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Lecture One: THE HISTORY OF LAND LAW IN TANZANIA

INTRODUCTION:

Definition of Land

The term land is defined by the *Land Act, 1999 (*Act No. 4/1999) as to include - the surface of the earth and the earth below the surface and all substances other than minerals and petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land (s.2). This definition excludes minerals and petroleum forming part of or below the surface. The essence of it is that in Tanzania the occupier of land cannot claim to have rights over minerals or mineral oil and also water rights and rights over any foreshore. These rights may be acquired on application to appropriate authorities under specific laws.

Read the following cases:

- *Saleh bin Hadi v. Eljofri* (1950) 24 KLR 17,
- *Sing v. Singh*, vol. 11 EACA 48,
- *Francis v. Ibitoye* (1936) 13 N.L.R. 11.

Meaning of Property

In its widest sense, says Salmond, property includes all a person's legal rights, of whatever description. In a second and narrower sense, property includes not all a person's rights but only his proprietary as opposed to his personal rights. The former constitutes his estate or property while the latter constitutes his status or personal condition. In this sense a man's land, chattels, shares and the debts due to him are his property but not his life or liberty or reputation. (Salmond on Jurisprudence, 12th Ed. pp 441-412). The law of property is the law of proprietary rights *in rem,* the law of proprietary rights *in personam* being distinguished from it as the law of obligations. Therefore tangible

moveable or immovable things like land, goods etc, is property but any right or claim arising out of a contract would not be property. The word 'property' has two meanings (i) a right to or interest in a thing and (ii) the thing itself. The 'thing' may be immovable or moveable. Property is of two types, (i) corporeal and (ii) incorporeal. The former can be either immovable or moveable, the latter consists of (i) right in or over a material thing which is lesser than full ownership such as by way of an encumbrance or lease, or easement or trust and (ii) right to an immaterial or intangible thing such as patents, trade mark, copyright which are also called in modern parlance as intellectual property. So while corporeal property is tangible property incorporeal is intangible. To use a common categorization, property is generally, either immovable or movable. Any property which is not immovable property would be movable property. And further, property is also divided into two classes (i) real and (ii) personal. The former consists of immovable nature such as land and buildings. Personal property consists of rights which are 'unseen' or *in personam.* Moveable property is considered as personal property.

Any property can be acquired by any of the four methods, viz., (i) possession, (ii) prescription, (iii) act *inter vivos* or by transfer or agreement,(iv) inheritance.

Meaning of estate

Estate denotes any property whatever and is divided into real or personal estate. 'Estate' is an interest which a person enjoys over land or chattel, particularly the former. Therefore the same land is capable of having more than one estate or interest like the lessor and the lessee or mortgagor and mortgagee.

Meaning of Tenure

Immovable properties are of different tenures. **Tenure means a kind of right or title by which real or immovable property is held.** Tenure signifies the relation of the holder of land to the land whereby land is held on. The word tenure indicates the nature of ownership of land. In England, before the passing of the Law of Property Act, 1925, there were several feudal tenures existing, but all of them were abolished since the passing of the Law of Property Act. Now in

England, there are only two types of ownership in land remaining. These are- Estate in fee simple absolute in possession and Estate for a term of years absolute (s. 1(i) of the Law of Property Act) which are equivalent as free hold tenure and lease hold tenure. Which means, the property is either held in full ownership or held under a lease or sub lease.

Movable and Immovable properties

At Common law the natural division of physical property is between land which is 'immovable' as it is sometimes called and, other objects known as chattels or 'movables'. This simple distinction however is inadequate. The reason is that, chattels may become attached to land so as to lose their character of chattels and become part of the land itself. The general principle is therefore stated that '*Quicquid plantatur SoloSolo Cedit'.*" Meaning that, whatever is attached to the soil becomes part of it. Thus, if a building or any structure is erected on land and some objects (chattels) are attached to the building the word 'Land' includes the soil, the building and the objects affixed to it. In this situation the objects lose their character of chattels and become part of the land itself; and the owner of the land becomes the owner of the building. All these articles which remain as the owner's property are thus called 'fixtures', or immovable.

However, it is sometimes difficult to determine whether a thing is a fixture or just a chattel. In deciding whether or not an object has become a fixture, there are two main elements to be considered, namely;

(i) The degree of annexation and,

(ii) The purpose of annexation.

For an article to be considered as a fixture some substantial connection with the land or building on it must be shown. A chattel attached to the land or a building will prima-facie be a fixture even if it would not be very difficult to remove it.

The purpose of annexation however, is said to be the main factor. The modern tendering is to regard the degree of annexation as being chiefly of importance as evidence of the purpose of annexation. The more securely an

object is affixed and the more damage that would be caused by its removal the more likely it is that the object was intended to form a permanent part of the land.

In determining the purpose of annexation, the question to be asked is: "was the intention to effect a permanent improvement of the land or building as such or was if merely to effect temporary improvements or to enjoy the chattel as a chattel"? In the first case the chattel is a fixture, in the second it is not.

At Common law the principle of *Quicquid Plantatur Solo Cedit* applied without qualification. Where an article is described as fixture it cannot be removed by the person who brought it on to the land or by his successors in title. If it is not a fixture it can be removed. The maxim actually caused a number of unjust situations. This rule was thereafter relaxed. **Read:** *Ruanda Coffee Estate v. Singh* (1966) E.A. 564. More on this will be covered in another topic relating to the payment of compensation.

THE HISTORY OF LAND LAW IN TANZANIA

The legal and administrative machinery governing land tenure in Tanzania Mainland has its genesis in the colonial period. The stated objectives of Colonial rulers over land policy and tenure was to effect a transformation of the customary tenure into tenure where the Colonial objectives could be achieved easily.

Both the German and British colonial states in Tanganyika encouraged establishment of plantation agriculture and development of peasant agriculture. Under this land policy the state vested in itself exclusive powers to decide on matters regarding land ownership, land distribution and land use. This was meant to facilitate exploitation of resources (both land and human labour).

The land regimes established by the German (1895 to 1916) and British (1918 – 61) assumed that the indigenous occupants (Natives) had no "Ownership rights" over their land. The western anthropological view was that African land tenure is much the same in every part of the continent; i.e. it is communal and an individual only has security of tenure whilst he is using the

land. They said, "land is owned by the community never by the individual" and thus land is inalienable.

Under the German, land alienation was thus facilitated by an *Imperial Decree of 26.11.1985* (The Imperial Decree regarding Creation, Acquisition and Conveyance of Crown Lands). This enactment stated that except where claims to ownership and to real rights in land could be proved by private and certain other persons, all land was to be deemed unowned and to be regarded as Crown land and the ownership to such land was vested in the Reich. Existing rights of individuals were to be recognised by commissions set up for such purposes and the manner of proof of a title in land was generally to be by documentary evidence. As Africans holding under customary land tenure had no documentary titles their rights in land were not recognised. It followed that titles to land were to be obtained through the governor either by – "conveyancing of ownership "or by" leasehold."

After the First World War, the British Government assumed responsibility over Tanganyika under the surveillance of the League of Nations, which later became the United Nations. The general policy relating to land in Trust Territories was clearly stipulated in Article 8 of the Trusteeship Agreement and which was a reproduction of the corresponding Article in the League of Nations 'B' mandate for Tanganyika, the Cameroons and Togoland. The Article stated that " in framing laws relating to the holding or transfer of land and natural resources, the Administering Authority should take into consideration native laws and customs, and should respect the rights and safeguard the interests, both present and future, of the native population".

When the British established its administration, it passed *The Land Tenure Ordinance, 1923* (Later referred as *Land Ordinance, 1923 Cap 113*), which was based on the *Land and Native Rights Ordinance* of the Northern Nigeria. This followed suit the German law. It stated in section 3 that: "The whole of the lands of the Territory, whether occupied or unoccupied, are [on 26 January, 1923] hereby declared to be public land'. The proviso to that section exempted from 'public lands' and from the operation of the Act "a title to land or

any interest therein lawfully acquired before 26 January, 1923". These titles were stated to have the same effect and validity as they had before the passing of the Act, but the proviso was interpreted not to embrace customary law titles. This was done to preserve interest acquired during the German period, because by virtue of Versailles Peace Treaty of 1919 the existing German titles were to be recognized.

The Ordinance placed the control of such 'public land' in the hands of the Governor. The Governor was empowered to make grants of land on rights of occupancy for periods not exceeding 99 years. And it was stated clearly under section 4 that "no title to the occupation and use of any such lands shall be valid without the consent of the Governor." The governor under this law could grant land to companies, settlers and any other legal or individual persons. In essence, the legal regimes gave the Colonial government a free hand as and when necessary to control and alienate indigenous land without being encumbered by any legal obligations.

To preserve German derived titles the *Land Registry Ordinance, 1923* was enacted; in which all lands that were lawfully acquired during the German era were to be registered and become freehold tenure. In addition, S.11 thereof provided that any person who claims to be in adverse possession of pubic land and applies for registration as the first registered proprietor thereof shall been titled to be so registered. (Adverse possession for 60 years or by proving 30 years adverse possession prior to 26.1.1923).

Therefore, it should be noted that the conversion of German titles to freehold was not automatic, but, they were to be registered under the *Land Registry Ordinance* as a requirement. This was discussed in *A.G. v. Ndugumbi* (1963) 21 EACA 43, where it was held that the effect of S.2(1) of Land (Law of Property and Conveyancing) Ordinance, 1923 was to convert the pre-existed titles of absolute ownership into fee simple with absolute possession.

Right of Occupancy

Looking at the *Land Ordinance 1923*, it was legally unclear whether interests of natives were safeguarded. The 'Right of Occupancy', for example, was defined as "a title to the use and occupation of land." The omission of not including customary title to the land raised criticisms in the Permanent Mandates Commission of the League of Nationals. Hence, in 1928 the scope of application of the Ordinance was widened. The definition of 'right of occupancy' was expanded to include "the title of a native or a native community lawfully using or occupying land in accordance with native law and custom" (*Land Ordinance (Amendment) Ordinance, 1928 No. 7*). Since then the customary land titles have come to be called "deemed rights of occupancy". Meaning that, they were 'deemed' to exist not through grant.

In this regard there existed three types of rights over land tenure in the country soon after the Land Ordinance was enacted, viz.

1. The Granted Right of Occupancy which was granted by the governor under the *Land Ordinance, 1923* (section 6);
2. Customary or deemed Right of Occupancy which was not granted by the state but 'deemed' to exist under customary law and practice; and
3. Freehold system – derived from title(s) lawfully acquired during the German period.

EFFECTS UNDER CUSTOMARY RIGHT OF OCCUPANCY

The widening of definition of Right of Occupancy to include interest of native using or occupying land under customary law did not assist the natives. The Land Ordinance jus declared and defined customary tenure but without securing and statutorily entrenching customary titles and rights. This enabled the colonial state to alienate lands to non-natives without any problem. Comparing the two tenures, the granted right of occupancy and customary/deemed right of occupancy, the latter was only declaratory. The law did not define the rights of customary land holders as against the state, nor were these rights entrenched in law in any form. Thus the lands occupied by indigenous people remained public lands under the control and subject to the disposition of the state.

On the other hand, the relation between the state and the holders of land under the granted right of occupancy was in essence contractual and regulated by law. A statutory holder was given certificate of occupancy. Terms and conditions of the grant were stipulated in the certificate of occupancy, which made security dependent on use by attaching development conditions to every right of occupancy. Consequently the practice grew up that customary land tenure came to be identified and treated as inferior to statutory/granted right of occupancy. The occupation and use of land by customary holders was validated by the colonial courts by assuming constructive consent on the part of the Governor. The customary titles were categorized as merely "permissive rights". See the case of:

1. *Muhena bin Said v. Registrar of Titles* [1948] 16 EACA 399;
2. *Mtoro bin Mwamba v. A.G*. [1953] TLR 327.

MUHENA BIN SAID CASE

In this case, the appellant derived his title to land near Mwanza through an Arab in 1890. He applied to be registered as owner in fee simple. In 1931, the Land Officer, Acting Registrar of Title, wrote to appellant's advocate that "the claim to freehold by your client is admitted." When the Registrar came to determine whether the appellant was entitled to be registered he dismissed his application. Hence an appeal was made. The basis of his application was that having lived in the land in question for more than 60 years or 30 years prior to 26th January, 1923 he was entitled to be registered by virtue of adverse possession (as per the *Land Registry Ordinance, 1923*).

The Court (Sir Graham Paul – C.J.) stated that "possession has been proved for the requisite period, but that the obviously difficult thing is to prove adverse possession as against the German or British governments who undoubtedly as a matter of policy permitted the inhabitants generally of the territory to use land for their reasonable requirements of residence and sustenance without any special grant to any individual. To satisfy the Registrar that the possession was adverse in this case evidence would (in the judge's

view) be required of something definite in the occupation of the applicant or his predecessors to take that occupation out of the category of the admitted general permissive occupation by all the inhabitants of the territory.

The Court proceeded to say – "there is nothing so far I can see in the evidence to show that the occupation by the applicant or his predecessors was in any way special or different from that of any other inhabitants of the territory or inconsistent with it being just the general permissive occupation enjoyed by all inhabitants".

The appellant also argued that since his predecessor was an Arab whose religion (i.e. Islam) recognizes individual ownership of land, the appellant acquired similar ownership right – the Court held that the first Arab occupant entered into the land peaceably not by conquering. Edward C.J., added that since the first Arab entered peaceably under same sort of arrangement with the chief or representative member of the tribe, he could not foist their land law and custom upon the land. That being so, the chief or representative could give him no better title to the land than he possessed and could only grant him a tenure recognized by the customary law of the tribe. The judge concluded:- "I am satisfied that the customary law of that tribe like that of most African tribes in the interior of the continent had no conception of freehold tenure such as is known to English law or the analogous individual ownership known to Muslim law." The suit failed.

MTORO BIN MWAMBA CASE

The appellant in this case applied for first registration as beneficial owner of land in fee simple to a land situated in Upanga area, which he claimed under Washomvi laws and customs. Alternatively he claimed to be registered as owner by virtue of adverse possession. The appellant contended that he and his predecessors in title had been in effective possession of land prior to German Sovereignty in 1895 and that he had acquired "in equity" a title thereto equivalent to an estate in fee simple in accordance with the laws and customs of the Washomvi tribe of which he was a member, which recognized an individual

ownership of land equivalent to freehold and that by the law of Islam which had been applied by the Sultan of Zanzibar during his suzerainty, an individual title could be acquired by clearing vacant land and planting it with coconut palms.

When the case went to appeal; (Court of Appeal for Eastern Africa) it was held that conversion to the Islamic religion did not include conversion to the Islamic law of land tenure. The appellant was still bound by African Customary law and was for the purpose of the Land Ordinance a "native." The Court further held that Customary law does not know individual ownership of land, what it recognizes is only usufructuary rights" (the right to use land).

On the issue of adverse possession, the court held that "were land is held by a native, the inference must always be that possession is permissive not adverse."

Other cases to read are:

-*Re Sourthern Rhodesia* (1919) AC 211;

-*Amodu Tijani v. the Secretary Southern Nigeria* (1921) 2AC. 399;

-*Descendants of Sheikh Mbaruk. Bin Rashid v. Minister for Lands and Mineral Resources* (1960) EA. 348.

The Case of Descendants of Sheikh Mbaruk Bin Rashid

This is a case regarding the nature of rights acquired by Arabs who settled on land granted to them by the German Administrator of Tanganyika, without any documentary title. The issue before the Court was whether Arab occupiers acquired customary possessory title, or freehold title or whether they were just tenants at will.

The facts of the case can be stated as follows:

In 1896 the German Administration of Tanganyika settled certain Arab Immigrants on land at Ukonga in the District of Kisarawe. Although these Arabs and their descendants had occupied the land since the original settlement, they had never had any documents of title but no one had ever claimed the land. In 1952 the Member (Minister) for Lands and Mines gave notice under s. 5 of the *Land Acquisition Ordinance* of his intention to acquire the land in question and

called upon all parties concerned to specify the nature of their interest thereon. Claims were made by the appellants and negotiations for compensation followed but finally broke down.

In due course a suit was filed by the Ministry for Lands and Mineral Resources under s.9 of the Land Acquisition Ordinance (Cap 118) to have the appellants removed. The summons was served on the appellants who field a written statement of defence. Some of the questions that were framed in the High Court were as follows:

(1) Who is the person or persons entitled to all those pieces/parcels of land situate at Ukonga?

(2) What is the estate or interest of such person or person in the land acquired?

At the hearing, the High Court held that the court had no jurisdiction, but it held that, apart from the question of jurisdiction, the appellants had substantiated their claim to be entitled to the lands and found that they were entitled to be paid compensation. In the appeal, among the grounds raised, the crucial ground was that – the learned judge erred in fact in finding that the German government had granted to the appellants permanent occupation which was freehold in nature.

The decision of the trial High Court judge based on construction of s. 20 of the Land Acquisition Ordinance. That section reads:

> "20 – If any question arises respecting the title to the lands to be acquired under this Ordinance, the parties in possession as being the owners thereof, or in receipt of the rents of such land being purchased or taken shall be deemed to have been lawfully entitled to such land unless the contrary be shown to the satisfaction of the court and they and all parties claiming under them or consistently with their possession shall be deemed entitled to the consideration or compensation money…"

The judge held that the claimants were in possession at the time of acquisition and must be deemed to have been lawfully entitled to the land, unless the contrary be shown to the satisfaction of the court. The judge stated:

> "To my mind the claimants have shown a right of title which comes within the meaning of the section although I am certainly not prepared to specify precisely what interests would and what interests would not come within the section. The claimants' family had been in occupation of the lands for some fifty – six years prior to the acquisition proceedings in 1952, and during the whole of that period it would appear likely that they had been regarded by the local people as the owners of it …. Having held that the claimants have substantiated their claim to have been lawfully entitled to the lands, the onus of showing that the contrary is so, under s. 20 must I think in the circumstances of this case be on the Crown, and it is therefore for the Crown to satisfy the court that the original possession was permissive only".

The judge finally, held that "I am satisfied that at the time the intention of the German
Government was permanent occupation and not, as Miss Sligh maintains, a tenancy at will. There was, to use the words of, Graham Paul, Ag. President, something "definite" and "special" in the occupation which took it out of the category of any general a even special permissive occupation and in my opinion the government, by its apparent intention and its actions, is stopped from denying the freehold nature of the claimants' title".

The Court of Appeal reversed this decision. It held that the appellant's predecessors entered into possession of the land by *permission* of the then government of the territory. There was no reason to suppose that the German Administration intended to give the original Arab settlers anything more than permission to occupy the land, and accordingly the appellants and their predecessors were not in possession "as the owners thereof." The court stated further that,

> "It is to be noted that the Ordinance (i.e. the German Imperial Ordinance of 26 Nov. 1895) was in force when the appellants' predecessors were settled on the land, and that, as found by the learned judge, and indeed,

> I think, conceded, no document of title were issued. I feel little doubt that in settling the appellants' predecessors on the land the German Government were doing no more than giving then permission to use the land for their reasonable requirements of residence and sustenance. Had any other form of title been intended a document of title would have been issued, indeed, must have been issued to create a valid title under the German ordinance."

THE LAND LEGAL REGIME AFTER INDEPENDENCE

Attempts at Individualization of Land Tenure

Towards the end of British rule in Tanganyika the colonial government welcomed and supported the emergence of a class of wealthy African farmers in the place of a peasantry. It was believed that that class would increase political and economic stability in the rural areas. The first effort at creating a class of wealthy African farmers was made through the formation of The Tanganyika Agriculture Corporation in 1954. Its stated aim was to promote "a healthy, prosperous Yeoman farmers class, firmly established on the land, appreciative of its fruits, jealous of its inherent wealth and dedicated to maintaining the family unit on it."

It was argued that the African peasant must be separated from his "traditional" environment before he could be transferred into a modern small holder. The same policy of supporting the most progressive farmers was recommended in the Report of the *Royal commission on Land and Population in East Africa* published in 1955. The Commissioners felt that implementation of that policy lay in the replacement of customary land tenure by individual freehold. The report stated: "The policy concerning the tenure and disposition of land should aim at the individualization of land ownership and mobility in the transfer of land which, without ignoring existing property rights, will enable access to land for economic use."

The Royal Commission highlighted with commendation the important element of the freehold system, namely the quality of unrestricted disposition

which in a free market, the Commissioners said, would allow "mobility in the transfer and disposition of land consequently ensuring the power of progressive farmers in buying up the less progressive". The Commissioners further argued that on granting individual titles to land the owners would be given documentary titles which would enable them to raise money from financial institutions. The commissioners pointed out that in contrast, the non-negotiability of a customary law title "prevents a progressive farmer from raising money for capital impairments."

The Colonial Government in Tanganyika accepted the recommendations of the Royal Commission and in a paper entitled *Review of Land Tenure Policy* (Government Paper No. 6 1958) announced that it was going to implement the recommendations. This followed closely what the government had earlier on stated in its Circular No. 4 of 1953. In this circular (para 12) it was stated that:

> "It is the intention that in townships all land should be alienated from tribal tenure and that Africans should obey the same laws of the territory with regard to their occupation as members of any other race."

Following this circular, the practice grew up in urban areas that upon the creation of City, Municipal or Township boundaries urban land became alienated from customary tenure and those who remained within the urban boundaries or came after declaration were regarded as squatters. Following this and the Government Paper No. 6 of 1958, TANU opposed these measures. In a paper called "Mali ya Taifa" published in 1958, the TANU President, Mwalimu Nyerere stated,

> "the Government intends to remove this menace of shifting cultivation. I support the Government on this issue, and I must say that we must look for an immediate remedy. I am however opposed to the proposed government solution to this problem of shifting cultivation. I agree that the freehold system of land ownership can remove many of the obstacles already mentioned, but it is a solution which will create may other problems more difficult to solve than the ones it intends to eliminate …

> If people are given land to use as their property then they have the right to sell it. It will not be difficulty to predict who, in fifty years time will be the landlords and who the tenants. In a country such as this, where generally speaking the Africans are poor and the foreigners are rich, it is quite possible that, within eighty or hundred years, if the poor African were allowed to sell his land, all the lands in Tanganyika would belong to wealthy immigrants and the local people would be tenants. But even if there were no rich foreigners in this country there would emerge rich and clever Tanganyikans. If we allow land to be sold like a robe within a short period there would only be a few Africans possessing land in Tanganyika and all the others would be tenants."

These arguments, truly, were against the rise of a landed bourgeoisie. Nyerere viewed that, ownership of land does not rest in man but is vested in God and that the people whether in groups or individual, have only rights of user. In his view, land was not a saleable commodity at all.

AFTER INDEPENDENCE

(a) **FREEHOLD CONVERSION**

When Mwalimu Nyerere was opposing the extension of the freehold system to African he did not say anything about the existing freeholds. Four years later he directed his attention to this question. In a paper "Ujamaa – the Basis of African Socialism" published in 1962 and in an obvious reference to the fact that development of freehold land is dependent on the profit motive to the owner, Mwalimu stated:

> "The TANU Government must go back to the traditional African custom of landholding that is to say; a member of society will be entitled to a piece of land on condition that he uses it. Unconditional, or "freehold" ownership of land … must be abolished."

This authoritative paper was followed by a Government Paper No. 2 of 1962. It contained proposals of the TANU Government for the conversion of freehold

titles into 'government leases'. The freehold titles were abolished in 1962 when they were converted into Government Leaseholds of 99 years by the *Freehold Titles (Conversation and Government Leases) Ac*t, 1963; Cap 523. All existing fees simple in possession were converted into government leaseholds for a period of 99 years subject to possible annexure of development conditions. No new grant for an estate in fee simple or for any absolute or perpetual interest was possible after 1st July 1963. The Republic became the landlord who was entitled to a rent from the former freeholder. This rent was calculated in accordance with the provisions of the first schedule to the Act and was quite nominal. Although a government lease was a disposable interest, the government lessee had to seek the consent of the Commissioner for Lands before any disposition. If development conditions were not complied with the government lease would be forfeited.

The conversion of freehold titles into government leases in 1963 subjected valuable land to some amount of government control. And Nyerere referred this conversion of freehold titles into government leases as land nationalization. In doing this, however, the independent government still embraced both peasant agriculture and plantation agriculture. Thus, having accepted that policy the new government further accepted the legal framework which had been erected to facilitate implementation of the policy. The *Land Ordinance* with its concept of 'public land' was accepted and retained. What the legislature did was to substitute the word 'President' for the word 'Governor' whenever it appeared in the *Land Ordinance*. Consequently, the power of granting land on right of occupancy became vested in the President.

In 1969, through *The Government Leaseholds (Conversion to Right of Occupancy) Act*, *1969* with effect from 1st April 1970 the government leases were in turn converted into Rights of Occupancy and these rights of occupancy were deemed to have been granted under the *Land Ordinance*. Since then the Right of Occupancy has remained the only land tenure recognized in the Tanzania land law. If a right of occupancy was granted by the President it was subject to development conditions contained in the certificate of title and land

regulations. (See the Land Regulations, 1926 and the Land (Pastoral) Regulations, 1927 which were later repealed and replaced by the Land Regulations,1948.) There are specific development conditions for each type of right of occupancy, failure to comply with the terms of the regulations is a good cause for the revocation of the right of occupancy.

(b) **TANU AND THE LANDLORDS**

The TANU objectives of eliminating a class of exploiters did not end with conversation of freehold system. The guiding principle of TANU was that landlords are exploiters. In 1962 Nyerere asserted,

> "Landlords in a society which recognizes individual ownership of land can be, and usually are in the same class as the loiterers, I was talking about: the class of parasites."

He finally said; what has remained is to fight on the legislative fronts against landlords. In this regard, TANU's struggle began with Nyarubanja tenure – a feudal system of landholding which existed in then West Lake region (now Kagera Region). In this system the landlord, called "Mtwazi" took possession of land by way of dispossession and claim to have a right over it against any other persons. If he allowed people to stay there, they became his tenants – called "mtwarwa." The landlord was entitled to shares in the tenant's produce. It was a rule that the tenant could not sell his holding, pledge it or otherwise dispose of it. Lastly, it was a custom for all tenants to build their house with the doors facing the house of the landlord as a sign that they looked to him for everything. To put this system into an end, the *Nyarubanja Tenure (Enfranchisement) Ac*t of 1965 (No 1) was enacted. It became into operation in March 1965. The Act was expressed to apply to the whole of the West Lake Region. It set out to enfranchise those Nyarubanja tenants who held land immediately before the date of its commencement. The enfranchising procedure was by vesting in those persons titles free from all incidents of Nyarubanja tenure. The Act prohibited creation of any future holdings in Nyarubanja tenure. There was provision for

compensating ex-landlords for any unexhausted improvements they had effected on the enfranchised lands.

However, the Act had many shortcomings. Noticeable among them is uncertainity concerning its scope. Although the aim of the Act was to abolish all forms of tenure in West Lake Region with feudal overtones, the terminology used caused confusion particularly in the areas where the terms Nyarubanja, Mtwazi and Mtwarwa were unknown. For example, even in Ngara District the system used a different name. A committee chaired by Samuel Luangisa was appointed to look into the causes of the failure of the Nyarubanja enfranchisement legislation and to recommend solution.

Following its report, in 1968 the *Customary Leaseholds (Enfranchisement) Act* was enacted. This Act become applicable to any part of Tanzania mainland provided some kind of customary leasehold were seen. On the effective date, i.e. 1st August 1969, every parcel of land held by tenant was enfranchised. The landlord's rights in land were extinguished.

VILLAGE COMMUNITIES/VILLAGE SETTLEMENT

Back in 1962 Nyerere had formed an idea of settling people in planned communities. On 10th December, 1962 President Nyerere, after reviewing the problems involved in developing Tanganyika, made the following observations on the beneficial possibilities of the planned communal system.

> "Before we can bring any of the benefits of modern development to the farmers of Tanganyika the very first step is to make it possible for them to start living in Village Communities."

He went on to say:

> "Unless the widely distributed people of Tanganyika are brought together, we shall not be able to use tractors, we shall not be able to provide schools for our children; we shall not be able to build hospitals or have clean drinking water; it will be quite impossible to start small village industries, and instead we shall have to go on depending on the town for all own requirements; and, even if we had a plentiful supply of electric

> power we shall never be able to connect it up to each isolated homestead."

He subsequently added:

> "The effect of this settlement will be far-reaching, for planned settlement does not only mean farms; it also means roads, commerce and some local industries, as well as schools for the children, and health centres to help people enjoy the life they are creating."

Thus, the First Five Year Plan sought to achieve rural transformation through village settlement schemes under the 'Transformation Approach.' This approach had been recommended by the World Bank Mission in 1960. The view of the government was that there were two cardinal problems of peasant production, namely, land tenure and agricultural underdevelopment. It felt that the solution to these problems lay in the transformation approach whose stated goal was "the introduction of technical, social and legal systems which allow the exercise of modern agricultural techniques based on relatively high productivity and which consequently justify considerable investment in capital". (see Tanganyika Government (1964) First Five Year Plan, 1st July 1964 to 30th June 1969, vol. 1 General Analysis p.14).

The focus of this approach was regrouping or resettling of peasants in new lands. It involved capital intensive new settlements which were supervised by government officials. The strategy involved singling out a few peasants who were considered progressive and supplying them with loans, mechanical equipment, and other inputs. By so doing, it was hoped that others would be motivated by their positive results and hence induced to do the same. A new ministry was established for this purpose, The Ministry of Lands, Settlements and Water Development. The land tenure for village settlement was erected by the "*Land Tenure (Village Settlements) Act,* No. 27 of 1965 as amended later by Act No. 17 of 1966.

The President of the United republic could grant a right of occupancy called – 'A settlement right,' to the Commissioner for Village Settlement. The Commissioner had power to assign the settlement right to the Village Settlement Cooperative Society, which in turn would grant derivative rights to its members. Derivative rights meant leases, licenses for use and occupation and easements.

It is clear from the Act that in these village settlements both homestead plots and agricultural plots were held individually. Production was on individual basis. The people did not farm together jointly and were normally separately responsible for planting, weeding and harvesting under the supervision of management..

By 1966 the village settlement scheme failed; See *James & Fimbo (Source Book* p. 124) which explain the following as causes for its failure,

- Many of the farmers chosen to join the schemes were far from suitable. Meetings were held around the districts to attract farmers to the schemes, but the response in many cases came from urban unemployed people with little experience and less interest in farming. They applied to join the schemes more for the promises of free rations and services than for the opportunities offered to improve their standard of living by their own efforts;
- No serious attempt was made to explain to the farmers Government policy. Farmers considered themselves rather temporary and underpaid employees on Government estates;
- There was no farmers' involvement in the planning and establishment of the schemes – the schemes were initiated and managed by government servants, consequently bureaucracy in decision making developed;
- The initial planning on many schemes was poor;
- There was an unnecessary heavy capital investment, the capital cost per acre and staff requirement was very high;

- The allocation of land rights on individual basis made co-operative activity and later transition to communal ownership very difficult.

Following the Arusha Declaration in February 1967 which committed Tanzania to the goals of 'Socialism and Self reliance,' the village settlement programme was abandoned in favour of that of *Ujamaa Vijijini* (Ujamaa villages). The Arusha Declaration blue print spelt out TANU's policy of Socialism and Self – Reliance which revolved around 4 main themes; namely, - public control over the economy; - development through self-reliance, - social equality,- and rural development.

The Arusha Declaration and the Second Five Year Plan, 1969 – 1974, gave priority to rural development and increased production of agricultural crops for consumption and export became imperative. Besides the need for increased agricultural production, the government expressed the need to create collective productive activities in the rural sector through application of the principles of Ujamaa. The policy statement on Rural Development & Socialism stated,

> "The basis of rural life must be the practice of cooperation in its widest sense – in working and in distribution and all with the acceptance of the absolute equality of all men and women."

An enabling Act of Parliament was passed in very late in 1973 by the name of *Rural Lands (Planning and Utilization) Act*, No. 14 of 1973. The Act envisaged two stages. First, the President may declare any area of Tanganyika to be a specified area for the propose of the Act. Second, the Minister for Regional Administration may make regulations regulating farming operations in such area or reserving the area or any part thereof for establishment of an Ujamaa village or providing for the extinction, cancellation or modification of the rights, titles and interests in or over parcels of land falling wholly or partly within the specified area. (See for example G.N No 25/1974; 216/1974; 659/1986 and 88/1987).

In the implementation of the Ujamaa programme, bureaucratic control became the order of the day although as initially conceived; formation of Ujamaa villages was to be voluntary. What happed during the implementation of the programme was that there were no pretence about the voluntary character of the programme implementation – the programme took the form of massive government operations, hence the expression "OPERATION VIJIJI". These operations were embarked upon following TANU decision in November 1973 that all peasants must live in planned villages by the end of 1976. In doing this, some significant number of people was deprived of their pieces of land which they held under customary law, and were given in exchange other pieces of land in the villages established pursuant to Operation Vijiji. Despite there being the *Rural Lands (Planning Utilization) Act*, 1973, the exercise was undertaken not in accordance with any law but purely as a matter of government policy. (See the case of *AG v. Lohay Akonaay* (1995) TLR 80).

In some places, the settlement pattern in traditional villages was rearranged. In most cases villagization involved settlement on virgin land. The state ignored traditional land allocating authorities (i.e. chiefs, clan leaders, headmen, council of elders etc) which, however, had disintegrated. The function of allocating land to villages was assigned to District Development Councils (DDC) established by the *Decentralization of Government Administration (Interim Provision) Act* 1972. At the same time the *Villages and Ujamaa Villages (Registration, Designation and Administration) Act*, No. 21 of 1975 was enacted. This Act did not contain any provisions on land tenure. It only contained provisions which empowered the Prime Minister to designate a village as Ujamaa village if "a substantial portion of the economic activities of the villages are being undertaken and carried out on a communal basis."

Under the Directions made under the above Act, the D.D.C. would allocate land to a village. The village Council in turn allots a piece of farmland to every *Kaya* in the village according to need and ability to develop it. Since neither the DDC nor the village council were/are recognized by customary law as land allocating authorities it was doubtful whether such land was held under

customary law. And where a village was designated to be Ujamaa village the requirement was that once land had been allocated by the DDC the village Council of the Ujamaa village was obliged to,

> "take such measures as may be necessary to acquire rights of occupancy in respect of land within the limits of the village and no other person shall have any right, title or interest in or over any land within such limits."

This meant that after this had been done, customary tenure would cease to exist. The failure to act according to law led to, in 1980s, some aggrieved villagers to seek remedies in courts by claiming recovery of the lands they were disposed during the exercise. This was done when Ujamaa villages started to disintegrate. To avoid much conflict the government resorted in enacting orders, regulations and finally an Act of Parliament. *The Regulation of Land Tenure (Established Villages) Act,* No 22 of 1992 is a point in reference. The effect of this Act was to extinguish customary rights in land acquired before 'operation vijiji' in an established village; to prohibit the right to compensation for such extinction, to oust the jurisdiction of the courts, to terminate relevant court proceedings and prohibit the enforcement of any relevant court decision. Following this, a case was filed against the Government and consequently some provisions of this Act were declared unconstitutional in *Attorney General v. Lohay Akonaay, & Joseph Lohay* (1995) TLR 80.

Read the following cases to understand the status of customary tenure vis a vis granted right of occupancy as judicially determined between 1980s to 1999.

- *NAFCO v. Mulbadaw Village* (1985) TLR 88.
- *Suzana Kakubukubu & Others v. Walwa Joseph Kasubi and others*; Civil Appeal No. 14 of 1991 (C.A.T).
- *M. P Nyagwaswa v. C. M. Nyirabu* (1985) TLR 103.
- *Yoke Gwaku & Others v. NAFCO & Anothe*r, High Court of Tanzania, Civil Case No 52 of 1988.
- *Mwalimu Omari & Other v. Omari Bilali,* Civil Appeal No 19 of 1996, (CAT).

- *Joshua Okuku v. Shaban Adam*, Civil appeal No. 1 of 1996.
- *Lekengere Faru Parut Kamunyu & 52 others v. Minister for Tourism Natural Resources and Environment & 3 Others* Civil Appeal No. 53 of 1998, (CAT).

Lecture Two: THE RIGHT OF OCCUPANCY SYSTEM

The Right of Occupancy is a tenure which is unknown to the English common law. It was introduced into the then Protectorate of Northern Nigeria as a result of the recommendation of the Northern Nigeria Lands Committee which reported in 1910. The Committee recommended that land legislation should declare all land to be under the control and administration of the government and that no title to the use or occupation of land should be valid without the consent of the Governor. It went on to suggest other stringent limitations on individual titles. That, no individual was to have exclusive rights as against the government. The right was to be revocable for a wide number of reasons including the need of the land for public purposes, whereas no compensation was to be payable by right, only as a matter of administrative practice. The recommendations were embodied in the *Land and Native Rights Proclamation* No. 9 of 1910, which was revised and largely re-enacted by the *Land and Native Rights Ordinance* No. 1 of 1916 of Nigeria.

When the British came into Tanganyika, the then colonial government adopted almost identical provisions in 1923 by passing the *Land Ordinance of 1923*. The rights and powers of the holder of right of occupancy are never absolute, and their exercise is in most cases, limited by a number of restrictions, and subject to control. This system has continued to be part of the law of Tanzania even after the enactment of the new Land Acts of 1999, namely the *Land Act, No. 4 of 1999* and the *Village Land Act, No. 5 of 1999* which at present govern the land legal regime in Tanzania Mainland.

CLASSIFICATION AND TENURE OF LAND

The new *Land Act, 1999* continues to state just as the repealed *Land Ordinance, 1923* that "All land in Tanzania shall continue to be public land and remain vested in the President as trustee for and on behalf of all the citizens of Tanzania" (s. 4(1)). The law therefore says that, " a grant of a right of occupancy shall be made in the name of the President and shall be sealed with a seal of a nature and pattern which the President may, by order, published in the *Gazette* approve" (s. 4(5)).

For the purpose of the management of land under the *Land Act, 1999* and all other laws applicable to land, public land is now categorized into the following:

- General Land;
- Village Land; and
- Reserved Land (See s. 4(4) of the *Land Act).*

The village land is that category of land within the domain of the village authority, whereas species of reserved land are indicated in section 6 of the *Land Act, 1999*. All other remaining land forms the category of general land. However there are provisions which allow the transfer of land from one category to another (See ss.5(1) of the *Land Act* and the *Village Land Act).*

Under the scheme provided in the new *Land Acts,* land can be occupied in different ways as follows:

(i) Granted right of occupancy (s. 29 of the Land Act).

(ii) Customary/deemed right of occupancy (ss. 25, 14 of the Village Land Act).

(iii) Residential license (also called derivative right) under s. 23(1) of the Land Act whereby urban or peri-urban dwellers are issued with temporary license.

(iv) Derivative rights through the Tanzania Investment Centre (TIC) for non citizen investors.

Rights of occupancy and derivative rights are granted for a short term and long term period.

- Long term rights of occupancy periods range from 5 - 99 years and are renewable, but for not more than 99 years.
- Long term derivates rights and leases range between 5 - 98 years.
- Short term right of occupancy is for less than 5 years (See S. 32 (1) of Land Act). In practice, grants of a short term are rarely made and when granted, they are granted over land in respect of which there is no planning scheme under the provisions of the *Town Planning Act*. According to the Land Registration Act, Cap 334 only long term right of occupancy are compulsory registrable (S. 27 thereof).

The nature of the rights of the occupier of land can be summarized as follows:

(i) It can only arise by grant from the President (s.22 of the *Land Act*) for a definite term, not exceeding 99 years.

(ii) The occupier has exclusive rights to the use of land the subject of the right of occupancy against all persons other than the President except mines, minerals, gas, water or rights over the foreshore, (S.22(2) of the *Land Act*). This connotes the concept of 'imminent domain', that, the President is deemed to be "the superior landlord", or as having "reversionary title" or "radical title". However, the law empowers the President under section 4(2) of the *Land Act* to delegate any of his functions under the Act to the person called Commissioner for Lands who shall be the principal administrative and professional officer over all matters connected with administration of land in the country. It follows that the Commissioner for Lands or any other authorized officer (for instance, the Land Officers) are authorized to enter on the land the subject of a right of occupancy to inspect any land and to investigate whether the conditions subject to which the right of occupancy has been granted have been complied with (See s. 34(8) of the Land *Act*).

(iii) The occupier is entitled to compensation in case of expiry, (where the Land Commissioner decline to renew his right of occupancy) or revocation of the right of occupancy (except when done for breach of conditions) or where the right of occupancy is compulsory acquired for public interest under the *Land Acquisition Act No. 47 of 1967.* (See s 45 of the *Land Act*).

(iv) With governmental approval the occupier can transfer the right of occupancy, or otherwise dispose of it. (See ss. 36, 37 of the *Land Act*).

Author's Note: It is important to refer to section 22 of the *Land Act* to see the specific features/incidents of a right of occupancy granted under the *Land Act* and section 18 of the *Village Land* Act for incidents of customary right of occupancy and compare them.

To understand the judicial attitudes of the nature of "right of occupancy" system read the case of: (Is the right of occupancy equal to lease?).

- *Director of Lands & Another v. Sohan Singh* (1952) 1 TLR (R) 631;
- Premchand Nathu v. Land Officer (1962) EA 738;
- *Patman Garments Industries Ltd v. Tanzania Manufactures Ltd* (1981) TLR 103 (on powers of the President to revoke right of occupancy).

Tanzania`s exprerience with land administration and land policy reforms: Womens

Land Rights (Extract from the Guardian of 27th July 2007)

By Dr.Furaha Lugoe

Land policy reform in the modern context is about equitable land redistribution and guaranteeing land rights and tenure security to enable economic growth and poverty reduction. Land has a particularly significant role to play for securing the livelihoods of poorer rural people. More than half the population in many African countries lives below poverty line subsisting on less than US $ 1 per day and a significant part of this poor populace, live in abject poverty on less the US $ 0.75 per day.

Since land is a primary means of both subsistence and income generation in rural economies, access to land, and security of land rights, are of primary concern in improving on such statistic towards the eradication of poverty. In rural areas, land is a basic livelihood asset from which people produce food and earn a living. Access to land enables family labour to be put to productive use in farming. It is a source of food, and provides a supplementary source of livelihoods for rural workers and the urban poor.

The grazing of livestock on extensive rangelands is a basic livelihood activity for pastoralists and access to pasture land. Gathering fruits, leaves and wood from common land is an important regular source of income for rural women and poor householders, as well as constituting a vital coping strategy for the wider population in times of drought and famine.

Land can be loaned, rented or sold in times of hardship and thereby provides some financial security.
At the same time as a heritable asset, land is the basis for the wealth and livelihood security of future rural generations. In this regard, it is important that the lands sector must develop policies geared at giving every adult in the rural areas legal access to land. The contribution of land to economic growth depends upon the security of tenure, duration and the enforceability of property rights since these provide an incentive for agricultural investment and helps develop markets to rent and sell land (Mtatifikolo and Lugoe, 2006).

Land markets, enable the transfer of land from less to more efficient producers, thereby increasing yields and agricultural output. Increased agricultural growth will bring benefits not only to those receiving titles directly, but also to the poor as a result of more employment, cheaper food and other trickle down effects. However, in some cases land titling may benefit few powerful private interests and create opportunities for land concentration and speculation rather than investment. Hence, the land market has to be carefully regulated to produce the desired results of poverty reduction, economic growth and development.

A Victory for Women`s Land Rights:
A key aspect of the land tenure system of Tanzania as provided in the Land Act no. 4 and the Village Land Act no. 5 of 1999 is the enhancement of the right of vulnerable groups (women, children, minorities) in society (Shivji, 1997). The male dominant structure of society governs nearly 80% of the rural population including succession and inheritance in Tanzania. The problems are deep-rooted in succession or inheritance of immovable property including land by the female gender.

Custom, culture and certain religious practices have combined to produce a bias against vulnerable groups. Both Land Act No. 4 and Village Land Act No. 5 of 1999 have attempted to put into effect the above sentiments with provisions relating to repugnancy of customary law, acquisition of land rights and sales or assignments of land and mortgages. A number of critical statements against gender discrimination are provided in the Land Act no. 4, in the context of co-ownership and mortgages (see sections 85, 112, and 161 (2)), which apply to the Village Land Act as well.

The latter is very specific on the rights of children in sections 20(2), 23(2) (e) (iv), 30(3) c) and 33

(1) c) and that of pastoralists in sections 29 (2) (a) (iii), 3 (1) (l), 7 (1) and 8 (8) (d). The Village Land Act provides for a representation of women (at least 25%) on the Village Council, at least 4 members of the Village Adjudication Committee and at least 3 on the Village Land Council (dispute settlement) to guard against discrimination in the access to land.

In the context of Tanzania, as an example to Africa, there has been steady progress in the contributions of the lands sector towards poverty eradication. The PRSP progress reports for 2000/01 and subsequent years have credited the lands sector with a number of accomplishments, including: (i) Streamlined procedures for land access and therefore improving the sensibility of the land tenure system; (ii) Providing a greater scope for women to own land rights, although much still had to be done to reduce the gender poverty gap and vulnerability; (iii) Setting the ground for the use of land as a productive asset and collateral in mortgage loans by commercial and micro-finance banks and other finance houses; (iv) Providing a mechanism for enhancing property rights of low income households through the provisions of the new land laws, including the possibility of tenure regularisation in informal settlements; (v) Initial popularisation of the Land Acts to enhance the legal capacity of women and other vulnerable groups and their predicament.

These accomplishments are to be enhanced by the strategic plan for the implementation of the land laws (SPILL) now under implementation. The Gender debates of the 1990s on Land Rights could achieve more: The above provisions are a list of issues for which women and gender groups, in general, bargained for in the run-up to the national land policy and the new land laws in Tanzania.

Their participation was exemplary and were given attention by all including the presidential commission on land matters, the seminars preceding the NLP and the parliamentarians. Whether or not they could have achieved more depends on the agenda carried forward by the stakeholders. The issue of women`s land rights should be addressed in amore holistic and proactive way so that the status quo with regard to marginalisation, sidelining and neglect can be challenged and in order to advance appropriate proposals for policy changes.

It is widely felt that land policy reform advocates on the side of the gender question in Tanzania were more interested in reversal of legal provisions on succession and inheritance (Manji, 1998). Succession in land title and landed property, it is felt, is one aspect of women's unequal rights to land but is not everything as women's relations to land are much more complex than status relationships reflected in inheritance.

More importantly are relations governed by roles of women as food producers for the home and market, i.e., as farmers and farm workers and are affected by policies on land matters. Women as full subjects on land relations should pursue issue of difficulties encountered in exercising effective control and management of land; of removing barriers to land access; and of food production hindered by inequitable distribution and re-distribution of land.

Women issues therefore transcend issues of women employment as indicator of status; advocacy in amending legal provisions in laws on inheritance or land; urban concerns and class structure. Women issues ought to recognise land as the most important and valuable of all assets particularly to rural economies (Manji, 1998). In villages land provides livelihood, an identity and a sense of

belonging and, determines status. It is a vital asset for women over other sources of income, particularly for those engaged in smallholder agriculture, including employment.

Discrimination is Repugnant at Law:Gender discrimination in land matters is repugnant at law. The concept of repugnancy has a historical origin in Tanzania and many other African countries. The Tanganyika Order in Council, 1920 stated that customary laws were applicable to the extent that they were not repugnant to justice and morality. Fimbo (2004) adds that in the Village Land Act, a new version of repugnancy has been enacted, namely, repugnancy of customary laws to notions of equality of the sexes. Sub-section (2) of section 20 declares that a rule of customary land law is void and inoperative to the extent that `it denies women, children or persons with disability lawful access to ownership, occupation or use of any such land`.

In this provision the Legislature is addressing itself to customary rules of inheritance that discriminate against daughters. Both Land Acts contain gender-neutral provisions on acquisition of lands rights in Tanzania. Thus it is open to any man or woman, being a citizen of Tanzania, to apply for granted right of occupancy or customary right of occupancy (Shivji, 2005).

With an eye on gender equality, section 23- (3) of the Village Land Act No. 4 of 1999 provides that in determining whether to grant a customary right of occupancy, the village council shall; `have special regard in respect of the equality of all persons, such as: that an application from a woman, or group of women no less favourably than an equivalent application from a man, a group of men or a mixed group of men and women`. Sub-section (4) further provides that where an application is refused, the village council must furnish the applicant with a statement of reasons for the refusal.

The significance of this provision is that the aggrieved person may wish to challenge the decision in a land court. Another innovation in this regard relates to the concept of co-occupancy between spouses.

Section 161 of the Land Act contains a rebuttable presumption that spouses will hold the land as occupiers in common in all cases where a spouse obtains land under a right of occupancy for the occupation of all spouses. In every such case the Registrar of Titles is required to register the spouses as occupiers in common.

So in an appropriate case an application for a granted right of occupancy by a spouse may lead to registration of both spouses or all the spouses as occupiers in common. In addition a spouse`s contribution of labour to the productivity, upkeep and improvement of land held in the name of one spouse only leads to acquisition of interest in that land by the other spouse.

In summary, Gender issues in land seek to address the rights of women to own and use land that constitutes the ultimate resource for human kind. These rights are more basic than reversal of customary arrangements over inheritance and/ or employment. Women should not lose focus of primary issues in the struggle for land access. Further gender discrimination is repugnant to justice and morality in most communities. Therefore gender sensitive legislation is to support emancipation of women towards equitable access to land and subsequent enhancement of production and higher contribution to the GDP. In this regard affirmative action, in cases of gross deprivation and neglect particularly where customary rules of inheritance and religious polarization are deeply entrenched, should not be ruled out.

Reviewed by Dar es salaam Institute for Land Administration and Policy Studies. SOURCE: *GUARDIAN*

See this summary on rights of women to land:

Women's Rights in The Land Act, 1999 and The Village Land Act, 1999

These Acts are of particular importance, since secure land rights are key in promoting women's economic empowerment and the majority of working women in Tanzania live in rural areas, are engaged in agricultural work and are without the right to own, manage or inherit land.

In general, the new land laws secure the rights of women in the following ways:

a. Secure women's rights to acquire title and registration of land.
b. Actively promote women's representation in decision-making bodies addressing land issues, such as participation in administrative and dispute settlement institutions.
c. Address issues of customary land rights and uphold the principle of non-discrimination based on sex.
d. Inclusion of women's land rights in the forthcoming National Land Policy (see Government Programmes below).

Specific provisions in both Acts regarding women's rights, and equal opportunity for women concerning land management, include:

b. Sub-section 20(2) of the *Village Land Act, 1999* prohibits the use of customary law in determining the right of occupancy, if the law discriminates against, *inter alia*, women:

"Any rule of customary law and any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally, shall have regard to the custom, traditions, and practices of the community concerned and the rule of customary law or any such decision in respect of land held under customary tenure shall be void and inoperative and shall not be given effect to by any village council or village assembly or any person or body of persons exercising any authority over village land or in respect of any court or other body, to the extent to which it denies women, children or persons with disability lawful access to ownership, occupation or use of any such land."

b. Family land is protected by a presumption of co-occupancy, which recognizes both spouses (*Land Act, 1999*, ss. 161-164.).
c. A married woman must give her consent before her husband can make a disposition (i.e.: mortgages, sales, leases and other derivative rights) of their matrimonial landed property (*Land Act, 1999,* s. 112(3).).
d. Appointment of members to the National Land Advisory Council must have regard to the importance of ensuring a fair balance of men and women (*Land Act, 1999*, s.17).
e. Village Councils must not allow or make assignments which would negate the right of a woman to occupy land (*Village Land Act, 1999*, s.30(4)(b).).

f. In approving a disposition of a customary right of occupancy, the Village Council is bound, *inter alia*, to ensure that the special needs of women for land are adequately met (*Village Land Act, 1999*, s.33(1)(d).).
g. In case of a husband exercising his customary right of surrendered occupancy, first priority for offer of the land must go to his wife or wives (In the latter case, in their order of seniority - *Village Land Act, 1999,* s.36.).
h. The number of women participating in the Village Adjudication Committee and Dispute Settlement Machinery, must not be not less than half the minimum number of members (*Village Land Act, 1999*, ss. 53(2), 53(5) and 60(2).).

CUSTOMARY/DEEMED RIGHT OF OCCUPANCY

In the case of *Mtoro bin Mwamba* (supra) the judge held that, 'the Bantu had no idea of a right to the land in itself in *re* … the general right over the land might be termed usufractuary occupational agricultural right and heritable'. It was the view of colonial judge that individual ownership of land is unknown to African societies, the reason being that all land is held communally.

It cannot, actually, refuted that in early African societies a person could not acquire permanent rights in land through purchase or any other means for there was no scarcity of land and the pattern of cultivation was shifting, being done for subsistence. However, with the availability of more detailed studies from various communities, it is now clear that it is not true that Africa land tenure was much the same in every part of the continent, variations existed and changes took place as time went on. For example, various forms of feudalism flourished in many parts of Africa.

Under customary law, there were major three ways of acquiring land (1) by cultivation through clearing virgin land (2) by purchasing and (3) by inheriting land from one's elders. Under all those, nobody's permission was necessary in order to acquire ownership. Under the *Land Ordinance, 1923*, this system of occupation came to be referred as 'Deemed Right of occupancy' or 'Customary right of occupancy' - means a title of a native or a native Community lawfully using or occupying land in accordance with native law and custom. This definition is now modified in the *Village Land Act, 1999* as follows,

> "the title of a Tanzania citizen of African descent or a community of Tanzanians citizens of African descent using or occupying land under and in accordance with customary law."

Furthermore, the *Village Land Act, 1999* now creates a difference between 'Deemed Right of Occupancy' and 'Customary Right of Occupancy'. While a deemed right of occupancy is regarded to be a customary right of occupancy but it is not necessarily the same. A customary right of occupancy is now granted by the Village Council under s.25 of the *Village Land Act*, and a certificate of customary right of occupancy is issued thereto. It follows logically that, those interests acquired by virtue of native law and custom remain as deemed rights of occupancy and those which are now issued by the village council are called customary rights of occupancy.

This arrangement came about as a result, partly, of the recommendation of the Presidential Commission of Enquiry into Land Matters (Commonly referred after its Chairman- Prof. Issa Shivji, 'the Shivji Commission'). The Commission recommended two forms of tenure, that is to say, the 'right of occupancy' and 'customary rights' And on the relationship between them (as argued earlier in the case of *Yoke Gwaku* (supra)) the Commission stated that,

> "The Land tenure system is based on multiple land regimes all existing side by side and none of which shall be considered superior to the other and interests under each of them shall enjoy equal security of tenure under the law."

When the *National Land Policy of 1995* was drafted, it made further clarification by making a policy statement to the effect that,

> "(vi) A dual system of tenure which recognizes both customary and statutory rights of occupancy as equal in law will be established."

The *National Land Policy* became the core document to the drafting of the *Land Acts* as it contains the Government position. The *Village Land Act, 1999* tries to implement the above policy statement. Under section 18 it states that:

"18 – (1) A customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy and shall subject to the provisions of this Act, be –

(a) capable of being allocated by a village council to a Citizen, a family of citizens, a group of two or more Citizens whether associate together under any law or not …

(b) in village land or reserved land

(c) capable of being of indefinite duration

(d) governed by customary law …

(e) inheritable and transmissible by will

(f) liable, subject to the prompt payment of full and fair compensation, to acquisition by the state for public purposes in accordance with any law making provision for that action.

Arguably, the above provision does not cover the "deemed right of occupancy" since it is not "capable of being allocated by a village council." However, the definition of customary right of occupancy states that "it includes deemed right of occupancy," (s. 2 of the *Land Act*).

The core issue here is to consider whether these *Land Acts* (Acts Nos. 4 and 5) have succeeded to create a dual system of tenure as equal in law. It is argued that the *Land Act, 1999* still maintains the superiority of the granted right of occupancy over the customary and deemed right of occupancy. For example, while s.18(1) of the *Village Land Act* states that both tenures are of equal status and effect, s. 34(3) of the *Land Act,* contains the following words:

"(3) where a right of occupancy includes land which is occupied by persons under customary law, it shall be a condition of that right of occupancy that those customary rights shall be recognized and those persons so occupying the land shall be moved or relocated only –

(a) so far as is necessary to enable the purpose for which the right of occupancy was granted to be carried out; and

(b) in accordance with due process and principle of fair administration, being given…."

This provision seems to override section 18 of the *Village Land Act* because of the clear provisions of section 181 of the *Land Act* which provides that, wherever any other written law applicable to land is in conflict with the provisions of the *Land Act*, the *Land Act* shall prevail. So, through the grants of a right of occupancy the petty bourgeoisie can cleverly side step customary tenure. Arguably, it can be said that s. 34 (3) of the *Land Act* evades tenure security of customary title, and progressively replaces it by granted right of occupancy.

PROCEDURES FOR GRANTING RIGHT OF OCCUPANCY

Neither in the *Land Ordinance, Cap 113* nor in the *Land Regulations, 1948* made under it had the procedure for granting of right of occupancy. Because of this lacuna, the Ministry of Lands took two administrative steps for guidance. In the first place, it introduced the granting of a letter of offer of right of occupancy for an applicant of a granted right of occupancy before a certificate of occupancy is prepared and issued to him. Secondly, it established land/plot allocation committees which were responsible for considering applications. In this procedure, the applicant applies for a grant. After approval of the application by land allocation committee the applicant was issued with an offer for which he is required to accept by paying the necessary fees for the plot within a certain specified period (like 30 days). This procedure of Plot allocation was provided in the Circulars issued by the Ministry of Lands, Housing and Urban Development, Circular No. NLUUD-C-1133/11/23 of 13th November 1978. (See the case *of Col. Kashimiri v. Naginder Matharu* (1988) TLR 163 – the Court of Appeal of Tanzania adopted took judicial notice of this circular)

Since the institution of plot allocation committees, three problems arose, namely:

(i) plot allocations were sometimes made without committee meetings,

(ii) there was a conflict between land granting bodies – the Commissioner for Lands and local government authorities e.g. The City Council of DSM, over jurisdiction to allocate plots.

(iii) concurrent jurisdiction of the Commissioner and District Land Officers to make land/plot allocation which led to double or multiple allocations.

(**Read:** *Fimbo, G.M. Essays in Land Law Tanzania* at pp. 84-99 and the case of *Tanzania Manufacturers Ltd v. Patman Garments Industries* Ltd (supra)).

Another problem which arose was regarding the significance of the letter of offer of a right of occupancy. The main issue of contention was when was the right of occupancy created? Is it just after the letter of offer has been issued and accepted or is it after the title of the right of occupancy is issued? In the case of *Sarjit Singh v. Sebastian Christom* (1988) TLR 24 the High Court (Kyando, J.) held that "a right of occupancy is created by the approval of the applicant's application for the grant of one, ie.. a right of occupancy, and the acceptance by the applicant for the granted right". The existence of a certificate of right of occupancy is merely evidence of a right of occupancy but not the right itself.

Reading the Land Act, 1999 this position seems to be overruled by section 29(1) (2) (3) (4). Sub-section (4), for instance, provides that "the occupier to whom a certificate of occupancy is issued shall sign at the bottom of the certificate as acceptance of the terms and conditions of that certificate *and no certificate of occupancy shall be valid or give rise to any liabilities on the part of the state or any rights on the part of the occupier to whom the certificate has been issued until it is so signed." (emphasis supplied).*

Since there were many problems under the old land law regime the new Land Act tries to address those problems under various provisions to make land administration transparent and certain. For example, land administration and distribution of land rights over general or reserved land is now completely centralized in the office of the Commissioner for Lands. However there is room for delegation of functions, under G.N. No 76 of 2001, "Land (Functions of Authorized Officers) Regulations, to authorized officers. To a greater extent the *Land Act* introduces openness and transparency in land administration and land delivery. There are four stages before a right of occupancy is granted:

- First, under S. 25(1) an application for a right of occupancy is submitted on a prescribed form (duly filled Land form No. 19) to the Commissioner; accompanied by passport size photograph, application fee, and any other information as required by the Commissioner. There should also be a declaration of all rights and interests in land in Tanzania which the applicant has at the time of application. Application by a non citizen or foreign company should be accompanied by a Certificate of Approval granted by Tanzania Investment Centre (TIC) under Tanzania Investment Act, 1997. (See the entire S. 25 of the *Land Act*).

  The Commissioner is obliged to maintain a register of application which shall be available to inspection by the members of the public. (S.25(6)).
- Secondly, after receiving such applications The Commissioner shall be responsible for determining the application (S. 26(1)).

  In determining the above, the Commissioner may act on the recommendation from a local government authority or other body (S. 26(2);(3)). If he accepts the application and determines to grant a right of occupancy he issues 'a letter of offer' to the applicant in the prescribed form (Land Form No. 20) (S. 27 (1);(2)).
- Thirdly, is an acceptance of the letter of offer by the applicant in the prescribed form (Form No. 20) accompanied by any fee or deposit or any irrevocable commitment to pay such fee or deposit (S.28(1)).
- Fourthly; the Commissioner grants a right of occupancy by issuing of certificate of occupancy in the prescribed form. (S.29(2) (Land Form No. 22).

  Note: Read the whole of S. 29 of the *Land Act*. But note also that, where the certificate of occupancy to the applicant is not issued within 180 days since the date of receiving a letter of offer, the offeree may apply to the Registrar of Documents to have his offer registered.

The Land Act establishes what are called Land Allocation Committees (S. 12(1) which may be established at the rural level or at the urban level or district

authorities (S.12(3)). But their role is to advice the Commissioner on the exercise of his power to determine applications for right of occupancy.

Non Citizen Investors

Occupation of land by non-citizens is restricted to lands for investment purposes under the Tanzania Investment Act, 1997. Under the *Land Act*, a foreign investor may occupy land through:

- Derivative rights under section 20(2) of the *Land Act, 1999;* (See S. 19(1) for definition or derivative right).
- Application to the Commissioner for Lands for grant of a right of occupancy under section 25(1)(h) and (i) of the Land Act, 1999 ;
- Sub-leases from private sector;
- Licenses from the Government ;
- Purchase from other holders of granted right of occupancy.

As for derivative rights, land designated for investment purposes shall be identified, gazetted and allocated to TIC, which shall create derivative rights to investors. Instances of grant of right of occupancy to a non-citizen are recognized under section 19(2) of *Land Act,* 1999. Since, section 22(1)(i) allows the granted right of occupancy to be capable of being a subject of disposition, a non-citizen can obtain it from the market. Read the case of SHAFFIQUE DHIYEBI v. PSRSC, HC (Land Division) Land Case No. 46 of 2004(unreported).

Lecture Three: REVOCATION OF THE RIGHT OF OCCUPANCY

INTRODUCTION

As stated in the previous lectures the rights of land users are:

(i) The right of exclusive possession of the right of occupancy against all persons other than the President.

(ii) The right, in conformity with statutory provisions, to erect dwelling houses, production, cultural, services and other buildings and structures, to sow agricultural crops and plant forests and fruits, decorative and other tress, pastures etc.

(iii) The right to transfer the right of occupancy, mortgage or otherwise dispose of it subject to government approval.

(iv) The right to compensation should the interest of occupier is acquired in the public interest.

It was also mentioned to you that the mere grant of a right of occupancy does not confer on the occupier any water rights, rights over any foreshore, any rights to mine, minerals or mineral oil. These rights may be acquired on application to appropriate state authorities under specific legislation.

Just as rights go with duties/liabilities so is in the occupation of right of occupancy. The duties of land users are mostly dependent on the specific aim for which the land was granted. Generally, the land occupier is obliged to use the land granted for the purposes for which it was allotted. In such a case he shall not leave his land unused. A grantee of the right of occupancy for agricultural, pastoral or mixed agricultural and pastoral purposes or a grantee of land for building purpose in urban areas shall comply with conditions stipulated in the certificate of right of occupancy given to him and specifically observes the conditions contained in the **Land (Conditions of Rights of Occupancy) Regulations of 2001 (G.N No. 77 of 2001)**. For example, regulation 6(1) thereof maintains that:

"Where the land the subject of a granted right of occupancy in a Planning area or in any urban or peri-urban area is undeveloped land or land in a redevelopment area the occupier thereof shall apply for planning consent under the **Town and**

Country Planning (Application for Planning Consent) Regulations 1960, and shall apply for a building permit under the **Township (Building) Rules, 1953** within six months of the grant of the right of occupancy and shall use the land in conformity with the **Town and Country Planning (Use Classes) Regulations, 1960**."

REVOCATION

The previous *Land Ordinance, Cap 113* was very skeletal in many respects. One area was that it granted wide discretionary powers to the Governor (later the President) and bureaucrats with regard to revocation of right of occupancy. Under the previous Land Ordinance, 1923, section 10, it was clearly stated that, it shall not be lawful for the President to revoke a right of occupancy save for "good cause." See the case of *Patman Garments Industries Ltd v, Tanzania Manufacturers Ltd* (supra) where the Court of Appeal attempted to interpret section 10(1) of the Ordinance. Good cause was defined to include, any breach of any term or condition contained or to be implied in the certificate of occupancy (i.e. development conditions); or breach of any regulations under that Ordinance relating to the transfer of or dealings with rights of occupancy or interests therein. Under the Land Act, similar provisions can be found. The President is empowered to revoke a granted right of occupancy upon any breach arising from any condition attached to the right of occupancy (S. 45(1)) and upon other "good cause". What matters can amount into good cause are specified under subsection (2). Generally, a holder of right of occupancy holds his certificate of title subject to conditions expressly provided in the certificate of a right of occupancy, in the Land Act, the Land Registration Act, Town Planning Act and all regulations made there under. In short, the holder is required to comply with the laws which govern the nature of his/her title.

The good thing with the Land Act is that, before revocation is done "due process" must be followed. Certain specified procedures as provided from S. 35(4)- 49) must be adhered to, these includes serving of notice to the occupier informing him/her the breach he/she is alleged to have committed as was

required in the case of *Director of Land and Mines v. Sohan Singh* (1952) 1 TLR 631

In 1970 an amendment was made to the Ordinance by virtue of Act No. 28 of 1970 under which subsection (2) was added into. This subsection granted power to the president to revoke a right of occupancy "if in his opinion, it is in the public interests so to do". These provisions brought to surface the following problems: (i) no definition of "public interest" was given in the Ordinance; (ii) there was no provision for notice to the occupier before his right could be revoked; (iii) there was no provision for appeal to any forum against the revocation order, (iv) there were numerous revocations which were made without good cause and (v) revocations were often made to solve the problem of double/multiple allocation and in order to clear the way for fresh grants of rights of occupancy.

Like the Land Ordinance which empowered the President to revoke a right of occupancy in the "public interest," the Land Act does the same under section 45(3). The problem is that, up until now the word 'public interest' is not defined anywhere. Case law has tended to focus only on the justiciability of public interest but not its meaning. With regard to revocation power, the President has no power to delegate this power. This position is reinforced from the National Land Policy para. 4.2. 14(ii).

Students Should read these cases/materials:

(i) Read the case of DIRECTOR OF LANDS AND MINES v SOHAN SINGH (1952) TLR 63, and PREMCHAND NATHU & CO LTD v. LAND OFFICER [1962] E A 739 PC; [1960] EA 941, and consider how the court dealt with the issue of notice at the time of revocation.

(ii) Read page 89 to 99 in Fimbo G.M; The Essays in Land Law Tanzania, Dar es Salaam, 1992.

(iii) Read the following cases relating to revocation of right of occupancy: Premji v. Calico Textiles Industries Ltd., High Court, Dar es Salaam, Civil Case No. 5 of 1987(found in page 94 of Essays in Land Law); Patman Garments Industries

Ltd., v. Tanzania Manufactrers Ltd., (1981) TLR 303 (also found in Essays in Land Law page 95); Agro Industries Ltd., v. Attorney General [1994] TLR 43.

THE LAND ACT 1999 ON REVOCATION

The Land Act has addressed itself to the problems mentioned above by making extensive provisions on grounds of revocation, the process of revocation and relief to the occupier who is aggrieved by the revocation. Like the previous Land Ordinance, the power to revoke right of occupancy is vested in the President. (Section 45(1)). This power is exercised upon any breach arising from any condition or good cause (see s. 45(1)(2)) or where the President is of the opinion that "it is in the public interest to do so".(s. 45(3)). However, before proceeding to take action in respect of a breach of condition of the right of occupancy the Commissioner must consider a number of things, which includes:

(a)the nature and gravity of the breach and whether it could be remedied;

(b)the circumstances leading to the breach by the occupier;

(c)whether the condition that has been breached could be amended so as to obviate the breach. (s. 45(4)).

So, revocation is not the only remedy available. The Commissioner may, instead of proceeding with the process of revocation either impose a fine on the occupier in accordance with section 46, or serve a notice on the occupier in accordance with section 47 requiring the breach to be remedied (s. 45 (5)).

Now, should the Commissioner be minded to proceed to take action on a breach the process of revocation is elaborate as follows;

(i) He must issue a warning letter to the occupier advising him that he is in breach of the conditions of the right of occupancy(s.45(4) (c); GN No. 71 of 2001 Land Form 6);

(ii) Serve a notice on the occupier in a prescribed form requiring the breach to be remedied; [if such notice is not complied with the Commissioner will proceed with the next step];

(iii) Serve upon the occupier a notice of revocation in the prescribed form and notifies the Registrar of Titles of the service of such notice of revocation (s. 48(1));

(iv) Then the Commissioner recommends to the President to revoke the right of occupancy(s/ 48(2));

(v) Finally, the President approves a revocation and the Commissioner is required to cause it to be published in the Gazette and in one or more newspapers(s.49(1)).

[For deeper understanding students are advised to read whole of sections 44 – 49 of the Land Act].

No doubt that under these detailed procedures to be followed no revocation can be done arbitrarily. This in turns enhances tenure security of occupier of right of occupancy.

The Village Land Act on the other hand does not contain provision for revocation of deemed right of occupancy or customary right of occupancy by the village council. It employs a different terminology. And that is - deprivation of land under customary right of occupancy. This sanction can be invoked only if the relevant customary law provides so. The condition precedent is breach of a condition imposed under and in accordance with customary law. (Ss. 37(1), 39(1)). The procedure to follow in the event of breach is (i) the village council issues a warning to the occupier advising him that he is in breach of condition(s38(6)), (ii) the occupier makes a representation (s. 39(1)), (iii) the village council determines to proceed to exercise a customary law remedy (s.39(1) (c), and finally (iv) the Commissioner to assent to the remedy (s.39(2)).

COMPENSATION FOR UNEXHAUSTED IMPROVEMENT

What is unexhausted improvement is defined in the Land Act section 2 to mean “any thing or any quality permanently attached to the land directly resulting from the expenditure of capital or labor by an occupier or any person acting on his behalf and increasing the productive capacity, the utility, the sustainability of

its environmental quality and includes trees, standing crops and growing produce whether of an agricultural or horticultural nature."

Compensation is a right of a person who effected some improvements on the land and thereafter he is dispossessed by another person. Compensation is normally payable by the person who takes the benefits of the improvements. For example, where 'A' leases his land to 'B', upon effluxion of time 'A' should compensate 'B' for whatever benefits he can enjoy from B's improvements. Improvements on the land may be carried out mainly under two situations: (i) in pursuance of a grant of occupational rights in land- either express or implied; just like where a right of occupancy is granted to the occupier, or a tenancy or licence; (ii) in pursuance of adverse occupation of land.

Payment of compensation in the Land Ordinance was being effected as per the provisions of section 14 thereof. Generally where right of occupancy is revoked the occupier was entitled to compensation for unexhausted improvements upon the land. Read the case of MANYARA ESTATES LTD v. NATIONAL DEVELOPMENT CREDIT AGENCY [1970] E A 177 and consider the right of the mortgagee when the right of occupancy is revoked during the subsistence of the mortgage. In short the court held that (as per Law, J.A., at page 182-183) "One has only to refer to the deeds …. The security in each case (mortgage) was the right of occupancy and nothing else, and when the right of occupancy was revoked, the security was destroyed". This case compelled the government to amend the Land Ordinance in 1970 by Act No. 28 in which section 14B was added in. This added section provided that:

> Where any amount is paid to the President on behalf of a previous occupier in accordance with the provisions of paragraph (b) of section 14 and the President is satisfied that-
>
> (a) such previous occupier had created a mortgage on the right of occupancy of the land previously held by him; and
>
> (b) that the amount payable to the mortgages in respect of such mortgage remains wholly or partially unpaid, the President shall, out of the amount so received by him, make payment to the mortgagee of the

amount remaining due to him under the mortgage, and where such payment is made to a mortgagee the remainder only, if any shall be paid to the previous occupier.

The proviso was that in order to receive payment the mortgagee was required to lodge his claim in writing to the Minister within three months since revocation was done.

The Land Act also provides for payment of compensation to the former occupier whose right of occupancy has been revoked. Section 49(3) provides inter alia that " there shall be payable to the former occupier whose right of occupancy has been revoked compensation which shall equal the value of unexhausted improvements made in accordance with the terms and conditions of the right of occupancy on the land at the time of revocation less-

(a) the costs to the Government of any proceedings for or taken in connection with the revocation;

(b) any rent, taxes and dues together with any interest on the rent, taxes and dues which were owed to the Government immediately before the revocation;

(c) any sums owed by the former occupier, or by the Government as a consequence of the revocation, to any person claiming a derivative right to the land through the former occupier; (see the definition of derivative right in section 2);

(d) any monies which the Government is obliged to spend or which it is reasonably necessary for the Government to spend to repair any damage to the land or any building on the land or to any contiguous land or to any persons lawfully occupying and using the land or any contiguous land as result of any act or omission to act by the former occupier during his occupation, whether that act or omission to act was lawful or not;

(e) any other expenses which the Government incurs or may reasonably anticipate incurring as a result of or on account of the revocation.

According to the **Land (Assessment of the Value of Land for Compensation) Regulations, 2001** GN No. 78 0f 2001 the basis for assessment of the value of any land and unexhausted improvement for purposes of compensation, under the Act shall be the market value of such land. In the event of revocation the Government shall pay compensation out of the **Local Compensation Fund** established by section 173 of the Land Act. The GN No. 79 of 2001, namely, **Land (Compensation Claims) Regulations 2001** mentions under its regulation 4 categories of persons who can claim compensation.

[Examine whether unpaid mortgagee falls under any category of person].

Lecture Four: THE LAW OF LANDLORD AND TENANT (LEASE)[1]

DEFINITIONS AND FEATURES OF LEASE

A **lease** is also a species of transfer of immovable property. While a **sale** is an absolute transfer of property, a lease is a partial or limited transfer of property. One can define a lease as a transfer of right to enjoy property made for a certain time, express or implied, in consideration of a price paid or promised or of money, a share of crop, service or any other thing of value or to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms.

A **lease,** therefore, is a transfer of property to the extent of a right to the transferee that is the **lessee,** to enjoy the same that is to make use of the property, for a fixed period in consideration of some price or premium and in consideration of the payment of rent or both. A lease is, therefore, not a mere contract but is a transfer of an interest in land. It creates a right *in rem*. Therefore, by way of **a deed of lease** what is transferred by the owner or the **lessor** to the lessee is his right to enjoy the property for a certain period (subject to the terms of the lease) and not the whole or any other part of the rights of ownership of the lessor. This type of transfer is called in conveyancing '**a demise'.** So by demise or a lease what is transferred is only the right to use the land subject to the **terms** or **covenants** that may be agreed upon. Indeed, a lease is the outcome of the rightful separation of **ownership** and **possession.** The essential characteristic of a lease is that the subject of the lease (i.e. land) is occupied and enjoyed but the ***corpus*** of the subject does not disappear by user. On the grant of a lease, the lessor retains what is called **reversion**, which he may assign.

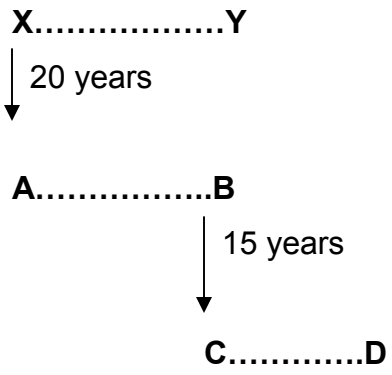
The expression **'lease'** and '**tenancy'** are several times intermixed. Both have the same meaning but generally under conventional/traditional usage, a tenancy

[1] Although the paper has been prepared as a simple guide to students of land law, the students should not take it as the only reference material for purpose of land law. The paper is also useful for the students to acquire legal writing skills. It shows how references by way of foot notes are cited etc; this will equip students with the requisite skills that can be used in writing their papers and/or dissertations.

is usually referring to the relatively short term while lease to more formal longer period, that is, more than a year or so. So, a tenancy for more than a year is generally called lease, though there is no distinction made by law. The word 'tenancy' is used when the lease is for a period of month to month or for less than one year or if it is **at will** or **at sufferance**. In English law 'tenancy' indicates 'possession' not ownership. So, '**tenant**' means one who occupies land or tenement under a **landlord.**

A lessee's right to enjoy or use the property is a right in an immovable property and is **a right in rem** and, therefore, transferable and heritable. It is by itself an immovable property or interest therein and it is therefore, a subject matter of conveyancing like the transfer of property by way of sale or mortgage. It follows, therefore, that a lessee can transfer his leasehold interest by way of **sub-lease** or by way of **absolute assignmen**t or assignment **by way of mortgage**.

Illustration of Assignment and Subletting



This diagram is the usual way of representing the following events. X grants a 20 years' lease to A and then assign the reversion to Y. B also takes an assignment of A's lease and grants a sub-lease to C for 15 years, whereas C assigns his sub-lease to D.

As to the 20-years' lease (head-lease) X is the 'lessor', 'Y' is the 'assignee of the reversion' or new landlord, and A the 'lessee'. B is in dual position; as to 20years' lease, he is the 'assignee of lease', or the new tenant; as to the 15 years' lease (sub-lease), he is 'sub-lessor'. C is the 'sub-lesee' and D the 'assignee of the sub-lease' or the 'sub-tenant'.

For the purpose of enforcing covenants in the lease it is important to note that '**Privity of Contract'** exists between X and A and between B and C, whilst '**Privity of Estate**' exists between Y and B (having the same estates as originally vested in X and A) and between B and D. Thus, as between the original parties to a lease (i.e. X and A; and B and C) all covenants in the lease are enforceable under normal contractual principles based on the privity of contract. However, where one party to a lease has assigned (not subletting) his interest, covenants may be directly enforceable by or against the assignee because of the principle of privity of estate. In this regard those covenants which '**touch and concern'** the land are so enforceable.

2.0 AGREEMENT TO LEASE

Every transaction of lease, particularly when the lease is for a long period, is generally preceded by **an agreement to lease**, followed by investigation of title of the lessor to the property and finally by execution of the **deed of lease**.

Under section 54 (1) of the *Land Registration Act, Cap 334* [R.E 2002] no lease shall be registered unless it is expressed to be for a term exceeding five years or contains an option whereby the tenant can require the landlord to grant him a further term or terms which, together with the original term, exceed five years. This means, it is only a lease for five years or more which is registrable under the *Land Registration Act, Cap 334* and can therefore be made by a registered instrument. In the case of a lease or tenancy for less than five years it can be effected orally or by an unregistered deed.

2.1 The Essentials of an agreement to lease

To create a valid lease the following are important:

(a) **The parties to the lease**-

Since one features of the leasehold interest is that, except where statute law operates, it is founded on a contract, there must be two parties to such contract. A lease cannot be made with oneself.[2] Under section 65(1) of the *Land Act, 1999* [Cap 113], however, "any person may make a disposition[3] to himself and any other person or together with any other person to himself alone."

(b) **The property to be demised-**

The subject matter of a lease must be land as defined in the law. The expression 'lease' is also nowadays used in respect of hire purchase agreements relating to moveable property like vehicle etc. But this is misnomer. Financing leases or leasing of machinery for securing finance is only a garb for hire purchase agreement.

(c) **Reversion-**

A lease must always be granted out of a larger estate, such as the right of occupancy, and there must always be a **reversion**. If there are no interests to revert to the landlord at any stage, the legal result is that there has been an **assignment** of that interest. Thus, the fundamental rule is that an estate must be shorter than the one out of which it is created. Section 78(2) of the *Land Act, 1999* says for instance, that the maximum term for which any lease may be granted shall be ten days less than the period for which the right of occupancy has been granted [for a definite period].

(d) **Certain term**-

It is an old principle that the term for which the lease is made must be certain. This easily applies where the term of the lease is defined in the agreement. One problem arose during the World War II, where a lease was drawn 'for the duration of the war'. This was declared to be invalid since the term was uncertain

[2] Rye v. Rye [1962] AC 496

[3] See the definition section 2 of the Land Act. The word 'disposition' includes lease.

in time.[4] As a result, Parliament hurriedly passed the '*Validation of War-time Leases Act, 1944'* which converted such tenancies into ones for a fixed period of ten years, determinable after the end of the war, usually on one month's notice.

This principle obviously is harder to apply in case of periodic tenancies for in a sense they are in effect leases for an uncertain duration determinable by notice. But the certainty need not exists at the date of the lease. But the period must be such that the day will arrive which will make it certain. So, certain term can either be a fixed term of certain duration (e.g. 10 years) or a fixed term with its duration capable of being rendered certain by notice (e.g. a yearly tenancy etc).

(e) **The right of exclusive possession must be given-**

Exclusive possession is the hall-mark of an estate in land, and is an essential characteristic of a tenancy. For a lease to be created the right to exclusive possession of the premises must be given to the tenant. Since a lease is an estate in land, i.e. a proprietary right that should be enforceable against the whole world including the landlord, the tenant must be given the right to exclude all other persons from the demised land during the period of the lease. A right to occupy a certain land cannot be a tenancy/lease if the person granting the right remains in general control of the property; as is normally the case with rooms in hotel, guest house or boarding house. A mere lodger has no tenancy[5] . However, even a licence[6] may nowadays confer such a right of exclusive possession. In determining whether a document conferring exclusive possession is a lease or a licence the court looks at the substance of what the parties intended rather than the external form of the document[7]. The crucial question to ask is - was the occupier intended to have only a personal non- assignable privilege or was he to have a disposable stake in the property that would bind third parties?

[4] In the case of Lace v. Chantler [1944] K.B 368

[5] Appah v. Parn Cliffe Investments Ltd [1964] 1 WLR 1064; Merchant v. Charters [1977] 1 WLR 1181

[6] Read the article by James R.W; "Some Problems Concerning Lease and Licenses" In Eastern African Law Journal No. 8, vol.3 of 1967.

[7] Barnes v. Barrat [1970] 2 QB 657; Finbow v. Air Ministry [1963] 1 WLR 697; Shell Mex v. Manchester Garage [1971] 1 WLR 612

2.2 Option to renew or sale

An agreement for lease also sometimes contains a provision giving option either to extend the period of the lease or terminate the lease before the expiration of the agreed period. An option to renew the lease is generally given to the lessee. An option to renew is given to the lessee to be exercised by him either within a particular period or on the expiration of a particular period as may be agreed upon, by giving prior notice to the lessor of such period as may be agreed upon. If no period is mentioned the option can be exercised at any time before the determination/termination of the lease. The option may be absolute or conditional. In case of **absolute option** the lessee can extend the period, that is renew the lease on the same terms and conditions[8] by giving prior notice for the period as may be stipulated. Where the clause of option has stipulated that the lease will be renewed on the same terms and conditions including rent or excluding rent or on such terms and conditions as may be agreed upon as to rent or other provisions, provided the lessee had paid the rent up to date and observed the terms and conditions of the lease, this is a **conditional option**.

If the option is conditional that is subject to fresh terms as to rent or otherwise being agreed upon between the lessee and the lessor or if the lease provides that the same can be renewed for a further period, if agreed upon between the parties, the option is almost illusory because in such a case only if both the parties agree upon the terms and conditions of the new lease the same can be granted or renewed. If both the parties agree, then even if there is no provision for renewal, the lease can be renewed for any further period by consent of parties. **If the lease is renewed for further period either under an option or by mutual consent, a fresh document of lease will have to be executed and a mere notice of renewal or agreement for extension may not be sufficient**. So, when there is an option given to the lessee or the lessor to renew the lease the exercise of the option does not by itself extend the period or renew the lease but a fresh deed of lease must be executed. The provision regarding how the

[8] See Hitkarini Sabha v. Jabalpure Corporation, AIR 1961 M.P 324

option is to be exercised as a condition precedent **must be strictly complied** with. And the **covenant for renewal must be clear and definite otherwise it would be treated as void.**

The covenant or agreement to renew the lease **runs with the land** and can be availed of by the lessee's successors and assigns.

A lease may also contain a provision for **purchasing the reversion by the lessee**. This option is also made conditional upon the lessee exercising the option within a particular period or after a particular period but before the determination of lease by efflux of time or otherwise and on payment of the price agreed upon and by giving a prior notice for such period as may be agreed upon. **The conditions precedent must strictly be carried out**. An option to purchase the reversion is in effect an agreement to sell and purchase and the agreement becomes effective when the option is exercised. On exercising the option the relation between the two ceases to be that of lessor and lessee and becomes that of vendor and purchaser. Such option **does not run with the land** unless it is so specifically provided.

3.0 COVENANTS[9] IN LEASES

A well drawn deed of lease will contain (i) covenants by lessee (ii) covenants by lessor (iii) any special terms and conditions[10] agreed upon between the parties or which are statutorily implied.

[9] Covenant is a contractual stipulation contained in the agreement/lease

[10] The distinction between a covenant and a condition is that a covenant is an agreement under seal whereby, one or more of the parties to the deed stipulate for the truth of certain facts or are bound to do or not to do a specified thing, while a condition is a quality annexed to an estate by virtue of which it may be defeated, enlarged, or created on an uncertain event. For example, forfeiture clause in a lease is a condition. Condition is preceded generally by word like "provided that" or "upon condition". Under the English law the difference between a condition and a covenant is that if there is a breach of a condition the lease is liable to be terminated but if there is a breach of a covenant the remedy against breach is by way of damages or injunction or specific performance. See Halsbury's Law of England, Vol. 1 4th Edition. Para 321.

The usual covenants[11] on the part of the lessee are (a) to pay rent, (b) to use the land for the purpose for which the lease is given and no other purpose, (c) to keep the property in repairs and good condition subject to normal wear and tear, (d) to permit the lessor or his agent to inspect the property, (e) not to do anything on the property which would be dangerous or hazardous or a nuisance to the adjoining owners/occupiers, (f) to yield up possession of the property to the lessor on the expiration of the period of lease or earlier termination thereof (g) to observe all municipal/town rules and regulations governing the property and the use thereof.

On the part of the lessor the common law imposes very few obligations on the landlord. The lessor normally gives a covenant that so long as the lessee pays rent and observes and performs his covenants and other terms and conditions of the lease the lessee shall hold the property without any interruption on the part of the lessor. This is a statutory or implied covenant and is contained in section 88 (1) of the *Land Act, 1999.*

Because of the imbalance of bargaining power between landlords and tenants there have been legislative measures to ensure that balance is created to avoid conflicting interests. In this regard there has been legal development of covenants which are implied by law whenever a relationship of landlord and tenant is created. These covenants statutorily implied cannot be ousted by express covenants[12] in the lease unless the particular statute provides a possibility for 'contracting out' on certain conditions and those conditions have been complied with. So, although the parties are entitled to covenant as they may wish by inserting any covenants and conditions which they may deem fit;

[11] Section 91 of the Land Act, 1999 defines what "usual covenants" are. It says that unless the context requires otherwise, a reference to the 'usual covenants' is to be taken as reference to the covenants implied in the lease by sections 88 and 89.

[12] Express covenants are those which are spelled out in the agreement. Implied covenants are implied either by common law, by virtue of the creation of the relationship of landlord and tenant for the protection of the parties and make the relationship workable, or by statute for the regulation of certain matters in relation to the specific kinds of tenancy or all types of tenancy.

they are required to observe the implied covenants and conditions stipulated by the law governing them.

3.1 Rights and Obligations of Lessor and Lessee

It is common knowledge that the rights of one party to the contract are the obligation of another. The rights of the landlords create obligation on the part of the tenant and vise versa.

3.1.1 Implied Covenants by the Landlord

(i) **Quiet enjoyment____** as provided under section 88(1)(a) of the *Land Act, 1999*; ss. 56 (1) (a) and (2) of Cap 334 and ss. 33, 38 of the now repealed *Rent Restriction Act,* 1*984*

It is a requirement both in the common law and now statutorily that the tenant will have 'quiet enjoyment' of the demised land so long as he pays rent and observes and performs the covenants and conditions contained or implied in the lease. This phrase connotes freedom from physical interference with the tenant's enjoyment of the land[13]. For example, if without any lawful reason the landlord disconnects electricity may amount into breach of this obligation.

(ii) **Non derogation from grant___** section 88(1) (b) of the *Land Act* provides this

This covenant is an application of the general principle that a grantor may not derogate from his grant.[14] In other words, he may not take away with one hand what he has given with the other. So, an owner must not interfere with easements (aright over or against another's land) or *profit – a- prendre* (a right to take something from another's land). The landlord must not exercise any rights reserved by him in such a way as to defeat the purpose of the grant. In *Aldin v.*

[13] Perera v. Vandiyar [1953]1 All ER 1109
[14] Palmer v. Fletcher (1663).

Latimer Clark Muirhead and Company,[15] Muirhead leased land to Aldin, a timber merchant. In order timber to dry, there needed to be a free flow of air to the sheds where the timber was staled. Muirhead retained the adjoining land. After Muirhead's death, the interest passed to Latimer, the respondent. Latimer proposed to build on the land in such a way that the free flow of air to the sheds on the land leased to Aldin would be interrupted. It was held that this constituted derogation from grant and that Latimer was, therefore, not entitled to build so as to interrupt the access of air to Aldin's sheds. He was prevented by injunction.

(iii) **Fitness for Habitation**____ as per section 88(1) (d) of the *Land Act*

At common law, the landlord gave no implied warranty or undertaking as to the fitness of the premises for habitation (except in the case of furnished premises) or their suitability for any particular purpose, at the commencement of the tenancy, or even during the continuance of the lease. This is based upon the maxim 'caveat emptor' which requires that a purchaser take land as he finds it, and satisfy himself as to its condition[16]. However, some of the statutes governing lease provide for that requirement that the house let must be fit for human habitation. For example, the *Housing Act of 1957* (UK) provides for this requirement for houses let at low rent.

In the *Land Act, 1999*, (s. 88(1) (d)), there is a duty for the landlord to let a house, flat or room which is fit for human habitation at the commencement of the lease and will continue to be kept fit during the lease. So, where the demised premises fall short of habitation caused by damages certain consequences will follow[17]. The *Land Act* suggests the following consequences. Under section 88(1) (e) it is provided that if at any time the leased premises or any part of them are destroyed or damaged by fire, flood, or explosion or other accident, not attributable to the negligence of the tenant, his invitees or employees, or the damage is caused by civil commotion, lightning, storm, earthquake, volcanic

[15] (1884) 2 Ch. 437
[16] See Hart v. Windsor (1844) 12 M & W 68; Cavalier v. Pope [1906] AC 428
[17] See the case of Savy v. Jenny Tharani [1965] EA 211

activity or other natural disaster, so as to make the demised premises or any part of it wholly or partially unfit for occupation or use, then:

___ the rent and any contribution payable by the lessee to the outgoings on the premises, or a just proportion of that rent or contribution, according to the nature and extend of the damage sustained, shall be suspended until the leased premises have been again rendered fit for occupation and use.

___ However, if the leased premises have not been so rendered fit for occupation and use within six months of their destruction or damage, the lessee may at his option and on giving one month's notice of his intention to terminate, terminate the lease.

However, an alternative remedy is suggested by section 109(2) (b) of the Land Act. This provision provides that where the lessor has failed to comply with the covenant of making the land leased habitable by effecting the necessary repairs the tenant may:

- serve a notice on the lessor that unless he undertake the repairs and maintenance which he (the lessor) is obliged to undertake within 30 days, the lessee will undertake the repairs and maintenance instead.
- If the lessor does not commence the repairs and maintenance as specified in the notice and does not seek an extension of time within which to undertake the repairs and maintenance the lessee will undertake the same, and
- set off the cost of that work against the rent due under the lease, or
- deduct from any rent due under the lease any sums which the lessor has required the lessee to pay as condition either of obtaining the lease or of continuing as the lessee.

(iv) **Repairs____** see section 88(1) (c) of the *Land Act* and section 56(1)(b) of Cap 334.

At common law, the landlord is under no implied covenant with regard to repairs and therefore only if he covenants expressly to do repairs, or unless the law specify to the contrary, can the tenant force him to do any repairs that become

necessary. A covenant by the landlord for structural and external repairs is now implied however in short residential tenancies and dwelling houses let at low rent in UK.

For the purpose of clarity I will cite the relevant sections of the Tanzania law on the duty to repairs. For the registered lease under Cap 334, section 56(1) (b) thereof says that:

" There shall be implied in every registered lease covenants by the tenant with the landlord, binding the tenant__

(a) N.A

(b) not to cut down, injure or destroy any living tree being upon the land leased and to keep and yield up the land leased, in the case of agricultural, in good heart, and in the case of buildings, in good and substantial repair and condition;"(emphasis added)

What does this provision means? It means that the tenant has the obligation in case of premises to keep them in "good and substantial repair and condition". It his obligation to repair the leased land once it is let to him.

Section 88(1) (c) of *the Land Act*, on the other hand, provides the obligation of the landlord in the following terms, that is to say - "where part only of a building is leased, to keep the roof, all external and main walls and main drains, and the common parts and common installations and facilities, including common passages and walkways in a proper state of repair".

What can be derived from the above provision is that it is 'only where part of a building is leased', that the landlord has the obligation of repair those parts mentioned in the provision. So, this means that where the tenant(s) has rented the whole house the duty to repair is vested to him. This might appear to resemble section 56(1)(b) of Cap 334. Further more it is important to read together with these provisions the following sections. First is section 89(1) (e) of

the *Land Act* which provides an implied obligation on the part of the lessee in every lease(other than a short term lease) to, subject to the lessor's obligations set out in paragraph (d) of subsection (1) of section 88 and except where part only of a building is leased, to keep all buildings comprised in the lease in a reasonable state of repair, regard being had to the condition of the building and the materials of which it is composed at the beginning of the lease. Second, is section 89(1) (f) which provides the tenant's obligation where part only of the building is leased. It says "subject to the lessor's obligations set out in paragraphs (c) and (d) of subsection (1) of section 88, where part only of a building is leased, to keep the leased part of the building in a reasonable state of repair, regard being had to the condition of the building and the materials of which it is composed at the beginning of the lease."
From the above provision it is therefore instructive to read paragraph (d) of section 88(1) which requires the landlord to ensure that a leased house, flat or room is kept fit for human habitation throughout the lease period.

The logical interpretation to all the above cited provisions is that the duty to repair is divided between the lessor and lessee. On the part of the lessee the obligation is as follows: First, where only part of the building is leased the tenant is obligated to keep his leased part in a reasonable state of repair. Second, where the whole building is leased to the tenant the tenant is required to keep all buildings comprised in the lease in a reasonable state of repair. The crucial issue here is to know what can amount into "a reasonable state of repair". Section 92 defines it. It means "in the absence of an express provision to the contrary, mean in such a state of repair as that which a prudent owner, might reasonably be expected to keep his own building, due allowance being made for the age, character and locality of the building and the means of the person under the obligation to comply with such a covenant [and] provided that there shall not be read into any such covenant an undertaking by a lessee to put any building or part of it into a better condition than it was in at the commencement of the lease."

This means that the duty to the tenant to repair is not very high. He is only required to effect repairs which he might be expected to do as a reasonable tenant. In other words- to live in the leased premises in the 'tenant-like manner'.

The duty of the landlord with regard to repair is as provided in section 88(1) (c) where only part of the building is leased, and generally to ensure that the house, flat or room leased is kept fit for human habitation during the lease. So, all substantial repairs pertaining to the leased premises are to be carried upon by the landlord. Whenever a dispute arises it will be the question for the court to decide and apportion responsibilities as per the law.

(v) **Payment of rates, taxes, dues and other outgoings__** section 88(1) (g) of the *Land Act.*

The duty to pay leviable rates from any law; taxes such as land rent(s.33(1) of the *Land Act*), dues and any other outgoings such as premium for insurance can either be to tenant or landlord, unless under any law the same are to be payable by the landlord only. However, section 88(1)(g) stipulates that where the parties have not, by agreement, arranged who shall have to duty to pay rates, dues and other outgoings which are payable in respect of the land leased the landlord shall pay.

3.1.2 Implied Covenants by the Tenant

(i) **Obligation to pay rent___** section 89(1)(a) of the *Land Act*, section 56(1)(a) of Cap 334.

In the relationship of landlord and tenant there is an implied condition that the tenant shall pay rent reserved by the lease at all times and in the manner specified in the lease. The amount of rent agreed must be certain, otherwise it will not be rent properly so-called, in which case there will be an implied promise by the tenant to pay a reasonable sum to the landlord by way of compensation for the use and occupation of land. This is called *mesne* profit. It is therefore a

condition that the landlord may have a right of re-entry or forfeiture of lease if the tenant does not pay rent since failure to pay rent amounts into a breach of condition.

(ii) **Obligation not to commit waste___** section 89(1)(b) (c) of the *Land Act*; section 56(1)(b) of cap 334

It is the obligation of every tenant to use the premises in 'a tenant-like manner', i.e. the tenant is bound to use the demised premises with due care so that its value to the landlord will not be destroyed or diminished when the reversion falls in. A tenant commits waste if he causes any alteration to the premises or the land by way of damage, destruction, addition, improvement or neglect, which injures the reversion. Section 89(1) (b) of the *Land Act* imposes this obligation by requiring the tenant to use the land in a sustainable manner and in accordance with any conditions imposed on the use of that land by the lease. And paragraph (c) to subsection (1) requires the tenant to yield up the land or buildings leased in the same condition as they were when the term of the lease began.

In practice, in order to protect the landlord's interest there is a duty on the tenant to maintain and repair the demised land. Any waste committed by the tenant or his invitee or his employee may amount into breach of covenant. Generally, there are three categories of waste, namely:

(a) Voluntary waste- this is committed by any act causing damage such as destroying buildings or altering or converting premises done by the tenant.
(b) Ameliorating or Meliorating waste- something which improves the value of the premises such as by building on the land or extending an existing building. Ordinarily, unless the landlord can show substantial damage no injunction can be granted when ameliorating waste is shown.
(c) Permissive waste- is distinguishable from voluntary waste in that the damage caused results from negligence to maintain or repair such as allowing walls to deteriorate and eventually collapse, etc.

In the case of *Hamid Mbaye v. Brigade Commander*[18] the defendant made certain alterations to the house, for example, the toilet had been sealed and turned into a kitchen. The High Court held that the damage was willful and had to pay for the damages.

(iii**) Restraint on Alienation**___ section 89(1) (i) of the *Land Act*

In the common law, in the absence of any stipulation to the contrary, a tenant is entitled to assign the lease, or sub-let or part with possession of the premises (e.g. let someone else live in the house). As a result the well drawn lease contains an express words against assignment, subletting or parting with possession 'without licence or consent' of the landlord. The breach of which will usually give rise to forfeiture or a claim for damages.

Under the law in Tanzania there is an implied covenant restricting the right of the tenant to assign, sublet or transfer of possession of demised premises, or any part of it except with the consent of the landlord- section 89(1)(i). However, this covenant is deemed to be subject to a proviso that the licence or consent of the landlord should not unreasonably be withheld. Section 93 (3) of the *Land Act,* provides circumstances under which consent can be said to be unreasonably withheld. The onus is on the tenant to show that he requested a consent of the landlord and the landlord has unreasonably refused consent.

Case for reference is *Mrs Clara D'Souza v. Charles Frank Kanyamala* (1974) LRT 27 where the court held that where assignment is made without consent the assignee becomes a trespasser. However, section 98(2) of the *Land Act* states that if there is a covenant in the lease that the lessee will not, or will not without the consent of the lessor transfer or assign the lease, a transfer or assignment has effect whether or not the lessor has consented to that transfer or assignment and whether or not that transfer or assignment is in breach of the covenant but

[18] [1984] TLR 294)HC Z'bar)

this subsection does not prevent the lessor from seeking and remedy for any such breach.

(iv) **Landlord's right to view ___**section 89(1) (g),section 88(2)(a) of the *Land Act;* section 56(1)(c) of Cap 334

It is a rule that in the absence of an express right reserved under the lease, the law implies right on the landlord to enter the premises to view the state of the premises. However, before doing so, the lessor should serve the tenant with a notice of give him reasonable notice before he can exercise that right of viewing the premises. If he does not do so he may be liable for trespass. Paragraph (g) to subsection (1) of section 89 requires the lessee to permit the lessor or his agent or employees at all convenient times and after reasonable notice to enter on the leased land or buildings to examine their condition and to undertake any repairs and make good any defects for which the lessor is responsible.

4.0 REMEDIES FOR THE BREACH OF COVENANTS

(a) Forfeiture or Right of Re-entry

Where the tenant is in breach of any covenant in the lease the landlord is given the power to **terminate the lease**: It is an implied power of the landlord, under section 88(2),(b) that where any rent is unpaid for one month after due date for payment has reached or where the lessee has failed for a period of one month to observe or perform any condition, covenant or other term the landlord may terminate the lease after serving the tenant with a notice of intention to do so. The procedure for determination of lease is provided under sections 104 and 105 as follows:

Serving of notice of intention to terminate the lease.

Where a lessee is in arrears with the rent and has been in arrears for not less than 30 days, or where a lessee is in breach of a covenant or condition in the lease the lessor may serve on that lessee a notice of intention to terminate the lease.

The content of the notice for non payment of rent (s. 104(2))

A notice served on a lessee shall adequately inform the recipient(lessee) of all the following matters:

(i) the nature and extent of the breach complained of,

(ii) the amount which must be paid to remedy the breach,

(iii) the period, being not less than 30 days from the date of the service of the notice within which the breach must be remedied,

(iv) in the event that the breach is not remedied the lease shall terminate at the expiry of 30 days from the date of service of notice.

The content of the notice for breach of any other covenant or condition (s. 105(2))

A notice served on a lessee under this section shall adequately inform the recipient(lessee) of all the following matters:

(i) the nature and extent of the breach complained of,

(ii) where the lessor considers that the breach is capable of being remedied he shall inform him:

- the action which the lessee must take or desist from taking to remedy the breach
- the amount (if any) of compensation which the lessee must pay to remedy the breach and to reimburse the lessor's reasonable expenses incurred in connection with the breach,
- the reasonable time, being not less than 30 days within which the lessee must take or desist from taking any action
- in the event that the breach is not remedied the lease shall terminate on expiry of 30 days from the date of service of notice.

The law requires that (section 106) the lessor should as well and at the same time or as soon as practicable serve a copy of that notice served to the lessee to the sub lessees(if any), spouse of the lessee, mortgagee of the lessee or of sub

lessee and, where the lessee is bankrupt, to the trustee in bankruptcy of the lessee. However, this obligation only applies if the lessor has actual notice of the names and addresses of those persons other than the lessee.

Where such above mentioned process has been started by the lessor the only remedy the tenant or any person having an interest in the lease, has is to apply to a District Land and Housing Tribunal where the land is situate for relief (s. 107) against termination of the lease by the lessor. The Tribunal, upon application made, shall consider whether or not to grant a relief against an order of termination. It shall be guided by the factors mentioned under section 108(1).

(b) Distress for Rent

Distress for rent is a common law remedy which consists of the right of the landlord exercisable without application to the court but ordinarily exercised by a court certified bailiff, to enforce payment by seizing and selling enough of goods found on the premises, and the landlord recouping himself of the rent due from the tenant. In essence, it is a self-help remedy. At present this remedy is rarely used. By virtue of the *Written Laws (*Miscellaneous Amendments Act (No. 2) of 2005 [Act No. 11 of 2005] which amends the *Land Act* the remedy of distress for rent which was originally abolished by the *Land Act, 1999* has been re-introduced. If the tenant is in arrears of rent for not les than 30 days the lessor may, instead of serving a notice of intention to terminate the lease, exercise his right to levy distress for rent (s. 102) after serving of notice of intention to do so as per the requirements of section 104. However, such distress for rent cannot be done by the lessor but must be exercised by using a Court Broker or the Broker of the Land and Housing Tribunal. In the event that the exercise of right for distress cannot be exercised peaceably, such as in a situation where the lessee is resisting, distress for rent should be done under the order of the court (s. 102(2)).

(c) Other remedies

The above two remedies of determination of lease and distress for rent can only be exercised by the landlord and are specific remedies for breach of covenant, condition or term of the lease. Nevertheless, there are other remedies which under any contract can be employed. These can be exercised by the lessor or lessee in the event of breach. The *Land Act*, under section 109, has provided for these remedies. So, where a lessee is in breach of a covenant or condition of a lease, the lessor may, instead of serving a notice of intention to terminate the lease, commence an action against the lessee (i) for damages (ii) for specific performance (iii) for injunction or, (iv) to recover as a debt ay arrears of rent (i.e. action for rent).

Where a lessor is in breach of a covenant or condition in a lease, the lessee may commence an action against the lessor (i) for damages (ii) for specific performance (iii) for an injunction and (iv) repudiate the lease and cease to pay rent.

5.0 ENFORCEABILITY OF COVENANTS IN THE LEASE

In this part, we are concerned with the question of who can enforce a covenant and against whom, or as it is often referred to, " the running of covenants". The rule under the common law is that as between the original parties, liability is based upon the privity of contract between them[19], and therefore not only all covenants, but also any contracts collateral to the lease are enforceable in contract throughout the continuance of the lease, even though the landlord or tenant assigns his interest. When once there has been an assignment, there is no privity of contract between the new parties, but since the relationship of landlord and tenant has been created between them by the assignment, there is

[19] As between the original parties to the lease there is a two-fold relationship. There is privity of contract, arising from the contractual agreements created by the terms of the lease and there is privity of estate, arising from the tenure created by the granting and accepting of the lease by the two parties respectively. Privity of estate continues only whilst there is tenure between them, so that upon an assignment of either the lease or the reversion, it is destroyed as between them. For tenure is then between the remaining party and the assignee. But this is not so for privity of contract which , under the common law, continues between the original parties until the end of the lease.

privity of estate between them, which is the basis of liability upon those covenants which 'touch and concern the land'; (the modern words are "covenants which have reference to the subject matter of the lease").

As a general rule, no covenants are enforceable between parties in the absence of privity of contract or privity of estate (e.g. between a landlord and a sub-tenant). So, whether an assignee of the lease or the reversion is liable under lease or is entitled to sue upon a covenant in the lease depends upon two things:

(i) whether there is privity of estate between the parties, and

(ii) whether the particular covenant is one that 'touch and concern the land'.

If it does, it is called a ' real covenant'[20], if it does not, a ' personal covenant'. The issue now is what covenants touch and concern the land. Any covenant which affects the landlord qua landlord or the tenant qua tenant may be said to touch and concern the land.[21] If the covenant of its very nature and not merely through extraneous circumstances affects the nature, quality or value of the land demised, or the mode of enjoying it, it falls within the definition. However, it is better to note examples:

(i) All covenants which are implied by law into lease they touch and concern the land.[22]

(ii) Conditions for re-entry for breaches of covenants in the lease which themselves touch and concern the land do so.[23]

5.1 Rights and Liabilities of Assignee

When the question of enforcing legal liabilities arise, two questions must be considered, namely, is the defendant liable and is the plaintiff entitled to sue? In order to determine the rights and liabilities of assignee to sue or be sued it is

[20] Real covenants run with the land or reversion.
[21] Breams Property Investments Co. Ltd v. Stroulger [1948] 2 K.B 1
[22] Wedd v. Porter [1916] 2 KB 91
[23] Horsey Estates Ltd v. Steiger [1899] 2 QB 79

important to consider whether the burden of the covenant has passed and whether the benefit of the covenant has passed.

Assignment of the Lease

Assume that the landlord "L" leases land to the tenant "T" and the tenant assigns the lease to a third party "K" The common law rule laid down in *Spencer's case*[24] is that:

"K is entitled to the benefit, and subject to the burden, of all covenants and conditions touching and concerning land, for there is a privity of estate. In short both the benefit and the burden of the covenants touching and concern the land run with the land."

However, the assignee is liable only for breaches of covenant committed whilst there is privity of estate between himself and the landlord. He is not liable for breaches committed before the assignment unless they are continuing breaches,[25] nor for breaches committed after a further assignment of the lease by him,[26] except for breaches committed while the lease was still vested to him.

Under the common law a breach of the covenant after assignment of the lease results in the liability not only of the assignee in breach but also, of the original tenant. If, by default of the assignee, the tenant is sued, he is entitled to claim indemnity from the assignee responsible (whether he is the first or subsequent assignee) upon a right of indemnity that the law implies between joint debtors. This common law rule, however, has been changed by the *Land Act, 1999*. Section 97(1) abolishes privity of contract absolute. Once there is an assignment of lease the assignor of a lease does no longer remains liable for breaches of any covenants unless the assignor remains in occupation of the leased land after the assignment (s. 97(2)).

[24] (1583) 5 Co. rep 16a
[25] Granada Theatres Ltd v. Freehold Investment (Leytonstone) Ltd., [1959] Ch. 592
[26] Paul v. Nurse (1828) 8 B & C 486

Assignment of reversion

Assume the landlord, L, leases his land to the tenant, T, and then L assigns his reversion to a third party, R, subject to the lease. The common law rule was that with the exception of 'implied covenants', neither the benefit nor the burden of the covenants in the lease ran with the reversion. R was neither able to sue nor liable to be sued. But with the *Grantees of Reversion Act, 1540* ss. 1 and 2, the benefit and burden of all covenants and provisions contained in a lease which touched and concerned the land passed with the reversion. In other words, an assignee of the reversion can sue or be sued upon any covenants in the lease 'having reference to the subject matter of the lease'.[27] Another issue is whether the assignee of reversion can sue for previous breaches?

At common law, a right to sue for damages or to forfeit the lease for breach of covenant could not be assigned, so that if a reversion was assigned after a covenant had been broken, the new reversioner could not sue or forfeit the lease. Now, with the *Law of Property Act, 1925* the assignee is alone entitled to sue the tenant for rent or for breaches of covenant, whether such rent accrued or such breaches occurred before or after the assignment[28]provided they have not been waived.

The relevant section in the *Land Act* governing running of covenants in the lease and reversion is section 95(1). According to this provision, where the reversion is transferred, assigned, granted or otherwise changes hands by operation of law, then, unless a contrary intention appears from the lease, expressly or impliedly, or from other circumstances the obligations imposed by every covenant of the lease on the lessor run with the reversion and may be enforced by the lessee against the assignee of reversion. However, the assignee of reversion can only enforce the rights to the benefits of every covenant of the lease which has reference to the subject matter of the lease against the lessee. This right extend

[27] This provision is now in the Law of Property Act, 1925
[28] Re King [1963] Ch. 459

even to those rights which became exercisable or accrued before the assignment, unless that right was waived or the lessee was released from the obligation to which the right relates (s. 95(2)).

6.0 CLASSIFICATION OF LEASE

Leases or tenancies can be classified into various categories as follows:

(i) Leases for a fixed period (Fixed term lease).
(ii) Periodic Leases.
(iii) Tenancy at Will.
(iv) Tenancy at sufferance.
(v) Tenancy by estoppel.
(vi) Service tenancy.
(vii) Statutory tenancy.

- **Leases for a Fixed Period**.[29]

A lease may be granted for any certain period of certain duration, e.g. six months, one year, twenty years etc. The term must be either certain or capable of being rendered certain before it takes effect.[30] That means, the lease should specify when it commences and when it ends. If no date is specified for commencement of the lease it will usually be deemed to commence immediately, unless it is a future lease (reversionary lease) and the date of commencement cannot be inferred. A fixed-term lease can be with an option to renew at its expiration.[31]

A lease for a fixed period ends automatically when the terms expires, i.e. expiration by effluxion of time. There is thus no need for the landlord to give the tenant notice to quit in order to terminate the lease before the end of the period, (unless, and in certain circumstances, the tenant is in breach of his undertakings,

[29] See section 78 of Land Act.
[30] Lace v. Chantler [1944]KB 368
[31] North church Estates Ltd v. Daniels [1947] Ch. 117; [1946] 2 All ER 524

e.g. he fails to pay the rent due or on the happening of some specified events). Nor can the tenant terminate the lease before the end of the period(though he can ask the landlord to accept his surrender of the lease).

Future Lease (Reversionary Lease)

As shown above, it is possible to create a lease that takes effect at some future date. Originally, this was not possible because of the doctrine of '*interessee termini*' (tenant's interest pending entry). Which meant that actual entry onto the property was usually necessary before the lease could be effective. Thus, under the common law rule, a tenant could not acquire estate in the land until he had taken possession under the lease.

This doctrine was abolished by section 149(1) and (2) of the *Law of Property Act, 1925* (UK) which provided that leases are capable of taking effect from the date fixed for commencement without actual entry. In Tanzania the position was formerly stated in the *Land Registration At, Cap 334* under section 55 that:

" A lease of registered land may be made for a term to begin on a future date, not being later than 21 years from the date on which the lease is execute".

Similar position is repeated in section 83(1) of the *Land Act, 1999* and section 98 abolishes the common law doctrine of *intessee termini*. It states that:

" A person who accepts a transfer or assignment of a lease becomes the lessee without any need for that person to:

(a) acknowledge the lessor as such;

(b) take possession of the land or building complied in the lease."

- **Periodic Leases**[32]

Weekly, monthly, quarterly and yearly leases are examples of periodic leases, A periodic tenancy is one that continues indefinitely until ended by proper notice by either party. The difference from a fixed-term tenancy is that instead of its

[32] See section 79 of the Land Act

duration being fixed, right from the commencement of the tenancy, it continues automatically from period to period, until it is determined at the end of any period by a valid notice to quit given by one party to the other. As the tenancy progresses through one period and another, the tenancy is regarded as one continuous tenancy, without break and without renewal.

The length of the notice required to terminate such a lease depends(subject to agreement to the contrary or to the law) on the form that the periodic leases takes e.g. a weekly lease can be terminated by giving a week's notice; a monthly lease by giving a month's notice and so on, the notice expiring in each case at the end of a completed period. However, as for yearly tenancy, in the absence of agreement to the contrary, six months' notice is required. The *Land Act* does not clearly provides this but section 79(4) states that " a periodic tenancy may be terminated by either party giving to the other notice, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable."

There are various circumstances under which periodic lease may be created. These situations are:

(i) A periodic lease may be created expressly where such terms such as 'yearly lease', or 'yearly tenancy' or 'tenancy from year to year' or from week to week, month to month etc are used[33]..

(ii) Furthermore, it may be created where (in the absence of any indication as to the type of the lease granted) there is express reference to the period of notice required to terminate the lease. Thus, a lease to 'K' determinable on the giving of six months' notice creates a six-monthly lease.

(iii) If there are no express words creating a particular form of lease nor any other circumstances from which an intention to create a certain form of lease may be inferred, then by implication of law, a periodic

[33] Section 79(1) (b) of the Land Act

lease arises.[34] The form which the periodic lease thus created will take will depend on the period with reference to which the rent is calculated,[35] e.g. where the rent reserved is so much per year, a yearly lease will be implied even though the rent is payable monthly.

(iv) A periodic lease may also arise at the expiry of an existing lease. For example, suppose L leases his land to T for seven years at a rent of Tshs 200,000 a year, payable quarterly. T thus holds a lease for a fixed period of seven years. At the end of that time, if he remains in possession of the land (that means he 'holds over') and pays a month's rent, which L accepts then, provided there are no circumstances indicating some other intention, T holds by implication of law as a monthly tenant under a periodic lease[36].

- **Tenancy at Will**

A tenancy at will may also arises in some various situations such as these:

- If the landlord, L, permits the tenant, T, to occupy land as tenant and the arrangement is such that the tenancy may be determined by L or T at any time, then T occupies the land as a tenant at will. (But the occupation should be of a tenant and not merely as a servant or agent).

- In some cases the tenant holds rent free, as where the vendor of a land, owing to some delay in completion, lets the purchaser into possession of the property before the conveyance has been executed.

- Also a tenant who holds over after the expiration of an existing lease, such as a fixed term-tenancy, may become a tenant at will or a tenant on sufferance; but

[34] Section 79(1) (a) of the Land Act.
[35] See section 79 (3) of the Land Act
[36] See section 79(1) (c) and (2) and section 82(2) of the Land Act.

when he pays or agrees to pay rent on the same terms as under his former lease, periodic tenancy may arise by implication of law.[37]

A tenancy at will therefore arises where a person occupies land with the consent-i.e. "at the will" of the owner under a tenancy of uncertain duration. In a tenancy at will the lessee is said to have no defined estate in the land, i.e. he holds it for no fixed period, but at " will ". The lessor can put him out at any time. In addition, a tenancy comes to an end when either party does any act incompatible with the continuance of the tenancy, as where the tenant commits voluntary waste, or the landlord enters the land and demand possession, or either party gives notice to the other determining the tenancy or by an act which is inconsistent with the landlord's continuing consent such as death of either party. Or the landlord assigning his interest in the land to a third party. Essentially, the tenancy is only a personal relationship between the landlord and the tenant[38]. Sometimes it is very difficult to distinguish tenancy at will and licence.[39]

- **Tenancy at sufferance**

A tenancy at sufferance is said to arise where a tenant, having entered upon land under a valid tenancy, holds over without the landlord's consent or assent e.g. on the expiry of a fixed term-lease and without the landlord's consent the tenant holds over his previous tenancy, It is not really a tenancy at all, and is distinguishable from a tenancy at will by lack of consent, express or implied, on the part of the landlord. There can then be no payment of rent, under a tenancy on sufferance but the landlord can sue to recover *mesne* profits. The tenancy may be determined at any time where the landlord exercise his right of re-entry or sue the tenant to recover possession.

- **Tenancy by Estoppel**

[37] As shown ealier in section 79(1) © and section 82(2) of Land Act.
[38] Wheeler v. Mercer [1957]AC 416 at 426.
[39] Binions v. Evans [1972] Ch. 359; [1972] 2 All ER 70

It is a rule of evidence that once a tenant has been put into possession, the landlord is estopped from denying his tenant's title, and the tenant from denying his landlord's.[40]It follows that if a person with no estate in land purports to grant a tenancy thereof, both parties and their respective assigns will be estopped from denying that the landlord had title to grant the tenancy and that the tenancy is effective as against each other.

A tenancy by estoppel, as such a tenancy is called, is thus enforceable between the parties and their assigns, but not against third parties. However, if the landlord subsequently acquires a legal estate out of which the tenancy could be granted, this is said to "feed the estoppel", and the tenancy by estoppel becomes a good tenancy, giving the tenant an actual estate in the land.

- **Service Tenancy or Service Occupancy**

Service tenancy or service occupancy arises whenever an employee occupies living quarters of his employer.[41] According to traditional English common rule a service tenant is not different from a lodger. He is not usually a tenant in the strict sense, even though he may occupy certain rooms as his quarters. In the case of *Nitwa Msemembo v. Marco Ndawa*[42]it appears the court took similar orientation. It held that a service tenant has temporary though exclusive use of the quarters and not the legal possession of them, and accordingly, he cannot successfully maintain an action for trespass against his employer or his duly authorized servants.

Courts in England hold the view that there is a 'service tenancy' and 'service occupancy'. A service tenancy is just like any other tenancy except that it is generally expressed to be terminable automatically on the termination of the tenant's contract of employment with his employer, who is also, in effect, his landlord. A service occupancy arises also between employer and employee, but

[40] Tadman v. Henman (1893) 2 QB 168, 171, section 124 of Evidence Act, 1967 (Tanzania)
[41] Dobson v. Jones (1843)
[42] [1974] LRT No. 29

in this case the residential accommodation is held by the employee under a mere licence. The test generally applicable to distinguish between the two is whether the employee is required to occupy the accommodation by the nature of his duties- e.g. a resident caretaker, a game keeper etc. In such cases, the employee will generally be taken to hold under a service occupancy only unless a lease was expressly entered into. In this case, a servant is required to live in the house in order the better to do his work. If a servant is given a personal privilege to stay in a house for the greater convenience of his work and it is treated as part and parcel of his remuneration, then he is a licensee. But if he is given an interest in land separate and distinct from his contract of service, at a sum properly to be regarded as a rent, he is a tenant. The distinction depends on the truth of the relationship and not on the label which the parties choose to put upon it.[43]

- **Statutory tenancy** (a creature of *Rent Restriction Act, 1984* now repealed).

- **Short term Leases**

The *Land Act, 1999* has established a category of lease which is known as a 'short term lease.' According to section 80 this lease can either be a fixed term lease or periodic lease but its period must be short. If it is a fixed term lease, its duration should not be more than one year; and if it is periodic lease, it must be for periods of one year or less. Another periodic lease which fall under this category is a periodic tenancy made without any agreement in writing.

Brief Overtview Of The Rent Restriction Act, 1984 (Has been repealed by Act No. 11 of 2005).

[43] See Facchini v. Bryson [1952] 1 TLR 1386