, Village Council

……

Secretary, Village Council

Date: ……

(c) Approved/Refused by the Village Assembly

(d) Reasons for refusal ……
Signed, on behalf of the Village Assembly ……

Advice by the Commissioner of Lands:

……

Signed ……..

Date ……..

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……

PART TWO

2.0 MORTGAGES

What is a mortgage? There are many ways of defining a mortgage. For the purposes of this guide, however, we think that a more informative definition is that given by Cheshire and Burns. They define a mortgage thus:

... a conveyance or other disposition of an interest in property disguised to secure the payment of money or the discharge of some other obligation. The party who conveys the property by way of security is called the mortgagor and the lender or obligee who obtains an interest in the property is called the mortgagee, and the debt for which the security is created is termed the mortgage debt. The mortgagee since he is the grantee of a proprietary interest acquires a real, not merely a personal security that prevails against the general body or creditors in the event of the mortgagor's bankruptcy. He is not only a creditor of the mortgagor, he is secured creditor.

From this informative definition, we get to know what a mortgage is; who the parties to a mortgage deed are, to wit, a mortgagor and a mortgagee; and the advantages of security of a loan against a security in the form of a mortgage.

The mortgage, however, is not the only method of ensuring the loan. There are other ways of creating a security for a loan which are different from a mortgage; these include a lien, a pledge and a charge. We examine these below.

2.1 A LIEN

At common law, a lien may arise in equity or under certain statutes. A common law lien is the right to retain possession of the property of another until a debt is paid, thus a garage proprietor has a common law lien upon a motorcar repaired by him. This lien is a mere passive right of retention giving no right to sell or otherwise deal with the property, and is extinguished if the creditor parts with possession to the debtor or his agent.

An equitable lien exists independent of possession, that is, it may bond property not in possession at the time the obligation is incurred, but it can not stand against the purchaser of a legal estate for value without notice of the lien. This lien resembles a mortgage in a way, but is

different from a mortgage since a mortgagee's right is founded on contract where as an equitable lien is founded on general principles of equity which do not permit a man who has acquired property to keep it without payment. For example, a seller of land who has already conveyed it to a buyer without receiving the full purchase price has an equitable lien on the land for the unpaid balance.

A statutory lien is created by statute and its terms depend on the given statute. Statutes related to railways, shipping, road haulage, etc are common examples where statutory liens may be created. For example, a maritime lien will usually arise on a ship depending on whether the ship was taken as security against some form of credit.

2.2 A PLEDGE

This is usually a transfer of the possession, but not ownership, of a chattel as security for the payment of a debt or performance of an obligation; on default, the chattel may be sold. The difference between a mortgage and a pledge is that while in a pledge the lender has the possession and certain powers of sale, the general property ownership in the goods remains with the borrower; in a mortgage, on the other hand, the lender acquires ownership while the borrower usually retains possession of the mortgage property. The individual who makes it his business to take goods and chattels as security for credit is known as a pawnbroker and the pledged chattel as a pawn. It is thus a form of bailment.

2.3 A CHARGE

A charge is a form of security for the payment of a debt or performance of an obligation, consisting of the right of creditor to receive payment out of some specific fund or out of the proceeds of the realization of specific property. The fund or property is said to be charged with the debt thus payable out of it.

For most practical purposes, a charge should be regarded as a mortgage. Nevertheless, there is an essential difference between a mortgage and a charge. A mortgage is a conveyance of property subject to a right of redemption, where as a charge conveys nothing and merely gives the chargee certain rights over the property as security for the loan. A question arises as to the position of a registered mortgage. In this form of a mortgage, a mortgagor offers registered land

as security. This system dispenses with the transfer of an estate and has concretized the view that a mortgage is a charge only and not a transfer of an estate.

Note: a mortgage is always a better form of security, especially as far as the creditor is concerned. This is so because a mortgage arises out of contract and in the event of default, all the rights of a wronged party in a contract arise and these are known and help simplify matters. All the other forms of security discussed above are not contractual and are bound to create a number of problems on default.

2.4 THE POWER TO CREATE MORTGAGE

The Land Act under section 113 confers the right to any holder of the right of occupancy to create a mortgage. It is provided that:

113(1) An occupier of land under a right of occupancy and a lessee may, ***by an instrument in the prescribed form,*** *mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition.*

Note that the Act echoes the requirements for the disposition of the right of occupancy. One such requirement which is being stressed in section 113 is that disposition can only be carried by an instrument in the prescribed form.

So the first requirement for the creation of the mortgage is the possession of either the right of occupancy or a lease. The right of occupancy or lease presupposes ownership of a title deed or a leasehold title for the subject land.

The power to create mortgages under the Land Act includes the power to create third party mortgages, second and subsequent mortgages as per section 113 (2). A third party mortgage is a mortgage created by a third party who executes a guarantee arrangement with the mortgagee (the lender).

Note: in accordance with section 113, any owner of the right of occupancy can legally create a mortgage. Note further that by virtue of section 2 of the Land Act, a mortgage is a disposition. So, just as we have seen in the transfer of the right of occupancy, all requirements concerning the disposition of the right of occupancy will apply to the mortgage. Bear in mind that all conditions attached to the disposition of the right of occupancy will equally apply to the creation of a legal mortgage. Thus all other conditions, such as registration, will have to be adhered to. In this regard, section 113(4) of the Land Act, is decisive. It enacts that a mortgage will take effect only when it is registered in a prescribed register. It further provides that a mortgagee shall not be entitled to exercise any of his remedies under that mortgage if it is not so registered.

2.5 TYPES OF MORTGAGES

2.5.1 THE LEGAL MORTGAGE

This is the mortgage which arises by way of contract between a lender and a borrower. Usually a document would provide for the parties involved, the consideration involved, that is, the loan sum, and would convey the land to the mortgagee. It would also provide for redemption by the mortgagor and a reconveyance of the land by the mortgagee in certain period of time.

It is important to note, however, that the provision of a contractual date of redemption is not as useless as it may appear. It is on this date that the mortgagor's right of redemption arises and when certain rights and remedies accrue to the mortgagee.

From the contractual date of redemption, the mortgagor has an equity of redemption. He may convey interests in that equity to other parties. He may thus create another mortgage after the

legal estate has been conveyed. This second and subsequent mortgages are thus merely equitable mortgages. A complication may arise where all the principal sum and interest has been paid up but the mortgagee has not reconveyed the mortgaged property back to the mortgagor. At law, any mortgage created on the said property at this stage will still be an equitable mortgage, since the legal estate is still with the mortgagee.

The receipt made would operate as an automatic discharge of the property from the mortgage and also as a reconveyance. Where the receipt did not comply with the statutory requirements, then a mortgagee who took a conveyance of the mortgagor's property is bound to reconvey the estate to the mortgagor and the mortgagor has to insist on a reconveyance at the time of repayment.

2.5.2 THE EQUITABLE MORTGAGE

This type of a mortgage may arise in the following circumstances:

(a) The mortgagor's failure to execute an instrument which is sufficient to transfer the legal estate; or

(b) Due to the fact that the mortgaged property is equitable. This is often the case where mortgages are created after a legal mortgage and are based on the equity of redemption.

2.5.2.1 AGREEMENT TO CREATE A LEGAL MORTGAGE

Under the fundamental maxim of equity that "equity looks on that as done which ought to be done" and another that "equity looks at the intent rather than the form", an imperfect document

purporting to create a legal mortgage will be taken to be an equitable mortgage. The intention of the parties can be established by parole evidence, and since the legal mortgage is not transferred, the remedy in the case of default is usually not foreclosure or sale but specific performance.

Specific performance in relation to an equitable mortgage will entail the court to make an order for the execution of a legal mortgage drawn in accordance with the terms of contract. It must be noted that where the contract is for a loan of money, it is not specifically enforceable while it is still executory on both sides. The remedy, if any, is damages, so if the loan is to be granted by installments or if there is an agreement for further advances to be granted on the same security, the agreement is at any given time an equitable mortgage only to the extent of the moneys which have in fact been paid over.

Courts in East Africa have treated a defective document evidencing a registered mortgage as an equitable mortgage if steps are taken to protect it by entry on the register. In the case of **Guaranty Discount Co. Ltd. v Credit Finance Corporation Ltd. and Another, (1963) E.A 345**, it was held, inter-alia, that, defective documents create an equitable mortgage. In yet another case, **Ottoman Bank v Hanna Ghari (1961) E.A 419**, it was held, inter-alia, that a memorandum to create a legal mortgage creates an equitable mortgage. Under the Land Registration Act, the equitable mortgage is protected under section 64, by depositing title deeds with the Registrar showing intention to create a lien.

2.5.2.2 THE DEPOSIT OF TITLE DEEDS

Since a mortgage is an interest in land, it cannot be enforceable in the absence of a written memorandum or an act of part-performance. The case of **Russell v Russell (1783), I B60, C.C. 269**, however, held that where there has been mere delivery of title deeds with the intention of creating security for a loan that will be enough evidence of an agreement for mortgaging the property and a sufficient act of specific performance. In that case, an equitable mortgage will have been created.

The central principle in this kind of transaction is the intention of using the documents for purposes of security. Mere deposit of title deeds by, say, a customer to the bank for an overdraft cannot be said to have created an equitable mortgage in respect of the said overdraft.

Note that for the mortgage transaction to be effective against third parties, it must be registered under the Registration of Document Act (CAP 117R.E. 2002), as per section 8(1). Its section 8(2)(g) provides thus:

S.8(2)(g) any endorsement on a mortgage deed or charge acknowledging the payment of the whole or any part of the money secured thereby and any other receipt for payment of money due under a mortgage or charge when the endorsement or receipt does not purport or operate to extinguish the mortgage or charge.

The mortgage by deposit of title deeds is usually accompanied by a memorandum stating the terms of the mortgage. This memorandum is executed under seal to enable a mortgagee to exercise certain statutory remedies. Note that under the Companies Act (CAP 212 R.E. 2002), this is not necessary.

It is pertinent to mention here that a mortgagee under an equitable mortgage has one major problem. He can not pass the legal estate of his mortgagor to a purchaser although he has the power of sale. This is because the mortgagee has a mere equitable estate, which can not pass the legal estate. He can convey the legal estate to the purchaser only in the following two ways: First, he can get the mortgagor to declare that he holds the legal estate in trust to convey it as the mortgagee shall from time to time direct. This declaration of trust will enable the mortgagee to compel the mortgagor to pass the legal estate to the purchaser. Second, he can get the mortgagor to appoint the mortgagee as the mortgagor's attorney to make the conveyance on a sale under the express or statutory powers. Either the power of attorney or the declaration of trust, or both, may be inserted in the memorandum so as to allow the mortgagee to deal with the legal estate.

2.5.2.3 MORTGAGE OF AN EQUITABLE INTEREST

The mortgage of an equitable interest is of necessity equitable. It is created like the legal mortgage, that is, by assignment of the entire equitable interest to the mortgagee, subject to the proviso for reassignment on redemption. It, however, does not pass the legal estate to the subsequent mortgage. The equitable mortgagee cannot pass what he does not possess himself. The first equitable mortgagee should protect himself by giving a notice to the Registrar for registration of the equitable mortgage as an encumbrance pursuant to section 64 of CAP 334. This is the position with registered land. In the case of a non-registered land, the mortgagee

should give a written notice of the mortgage to the owner of the legal estate in order to protect himself.

2.5.3 THE REGISTERED MORTGAGE

Note that not all titles to land are registrable under the Land Registration Act (CAP 334 R.E. 2002). According to S.27 of CAP 334, titles of land in form of government leases and certificate of occupancy acquired after the coming into force of the Land Registration Act had to be registered in the name of the grantee or occupier. This provision exempts from registration two types of right of occupancy.

The first is those granted for a term of five years or less. Such a right of occupancy can only be compulsorily registrable under CAP 334 if its terms leave an option to the grantee or occupier to apply to the President for an extension of time, in such a way that the extended period when added to the original term exceeds five years.

The second type of right of occupancy which is non-registrable under CAP 334 is the year to year right of occupancy. Here again the title may be registrable if the initial term of the title exceeds four years.

If such land as precluded under the above quoted section is mortgaged, it may be registered under the Registration of Documents Ordinance, CAP 117 sections 8(1), 9 and 10 thereof. However, the formalities of a registrable mortgage will not be followed because such rights of occupancy for a period of five years or less are not registrable under CAP 334 as per section 27 already quoted above.

The registered mortgage is created where the mortgagor offers registered land as security for acquiring a credit of any nature. This type of a mortgage is quite similar to the legal mortgage but some of its elements are provided for by statute. A fundamental element of the registered mortgage is the stipulation, under section 57 of CAP 334, that a ***mortgage shall not operate as a transfer of the mortgagor's estate.*** It stipulates further that on registration, the lender shall have all the powers and remedies and be subject to all the obligations that would be conferred or implied in a transfer of an estate subject to redemption. The mortgage here does not vest in the mortgagee any estate; it only renders the registered title subject to such power of disposition as the statute declares. These powers are those of a legal mortgagee under law, or in other words

the remedies available to the mortgagee in case the mortgagor fails to redeem the mortgaged property.

Section 57 of the Land Registration Act is also echoed in the Land Act, under section 116(1). This provision enacts that:

(1) On and after the date of the commencement of this Act, a mortgage shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the mortgagor to the mortgagee but the mortgagee shall have, subject to the provisions of this Part, all the powers and remedies in case of default by the mortgagor and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption.

CAP 334, however, under section 62, implies certain covenants on the part of the mortgagor in the agreement for a registered mortgage. Under S.62(a), there is an implied covenant for redemption of the principal sum and interest; S.62(b) gives a covenant on the part of the mortgagor to repair and keep in-repair all the buildings and any other improvements. The lender is allowed to inspect the land and any improvements thereon provided that reasonable notice to the borrower is given. This covenant almost makes the registered mortgage a transfer of an estate which it is not supposed to be. S.62(c) gives a covenant to insure all buildings on the land in the joint names of the borrower and lender with insurers approved by the lender. This is a necessary safeguard in favour of the lender for in case any misfortune should befall the mortgaged property, he/she still can recover the principal sum and interest from the insurers. S.62(d) provides a covenant on the part of the mortgagor not to lease the mortgaged land for a period of more than one year without the prior consent of the mortgagee. This is to safeguard the interests of the mortgagee in case the mortgagor would decide to lease the mortgaged land for a period longer than the mortgage period. In a case of this nature, if the mortgagor defaulted in payment of the principal sum and interest, the mortgagee would be faced with a security which is already a security for yet another credit and this would cause some difficulties and embarrassment. S.62(e) gives yet another covenant: to wit, the mortgagor has to pay, perform and observe the rent, covenants and conditions affecting the mortgaged property and keep the mortgagee identified against all proceedings, expenses and claims out of the breach of this covenant.

Since the registered mortgage does not entail a conveyance of an estate, the mortgage has no interest to re-convey on payment of the debt. A discharge of the debt does not, therefore, operate

as re-conveyance. The state of the title is that which appears or is mirrored on the register from time to time. Registration of a discharge simply amounts to getting rid of the mortgage as a charge upon the estate of the registered owner.

The substance of the form must be generally followed and any variation must not conflict with the substance of the statute. However, by virtue of section 43 of CAP 334, any implied covenant by virtue of the statute can be negatived or modified by express declaration in the deed.

It is noteworthy to mention here that for the registered mortgage it is quite possible to create a second and subsequent mortgages which may be exactly the same in nature as the first. As such, under CAP 334, when such subsequent mortgages are accompanied by proper formalities, they will be considered as statutory or registered mortgages and not equitable mortgages and their priority shall be according to the order of registration, and not according to the order by which they were created.

2.5.4 THIRD PARTY MORTGAGES

Section 112 of the Land Act defines a third party mortgage to mean a mortgage which is created or subsists to secure the payment of an existing or future or a contingent debt or other money or money's worth or fulfillment of a condition by a person who is not the mortgagor, whether or not in common with the mortgagor.

2.5.5 CUSTOMARY MORTGAGES

Section 115 (1) of the Land Act provides that customary mortgages are mortgages which their creation and operation are in accordance with the customary law applicable to the land in respect of which the customary mortgage is created.

2.6 CONSENT TO MORTGAGE A PROPERTY

The issue of consent is serious problem when it comes to mortgaging of a matrimonial home. The law requires that individuals, husband and wife, should express their informed consent if the mortgage was to be considered valid. The import of section 114 of the Land Act is that the expressed consent should be an informed one. That is the reason why the Act requires a document as proof of such consent. Thus, a lawyer involved in mortgaging a property which falls into the category of a matrimonial home should make sure that before any meaningful

discussion, consent is extracted from the spouse of the mortgagor. Failure to do so will wreck the transaction.

2.7 THE RIGHTS, DUTIES AND REMEDIES UNDER A MORTGAGE

The mortgagee has the following rights under the mortgage where the mortgagor fails to discharge the mortgage, per section 126 of the Land Act:

(a) Appoint a receiver of the income of the mortgaged land;

(b) Lease the mortgaged land or, where the mortgaged land is of a lease, sub-lease the land;

(c) Enter into possession of the mortgaged land; and

(d) Sell the mortgaged land.

2.8 LAND FORMS AFFECTING MORTGAGES

Land Form No. 54

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

CONTRACT OF MORTGAGE

[Under Section 64]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I,...……. of ……..
HEREBY AGREE to take a loan/overdraft and to create a mortgage of the right of occupancy registered under the above reference in favour of ……. …… of ……..

1. Particulars of the Borrower ……
2. Particulars of the Lender (state whether a "prescribed lender") ……
3. (a) Loan (state whether term loan or overdraft) ……
   (b) Purpose of term loan/overdraft ……
4. Rate of interest ……
5. Description of the property to be mortgaged ……..
6. Terms of repayment ……..
7. Duration of the mortgage …….
8. Date of execution of the mortgage deed/date of creation of the lien by deposit of documents ……
9. Covenants by the Borrower/Mortgagor ……
10. Representations and Warranties by the Borrower/Mortgagor …….
11. Events of default ……
12. Notice ……

Dated at …….. this …… day of ……

_____ _____

Mortgagor/Borrower Signature of the Lender

Witness Witness:

1. Name:……. 1. Name:……
2. Signature:…… 2. Signature:……

Land Form No. 40

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

MORTGAGE OF A RIGHT OF OCCUPANCY

[Under Section 112]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I/WE …… of ……. HEREBY MORTGAGE the right of occupancy registered under the above reference to …… of …… to secure the sum/overdraft/existing or a future or a contingent debt or other money or money's worth of shillings of …… (Shs. ……) with interest at ……. per centum per annum payable or to secure the fulfilment of the following condition ……

The building on the land the subject of the right of occupancy is a matrimonial home/not a matrimonial home.

1. (Signature and attestation): ……

2. (Signature and attestation): …… Fee: ……

c.c. Spouse of the borrower

Land Form No. 41

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

MORTGAGE OF A LEASE

[Under Section 112]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I …… of ……. HEREBY MORTGAGE the leasehold estate registered under the above reference to …… of …… to secure the sum/overdraft/existing or a future or a contingent debt or other money or money's worth of shillings of …… (Shs. ……) with interest at ……. per centum per annum payable or to secure the fulfilment of the following condition ……

……

1. (Signature and attestation): ……
2. (Signature and attestation): …… Fee: ……

Land Form No. 44

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

DISCHARGE OF MORTGAGE

[Under Section 120]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

WE,..……..

…… of

…….

…… being the mortgagor and owner/mortgagee, respectively, HEREBY AGREE to the DISCHARGE of the mortgage registered on Field Document Number ……..

1. (Signature and attestation): ……

2. (Signature and attestation): ……

PART THREE

3.0 LEASES

3.1 CREATION OF LEASES

Under the general law of leases, since a tenancy is contractual, the normal laws of contract would follow. The lease can thus be created orally or in writing. However, it is hard to create a legal estate in a lease without a deed; even a legal assignment of a lease cannot be affected without a deed. The powers to create leases are specifically provided for under section 78 of the Land Act. Section 78(1) provides as follows:

(1) Subject to the provisions of this Act, the holder of a granted right of occupancy may lease that right of occupancy or part of it to any person for a definite period or for the life of the lessor or of the lessee or for a period which though indefinite, may be terminated by the lessor or the lessee, and subject to any conditions which may be required by this Act or any other law applicable to leases or which he may think fit.

The lease must be created in the proper way:

If the lease is created in the proper way it becomes a ***legal lease***. Such a lease has to follow the above-mentioned steps as modified by the relevant statutes. In other cases, an ***equitable lease*** is created. Such a lease is only assumed to be existing at equity and not at law it exists in the following circumstances:

Informal lease which is void at law:

Where requirements for creating a legal lease were not followed, no legal estate passes. However, if a tenant goes into possession, with the landlord's consent, a tenancy at will arises. If he further pays rent, a periodic tenancy arises which would either be yearly, monthly or weekly depending on the mode the rent is paid. The terms for such tenancy would be those which are consistent with the periodic tenancy.

The effect of contract:

Where the lease was imperfect, it could not pass a legal estate. However, a court of equity could take it to be a contract to grant a lease. Such a contract is made for value and evidenced in writing, or supported by a sufficient act of part performance. The court of equity would treat it as a contract to grant a lease and then on the doctrine of part performance order a Specific Performance to grant a legal lease. Then after that the position of the parties would be as if a legal lease has passed by a deed: **Walsh v Lonsdale, (1882) 21 Ch.D.9**.

What are the differences between legal and equitable leases? Though the effect of the holding in Walsh v Lonsdale is to make both almost similar, there are important differences.

Specific Performance: This is a discretionary remedy; complications would definitely arise where the court would not give the remedy.

Easements: Certain easements and similar rights can only be granted if there is a legal estate and they cannot be created by a mere contract.

Third parties: The rights which are assumed to exist at equity by Walsh v Lonsdale in a contract to lease are only between the parties and do not go to third parties. Thus a third party cannot demand the specific performance of a contract assigned to him. The original tenant's right to specific performance is not transferable.

Secondly, the rights of a tenant under an agreement for a lease, being merely equitable, are subject to the same frailty as all equitable interest, namely, they are void against a bone fide purchaser for value of a legal estate without notice of them. However, nowadays the requirement of registration ensures notice as such may render the agreement to lease assure as an actual lease.

3.2 FORMALITY REQUIRED IN CREATION OF LEASES

Every lease for a period over five years should be registered for it to be enforceable at law. But a lease for less than five years needs not be registered: see section 27 of CAP 334. Note that a lease is a disposition. Section 41 of CAP 334 provides that no disposition shall be registered unless it has been effected by a deed:

(a) In the prescribed form; or

(b) Where no form is prescribed, in such form as the Registrar may approve, and satisfies the requirements of this Act and of any other relevant law.

What is a deed? S.2(1) CAP 334 provides as follows:

Deed means an instrument in writing whereby a disposition is or is intended to be effected.

How is a deed to be executed?

S.91 (Requirement for execution):

*No deed shall be registered unless **executed** by all persons who are parties thereto and **attested** in accordance with the provisions of this ordinance.*

S.92 (Procedure of execution): Provides that a deed is executed when it is signed and delivered by a natural person as sealed with a common seal of a corporation and delivered.

S.93 (Procedure of attestation): Where it is signed by natural person either as a party thereto or on behalf of a corporation not having a common seal (where it has a common seal by those authorised by law or charter or Articles of Association), it is attested by an authorised witness.

S.93(2) provides who are the authorised witnesses who witness the signature and sign attestation clause in the prescribed firm.

r.9 Documents to be written legibly in English

r.10 Size and quality of paper to be used

r.11 Authorised witnesses

r.12 Attestation clauses

Such a conveyance which is a lease of less than five years is not compulsorily registrable even under Registration of Documents Ordinance CAP 117. For under S.8(1) of that Ordinance documents which are compulsorily registrable are outlined. Under S.8(2) some documents are accepted which include: S.8(2) (h):

Any document evidencing the grant of a lease, or right of occupancy, for a term of 5 years or less, or any document if the only interest in land dealt with thereby is derived from such a grant, or is an interest in standing trees or timber or growing crops or grass, where such trees, timber or growing crops or grass are to be removed within one year from the date of the document.

The above then would seem to be the necessary requisite for creation of a lease. It would seem that for leases under five years, not only is consent unnecessary, even registration is unnecessary.

Note that failure of registration under S.41(2) CAP 334 would only render the document bad as against third parties but not in between the parties. Under S.55, a lease does not necessarily begin on the day of execution; it can be made to begin on a future date agreed. Therefore execution and effect need not coincide. Thus the formalities are generally as follows:

(1) The conveyance of a lease as regulated by the Land Act (CAP 113 R.E.2002).

(2) The registrability of land as required by the Land Registration Act (CAP 334 R.E.2002).

(3) Under the Land Registration Act, no disposition is effectual unless it is registered (S.41(2)). For the registration one has to execute a deed in the prescribed form (SS 41(1); 91, 92, 93, LR 8). The prescribed form is L.R. 8.

(4) Even where a lease is for less than five years but includes an option whereby a tenant can require the landlord to exceed the term over five years, the lease is registrable (S.54(1)).

(5) A lease created by a R/O for a term of five years or less is not registrable and no writing is required.

A lease of the R/O for agricultural purposes requires consent (Regulation 6 of 1948 Regulations). Since it requires consent, writing is necessary. Absence of consent does not invalidate the lease inter-partes.

3.3 TYPES OF LEASES

The Land Act provides for five types of leases:

(i) Periodic Leases, see section 79 of the Land Act;

(ii) Short Term Leases, see section 80 of the Land Act;

(iii) Leases terminating on the occurrence of future event, see section 81 of the Land Act;

(iv) Future Leases, see section 83 of the Land Act;

(v) Tenancy at Sufferance, see section 82 of the Land Act.

Leases for a fixed period (Periodic Leases)

This kind of a lease is given for a certain period of certain duration no matter how long or short. The primary principle here is that this period must be fixed. Both the commencement and expiration of lease must be certain before the start.

The law may require certainty possibly to distinguish leases from freehold estates which are uncertain. Or it may be to enable a more efficient method of exchange of land for when the term is certain even the approximate value of the lease can be rendered possible. In that way there maybe lesser disputes.

At times a lease provides for an option to renew the lease. Now such options might bring difficulties in ascertaining the period. Courts have emphasised that such options have to be very clear.

Reversionary Leases

This kind of lease is synonymous with what can be termed as a future lease. A landlord would usually make a reversionary lease where someone is in possession and would vacate land sometimes in the future, and either the landlord or the tenant might not be around to execute the lease. However, by S.55 CAP 334:

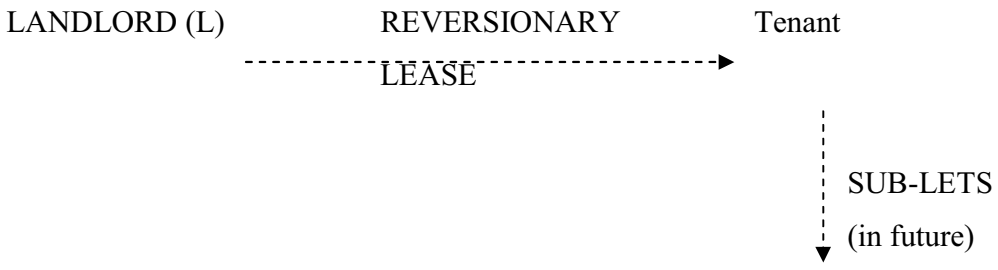
A lease of registered land may be made for a term to begin on a future date, not being later than twenty-one years form the date on which the lease is executed.

The time of execution and commencement of the lease should not exceed 21 years.

Interessee termine

This means an interest in the term. Where a reversioner grants a reversionary lease to a tenant, the tenant does not acquire a legal estate for that can only be acquired by actual possession. Now, since actual possession can only be effected in future, the tenant cannot have a legal estate to pass, he cannot even create a sub-lease for the future. If he does so, he cannot even claim rent through distress since such a right only goes to a reversioner of a legal estate. His interest is a mere interesse termini:

In case of default by the sub-lessee the lessee will not get the remedy of distress since when he gave the sub-lease he had no reversionary interest.



- When the sub-lessee deflates the tenant cannot destrain since when he gave the sub-lease he had no reversionary interest.

Determination

The general rule is that a tenancy or lease for a term certain determines with the effluxion of time. There is no requirement of notice by either the tenant or the lessor. Notice is only required in periodic tenancies.

Periodic Leases

These are divided between:

(a) Yearly tenancies;

(b) Monthly, weekly and other periodic tenancies (eg quarter to quarter, etc).

However, the rules which govern the yearly tenancies are the same for all periodic tenancies. Therefore we should treat only the year-to-year tenancy.

Creation

The tenancy can either be created expressly or impliedly. It is created expressly where there is an express grant to a tenant "from year to year" or as a "yearly tenant".

A yearly tenancy is created by implication where a person occupies land with the owner's consent and pays rent which is accepted and such rent is paid in reference to a year. Thus, firstly, a year-to-year tenancy may arise through the mode of payment of rent. If the rent is paid and accepted yearly, then there is yearly tenancy

And secondly, a yearly tenancy may arise by implication when a tenant under a leasehold for a term certain holds over, ie when he goes on staying after the term certain. In such cases, if rent is paid on a yearly basis, then the tenant has a yearly tenancy. In such a case, the tenant would hold over under such terms of the expired lease as are not inconsistent with a yearly holding, eg if the term requires a two-year notice for determination of a yearly tenancy, such a term would be inconsistent with a yearly tenancy.

Even where rent is paid more often, a yearly tenancy would still arise by implication if the period of reference to which the parties calculated the rent was a year

Determination

A yearly tenancy is characterised by continuity. Different from a tenancy for a fixed period, it goes on until proper steps are taken to determine it. If it is a year-to-year tenancy, a six-month notice is required. If it is a tenancy for lesser period, a notice equal to the length of the period is required.

The position for other periodic tenancies is similar to yearly tenancy except that while with yearly tenancy notice is implied to be half yearly, for other tenancies of less than a year notice is for the full period, subject to agreement.

Tenancy-at-will

This type of tenancy exists whenever a tenant with the consent of the landlord occupies land on terms that either party can determine the tenancy at any time. However, where a tenancy-at-will has been created without agreement on rent and then somehow rent is later paid on a periodic basis and accepted, a periodic tenancy is created.

A tenancy-at-will is determined:

(i) When one of the parties does an act which is incompatible with the tenancy (eg committing voluntary waste);

(ii) Where either party gives notice for the determination of the tenancy;

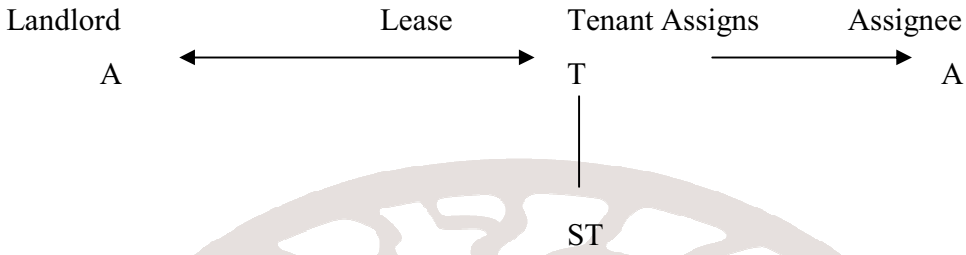
(iii) Where either party dies or assigns his interest in the land.

Tenancy at Sufferance

This kind of tenancy arises where the tenant, having entered upon land under a valid tenancy, holds over without the landlord's assent or dissent. Such a tenant differs from a trespasser in that his original entry was lawful, and from a tenant at will in that his tenancy exists without the landlord's assents. No rent is payable as such, but the tenant is liable to be paid compensation for his use and occupation of land. The tenancy may be determined at any time, and may be converted into a yearly or other periodic tenancy in the usual way, eg if rent is paid and accepted with reference to a year.

3.4 ASSIGNMENT OF LEASES

To assign is to transfer property. A person to whom property is assigned is known as the assignee. And a person who assigns or transfers property is known as the assignor. In the case of leases the transfer can be represented diagrammatically as follows:

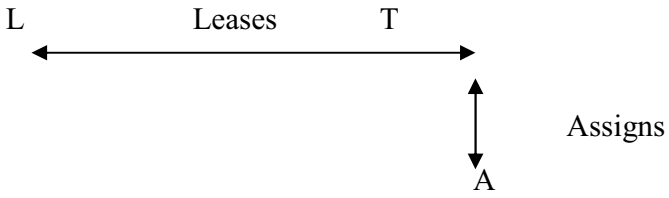


In case of assignment, the assignee (A) is subject, as a general rule, to the burdens and benefits of the lease. This position is provided for by CAP 334, S.49(1) which asserts that the assignee must observe covenant and conditions of the main lease.

49(1) In every transfer of a registered lease, there shall be implied a covenant by the transferee with the transferor to pay, perform and observe the rent, covenants and conditions by and in the lease reserved, contained and implied and on the part of the tenant to be paid, performed and observed, and to keep the transferor indemnified against all suits, expenses and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants and condition, or any of them.

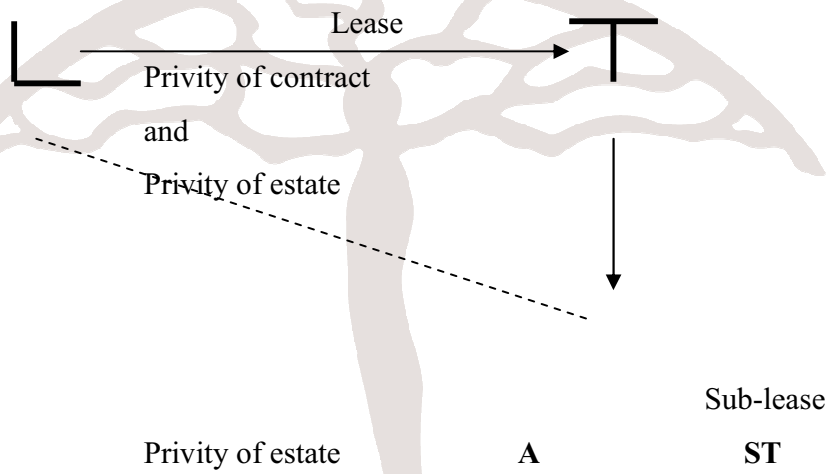
The general rule is that any covenant, ie a promise under seal contained in a deed, is enforceable as a contractual term. However, this rule is subject to the following rules in land law:

(i) If there is privity of contract, all covenants are enforceable. For as between parties to a contract, any term agreed upon can be enforced both at law by an action for damages, and in equity, by an injunction or specific performance. Thus:



There is privity of contract between L and T.

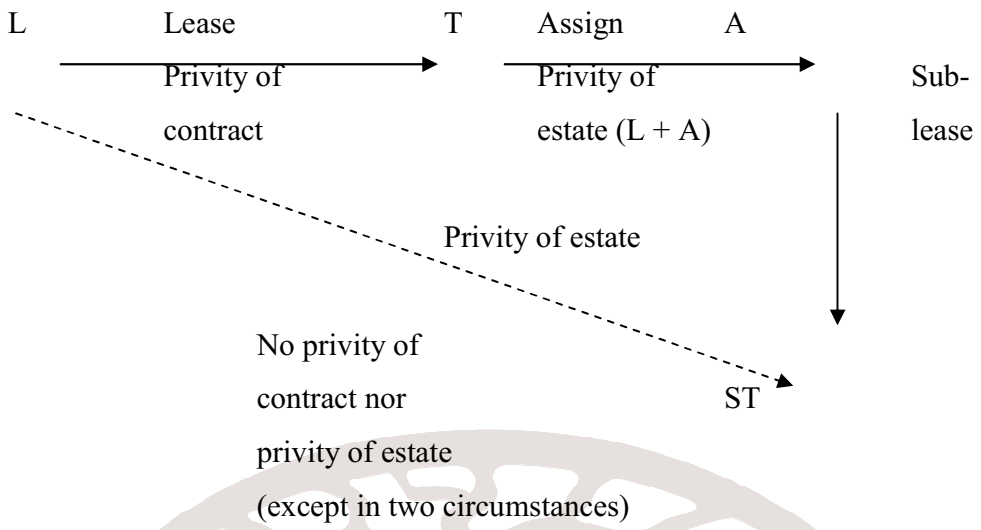
(ii) If there is merely privity of estate, only covenants which touch and concern the land are enforceable. Privity of estate is that which exists between lessor and lessee, lessor and assignee (but not lessor and a sub-lessee). In such a case, all covenants which concern and touch the land, eg covenants to repair, pay rent, not to assign lease without consent, not to build on certain parts of land, etc are enforceable both at law and in equity. But those which do not related to land, eg to pay annually some money to a third party, not to employ certain people, etc are not enforceable under privity of estate. Therefore:



But no privity of estate with subtenant

Habib Yusufali v Abdulsattal Riaziddin, Civ. App. No. 53 of 1992 (Discuss how the AB Act could not effect sub-tenants)

(iii) If there is privity, neither of contract nor of estate, then with two exceptions, no covenants are enforceable the lessor (L) and sub-tenant (ST) there is neither privity of estate nor privity of contract. Therefore the sub-tenant cannot be a party to any of covenants and the landlord has no remedy against him.



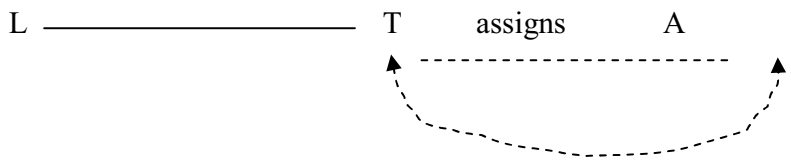
Thus when there is a transfer on an assignment, problems begin to arise of the question of what covenants are enforceable and what are the rights and liabilities of the parties. Note: our law requires a deed for all transfers even if it is under five years. Apparently it is so since the lease is transferred as a whole term.

3.5 PRIVITY OF ESTATE

In a lease between L and T there is privity of contract. Therefore T would become liable to L even if he assigns the property. Even L would be liable to T an assignment of the reversion not withstanding. The rights and liabilities of the assignees, on either a lease or a reversion, depend on whether or not a covenant in question touches and concerns the land. Any covenant which affects the landlord qua landlord or the tenant qua tenant may be said to touch and concern the land.

Therefore when one considers the rights and liabilities of assignees, it is important to ask whether the covenant passes with the assignment or not. Here one has to ask further whether the benefit of certain covenants (ie the right to sue on the covenant) passed or not; or whether the burden of a covenant (ie liability to be sued on it) passed. A benefit which goes with land normally passes, but those which ware burdens do not pass. They only affect the personal covenanter alone.

(a) Where the lessee assigns his lease:



So that the above rule maybe effective the following rules have to be considered:

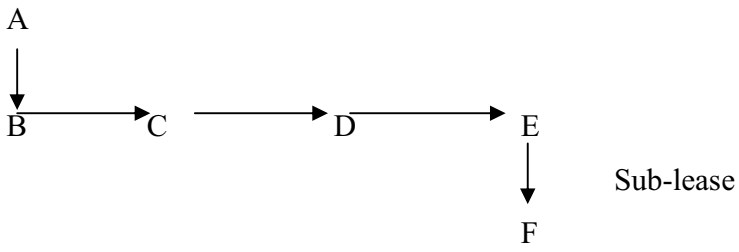
(i) The lease has to be in proper form (eg the above-mentioned rules on registration on registered leases, and consent provisions do apply).

(ii) There must be a legal assignment of the whole term. If it is even one day shorter than the full term it is a sub-lease and the sub-lessee cannot take any benefit or burden.

(iii) The liability of the assignee only arises when the lease is vested in him. Therefore he is not liable for any breaches made before the lease was transferred to him, nor for breaches after he assigns the property. Thus though the original lessee is liable continuously to the original lesser, for even future breaches is not liable once he assigns land, for his is only a privity of estate and only goes with the land.

(iv) Indemnities by assignees: If a covenant is broken, the lessor is entitled to sue either the lessee or the assignee. He can sue either or both but has no right to recover from both. The primary liability is with the assignee; if he sues the lessee then the lessee has an implied right to claim indemnity from the assignee. (S.49(1) CAP 334 puts in a statutory provision for indemnity.)

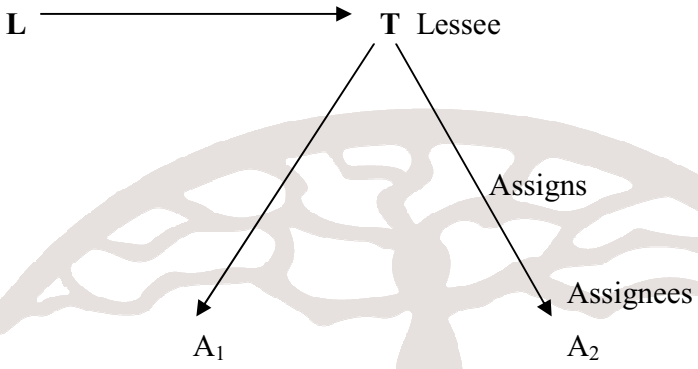
Thus where you have



In the above diagram, in a case where sub-lessee F breaks a covenant relating to the lease, A can sue either or both B and E: B under privity of contract and E under privity of estate. Where A

sues B, B has a right to claim an indemnity from E. Alternatively, if there was a covenant of indemnity when B assigned to C, he can claim from C and C from D and D from E, provided in each case the covenant for indemnity was assigned. Unless F's breach was a covenant in the sub-lease, he is liable to one.

However, in certain occasions there can be more than one assignee.

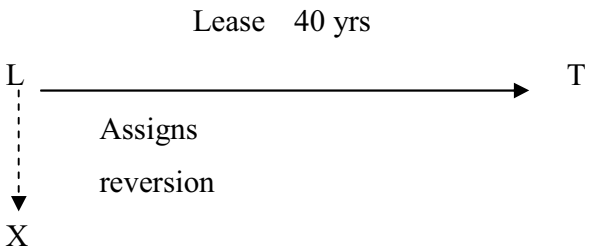


As long as T assigns to two assignees, each is liable for the full amount of damages for breach, and not a proportional share. There is a joint and several liability, ie the assignor (T) can choose to sue A_1 or A_2 or both.

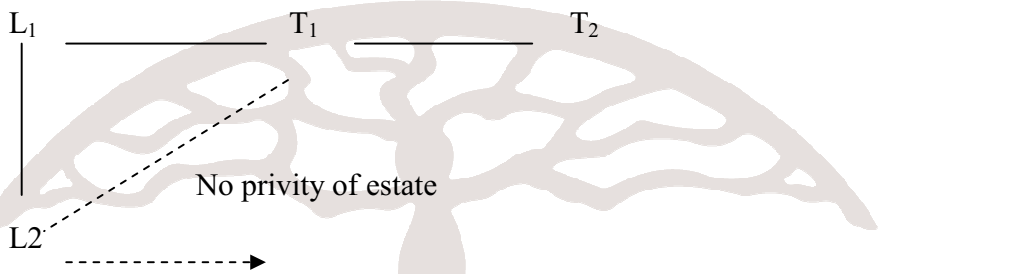
CAP 334, S.44 provides:

When in any deed a covenant is made or implied by or on the part of two or more persons, such covenant shall, unless the deed otherwise provides, be construed to bind such persons jointly and severally.

(b) Where the lessor assigns his reversion:

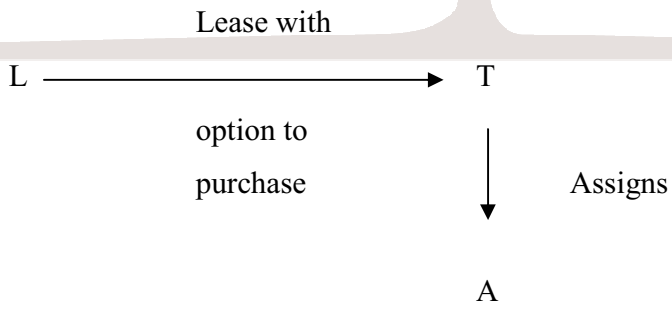


Strictly at common law, the reversioner, X, to whom the landlord (L) had assigned his interest could not get the benefit or be burdened by the lease. As far as liabilities are concerned, T is given an option: he can sue either X or L in case of breach. If he chooses X, then L becomes no longer liable. Here certain problems occur. Where L had a right to sue for damages or forfeit the lease and he does not so and instead he assigns his reversioner. His rights to sue for damages or forfeit the lease do not go with the assignment. However, the assignee can sue for a continuing breach the remedies of which are provided for in S.56 (3) CAP 334.



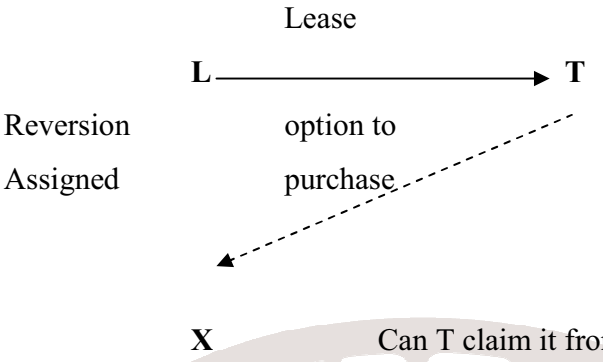
(He can still sue T1 since though T1 has no the land, therefore no privity of estate, neither has he privity of contract with L2, he can nevertheless be sued by L2 since the obligation of T1 is statutory.)

What if the lessor given an option to T to buy the reversion after giving notice? In case T assigns the lease to A, can A exercise the option?



The covenant to sell the reversion does not touch and concern the land at common law. So it would not run automatically with the assignment. What then can T do so that A can exercise the option? He can particularly assign the option to buy to A for generally any contractual benefit is assignable. However, the word "assign" does not include sub-leases.

In case L assigns his reversion to X, can T still claim the option against X?



The burden of the option is generally placed on the covenanter. In this case it would be L. However, this would be taken as an encumbrance (ie a charge, liability or burden on land, eg mortgage). In this case, the question would be whether at the time of the assignment of the reversion to X, X had notice impliedly or expressly. If he had notice, then he would be bound by the covenant, if he hadn't then he will not be bound by that covenant.

3.6 LICENCES

An authority to do something which would otherwise be inoperative, wrongful, or illegal, e.g. to enter on land which would otherwise be a trespass. A licence passes no interest, and a ***mere licence*** *is always revocable. A* ***licence coupled with an interest*** *which is in the nature of a grant, e.g. of sporting rights, is revocable until the benefit granted has been enjoyed or reserved. A* ***contractual licence****, whether or not coupled with an interest, may be irrevocable, depending on the construction of the terms of the contract between the parties. If the time of enjoyment is not limited, the giving of reasonable notice of revocation will be necessary.*

Thus in land law there are times when one might have a mere permission to enjoy certain rights on land. That permission, if it carries no interest in land and confers no right to the exclusive possession of the land concerned, is termed a licence, eg to become a lodger in a house. There are four categories of licence:

(i) Bare licence:

- It is granted otherwise than for valuable consideration, eg to enter a field to view it. It can be revoked at any time without being liable for damages.
- It cannot be assigned.

(ii) Licence coupled with an interest, ie a licence coupled with an interest in land or chattels thereon, eg permission to enter land, hunt and take the animals killed or cut trees and take them away. There is a double right, the licence to enter and the right to take away something.

(ii) Licence for value: It resembles a bare licence since it is not assignable. Furthermore it can be revoked at any time even if it is given for a fixed period.

(iii) Licence by estoppel: An irrevocable licence to occupy or use land may be acquired through the operation of an equitable doctrine known as "proprietary estoppel". This arises where a landowner stands by and allows a person to spend money improving his own or the landowner's land in expectation that some covenant will not be revoked.

The different types of licences have different procedures as regards revocation. It would depend on the nature of the licence whether it is revocable or irrevocable. If it is revocable, in general, no period of notice need be given before revoking it though the licensee must be given a reasonable time in which to leave the premises.

Determination of leases: [see sections 99-110 of the Land Act]

3.7 LAND FORMS AFFECTING LEASES

Land Form No. 55

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

CONTRACT OF LEASE

[Under Section 64]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I,...……. of

……..

HEREBY AGREE to lease the right of occupancy registered under the above reference to

…….…… of …….

1. Description of the land to be demised ……
2. Duration/Type of Lease ……..…
3. Purpose of Lease ……
4. (a) Rent ……...
   (b) Mode of payment of rent ……...
5. Date of execution of the Lease ……..
6. Date of delivery of possession of the demised land to the Lessee ……..
7. Covenants by the Lessee ……
8. Covenants by the Lessor ……
9. Option to renew ……
10. Notice ……

Dated at …….. this …… day of ……

_____ _____

Signature of the Lessor Signature of the Lessee

Witness Witness:

1. Name:……. 1. Name:……
2. Signature:…… 2. Signature:……

Land Form No. 56

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

DERIVATIVE RIGHT

[Under Section 20]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

Made and entered into this …… day of …… 20……

BETWEEN

TANZANIA INVESTMENT CENTRE

A Body Corporate established under the **TANZANIA INVESTMENT ACT NO. 26 of 1997** by order published in the Official Gazette as Government Notice No. 291 of 1997, (hereinafter referred to as "**the Lessor**") on the one part

AND

M/S ……..

(hereinafter referred to as "**the lessee**") on the other part

THIS LEASE WITNESSES as follows:

WHEREAS the Lessor is the holder of a Right of Occupancy registered in the Land Registry at …… under Title No. …… in respect of land within …… in the …… and in the terms thereof is authorized to grant leases, the Lessor hereby demises unto the Lessee(s) the land being more fully described in the schedule hereto for a term of …… commencing on the …….. day of …… 20……. and expiring on the ……. day of …… 20……. Subject to the provisions of the Land Act No. 4 of 1999 and regulations made thereunder and subject to the following conditions:

The land shall be used for the following purposes: …… …… ……

PART A: THE LESSEE(S) SHALL

1. PAY in advance to the Lessor the Rent and/or other charges ……

2. ERECT or cause to be erected on the land a building or buildings (hereinafter referred to as "the improvements") in such materials and in accordance with specifications as the Lessor may require, and to that end shall:-

(i) On or before the ……. day of …… 20…… submit for approval by the Lessor and the relevant Authority such plans drawings, specification and other information as may be required by the Lessor in respect of the improvements proposed to be erected;

(ii) Within ……. months from the date of notification by the lessor of approval of the aforementioned development proposals, commence building on the land the improvements in accordance with such plans and specifications;

(iii) Proceed continually from the commencement of building and complete the improvements in accordance with the plans and specifications so that they are capable of use and occupation on or before the …… day of …… 20……..;
(iv) Throughout the remainder of the term hereby granted have and maintain the land and the improvements to the satisfaction of the Lessor;
(v) Comply with such other conditions relating to the improvements as may be contained in the annexture hereto if any.

3. MAINTAIN and protect all beacons on the land and be responsible for the cost of replacing any such beacons that may be missing or destroyed.

4. BE liable to pay any and all costs arising herefrom and in particular:
(i) Any fees or stamp duties which may be discovered to be payable in connection with the Lease.

(ii) An amount or amounts levied by the duly authorized institutions by way of rates or like local property taxes.
(iii) An amount or amounts equal to any rates or like levy paid by the Lessor in respect of the land or improvements thereon.
(iv) Such sum as the Lessor shall assess as a proper share attributable to the land or the cost of making up the roads or improvements of the same upon which the land fronts, abuts or adjoins, whether demand for such sum is made during or after such making or improvement thereof. (This condition does not oblige the Lessor to make up or improve the roads.)

5. BE responsible:
(a) For protecting and preserving throughout the term of the lease all the existing and future infrastructure facilities on the land. Any damage, destruction or loss caused thereto shall be made good at the Lessee's expense.
(ii) For further protecting and conserving existing and future horticultural/environmental amenities such as trees, flower gardens etc provided they are within or immediately adjoining the land. Any damage, destruction or loss caused thereto shall be made at any time at the Lessee's expense.

6. YIELD up to the Lessor the land and improvements in good order and condition upon determination of the Lease by effluxion of time or otherwise.

PART B: THE LESSOR SHALL

1. ENSURE that the lessee paying rent and/or other charges hereby reserved in PART "A" Clause 1 hereof and complying with other terms and conditions hereinbefore contained

shall peaceably and quietly hold and enjoy the land and improvements during the said term without interruption from the Lessor or any other person claiming under or in trust for the Lessor.

2. UPON breach by the Lessee of any of the foregoing terms and conditions re-enter upon the land and improvements thereon and forfeit the Lessee and immediately thereupon the said term shall absolutely determine and whenever this power of re-entry and forfeiture shall arise the Lessor shall serve upon the Lessee a written notice specifying the nature and extent of the breach and requiring the Lessee to remedy the beach within the time to be specified in the said notice and also the action to be taken by the Lessor if the breach if not remedied within the specified period.

PART C: ARBITRATION

In the event of any dispute arising between the parties hereto in respect hereof either the Lessor or the Lessee may commence arbitration proceedings in conformity with the Arbitration Ordinance, Cap. 15.

I, the within-named …… hereby accept the terms and conditions contained in the foregoing Lease Agreement.

1. SIGNED and DELIVERED by the said
……

who is known to be personally ……

…….

the latter being known to me personally in

my presence this ……. day of …… 20…

Signature: ……

Postal Address:……

……

Qualification: ……

2. ……
……

SCHEDULE

All that land known as

Square metres, shown for identification only edged on the plan attached to this Lease Agreement and defined on the registered Plan Numbered …… deposited at the Office responsible for Survey and Mapping at Dar es Salaam.

Land Form No. 57

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

NOTICE OF INTENTION TO TERMINATE LEASE

[Under Section 105]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

To …… of

……..

HEREBY GIVE YOU NOTICE of my intention to terminate the lease on the ground(s) that your rent is in arrear for …… days/you are in breach of the following covenant(s)/ condition(s) ……

……

You are required to pay Tshs. …… to remedy the breach and to reimburse my reasonable expenses in the sum of Tshs. …….

You are required to remedy this breach within sixty days of the service of this notice upon you.

I intend to apply to course for an order of termination of the lease if the breach is not remedied within the time specified herein above. You are at liberty to apply to course for relief against the order of termination.

Dated at …… this …… day of ……

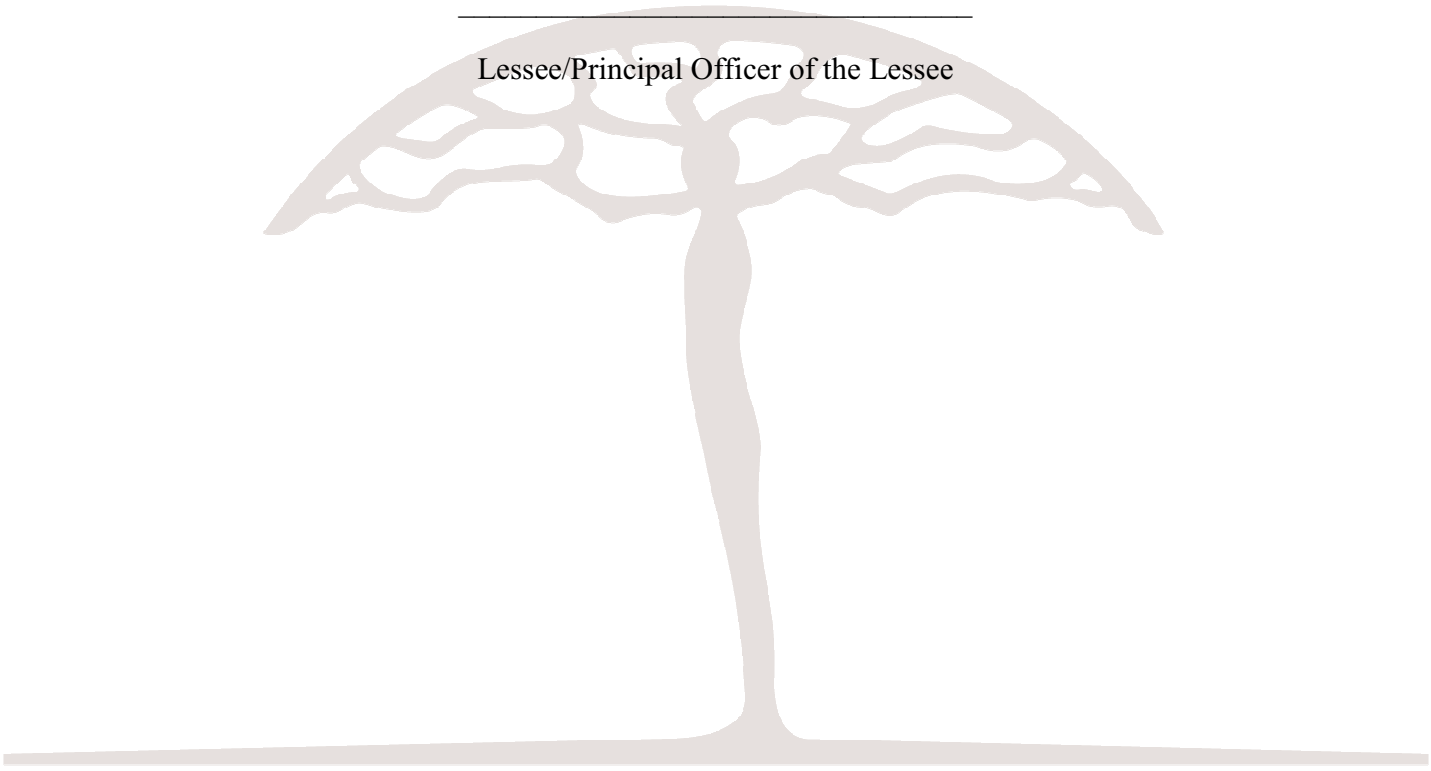
_____

Lessor/Principal Officer of the Lessor

Served Upon me/us:

_____

Lessee/Principal Officer of the Lessee



PART FOUR

4.0 EASEMENTS

4.1 WHAT IS AN EASEMENT?

"An Easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon or in respect of certain other land not his own. The Essence of Easement is that it should be a right over property belonging not to the person claiming the Easement but to someone else": Mogha in Indian Conveyancer. The Land Act in section 144(1) stipulates on the nature of the easements. It enacts as follows:

(1) Subject to the provisions of this Act or any other written law applicable to the use of land, the rights capable of being created by an easement are–

(a) any right to do something over, under or upon the servient land; or

(b) any right that something should not be so done; or

(c) any right to require the occupier of servient land to do something over, under or upon that land;

(d) any right to graze stock on the servient land.

The Land Act excludes certain rights from being created out of the easement. They are provided for in section 144(2) which enacts as follows:

(2) The rights capable of being created by an easement do not include–

(a) any right to take and carry away anything from the servient land;

(b) any right to the exclusive possession of any land or any part of it.

The rights under easements will only be in existence and capable of being protected during the period of the right of occupancy or the lease under which they are created. The Land Act in section 144(3) and (4) enacts as follows:

(3) Except where an easement has been created for specific period of time which will terminate at a fixed date in the future or on the happening of a specific event in the future or on the death of the grantor, the grantee or some other person named in the grant, an easement burdens the servient land and runs with the land for the same period of time as the right of occupancy or lease held by the grantor who created that easement.

(4) Subject to the provisions of this Part an easement shall be capable of existing only during the subsistence of the right of occupancy or lease out of which it was created.

Note that the dominant land is defined under the Land Act to mean the land for the benefit of which any easement is created (this is the benefiting land); while the servient land is defined as the land of the person by whom an easement is created (this is the burdening land): see section 145(1),(2) of the Land Act.

Note further the following:

(a) There must be a dominant and a servient tenement. Put technically, an easement cannot exist in gross (ie independent of the ownership of land) but only as appurtenant (ie attached) to a dominant land; and on a transfer of the dominant land, the easement will pass with the land, so that the tenant for the time being may enjoy it, even if he is a mere lessee.

(b) The easement must accommodate the dominant land. Hence an easement cannot exist unless it confers a benefit on the dominant land, ie the test is whether the right makes the dominant land a better and more convenient land.

(c) The dominant and servient lands must not be both owned and occupied by the same person. The principle here is that a man cannot have an easement over his own land. However, where the same person owns both properties but does not occupy both of them it is possible to create an easement. Unity of ownership without unity of possession is not fatal to an easement. Similarly, where each property is owned by different persons the easement is not destroyed if the plots are leased to the same tenant, ie there is a unity of possession without unity of ownership (ie during the currency of the lease the easement is suspended but it will revive when the lease ends). Hence it is possible to visualise what "quasi easements" are in that a such right habitually exercised by an owner over his land which if owned and occupied by another person would create easements. It is important to recognise them for in certain instances they become easements.

(d) The easement must be capable of forming the subject matter of a grant. This element follows the normal rules of contract. There must be parties who are capable (grantor and grantee). The right, the subject matter of the easement, must be sufficiently definite, not some amorphous right. Hence courts in England have refused easements of privacy, or of

prospect (ie the right of a view), as they have said "the law does not give an action for such things of delight".

(e) And finally the right must be within the general nature of rights capable of existing as easements. The category of easements is not a closed one. It alters and expands with the changing circumstances of mankind. In England some novel easements have been recognized as recently as 1950s where even the right to use a neighboring lavatory has been recognized as an easement.

There are Natural Rights (such as those of support) and Public Rights (eg the Public Right of Way) which are similar to easements but are not easements. Natural Rights go with the land and cannot be subject to grants; and Public Rights are created either by statute or dedication and they are open to the whole public, and as such they are not exercisable through specific grants and hence not subject to private grant.

4.2 CLASSIFICATION OF EASEMENTS

According to their nature, easements may be classified into the following classes:

(i) **Positive and negative easements**: A positive easement confers a right to commit some act upon the servient tenement, eg rights of way. A negative easement gives a right to prohibit the commission of certain acts upon the servient tenement which the servient owner would have been otherwise entitled to commit, eg right of support to a building, the right to light.

(ii) **Continuous and non-continuous easements**: A continuous easement is a right to do some act of a continuous and constant nature. A continuous easement is one whose enjoyment is, or may be continued without the act of man. The enjoyment of a non-continued easement is intermittent and consists of the commission of some act or of a series of acts. A non-continuous easement is one that needs the act of man for its enjoyment.

(iii) **Apparent and non-apparent easement**: An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him. An

apparent easement is evident by some apparent sign, whether that sign be patent to everyone or whether it can only be perceived on a careful inspection by a person ordinarily conversant with the subject. The non-apparent easement has no external sign pointing to its existence.

(iv) **Easement of necessity**: An easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the erasable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists, for a grant arising out of the implication of necessity cannot be carried further than the necessity of the case requires.

4.3 CREATION OF EASEMENTS

The Land Act provides that an easement is capable of being created by a person who is rightful owner of a right of occupancy or a lease by way of an instrument in a prescribed form. Section 146(1) enacts as follows:

(1) An occupier of land under a right of occupancy or a lessor may, by an instrument in the prescribed form, grant an easement over the land comprised in the right of occupancy or lease or a part of any that land to the occupier under a right of occupancy or a lessee of other land for the benefit of that other land.

Note that all requirements for the proper execution of documents as are provided under the Registration of Documents Act (CAP 117 R.E. 2002) do apply.

The Land Act further prescribes what should be the content of the prescribed form used to grant an easement. The instrument creating an easement should specify the period, conditions, the land to benefit and the land to be burned. The Land Act in section 46(3) enacts as follows:

(3) An instrument creating an easement shall specify clearly–

(a) the nature of the easement and any conditions, limitations, and restrictions subject to which it is granted;

(b) the period of time for which it is granted;

(c) the land, or the particular part of it burdened by the easement;

(d) the land benefited by the easement;

and shall, if so required by the Registrar, include a plan sufficient to define the easement.

Note that the Land Act makes it clear that an easement right cannot arise out of presumption. An easement must be created properly in accordance with the Act. Section 146(7) provides as follows:

(7) No easement and no right in the nature of an easement shall be capable of being acquired by any presumption of a grant from long and uninterrupted user.

Thus, no non use or uninterrupted use will create an easement.

The creation of an easement carries with it certain implications. The Land Act provides that it is implied in any granted easement all ancillary rights which may be reasonably necessary for the full and effective enjoyment of it: see section 146(5) of the Land Act.

4.4 EXTINGUISHMENT OF EASEMENT

An easement right can only be extinguished or cancelled by the person occupying the dominant land upon the occurrence of an event so provided in that instrument granting the easement. Section 150 of the Land Act enacts as follows:

(1) Subject to subsection (3), any easement granted under this part or any analogous right created under this part may be cancelled by the person occupying the dominant land under a right of occupancy.

The Act further requires that any such cancellation or extinguishment can only be effected in a prescribed form, and the same must be registered before it becomes effective. Section 150(2) of the Land Act provides as follows:

(2) Any cancellation referred to in subsection (1) shall be effected by the prescribed form and the easement or analogous right shall be extinguished on the date that that form is recorded in the register.

The other means of extinguishing an easement is by an application of the person holding the servient land to the Registrar asking the latter to cancel the easement upon occurrence certain events. Section 150(3) provides that:

(3) On the application of any person occupying servient land under a right of occupancy, the Registrar may cancel an easement or an analogous right where he is satisfied that–

(a) the period of time for which the easement or analogous right was intended to subsist has expired; or

(b) the event upon which the easement or analogous right was intended to terminate has occurred.

4.5 CHECKLIST

(1) Check whether the deed granting easement shows the intention to create an easement grantable at law.

(2) In case of grant of an easement of way, check whether the easement is clearly defined. If the position of the way is left to be determined in future at the election of either party, check whether it has been provided that the election should be made within the period allowed by the rule against perpetuities.

(3) Check whether the purpose of easement to be enjoyed has been defined, unless an unlimited enjoyment is intended.

(4) If the easement is for a limited period, check whether the period for which the easement is granted has been specifically mentioned.

(5) Check whether the description of dominant and servient lands has been given clearly in the deed.

(6) Make sure that the instrument is in the proper prescribed form.

(7) Make sure that the instrument creating the easement is properly registered.

4.6 LAND FORMS FOR EASEMENTS

Land Form No. 58

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

GRANT OF AN EASEMENT

[Under Section 146]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I, ……..... of ……..

HEREBY GRANT AN EASEMENT to …… of …… over the land comprised in the right of occupancy/lease registered under the above reference for the benefit of the following land:

(a) Location of the Land …….
(b) The boundaries and extend of the land …….

This easement is granted for an indefinite period/a period of …… years and subject to the following conditions, limitations or restrictions …… ……
A plant sufficient to define the easement is attached hereto.

Dated at …… this …… day of …….

Attestation Clause ……

Holder of Dominant Land

Signed …….

Served upon us:

_____

Signature of Servient

Fee: …….

Endorsement by Registrar

Land Form No. 59

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

APPLICATION FOR CANCELLATION OF AN EASEMENT

[Under Section 150]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I, ... …… of ……..

Occupier of Servient land under a right of occupancy registered under the above reference HEREBY APPLY that the easement granted for the benefit of land held under a right of occupancy CT No. ……. LO No. …… LD No. ……. by …….. of ……. and recorded in the register under Filed Document No. …… BE CANCELLED.

Reasons: 1. ……

……

2. ……

……

Dated at …….. this …… day of …… 20……..

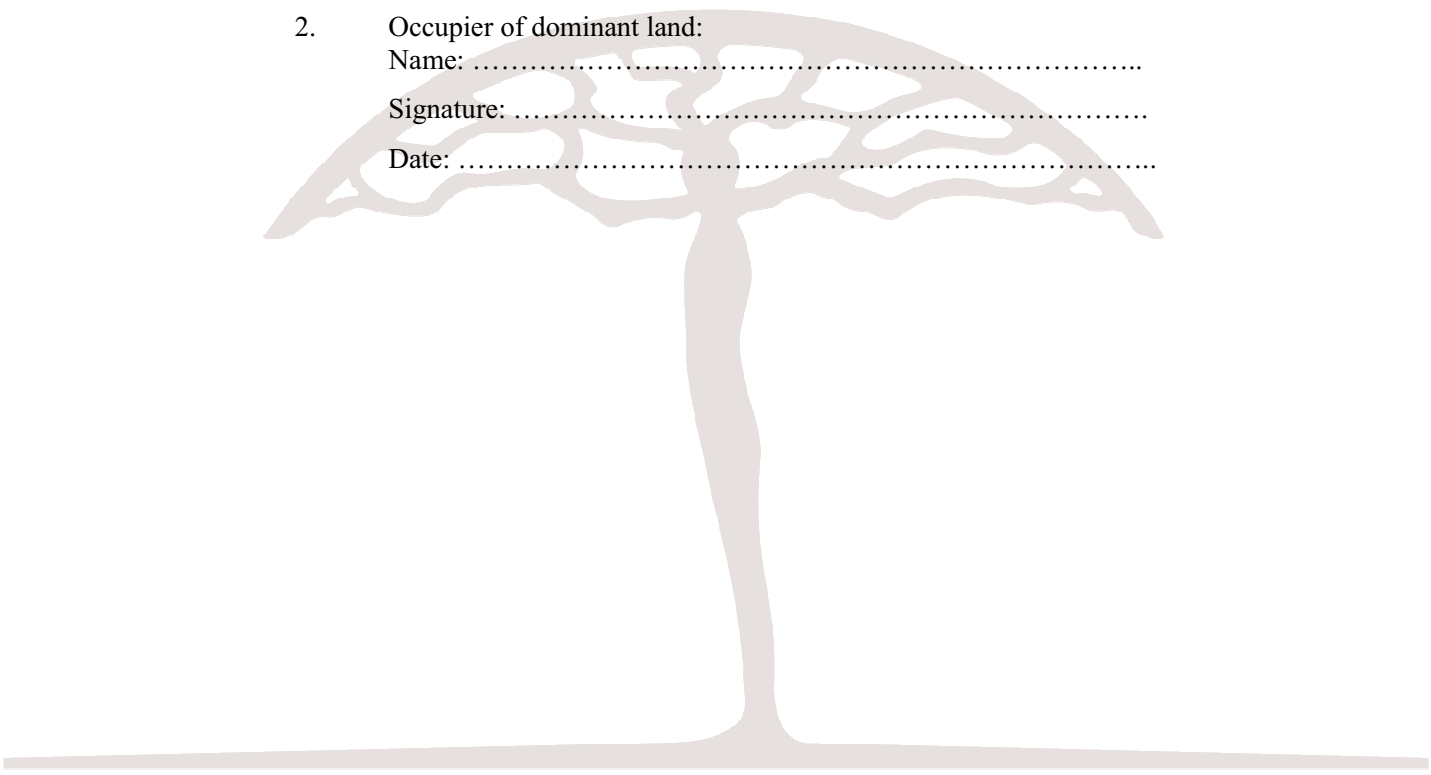
_____

Signature of Occupier of Servient Land

Served Upon:

1. Registrar:
   Name: …….
   Signature: ……....
   Date ……

2. Occupier of dominant land:
   Name: ……..
   Signature: ……
   Date: ……..



Land Form No. 60

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

CANCELLATION OF AN EASEMENT

[Under Section 150]

C.T. NO. ……

L.O. NO. ……

L.D. NO. ……

I, ... …… of ……..

HEREBY CANCEL the easement granted to …… …… for the benefit of the land over which I hold the right of occupancy and recorded in the register under Filed Document No. ……..

Dated at …… this …… day of ……..……

_____

Signature of Occupier of Dominant Land and Attestation

I consent

_____

Signature of Lessee/Lender

Fee: …….

Endorsed by the Registrar