

THE LAND (AMENDMENT) ACT, 2004

ARRANGEMENT OF SECTIONS

Section *Title*

PART I

PRELIMINARY PROVISIONS

1. Short title and construction.

PART II

GENERAL AMENDMENTS

2. Amendment of section 2.
3. Amendment of section 19.
4. Amendment of section 20.
5. Amendment of section 37.
6. Repeal and substitution of Part X.

THE UNITED REPUBLIC OF TANZANIA



No. 2 OF 2004

I ASSENT

Benjamin W. Mkapa

President

14th April, 2004.

An Act to amend the Land Act, 1999

ENACTED by Parliament of the United Republic of Tanzania.

PART I
PRELIMINARY PROVISIONS

1.-(1) This Act may be cited as the Land (Amendment) Act, 2004 and shall be read as one with the Land Act, 1999 hereinafter referred to as the "principal Act".

Short
title
and
constru-
ction

(2) This Act shall come into operation on the date as the Minister may, by notice in the *Gazette*, appoint, and the Minister may appoint different dates on which different sections of this Act may come into operation.

PART II
GENERAL AMENDMENTS

2. Section 2 of the principal Act is amended by inserting in appropriate alphabetical order the following definition -
"sale" as used in relation to a right of occupancy, means transfer of

Amend-
ment of
section 2

an interest in or over land on conditions attached to a granted right of occupancy;"

Amend-
ment of
section
19

3. Section 19 of the principal Act is amended by repealing subsection (2) and substituting for it the following:

Cap. 212 "(2) A person or a group of persons whether formed into a corporate body under the Companies Ordinance or otherwise who is or are non-citizens, including a corporate body the majority of whose shareholders or owners are non-citizens, may only obtain-

- Act No.
26 of
1997
- (a) a right of occupancy for purposes of investment approved under the Tanzania Investment Act, 1997; for
 - (b) a derivative right for purposes of investment approved under the Tanzania Investment Act, 1997; or
 - (c) an interest in land under a partial transfer of interest by a citizen for purposes of investment approved under the Tanzania Investment Act, 1997 in a joint venture to facilitate compliance with development conditions.

Amend-
ment of
section
20

4. Section 20 of the principal Act is amended by repealing subsection (3) and substituting for it the following:

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

Amend-
ment of
section
37

5. The principal Act is amended in section 37 by repealing subsections (8) and (9) and substituting for them the following subsections:

"(8) Subject to subsection (9), the Commissioner shall approve sale of a right of occupancy without unexhausted improvement if such sale complies with the provisions of subsection (9).

(9) The sale of a right of occupancy without unexhausted improvement may be made to a citizen of Tanzania and shall be lawful if that land is sold in the following circumstances, that is to say:

- (a) it is sold to a purchaser who agrees to comply with development conditions; or
- (b) is a partial transfer of interest in land for a joint venture to facilitate compliance with development conditions.

6. The principal Act is amended by repealing Part X and substituting for it the following new Part X-

Repeal and substitution of Part X

"PART X
MORTGAGES
Sub-Part 1

(a) General Provisions

111.-(1) This Part applies to all mortgages of land or interests in land, made or coming into effect on and after the coming into operation of this Act and any other mortgages of land which are specifically referred to in any section in this Part and references to mortgages in this Part shall apply and apply only to mortgages of land and interests in land.

Application of this Part to mortgages

(2) The repeal and substitution of Part X shall not apply in the case of mortgages created on or before the time when Part X as substituted came into operation.

(3) References in this Part to "the mortgaged land" shall be taken to mean and include a mortgaged right of occupancy, a mortgaged lease and sublease and a second or subsequent mortgage.

112.-(1) Where the expressions "borrower" or "lender" are used in this Part, their respective definitions in section 2 shall not apply, and they shall be respectively construed as "a person who borrows" and "a person who lends"

Interpretation of expressions used in this Part

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of 1971

- (2) In this Part, unless the context requires otherwise -
- "matrimonial home" means the building or part of a building in which the husband and wife ordinarily reside together and includes-
- (a) where a building and its cartilage are occupied for residential purposes only, that cartilage and any outbuildings thereon; and
 - (b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by the husband or the wife, as the case may be to his or her spouse for her or his exclusive use;'
- "mortgagee" means a person in whose favour a mortgage is created or subsists;
- "mortgagor" means a person who has mortgaged a right of occupancy or a lease and includes a transferee of a right of occupancy or lease subject to a mortgage and a person to whom such right of occupancy or lease so subject has passed by transmission; and
- "third-party mortgage" means a mortgage which is created or subsists to secure the payment of an existing or future or a contingent debt or other money or money's worth or the fulfillment of a condition by a person who is not the mortgagor, whether or not in common with the mortgagor.

(3) References in this Act to "mortgage" shall be taken to include a third-party mortgage, or, as the context requires, the creation of a third-party mortgage.

Power to
create
mortgage
Cap. 334

113.-(1) An occupier of land under a right of occupancy and a lessee may, by an instrument in the prescribed form, with such variations and additions, if any, as the circumstances may require, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition.

(2) The power conferred by subsection (1) shall include the power to create third-party mortgages and second and subsequent mortgages.

(3) The power conferred by this section shall be exercisable subject to-

- (a) any prohibition or limitation imposed by this Act or any written law; or

- (b) any restriction contained in an instrument creating or affecting the interest in land which is to be the subject of a mortgage.

(4) In respect of a mortgage other than a mortgage of land registered under the Land Registration Ordinance, it shall take effect only when it is registered in a prescribed register and a mortgagee shall not be entitled to exercise any of his remedies under that mortgage if it is not so registered.

Cap. 334

(5) Nothing in this section shall operate to prevent a borrower from offering and a lender from accepting -

- (a) a written and witnessed undertaking, the clear intention of which is to charge the borrower's land with the repayment of money or money's worth obtained from the lender; or

(b) a deposit of any of the following -

- (i) a certificate of a granted right of occupancy;
- (ii) a certificate of a customary right of occupancy;
- (iii) a document of a lease;
- (iv) any other document which may be agreed upon evidencing a right to an interest in land; or
- (v) any other documents which may be agreed upon,

to secure any payments which are referred to in subsection (1).

(6) The arrangement specified in paragraph (a) of subsection (5) may be referred to as an "inform mortgage" and a deposit of documents specified in paragraph (b) of subsection (5) shall be known and referred to as a "lien by deposit of documents"

114.-(1) A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if-

Mortgage of matrimonial homes

- (a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or
- (b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the

mortgagor and the spouse or spouses living in that matrimonial home.

(2) For the purpose of subsection (3), it shall be the responsibility of a mortgagee to take reasonable steps to ascertain whether the applicant for a mortgage has a spouse or spouses¹;

Application of this Part to customary mortgages

115.-(1) The creation and operation of customary mortgages of land shall, subject to the provisions of this section, continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created.

(2) Where the mortgagee under a customary mortgage seeks to exercise any customary remedy which involves or may involve the mortgagor being disposed or permanently deprived of the occupation of the mortgaged land, the mortgagee shall, after using the services of the Village Land Council, try and mediate on the application of the proposed or any other remedy, make an application to the Village Land Council for an order authorizing the exercise of that remedy.

(3) The mortgagor under a customary mortgage may, after making use of the services of the Village Land Council to try and mediate on the matter with the mortgagee, apply to a Village Land Council for the mortgage to be re-opened on the ground that the terms of the mortgage are -

- (a) unfair; or
- (b) an unreasonable departure from the normal terms of a customary mortgage applicable in the area where the land is located; or
- (c) disadvantageous to the interests of the dependents of the mortgagor,

and the Village Land Council shall, in considering and determining that application, be guided by the provisions of sections 141 and 142.

(4) In any case concerning a customary mortgage, the Village Land Council determining the case shall, where it appears to the Village Land Council that -

- (a) there is a lacuna in the customary law applying to that mortgage; and

(b) no other system of customary law makes adequate or any provision for the matter in respect of which there is a lacuna, be guided by the relevant provisions of this Part of this Act.

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

Mortgage of land to take effect as security only

(2) In the case of the mortgage of a lease, the mortgagee shall not be liable to the lessor for rent or in respect of the covenants and conditions contained or implied in the lease to any greater extent than he would have been if the mortgage had been by way of a sublease.

117.-(1) Mortgages shall rank according to the order in which they are registered -

Priority

(a) in respect of mortgages of land registered under the Land Registration Ordinance, in accordance with section 60(1) of that Ordinance;

Cap. 334

(b) in respect of all other mortgages, in accordance with the appropriate register.

(2) Informal mortgages shall rank according to the order in which they are made provided that, where an informal mortgage is registered under section 11 of the Registration of Documents Ordinance, it shall take priority over any unregistered informal mortgage.

Cap. 117

(3) For purposes only of determining the priority of mortgages, a customary mortgage shall be deemed to be an informal mortgage, and registration of a customary mortgage in a register of village land shall have the same effect as regards the priority of such a mortgage as if it were registered under section 11 of the Registration of Documents Ordinance.

Cap. 117

(4) Where two informal mortgages are made on the same day or are registered on the same day, the mortgage which was first in time to be made or registered shall have priority.

(5) Where, a subsequent mortgagee has entered into the transaction secured by his mortgage as a consequence of or through the fraud, dishonesty or misrepresentation of a prior mortgagee, either in conjunction with or separately from the fraud, dishonesty or misrepresentation of the mortgagor, the subsequent mortgage shall have priority to the mortgage of that prior mortgagee as between them, but not so as to affect the priority of any other mortgage having priority to the subsequent mortgage.

(6) The rules of priority for informal mortgages shall apply as far as the circumstances shall permit to liens by deposit of documents.

Tacking

118.-(1) A mortgagee may, subject to the provisions of this section, make provision in the mortgage instrument to give further advances or to give credit to the borrower on a current or continuing account.

(2) A further advance referred to in subsection (1) shall not rank in priority to any subsequent mortgage unless -

- (a) the provision for further advances is noted in the register in which the mortgage is registered; or
- (b) the subsequent mortgagor has consented in writing to the priority of the further advance.

(3) Except as provided for in this section, there is no right to tack.

(4) Where a mortgage provides for the payment for a principal sum by way of installments, the payment of those instalments shall not be taken to be a further advance, and such payment shall rank in priority to all subsequent mortgages.

Consolidation

119.-(1) Unless there is an express provision to the contrary clearly set out in the mortgage instrument, where a mortgagee has more than one mortgage from a single mortgagor, the mortgagor may discharge any or some of the mortgages without having to redeem all mortgages.

(2) A mortgagee who has made provision in accordance with subsection (1) for the consolidation of his mortgage shall record that right in the register or registers against all the mortgages so consolidated which are registered.

(3) Notwithstanding subsection (1), no right to consolidate shall be exercisable to the prejudice of any person acquiring any right of occupancy or lease or other interest in land entitling that person to the occupation and use of that land prior to the recording of that right to consolidate in the prescribed register.

(4) The rules of equity applicable to consolidation shall not apply as from the date of the commencement of this Act.

120.-(1) A mortgagee shall not vary the rate of interest payable under a mortgage without giving notice of such variation to the mortgagor.

Variation
of a
mortgage

(2) A mortgage may be varied by a memorandum which:

- (a) complies with subsection (4); and
- (b) is signed by the mortgagor and the mortgagee.

(3) The covenants, conditions and powers expressed or implied in a mortgage shall take effect as regards the mortgage as so varied from the time of the variation.

(4) A memorandum for the purposes of subsection (2):

- (a) must be endorsed or annexed to the mortgage instrument; and
- (b) when so endorsed or annexed to the mortgage instrument, shall operate to vary the mortgage in accordance with the terms of the memorandum.

Sub-Part 2

(b) Discharge of Mortgages

121.-(1) Subject to the provisions of this section and section 136, on payment of all moneys and the performance of all other conditions and obligations secured by the mortgage, the mortgagee shall at the request and cost of the mortgagor discharge the mortgage at any time and any agreement or provision in the mortgage instrument or otherwise which -

Right to
dis-
charge

- (a) purports to deprive the mortgagor of this right; or

(b) seeks to fetter the exercise of this right; or

(c) stipulates for a collateral advantage which is unfair and unconscionable and inconsistent with the right to discharge, shall be void.

(2) Any agreement or provision in the mortgage instrument or otherwise which requires that a mortgagor wishing to obtain a discharge of the mortgage under subsection (1) shall be required to pay to the mortgagee, as well as paying all other monies secured by the mortgage, additional amount in excess of one month's interest at the rate at which interest is payable on the principal sum secured by the mortgage shall be void.

(3) A discharge whether of the whole or a part of a mortgage shall be as prescribed under this Act or any other written law.

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(4) Section 63 of the Land Registration Ordinance shall apply to any mortgage made under this Part.

Transfer
of
mortgage

122.-(1) The current mortgagor or any person mentioned in subsection (2) may at any time, other than a time when the mortgagee is in possession of the mortgaged land, in writing request the mortgagee to transfer the mortgage to a person named in the written request.

(2) Subject to the consent of the mortgagor, which consent shall not be unreasonably withheld, the persons who may make the written request under subsection (1) are -

(a) any person who has an interest in the right of occupancy, lease or mortgage that has been mortgaged; or

(b) any surety for the payment of the amount secured by the mortgage; or

(c) any creditor of the mortgagor who has obtained a decree for sale of the mortgaged right of occupancy, lease or mortgage.

(3) The mortgagee on receiving a written request made under subsection (1), and on payment by the person or persons making the request of all monies which would have been payable if the discharge

of the mortgage had been made under section 120 and the performance of all other obligations secured by the mortgage, shall transfer the mortgage to the person named in the written request.

123. Where a mortgage contains a condition, express or implied, by the mortgagor that the mortgagor will not, without the consent of the mortgagee transfer or assign or lease the right of occupancy or in the case of a lease or sublease, no transfer, assignment, lease or sublease shall be registered until the written consent for the mortgagee has been produced to the Registrar.

Mortgagee's consent to transfer

Sub-Part 3

(c) Covenants, Conditions and Powers Implied in Mortgages

124.-(1) There shall be implied in every mortgage covenants by the mortgagor with the mortgagee binding the mortgagor:

Implied covenants by the mortgagor

- (a) save in the case of a mortgagor under a third-party mortgage, to pay the principal money on the day appointed in the mortgage agreement, and, so long as the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money which for the time being remains unpaid at the rate and on the days and in the manner specified in mortgage agreement;
- (b) to pay all rates, charges, rent, taxes and other outgoings which are at all times payable in respect of the mortgaged land held for a right of occupancy;
- (c) to repair and keep in repair all buildings and other improvements upon the mortgaged land or to permit the mortgagee or his agent at all reasonable times until the mortgage is discharged and after reasonable notice to the mortgagee to enter the land and examine the state and condition of such buildings and improvements;
- (d) to ensure by insurance or any other means which may be prescribed or which are appropriate, that resources will be

- available to make good any loss or damage caused by fire to all buildings on the land, and where insurance is taken out, it is done so in the joint names of the mortgagor and mortgagee with insurers approved by the mortgagee and to the full value of all the buildings;
- (e) in the case of a mortgage of land used for agricultural purposes, to use the land in a sustainable manner and in accordance with the principles of good husbandry and any conditions subject to which the right of occupancy or lease under which the land is held and to comply with all written laws and lawful orders applicable to that use of the land;
 - (f) not to lease or sublease the mortgaged land or any part of it for any period longer than a year without the previous consent in writing of the mortgagee but that consent shall not be unreasonably withheld;
 - (g) not to transfer or assign the right of occupancy or lease or part of it without the previous consent in writing of the mortgagee but that consent shall not be unreasonably withheld;
 - (h) in the case of a mortgage of a lease, during the continuance of the mortgage, to pay, perform and observe the rent, covenants and conditions by and in the lease contained and implied and on the part of the lessee to be paid, performed and observed and to keep the mortgagee indemnified against all proceedings, expenses and claims on account of non-payment of the rent or part of it or the breach of non-observance of the said covenants and conditions or any of them, and, if the lessee has an enforceable right to renew the lease, to renew it;
 - (i) where the mortgage is a second or subsequent mortgage, that the mortgagor will pay the interest from time to time accruing on each prior mortgage (not being a third-party mortgage) when it becomes due and will at the proper time repay the principal money or part of it due on each prior charge;
 - (j) where the mortgagor fails to comply with any of the covenants implied by paragraphs (b), (c), (d), (e) and (h) of

this subsection, that the mortgagee may spend any money which is reasonably necessary to remedy the breach and may add the amount so spent to the principal money and that amount shall be deemed for all purposes to be a part of the principal money secured by the mortgage.

(2) Reference to the obligation of the mortgagor in paragraph (b) of subsection (1), to keep all buildings upon the mortgaged land in repair shall be taken to be an obligation to keep such buildings in a reasonable state of repair as set out in section 92.

(3) The provisions of section 93 shall apply to an application by a mortgagor to a mortgagee for consent under paragraphs (f) and (g) of subsection (1).

(4) The mortgagee shall not spend any money pursuant to paragraph (j) of sub section (1) without giving notice to the mortgagor of intention to do so.

(d) Powers of the Mortgagee

125.-(1) Any rule of law, written or unwritten, entitling a mortgagee to foreclose the equity of redemption in mortgage land is abolished.

Foreclosure abolished

(2) It is hereby declared that, on and after the coming into operation of this Act, a mortgagee shall not be entitled to enter into possession of the mortgaged land held for a right of occupancy or a mortgaged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the mortgage, other than in accordance with the provisions of this Sub-Part.

126. Where the mortgagor is in default, the mortgagee may exercise any of the following remedies -

Remedies of the mortgagee

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

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of 1999

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

(d) sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 of the Village Land Act, 1999.

Notice to
exercise
remedies

127.-(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:

(a) the nature and extent of the default;

(b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and

(c) that, after the expiry of thirty days following receipt of the notice by the mortgagor, the mortgagee may exercise the right to sell the mortgaged land.

(3) The Minister may, by regulations prescribe the form and content of a notice to be served under this section and where the notice to be served under this section has been so prescribed, a notice served under subsection (1) shall be in that form and shall be void if it is not in that form.

Appoint-
ment,
powers,
remune-
ration
and
duties of
receiver

128.-(1) It shall be an implied condition in every mortgage, that the mortgagee shall have the power to appoint a receiver of the income of the mortgaged land.

(2) Prior to the appointment of a receiver under this section, the mortgagee shall serve a notice as provided for under section 127 on the mortgagor.

(3) The appointment of a receiver shall be in writing signed by the mortgagee.

(4) A receiver may be removed at any time and a new receiver appointed by writing signed by the mortgagee.

(5) A receiver appointed under this section shall be deemed to be the agent of the mortgagor for the purposes for which he is appointed including power of sale of mortgaged land so that the mortgagor shall, unless the mortgage instrument provides otherwise, be solely responsible for the acts and defaults of the receiver.

(6) The receiver shall have the power to demand and recover all the income of which he is appointed a receiver, by action or otherwise, in the name of the mortgagor and to give effectual receipts for the same.

(7) The receiver shall be entitled to retain out of any money received by him all costs, charges and expenses incurred by him as receiver and, for his remuneration, a commission at the rate not exceeding five per centum of the gross amount of all monies received as specified in the appointment, or if no rate is so specified, at the rate of five per centum or any other rate as the mortgagor and mortgagee may agree or where the appointment of a receiver comes before the court, which the court thinks fit.

(8) The receiver shall apply all moneys received by him in the following order of priority:

- (a) first, in the payment of all rents, rates, charges, taxes and other outgoings required to be paid in respect of the mortgaged property;
- (b) second, in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage of which he is the receiver;
- (c) third, in payment of his remuneration and expenses;
- (d) fourth, in payment of all reasonable expenses incurred in the doing of anything which a receiver is required or entitled to do in respect of the mortgaged land, including but not limited to -

- (i) the payment of any premiums on any insurance policy properly payable under the mortgage instrument; and
 - (ii) the costs of undertaking necessary and proper repairs to any buildings comprised in the mortgaged land as directed in writing by the mortgagee;
- (e) fifth, in the repayment of any money paid or advanced by the mortgagee to meet the reasonable expenses referred to in paragraphs (a), (b), (c), and (d) together with any interest on any amount so paid or advanced at the rate at which interest is payable on the principal sum secured by the mortgage;
- (f) sixth, in payment of the interest accruing due in respect of any principal sum secured by the mortgage;
- (g) seventh, in and towards the discharge of the principal sum secured by the mortgage,
- and shall pay the residue, if any, to the mortgagor or other person entitled to the mortgaged land.

Mortgagee's
power of
leasing

129.- (1) A mortgagee shall, unless the mortgage instrument expressly provides to the contrary, have power, subject to the provisions of this Act and any other law applicable to the leases of land -

- (a) to grant leases in respect of the mortgaged land or any part thereof;
 - (b) to accept a surrender of any lease so granted and of any lease affecting the mortgaged land,
- and may, for that purpose, execute, in place of the mortgagor, any instrument required to execute that lease or surrender.

(2) Prior to granting a lease under this section, a mortgagee shall serve a notice on the mortgagor as provided for under section 127(2).

(3) Every lease granted by the mortgagee shall -

- (a) be made to take effect in possession not later than six months after its date;
- (b) reserve the best rent that can reasonably be obtained regard being had to the circumstances of the case;

- (c) be for a term not exceeding fifteen years or the length of the term of the mortgage, whichever is the shorter; and
- (d) contain any terms and conditions which are reasonable, having regard to the interests of the mortgagor and of any other persons having an interest in the mortgaged land.

(4) A lease created by a mortgagee under this section shall not be binding on any person holding, and shall not take priority over, any mortgage which has priority to the mortgage of the mortgagee who has granted the lease, unless such person has consented thereto.

(5) A mortgagee shall not exercise the powers under subsection (1) in relation to any such land as is referred to in paragraphs (a), (b) or (c) of subsection (5) of section 130 without first having obtained an order for possession thereof from the court or having taken possession in the manner prescribed in paragraph (b) of subsection (2) of section 130.

130.-(1) A mortgagee may, at any time after service of a notice under section 127, enter into possession of the whole or a part of the mortgaged land.

Power of mortgagee to take possession of mortgaged land

(2) A mortgagee may exercise the power of entering into possession of the mortgaged land -

- (a) by entering into and taking physical possession of the land or a part of it peaceably; or
- (b) by asserting management or control over the land by serving a notice in the prescribed form requiring any lessee or the mortgagor or any other occupier of the land to pay to the mortgagee any rent or profits which would otherwise be payable to the mortgagor; or
- (c) pursuant to an order of the court.

(3) The mortgagee shall be regarded as being in possession on the date -

- (a) on which he enters into possession in accordance with paragraphs (a) or (c) of subsection (2); or
- (b) on which he first receives any rent or profit from the land.

(4) A mortgagee who has entered into possession may remain in possession, without prejudice to the right to withdraw from possession, so long as the mortgaged land continues to be subject to any liability under the mortgage.

(5) A mortgagee shall not otherwise than through the execution of an order of the court enter into or seek to enter into possession by taking physical possession of -

- (a) a dwelling house in which any person is in residence; or
- (b) any land in actual use for agricultural purposes; or
- (c) any land in actual use for pastoral purposes; or
- (d) any land where the taking of physical possession peaceably is not possible.

(6) A mortgagee in possession of any mortgaged land by occupation shall be entitled to manage the land and take all its profits, but shall be liable to the mortgagor for any act by which the value of the land, or any buildings on, or other permanent improvements to the land are impaired or the borrower otherwise suffers loss.

(7) A mortgagee in possession shall apply all the moneys received by him to the same payments and in the same order as would apply to a receiver and which are set out in subsection (8) of section 128, except that a mortgagee in possession shall not be entitled to receive any payments under paragraph (c) of that subsection.

(8) Any person on whom a notice under paragraph (b) of subsection (2) has been served shall forthwith comply and continue to comply with that notice until -

- (a) a notice of withdrawal in the prescribed form is served on that person by the mortgagee in possession; or
- (b) the mortgagee in possession withdraws from that possession; or
- (c) a court orders the mortgagee in possession to withdraw from possession.

131.-(1) A mortgagee shall withdraw from possession of the mortgaged land -

With-
drawal
of mort-
gagee
from
posse-
sion

- (a) where a court makes an order directing the mortgagee to withdraw; or
- (b) where the mortgagee appoints a receiver under section 128; or
- (c) where the default which was the cause of the entry into possession has been rectified through the possession of the mortgagee; or
- (d) where the mortgagee has exercised the power of sale under section 132; or
- (e) where the mortgagor has become entitled to a discharge of the mortgage under section 121.

(2) A mortgagee in possession shall be taken to have withdrawn from possession of all or a part of the mortgaged land in any case provided for -

- (a) by paragraph (a) of subsection (1), when the order of the court is made; or
- (b) by paragraph (b) of subsection (1), when the receiver has been appointed in accordance with section 128; or
- (c) by paragraph (c) of subsection (1), when the mortgagee has either -
 - (i) ceased to occupy the mortgaged land; or
 - (ii) where he is not in occupation, served a notice of withdrawal on all persons served with a notice under paragraph (b) of subsection (2) of section 131; or
- (d) by paragraph (d) of subsection (1), when the purchaser of the mortgaged land enters into occupation of that land; or
- (e) by paragraph (e) of subsection (1), when the mortgagor obtains the discharge of the mortgage.

(3) A mortgagee who has withdrawn from possession of mortgaged land may not again enter into possession of that land, otherwise than by complying again with the provisions of section 130.

Mortgagee's
power of
sale

132.-(1) A mortgagee may, after the expiry of thirty days from the date of receipt of a notice under section 127, sell the mortgaged land.

(2) A mortgagee shall not exercise the power of sale in relation to any such land as referred to in paragraphs (a), (b) or (c) of subsection (5) of section 130 without first having obtained an order of the court for possession of the land or having taken possession in the manner prescribed in paragraph (b) of subsection (2) of section 130.

(3) The exercise by a mortgagee of his power of sale shall not be a disposition which is subject to the provisions of section 38.

Duty of
mort-
gagee
exerci-
sing
power of
sale

133.-(1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the market price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection (1).

(3) It shall not be a defence to a proceeding against a mortgagee for breach of the duty imposed by subsection (1) that the mortgagee was acting as agent of or under a power of attorney from the mortgagor or any former mortgagor.

(4) A mortgagee shall not be entitled to any compensation or indemnity from the mortgagor, any former mortgagor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

(5) The sale by a mortgagee of any village land occupied by a villager shall conform to the provisions of sections 30 and 31 of the Village Land Act, 1999, save that such a sale shall not require any approval from a village council.

Act No.
5 of
1999

(6) Any attempt by a mortgagee to exclude all or any of the provisions of this section in any mortgage instrument or any agreement collateral to a mortgage or in any other way shall be void.

134.-(1) Where a mortgagee becomes entitled to exercise the power of sale, that sale may be -

Powers
incidental
to the
power of
sale

- (a) of the whole or a part of the mortgaged land;
- (b) subject to or free of any mortgage or other encumbrance having priority to the mortgagee's mortgage;
- (c) by way of subdivision or otherwise;
- (d) by private contract or public auction;
- (e) with or without reserve;
- (f) for a purchase price payable in one sum or by instalments; or
- (g) subject to any other conditions which the mortgagee shall think fit, having due regard to the duty imposed by subsection (1) of section 133.

(2) Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that, the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provisions of section 52 (relating to auctions and tenders for right of occupancy) are, as near as may be, followed in respect of that sale.

(3) A sale of the mortgaged land by a mortgagee in exercise of the power of sale shall be made in the prescribed form and the Registrar shall accept it as sufficient evidence that the power has been duly exercised.

(4) Upon registration of the right of occupancy or lease or other interest in land sold and transferred by the mortgagee, the interest of the mortgagor as described therein shall pass to and vest in the purchaser free of all liability on account of the mortgage, or on account of any other mortgage or encumbrance to which the mortgage has priority, other than a lease or easement to which the mortgagee had consented in writing.

Prote-
ction of
purcha-
ser

135.-(1) This section applies to -

- (a) a person who purchases mortgaged land from the mortgagee or receiver, excluding a case where the mortgagee is the purchaser;
- (b) a person claiming the mortgaged land through the person who purchases mortgaged land from the mortgagee or receiver, including a person claiming through the mortgagee where the mortgagee is the purchaser where, in such a case, the person so claiming obtained the mortgaged land in good faith and for value.

(2) A person to whom this section applies -

- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the mortgaged land;
- (b) is not obliged to see to the application of the purchase price;
- (c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, he has actual notice that there has not been a default by the mortgagor, or that a notice has not been

duly served or that the sale is in some way unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

136.-(1) A mortgagee exercising the power of sale may sell to himself, other than in the circumstances provided for in subsection (3), only if a court gives him leave to do so.

Sale by
mort-
gagee to
himself

(2) A court shall not grant leave unless the mortgagee satisfies such court that a sale of the mortgaged land to himself is the most advantageous way of selling the land so as to comply with the duty imposed on the mortgagee by subsection (1) of section 133.

(3) Where the mortgaged land is to be sold by public auction, the mortgagee may bid for and purchase the mortgaged land at that public auction so long as the price bid for the mortgaged land by the mortgagee is -

(a) the highest price bid for that land at the auction; or

(b) equal to or higher than the reserve price, if any, put upon the land before the auction,
whichever amount is the greater.

(4) Where a mortgagee who has sold mortgaged land to himself applies to the Registrar to be registered as the lawful occupier of land under a right of occupancy or lease, the Registrar may require that mortgagee to provide any evidence which the Registrar may specify that the provisions of this section have been complied with and the Registrar shall not be obliged to register any such right of occupancy or lease until the mortgagee has so satisfied the Registrar.

Applica-
tion of
proceeds
of sale of
mort-
gaged
land

137. The purchase money received by a mortgagee who has exercised his power of sale shall be applied in the following order of priority -

- (a) first, in payment of any rates, rents, taxes, charges or other sums owing and required to be paid on the mortgaged land;
- (b) second, in discharge of any prior mortgage or other encumbrance subject to which the sale was made;
- (c) third, in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;
- (d) fourth, in discharge of the sum advanced under the mortgage or so much of it as remains outstanding, interest, costs and all other moneys due under the mortgage, including any moneys advanced to a receiver in respect of the mortgaged land under section 128;

(e) fifth, in payment of any subsequent mortgages in order of their priority,
and the residue, if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to discharge the mortgage.

Right of
mort-
gagor to
dis-
charge
mortgage
on pay-
ment of
sum due
any time
before
sale

138.-(1) At any time before an agreement is reached between the mortgagee and any purchaser for the sale to that purchaser of mortgaged land (whether or not such sale has been completed), the mortgagor or any other person who is entitled to discharge the mortgage may discharge the mortgage in whole or in part by paying to the mortgagee all moneys secured by the mortgage at the time of discharge.

(2) Where payment is made under subsection (1), the mortgagee shall deliver to the mortgagor -

- (a) a discharge of the mortgage in the prescribed form over the whole or that part of the mortgaged land to which the payment relates; and

- (b) all instrument and documents of title held by the mortgagee in connection with the mortgaged land.

139.-(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling house, to which subsection (5) of section 130 applies brings an action in which he claims possession of the mortgaged land, the court may exercise any of the powers conferred on it by section 140 if it appears to it that in the event of its exercising that power, the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

Action
by mort-
gagee for
possession of
dwelling
house or
agricul-
tural
land

(2) Where the mortgagor is a natural person (or, in the case of joint mortgagors, all are natural persons) and the mortgagee under a mortgage of land which consists of or includes agricultural or pastoral land to which subsection (5) of section 130 applies brings an action in which he claims possession of the mortgaged land, the court may exercise any of the powers conferred on it by section 140 if it appears to the court that in the event of its exercising that power the mortgagor will by the working of the land for such period as the court determines to be reasonable (taking account of the nature of the land and its use, crops, pasture or produce) or otherwise, be likely to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage within a reasonable period.

(3) For the purposes of subsections (1) and (2), a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment, where by the mortgage of the land or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise.

Power of court in relation to possession of mortgaged land, and application of the Civil Procedure Act, 1966 Act, No. 49 of 1966

140.-(1) All proceedings instituted in court in relation to the exercise by the mortgagee of powers to sell or enter in possession of the mortgaged land shall be brought in accordance with the provisions of the Civil Procedure Act, 1966 and tried by way of summary proceedings.

(2) Without prejudice to subsection (1), the court-

(a) may adjourn the proceedings; or

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged land, or at any time before the execution of such judgment or order may -

(i) stay or suspend execution of the judgment; or

(ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable for the payment of the sums due or for the remedying of the default.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.

(4) The court may from time to time vary or revoke any condition imposed by virtue of subsection (3).

(5) A court shall not exercise by virtue of subsection (3) of section 139 the powers conferred by this section unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection (3) of section 139) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to pay any further amounts that he would have expected to be required to pay on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (3) of section 139 for earlier payment.

(6) Where the mortgagee under a mortgage of land to which neither subsection (1) nor subsection (2) of section 139 applies brings an action in which he claims possession of the mortgaged land, the court may exercise any of the powers conferred on it by subsection (7) of this section, if it appears to the court that, in the event of its exercising the power, the mortgagor will be able within the period of the next succeeding thirty days, to pay any sums due under the

mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(7) The court may on giving judgement, or making an order, for delivery of possession of the mortgaged land, or at any time before the execution of such judgement or order-

(a) stay or suspend execution of the judgment; or

(b) postpone the date for delivery of possession, on condition that the mortgagor shall within the period of the next succeeding thirty days pay all sums due under the mortgage (including such as may further fall due within such period) or remedy the default on the grounds of which the mortgagee brought the action for possession of the mortgaged land.

141.-(1) Where a mortgage has been obtained -

(a) through fraud, deceit or misrepresentation by the mortgagee;
or

(b) in a manner or containing a provision which is unlawful (whether by virtue of this Act or otherwise) or;

(c) as a result of the exercise upon the mortgagor of undue influence by a third party in circumstances where the mortgagee had notice thereof,
application may be made to the court for the exercise of the powers contained in section 142.

Powers
of court
to reopen
certain
mort-
gages
and
revise
terms

(2) An application under subsection (1) may be made -

(a) by the mortgagor;

(b) if two or more persons are joint mortgagors, by one or more of them on their own behalf (save that in the case of an application on the grounds set out in paragraph (c) of subsection (1), only the person alleging to have suffered from the undue influence may apply).

(3) An application under subsection (1) may be made -

- (a) at any time before the mortgagor shall have obtained a discharge of the mortgage; or
- (b) on an application by the mortgagee to the court for an order for possession or the execution of such an order.

142.-(1) Upon an application under section 141, the court may -

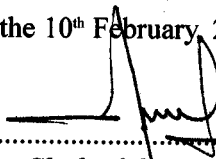
- (a) declare the mortgage to be void;
- (b) direct that the mortgage shall take effect subject to modifications which the court shall order.

(2) The court shall not declare a mortgage to be void unless it is satisfied that the circumstances justify it.

(3) Where application is made on the grounds that the mortgage contains a provision which is unlawful, the court shall, to the greatest extent possible, uphold the mortgage with the omission of the unlawful provision.

(4) Where application is made on the grounds of the exercise of undue influence, and two or more persons are joint mortgagors, the court shall uphold the mortgage to the extent of the interests of the joint mortgagors upon whom undue influence was not exercised.

Passed in the National Assembly on the 10th February, 2004.



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Clerk of the National Assembly

Exercise
of po-
wers to
reopen
certain
mort-
gages