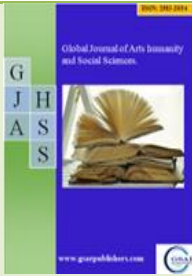


OPEN ACCESS	<b>Global Journal of Arts Humanity and Social Sciences</b>			
	ISSN: 2583-2034			
	Abbreviated key title: Glob.J.Arts.Humanit.Soc.Sci			
	Frequency: Monthly			
Published By GSAR Publishers				
Journal Homepage Link: <a href="https://gsarpublishers.com/journal-gjahss-home/">https://gsarpublishers.com/journal-gjahss-home/</a>				
Volume-4	Issue-12	Dec 2024	Total pages 1199-1207	

## EXAMINATION OF THE EFFECTIVENESS OF THE LAW GOVERNING THE POWERS AND DUTIES OF THE RECEIVER OF INCOME OF THE MORTGAGED LAND IN TANZANIA

By

Lameck M. Meruba<sup>1\*</sup> Dr. George Mwaisondola<sup>2</sup>

<sup>1</sup>LLM St. Augustine University of Tanzania (SAUT), Mwanza, Tanzania

<sup>2</sup>Senior Lecturer at St. Augustine University of Tanzania (SAUT) Mwanza and an Advocate of the High Court of Tanzania and Subordinate Court thereto



### Abstract

The appointment of a receiver of income of the mortgaged land is one of the remedies available to the lender when the borrower defaults on debt repayment. The power to appoint a receiver is either expressly or statutory, and when a receiver is appointed is deemed to be an agent of the borrower with the power of selling the mortgaged property. The deemed agency relationship between the borrower and receiver who indeed is appointed by the lender poses legal and practical challenges in selling the mortgaged land. The receiver in selling the mortgaged land acts as an agent of the borrower or the lender and if the mortgaged land does not generate income still a receiver of income of the mortgaged land may be appointed.

The article further examines a receiver's legal and practical challenges in exercising his powers and duties as an agent of the borrower with the powers of selling the mortgaged property. Finally, the article concludes that a receiver of income of the mortgaged land should only be appointed to the mortgaged property which generates income also a receiver should not have the power of selling the mortgaged land which is similar to that of the lender unless he obtained leave of the court to exercise that power.

**Keywords:** Mortgaged Land, Receiver of Income, Legal, the Powers and Duties

### Article History

Received: 01- 12- 2024

Accepted: 19- 12- 2024

Published: 21- 12- 2024

Corresponding author

Lameck M. Meruba

### 1.1 Introduction

The Tanzania Land Act<sup>1</sup> vests the borrowers and the lenders alike with powers and duties in loan agreements. The lenders are empowered under the law to appoint a receiver of mortgaged land when the borrower fails to discharge his obligations of repayment of the loan advanced to him. The receiver is appointed to ensure the borrower redeems the land he pledged as collateral for the loan. However, the appointed receiver of the mortgaged land is allowed to sell the mortgaged land which defeats the purpose of appointing him further the law recognizes a receiver as the agent of the borrower who the lender appoints to act on behalf of the borrower. The borrower is not involved in the appointment of a receiver by the lender who became his agent.

### 1.2 Key Terms

#### 1.2.1 Mortgage

The term mortgage originates from Old French, which entails a "death vow." The death vow refers not to the death of the borrower but to the "death" of the loan. The rationale of the death vow under Old French was simple: the loan has a fixed term of payment, that is, a date at which the loan is to be wholly repaid.<sup>2</sup> The transfer of an asset's interest as security for specific liabilities with the stated or implicit promise that it will be retransferred upon the satisfaction of the secured obligations is known as a mortgage.<sup>3</sup>

<sup>2</sup>A Primer on the Mortgage Market and Mortgage Finance, Daniel J. Mc Donald and Daniel L. Thornton available at <https://htdocs/publications/review/08/01/Mc Donald.pdf>

<sup>3</sup><https://uk.practicallaw.thomsonreuters.com/> accessed on 03<sup>rd</sup> June 2024

<sup>1</sup>Cap 113 RE 2019.



Other scholars have given the meaning of mortgage into two issues which are first, a written document, the mortgage instrument, in which the borrower pledges his title to property as security for the loan, and second, a written pledge by the borrower to the lender surrendering the borrower's interest in the landed property in the event of default.<sup>4</sup> The borrower is the person who grants a mortgage, who is also denoted as the mortgagor or chargor. Therefore, the mortgage is the security of interest the borrower is supposed to grant to the lender.<sup>5</sup> The lender is called the mortgagee or chargee. In *Swiss Bank Group vs. Lloyds Bank Ltd.*,<sup>6</sup> it was observed by Lord Justice Buckley that the essence of a mortgage transaction is an exchange for the creditor's ability to obtain the debtor's liability being discharged, the debtor grants the creditor a proprietary interest in the debtor's property, or undertakes in a binding manner to do so; furthermore, the proprietary interest is redeemable, meaning that, should the debtor discharge liability, the creditor will be able to create it. Basically, in a mortgage transaction, there is no legal transfer of a proprietary interest but a binding undertaking that confers such an interest, that obligation, if specifically enforceable, confers a proprietary interest in the subject in equity.<sup>7</sup>

In Tanzania the *Land Act*,<sup>8</sup> defined a mortgage as an interest in a lease or right of occupation that secures the payment of money, the value of money, or the satisfaction of any requirements. Note that in certain countries, a mortgage functions as a transfer of ownership from the mortgagor to the mortgagee, with the mortgagor having the option to redeem the mortgage after the loan is successfully repaid.<sup>9</sup> To the opposing, section 116(1) of the *Land Act*<sup>10</sup> stipulates that a mortgage has just the security effect and does not transfer any land interests from the mortgagor to the mortgagee. Thus, an interest in the right of occupation to guarantee payment of a loan upon the satisfaction of specific requirements that constitute a mortgage.

Mortgages are classified as legal mortgages and equitable mortgages. A legal mortgage gives the mortgagee legal ownership and forbids the mortgagor from handling the mortgaged asset while it is subject to the mortgage, it is the safest and most complete type of security interest.<sup>11</sup> An equitable mortgage is created when the formalities necessary for creating a legal mortgage are not fulfilled or when the asset being mortgaged is merely an equitable interest.

<sup>4</sup>TALAMO, J.J., (2008) *The Mortgage Answer Book (2nd Edition)*, Illinois: Sphinx Publishing, page 2.

<sup>5</sup>SMITH, Rogers (2010), *Introduction to Land Law*, 2<sup>nd</sup> Ed., Magdalen College, Oxford, Longman page 273

<sup>6</sup>[1982] AC 584, HL

<sup>7</sup>Ibid

<sup>8</sup>Section 2 of Cap 113 R.E 2019

<sup>9</sup>PERRINS, B., (2000) *Understanding Land Law (3rd Edition)*, London: Cavendish Publishing Ltd., page 168

<sup>10</sup>Ibid

<sup>11</sup>MWAIKONDOLA, G., (2009) *The Law of Mortgages in Tanzania: Following the Enactment of New Land Laws, in Particular the Land Act 1999*, A thesis submitted to the School of Law of the University of Birmingham for the degree of Doctor of Philosophy,

In these situations, the mortgagee receives only a beneficial interest in the asset, with the mortgagor maintaining legal title.<sup>12</sup>

### 1.2.2 The General Concept of Receiver

A receiver refers to an unsympathetic or in American expression for impartial, when it does not appear rational to the Court that any party should hold the property or fund in litigation, the term "*pendente lite*" refers to an impartial person chosen by the Court to receive and preserve it between the parties to a lawsuit.<sup>13</sup> A receiver instead of acting as the agent or representative of any party involved in the action, a receiver is universally recognized as an officer of the court who performs his duties for the advantage of all parties involved, not just the plaintiff or defendant. The Court itself is responsible for the care of the property through its receiver, who is merely its creature or officer and has no other powers except those granted to him by the order of his appointment or those derived from the established practice of Courts of equity. As an officer of the Court, the fund or property entrusted to his care is regarded as being in "*custodia legis*" for the benefit of whoever may finally establish title thereto.

Historically a receiver was someone who was appointed to collect or receive income from the debtor's property for the benefit of the creditor, hence the coining of the term Receivership which is a debt collection measure. The office of an administrative receiver has its roots in the United Kingdom in the Sir Kenneth Cork Committee Report on Insolvency Practice in the United Kingdom in 1982, which developed into the Insolvency Act of 1986 in the UK. The practice was articulated due to the need to devise ways to provide a quick less formal procedure for debt recovery and for the preservation of viable commercial enterprises capable of making convenient contributions to the economic life of the Country.<sup>14</sup> It was aimed at a fast less informal insolvency procedure and more efficient debt collection mechanism where the party didn't want to sell off the property at once; it's a mode of avoiding liquidation or winding up of companies while recovering debts. This is chiefly a way of enforcing a secured debt. As a method of debt enforcement, receivership functions by removing control of secured assets from the company's management and placing it in the hands of the receiver.<sup>15</sup>

A receiver is regularly articulated as the "hand of the Court", and the expression aptly designates his functions and his relation with the Court.<sup>16</sup> The laws majorly allow the Courts of law to have the power to appoint receivers under particular circumstances. The second class of Receivers are those appointed to preserve the property pending litigation to resolve the parties' rights. When a

<sup>12</sup>Ibid

<sup>13</sup>HIGH.J. L., (1894) *A Treatise on the Law of Receivers*, Third Edition (1894), Callaghan & Co., Chicago p. 2

<sup>14</sup>FINCH, Vanessa (1992), *Company Directors: Who Cares About Skill and Care?* *Modern Law Review*, Vol.55, No. 2, Wiley p.179

<sup>15</sup>*Insolvency Law and Practice: Report of the Review Committee (hereinafter the Cork Report)*, Cmnd. 8558 (1982: HMSO: London),

<sup>16</sup>HIGH.J. L (1894), *A Treatise on the Law of Receivers*, Third Edition (1894), Callaghan & Co., Chicago p. 2



receiver is appointed pending a grant of probate or administration, for example, or when there is a risk that the property will be damaged or lost by those holding legal title, like executors or trustees, or tenants for life, or by those with a partial interest, like partners, or by those in control, like directors of a company with equal powers, the appointment of a receiver is made to preserve the property awaiting litigation to determine the rights of the parties or to prevent a scramble among those entitled.<sup>17</sup> In all these cases, it is necessary to allege and prove some threat to the property; the appointment then rests on the Court's sound discretion.

### 1.2.3 The Receiver of Income of the Mortgage Land

In the past, the lender had the right to seize the mortgaged property directly in the event of a loan default. However, due to the severe obligations placed on a mortgagee in possession, the mortgagee considers gaining possession without the associated disadvantages, a goal that the courts of equity were often sympathetic.<sup>18</sup> As part of the security, the mortgagee demands that a receiver be named by the mortgagee to collect income, control the interest on encumbrances, and retain any excess for the mortgagor. The mortgagee has power under statute or mortgage instrument to appoint a receiver in the event of default, who upon appointment assumes the role of the mortgagor's agent.<sup>19</sup> Therefore, a receiver of income of the mortgaged land is deemed to be the agent of the mortgagor.<sup>20</sup>

Because an appointment of the receivers by agreement became so widespread, a number of English statutory provisions, including the Trustee Act, Lord Cranworth's Act, Conveyancing Act 1881, and the Law of Property Act 1925, made it legally recognized.<sup>21</sup> The process of establishing instruments of disposition was not covered under Tanganyika's colonial-era Land (Law of Property and Conveyancing) Ordinance.<sup>22</sup> The ordinance recognized that English mortgage law and procedures would operate in Tanganyika in the same manner as they do in England. The ordinance states that real estate, mortgages, leases, tenancies, trusts, and trustees in England as of January 1, 1922, will be governed by the laws of real estate, mortgagor and mortgagee, landlord and tenants, and trusts and trustees in England. Additionally, Tanganyika will be subject to the English conveyancing practices and laws in effect on that day in England.<sup>23</sup>

In England to create a mortgage the mortgagor was to transfer his legal right over freehold or leasehold to the mortgagee. The mortgagee upon repayment of debt on the appointed date must re-convey or redeem the landed property to the mortgagor.<sup>24</sup> The land tenure in Tanganyika was not freehold or leasehold like in England

but in the form of the right of occupancy<sup>25</sup> which was like the lease.<sup>26</sup> In *NBC vs. Walter T. Czurn*<sup>27</sup>, the Court of Appeal of Tanzania in recognizing the application of English law relating to mortgage observed that the appellant bank relied heavily on section 19 of the 1881 Act.<sup>28</sup> The Court further observed that the learned trial judge was correct under the provisions of section 2 (1) of the *Land (Law of Property and Conveyancing) Ordinance*,<sup>29</sup> read together with section 2 of the *Judicature and Application of Laws Ordinance*,<sup>30</sup> that the 1881 Act applies in Tanzania for mortgages. In 1999 Tanzania put in place mortgage laws after enacting two legislations namely the *Land Act*<sup>31</sup> and the *Village Land Act*.<sup>32</sup> The two laws to a large extent adopted the English *Law of Property Act* which stipulates for the appointment of a receiver of income of the mortgaged land.

## 2.0 The Legal Framework Governing the Powers and Duties of a Receiver of Income of the Mortgaged Land

The article focused on an important area: the powers and duties of the receiver of income of the mortgaged land in Tanzania after the borrower defaulted on loan repayment. It starts by looking at and analyzing the Constitution of the United Republic of Tanzania, which is the highest law of the land and guarantees people's rights to own property and enjoy it as long as they don't break the law.<sup>33</sup> The Constitution does not specifically address the issues of mortgages. However, the ability to own property as guaranteed under the Constitution makes it easier to create a mortgage as a mortgage requires proof of an interest vested over the property.<sup>34</sup>

### 2.1 The Land Act, Cap. 113 R.E 2019

The *Land Act*<sup>35</sup> is the principal legislation that governs matters affecting the ownership and rights over the land in Tanzania. *The Land Act* addresses the conditions that must be met before the parties enter into a mortgage relationship, during the mortgage, and after the mortgage is completed. These conditions include the mortgagor's obligations to discharge the loan as well as the remedies available to the mortgagee in the event of default by the mortgagor.

*The Land Act* gives the mortgagee the mandate to appoint a receiver of income of the mortgaged land.<sup>36</sup> The receiver before being appointed, must be a notice of default outlining the extent of the default. In the notice also the borrower is informed that if he does not do any good to the default within the time frame specified

<sup>25</sup>Section 5 of the *Land Ordinance Cap 113*

<sup>26</sup>See *AbualyAlibhaiAzizi vs. Bhatia Brothers [2000] TLR 288*

<sup>27</sup>[1998] TLR 380

<sup>28</sup>*The Conveyancing and Law of Property Act*

<sup>29</sup>Cap. 114

<sup>30</sup>Cap. 453 R.E 2002

<sup>31</sup>*Land Act, Cap 113 [R.E 2019]*

<sup>32</sup>*Village Land Act, 114 [R.E 2019]*

<sup>33</sup>Article 24 of Cap. 2 R.E 2019

<sup>34</sup>URT Constitution of 1977

<sup>35</sup>Cap 113 R.E 2019

<sup>36</sup>Section 126 of Cap. 113 R.E 2019

<sup>17</sup>*Ibid*

<sup>18</sup>CLARK, Wayne (ed.) (2001), *Fisher and Lightwood's Law of Mortgage, 11<sup>th</sup> Edition, Butterworths Page 448*

<sup>19</sup>*Ibid*

<sup>20</sup>*Jefferys vs. Dickson (1866) 1Ch App 183*

<sup>21</sup>Sections 101 and 102

<sup>22</sup>Cap 114

<sup>23</sup>Section 2 *Ibid*

<sup>24</sup>*Mwaisondola Op cit page 103*



in the notice of default, the receiver of income of the mortgaged land will be appointed. A receiver's appointment is always in writing and is subject to be replaced by another receiver. The person who receives the income from the mortgaged land is considered the borrower's agent and is authorized to sell the mortgaged land. There are two situations when a receiver of income of the mortgaged land may be appointed, first, where there is a default on the part of the borrower; and second, when the lender's right to sell the mortgaged land arises. The main reason for picking a receiver of income for the mortgaged land is not to sell the mortgaged land but rather to ensure the borrower redeems the mortgaged land.

The receiver has the authority to demand and recover any income that has been assigned to them.<sup>37</sup> The law allows for the appointment of a receiver, who is typically assigned to the mortgaged land that does not generate income. Since the mortgaged land does not generate income, the receiver is compelled to sell it to recoup the debt, the law requires the receiver to demand and recover the income of the mortgaged land and apply it in payments, including loan payments and other payments for order of priority under.<sup>38</sup> The law does not intend for the receiver to sell the mortgaged land after being appointed to act as such. The appointment of a receiver of the income of the mortgaged land is worthwhile if the mortgaged land is competent by itself to generate income, and the Land Act is silent on the categories of landed property that a receiver may be appointed.

The power of a receiver to sale mortgaged land should not extend to a receiver of income of the mortgaged land because the lender also has the power of sale and he can exercise that power independently without involving a receiver. The deemed agency of a receiver and mortgagor is permitted by the Land Act. The agent of the mortgagor is considered to be the receiver of income from the mortgaged land. The deemed agency of a receiver and mortgagor has raised controversy in practice because in appointing a receiver as an agent of the mortgagor, the mortgagor himself is not involved and that relationship seems as artificial than a real relationship of agent and principal as contemplated in the common law.

## 2.2 The Land Registration Act, Cap. 334 R.E 2019

The *Land Registration Act*<sup>39</sup> stipulates that the mortgage is security for a loan and not a transfer of title to the lender; the *Village Land Act*<sup>40</sup> and the *Land Registration Act* does not specifically address the powers and duties of the receiver of the mortgaged land. The mortgage must have been registered under the Land Registration Act and, once registered, is treated as a security rather than a transfer of title with the right of redemption, which entitles the borrower to reclaim his title over the landed property upon loan repayment. This allows the lender to appoint a receiver of income of the mortgaged land. A mortgagor has an essential right of

redemption, and if the debt is paid off, the land that was mortgaged becomes unrestricted, just as if it had never been secured. The idea that a mortgage is always a mortgage and nothing more than a mortgage is the foundation of the right of redemption. Therefore, nothing prevents or hinders the ability to redeem.<sup>41</sup> The lender in setting terms for repayments of loans must consider the mortgage as security for the loan and ensure that the conditions stipulated in the loan agreement are fashioned in a manner that enables the debtor to pay back the loan and not to hinder the repayment by imposing excessive and unconscionable interest.<sup>42</sup>

## 2.3 The Companies Act, Cap. 212 R.E 2002

The *Companies Act*,<sup>43</sup> regulates all company matters in Tanzania. Section 95(2) mandates that in the event of company default, the person assuming possession is the receiver of the mortgaged land, with priority given to any claims for principal or interest regarding the debentures.<sup>44</sup> The receiver appointment is a means to help a secured creditor in exercising the legal rights against the debtor. The receiver is an individual with no personal interest in the matter; his only responsible to safeguard or retrieve property that involve conflicting claims. The receiver is appointed with the power of sell, and the power is derived from the loan agreement, debenture, mortgage, or charge. The debenture holder's right to appoint a receiver must first send to the borrower a notice of demand that a default has occurred. When the receiver is appointed, they represent the debtor as their representative, and their goal in doing so is to release the lender from responsibility when the lender wants to take possession of the mortgaged land.

## 3.0 Examination of the Effectiveness of the Laws Governing Powers and Duties of Receiver of Income of the Mortgaged Land in Tanzania

The mortgagee is required to ensure the mortgaged land is managed effectively and that the net rents and profits earned from the land are applied first to the interest owed under the mortgage by appointing a receiver. The receiver who is appointed by the court, he serves as an officer of the court; if the receiver is appointed by the mortgagee outside the court process his appointment is either expressly or statutory. In the latter cases, the receiver is considered to be the mortgagor's agent.

The mortgage deed between the mortgagor and the mortgagee may specifically provide the mortgagee the authority to choose a receiver. The holder of the debenture has the authority to appoint a receiver. Additionally, if the trustee of a debenture is convinced that something has happened that gives the holder of the debenture or a class of debenture holders the right to realize the security, the trustee may designate a receiver or manager. Regarding the appointment of a receiver, the law mandates that, within seven

<sup>37</sup>Section 127 of Cap. 113 R.E 2019

<sup>38</sup>Section 128(8) of Cap 113 R.E 2019

<sup>39</sup>Cap 334 R.E 2019

<sup>40</sup>Cap 114 R.E 2019

<sup>41</sup>Section 121 of Cap. 113 R.E 2019 also see *Noakes & Co. Ltd vs. Rice* [1902] AC 24

<sup>42</sup>*Samuel vs. Jarrah Timber and Wood Paving Corp Ltd* (1904) AC 323

<sup>43</sup>Cap 212 R.E 2002

<sup>44</sup>Cap 212 R.E 2002





days of the date of the order or of the appointment under the said powers, the person who obtains an order for the appointment of a receiver or manager of a company's property or appoints such a person under any powers contained in any instrument shall give notice of the fact to the Registrar, who shall then record the fact in the register of charges.<sup>45</sup>

The appointment by the court is an additional route that can lead to the appointment of the mortgaged land's receiver, such as when the trustee or holder of the debenture applies to the court for the appointment of a receiver or manager if a power of appointment is not available. The protection or maintenance of the property for the benefit of those who have an interest in it is the primary basis upon which the court will appoint a receiver.<sup>46</sup> Section 95(2) of the Companies Act<sup>47</sup> states that the receiver has the option to either close the business and sell it up or to continue operating it to rescue it in the long run and sell it for a profit as a going concern in the short term.<sup>48</sup> Although the conditions under which a duty of this kind would arise are probably uncommon, it is unclear whether the creditors and receivers would have an obligation to protect the company's reputation or secure the most advantageous realization by carrying on with operations.

The appointment by the Statute is when an instrument appoints a receiver shall subject to sections 106 and 416 (1) of the *Companies Act*, be considered as an agent of the person or people he is appointed on their behalf, and if a designated manager of the entirety or any portion of a company's endeavor<sup>49</sup>, is considered to have a fiduciary connection with the company and will be required to act in good faith whenever transacting with it or on its behalf.<sup>50</sup>

### 3.2 The Powers and Duties of a Receiver of Income of the Mortgaged Land

The lender is given the power to appoint a receiver to guarantee loan repayment. A receiver's principal obligation is to the lender who appointed him, not the borrower, and he may use that power to the detriment of the borrower on whose behalf he worked.<sup>51</sup> The borrower when defaults in repayment of loan his security becomes enforceable, and the out-of-court method of the appointment of a receiver of income of the mortgaged land may be employed to recover the loan together with interest. The legislation gives the lender the authority to appointed a receiver of the mortgaged land's income, and once appointed, that person is considered to be the borrower's agent with the authority to sell the mortgaged land.<sup>52</sup>

<sup>45</sup>*Ibid*, Section 311 (1)

<sup>46</sup>*Okoya & Others vs. Santili & Others* (1990) 2 NWLR 172.

<sup>47</sup> Cap. 212 R.E 2002

<sup>48</sup>Lightman, G., et al., (2004), *the Law of Receivers of Companies*. (Sweet and Maxwell, London) p.11

<sup>49</sup> Onuoha R.A. (2003) 'The Role of Receiver in the Preservation, Realization, and Enforcement of Security', in *Secured Credit in a Global Economy- Challenges and Prospects*, Editor, I. O Smith. The Department of Private and Property Law, Faculty of Law, University of Lagos, 2003.

<sup>50</sup>Section 416 (3) Companies Act Cap 212 R.E 2002

<sup>51</sup>*Downsview Nominees vs. First City Corp Ltd* [1993] AC 295

<sup>52</sup> Section 128(1) and (5) of Cap.113 R.E 2019

The receiver of income of the mortgaged land as stated earlier is empowered to demand and recover income derived from the mortgaged land although has also the power of sell the mortgaged land. The Land Act does not provide how a receiver of income of the mortgaged land acquires the power of sale. The Act provides for the procedure of selling the mortgaged land by the mortgagee and not the receiver of income of the mortgaged land. The mortgagee is required to issue sixty (60) days' notice to the mortgagor before the mortgaged property is sold.<sup>53</sup> The mortgagor after being served with sixty (60) days' notice and fails to pay a debt, the mortgagee may proceed to exercise his power of sale through public auction.<sup>54</sup>

The public auction is regulated by the Auctioneer Act<sup>55</sup> which requires the issuance of fourteen (14) days' notice to the public before the sale by auction is conducted. The notice has to be published in a newspaper with wide circulation and published in both languages Swahili and English.<sup>56</sup> The mortgagor in failure to abide by notices of sixty (60) days and fourteen (14) days, the mortgagee may engage the registered auctioneer to sale the mortgaged property as it was observed in the case of Joseph Kahungwa vs. Agricultural Inputs Trust Fund and Two Others<sup>57</sup>.

The procedures of selling the mortgaged property were meant for the mortgagee to exercise the power of sale and not a receiver of income of the mortgaged land.<sup>58</sup> The mortgagee in the exercise of the power of sale may take various forms apart from public auction, a mortgagee may exercise the power of sale by either private contract or bid but when you take a close look those modes of disposing of the mortgaged land could not be applicable in practice by a receiver of income of the mortgaged land. In practice, a receiver of income from the mortgaged land exercises the power of sale through advertising tender in respect of the mortgaged land because a receiver has no direct power to sell the mortgaged property. The receiver of income of the mortgaged land is not privy to a mortgage or loan agreement and a receiver is said to be an agent of the mortgagor but his agency as the law stands is restricted to the demand and recovery of the income from the mortgaged land and not to sale the mortgaged land.<sup>59</sup> Therefore, it may be noted from the outset that a receiver of income of the mortgaged land in both law and practices has no power of sale.

### 3.3 The Agency Relationship between a Receiver of Income of the Mortgaged Land and the Mortgagor

The agent of the mortgagor having the authority to sell the mortgaged land is considered to be the receiver of income from the land. The purpose of a receiver acting as the borrower's agent is to shield the lender from responsibility for the receiver's actions or

<sup>53</sup>Section 127 of Cap. 113 R.E 2019

<sup>54</sup>Section 134(2) of Cap. 113 R.E 2019

<sup>55</sup> Cap. 227 R.E 2002

<sup>56</sup> Section 12(3) *Ibid*

<sup>57</sup> *Court of Appeal of Tanzania at Mwanza Civil Appeal No. 373 of 2019[2021] TZCA 325*

<sup>58</sup>Section 131 and 132 of Cap. 113 R.E 2019

<sup>59</sup>Section 127(7) of Cap. 113 R.E 2019



inactions<sup>60</sup>The appointment of a receiver creates a tripartite agency relationship between the mortgagee, mortgagor, and receiver.<sup>61</sup> The practical legal issues arise between a receiver, the lender that appointed him, and the borrower whose property the receiver is appointed over because of the tripartite agency connection. The lender appoints the receiver to act as the borrower's agent. The borrower to whom a receiver is assigned is neither consulted nor involved in the appointment process. The receiver of income of the mortgaged land is closely linked to the lender and cannot, in any way, be instructed by the borrower on how to carry out receivership.<sup>62</sup> The receiver's agency relationship with the mortgagor can cause snags because the interests of the mortgagor and mortgagee conflict, and the position of a receiver as an agent raises difficulties.<sup>63</sup> The receiver under the mortgage instrument is not appointed by the court but rather by the mortgagee. Curiously enough, he is deemed to be an agent of the mortgagor, who had no say or control over his appointment.<sup>64</sup>

In Goodwell Siamutwa v. Southern Province Cooperative Union and Another<sup>65</sup> the Supreme Court of Zambia noted the legal challenges associated with a receiver's agency relationship. Essentially, a receiver appointed by a debenture is the company's agent; however, he is also appointed to safeguard the interests of the debenture holder. Consequently, this dual and conflicting loyalty of a receiver can occasionally lead to messy and challenging situations.<sup>66</sup> The borrower is not allowed to direct or fire the receiver, nor is he allowed to have any say in the receiver's appointment or identification. The receiver's principal obligation is to the mortgagee who appointed him, not the mortgagor for whom he served as an agent.<sup>67</sup> The receiver of income of the mortgaged land in exercising his powers involves two parties with competing interests namely the borrower and lender. The borrower seeks to get back the property that was pledged as security for the secured loan, while the lender wants to get back any unpaid obligations under the mortgage. As previously said, a mortgage serves as security for loan repayment, and if one is appointed as a receiver needs to act honestly and lawfully to secure repayment of the debt owing to the mortgagee.<sup>68</sup> A receiver owes a duty in equity to ensure that, whilst performing his powers and duties needs to deal

fairly and equitably with the borrower and other interests in the equity of redemption.<sup>69</sup> Under Section 128(8) of the Land Act, the receiver has the authority to demand and recover income from the mortgaged land and use that money to settle all claims in the order of priority. It is incumbent upon the receiver to demand recover the income for which he has been designated.<sup>70</sup>

The law mandates, the receiver to collect income from the mortgaged land on behalf of the borrower and use it to pay interest on the principal amount and pay off the mortgage's principal amount.<sup>71</sup> The Land Act's appointment of a receiver of income of the mortgaged land was meant to assist the borrower in redeeming his mortgaged land. And the appointment of a receiver should only apply to landed properties that generate income.<sup>72</sup>

The receiver is required to be appointed to the property that produces rent or profit for a receiver to receive that income as rent or profit.<sup>73</sup> Given the circumstances, the agency connection between a borrower and a receiver is not an ordinary agency and serves mainly as a safeguard for the lender because it is difficult to determine the obligations due by the receiver to the borrower using traditional agency principles.<sup>74</sup> The traditional agency principles involve the agent and principal acting under a fiduciary relationship. The Black's Law Dictionary defines Agency as 'a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.'<sup>75</sup> The definition suggests that the agency relationship imposes responsibilities between the two parties, one of which is that the agent does something or says something on behalf of his principal and in so doing or saying, binds the principal. An agent is a person employed to do any act for another or to represent another in dealings with third persons<sup>76</sup> and a principal is a person who employs another person to act on his or her behalf.<sup>77</sup> The common law rule of agency is coined from the maxim *qui facit per alium, facit per se* (means who acts by another act by himself).<sup>78</sup> This fundamental principle of agency law received statutory recognition under section 178 of the Law of Contract Act<sup>79</sup>.

The Court of Appeal of Tanzania once decided on the issue of establishing the relationship of a principal and agent in the case of the Registered Trustees of the Cashewnuts Industry Development Fund vs Cashewnut Board of Tanzania<sup>80</sup>, The Court of Appeal

<sup>60</sup> *Gomba Holdings UK Limited vs. Homan* [1986] 1 WLR 1301 at 1305

<sup>61</sup> *Gomba Holdings UK Ltd vs. Minorities Finance Ltd* [1988] 1 WLR 1231

<sup>62</sup> SHEA, Caroline and BENNISON Gavin, (2019), *The (Messy) Law of Receivership* available at [https://www.newlawjournal.co.uk/docs/default\\_source/article\\_files/nlj\\_01-11-2019\\_property-shea-bennison.pdf?srsn=29b450fe\\_1\\_-accessed-in-July-2024](https://www.newlawjournal.co.uk/docs/default_source/article_files/nlj_01-11-2019_property-shea-bennison.pdf?srsn=29b450fe_1_-accessed-in-July-2024).

<sup>63</sup> MUHOME, Allan Hans, (2021) *Insolvency Law in Malawi*. Available at <https://www.icam.mw/wp-content/uploads/2021/11/INSOLVENCY-LAW-BOOK-Allan-Hans-Muhome.pdf>

<sup>64</sup> KLUZDE, A.K.P, *The Modern Ghanaian Law of Mortgages*, University of Ghana Law Journal Vol. XI 1974 No.1.

<sup>65</sup> SCZ Appeal No. 114 of 2002

<sup>66</sup> *Ibid*

<sup>67</sup> *Downsview Nominees Ltd vs. First City Corp Ltd* [1993] AC 295

<sup>68</sup> CLARK, Wayne (ed.) (2002), *Fisher and Lightwood's Law of Mortgage, 11<sup>th</sup> Edition*, Butterworths Page 455

<sup>69</sup> *Medforth vs. Blake* [2002] Ch 86

<sup>70</sup> Section 128(6) of Cap 113 R.E 2019

<sup>71</sup> Section 128(8)(f) and (g) of Cap 113 R.E 2019

<sup>72</sup> KLUZDE, A.K.P, *The Modern Ghanaian Law of Mortgages*, University of Ghana Law Journal Vol. XI 1974 No.1.

<sup>73</sup> *Ibid*

<sup>74</sup> *Gomba Holdings UK Ltd vs. Minorities Finance Ltd* [1988] 1 WLR 1231

<sup>75</sup> BA Garner (ed), *Blacks' Law Dictionary* (7<sup>th</sup>edn, West Group St. Paul, 1999) 62.

<sup>76</sup> Section 134 of the Law of Contract Act Cap. 345 R.E 2019

<sup>77</sup> *Ibid*

<sup>78</sup> *qui facit per alium, facit per se* - Google Search

<sup>79</sup> Cap 345 R.E 2019

<sup>80</sup> Civil Appeal No. 18 of 2001, CAT at Dar es Salaam (unreported)



quoted a passage from the book by Sir William Anson titled *The Principle of the English Law of Contract and Agency* in its Relation to Contract, 22<sup>nd</sup> edition, published by the English Language Book Society and Oxford University Press, the author at page 536 states that;

“The relation of the principle and agent *inter se* [between or among themselves] are made up of ordinary relation of employer and employee and of those which spring from the special business of an agent to bring two parties together for the of making a contract to establish privity of contract between his principal and third parties. The rights and duties of the principal and agent depend upon the terms of the contract, whether express or implied, which exist between them”.

Unlike the common law rule of agency where the principal appoints the agent to act on his or her behalf, in the deemed agency under the mortgage the principal (mortgagee) who appoints a receiver of income of the mortgaged land has nothing to do with the mortgagor (whom the receiver act as his or her agent) and the mortgagor is not involved in the appointment of a receiver altogether. The deemed agency of the borrower and a receiver increases practical challenges to a receiver as an agent of the borrower. The agency of the receiver is said to be the real one although it is of an unusual, special, and limited nature which causes juridical difficulty.<sup>81</sup>

#### 4.0 The Legal Challenges facing the Power of Sale by a Receiver of Income of the Mortgaged Land

In acting as the borrower's deemed agent, the person who is appointed as a receiver of the mortgaged land's income has the power of sell.<sup>82</sup> The capacity of the receiver to sell the mortgaged land is granted expressly or statutory. In specific legal charge, the debenture holder may sell under the statutory power of sale, a receiver appointed by the debenture holder generally has an express power of sale under the debenture.<sup>83</sup> In collecting money from the mortgaged land, the receiver is deemed to be the borrower's agent.<sup>84</sup>

#### 4.1 Conflict of Interest

The receiver in selling the mortgaged land raises a conflicting interest with the borrower because the borrower wants to retain the property and the receiver being the agent of the borrower wants to recover the remaining balance owed by the lender. In regard to the relationship between the receiver, borrower, and lender in the exercise of the receiver's power of sale, the question is whether the receiver of income of the mortgaged land act as the borrower's or the lender's agent. As the borrower's agent, the receiver's primary

duty is to demand and collect income from the mortgaged land and use it to pay off the debt. However, there is a controversy as to whether the receiver's function as the borrower's agent continued when the receiver exercised the power of sale. The rationale of choosing a receiver as an agent of the borrower is to ensure the debt is repaid through the income generated from the mortgaged land which enables a borrower to redeem the landed property upon repayment of debt.

In reality, the borrower's right of redemption is terminated when a receiver of income of the mortgaged is appointed as the borrower's agent and immediately exercises the power of sale of the mortgaged land. The receiver, who also serves as the mortgagee's recourse if the borrower defaults on loan repayment, possesses the right of sale and consistently utilizes it. When appointed as the borrower's agent, the receiver of the mortgaged land's income continues with the sale of the appointed landed property because it does not generate income. Since the receiver of the mortgaged land's income is appointed to recover and demand income from the mortgaged land as the borrower's agent, the law is silent as to when he may exercise his power of sale.

#### 4.2 Failure to exercise a duty of care

The receiver of income of the mortgaged land uses his power to sell the mortgaged property, among other responsibilities and duties, he is required to exercise that power in good faith to ensure the lender's debt is repaid.<sup>85</sup> Essentially, the receiver of income of the mortgaged land is not required to use the power of sale, but if he does, he has the same specific obligations as the mortgagee, namely to sell the mortgaged property for the best price reasonably obtainable.<sup>86</sup> In *Kennedy vs. De Trafford*,<sup>87</sup> it was observed that when using his power of sale, a mortgagee owes a mortgagor a duty of good faith. The Privy Council held in the *Downsview Nominees Ltd. v. First City Corporation Ltd.*,<sup>88</sup> that equity imposed specific duties on the mortgagee and receiver/manager, including the duty to exercise their powers in good faith to obtain repayment.

In *Cuckmere Brick Co. Ltd. & Anor. vs. Mutual Finance*,<sup>89</sup> The Court of Appeal in England determined that a mortgagee had an obligation to exercise reasonable care to obtain a fair price from the mortgagor when using his power of sale. As a result, in cases where the mortgagee's negligence causes property to be sold for less than the going rate, the mortgagee is responsible for any losses incurred. However, it should be mentioned that a receiver or manager has a greater responsibility for care than a mortgagee. In *M&J Duddy Development Limited vs. Finance DAC & Others*,<sup>90</sup> the Court noted that the obligations of a mortgagee and a receiver when it comes to selling a property are identical; both

<sup>81</sup> [https://www.guildhallchambers.co.uk/files/Spotlight\\_on\\_Receivers\\_Neil\\_Levy\\_Holly\\_Doyle\\_June2013.pdf](https://www.guildhallchambers.co.uk/files/Spotlight_on_Receivers_Neil_Levy_Holly_Doyle_June2013.pdf)

<sup>82</sup> Section 128(5) of Cap 113 R.E 2019

<sup>83</sup> CLARK, Wayne (ed.) (2002), *Fisher and Lightwood's Law of Mortgage*, 11<sup>th</sup> Edition, Butterworths Page 455

<sup>84</sup> Section 127(5) of Cap 113 R.E 2019

<sup>85</sup> CLARK, Wayne (ed.) (2002), *Fisher and Lightwood's Law of Mortgage*, 11<sup>th</sup> Edition, Butterworths Page 455

<sup>86</sup> *Downsview Nominees Ltd v First City Corporation* [1993] A.C. 295

<sup>87</sup> (1897) AC p. 181

<sup>88</sup> [1993] AC 295

<sup>89</sup> [1971] Ch 949

<sup>90</sup> [2023] 1 EHEC



must seek to get the highest price that is reasonably possible for the asset.

#### 4.3 Lack of Legal Procedures for Sell of the Mortgaged Property by a Receiver of Income of the Mortgaged Land

A receiver and mortgagee are given the authority by statute to sell the mortgaged land. The law specifies the procedures for the mortgagee to sell the mortgaged property; however, it makes no provisions for the procedure to the receiver of income from the mortgaged land to follow while selling the mortgaged property. Instead, it outlines the receiver's appointment, powers, remuneration, and duties.<sup>91</sup> It presents a practical challenge to determine in what capacity a receiver exercises the power of sale, is he exercise such power as an agent of the borrower or lender given that he has been designated to demand and recover the income from the mortgaged land. In George Barker (Transport) Ltd vs. Enyon<sup>92</sup> it was noted that the conditions of an express authority typically state or explicitly presume that the receiver appointed under it is the mortgagor's agent. Therefore, the mortgagor is liable for the receiver's acts and default. The mortgagee will be liable for the acts, default, and remuneration of the receiver if he is appointed under explicit power and is not specifically designated as the mortgagor's agent.

In Basic Element Limited vs. National Bank of Commerce Limited<sup>93</sup> the Court observed that the bank/lender had taken over the control of the process from the Receivers, thereby negating section 418 of the Companies Act, and turning the Receivers into her agent. It was further observed that the bank/lender had direct control of the manner the receivership was being handled, thereby negating the legal fiction that in ordinary situations exists between the mortgagor/borrower and the receiver and finally the Court was in the view the bank constituted the Receivers their agents, and they cannot escape liability.

#### 5.0 The Solution to the Practical Challenges of Powers and Duties of the Receiver of the Mortgaged Land as Agent of the Mortgagor

The purpose of appointing a receiver of the mortgaged land's income is to demand and receive the income from the land and use it to pay off an outstanding loan. As things stand, the receiver is appointed even in the circumstances where the property upon which they are appointed is incapable of generating income. In these situations, the receiver is referred to as the borrower's agent, acting on their behalf to collect income from the mortgaged land; conversely, if the mortgaged land is incapable of generating income, then the deemed agency of a receiver is deemed to be nonexistent. The appointment of a receiver of income of the mortgaged land to address practical issues related to the rights and duties of the receiver of income of mortgaged land should only

occur in cases where the property being pleaded as security generates income.

Since the mortgagee has the power of sale, such powers should remain with the mortgagee. The receiver should only use the power of sale after being convinced that the property to which he was appointed is no longer able to generate income and for that matter, the court's permission, should be sought and obtained to allow a receiver of income of the mortgaged land to exercise power of sale of the mortgaged land.

#### 6.0 Recommendation

Following an analysis of the practical and legal difficulties associated with the powers and duties of the receiver of income of the mortgaged land under mortgage particularly the deemed agency relationship between the receiver of income of the mortgaged land and borrower, the following are recommendations:

- The mortgage laws be amended to allow for the appointment of an income receiver exclusively for mortgaged properties that generate rent, which could enable the receiver to use the rent to pay off outstanding debts. The receiver of the landed property that generates income will assist the borrower in reclaiming his assets and safeguard his interests by keeping the security intended to prevent title transfer to the lender.
- The law be amended to require a receiver of income from mortgaged land to request permission from the court and provide justification for the change in circumstances before exercising the right to sell mortgaged land. This is because the current law is designed to allow a receiver of income from mortgaged land to demand and recover income from the mortgaged property and not to sell the mortgaged land directly. It should be noted that a mortgagee has similar powers of sale that can be exercised as the remedy available to the mortgagee directly without the need to appoint a receiver to sell the mortgaged property. However, in practice when a receiver of income from mortgaged land is appointed directly exercises the power of sale instead of collecting the income generated from the mortgaged property.
- The law should be changed to allow the court to intervene in regulating the duties and powers of the receiver of the mortgaged property. As it stands, the receiver's powers under the Land Act are unchallenged once appointed, so the court must intervene to challenge the receiver's duties and powers. Currently, the receiver may sell, proceed, and provide an account without interference, which can occasionally result in the violation of the borrower's rights and remedies.
- Regulations should be put in place by the government, through the Minister in charge of land matters, to compel lenders to specify the type and character of mortgaged property that a receiver of income from mortgaged land may be appointed. The regulations also should specify

<sup>91</sup> Section 128 of Cap 113 R.E 2019

<sup>92</sup> [1974] 1 ALL ER 15

<sup>93</sup> Civil Case No. 72 of 2012





the qualifications of security that the lender may use to support the appointment of a receiver.

### 7.0 Conclusion

The receiver of income from the mortgaged land should only be appointed when the mortgaged land is capable of generating income to support the lender's agency relationship with

the borrower, who is appointed as the lender's agent to demand and recover income from the mortgaged land. Since the receiver is appointed to receive the income from the mortgaged land, he should not have the authority to sell, but when such need arises, he should obtain court permission before doing so because the lender has the right to sell the mortgaged land if the borrower defaults.