

# **Land Sector as an Impediment to Mortgage Lending in Tanzania**

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## **Key words:**

## **SUMMARY**

The pervasiveness of problems associated with lending is acknowledged even in Shakespearean times and the lender's risk of losing both his money with the borrowers is aptly captured in Hamlet". Neither a borrower nor a lender be for loan off losses both, itself and friend..." Hamlet: Act 1, scene 3.

Mortgage lending is by itself a business in some other countries lucrative and well secured. In Tanzania, few people opt for loans to run business even if the effects of gearing are desirous to use loan/borrowing for investment purposes.

It is widely held in financial institution circles that Tanzanians have a culture of defaulting. This why banks give priority to collateral whenever they lend money. The problem is compounded by lack of borrowers' credit risk information that lending institutions could rely in lien of collaterals. Lack of data bank, which can guarantee banks to issue loans.

# **Land Sector as an Impediment to Mortgage Lending in Tanzania**

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## **1. GENERAL INTRODUCTION**

It is a matter of fact that, some competent authors and scholars have made a recommendable study, which in one way or another provide a considerable knowledge about this research. Their contributions form the launch pad of my research. Mentioned hereunder, is a detailed discussion about their observations and comments about this research.

Geho, (2002) under the paper titled " Due Diligence in Mortgage Valuation carried out under Land Act, No.4 1999" The Act placed new responsibilities on the part of a valuer carrying out mortgage valuation on behalf of a lender. The Act includes specific provisions on the right of spouses, the ability of the lender to command the income from property in the event of the borrower's default and the lender's obligation to ensure that in exercising the power of sale under the Act, the sale price is not less than 25% of the market value of the property. He dwelled much on physical inspection of the property where by the valuer needs to make careful note of the construction details for the building and in particular, the structural condition of the building. Further than this the valuation report needs to incorporate information on the following issues: tenure, planning and zoning, market conditions, valuation methodology, suitability of the property for mortgage purposes, rental income and forecasting. The research will examine the trend of valuation report done by professional valuers from 2000 to 2002.for mortgage purposes sent to the Chief Government Valuer.

Masebu, (2001) Cementing on similar topic in his paper "Valuations for mortgage Purposes-Lenders need to be more careful". There are many reasons to explain this sad state of affairs and these include the following: use of inappropriate valuation methods, inadequate/improper search on the tenure details of the subject property, fraud and in some cases, corruption as will be shown by the research. The use of inappropriate valuation methods, this normally will result into a valuation that is out of touch with market realities. As the study referred to above shows, this by far, is the major culprit. For many years, valuers in Tanzania were using the contractors test (or replacement cost) method to value virtually all types of properties the excuse being that there were no adequate data on the property market with which to use market valuation approaches like the investment, comparative, profits or residual methods.

On the question of improper search of tenure details, this results in many problems, including the title purporting to be one for the mortgaged property being a forged one, in which case the lender will have nothing as security. In other instances, the landed property shown and valued for the purpose is not the one actually standing on the plot for which the correct title was issued. It is in

such instances that the lender ends up with a vacant plot even though a valuation had been given a substantial property standing thereon!

The issue of fraudulent and corrupt practices includes the submission of fraudulent documents, corruption cannot be ruled out in instances where values of buildings have been inflated to unrealistic levels. This seems to have happened mostly in instances where the person commissioning the valuation is the prospective lender.

In the meantime however, lenders are increasingly becoming reluctant to accept just any valuation. Many have resorted to entering into partnerships with say, two or three valuation firms, to which they will then direct all their prospective borrowers. This will possibly eliminate valuations that would be inflated, if only to please the client

Having seen the nature of mortgage lending and land sector in Tanzania, Geho (2001) observed that, through legislation the government would strive to be seen as a promoter and facilitator of mortgage arrangements by not being unduly harsh on either the lender or the borrower. On top of this he argued that, the enactment of the Land Act sent shock waves through the lending industry, most lenders feel, perhaps unjustifiably, that the Act has an adverse affect on the mortgage business as it makes it extremely difficult for a mortgage to recover mortgage loans, particularly so far loans advanced to delinquent mortgagors. He went further to discuss issues of foreclosure, sale price that is less than 75% of the market value of the property and remedy laid under S.125 of the land Act, 1999.

According to Kabwogi,<sup>1</sup> the land delivery system is remarkably inefficient. The primary characteristic of inefficiency embedded in the system under which land is delivered (not sold because this is not statutorily sanctioned) includes scarcity of planned, surveyed and serviced building plots in urban areas. Another inefficiency that is worth mentioning is the bureaucratic procedures in allocation of land by the urban authorities and registration by the Ministry of Lands and Human Settlements Development.

On similar lines Kironde, (1994 pg: 521) observed that, "The process of land transfer, be it of planned or of unplanned land needs to supported so that it comes out in the open. Currently, since land is regarded with suspicion by the government, many such transfers are not done in the open, thus leading to problems in land administration.<sup>2</sup> Furthermore, describing reasons for inefficient on land administration in the country, Shivji (2001)<sup>3</sup> observed that,

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<sup>1</sup> C. M. Kabwogi (2002). "Lack of Housing Finance Compounds NHC Problems; in *Business Times* Friday September 27, 2002.

<sup>2</sup> J.M. L. Kironde (1994); "The Evaluation of the Land use Structure of Dar es Salaam (1890-1990). A Study in Effects of Land Policy, *Unpublished PhD Thesis*, University of Nairobi.

<sup>3</sup> I. G. Shivji (2001): Contradictory Perspectives on Rights and Justice in the Context of Land Tenure Reform in Tanzania Ed. in a Journal "*Tanzania Zamani*".

...” *It is our position that the issue of land tenure reform can't be separated from the question of democracy facing the country today, that no major law like land tenure reform can work satisfactorily if it does not speak to the major grievances of the large majority of land users- the peasant and pastoral communities; that land tenure reform is not simply a matter of law but an issue of justice”...*

Arguing in the same lines Hon. Mahanga (MP), (2002)<sup>4</sup> had then following observation, “the government had to amend various related laws, including the Land Act, so as to enable holder of land to mortgage it for bank credits. Commenting on similar reasons Balali (2002)<sup>5</sup> went further to this as follows, calling on the current Land Act to be amended, the Governor said this, would enable the use of land as collateral in borrowing. On micro financing Balali urged the taking of measures that would encourage on going efforts by Ngos and community banks to provide credit to micro enterprises”...

Giving hand on the same topic, Silayo (2001:pg 350)<sup>6</sup> in his presentation mentioned that, National Land Policy formulated in 1995 states categorically that 'land has value' (1997:pg 9). The Land Act No.4 of 1999 was drawn up based on the policy. But the Act itself spells out clearly that bare land has no value<sup>7</sup> and indeed prohibits sale of such land (S.37 (8), pg.125). Moreover recently the Permanent Secretary to the Ministry of Lands and Human Settlement Development stated that Land is not yet a commodity to be traded<sup>8</sup>. The same argument was earlier on given on or detailed manner by Geho (2001 & 2003:pg 25) in the article titled "*The land value enigma in Tanzania*"<sup>9</sup>. What he asked is that, "Does the government intend to confer windfall gains to land holders through the current policy on land value?"

However the court of Appeal declared a Nyerere Doctrine of 'land value' i.e according to which the basis for compensation should not be confined to what is known in law as unexhausted Improvements rather where there are no unexhausted improvements, but some effort has been put into the land by the occupier is entitled to protection under article 24(2) of the Constitution and fair compensation is payable for deprivation of property.(Shivji,1997:pg.34 ) Insisting on the need for efficiency and well-regulated land laws Kironde (2001:pg 111 & 2003), commented that,

*“One problem is that the whole issue of investment in real estate is still regarded with suspicion, as being a form or manifestation of exploitation. The government, even under the Land Act 1999*

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<sup>4</sup> *Business Times*, Friday July 12, 2002

<sup>5</sup> *Ibid*

<sup>6</sup> E.H. Silayo (2001): “The Real Property Cadastre in Tanzania,” Paper Presented on *African Conference on Real Estate 23<sup>rd</sup>-25<sup>th</sup> October 2001* Arusha International Conference Centre.

<sup>7</sup> ‘Land has no Value’ -Examples Mozambique, Zambia and Namibia in a Paper "*Land Reform in Namibia*" 4-9 Nov. 2002 South Africa –Pretoria by Karim Owolabi & Harry Tjipueja: Ministry of Lands, Resettlement & Rehabilitation. Windhoek, Namibia.

<sup>8</sup> *The Daily News* No 7820 of 28<sup>th</sup> September 2001

<sup>9</sup> Tivea (2003) Vol. I, (January-June) *The Land Value Enigma In Tanzania in Real Estate Frontier*,

*wants to have centralised control over land ownership, land transfer, land values and land regulation. We are aware that the government wants a new housing bank put in place, but this can only be expected to work if the whole dynamic of the property market is regulated for maximum efficient operation”*

Referring to the issue of formation of a state land bank whose operations nevertheless still reflects the power of bankers and large land owners, though, for it allowed them to liquidate land taken by foreclosure or speculation; Agricultural credit Bill supported the introduction of rural credit societies, stronger Land Bank, and favoured position for farmers in their dealings with lenders. These, however, displaced but did not resolve the problems of structured unevenness, (Othman, 2000:pg 252). Lumumba (2003) also commented this argument at Kurasini, he argued as

*In any case the land banks normally are funds provided by the state. So they are trying to give legitimacy to the system so, that the savings with small timers is going to be used to loan to these white settlers who enter Tanzania and start production.<sup>10</sup>*

Commenting on the impacts of rapid amendments on the Land Acts Shivji (2003) had this to say, "that there is likelihood that the government will go ahead and amend the laws to suit the interests of bankers and other foreign investors. It is also possible that the government would proceed in making amendment to the laws without consulting the public, the larger section of the majority poor rural land users. There is also greater possibility that amendments would be made without appreciating the full implications of what is proposed by TBA and other foreign investors to land rights of the poor in rural Tanzania.<sup>11</sup> His view on Land laws governing mortgage transactions is largely to protect poor Tanzanians who will be prone to foreclosure. Furthermore, Moyo, et al (2003) criticised the system of land reform in Africa and added the following:

*“The central Land reform issue in most African countries is now to conserve the social advantages of customary tenure systems while at the same time facilitation their evolution so that they can better meet the new demands placed on peasant farmers resulting from their incorporation into rational and international markets”.*

Nhabanga (2003), who summed up as follows heavily, supported them; foreign investment is not equal to development or well fare promotion. This way must resist selling the land in the belief it will bring foreign investment, "the remedy for the poverty" because his assumption is fallacious and fatal. On selling land we can be selling our 'freedom', of which our sisters and brothers fought and died.

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<sup>10</sup> O. Lumumba (2003) "The National Forum on Foreign Investment and Privatization on Land in Tanzania: Kenya Experience in Land Mortgaging and Foreclosure and its Implications to Poor Rural Peasant and Pastoralists, Paper Presented at Kurasini (TEC) on 21-22/02/2003. Also: *The Guardian*, Saturday March 29,2003.

<sup>11</sup> I. G. Shivji (2003) Foreign Investment and Privatization of Land in Tanzania; Paper Presented to Conference on Implications of Investment and Privatization to Land of Poor on 21<sup>st</sup>-22<sup>nd</sup> February, 2003.

Describing on the weakness of the Land Act, Luyangi (2001) holds that, bankers and financial institutions, especially, have been complaining about the land Act as far as the mortgages are concerned. Posed the question as; what is so special about mortgages in the Act that has made it so controversial? Apart from elaboration on this, he went further to mention S.124 (1) of the Act i.e. foreclosure issues, matrimonial home recognised in the law of marriages Act, 1971 and S.112 (3) of the Act<sup>12</sup>. Cementing on similar lines Kibodya (2002) went further to mention absence of "condominium rules" which are registrable, e.g. South Africa there is "Sectional Titles Act" and share block which "shares" are issued in respect of area held by an individual in a property<sup>13</sup>. ( Kironde, Mutagwaba & Mabelle, January, 2003 ).

All these arguments have been summed by Rosset (2003) as follows: the bank pushing for facilitating markets in land where land is to be bought and sold like merchandise despite the fact that the people's livelihoods are at stake. The end result has been the disastrous, provoking mass sell-off out of destruction and further depending of misery.

A bank is a financial institution authorised to receive money on current account subject withdrawal by cheque. The issuing of mortgage finance is a lucrative business. The mortgage market is expanding, and the banks societies and other financial institutions are vying with each other for a share of the mortgage market<sup>2</sup>.

## 2. BANKS IN TANZANIA

The financial sector was liberalized in 1991 through the Banking and Financial Institutions Act of 1991 No. 12. The act consolidated the law relating to business of banking, to harmonise the operations of all financial institutions in Tanzania, to foster sound banking activities, to regulate credit operations and provide for the other matters incidental to or connected with those purpose. The financial system in Tanzania is made up; of the Bank of Tanzania Act, 1995 No.1. Currently there are over twenty commercial banks (banks that carry out all banking functions including the operating of checking accounts), nine non-bank financial institutions; four pensions funds and at least ten insurance companies, forty insurance brokerage firms and over three hundred insurance agencies (Kironde, 2003). The Table below shows registered commercial banks in Tanzania since the Banking and Financial Institutions Act became operative in 1991.

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<sup>12</sup> L. Mwakalebela (2002) Government Rejects Proposals on Land Act Revision, *Business Times*

A. Njau (2002) Land Law Hinders Mortgage Financing - *Business Times*

J. Tarimo (2003) Land Law Experts to Discuss Mortgages –“*The Guardian*”

M. Rwebangira (2003) Recommendation from TBA, Paper Presented at TEC 21st-22<sup>nd</sup> Feb.,2003.

<sup>13</sup> J.M.L. Kironde- article in *Business Times*, March 7, 2003

<sup>2</sup> Ibid

**Table 1:** Registered Commercial Banks in Tanzania as at 29 April, 2003.

S/No	Name of the Bank	Branch Network
1	Standard Chartered Bank (T) Ltd.	7
2	Stanbic Bank (T) Ltd.	5
3	Citibank (T) Ltd	2
4	Delphis Bank (T) Ltd	3
5	Eurafrican Bank (T) Ltd	1
6	Diamond Trust Bank (T) Ltd	1
7	Exim Bank (T) Ltd.	2
8	National Bank of Commerce (NBC) Ltd	34
9	National Microfinance Bank Ltd	104
10	CRDB Bank Ltd	24
11	The Peoples' Bank of Zanzibar Ltd	3
12	Kilimanjaro Co-operative Bank Ltd	1
13	Akiba Commercial Bank Ltd	3
14	Kenya Commercial Bank Ltd	2
15	International Bank of Malaysia (T) Ltd	2
16	Habib African Bank Ltd	1
17	Barclays Bank (T) Ltd	2
18	African Banking Corporation	1
19	United Bank of Africa	1
20	CF Union Bank Ltd	1

**Source:** Bank of Tanzania, (2003), [www.bot-tz/bankingsupervision\\_banks.htm](http://www.bot-tz/bankingsupervision_banks.htm)

**Table: 3.4.** Mortgage Interest Structure between 1993 and 1999

Year	1993	1994	1995	1996	1997	1998	1999
Housing Mortgage Interest Rate	9. /29	29/33	29/33	Nil* **	Nil* **	Nil* **	Nil* *

**Source:** Bank of Tanzania, Economic Bulletin for the Quarter ended 31st December 1999. XXIX NO.4

\*\*\*No mortgage rates after the collapse of THB.

### 3. STATUTORY EVOLVEMENT OF MORTGAGES IN TANZANIA

The enactment of the Land and Property Act. 1885 that is before 1926. A legal mortgage of leasehold at this period could be made in two ways, one is by assignment of lease to the mortgagee with a covenant for reassignment on redemption and two by the mortgagee of a sub lease at least one day shorter than the lease with a proviso for lesser on redemption.

While in 1923 under Cap 113 Sup. 64 i.e. Land Ordinance made under the land Regulations 1948 under S. (3) (a) to S. (3) (d). The Land Ordinance with only twenty-three sections had only little literature regarding to mortgage transactions.

Further than this we have Cap. 334 i.e. Land Registration ordinance of 1953 under section 57 to section. 64, which are special, provisions relating to mortgages.

As seen above, in Tanzania there is no single comprehensive statute that deals specifically with the issue of mortgages or securities in general. This view held by Simba, 1998: who goes on to note that there are however, statutes, which have in one way or another accounted for mortgages<sup>7</sup>. The following legislation have been repealed and replaced by new provisions of the Land Act No 4 S.182.

- The Land Ordinance, Cap 113 of 1923.
- The Law of Property and Conveyance Ordinance, Cap 114,
- Right of Occupancy Act, 1963 Cap 518
- Land (Settlement of Disputes) Act 1963 Cap. 524
- Range Development and Management Act, 1965 Cap 569
- Land Tenure (Village Settlements) Act, Cap. 588
- Government Rents (Summary Recovery) Act, 1965. Cap 579
- Rural Lands (Planning and Utilization) Act, 1973 (Act no. 14 of 1973).
- Specified Coffee Estates (Acquisition and Regrant ) Act, 1973
- Specified Sisal Estates (Acquisition and Regrant) Act, 1974.

Together with these scattered statutory provisions and by involving the provisions of the Judicature and the Application of General Clauses Act, 1961, Common Law and Principles of Equity have quite often been deployed in deciding issues concerning mortgages. As a right of occupancy title holder in Tanzania as noted is in effect a fee simple estate owner and can mortgage his/her land in so far as he has complied with provisions of the 1948 Land Regulations and other terms of the grant.

The common law stand on mortgages that if by the due date the mortgagor has not been able to redeem his/her land, i.e. repay the loan advanced together with the interest on the loan, the security goes to the mortgagee. Not only this but also the mortgagor will remain liable for the (usual) i.e. usury rate of interest, and principal sum. However it has been checked with equity<sup>8</sup> and therefore non-repayment of the loan and the interest thereon does not automatically lead to conveyance of property to the mortgagee. Equity position is similar to the provisions set up in S.57 to 62 Cap 334. These statutory provisions have been translated as meaning “*once a*

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<sup>7</sup> F.G.Kibodya (2001) *The Land Act No.4 of 1999: A Vehicles for Mortgage Finance in Tanzania*.

<sup>8</sup> When the two ,equity and common law contradict, equity prevails.



*mortgage always a mortgage*” i.e. the mortgagor should be given every chance to redeem his/her land<sup>9</sup>.

#### **4. COMMON TYPES OF MORTGAGES**

There are various types of mortgages<sup>10</sup> but the most common ones are:

##### **4.1 Variable Rate Mortgage**

Here the interest rate on the mortgage goes up and down with other interest rates in the market, and as a result, the payments differ from time to time.

##### **4.2 Capped Mortgage**

This is a halfway house between a variable rate mortgage and a fixed rate mortgage. It means the interest rate is guaranteed (capped) not to go above a certain figure.

##### **4.3 Discount Mortgage:**

This type gives the borrower a discount on the variable rates set by the bank.

##### **4.4 Low Start Mortgage**

This mortgage starts off with a low interest rate, which then increases substantially over three to five years. The idea is that by the time the interest rates have raised so will be the borrower’s income. This is usually used to encourage home ownership among low-income households.

##### **4.5 Cash-Back Mortgage:**

A loan is given to cover the purchase of the property, but some cash is also given to the borrowers to use this cash to furnish their houses, but it should be realized that this is more debt being carried.

##### **4.6 Flexible Mortgage**

Allow the borrower to make additional payments on the principal or capital of the mortgage, thereby shortening the term of the loan. Some of these mortgages allow the borrower to build up a reserve, which can be drawn upon, or can be withdrawn at a later date. Some of these flexible mortgages allow the borrower to suspend payment if need be.

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<sup>9</sup> See the case of *Santly V Wilde* (1899) 2Ch 474

<sup>10</sup> Quoted in “*The Business Times*” in the year 2002.

#### 4.7 Fixed Rate Mortgage

The interest rates and the monthly payments remain constant for fixed period of time and this can differ from six months fix to the whole life of the mortgage and everything in between.

Apart from all these, there are *Repayment Mortgages*. In this scheme, repayment is paid monthly and the installment consists of a percentage of both the interest and the principal. So those at the end of the mortgage period, both are fully repaid. The other one is; interest only (endowment) mortgage: In this scheme, over the course of the loan the borrower pays only the interest, while at the same time, making another payment into an installment which should be worth enough (or more to pay off the mortgage in one lump sum at the end of the term. (Kironde, 2002).

### 5. LENDING TRANSACTIONS

As was noted earlier, commercial banks profit from lending money by way of placing interest rate on loans. As such lending features so high amongst ordinary banking activities. The banks have deposits from other savers that are loanable to others. Such is a lucrative business to venture if guarantee is sought to ensure that the debt is repaid timely. Consequently banks place special emphasis on security for loan(s). In Tanzania the central bank (BOT) is set to ensure that banks provide loans to the public. The Bank has the Credit Concentration and Other Exposure Limits Regulation, 2001: these regulations came into effect on 1<sup>st</sup> May, 2001. The objective of the regulation inter-alia is to make credit available to broader group of borrowers<sup>11</sup>.

In the ordinary meaning, security means freedom or protection from danger or worry; further than this it may mean, measures taken to guarantee the safety of a country<sup>12</sup>. It is a guard against a probable bad act. Legally, the term is usually applied to an obligation, pledge, mortgage, deposit, lien etc given by a debtor in order to assure the payment performance of his debt, by furnishing the credit or with a resource to be used in case of failure in the principal obligation. The Bank of Tanzania has established prudential guidelines for banks to follow, and those banks that follow these lending guidelines will usually prosper and it is enforced vigorously<sup>13</sup>.

Lending portfolio covers different sectors in the country. These sectors include trade and commerce, manufacturing transport and communication, real estate construction, finance and insurance business, agriculture, fishing, forestry and hunting, personal and staff, tourism, hotels and restaurants, house purchase, and any other just to mention few<sup>14</sup>.

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<sup>11</sup> s.8 of the Exposure Limits Regulation –2001.

<sup>12</sup> Oxford Advanced Learners Dictionary “Special Price Edition”pg.1062.

<sup>13</sup> Author interview with various bank credit officers-2003.

<sup>14</sup> *Business Times*, Friday April 25,2003 pg.8

## 5.1 Types of Securities Used

Apart from the known one (mortgage)<sup>15</sup> which is provided with some security to ensure the performance by the mortgagor of his obligation of repaying the loan (capital and interest), if any or discharging any other obligation<sup>16</sup> there are other forms of securities that may be taken prior to loan advancement by lenders. These include but not limited to;

## 5.2 Charge

It differs from mortgage as to ask an amount as a price; for instance where a person borrows money from another person by depositing his title deed by way of a charge, such a process does not give the charges any proprietary rights over the property charged but the title kept by the mortgagee as a mere security to the effect of the borrower will be given the title deed when he/she pays the loan<sup>17</sup>.

## 5.3 Pawn

Consists of the loan of money in return for the delivery of possession of chattles to the lender. Although the lender has certain powers sale, the general property in the goods remains in the borrower and the lender has possession<sup>18</sup> (Megarry, 1982).

Pledge resembles the above i.e. pawn but under pledge the commodity taken as collateral is agricultural produce and there is no physical delivery of the property while under pawn there is physical delivery of the property.

## 5.4 Lien

Is a mere right to keep ones property until a debt owed in connection with it until is paid.<sup>19</sup> According to Oxford Dictionary, 1998 pg.680, lien is a passive right of retention, giving no right to sell or otherwise deal with the property and is extinguished if the creditor parts with possession to the debtor or his agent whereas a mortgage gives right to sell.

Goodwill: in the plain meaning is the good reputation of an established business or the estimated financial value of the said business, which on return can assist one to have good/better access on mortgage transactions<sup>20</sup>.

security arrangement<sup>21</sup>.

Land to qualify as collateral the following things should be used

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<sup>15</sup> Land Act No.4 of 1999 Part X s.111-s.142

<sup>16</sup> R. W. James (1971) supra 303

<sup>17</sup> London Country and Westminster Bank V. Tompkins (1918) 1K. B515

<sup>18</sup> ...A thing given to as a sign of friendship, love etc Oxford Dictionary (1998) Advanced Learners.

<sup>19</sup> Pennington V Reliance Motor Works Ltd (1923) 1K.B127

<sup>20</sup> Geho, M. L. (2002) Teaching Manual –LMV 3,2<sup>nd</sup> semester (applied valuation).

<sup>21</sup> Revised Credit Policy CRDB Bank 22<sup>nd</sup> March, 2002 and approved by BOT in July 2002.

Land should be recognised as a commodity that can be traded in the market and this perception should be supported by institutional framework (i.e. recognition of land as a central means in rural livelihoods – economic, social, cultural and environment (Lumumba, 2001 pg.3).

Land value to be recognised in the land Act, 1999 if land is treated as a commodity, then this stance must be supported by the legislations concerning land administration. In Tanzania it is widely held that land has value, although many professionals have criticised such statement that land is argued not to have value to be recognised in the Land Act, 1999.(Geho, 2002, Luyangi, 2002, Kibodya 2001, Silayo, 2002).

Foreclosure to be established s.124 of the Land Act, 1999.They have gone further to demand re-introduction of foreclosure as the banks assurance to recover loans.

The land tenure system to be changed for smooth operation of transferring of ownership without any hindrance (Kironde & Mutagwabwa: 2003, Shivji, 2003 pg.6).

Private ownership of land tenure to be recognised and protected by the land i.e. the government. In short the named points are contrary to the late Father of the nation Mw. J.K. Nyerere doctrine; (1958) which states that:

*“In a country such as this where, generally speaking, the Africans are poor and the foreigners are rich, it is quite possible that, within eight or a hundred years, if the poor African were allowed to sell his land, all the land in Tanganyika were allowed to sell his land, all the land in Tanganyika would belong to the wealthy immigrants, and the local people would be tenants. But even if there were no rich foreigners in this country, there would emerge rich and clever Tanganyikans. If we allow land to be sold like a robe, within a short period there would only be a few Africans possessing land in Tanganyika and all the others would be tenants” (James, 1971 pg. 140-141, Shivji, 2003, pg.7).*

## **6. CREDIT APPRAISAL**

Before granting any credit<sup>22</sup>, the Bank shall consider and satisfy itself that the borrower is capable of fulfilling its commitments. The following shall be properly addressed.

### **6.1 Character of the Customer**

In assessing the character of the customer regard shall be made to moral responsibility business experience, training and quality of the management, credit history and repayment performance of the borrower, willingness to disclose and provide transparent and reliable information, documentation to the bank.

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<sup>22</sup> Ibid

## 6.2 Capacity of the Customer

This refers to the financial and managerial capacity of the customer and his/her business. The bank shall not grant any credit facility to any applicant who lacks the capacity to repay in full even if the applicant's character is deemed to be financially responsible. With this in mind the Bank will demand from the credit applicant the following.

- Audited balance sheet, profit and loss account and cash flow statement for each year during the last three to five years
- Projected balance sheet, profit and loss Account and cash flow<sup>23</sup> statement for the requested credit period
- Official return submitted during the last two years for income taxation(see Income Tax Act of 1973 No.33) purpose to the income tax office.
- Business plan

Where the credit intended to finance a specific or new project or to rehabilitate the business, the applicant shall also be required to submit project feasibility study, which shall be reviewed when appraising the credit application.

- v).Swot<sup>24</sup> (i.e. strength, weaknesses, opportunities and threat) analysis

The customer will be requested to provide audited accounts from an audit firm acceptable to the Bank. The Bank may decide not to accept certain audit firms and demand customers accounts be audited by an audit firm selected by the Bank. The Bank will also demand from customer to have direct contact with their auditors for any clarifications related to accounts.

## 6.3 Credit History

Credit history shall be assessed based on

- Payment history of the customer/business
- Outstanding debts
- Credit history
- Pursuit of new credits
- Existing credits in use.

## 6.4 Collateral

Collateral<sup>25</sup> shall be in direct relation with the purpose, asset to finance. Additional collateral will in some situations be needed and owners contribution a must.

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<sup>23</sup> Ibid.

<sup>24</sup> P. Kotler (2001) Marketing Management ,Millenium Edtion, USA

<sup>25</sup> s.8 of BOT Regulation 2001.

One of the essentials criteria for credit appraisal is collateral (i.e. registered title deed). But before one has a title deed the survey of that area must be done so as to qualify for title deed otherwise there is the so-called regularisation of interests in land (S.57-S.60 of the Land Act No.4, 1999).

## **6.5 Conditions**

### *Margin of Profit*

The business should be able to generate sufficient funds for the loan repayment as well as sustain the business.

### *Purpose of the Credit*

The purpose of the credit for which the loan is applied for must be clearly specified and staged. If after granting the credit, the bank finds that the funds have been employed without its approval, for purposes other than those agreed upon: The credit shall be terminated and immediate repayment demanded the borrower.

## **6.6 Amount of the Credit**

The credit facility shall be granted and its repayment schedule shall be appropriate for the credit and purpose of the credit.

The terms and conditions must be clearly spelt out and in proper accordance with the type of facility.

## **6.7 Repayment Terms**

The type of the facility granted and its repayment schedule shall be appropriate for the credit and purpose of the credit. The terms and conditions must be clearly spell out and in proper accordance with the type of facility.

## **6.8 Risk Assessment<sup>26</sup>**

Risk Assessment shall be made covering every aspect of the business (such planning, marketing, management and also inherent risks). Ways to mitigate these risks should be given insurance against possibility of non-payment (security). Each credit granted by the Bank shall be properly secured by collateral which can be easily realized and repay the loan in full in case of default.

After all these, there are credit approval i.e. appraisal and approval functions shall be separated. Appraisal report will be the basis for approval that is each approving authority will approve, reject the credit application based on information provided in the appraisal report. A signed copy of the appraisal report must be kept in main file.

## **6.9 Appraisal Authorities**

The Board will from time to time set credit approval limits for different levels of authority as per Authority manuals.

## **6.10 Credit Documentation**

After approval of the credit facility, the bank and the borrower shall duly execute a credit agreement and securities will be perfected before utilization of the credit is allowed.

## **6.11 Credit Utilization**

No disbursement, drawing or utilization of any credit facility shall be allowed until all terms and conditions are fulfilled including the following:

- Perfection of securities
- Execution of credit agreement documents

The Branch Manager together with the branch controller shall authorize the first utilization of all approved credit facilities upon being satisfied that all terms and conditions have been fulfilled and that credit agreement and security documents properly executed securities perfected and that all documents kept under branch safe custody. Subsequent withdraws and the credit officer responsible for that customer before approval will initiate disbursements from the account by the branch manager and or only delegated officer.

## **7. LAND LAWS, REGULATIONS, POLICIES THAT AFFECT LENDING TRANSACTIONS IN TANZANIA.**

### **7.1 National Land Policy, 1995**

Though land has value a landholder can only transfer the Right of Occupancy Special taxes will be imposed to deter land speculation<sup>27</sup>

*What is this supposed to mean? The holder of a right of occupancy does not have the right of an owner i.e. the right to ground rent. In that sense land has no value for him/her. His/her right is the right to use and occupy. If she does not use and occupy she/he can only surrender his/her right of occupancy or his/her right may be worked. In either case she /he is not entitled to get any value for land (Shivji, 1997 pg. 43.)*

*No disposition will be allowed unless all development conditions have been complied with. However, dispositions in the form of sale and mortgages will be allowed to transfer the obligations to meet prescribed development conditions<sup>28</sup>*

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<sup>27</sup> Article in the National Land Policy 4.2.1. (2) I pg.14, K. Simba et al (97/98) Land Prices from Sala Sala and J.Wilson (2002) Land Prices Changes the Case of Kariakoo.

<sup>28</sup> Ibid

The two sentences are mutually contradictory. Sale of obligation to meet prescribed development on conditions does not make sense because occupier who has not developed has nothing to sell. It also follows in logic, and has been established in law that the mortgage of a right of occupancy in substance the mortgage of the right to potential compensation for unexhausted improvements<sup>29</sup>...”The consent of the Minister or his appointed officers is not necessary for market transfer to take place”<sup>30</sup>.

This statement undermines the whole edifice of the existing land tenure system based on right of occupancy which the policy document describes earlier as “fundamentally sound” unless the “root” in the sentence is a printing error in which case it would be an interesting Freudian slip. These mutually contradictory and inconsistent policy statements on disposition, it seems to me, are not without significance<sup>31</sup>.

## 7.2 The Land Act No. 4 of 1999

Under the Act all land in Tanzania mainland is declared to be public lands and remain vested in the president as a trustee for and on behalf of all citizen of Tanzania. S. 4(I)<sup>32</sup>,

...This provision, as alluded to before, in terms clearer than even those of the colonial land ordinance cap 113 of 1923 gives the state the monopoly of radical title. The only requirement in this provision is that he (president) must be fair and must give reasons for any decision. (Silayo, 2001:52, Shivji, 1997: pg.50).

Under the same act, it spells out clearly that bare land has no value and indeed prohibits sale of such land (s.37(8)<sup>33</sup> pg. 125.

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

However, recently the Permanent Secretary to the Ministry of Lands and Human Settlements stated that Land is not yet a commodity to be traded” (The daily News No. 7820 of 28<sup>th</sup> September 2001).

What are the consequences of all this? To begin with the claim that land can not be sold is both untrue and also absurd. This is because it is common practice and indeed the sale of land everywhere in Tanzania is an on going activity. It is therefore absurd for the government to deny such fact. (Mahanga, 2002:pg.1289, Kironde, 2002). The deny that land can not be sold and that it has value with or without unexhausted improvements has actual resulted into people making illegal sales of land and denying the government revenue by taking the proceeds. (Luyangi, 2001): went on with these views.

...Moreover, if a peasant can not sell his land legally, what can he offer as

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<sup>29</sup> See Manyara Estate V.National Development Agency ,Civil Appeal No.27 of 1969

<sup>30</sup> Article 4.2.12.(iv) in the National Land Policy –1995 pg.15

<sup>31</sup> I.G.Shivji (1997) Grounding the Debate on Land pg.43.

<sup>32</sup> Land Act No.4 of 1999 as operated from May 2001

<sup>33</sup> Real Estate Frontier (2003) pg.25 i.e Land Value Enigma in Tanzania



*collateral? Or how can a peasant use it in buying shares in a company or partnership/. How could the value of his land be assessed if it is deemed to have no value?''.*

S.37(9)<sup>34</sup> states;

*...Any disposition in contravention of subsection (8) of this section shall be void abinitio''...*

hence, s. 38<sup>35</sup> of the act is therefore a very effective drag on the government's efforts to alleviate poverty.

Another s.132 (3)<sup>36</sup> of the act has misspelled the word rebuttable i.e. prove in advance, Instead it is written reputable which is not corresponding to section at all. Further than this even the definition of the market value, forced sale value matrimonial home have not been considered by the act.

### 2.9.3 Land Act Regulation 2001

Under the Land form No. 40 (which is Mortgage of a Right of Occupancy – made under s. 112<sup>37</sup>) which is missing no photograph(s) requirement have been written so far as opposed to practice which is accepted (with the photographs).

## 7.3 Other Legislations to be Reviewed/Amended are

Town and country Planning Ordinance cap 378 of 1956 (Juma, 1997: 24-30; Kironde, 1996: pg.524 – 527)

Rent Restriction Act of 1984 (Kironde, 1987: pg.133; Simba, 1987:pg 106, Kabwogi, 2002)

Marriage Act of 1971 (Kironde, 2001: pg.111, Ngole, R.M. & Magoiga, S.M., pg.97).

Land Registration Ordinance Cap 334 of 1953 (Kibodya, 2002: pg 97).

Registration of document ordinance, cap 107 (Kibodya, 2002: pg.97)

Land Acquisition Ordinance of 1967 No. 47 (Issa, 1986; Komu, 1999).

Civil Procedural Code of 1966

Judicature and Application of Laws Ordinance 1961 cap 453 (see Sunday Observer, April 13, 2003).

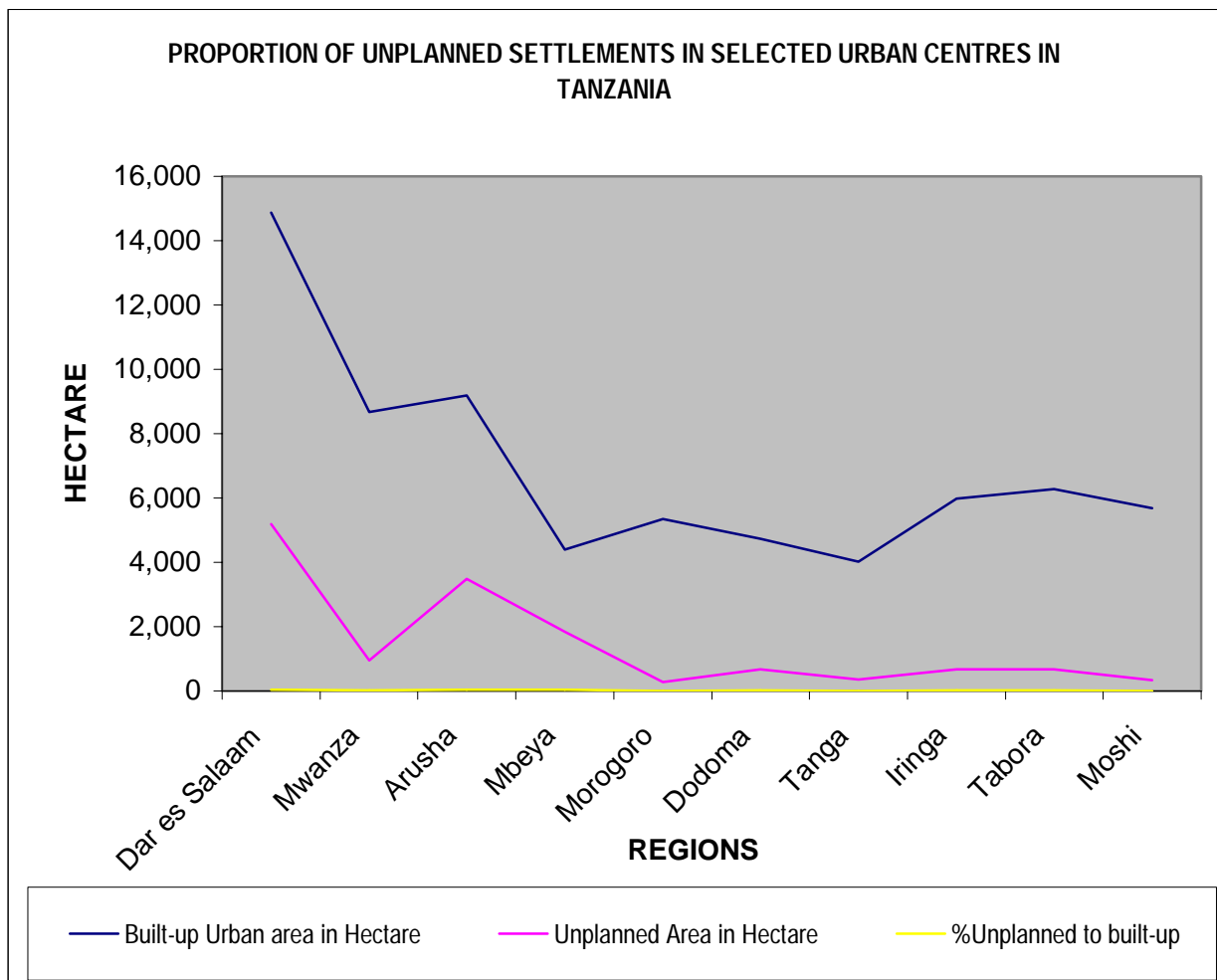
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<sup>34</sup> Land Act No.4 of 1999

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid



**Source:** Kombe W.J.,(1999), Urban Poverty, Service provision and Land Development in Tanzania -predicaments and prospect<sup>4</sup>

Kombe (1999) went further to mention that; other studies done indicated that about 65% of all residential housing constructed in urban areas in 1980 were in unplanned settlements, and that in the same year, developers in unplanned areas constructed about 10,000 dwellings in the various regional centres compared to less than 2,000 that were constructed in planned areas .i.e twenty percentage only which were constructed in that year. (Mahanga, 2002:pg.89). This can be evidenced by the research done by Kironde (1998), which observed that 70% of DSM population live in unplanned areas.

<sup>4</sup> A Paper Presented at the Annual Seminar for Engineers, “Engineering for Sustainable Development –Strategies, Issues” in Arusha, Tanzania, Dec.1999.b

## **8. VALUATION RELATED IMPEDIMENTS**

### **8.1 Valuation Variance and its Effect on Lending Transactions**

Perhaps one of the vital role in effecting lending by pledging collateral is the banks ability to establish realisable sale value of property mortgaged. Usually banks hire professional consultants to help them assess the most probable value that mortgaged properties may sell if and when defaulting compels selling of the property. The consultants must be learned valuers with relevant experience to be able to assess with high precision the sale price of pledged properties under forced market conditions. Thus, banks by hiring the service of hired consultant limit the risk of negative equity<sup>1</sup> that they are exposed to once they issue loans to borrowers. In Tanzania, it has been noted there is considerable difference between property value and price of mortgaged properties. This is despite the fact that valuations are done by experienced valuation professionals and must be approved by the Chief Government Valuer prior to any mortgage lending. Refer to the Table shown below which shows some selected properties.

### **8.2 Plot Identification**

It has been observed that in some instances there can be considerable difficulty in identifying plots for valuation. This is exacerbated by the fact that plots are not visually demarcated. Although it is true that individual properties in the newer planned areas can be identification is seldom consistent and is difficult to understand/follow by a common man in the street.

### **8.3 Possibility of Valuation of another Property**

There is a possibility that a valuer may inadvertently or through misinformation from a client undertake a valuation of wrong property. This is also worsened by the fact that some unscrupulous clients may exploit the in existence of easy number reference of land title details with on site features. These results in many problems, such as the lender will have nothing as security. Hence, the landed property shown and valued for the purpose is not the one actually standing on the plot for which the correct title was issued. It is in such instances that the lender ends up with a vacant plot even though a valuation had been given of a substantial standing thereon.

### **8.4 Tenure Details**

Also there is a great possibility to have problems on tenure details. In yet other instances, the title and property would indeed be verified as correct, but if the unexpired period of the relevant right of occupancy is taken lightly, the lender might in for an unpleasant surprise of the right of occupancy expires whilst the loan is still outstanding. Another surprise awaiting a careless lender

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<sup>1</sup> Mortgage debt being greater than capital value of the subject property resulting from the collapse of the property market or over valuation.

may arise where the planning conditions for the area where the property is situated are stated for change –which may result into potential loss.

## **9. LAND REGISTRATION RELATED IMPEDIMENTS**

### **9.1 Creation of Plots in Planning Schemes**

It is a common practice by land surveyors or those without necessary probity to include land parcels in schemes that are not included in the approved scheme plans. This for whatever reasons, its done, causes where a parcel created under such circumstances is subject to mortgage dealings, problems in title authentication may arise.

### **9.2 Absence of Title Deeds**

The informal land market that still operates in avoidance of bureaucracy and taxes has undermined the function of title deeds. As a result even occupant of parcels of land in unplanned areas has no valid land titled disqualifies such as a category of owners of landform access to mortgage facilities. The research has realized that, in Tanzania serviced land plots are few and even fewer of these carry official title. Even where land which has been surveyed and officially allocated, it may not carry title. The research has found that only 4.5% (166) of the 3695 land plots in Sinza area of Dar es Salaam, surveyed in the 1970s, carry certificate of title to land. This means, many landowners in informal sector but also in many of the planned areas cannot use their land to get loans.

### **9.3 Lengthy Land Disposition Procedures**

Although the legal provisions on land disposition seem to be straightforward and clear, the practices are divided with bureaucracy, delays and costs as can be supplemented by data from the Ministry of Lands, Land Registry section. This includes the most of the common dispositions in land such sale, mortgage and lease. This in itself impacts on the use of land as collateral in mortgage transactions and there is a question of non-transferability of land whose owner has not fulfilled development conditions.

## **10. PHYSICAL PLANNING RELATED IMPEDIMENTS**

### **10.1 State of Planning**

It is a policy by most lending financial institutions that land in unplanned areas is not adequate as mortgage able asset. This stance automatically rules out the 70% of the urban population who live in unplanned areas without formally granted land rights/i.e. Right of Occupancy. They thus lack satisfactory collateral's through which they can provide security needed by lending institutions to mortgage facilities.

## **10.2 Use of Rural Landed Assets**

The same policy reiterated above largely undermines the use of rural landed assets, as mortgage able credit is limited to a minute fraction of the population mostly in the planned urban areas.

## **11. STATUTORY RELATED IMPEDIMENTS**

### **11.1 Non Exchangeability of Bare Land**

It is stipulated in the National Land Policy –1995 that Land has Value in the article No.4.1.1.b (I). However, when one examines the Land Act No. 4 of 1999, the observation is that this provision of the National Land Policy is overlooked. The Act does not come out openly to declare that land has value. (Refer S.20 (3) and s.37 (8) together with s.37 (9) of the Land Acts).For the time being the Act has recognized the Land Value.

### **11.2 Other Provisions in the Land Act**

**Matrimonial Issues** The Act requires the borrower to have consent of a spouse before he pledges a matrimonial home as a collateral for loan. The Act sounds to be gender balanced by increasing the role of the weaker spouses in decision ones their collective home (matrimonial home). However, Tanzania is still a male dominated country like other developing countries where business is still done by males. Seeking marital consent when matrimonial home is a collateral may be difficult and may retard potential borrower from borrowing.

According to information gathered during the preparation of this report lenders (banks) feel that the ultimate security in case of default is foreclosure. Many lenders and reputable professionals have been supporting re-introduction of foreclosure as it were when the Land Ordinance, Cap.113 of 1923 was still operative.

The Act does not specify condominium as collateral. The condominium law is missing here in Tanzania. This is a law that provides for the division of buildings on the same piece of land into units that can be owned individually, and ownership of common property by proprietors of the units as tenants in common. As a result there is no benefit for those who own such flats in mortgage transactions. From that said, it is limiting or rather impeding mortgage transactions compared to countries where it is prevailing.

## **12. RECOMMENDATIONS**

It is known that under the Land Act, all mortgage valuations have to be approved by the chief government valuer before effecting any mortgage transactions. The role of the valuer is to ensure that all mortgage valuation are in compliance with set valuation standards and therefore does not

undermine the Act itself<sup>2</sup>. The Ministry of Lands (MLHSD) needs to impose stricter controls before any valuation is approved. It has been seen that the nature of problems leading to wrong valuation report are known to the Ministry and can therefore be restricted.

### **12.1 Land Sector**

Rural titling, land registration process, allocation of plots on cost recovery basis, involvement of private sector in land acquisition, planning, surveying, servicing, sale, legal regularization of informal settlement, provisional of infrastructure and services and land transfer have to be adopted and enhanced by stakeholders, being given assistance from the government.

### **12.2 Creating Special Provisions**

For access to bare landholders for mortgage facilities, so as to enlarge the number of people qualifying for mortgage lending in Tanzania.

### **12.3 The Question of Valuation Report**

The reports should provide concise information on the name and address of the owner, complete with his/her photographs. The subject property should also be photographed showing front and side elevations. Details of un-expired term should also be specified, as should the property's Land Office Number, the size of the plot and encumbrances on the property, if any (e.g. mortgages, easements, caveats, etc) and planning conditions for the neighbourhood. It is also important to specify if it is a matrimonial property. It is important that outgoings such as land rent, property tax sewerage costs be specified. Further than this, title search issued by the Registrar of Titles should also be appended, sketch plan of the buildings on the plot.

### **12.4 The Case of Government**

The government has to commit more physical human resources to the Ministry of Lands Human Settlements and Development. Financing from the government is crucial to all land sections; commitment to the current boards involved with land sector is quite important; just to mention this board –National Council of Professional Surveyors.

The Land Act No.4, of 1999

These are provisions with relation to mortgages, which need some consideration e.g. matrimonial issues; at least the Act should consider the question of identification cards to all Tanzanians citizens. On the question of foreclosure the law should remain, as it is with some changes on operation i.e. things like bureaucracy, corruption, legal system (court injunctions) and adopt swiftly operation for defaulters.

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<sup>2</sup> In Tanzania, all land is public land entrusted to the President of the United of Tanzania. Since mortgage affects interest in land, the Ministry of Lands and Human Settlement Development (Chief Government Valuer) is responsible to ensure that this position is not compromised.

### 13. CONCLUSION

This research has been focused on seeking reasons as to why despite financial institutions cash reserves (loan able funds), relatively individuals and business borrow little. From the outset, the hypothesis of the research has been “*The land administration (laws, policies, regulations) set up in the country is unfavourable and therefore inhibitive to financial institutions wishing to lend money*”.

The research also explored other likely factors that could be responsible for low level of lending in the country such as the state of economic growth (stated in GDP), The growth of finance and insurance sector as compared to other sectors of the economy and pattern of interest rates. The findings of the research show that of the above mentioned factors, level of interest rates (on lending) bears noticeable relationship to lending pattern. The level of interest rates was compared and contrasted to the number of registered mortgages for a period of 1990-2002. There is a negative correlation between interest rates and number of registered mortgages.

As for the case of land administration influence on lending, some specific laws were analysed to assess their impact on lending. It has however been noted, financial institutions (lenders) have largely criticized the Land Act 1999 as disincentive to lending. The Act being operative in such a short period (it was signed by the President in May 2001) have shown to have no known link to the registered mortgages. Over time passage it may be possible to draw the line of the effects of the Act on lending. Other laws, policies and regulations have been noted as to affect lending, although it could not be established quantitatively the extent of their effects on lending. For instance, it has been learnt that only 30% of the urban population who live in planned (formal) areas and titled piece of land are eligible to borrow from lending institutions. The rest, 70% cannot borrow from banks because they lack qualified collaterals stipulated by bank.

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