THE MOVABLE PROPERTY SECURITY RIGHTS ACT AND THE LEGITIMISATION OF MONEYLENDERS BY IMPLICATION

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DECLARATION

I hereby declare that this Project Paper is my original work and that it has not been submitted for award of a degree or any other academic credit in this or any other University.

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ABSTRACT

This paper explores the legal standing of moneylenders in Kenya. The paper argues that although the Movable Property Security Rights Act, 2017 has impliedly legitimised moneylenders in Kenya, it has, nevertheless failed to provide a regulatory framework thereof because it does not make provision for supervision of their business yet it allows them to enforce their debts under it.

The study traced the origins of moneylenders to ancient civilisations of Rome and Greece. Their development through time was examined with a view to contextualising the current trends. The practice of moneylending business in various societies across the globe, and the corresponding legal regimes were analysed. These included jurisdictions in Europe, America, Asia as well as Africa. A comparative study was done. Legal regimes in jurisdictions that were considered developed with regards to regulation of moneylenders were comprehensively discussed.

The study indicates that moneylending business is as old as history itself. The practice has consistently existed throughout time. The disapproval of moneylenders by societies has also been a constant factor since time immemorial, moreso in earlier times than later on in history. The contempt against moneylenders eased with time. In more recent times, they are seen as a necessary evil that needs to be regulated.

Kenya's moneylending history can be traced back to pre-colonial periods. A law existed to regulate moneylenders until 1984 when it was repealed leaving moneylenders to operate in the shadows of the law. This rendered borrowers vulnerable to exploitation by moneylenders. The Movable Property Security Rights Act, 2017, in a way legitimised the business of moneylenders, giving them rights to formally secure their debts, acquire priority right, and enforcement thereof among other rights. Nevertheless, it failed to provide a framework for their regulation.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

A moneylender is defined as a person or organisation that lends money to people, especially at a high rate of interest. It is a person who lends but is not connected to a bank.[1] A moneylender may also be defined as a person who lends money which has to be paid back at a high rate of interest.[2] The word moneylender is often used interchangeably with more informal words such as loan shark, or shylock. A moneylender may also be defined as anyone, besides a bank, credit union, building society or hire purchase company, who loans money or goods to an individual for financial gain.[3]Usurer is an ancient term used to refer to moneylenders.[4]Usury may be defined as the practice of lending money at an interest – usually illegally high interest rates. A usurer is a person who practises usury, a moneylender.[5] Usury law is a law prohibiting moneylenders from charging illegally high interest rates.[6] Moneylenders are known to give short-term loans, on the personal security of borrowers, they charge excessively high rates of interest, and adopt pressure tactics in the recovery of loans.[7]

Despite the foregoing, some scholars have argued that the mere fact that a person or entity lends money at a profit does not make them a moneylender. There is need to establish continuity and consistency, a person must actually be doing the business of moneylending for them to be termed

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[1]*Cambridge Business English Dictionary* (2011) Cambridge University Press. Accessed at http://dictionary.cambridge.org on 21st May, 2019.
[2]*Collins English Dictionary, (2014) Complete and Unabridged, (12th Edition)* HarperCollins Publishers. Accessed at www.harpercollins.com.au on 21st May, 2019.
[3] Colm Buckley (2012) "Explainer: What are the Rules that Govern Legal Moneylenders?" *TheJournal.ie, Dublin.*
[4] Houghton Mifflin (2016) *American Heritage Dictionary of the English Language, (5th Edition).* Harcourt Publishing Company. Accessed at https://ahdictionary.com on 20th May, 2019.
[5] Bryan A. Garner (2009) *The Black's Law Dictionary (9th Edition)* Thomson Reuters, p.1685.
[6]*Ibid.*
[7] Meghana S. (2018) "Moneylenders: Meaning, Working and Importance" *Micro Economic Notes.* Accessed at www.microeconomicsnotes.com/financers/moneylenders/moneylenders-meaning-working-and-importance/1754 on 20th May, 2019.

as such. In essence, a person does not become a moneylender simply by reason of occasional loans to relations, friends or acquaintances, or even strangers. This is regardless of whether interest be charged or not. There must be more than occasional and disconnected loans. There must be a business of moneylending.[8] Some judicial jurisprudence, such as the case of *Edgelow v Macelwee,*[9]have affirmed this position.

The Canadian Moneylenders Act defines moneylenders as any person carrying on a loaning business, and who makes a practice of lending money at a higher rate than ten per cent per annum, but does not include a registered pawnbroker or a bank.[10] The definition of a moneylender in Fiji is the same as that of Canada.[11]

The Money-Lenders Act (Repealed)[12] defined a money-lender to "…include every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business…" The Act expressly excluded pawnbrokers, banks, insurance companies, and mortgage companies from the definition of money-lenders.[13]

The history of moneylenders is as old as the history of trade. Moneylenders existed alongside legitimate institutions and their main clientele has always consisted of high risk borrowers. Ancient moneylenders in Rome used tangible assets such as real estate, ships' cargoes, slaves, sheep, cattle, merchandise, or precious stones as collateral.[14] As time passed, waged borrowers were added to the client list of moneylenders.[15]

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[8] Justus O. Imafidon (2015) "Debt Recovery and the Law of Money Lending in Nigeria" *Academia,* Accessed at https://www.academia.edu/33335340/DEBT_RECOVERY_AND_THE_LAW_OF_MONEY_LENDING_IN_NIGERIA on 21st May, 2019, p.4.
[9] (1918) 1 K.B. 205 at p. 206.
[10] Section 2 (c) of the Money-lenders Act, Revised Statutes, Chapter 289, Laws of Canada, (1989).
[11] Section 2 of the Moneylenders Act, Chapter 234 of the Laws of Fiji.
[12] Chapter 528 of the Laws of Kenya.
[13]*Ibid* Section 2 (1).
[14] It is noteworthy that moneylenders in the current age still prefer tangible assets for ease of enforcement.
[15] Rolf Nugent (1941) "The Loan-Shark Problem" *Law and Contemporary Problems Vol. 8, No. 1, pp. 3-13,* p.3.

In the UK, moneylenders existed alongside formal financial institutions. They thrived as a result of the stringent usury laws that existed in the UK. Conventional financial institutions avoided lending money to high risk borrowers due to the usury laws. These borrowers would then turn to moneylenders for credit services.[16]

The exploitative nature of these moneylenders triggered reforms in the usury laws. Towards the end of the 19th century, Great Britain repealed its usury statute initiating a bold experiment in deregulation.[17] This was in a bid to allow high risk borrowers to obtain credit facilities from legitimate institutions.[18] Nevertheless, this deregulation did not curb the growth of moneylenders – they simply metamorphosised to nonviolent methods of exploitation. Essentially, moneylenders thrived in Great Britain regardless of whether there were interest cap laws or not. This they did by trapping many of their customers.[19]

In the USA, moneylenders emerged and thrived during the Civil War. They were widely referred to as 'loan sharks' due to the ruthless and predatory methods they used in enforcement of their credit facilities.[20]The business was characterised by lending to high risk borrowers and high margin investors. As a result, the government put in place measures that curtailed their businesses and practices. However, the business continued illegally under the control of organised crime gangs.[21]

In Kenya, moneylenders have continued to thrive in the shadows of the law for a long time. The first legal framework concerning moneylenders was enacted in 1932 while Kenya was under the

[16] Justice David Baker & MacKenzie Breitenstein, (2010) "History Repeats Itself: Why Interest Rate Caps Pave the Way for the Return of the Loan Sharks," *127 Banking L.J.* p.584.
[17] Geisst, Charles (2013) *Beggar Thy Neighbor: A History of Usury and Debt,* University of Pennsylvania Press. p. 138.
[18] Dorothy Orchard & Geoffrey May, (1933) *Moneylending in Great Britain*, Russell Sage Foundation, p. 43
[19] Robert Mayer, (2012) "Loan Sharks, Interest-Rate Caps, and Deregulation." *Washington and Lee Law Review* 69*(2) pp. 806-848,* p.821.
[20] Robert Mayer, (2012) *supra*, p.810.
[21] Charles R. Geisst (2017) *Loan Sharks: The Birth of Predatory Lending,* Brookings Institution Press, p.5.

colonial rule of the British. This law was enacted with the main objective of making provision for persons carrying on business as moneylenders.[22] This law defined moneylenders and their business.[23] It also provided for enforcement procedures, protection of consumers of these services,[24]licensing,[25] forms of moneylending agreements,[26] and regulation of interest rates to be charged[27] among other provisions. The Money-lenders Act was repealed in 1984.[28]

The repeal of the Moneylenders Act left a void in the legal framework. There was no law that provided for moneylenders. They therefore continued to operate without any form of regulation whatsoever. Many moneylenders have also taken to framing their transactions as normal commercial contracts. This is to ensure they fit under the definition of an enforceable contract as provided by the Law of Contract Act.[29] Courts have even ruled in favour of moneylenders on the grounds of the provisions of this Act regarding disputes of default by borrowers. In *Pius Lelei vs Paul Kosgei*[30]the High Court held that a borrower was obligated to pay the lender all sums owed including the interest because he had entered into a binding contract undertaking to do so. This was regardless of the fact that the lender was not a licensed financial institution.

Some moneylenders operate under the disguise of other businesses such as credit traders and electronics retailers, among others. Most of these are sole proprietorships that lend out small amounts and use small value items such as computers, mobile telephones and other electronic appliances, as well as household items as collateral. However, others, mostly large scale moneylenders are duly registered corporations under the Companies Act. Some of them bear

[22] The Money-Lenders Act, Chapter 528 of the Laws of Kenya.
[23]*Ibid* at Section 2 (1).
[24]*Ibid* Section 3.
[25]*Ibid* Section 5.
[26]*Ibid* Section 10.
[27]*Ibid* Section 11.
[28] Section 2 of the Statute Law (Repeals and Miscellaneous Amendments) Act, No. 12 of 1984.
[29] Section 2 (2) of the Law of Contract Act, Cap. 23 of the Laws of Kenya.
[30] [2014] eKLR.

names insinuating they offer credit facilities, for instance Platinum Credit[31]and Izwe Loans Kenya Limited (Izwe Kenya).[32]The Companies Act has provisions to rejection of registration of a company name that bears certain words or group of words unless the required consent to do so is obtained.[33] Further, the Companies Regulations provide:-[34]

> *(1) If an application for the approval by the Registrar of a name for a proposed company could in the Registrar's opinion give the impression that the company would, if registered with that name, be connected with a public authority, the Registrar shall require the applicant to request the authority to give its view on the matter.*
>
> *(2) On being required by the Registrar to do so under paragraph (1), the applicant shall request the authority to give its view as to—*
>
> > *(a) whether it considers that the name, if approved, would give the impression referred to in paragraph (1); and*
> >
> > *(b) if the authority considers that the name would have that effect, whether it would object or not object to the name being approved for the company by the Registrar.*
>
> *(3) As soon as practicable after receiving a request under paragraph (2), the public authority shall—*
>
> > *(a) give its view on the proposed name of the company; and*

[31] Platinum Credit Website, accessed at https://platinumcredit.co.ke/ on 21st May, 2019.
[32] Izwe Loans Website (2019) "Investor Relations" accessed at www.izwekenya.com/investor-relations/ on 20th May, 2019.
[33] Section 57 (2) (a) (ii) of the Companies Act, No. 17 of 2015.
[34] Regulation 8 of the Companies (General) Regulations, 2015.

(b) if it considers that that name would give the impression that the company is, if registered under that name, connected with that authority, state whether it objects or does not object to the approval by the Registrar of the name for the company.

It can therefore be inferred that these moneylending companies with names that suggest financial services business, which is ordinarily under the regulation of the Central Bank of Kenya, did seek and obtain consent to be registered and run their moneylending business.

1.2 STATEMENT OF PROBLEM

With the repeal of the Money-Lenders Act[35] in 1984, there is no legal framework for the regulation of moneylenders in Kenya. This law defined moneylenders and moneylending business and their licensing procedures. It also provided for the conduct of their business, rights and obligations of the parties, as well as sanctions for non-compliance with the law. It was however repealed without any other law being put in place to either regulate the business or prohibit it. This created a gap in the legal regime, resulting in moneylenders carrying on their business in an unregulated environment.

The other existing laws regulating the financial sector limit the business of lending money only to licensed institutions such as banks, specified financial institutions or mortgage finance companies,[36]microfinance institutions,[37] sacco societies,[38] and co-operative societies[39] among other regulated credit services providers. This thereby limits the scope of the existing laws to the licensed institutions to the exclusion of moneylenders.

[35] Chapter 528 of the Laws of Kenya.
[36] Section 3 of the Banking Act, Chapter 488 of the Laws of Kenya.
[37] Section 3 of the Microfinance Act, No. 19 of 2006.
[38] Sections 2 and 3 of the Sacco Societies Act, No. 14 of 20008.
[39] Section 43 of the Co-operative Societies Act, No. 12 of 1997.

The legal regime in Kenya is therefore completely silent on moneylenders. This has resulted in gross violation of the economic rights of borrowers. It has also led to uncertainty in the business, unclear enforcement procedures, as well as other vices that come with an unregulated financial business.

The lack of a regulatory framework has created uncertainties in judicial jurisprudence. Courts have been unable to agree on whether moneylending is an illegal business or otherwise. Some have declared it unlawful and ruled that the repeal of the Money-Lenders Act in 1984 meant the end of moneylending and credit business was henceforth a preserve of licensed formal financial institutions.[40] On the other hand, some courts have held that the absence of a legal requirement for moneylenders to be licensed meant that they cannot be said to be operating illegally for lack of a license.[41]

The coming into force of the Movable Property Security Rights Act, 2017 has strengthened the position of moneylenders and legitimised their business by implication. The Act applies to security rights in movable assets, including all transactions that secure payment regardless of their form or the person who owns the collateral. The only limitation is with regards to transactions that are to be done in accordance to any other written law.[42]Further, the Movable Property Security Rights Regulations, 2017, make provision for secured creditors that are natural persons.[43] Such provisions are very broad and may be interpreted to include moneylenders. This therefore enables moneylenders to register security rights and acquire rights under the Act just as any other credit services providers. These include priority and enforcement rights.[44] This law enables moneylenders to legitimately employ a number of enforcement procedures including

[40] Joel Njema Waruru and Nancy Wambui Njema v Robert Kibunja, [2013] eKLR.
[41] John G. Kamuyu and Elizabeth Waithera Kamuyu v Safari M Park Motors [2013] eKLR.
[42] Section 4 of the Movable Property Security Rights Act, 2017.
[43] Regulation 10 (1) of the Movable Property Security Rights Regulations, 2017.
[44] Sections 38 and 65 of the Movable Property Security Rights Act, 2017.

institution of legal suits, appointment of a receiver, leasing of, taking possession of, and or sale of the collateral.[45] This law, nevertheless, fails to provide a regulatory framework for moneylenders. It has worsened the situation for borrowers by allowing moneylenders to legitimately enforce their exploitative loans. This lack of a regulatory framework poses a problem.

1.3 JUSTIFICATION OF THE STUDY

It is clear that moneylenders have existed for as long as trade. Initially, as discussed hereinabove, governments took deliberate steps to try and abolish the business of moneylending. Evidently, these efforts were unsuccessful. Moneylenders have somehow managed to thrive whether within the confines of the law, or on the fringes of the law. Not even the stringent intervention of legislation could reverse the trend as the business thrived more in informality and illegality.[46]

This calls for a rethinking of the entire legal approach to moneylenders. Governments' attempts to abolish the business may not be the solution. Neither is ignoring them and hoping they will go away.

This study is important in pointing out the gaps in the legal and regulatory framework surrounding moneylenders in Kenya. It will put forward proposals for reform of regulatory, policy, and institutional frameworks that will ensure that the interests of all the stakeholders of the moneylending business are taken into consideration and protected, thereby propagating economic development.

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[45]*Ibid* section 67.
[46] Esege E. Eja and Ecuah E. Bassey, (2011) "Money Lending law and regulation of consumer Credit in Nigeria" *Nnamdi Azikiwe University Journal of International Law and Jurisprudence Vol. 2, pp. 196-211,* p.196.

1.4 STATEMENT OF OBJECTIVE

This study seeks to comprehensively evaluate the position of moneylenders in Kenya and how the Movable Property Security Rights Act, 2017, has indeed legitimised their business without providing a regulatory framework thereof.

1.5 SPECIFIC OBJECTIVES

a) To comprehensively evaluate the historical development of the legal position of moneylenders.
b) To establish whether the Movable Property Security Rights Act, 2017 has legitimised moneylenders in Kenya.
c) To determine whether the legal regime in Kenya has failed to provide a regulatory framework for moneylenders in Kenya.
d) To draw lessons from other jurisdictions with developed regimes on moneylenders.
e) To evaluate any possible solutions and make proposals for reform of the legal regime regarding moneylenders in Kenya.

1.6 RESEARCH QUESTION

The central research question guiding this study is: -

> Does the implied legitimisation of moneylenders in Kenya by the Movable Property Security Rights Act, 2017 create a gap in the law?

1.7 SPECIFIC RESEARCH QUESTIONS

a) How has the legal position of moneylenders developed over time?

b) How has the Movable Property Security Rights Act, 2017, legitimised moneylenders in Kenya?
c) How has the legal regime failed to provide a regulatory framework for moneylenders in Kenya?
d) What lessons may be drawn from other jurisdictions with developed regimes on moneylenders?
e) What are the possible legal reforms that will sufficiently address the issue of moneylenders in Kenya?

1.8 HYPOTHESIS

This study tentatively argues that although the Movable Property Security Rights Act, 2017 has impliedly legitimised moneylenders in Kenya, it has, nevertheless failed to provide a regulatory framework thereof because it does not make provision for supervision of their business yet it allows them to enforce their debts under it.

1.9 THEORETICAL FRAMEWORK

The theories of economic regulation are important in the justification for regulation of the financial sector, moneylenders included.

The public interest theory of economic regulation explains the importance of economic regulation. This theory sees regulation as a response to market inefficiencies. The regulator (government) intervenes the market to cure inefficiencies for the interest of the public.[47]The proponents of this theory contend that the government has a duty to protect the interests of the public from exploitation by service providers who are viewed to be in a position of power. This

[47] Richard A. Posner, (1974) "Theories of Economic Regulation" *The Bell Journal of Economics and Management Science Vol. 5, No. 2, pp. 335-358.* p. 336.

duty is achieved through the use of established regulatory authorities.[48]The theory assumes that regulators have sufficient information and enforcement powers to effectively promote the public interest. It further presumes that the regulator cares about the interest of the public.[49]

Moneylenders create inefficiency in the financial sector. Their business may potentially destabilise the market leading to collapse. The failure to regulate them creates uneven playing ground in the financial credit industry. This may lead to collapse of the market. As such, regulation is needed. Further, moneylenders practice predatory and exploitative business against desperate borrowers. It is therefore in the interest of the public that the state intervenes to protect the consumers of their services.

The protection of the interests of consumers is captured under the Constitution of Kenya. It provides for the protection of social and economic rights which every person is entitled to.[50] Further, it provides for the protection of the rights of consumers of various goods and services offered by public as well as private entities.[51] For this to be achieved, regulation is necessary.

The capture theory has also necessitated financial regulation. Theorists posit that regulators are more often bound to shape and design regulation in a way to align it with the whims of interest groups. Interest groups have always managed to influence regulation to work in their favour. The strongest market players are the ones in positions to sway the regulatory system.[52] It is therefore necessary to have a strong independent regulator that is not susceptible to capture by industry players.

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[48] Efraim Benmeleck &Tobias Moskowits (2010) "The Political Economy of Financial Regulation: Evidence from US State Usury Laws in The 19th Century" *The Journal of Finance Vol. LXV No. 3, pp. 1029-1073,* p. 7.
[49] Johan den Hertog, (2010) "Review of Economic Theories of Regulation" *Utrecht School of Economics,Tjalling C. Koopmans Research Institute, Discussion Paper Series 10-18.* p. 2.
[50] Article 43 of the Constitution of Kenya.
[51]*Ibid* Article 46.
[52] Sam Peltman, (1989) "The Economic Theory of Regulation After a Decade of Deregulation" *Brookings Paper on Economic Activity.* University of Chicago, p.2.

Another relevant theory is Marxism. This theory holds that human societies progress through class struggle: a conflict between the ruling class and the oppressed class. According to this theory, in any societies, there are two major social groups: a ruling class and a subject class. He who has economic power, controls society.[53]

The relationship between moneylenders and borrowers clearly demonstrates a situation of one party having control through economic power (moneylender), and the other (borrower) being controlled thereof.

Sociological approaches to law views the law as that which is accepted by society as law and that which is good for the society in general. It views the law as a social phenomenon. According to this theory, the validity of a law is a matter of its normative character. The validity solely lies in its capacity to make claims supported by reason, and depends on agreement of the citizenry.[54]Moneylenders have been accepted as part and parcel of the society. The society also views moneylending industry not as an illegal business but as a thriving business which can be of benefit to the economy. Moneylenders should therefore not be done away with but instead regulated for the benefit of the society as a whole. Laws regulating the money lending business should be formulated to ensure that the society exists as a whole and that no gap exists. Institutions governing this business should also be created to ensure the functionality of the society as a whole.

Sociological Jurisprudence, as propounded by Roscoe Pound, categorises legal interests into individual, public and social interests. Individual interests involve claims in an individual's life and are asserted for the titles of individual life. Public interests are commonly treated as the

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[53]Pet'ko Lyudmila, (2014) "Karl Marx and Marxist Sociology" *Institute of Sociology, Psychology and Social Communications, student (Ukraine, Kyiv, pp. 94-96.*

[54] Michael D. A. Freeman (1972) *Lloyds Introduction to Jurisprudence*, Sweet & Maxwell, UK, p. 733.

claims of a politically organised society thought of as a legal entity.[55] Pound describes social interests claims or demands or desires involved in the social life in civilised society. They are claims of a social group as an entity. Social interests have been tied to the concept of security. One vital part of security is for society to enjoy an organised legal system within the political organisation, which could arguably also fall within the public interests, as political organisation also requires the existence of some form of legal control, which can only be provided, by the legal system.[56]

It therefore follows that for a society's individual, public, and most importantly social interests to be sufficiently protected, legal control is necessary. Regulation of moneylenders is imperative, not only in protection of interests but also in creation of a sense of security to the public.

The Social Contract Theory argues that man originally lived in a state of nature. There was no government nor law to regulate man's conduct resulting in hardships and oppression of part of the society. In a bid to correct this, the members of society entered into two agreements: *pactum unionis*; and *pactum subjectionis*. Under the pact of *unionis*, people sought protection of their lives and property. This resulted in the formation of a society whose members undertook to respect each other and live both peacefully and harmoniously. The pact of *subjectionis* united people who then pledged obedience to an authority and surrendered the whole or part of their freedom and rights to the authority. The authority guaranteed everyone protection of life, property and to a certain extent liberty. Therefore, to ensure their escape from the state of nature, they agreed to live together under common laws, and create an enforcement mechanism for the social contract, and the laws that constitute it.[57]

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[55] Roscoe Pound (1921) *The Spirit of the Common Law*, Beacon Press, Boston, p. 212.
[56] Roscoe Pound (1959) *Jurisprudence,* West Publishing Company, St Paul, Minnesota, p.3.
[57] Laskar Manzoor (2013) "Summary of Social Contract Theory by Hobbes, Locke and Rousseau." *SSRN Electronic Journal,* p.10.

The social contract theory suggests that the state has an obligation to protect the citizens and the public have conformed to all the regulations of the state and in turn the state offers them security and takes decisions on their behalf. This mandate includes the protection of the public from exploitation by moneylenders.

1.10 RESEARCH METHODOLOGY

The research will be largely qualitative. It will particularly focus on literature that covers the jurisprudence around moneylenders with particularly focus on the issue of legitimacy of moneylenders in Kenya.

Primary and secondary methods of data collection will be used. An analysis of all data collected from relevant case law, legislation, journals and books will be made and a report made thereof.

Doctrinal research methodology will be employed. It will make use of relevant library materials including books, journals, case law and other scholarly materials. These will be sourced from the University of Nairobi Library. Further, online sources shall be used – this will be essential in obtaining recent information on the subject.

This study uses comparative research methodology to answer the research question.

1.11 LITERATURE REVIEW

1.11.1 Background

Esege Eja and Ecuah Bassey note the existence of moneylenders throughout history. They argue that people with surplus money came in to fill in the gap between needy borrowers and credit providers with stringent requirements. These individuals with surplus money were characterised

by charging exorbitant interests on their loans. This was due to the fact that in most cases, they lent their money to high risk borrowers, and for no security at all.[58]

They observe that most borrowers prefer the unscrupulous and exploitative money lenders due to the simplicity of the process as opposed to financial institutions such as banks whereby the borrower is required to maintain an active account with the bank in which the inflow of money through salaries is closely monitored.[59]

According to them, moneylending has come to stay. It has not only assumed the status of inevitability, but also that of indispensability. As such, regulation should therefore, facilitate it rather than inhibit it.[60]

E. Farnsworth argues that at the turn of the 19th century, consumers were presented with more ways of accessing credit facilities. This, he notes, was a consequence of the industrial revolution in Europe and North America. The revolution led to an increased demand and supply of manufactured goods. Consequently, traders began to deliver the goods to consumers on credit and allowed them to enjoy their use then pay in instalments.[61]

It is noteworthy that this practice is still ongoing presently and is regulated by consumer credit sale laws such as hire purchase law among others. Esege E. Eja argues that this practice has in a way provided consumers with an alternative to borrowing money. He sees it as an alternative to moneylenders. The practice has therefore loosened the grip of moneylenders on high risk borrowers.[62]

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[58] Esege E. Eja and Ecuah E. Bassey, (2011) *supra*, p.196.
[59] *Ibid* p.198.
[60] *Ibid* p.211.
[61] E.A. Farnsworth, "A Modern Instalment Sales Law: A Comparative Survey" in: A. L. Diamond, (ed.) I*nstalment Credit* (London: Stevens & Sons, 1970) p. 25.
[62] Esege E. Eja and Ecuah E. Bassey, (2011) *supra*, p.197.

Madestam Andreas, in his article, seeks to examine why some poor borrowers in underdeveloped credit markets take informal loans despite the existence of formal banks. Moneylenders expand the supply of funds as opposed to the formal finance schemes. In addition, moneylenders help entrepreneurs who have an insufficiency of capital to increase investment by allowing more external funding to be raised. [63]

Charles R. Geisst[64] contends that there is a direct link between 'loan sharks' and the stability of a financial sector, and the economy as a whole. He argues that unregulated moneylenders destabilise a financial system leaving it vulnerable to crises. Indeed, he is positive that the emergence of and growth of loan sharks directly to the Wall Street crash of 1929.[65]

He expertly reveals the extent to which the extortion of high loan interest from borrowers who are in most cases unable to bear the burden promotes a rigged and sinister market place that needs to be regulated. He questions the political and economic repercussions, and morality of such practices which he acknowledges are still ongoing to date.[66]

Justice David Baker argues that there is never a misunderstanding between a loan shark and a borrower regarding the nature of their relationship, moreso, the terms of the loan and the collateral involved. He notes that there is hardly any paper that passes between them – there understanding is based on a simple handshake. The borrower understands clearly that they are offering themselves as well as their family's wellbeing as collateral. According to him, the issue

[63] Madestam, Andreas, (2009) "Informal Finance: A Theory of Moneylenders". *Fondazione Eni Enrico Mattei Working Papers.* Paper 330.
[64] Charles R. Geisst (2017) *supra*.
[65]*Ibid* p.155.
[66]*Ibid* p.47.

about exploitation of such borrowers is not that they did not know what they were getting themselves into, but that they did not feel like they have any better choices.[67]

Justus Imafidon looks at the moneylending business from the perspective of the moneylenders. He argues that the Nigerian government's efforts to protect the consumers, mostly SMEs and start-ups has greatly frustrated the efforts of innocent lenders to recover their debts from unscrupulous borrowers.[68]He argues that the law places the burden of proof that one is not a moneylender upon the presumed moneylender. Failure to provide sufficient evidence to that effect will lead to one being treated as a moneylender operating without a license. This may result in them not only failing to enforce their contracts for recovery of debts, but they may also face legal sanctions of operating without licenses such as fines and/or jail terms. This, he notes, is a demoralisation to friends and family who may have wanted to lend money to their fellows who have failed to access credit services any other way.[69]

In jurisdictions such as Singapore, courts have been vigilant in distinguishing between genuine commercial lending and illegal money lending. Money lending agreements are keenly scrutinised by the courts to ascertain their legality.[70]

Michael Aliber argues that informal finance is heavily relied on by informal operators in their tasks and endeavours. Informal finance such as moneylending is preferred due to its convenience and familiarity.[71]

[67] Justice David Baker & MacKenzie Breitenstein, (2010) *supra*, p. 581.
[68] Justus O. Imafidon (2015) *supra*, p. 1.
[69]*Ibid* at p.4.
[70] Rajah and Tann Asia, (2017) "Unlicensed Money Lending Agreements: Form Versus Substance and Legal Implication of Purported Compromise" *Rajah and Tann Singapore LLP*.
[71] Michael Aliber, (2015) "The Importance of Informal Finance in Promoting Decent Work Among Informal Operators: A Comparative Study Between Uganda and India," International Labour Organisation Working Paper No.66.

Lastone Gulume notes that the Tier 4 Microfinance Institutions and Money Lenders Act, 2016 has introduced a number of commendable reforms which were long overdue. The repealed Moneylenders Act had become obsolete. He contends that the new legal regime will play an instrumental role in enhancing and promoting the effective regulation of moneylending business. In essence, it will protect the interests of the borrower while at the same time guarding lender's business through establishment of a degree of legitimacy.[72]

1.11.2 Legal Framework

In Fiji, there is legislation that provides for the business of moneylenders. The Moneylenders Act defines a moneylender as every person whose business is that of money lending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business a principal or as an agent.[73] The Act excludes a number of institutions from the definition of moneylenders. These include; body corporates incorporated or empowered by any written law to lend money in accordance with such law, banks or insurance companies, persons carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof lends money at a rate of interest not exceeding ten per cent per annum, pawnbrokers licensed under the Second Hand Dealers Act,[74] and body corporates for the time being exempted by the Minister from the provisions of the said Act.

[72] Lastone Gulume Balyainho (2016) "Regulating Money Lending Business: Uganda's New Regulatory Framework" *Academia,* accessed at www.academia.edu/30020785/REGULATING_MONEY_LENDING_BUSINESS_UGANDAS_NEW_REGULATORY_FRAMEWORK on 21st May, 2019.
[73] Section 2 of the Moneylenders Act, Chapter 234 of the Laws of Fiji.
[74] Chapter 238 laws of Fiji.

The Act establishes the office of the Registrar of moneylenders, appointed by the Minister, and who shall keep a record of all moneylenders.[75] The list of licensed moneylenders is published in the official Gazette by the Registrar at the beginning of every year.

Further, it provides for licensing of moneylenders. All persons intending to carry on the business of moneylending shall be required to take out annual licenses upon payment of prescribed fees to the Registrar.[76] Carrying on moneylending business without a license is a criminal offence in Fiji.

A license may be declined on the grounds of;[77]

a) poor character of the applicant, or its managers (in case of corporations),
b) applicant's or the management of the business are not a fit to hold a license,
c) applicant's or management's disqualification from holding a license by an order of a court,
d) failure of the applicant or management to comply with the provisions of any regulations made with respect to applications for licenses,
e) the applicant knowingly lending money to a minor after the commencement of the Act.

The Act has comprehensive provisions prohibiting moneylenders from advertising their business in the print media such as newspapers, sending circulars and inviting any member of public to borrow from them, employing agents or canvassers for purposes of inviting the public to borrow money from them, or issuing circulars containing expressions which might reasonably be held to imply that they carry on banking business. Further, moneylenders are required to affix in a conspicuous position outside their authorised address a board bearing the words "Licensed

[75] *Ibid* section 4.
[76] *Ibid* section 5.
[77] *Ibid* section 9.

Moneylender" distinctly printed in letters not less than two inches high. Failure to comply with these provisions results in penalties such as fines, jail terms, and/or revocation of licenses.[78]

Additionally, no contract for the repayment of money lent after the commencement of this Act by an unlicensed moneylender shall be enforceable.[79] There also must be a written memorandum between the borrower and moneylender for any such agreement to be enforceable.

The Act prohibits the direct or indirect imposition of compound interest or the increase of the rate or amount of interest by reason of any default in payment.[80]

The law makes further provisions with regard to keeping of accounts done in English language failure to which transactions relating thereto shall not be enforceable.

There are also powers given to courts to review any moneylending transaction in which it presumes excessive interest was charged, and order reimbursement to the borrower of such excess interest paid. The Act consider any interest charged above the rate of 12%, unless the contrary is proven, to be excessive.[81]

From the foregoing, it is evident that Fiji has taken substantive measures to protect the public from exploitation by moneylenders. It is noteworthy that the law has not prohibited the business, but has ensured it is done within the confines of the legal regime.

The Canadian law on moneylenders is quite similar to the regime in Fiji. The law defines a money-lender as any person carrying on a loaning business, and any person who carries on the business of money-lending, or advertises or announces himself or holds himself out in any way

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[78] *Ibid* sections 11-14.
[79] *Ibid* section 15.
[80] *Ibid* section 17.
[81] *Ibid* section 22.

as carrying on that business, and who makes a practice of lending money at a higher rate than ten per cent per annum, but does not include a registered pawnbroker or a bank.[82]

The Nigerian Moneylenders Act defines moneylenders in the same way as the Fiji Act. The only addition is that it adds co-operative societies to the institutions exempted from the definition of moneylenders.[83]

In Uganda, moneylending business is provided for under the Tier 4 Microfinance Institutions and Money Lenders Act, 2016. This law repealed the Money Lenders Act.[84][85] The repealed Act was almost a replica of the repealed Moneylenders Act of Kenya. The Tier 4 Microfinance Institutions and Money Lenders Act, 2016 applies to tier 4 microfinance institutions and money lenders.[86] Provision of a framework for the management and control of money lending business is stated as one of the objectives of the Act.[87]

The Act defines a moneylender as a company licensed under section 79.[88]Section 79 of the Act provides that upon application, the Authority (UMRA) shall within three months, consider and issue a license subject to such conditions as it deems fit. It may also decline to issue a license on the grounds of poor character of the management of the applicant among other reasons.

The Act establishes the Uganda Microfinance Regulatory Authority (UMRA) which is responsible for the regulation of all institutions covered therein. The Authority is led by a board of directors comprising seven members appointed by the Minister of Finance, Planning and Economic Development.[89] This is a development that was not there in the preceding law.

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[82] Section 2 (c) of the Money-lenders Act, Revised Statutes, Chapter 289, Laws of Canada, (1989).
[83] The Money Lending Act of 1939, Nigeria.
[84] Chapter 273 0f the Laws of Uganda.
[85] Section 113 of the Tier 4 Microfinance Institutions and Money Lenders Act, 2016.
[86]*Ibid* section 2.
[87]*Ibid* section 3 (e).
[88]*Ibid* section 5.
[89]*Ibid* section 6.

Another new development in the legal regime on moneylenders in Uganda is the restrictions of persons carrying on moneylending business to incorporated companies.

The Money-lenders Act (Repealed)[90] contained similar provisions as those under the Canadian and Fiji laws. In fact, the repealed Kenyan Act was almost identical to the Fiji Act on moneylenders. This is with regards to definition of the business, regulation, licensing, remedies and offenses thereof. This therefore means that the law at some point did protect the public from the exploitative business of moneylenders in Kenya. When this law was repealed, the supervision and regulation of moneylenders, as well as protection of borrowers was done away with.

The Companies Act[91] provides that the Companies Regulations may prohibit the use, in a name, of specified words, expressions or other indications that are associated with a particular kind of company or organisation, or that are similar to words, expressions or other indications that are associated with a particular kind of company or organisation.[92] The Companies Regulations provide that the Registrar shall not register a company which bears a name that suggests a connection with a public authority without an authority from the relevant public authority authorising the registration thereof.[93] It is this provision that has enabled large scale moneylenders to register corporations and operate publicly.

The Central Bank of Kenya, in an attempt to review the existing regulatory and supervisory framework for microfinance institutions, has developed the Microfinance Bill, 2019. The Bill proposes that the proposed Act shall be applicable to microfinance bank business, and specified non-deposit-taking business as may be prescribed. It goes on to state that the Cabinet Secretary may make regulations specifying non-deposit-taking business as well as prescribing

[90] Cap. 528 Laws of Kenya.
[91] No. 17 of 2015.
[92] *Ibid* section 56 (1).
[93] Regulation 8 of the Companies (General) Regulations, 2015.

requirements for the conduct of their business.[94] Non-deposit-taking microfinance business is defined as a business other than microfinance bank business.[95]

It is important to note that the Bill makes a minute attempt to provide for moneylending business which may be interpreted to fall under the definition of non-deposit-taking microfinance business. However, it leaves the prescription and subsequent regulation of the business at the discretion of the Cabinet Secretary through regulations. It does not even make the development of regulations regarding the same mandatory. Which means they may never be developed at all. Further, regulations are prone to change from time to time with the discretion of the Cabinet Secretary. They also may not take into consideration the interests of the public as they do not go through the same scrutiny as that of developing a legislation.

The Moveable Property Security Rights Act enacted in 2017 is relevant to this study as it made provisions that impliedly touched on moneylending business in Kenya. The Act defines a secured creditor as a person that has a security right, and a transferee in an outright transfer of a receivable. A security agreement is defined as an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for the creation of a security right. and an agreement that provides for the outright transfer of a receivable. A security right is a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation, and the right of the transferee in an outright transfer of a receivable.[96]

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[94] Section 3 of the Microfinance Bill, 2019.
[95] *Ibid* section 2.
[96] Section 2 of the Movable Property Security Rights Act, 2017.

The Act includes non-regulated financial institutions, and credit service providers in its definition of a secured creditor. This means that even individuals or other non-regulated entities may secure their credit services transactions and acquire priority rights thereof.

The Act goes on to provide for enforcement procedures in the event of default by a grantor. A secured creditor may exercise their enforcement rights under this Act, any other law, or under the security agreement.[97] A secured creditor may exercise their rights either by application to court or without applying to court but in accordance to the provisions of the Act.[98] This law vests upon secured creditors vast remedial options including institution of legal suits, appointment of a receiver, lease the movable asset, taking possession of the movable asset, and sale of the movable asset.[99]

It is noteworthy that all these provisions under the MPSR Act are applicable to all secured creditors including the unregulated ones – essentially moneylenders and other informal moneylenders. The only limitations are with respect to contravention of any other written laws.[100]No other written law provides for the business carried on by moneylenders.

1.12 CHAPTER BREAKDOWN

Chapter One – Introduction

This chapter gives a general introduction of the study. It lays the foundation of the research paper giving the objective, hypothesis, justification, and a statement of the problem.

The chapter further discusses the various theories upon which the research is grounded, and a review of literature to shed light on what other writers have said about the topic of study.

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[97] *Ibid* section 65.
[98] *Ibid* section 66.
[99] *Ibid* section 67.
[100] *Ibid* section 4 (3).

Chapter Two – Historical Development of the Legal Status of Moneylenders

This Chapter will give a chronological development of moneylenders and their legal status over time. It will show how since time immemorial, this business has been shunned by governments and regulators. But also how it has never really gone away. Moneylenders are as old as history itself.

The chapter will discuss and critically analyse the position of moneylenders in society, as well their legal standing since the time of ancient civilizations all the way to the current position.

Chapter Three – Legal and Regulatory Framework on Moneylending

The focus of this chapter will be on the legal and regulatory framework surrounding moneylenders and their business. The chapter will focus on Kenya and will thoroughly analyse the various statutes, subsidiary legislation, and judicial jurisprudence on the issue of moneylenders. This will be both before and after the coming into force of the Movable Property Security Rights Act, 2017. Special focus will be placed on the Movable Property Security Rights Act, 2017.

The loopholes, gaps and shortcomings in the legal framework will be addressed.

Chapter Four – Lessons from the United Kingdom and Uganda

This chapter will draw comparisons of the Kenyan situation with other jurisdictions both in the developing and the developed world. The chapter will look at what other jurisdictions have handled the issue of moneylenders and their success or failure. This will be important in drawing important lessons from best practices from around the world with regards to the topic of study.

The chapter shall look at jurisdictions with functional regulatory frameworks on moneylenders, being the United Kingdom and Uganda.

Chapter Five – Conclusion and Proposals for Reform

This chapter will provide a general overview of the outcome of the research project. It will give a conclusion and further give a way forward. The chapter will make recommendations on the reforms that need to be made to the legal, policy, as well as the institutional frameworks so as to effectively address the issue of moneylenders in Kenya.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF THE LEGAL STATUS OF MONEYLENDERS

2.1 INTRODUCTION

Moneylending is an aspect of society that has been frowned upon all through history; all the way from the ancient Greece times up to the current age. In some cases, the practice was declared straight out illegal, whereas in others, moneylenders were tightly regulated in an attempt to shield borrowers.[101]

The constant need for money throughout time is what has kept moneylenders in business. This is due to the fact that some people cannot afford all the money needed to cater for their needs, while there are others with more than they require. The business was further enhanced by the existence of conventional banks that called for stringent security in the form of cumbersome collaterals. All the borrowers that couldn't meet the banks' security requirements turned to moneylenders.[102]

The ban against the charging of excessive interest has been witnessed in almost all societies since the beginning of recorded history. Levying of interest on money that has been lent is one of the oldest practices in the financial sector. Many societies have considered charging of interest on loans as predatory. The policy by which these unscrupulous lenders collected their debts was so brutal that it put borrowers at such a disadvantage to the extent of them losing their collateral, or, in extreme cases, their freedom or families. The policy was referred to as the beggar-thy-neighbour policy.[103]

[101] Esege E. Eja and Ecuah E. Bassey, (2011) *supra*, p.196.
[102] *Ibid*.
[103] Charles R. Geisst (2013) *supra*, p.2.

It is noteworthy that moneylenders have remained relevant for as long as the need for an alternative to conventional credit services providers has existed. Their legal position varies from one jurisdiction to another, as well as from one period of time to another.[104]

2.2 MONEYLENDING IN THE ANCIENT TIMES

Moneylending in the olden days was referred to as usury, a term which originally referred to the practice of lending money at a profit.[105] The term was however used in association with lending at unethical and excessively high interest rates that unfairly enriched the lenders. Consequently, laws regulating the practice have existed for as long as moneylending has existed.[106] Today, usury, is defined as illegal or unlawful interest.[107]

Anthropological records indicate that moneylending was despised by mankind's tradition. Traditionally, any party involved in moneylending, whether the lender or borrower, was a sinner. Usury is seen to have a negative connotation. And although records from different places and times showed differing definitions of usury, it was universally agreed that it was evil.[108]

Moneylending in ancient days attracted great moral disapproval by most ancient authorities particularly by the Jewish and Roman authorities. It was also later criticised by the early church who saw the practice as going against the teaching of the Bible.[109] Essentially, it was a sin to exert any predetermined payment beyond the principal in any loan of money or other like

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[104] R. M. Goode, (1970) "The Legal Regulation of Lending" in: A. L. Diamond, *Instalment Credit*, Stevens & Sons, London p.44.
[105] Bryan A. Garner (2009) *supra*, p.1685.
[106] R. M. Goode (1970) *supra*, p.45.
[107] Bryan A. Garner (2009) *supra*, p.815.
[108] David Graeber (2011) *Debt: The First 5,000 Years*, Brooklyn: Melville House Publishing, New York, p.332.
[109] The Holy Bible, (King James Version*), Book of Exodus, Chapter 22*, *verse 2.*

commodities.[110] At around the twelfth century, prosecution of living usurers in England was a mandate of the church.[111]

The great Greek philosopher, Aristotle was among the very first scholars to vilify moneylending. He equated moneylending, or more appropriately, usury, to heinous crimes such as murder. According to Aristotle, money was naturally intended to be a means to an end. The commercialisation of money creates a scenario where money is an end in itself – an unnatural end.[112] Usury, is a villain because it not only makes money an unnatural end, but a misused unnatural end. It results in unnatural breeding of money from money.[113]

Thomas Aquinas shared Aristotle's position on moneylending. To him, usury was more than a monster. It is noteworthy that by the time Aquinas addressed the usury issue, there had already been laid a strong tradition against usury. For instance, St. Augustine, a Catholic theologian had termed it as a sin against justice. He equated usury to stealing.[114] To Aquinas, money was a measure, with a fixed value. As such, selling money and giving it different values, through the practice of usury, distorted its original purpose.[115]

Moneylending in ancient times happened mostly between peers or at least among people who knew each other. It was never between strangers. This contextualises why the exorbitantly high interest rates, as well as the brutal debt collection mechanisms employed by moneylenders were frowned upon. The business was viewed as a foreign concept lacking an underlying moral

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[110] John Munro (2011) "Usury, Calvinism, and Credit in Protestant England: from the Sixteenth Century to the Industrial Revolution" *Department of Economics University of Toronto Working Paper no. 439 (MUNRO: no. 41),* p.1.
[111] Richard H. Helmholz (1986) "Usury and the Medieval English Church Courts" *61 Speculum 364, University of Chicago Law School,* p.365.
[112] Trever, Albert Augustus (1978) *A History of Greek Economic Thought,* Chicago, Ill., The University of Chicago Press, p.105.
[113] John Thomas Noonan, (1957) *The Scholastic Analysis of Usury*, Harvard University Press, Cambridge, Massachusetts, p.22.
[114] Maxwell Shockley (2015) "Some History of Economic Thought on Usury: Aristotle, Aquinas and Calvin" *Economics 406,* p.34.
[115]*Ibid* at p.35.

structure. This perception of moneylending persisted into the 13th century. Most societies such as the French perceived them as thieves, and even told stories of how there was no honour even among the thieves themselves.[116]

The social attitudes towards usury have undergone changes over the ages. From the ancient times up to the Protestant Reformation[117] period, usury was shunned and viewed as an inherent evil.[118] By the eighteenth century, usury was no longer regarded as a villain, at least not as much as it was prior to this era. Moneylending activities had become allowable exceptions that were endorsed by the legal, theological, and economic world.[119]

Tolerance for moneylending increased and the state reduced its interference in the issue except for extreme instances and for public interest. Individuals were left to decide on their own whether usury was or was not a sin. Both the Catholic and Protestants, as well as secular law loosened their stance on moneylending. Reference to moneylenders shifted from inherent evil, monstrous and other similar terms to socially inept fools.[120]

John Calvin, a French protestant reformer made great contribution to the discussion on usury. His arguments were a deviation from the previous scholars who had addressed the issue. It is important to note that most of the previous scholars were Catholics. And with the emergence of the protestant movement, who viewed the catholic perception of Christianity as faulty, it was expected that a protestant reformer's opinion of usury would differ from that of the predecessors.

[116] David Castillo (2007) "A Brief History of Moneylending" *The Credit Repairmen.* Accessed at www.thecreditrepairmen.com/brief-history-moneylending/ on 1st June, 2019.
[117] A major 16th century European movement aimed initially at reforming the beliefs and practices of the Roman Catholic Church. It happened between 1517-1648.
[118] Martin Lewison (1999) "Conflicts of Interest? The Ethics of Usury" *Journal of Business Ethics Vol. 22, No. 4pp. 327-339,* Springer, p.327.
[119] Maxwell Shockley (2015) *supra*, p.36.
[120] Norman Jones, (2008) "Usury". *EH.Net Encyclopaedia* (edited by Robert Whaples). Accessed at http://eh.net/encyclopedia/usury/ on 17th June, 2019.

Calvin saw usury as a sin against conscience as opposed to against justice. To him, moneylending was not a sin as long as it was done with a charitable intention.[121]

John Calvin concluded that the poor should be protected and an maximum interest rate should have been set by the government.[122] Martin Luther, another protestant reformer, conceded to the fact that usury was unpreventable, in as much as he was against it throughout his time. He however continued to say that the issue was one that the secular authorities were in charge of and therefore they were supposed to put in measures to control it.[123]

2.3 DEVELOPMENT OF THE MODERN MONEYLENDER

The modern moneylender started developing in the second half of the sixteenth century after both religious and secular groups loosened their stance on the practice of usury. Different jurisdiction experienced this development at different times and in different ways. This was highly dependent on the religious backgrounds of the various regions. A number of states such as the UK started enacting laws to regulate the conduct of business by moneylenders.[124]

2.3.1 United Kingdom

The use of the church to determine the fate of moneylenders/usurers in England remained the principal jurisdictional rule in place until the Tudor era. The church was entitled to hear all pleas concerning usury during the lifetime of offenders, and to determine them freely in accordance with the canon law. Despite the fact that medieval parliaments passed occasional statutes

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[121] John Thomas Noonan, (1957) *supra*, p.366.
[122] Eugen von Böhm-Bawerk, (1890) *Capital and Interest: A Critical History of Economical Theory,* Macmillan and Co., London (translated by William A. Smart), Book I, Chapter III.
[123] Paul M. Johnson, (1988) *A History of the Jews,* HarperCollins, New York, p.242.
[124] Norman Jones, (2008) *supra*.

marginally affecting the enforcement of the law of usury, the principal regulation thereof was left to the canon law.[125]

In the sixteenth century, laws were enacted, to work alongside the canon law in condemning usury. Moneylending could no longer be confounded with legitimate employment of capital. To avoid the stringent punishment imposed under the enacted laws, some moneylenders went ahead to disguise the nature of their business. They even developed a different name, 'dry-exchange', as a euphemism for usury which was condemned by religion and law alike during the middle ages. The term insinuated a situation where something passed to both parties in the transaction, whereas in fact, the transaction was only one-sided[126]

There are records of early court cases involving moneylenders in dioceses of Canterbury, York, Bath and Wells, Chester, Chichester, Ely, Hereford, Lichfield, Lincoln, London, Rochester, Salisbury, and Winchester. These were mostly instituted by borrowers who wanted restitution for the usury paid as well as punishment of the moneylenders for usury. There are also criminal proceedings instituted by these courts themselves against moneylenders who had attracted public notoriety as usurers. The complainant in these cases was the public.[127]

By the 17th Century the debate had shifted to the limits that should be in place when it comes to money lending. Francis Bacon,[128] saw the benefits of moneylending and noted that it was important for the growth of the economy. He eventually proposed interest rates to be allowed to a maximum rate of five percent. This practice was only allowed to licensed people who were

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[125] Richard H. Helmholz (1986) *supra*, p.365.
[126] R.H. Inglis Palgrave, (1925*) Palgrave's Dictionary of Political Economy (2nd Ed.),* Henry Higgs, p.643.
[127] Richard H. Helmholz (1986) *supra*, p.367.
[128] An English philosopher and statesman who served as Attorney General and as Lord Chancellor of England.

supposed to get these licenses from the state at a fee.[129] This interest rate was later increased to ten percent.

In 1664, the English Parliament enacted an Act against Usury. This law was meant to curb excessive interest rates by moneylenders. The Act set the maximum interest chargeable at eight percent. An amendment was later introduced to this Act that made it clear that the toleration of usury did not repeal the "law of God in conscience."[130]

The enactment of this law, and the developments around this era were generally characterised by the emergence of economists and other scholars who contributed to the topic. Robert Filmer, an English political theorist, argued that there was no need of subjecting matters of conscience to state control. Gerard de Malyne and Thomas Mun, who were among the first generation of economists, saw usury as a practical business problem as opposed to a sin. Malyne contended that moneylending at interest for commercial credit was admissible. He only had an issue with the oppression of the poor by pawnbrokers. Another economist, Edward Misselden, saw interest rates as a matter of the money supply but not an oppression of the poor.[131] John Locke[132] also made his contribution by arguing that moneylending at interest for productive purposes was no different from a landlord sharing the profits of a field with his tenant.[133]

Moneylending evolved over time in the UK. All the developments led to the enactment of the Usury Laws Repeal Act of 1854 which introduced some exceptions to the general and outright prohibition on usury by fixing a bench mark for interest not exceeding 10 percent on money lent.

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[129]Francis Bacon, (1892) "Of Usury," in *Bacon's Essays*, Macmillan and Co., London, p.109.
[130] Norman Jones, (2008) *supra*.
[131]Thomas F. Divine, (1959) *Interest: An Historical and Analytical Study of Economics and Modern Ethics, Marquette* University Press, *Milwaukee*, p.238.
[132] It is noteworthy that John Locke was also a protestant scholastic.
[133] Murray N. Rothbard (1995) *Economic Thought Before Adam Smith*: *An Austrian Perspective on the History of Economic Thought Volume I,* Ludwig von Mises Institute Auburn, Alabama, p.315.

The coming to force of the Usury Laws Repeal Act led to an upsurge of money lending activities often at exorbitant interest rates.

The upsurge was again brought under control by legislation when the English Parliament passed the Money Lenders Act of 1900. Under this legislation, moneylenders were required to register with the government. It also made false advertising illegal. Additionally, it authorised courts of equity to give relief in case of any transactions deemed "harsh and unconscionable."[134]This Act, however, failed to apply sufficient force to redirect the course of moneylending. Its results were modifications of details and extremes only.[135]

Moneylending practices persisted in the market for cash loans until the Act was later repealed and replaced by the Money lenders Act of 1927. This Act established the presumption that interest in excess of 48% a year was unconscionable. It also established the Financial Conduct Authority. Additionally, it made it mandatory for moneylenders to require licenses to be able to carry on their business.[136]

It is noteworthy that the UK Money Lenders Act of 1927 was later exported to almost all of the British Colonies. This explains why the Moneylenders Acts of, say, Uganda (repealed in 2016), Nigeria, Kenya (repealed in 1984), and Fiji are all identical to the UK's Act.

2.3.2 USA

Usury in the United States can be traced back to the eighteenth century. Upon independence in 1776, each of the original thirteen states enacted laws in respect of the maximum interest rate chargeable. These were fixed at a maximum of between six and eight percent varying from one state to another. These interest rate caps were included in the states' original colonial charters

[134] The Money-Lenders Act of 1900, UK.
[135] Dorothy Orchard and Geoffrey May (1933) *Moneylending in Great Britain,* Russell Sage Foundation, New York,
[136]Money Lenders Act, 1927, UK.

from Britain and into their first respective Constitutions. States like Maryland allowed a maximum of eight percent in trade-related transactions, but capped the interest at six percent for personal and other non-trade-related loans.[137]

The legal regime in place in the various states failed to achieve the intended purpose of protecting borrowers. The moneylenders ignored the laws and continued to run their businesses at their own terms. This was further worsened by the fact that the usury laws exempted smaller loans from regulation. Further, the trends in Europe regarding the changing perspective of moneylenders trickled to the USA making many states to review their law and interest caps in favour of money lenders.[138]

It is in the nineteenth century during the Civil War that moneylending greatly thrived. The business was characterised by lending to high risk borrowers and high margin investors.[139] In 1869, the very first moneylending advert was placed in a newspaper, the Chicago Tribune, by a small loan company. By 1872, the business had prospered with borrowers giving out their furniture or other easily reachable things such as pianos as collateral.[140]

Moneylending became a very large cottage industry during the last decade of the nineteenth century. Interest rates were set by the lender thereby making any complaints raised by borrowers at the time insignificant. Over time the name ‘loan sharks’ replaced the name “usurers” which had been used for a long time.[141]

In 1894, the Provident Loan Society of New York was created in an attempt to protect individuals from loan sharks. This Society offered small loans to borrowers at very low interest rates of a maximum of three percent for the first two months and a maximum of two percent

[137] Charles R. Geist, (2017) *supra*, p.4.
[138]*Ibid* at p.7.
[139] Robert Mayer, (2012) *supra*, p.810.
[140] James Grant, (1994), *Money of the Mind*, Noonday Press, New York, p. 79.
[141] Charles R. Geist, (2017) *supra*, p.3.

thereafter until repayment in full. This initiative inspired many people and churches across states leading to the formation of similar societies that gave loans of up to 1000 US Dollars. These societies came to be known as remedial lending societies because they helped borrowers disentangle themselves from onerous debts.[142]

By the turn of the century, the credit unions had evolved so much and become an anti-loan shark movement that influenced the development of laws to regulate their activities. In 1909, Massachusetts became the first state to enact and pass the Credit Union Law to protect its citizens from loan sharks. Other states followed suit.[143]

The beginning of the twentieth century saw a lot of improvements and seriousness by the government in its bid to protect borrowers. It is noteworthy that this was not achieved easily. In the years leading up to World War I, there was heightened public clamour against loan sharks as well as attacks against them in the press.[144] The Congress made laws for the Federal District which prohibited unlicensed moneylenders from charging interest rates of more than six percent per annum. Further, 1910 Usury Law allowed licensed moneylenders to only charge an interest rate of up to twelve percent per annum.[145] These laws were strictly implemented and any deviation thereof attracted sanctions.

An example is the *Tolman's* case in which Tolman, a New York moneylender was arrested for the violation of usury laws following a complaint by a local woman who accused them of being ruthless loan sharks. Tolman was unlicensed yet he was charging interests rates as high aa two hundred percent. He was sentenced to six months in prison.[146]

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[142]*Ibid* at p.56.
[143]*Ibid.*
[144]*Ibid* at p. 72.
[145]*Ibid* at p. 74.
[146] *Ibid* at p. 75.

The nature of moneylenders' business has undergone a lot of changes to the current payday lending and credit card lending. Today, a lot of Americans have a lot of their reservations when it comes to the moneylenders and a survey conducted proved that only sixteen percent of the total American population had trust for the industry.[147]

2.3.3 Asia

The existence of moneylenders was not limited to Europe and America. They carried on business and evolved in other parts of the world as well, including Asia.

In Burma (now Myanmar), moneylending has existed for just as long as in other parts of the world. There existed various moneylenders including *chattiers* and others and the interest rates charged on loans given largely varied. Large interest rates were charged and the lenders claimed interests of 150 to 220 percent per year. In rare cases, it could go up to between 600 and 1500 per year. There were consequences to not paying the interest rates and in some cases usurious moneylenders bonded the individuals that did not give back the money with the interest rates charged to unpaid labour while others took away their land.[148]

In 1945, laws were created with the intention of regulating the moneylenders. After the creation of the Money Lenders Act, 194,5 all the moneylenders were expected to be registered. The interest rates on secured loans from then on were not supposed to exceed 12 percent per annum and 18 percent per annum on unsecured loans. the Act also provided that the total amount of interest charged throughout the entire time until the loan payment was completed should not exceed one hundred percent of the loan and that the money lenders had no right to intimidate a debtor or even sexually harass them for the sole purpose of collecting the loan. Breaching these

[147] *Ibid* at p. 209.
[148] Turnell, S. (2009). *Fiery Dragons: Banks, Money lenders and microfinance in Burma*. Nordic Institute of Asian Studies Monograph Series Press.

laws as stated would attract a jail term or even cause the money lender to be instantly de-registered.[149]

The existence of this Act was important since it protected the debtors as opposed to before where the money lenders dealt with them however they wanted to no matter how harsh it was. Moneylenders started operating within the confines of the law. Some of them started using Ward Administrators to accompany them to collect unpaid debts.[150]

2.3.4 Africa

Pre-colonial Africans had their own form of financing procedures. Like in many other non-African societies, practised some form of wealth preservation which in this case was through purchasing of precious metals, animals, and/or land. Moneylending manifested itself when those who had surplus resources served a sources of business finance for others. They became moneylenders, and just as was the trend elsewhere, they charged excessive interests on these loans.[151]

The practice was grounded on trust and as such was mostly done among people from the same locality. Trust was also an important issue in this practice as the agreements were verbal. There are instances where borrowers brought in relatives or friends to serve as guarantors. Land or other property was also used as collateral. The reasons for borrowing included; business investment, funeral expenses, building and other social reasons.[152]

At the onset of colonialism in Africa, the moneylending practice as well as the entire financial and economic system was disrupted.[153] The British, for instance, brought in their system to their

[149] The Money Lenders Act,1945.
[150]Myanmar/Burma-Poverty, loan debts, force many young women into sex work, but others find alternatives.
[151] Senyo B-S. K. Adjibolosoo (1999) *Rethinking Development Theory and Policy: A Human Factor Critique,* Greenwood Publishing Group, p.125.
[152]*Ibid.*
[153]*Ibid* at p.126.

colonies. They went as far as duplicating their laws in the colonies. This explains why the Money Lenders Acts that were enacted in their various colonies such as Kenya, Uganda, and Nigeria were basically a replication of the UK Money Lenders Act of 1927.

Kenya repealed its moneylending law in 1984 without enacting any replacement to regulate moneylenders. Nigeria still uses the colonial Money Lenders Act with a few amendments. Uganda is the only country that has enacted a new moneylenders law recently. This law repealed the colonial Money Lenders Act. It not only covers moneylenders but Tier Four Microfinance Institutions as well.[154] The Act has reformed moneylending in Uganda.

2.4 CONCLUSION

From the foregoing, it is evident that moneylenders, or as were then popularly referred to, usurers, have been around for as long as history itself. It is also clear that the moneylending phenomenon has existed in all parts of the world – from Europe, Asia, Africa, and the Americas. They mostly served high-risk borrowers who could not meet the credit conditions of conventional banks.

The characteristics of moneylenders all around the world and over time have a lot of similarities. Brutal enforcement measures, exorbitant interest rates, as well as exploitative loan terms characterised moneylending business all over the world, traditionally and presently. It is also noteworthy that moneylending business was mostly between people who knew each other.

The society's perception of moneylenders was also similar around the world. They were frowned upon, moreso in ancient times than in the later periods. Moneylenders were clearly a major societal concern as evidenced by the numerous prominent philosophers, theologians, economists, and many other scholars that attempted to address the issue. These include; Aristotle, Thomas

[154] The Tier 4 Microfinance Institutions and Money Lenders Act,2016.

Aquinas, and St. Augustine. They condemned usury and perceived it as a monster, stealing, a sin against justice, and equated it to heinous crimes such as murder. Additionally, the early church disapproved it for being a sin and morally wrong.

Towards the end of the 17th century, the perception of moneylenders began to change. The secular, theological, and economic world all saw it as a necessary evil and eventually endorsed the practice. Protestant reformers such as John Calvin, John Locke, and Martin Luther contended that usury was not automatically a sin. They saw the practice as unpreventable and proposed protection of the poor and capping of interest rates. This was followed by several jurisdictions enacting laws to regulate and monitor the business of moneylenders. This happened in the UK, the USA, a number of states in Asia as well as Africa including Kenya through the enactment of the Money-lenders Act.[155]

[155] Chapter 528 of the Laws of Kenya.

CHAPTER THREE

LEGAL AND REGULATORY FRAMEWORK ON MONEYLENDING

3.1 INTRODUCTION

The legal and regulatory framework on moneylenders in Kenya is almost non-existent. This is mainly because the principal legislation[156] that regulated their conduct and business was repealed in 1984 and no other law was put in place to replace it. This step towards deregulation led to an upsurge of moneylenders who have since then continued to operate and even thrived in the shadows of the law. The industry is now a part of the informal financial sector.

3.2 DOMESTIC LAWS PRE-MOVABLE COLLATERAL REGIME

3.2.1 The Constitution of Kenya, 2010

The Constitution provides for the social and economic rights that every individual is entitled to.[157] Further, and more importantly, it lays great importance on the protection of consumers. Consumers have a right to goods and services of reasonable quality and the information necessary to enjoy the full benefits of the goods and services. It emphasises on the protection of the economic rights of consumers as well as compensation for any loss or injury that arises from defective goods and/or services. This applies to goods and services offered by both public and private entities.[158]

It follows therefore that the consumers of the credit services offered by moneylenders have a Constitutional right to protection by the state. Despite this entitlement, the state has failed to provide for any legal regime to effect the same.

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[156] Money-Lenders Act, Chapter 528 of the Laws of Kenya (Repealed).
[157] Article 43 of the Constitution of Kenya, 2010.
[158] *Ibid* at Article 46.

3.2.2 Debts (Summary Recovery) Act,1913[159]

This law was enacted with the main aim of making provision for the summary recovery of civil debts. This is a very old law enacted in 1913. It has since then received a few amendments over the years.

According to this Act, "any sum declared by any Act, whether past or future, to be a civil debt recoverable summarily may be recovered in the court of any magistrate of competent jurisdiction…"[160] The wording of the Act indicates that all civil debts are not necessarily recoverable through presentation of a claim before a court of competent jurisdiction. It is simply one of the ways.

There is no legislation that declares sums owed to moneylenders as civil debts recoverable summarily. This therefore gives moneylenders the lee way of only going to court when it is convenient for them. Otherwise, the law doesn't seem to prohibit any other forms of debt recovery including forcefully seizing a borrower's assets.

3.2.3 Law of Contracts Act[161]

Moneylenders have severally relied on this Act in the recovery of their debts. This is premised on the basic elements of a contract – offer, acceptance, intention and consideration. The Law of Contracts Act basically brings into force the Common Law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom.[162] According to these principles, parties with legal capacity to contract may enter into an agreement, which agreement shall be legally binding to them, and enforceable in a court of law, or in whatever other way provided under any written law.

[159] Chapter 42 of the Laws of Kenya
[160] *Ibid* at section 2.
[161] Chapter 23 of the Laws of Kenya.
[162] Section 2 (1) of the Law of Contracts Act.

In this case, a moneylender offers to lend a borrower money at an interest, and the borrower accepts the offer and undertakes to refund the lent sum plus the interest within the prescribed timeframe. As long as the two parties have the capacity to contract, then such an agreement is binding and enforceable. A number of moneylenders have used this avenue in court and succeeded in debt recovery.[163]

3.2.4 The Money-lenders Ordinance (Act), No. 45 of 1932 (Repealed)[164]

This was by far the most comprehensive and elaborate law on moneylenders in Kenya. The Ordinance was assented to by the Governor[165] of the Colony of Kenya at the time and was similar to the Moneylenders Acts of other British colonies such as Uganda and Nigeria. It was repealed in 1984 by the Statute Law (Repeals and Miscellaneous Amendments) Act of 1984. No other law was enacted to replace it. Neither was any other law enacted to regulate the activities of moneylenders. As such, moneylenders have since operated on the fringes of the law.

The Ordinance defined a moneylender as including every person whose business is that of moneylending or who advertises or announces himself out in a way as carrying out that business. It did exclude pawnbrokers, banks and insurance companies from the definition of moneylenders.[166] The Governor was mandated with the making of rules to help in implementation of the Ordinance. He had the power to delegate his functions to officers appointed by him.[167]

In a bid to protect borrowers from exploitation, the law allowed the court to re-open moneylending transactions in the event the said court felt that the interest charged was excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other

[163] Pius Lelei vs Paul Kosgei [2014] eKLR.
[164] Chapter 528 of the Laws of Kenya.
[165] J. Byrne.
[166] Section 2 of the Money-Lenders Ordinance of 1932.
[167] *Ibid* at section 6 (5).

charges, are excessive, thereby making the transaction harsh and unconscionable, or in any other way inequitable. In such a case, the court could stop the moneylender from demanding from the borrower such an excessive amount, or order a refund thereof, in the event the sum is already paid.[168]

The Ordinance further prohibited the charging of compound interest or arbitrary increase of interest in case of default.[169] Interests rates of above forty-eight percent per annum were considered excessive and such transaction termed harsh and unconscionable. This however did not limit a court's discretion to term any transaction with an interest rate below forty-eight percent per annum as harsh and unconscionable.[170]

Additionally, it did criminalise misrepresentation or making of false and misleading statements by moneylenders or its officers (in the case of a corporation) with the aim of luring a potential borrower into borrowing or agreeing to terms of the loan. This offence was punishable by either a maximum of two years' imprisonment or a fine not exceeding five hundred pounds.[171]

The Ordinance required all moneylenders, whether carrying on business as individuals, partners in a firm, or as corporations to take out a money-lender's license every year. The licenses were only issued upon payment of a prescribed fee. It's noteworthy that these licenses were to be taken in respect of each and every address at which the moneylender carried on their business.[172]Moneylenders were required to obtain certificates from magistrate courts within their districts authorising the grant of such licenses.[173]

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[168]*Ibid* at section 3 (1).
[169]*Ibid* at section 11.
[170]*Ibid* at section 14.
[171]*Ibid* at section 4.
[172]*Ibid* at section 5.
[173]*Ibid* at section 6.

Engaging in moneylending business without a valid license, taking out a money-lender's license in any name other than one’s true name, carrying on business in an unauthorised name, or at un authorised address, were all offences that resulted in a penalty of one hundred pounds each.[174]

Under the Ordinance, a moneylender was required to publish the authorised moneylender’s name in a manner that was equally conspicuous to any other business name the person carried on. Failure to adhere to this was an offence punishable by a fine not exceeding twenty pounds.[175]

Moneylenders were forbidden from sending to any person, except in response to the person’s request, any form of advertising, including publication in print media, of their name or address, or invitation: —[176]

a) to borrow money from a money-lender,
b) to enter into any transaction involving the borrowing of money from a money-lender, or
c) to apply to any place with a view to obtaining information or advice as to borrowing any money from a money-lender.

Employment or use of marketing and advertising agents or canvassers for the abovementioned purpose was also prohibited.[177]

Contravention of the above provisions was punishable, upon conviction, to either a prison term, fine, or both. In addition, a transaction done as a result of such contravention was considered illegal.

For a contract under the Ordinance to be enforceable, a note or memorandum in writing of the contract be made must have been personally signed the borrower and a copy thereof delivered to the borrower within seven days of making the contract. The signing of the memorandum and

[174]*Ibid* at section 5 (2).
[175]*Ibid* at section 8.
[176]*Ibid* at section 9.
[177]*Ibid* at section 8 (3).

issuance of the security to the moneylender were to happen before the making and execution of the loan contract.[178]

It is important to note that all repeat offenders under this law were liable to an additional penalty on top of what is prescribed for the particular offence. This was an important deterrent measure.

Other provisions of this law included: -

a) limitation of time for institution of debt recovery proceedings to twelve months after the cause of action arose, and
b) provisions in the event of bankruptcy of a moneylender.

Evidently, the Money-lenders Act was a very comprehensive law that ensured order in the industry but most importantly, protected the interests of the weaker party in the transactions, the borrowers. Its repeal was clearly many steps backwards.

The Money-lenders Act, 1932 was repealed by the Statute Law (Repeals and Miscellaneous Amendments) Act[179]leaving moneylenders unregulated[180] and to operate in the shadows of the law. This repeal resulted in an upsurge of moneylending activities, and exploitation of the now unprotected borrowers. This trend has continued to date.

The repeal of the Act was necessitated by it being allegedly superfluous in light of the establishment of more banks and other financial institutions which provided for adequate financial intermediation in the economy.[181]

[178]*Ibid* at section 10.
[179] No. 12 of 1984.
[180]*Ibid* at section 3.
[181] The Statute Law (Repeals and Miscellaneous Amendments) Bill, 1984, Memorandum of Objects and Reasons, p.431.

It is noteworthy that the period between the late 1960s and early 1980s witnessed a significant growth in the number of banks in Kenya. These included; Cooperative Bank of Kenya (1968), National Bank of Kenya (1968), Kenya Commercial Bank (1971), Stanbic Bank (1971), Barclays Bank International Limited (1971), and National Bank of Chicago and City Bank of New York (1974). This prevalence of banks led to the notion that moneylenders had been rendered obsolete and their services were no longer in demand. Their regulation was therefore unnecessary. It was further argued that the banks and related businesses such as companies, pawnbroking, and chattel transfers were adequately regulated and the Money Lenders Act was viewed as an unnecessary statute. The state therefore shifted its focus to comprehensively reforming the formal financial sector, addressing both institutional and policy reforms aimed at strengthening the regulatory powers of the central bank and liberalising interest rates.[182]

Evidently, moneylenders were not put out of business with the prevalence of banks. In any case, their business thrived upon the repeal of the Act.

3.2.5 The Pawn Brokers Act (Repealed)[183]

This law was enacted in 1962 to regulate the business of pawn broking. The Act defined a pawn broker to include every person who carries on the business of taking goods and chattels in pawn. It is any person who keeps a shop for the purchase or sale of goods or chattels or for taking goods by way of security for money advanced thereon and who purchases or receives or takes in goods or chattel and pays or advances or lends any sum of money not exceeding three hundred shillings with the express or implied agreement that the goods may be repurchased or redeemed

[182] Ngugi, R.W. and J.W. Kabubo (1998) "Financial Sector Reforms and Interest Rate Liberalization: The Kenya Experience." *African Economic Research Consortium* (*AERC) Research Paper 72*, Nairobi.
[183] Chapter 529 of the Laws of Kenya.

under any terms.[184] This law was mainly intended to enable owners of low cost items to obtain credit or advances from pawn brokers using the goods as collateral.

The Act made provisions in relation to licensing and supervision of pawn brokers. It required pawnbrokers to take out an annual license from the District Commissioner, as they were then called, of the district in which they carried on business. The Act made it an offence for one to operate without a license. A license ceases to have effect once the pawnbroker is convicted of fraud in his business or knowingly receiving stolen goods. A pawnbroker applying for a first license was to give notice in writing at least 21 days before such application to the officer in charge of the police in the district in which they intend to carry on business.[185] Further, the Act required pawnbrokers to keep books and documents as prescribed. They were also mandated to exhibit their names with the word pawnbroker and allow the police to enter and inspect their premises.[186]

The Act made provision for the pawners to redeem their pledged goods from the pawnbroker within a prescribed timeline after which the goods were considered the pawnbroker's property.[187]This is intended to protect the rights of the owners of the pledged goods. Further, pawners who have lost their pawn tickets were allowed to still access their goods by obtaining a court order declaring them as owners.[188]

The Act established a number of sanctions for non-adherence to the provisions thereof. For instance, knowingly pawning of goods belonging to another person and without their authority is an offence. Accepting articles in pawn by pawnbrokers from persons under the age of fourteen years or intoxicated persons, or employing any person under the age of fourteen years is also an

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[184]*Ibid* at sections 2 and 3.
[185]*Ibid* at sections 31-33.
[186]*Ibid* at sections 8 and 9.
[187]*Ibid* at section 21.
[188]*Ibid* at section 25.

offence. It was also an offence for a pawnbroker to wilfully refuse or neglect without a justifiable reason to deliver a pledge to a person entitled to the delivery. Taking in pawn, linen, apparel or unfinished goods and materials was prohibited by the Act. Production of forged pawn tickets is also an offence punishable by custodial sanctions.[189]Further, pawn brokers were liable for destruction of the goods belonging to pawners while in their custody.[190]

The business of pawn broking is quite similar to moneylending. The major distinction being that pawn brokers are allowed to acquire ownership of pledged goods and may put them up for sale. Further, pawn brokers are only allowed to take profits on the sale of the pawned goods as opposed to charging interest on the money advanced. The profits or charges taken were to be at a rate not exceeding twelve cents for every four Kenya Shillings.[191]

This law was repealed in 2017 by the Movable Property Security Rights Act, 2017. This development yet left another group of business people closely related to moneylenders unregulated. As much as provisions under this law relating to the rights of the borrower and the lender may have been taken care of under the Movable Property Security Rights Act, there are fundamental provisions such as those relating to licensing and supervision, of this business, as well as the relevant sanctions that have been left out following the repeal.

It is noteworthy that the Act was archaic and outdated. For instance, the maximum amount allowed to be lent under it was three hundred Kenya Shillings. This is hardly relevant in the twenty-first century. Nevertheless, a reform and update of the law would have sufficed.

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[189]*Ibid* at section 37.
[190]*Ibid* at sections 22-30.
[191]*Ibid* at section 11.

3.2.6 The Banking Act[192]

This is the main statute that provides for the establishment, operation, and regulation of banking business in Kenya. This law provides a very comprehensive legal regime for banks. It has articulate provisions on licensing,[193] the protection of borrowers such as interest rate caps,[194] protection of depositors' assets,[195] and prohibition of changing of terms without borrower's consent. It ensures stability of these financial institutions[196] through the elaborate accountability frameworks, corporate structure,[197] and financial reporting procedures,[198] among many other provisions. It has provisions regarding fighting criminal activities such as money laundering, terrorism financing, and corruption among many others.[199] Essentially, it has done quite well in keeping up with the international best practices as recommended by institutions such as the Financial Action Task Force (FATF), and the Basel Committee on Banking Supervision (BCBS).

Further, this Act prohibits any unauthorised entity from the use the word "finance" or any other word indicating the transaction of financial business, in whatever language, in the name, description or title under which it transacts business in Kenya or make any representation whatsoever that it transacts financial business.[200] This could have been interpreted to mean that moneylending business is unlawful except this Act defines financial business to include; the accepting of money on deposit from members of the public repayable on demand or expiry certain period, and the lending or investment of such money.[201] Moneylending business does not, whatsoever involve the accepting of deposits and the investment or lending of such deposits.

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[192] Chapter 488 of the Laws of Kenya.
[193] *Ibid* at sections 3-6.
[194] *Ibid* at section 33B.
[195] The Kenya Deposit Insurance Act, No. 10 of 2012.
[196] Sections 17-20 of the Banking Act, Chapter 488 of the Laws of Kenya.
[197] *Ibid* at section 9A.
[198] *Ibid* at sections 21-26.
[199] Part VI of the Banking Act.
[200] Section 3 (1) (c) of the Banking Act.
[201] *Ibid* at Section 2.

This therefore means that moneylenders do not carry on financial business as envisaged under the Banking Act.

It is noteworthy that this same comprehensive regime is provided for microfinance institutions under the Microfinance Act, 2006.

The question arising from this scenario is how and why moneylenders were left out of regulation. The fact that Kenya has been able to establish and continually develop the legal and regulatory regime for banks and other regulated institutions is proof that the same could be done for moneylenders. Regulation would be based on the same principles.

3.2.7 The Central Bank of Kenya Act[202]

This law establishes the Central Bank of Kenya (CBK). The CBK has the principal object of formulation and implementation of monetary policy directed to achieving and maintaining stability in the general level of prices. The bank is to foster the liquidity, solvency and proper functioning of a stable market-based financial system, as well as support the economic policy of the Government, including its objectives for growth and employment.[203]

To achieve the above listed objectives, the CBK needs to wholesomely monitor and ensure development of the entire financial sector. It is however apparent that the informal financial sector, including the moneylending industry, is negligently left out. The amounts of money moved by moneylenders and the informal financial sector in general are substantial and may very much impact the economy. Moreso, they involve members of the public who have constitutional entitlement to protection from predatory trade practices.

[202] Chapter 491 of the Laws of Kenya.
[203]*Ibid* at section 4.

3.2.8 The Competition Act[204]

This law provides for the safeguarding of competition in the national economy, the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and, in this case, protection of consumers from unfair and misleading market conduct.[205]

According to the Act, a consumer is a person who purchases or offers to purchase goods or services otherwise than for the purpose of resale. Services include, among many others, the lending of money.[206] This law is applicable to all persons with no exception. It is therefore clear under this law that consumers are to be protected from moneylenders. Their regulation is one way this could have been achieved.

The Act further makes it an offence for a trader to engage in conduct that is, in all the circumstances, unconscionable. This conduct is supposed to be determined based on facts on a case to case basis.[207] Failure to have a regulatory framework that sets standards for moneylenders makes it almost impossible for the Competition Authority to establish unconscionable conduct.

3.2.9 The Consumer Protection Act[208]

The Act's main objective was to provide for the protection of the consumer, to prevent unfair trade practices in consumer transactions and connected and incidental matters.[209] It does not define a moneylender. However, it talks about a 'lender' as being "…a supplier who is or may become a party to a credit agreement and who extends or may extend credit or lends or may lend

[204] No. 12 of 2010.
[205] *Ibid* at section 3.
[206] *Ibid* at section 2.
[207] *Ibid* at sections 56 and 57.
[208] No. 46 of 2012.
[209] *Ibid* at section 3 (4).

money to the borrower and includes a credit card issuer."[210] This definition inferably includes moneylenders.

The Act provides for protection of consumers in relation to credit agreements. This include all agreements that require repayment in instalments, involve interest and other non-interest charges, are secured, and may be assigned in the ordinary course of business. It protects consumers on matters relating to disclosures and imposition of default charges among other issues.[211] This provision would have been key in protection of consumers against the exploitative trading conditions of moneylenders, particularly the exorbitant interest rates and enforcement procedures. Unfortunately, the business of moneylenders is not defined. They are at liberty of adjusting their credit agreements to ensure they are excluded from this provision. As such, it may be difficult to determine whether or not they fall under this category of traders against whom consumers should be protected.

3.2.10 The Companies Act[212] and the Companies (General) Regulations, 2015

The Companies Act indicates that the Regulations may provide for circumstances under which the registration of a company by a name that would otherwise be prohibited, be permitted with a specified consent.[213]

The Companies (General) Regulations, 2015, makes provision relating to company names that indicate connection with public authorities.[214] Essentially, if the Registrar is the opinion that a proposed name suggests connection with a public authority, then they shall require that the Authority's view on the issue be sought by the applicant.[215] The public authority in question is to

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[210]*Ibid* at section 2.
[211]*Ibid* at section 54.
[212] No. 17 of 2015.
[213]*Ibid* at section 57 (2) (a) (ii).
[214] Regulation 8 of the Companies (General) Regulations, 2015.
[215]*Ibid* as sub-clause (1).

indicate whether it concurs with the Registrar's opinion, and if the answer is in the affirmative, whether it does have any objection to its approval for registration.[216]

Company names that have words such as insurance, communication, pension, capital, credit, and bank among others are examples of what may be deemed to be connected to the Insurance Regulatory Authority, the Communication Authority, the Retirement Benefits Authority, and the Central Bank of Kenya, respectively. It is therefore inferable that the existing moneylending companies with names that suggest connection with the Central Bank of Kenya such as Platinum Credit Limited and Izwe Loans (K) Limited had their application for registration approved because the CBK did not object to it.

3.3 THE MOVABLE PROPERTY SECURITY RIGHTS ACT[217]

3.3.1 Background

This law was enacted following a study conducted in 2009 by Financial Sector Deepening Kenya (FSD-K). The study showed that there were over 20 statutes that were applicable in respect of collateral. Compliance to all these fragmented laws resulted in increased costs, time consumption, as well as risks pertaining to realisation of collateral for financial institutions. On the other hand, a World Bank survey on the impact of reforms in the market indicated increased access to credit, lower interest rates, longer maturities and increased ability to finance working capital particularly for micro, small and medium enterprises.[218] These findings laid the

[216] *Ibid* as sub-clause (2).
[217] No. 13 of 2017.
[218] Inessa Love, María Soledad, Martínez Pería & Sandeep Singh, (2013) "Collateral Registries for Movable Assets, Does their Introduction Spur Firms' Access to Bank Finance?" *Policy Research Working Paper 6477, The World Bank.*

foundation for the development of a consolidated and comprehensive movable collateral regime in Kenya.[219]

As a result, in 2017, the Government of Kenya overhauled the legal framework governing movable collateral through the enactment of the Movable Property and Security Rights Act, 2017, the associated Regulations, and the creation and launch of an electronic Collateral Registry. The new legal framework was to be implemented by the Business Registration Service (BRS) under the Office of the Attorney General and Department of Justice.[220]

The reforms were aimed at creating an efficient, effective and robust framework for borrowers, particularly small and micro enterprises, to use movable property as collateral for credit that would be obtained from a vast range of lenders in an efficient and effective manner. The ultimate goal was to contribute to the reduction of the cost of credit, spur the creation of innovative products and increase access to finance.[221]

This is the law that impliedly legitimised the business of moneylenders in Kenya. It reinforced their authority and gave them more and easier enforcement procedures.

3.3.2 Overview of the Act

The Act defines a secured creditor as a person that has a security right, and a transferee in an outright transfer of a receivable. A security agreement is defined as an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for the creation of a security right and an agreement that provides for the outright transfer of a receivable. A security right is a property right in a movable asset that is

[219] The National Treasury, Kenya, Final Report (2015) "Options for Reforming the Movable Collateral Framework and Creation of an Electronic Registry in Kenya" *Commissioned by the National Treasury through FSD Kenya with Participation of the World Bank and Registrar General, Office of the Attorney General and Department of Justice*.
[220] *Ibid.*
[221] *Ibid.*

created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation, and the right of the transferee in an outright transfer of a receivable.[222]

The Act includes non-regulated financial institutions, and credit service providers in its definition of a secured creditor. Additionally, it is applicable to every transaction that secures the payment or performance of an obligation. This is regardless of the form of the owner of the collateral.[223] This means that even individuals or other non-regulated entities, including moneylenders, may secure their credit services transactions and acquire priority rights thereof. This is further echoed in in the Regulations.[224]

Further, the viability of the security right is independent of the legitimacy, nature or enforceability of the security agreement.[225] This means that regardless of the moneylenders' security agreements exhibiting conscionable terms contrary to consumer protection provisions, their security rights would be valid, acquire third-party effectiveness,[226]priority rights,[227] and enforceable once registered.

The objects of this statute include; promotion of certainty and consistency in secured financing relating to movable property, enhancement of access to credit, and establishment of the office of the Registrar and the e-registry.[228] In an attempt to ensure access to credit, this statute overlooked the plight of borrowers. It focused on easing and enforcement procedures for credit providers as well as protecting their interests.

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[222]*Ibid* at section 2.
[223]*Ibid* at section 4 (1).
[224] Movable Property Security Rights (General) Regulations, 2017
[225] Section 6 (4) of the Movable Property Security Rights Act, 2017.
[226]*Ibid* at section 15.
[227]*Ibid* Part V.
[228]*Ibid* at section 3.

The Act goes on to provide for enforcement procedures in the event of default by a grantor. A secured creditor may exercise their enforcement rights under this Act, any other law, or under the security agreement.[229] A secured creditor may exercise their rights either by application to court or without applying to court but in accordance to the provisions of the Act.[230] This law vests upon secured creditors vast remedial options including institution of legal suits, appointment of a receiver, lease the movable asset, taking possession of the movable asset, and sale of the movable asset.[231] Creditors are also protected in case the secured collateral is rendered insufficient to satisfy the secured obligation.[232]

In addition, as stated above, they may exercise their enforcement rights in accordance with the provisions of the security agreement. This is noting that the rights of a secured creditor are not limited by the viability, or nature of the security agreement, or whether it satisfies the requirements of any other written law.

It is evident that the interests of creditors, including moneylenders, are overly protected under this law. The act anticipates any form of injury that the creditors might suffer and ensures it is taken care of. All this is done at the expense of the borrowers. For instance, a lender is allowed to take possession of a grantor's assets even though the grantor had not consented in the collateral agreement to the possession thereof. This is as long as they do not object to such possession.[233] Further, moneylenders are given the liberty to dispose of the collateral whatever manner, place and time they choose and like. These include other aspects of the sale or even disposition such as leasing or licensing.[234] Seeing as most borrowers who procure credit services from moneylenders

[229]*Ibid* at section 65.
[230]*Ibid* at section 66.
[231]*Ibid* section 67.
[232]*Ibid* section 68 (1) (b).
[233]*Ibid* section 71 (1) (b).
[234]*Ibid* section 72.

are high risk and considerably desperate, it is highly unlikely that they would object to any demands of the moneylender.

Enforcement of security rights by the secured creditor does raise considerable fairness issues. Despite requiring that the notice of deposition meet certain requirements such as giving a timeline of at least five working days among others[235] the Act tends to give primacy to the freedom of the contract without paying due regard to protecting vulnerable persons who may be exploited due to unequal bargaining power when formulating the contract. There is need for reform to ensure veritable safeguards to protect the public especially where power disparities that may be exploited to defraud innocent parties.

3.4 THE MICRO FINANCE BILL, 2019[236]

This Bill is intended to review the microfinance business legal regime in Kenya by repealing the Microfinance Act, 2006.[237] This is an important step towards the supervision and taming of moneylending business.

The Bill defines a non-deposit-taking microfinance business as a business, other than microfinance bank business.[238] This definition is wide enough to include moneylenders. But again, ambiguous enough that it may be construed to include other non-financial services business. The proposed law is intended to apply to both deposit taking microfinance business as well as non-deposit taking microfinance business.[239] It is noteworthy, however, that these non-deposit taking microfinance business will still not be regulated by the Central Bank of Kenya.

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[235]*Ibid* section 73.
[236]The Microfinance Bill, 2019 was published by the Central Bank of Kenya in May, 2019 for public participation. It is available at www.centralbank.go.ke/2019/05/20/invitation-for-comments-on-the-draft-microfinance-bill-2019/ Accessed on 29th May, 2019.
[237] Section 64 (1) of the Microfinance Bill, 2019.
[238]*Ibid* at section 2.
[239]*Ibid* at section 3.

According to this Bill, the Cabinet Secretary may make regulations specifying non-deposit taking business, as well as a prescription of the requirements for the conduct of such business. Further, it prohibits non-deposit taking businesses from taking any form of deposit or cash collateral from any person. Failure to adhere to this prohibition is an offence punishable, upon conviction, by imprisonment, a fine, or both.[240]

There are no further provisions regarding non-deposit taking microfinance business in the Bill. Additionally, the Bill does not expressly talk about moneylenders. Their inclusion in the definition of non-deposit taking microfinance business can only be inferred. Since the Bill leaves it to the Cabinet Secretary to, through regulations, narrow down this definition, there is no guarantee that moneylenders will be included. Essentially, the Bill might still leave moneylenders unregulated.

It does not even make the development of regulations regarding the same mandatory. Which means they may never be developed at all. Further, regulations are prone to change from time to time with the discretion of the Cabinet Secretary. They also may not take into consideration the interests of the public as they do not go through the same scrutiny as that of developing a legislation. The idea of leaving moneylenders on the side-lines of the law continues to demonstrate the lack of interest by the government to protect the victims of their brutish business conduct.

3.5 INTERNATIONAL INSTRUMENTS

It is noteworthy that financial regulation is jurisdictional. There are no international laws on financial regulation. Regulation of moneylenders is not exempted from this. However, there are some aspects of financial regulation that have been incorporated into international laws for

[240] *Ibid* at section 3 (2) – (4).

purposes of curbing criminal activities such as money laundering, corruption, and terrorism financing amongst others. Additionally, there are international associations that give guidelines to participant countries on how to better their systems with the changing dynamics.

The Palermo Convention[241]provides the requisite legal framework for international co-operation in combating among other transnational organised crimes,[242] money laundering,[243] terrorism, and corruption.[244] It mandates each state party to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and other bodies where appropriate in a bid to deter and detect all forms of money laundering. They are also to take measures to ensure these financial institutions take part in the fight against money laundering including; customer identification, record keeping, reporting of suspicious transactions, as well as reporting of cross-border transfers of substantial quantities of cash and appropriate negotiable instruments.[245]

Corruption and terrorism, human trafficking, fraud, robbery, prostitution, illegal gambling, arms trafficking, and bribery are the main sources of illegal proceeds. Therefore, regulations aimed at preventing money laundering, by extension, prevents these criminal activities. Criminals are likely to use moneylenders to launder their dirty money because they are unregulated making the chances of being traced highly unlikely.

The Terrorist Financing Convention[246] aims to prevent and counteract the financing of terrorists and terrorist organisations. It recognises that such financing may be direct or indirect through complex and disguised transactions. It requires each State Party to take appropriate measures for

[241] The International Convention against Transnational Organised Crime, 2000.
[242]*Ibid* at Article 1.
[243]*Ibid* at Article 6.
[244]*Ibid* at Article 8.
[245]*Ibid* at Article 7.
[246] The International Convention for the Suppression of the Financing of Terrorism, 1999.

the identification, detection and freezing or seizure of funds used or to be used in commission of offences, or the proceeds thereof.[247]

Regulation of the entire financial sector, including moneylenders, is paramount in ensuring the objectives of the Terrorist Financing Convention are promoted by Kenya.

The Financial Action Task Force (FATF) Recommendations on the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation are important in the regulation of financial services. The FATF is an independent intergovernmental organisation that was established mainly to develop and promote policies to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction, and other related threats to the integrity of the international financial system.[248] It sets an international standard, which countries should implement through measures adapted to their particular circumstances as different jurisdictions have diverse legal, administrative and operational frameworks, and different financial systems.[249]

It therefore follows that to attain the standards set by the FATF, Kenya has to ensure that all the players in the financial sector are monitored and regulated. This includes moneylenders.

Kenya has made significant steps towards the implementation of the FATF Recommendations through the Proceeds of Crime and Anti-Money Laundering Act.[250] However, this is only as far as banks,[251] insurance institutions,[252] and the capital markets[253] are concerned. The entire informal sector including moneylenders are left out.

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[247] *Ibid* at Article 8.
[248] FATF (2012-2019), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation,* FATF, Paris, France. Accessed at www.fatf-gafi.org/recommendations.html on 8th July, 2019, p.6.
[249] *Ibid.*
[250] No. 9 of 2009.
[251] Guidelines on Anti-Money Laundering and Combating the Financing of Terrorism CBK/PG/08.

3.6 JUDICIAL JURISPRUDENCE

3.6.1 Josephine Mwikali Kikenye vs Omar Abdalla Kombo & Another[254]

This Appeal from the Environment and Land Court (ELC) to the Court of Appeal at Mombasa, involved a Defendant (the Appellant herein) who had fallen on hard financial times and therefore sought help from the 1st Respondent (a *shylock*) who willingly gave her a loan of Kshs. 400,000/=. She deposited her title document for her rental houses as a collateral for the loan.

The parties' main contention was on the terms of the agreement. The Appellant claimed that the loan was to be repaid within a period of 6 months and a default would attract a penalty of Kshs. 75,000/=. On the other hand, the 1st Respondent claimed that save for the principal amount, the Appellant ought to have paid Kshs. 75,000/= for a period of four months which was meant to be the interest for the loan.

The Appellant averred that she did pay the principal amount and conceded to owing a further Kshs. 75,000/= to the lender on grounds that her last instalment was one month late.

Later on when her husband passed on, she approached the 1st Respondent once more for a loan of Kshs. 350,000/= to be used for repairs in her rental houses. The two agreed that the loan together with the penalty this time would lead to a total of Kshs. 425,000/= and would be paid back using the rental income of the aforementioned premises within one year.

Upon full settlement of the loan amount, she instructed her caretaker to stop remittance but the 1st Respondent contested this action and refused to return the title document of the property to the Appellant. The Appellant later found out that the property's ownership had been transferred

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[252] Guidelines to the Insurance Industry on Implementation of the Proceeds of Crime and Anti-Money Laundering Act and Prevention of Terrorism Act, 2016.
[253] Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets, 2015 (CMA Guidelines).
[254] [2018] eKLR.

and the name listed for its ownership was that of the lender (1st Respondent). Her attempts to institute criminal proceedings against the Respondent on grounds that her signature was forged failed as the Attorney General's office directed that the file be closed because investigations had indicated that the signature on the transfer document was indeed hers.

She nevertheless managed to have the title re-transferred back to her name upon which the Respondent instituted a case at the Environment and Land Court to have the same nullified and have the title back in his name. The moneylender (1st Respondent) claimed that the Appellant had transferred the property willingly as payment for the money advanced which had accrued to 1.1 million shillings. On the other hand, the Appellant contended that at the time of the agreement, she was unable to read and therefore trusted the Respondent to read out for her the contents of the Agreement. Whereas she believed she was signing a loan agreement, she had indeed been duped into signing a transfer document.

The trial court (ELC) found in favour of the 1st Respondent, resulting in this Appeal.

The Court of Appeal allowed with costs thereby setting aside the trial court's judgment in its entirety and substituted thereof an order dismissing the 1st Respondent's suit and allowing the Appellant's counter-claim. This was because she had fully repaid her loan and therefore the act of taking her premises was unfair. Further, the transfer was null as she had not executed it (*non est factum*).

3.6.2 Joel Njema Waruru and Nancy Wambui Njema v Robert Kibunja[255]

This matter, instituted at the Nakuru High Court, involved Plaintiffs who entered into a loan agreement with the Defendant for a sum of Kshs. 30,000/= with the suit property as security thereof. The agreement was duly executed by both parties. The loan was to be repaid with an

[255] [2013] eKLR.

interest at the rate of 18%, and at 25% in case of late repayment. Further, the Plaintiffs would forfeit the suit property if they completely failed to repay the principle sum or the interest thereon. They did default in resulting in the property being transferred to the Defendant. The Plaintiffs sought to have the transfer of the title to the Defendant declared fraudulent, null and void, and to have the title issued to the Defendant cancelled.

The court ruled that the Defendant had failed to demonstrated that there was a charge or mortgage as require under the Land Act to entitle him to transfer the suit property to himself. There was also no evidence that the procedure for the exercise of statutory power of sale was complied with. It was the opinion of the court that the Defendant lacked capacity to undertake the transaction in question. Further, the Honourable Judge stated that the repealing of the Money-lenders Act[256] in 1984 led to the end of *loan sharks* and *shylocks* and lending of money was therefore the preserve of licensed formal financial institutions.

3.6.3 John G. Kamuyu and Elizabeth Waithera Kamuyu v Safari M Park Motors[257]

In this Nairobi ELC matter, the Plaintiffs and Defendant entered into a loan agreement in which the Defendant lent the Plaintiff's Kshs, 305,000/=. The Plaintiffs gave the title to their property as security for the loan, which property was to be disposed in the event of default. The Plaintiffs failed to repay the loan leading to the Defendant transferring the title to the Plaintiffs land to itself.

The issues before the court was whether the said loan agreement between the Plaintiffs and Defendant was illegal, and whether the Defendant's transfer of the Plaintiffs' property to itself was fraudulent. The court held that since there was no requirement requiring money lenders to be licensed, the defendant (moneylender) was not operating illegally. Further, the court applied the

[256] Chapter 528 of the Laws of Kenya.
[257] [2013] eKLR.

in duplum rule as provided for under the Banking Act[258] and ruled that the interest charged by the Defendant was unconscionable as it was more than the original principal amount.

3.6.4 Pius Lelei vs Paul Kosgei[259]

This was an appeal from a Chief Magistrate's Court to the High Court in Eldoret. The Applicant/Appellant herein has been sued by the Respondent for recovery of the principal sum of Kshs. 100,000/= advanced to him by the Respondent in an agreement dated 1st January, 2011. The loan was to attract an interest at a monthly rate of ten percent. This was reduced into writing. He failed to enter appearance and file defence consequent wherefore an *ex-parte* judgment in default of appearance was entered against him for a sum of Kshs. 230,000/=. Execution proceedings began and the Applicant was committed to civil jail for failure to pay the decretal sum. Whilst serving jail, his relatives partially satisfied the decree by paying Kshs. 50,000/=.

Upon his release, he engaged an advocate who moved the court in an Application seeking to set aside the *ex-parte* judgment. At the same time, he filed a Preliminary Objection, seeking that the suit be struck out on account that the entire suit did not satisfy Section 3 of the Banking Act.

Both the application and the Preliminary Objection were dismissed, giving rise to this Appeal. Additionally, the Appellant filed an Application to have the Orders of the trial court stayed pending the hearing and determination of the Appeal thereof. The Appellant's major argument was that the Respondent's suit was illegal as he did not have a license to render financial services and that he should not be allowed to benefit from an illegality. The applicant termed the Respondent as a *shylock* to whom he'd lose his (the Applicant) if his Application was dismissed.

[258] Section 44A of the Banking Act, Chapter 488 of the Laws of Kenya.
[259] [2014] eKLR.

The Respondent, in his reply, deponed that the Applicant/Appellant could not apply to set aside a decree for which he had partly satisfied.[260]

The Court noted that from the onset, there was no indication that the Respondent lent the money to the Appellant whilst he purported to be a financial institution. The loan agreement was in clear terms – that it was between two individuals who sat and agreed on the lending terms which bound them.

The court further noted that the Applicant was not certain of what he sought from the court. He failed in his duty to avail the relevant information required for a just and fair determination of the matter. Neither the Order nor Application for the Order he sought to set aside were attached in his Application. His case was therefore dismissed with costs.

3.6.5 Kagiri Wamarwe vs Samuel Kibuu Maina & Another[261]

This was a Nyeri High Court matter in which the Plaintiff and the Defendants, being *shylocks,* got into a loan agreement of Kshs. 300,000/= in May of 2006. It was to be repaid within six months with a monthly interest at the rate of 128.3%, and the Plaintiff's land was to be the collateral. At the same time the Defendants caused the Plaintiff to execute a blank transfer form over the suit land as well as a blank application form seeking the Land Control Board's consent to transfer. He did this as he was in dire need of the loan. The lent money was the fully deposited by the Defendants in the Plaintiff's bank account. The Defendants then went ahead to fraudulently obtain the consent of Land Control Board to transfer and subsequently transferred the property to themselves. All this was done without the consent of the Plaintiff, and in collusion with the Land Registrar as well as the District Officer. It is noteworthy that the consent of the Land Control Board and lodging of the documents was done on the same day, being a day

[260] The Appellant had paid Kshs. 50,000/= in partial settlement of the debt which led to his release from civil jail.
[261] [2009] eKLR.

after the loan agreement was done. The day after that, a title was issued in respect of the transfer to the Defendants. There was no evidence that they ever paid stamp duty or even filled the relevant forms in that regard. Soon afterwards, the Defendants started harassing the Plaintiff's wife threatening her with eviction even though they had not defaulted in payment and the six months had not lapsed.

The Plaintiff admitted to not repaying the amount though he was willing to do so because he felt that it was unfair that the Defendants had fraudulently taken ownership of his land. It was held that the land rightfully belonged to the Plaintiff and not the Defendants, and that the loan amount of Kshs. 300,000/= was to be repaid at the interest rate of the court.

3.6.6 Analysis

From the foregoing, it is inferable that moneylending business is practice throughout the country. There is evidence of cases from Nairobi, Nakuru, Uasin Gishu, Mombasa, and Nyeri Counties, just to mention a few.

It is also evident that the use of land as collateral in such transactions is prominent. Most borrowers deposit the titles to their property to secure the amounts borrowed. A look into the various case laws reveals a peculiar practice of moneylenders coercing borrowers to execute Land Control Board consent to transfer Application Forms as a condition for the loan to be issued. This is then followed by a chain of fraudulent activities resulting in the properties being transferred to the lenders. This is regardless of whether or not the loan terms are defaulted or not. In fact, the transfers are effected immediately upon execution of the loan agreements indicating that that was the lenders' plan from the start.

Desperation of borrowers is evident in all the cases. This explains why they are willing to accept extremely unfair loan terms such as having to pay interests at exorbitant rates such as 128.3% per

month.[262] The borrowers also agree to executing blank application forms for Land Control Boards' consent to transfer the property, as well as leaving the original title documents of their properties in the custody of lenders. Some of the illiterate ones unable to read trust the moneylenders' word on the contents of the agreements and go ahead to sign them. They also do not get copies of the said agreements.[263]

It is noteworthy that the fraudulent transfer of borrowers' properties to lenders involve a number of law enforcement officers as well as other government officers and institutions, and even legal practitioners. These are all used by moneylenders at different stages to help them in their fraudulent enforcement procedures. Legal practitioners are used in the drafting of fake sale agreements. Land Control Board and Land Registry officers play part in the fraudulent transfer of borrowers' properties in favour of moneylenders. Law enforcers through which borrowers seek remedial action have not been very helpful as they are always quick to close such investigations.

The role of the court is also evident. Courts play a very central role in recognition of moneylenders, helping moneylenders enforce their loan contracts, and protection of borrowers. Moneylenders have on several occasions successfully used courts of law to enforce their rights under the loan agreements.[264]

The lack of a law regulating the conduct of moneylenders has resulted in extremely divergent decisions by courts. This has created great uncertainty and unpredictability of court decisions. This is not good for jurisprudence. Some courts view moneylending business as illegal while others see them as legitimate businesses.

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[262] Kagiri Wamarwe v Samuel Kibuu Maina & Another [2009] eKLR.
[263] Josephine Mwikali Kikenye v Omar Abdalla Kombo & another [2018] eKLR.
[264] Pius Lelei v Paul Kosgei [2014] eKLR.

Nevertheless, there are a number of courts, mostly in their appellate jurisdictions that have taken significant steps to protect borrowers. These have included the nullifying of fraudulent transfers of borrowers' properties to moneylenders, and in rare cases, reviewing of interest rates by declaring that the interest rates set by the moneylenders are unconscionable thereby lowering the same to court rates.

3.7 INSTITUTIONAL FRAMEWORK

3.7.1 The Central Bank of Kenya (CBK)

The Central Bank of Kenya is a financial sector regulator. It is established under the Constitution[265] with its mandate being; formulation and implementation of monetary policy,[266] liquidity and solvency management, licensing and supervision of banks[267] and deposit taking microfinance institutions,[268] formulation and implementation of foreign exchange policy, enforcement of banking regulations through sanctions, and issuance of guidelines on proper operations by regulated institutions. The rationale for its mandate is grounded on the need to maintain macroeconomic stability, financial sector stability, as well as consumer protection.

It is evident that moneylending business is thriving throughout the country. However, it is unfortunate that the business is not regulated or supervised by the Central Bank of Kenya, or any other regulator for that matter. This is despite the fact that the business possesses aspects that technically should be regulated such as consumer protection, susceptibility to money laundering activities, and financial sector and macroeconomic stability issues.

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[265]Article 231 (1) of the Constitution, 2010.
[266] Section 4 of the CBK Act, Cap. 491.
[267] Section 3 of the Banking Act, Cap 488.
[268] Section 6 of the Microfinance Act, 2006.

3.7.2 The Registrar of Companies

The office of the Registrar of Companies is established under the Companies Act, 2015.[269] One of the functions of the Registrar of Companies is accepting applications for registration of companies, reviewing them, then either approving their registration, or rejecting the same.[270] The law mandates the Registrar to direct applicants, whose proposed company names suggest a connection to a certain regulatory authority, to seek written authorisation from such authorities before being registered.[271] Through this requirement, the Registrar in a way ensures that no businesses that should be regulated operate without such regulation. This includes moneylenders.

The only problem in the case of moneylenders is despite them issuing financial services to the public, no authority is mandated with their regulation. Therefore, in all cases, they are given a go-ahead to be registered and carry on their business. Moreso, there is no guarantee that all potential moneylending companies will have a name that suggests a connection with a public authority. Neither is it a guarantee that they would seek formal registration before carrying on their business.

3.7.3 The Judiciary

As stated above, the Judiciary plays a key role in the regulation of moneylenders. This is mainly in respect of recognition and enforcement of their loan agreements, and protection of the interests of borrowers. The courts have been instrumental in helping moneylenders enforce their rights in case of default. They have also played a significant role in shielding borrowers from the brutal enforcement procedures of moneylenders, as well as from fraudulent and other unlawful acts of moneylenders.

[269]Section 831 of the Companies Act, No. 17 of 2015.
[270]*Ibid* at section 832.
[271] Regulation 8 of the Companies (General) Regulations, 2015.

3.7.4 The Business Registration Service (BRS)

The BRS is established under the Business Registration Service Act.[272] It is responsible for the implementation of policies, laws and other matters relating to the registration of Companies, partnerships and firms, individuals and corporations carrying on business under a business name, bankruptcy, hire-purchase, and, in this case, security rights. The BRS maintains registers, data and records on registrations carried out by it.[273] These include registration of security rights done under the Movable Property Security Rights Act. It therefore is the host and operator of the electronic collateral registry.[274]

Therefore, the BRS has a responsibility of ensuring that the rights of lenders are borrowers including moneylenders are safeguarded by properly running the collateral registry, and proper storage of records stipulating the various security transactions.

3.8 PROLIFERATION OF DIGITISATION OF MONEYLENDERS IN KENYA

Moneylending business, like any other commercial industry, has embraced technological advancements. This is in a bid to revolutionise their business and further reach their target market.

In the past few years, Kenya has seen proliferation of digital moneylenders offering loans through mobile applications have emerged. For instance, Tala[275] and Branch,[276] use alternative data such as call logs, GPS, social network data and contact lists obtained with permission of the user, to assess credit risk and tailor loan offers such as reductions in interest rates as users build a credit history. Both have more than one million installs from Kenya's Google Play Store. Reports indicate that to date, Tala has disbursed over 5.6 million loans worth Kshs. 28 billion to

[272] Section 3 of the Business Registration Service Act, No. 15 of 2015.
[273] *Ibid* at section 4.
[274] Section 19 (2) of the Movable Property Security Rights Act, No. 13 of 2017.
[275] Tala Website. Accessed at https://tala.co.ke/ on 8th August, 2019.
[276] Branch Website. Accessed at https://branch.co.ke/tou/ke on 8th August, 2019.

over 1 million customers since its launch in March of 2014 (known then as MKopo Rahisi). Similarly, by mid-2017, Branch had disbursed 1.5 million loans worth Kshs. 3.63 billion to 350,000 customers since its launch in April of 2015.[277]

Individuals in rural areas represent the majority of digital borrowers.[278] Wealthier digital borrowers obtain higher sized loans in absolute terms.[279] Employed workers are by far the most active borrowers and the most common users of digital credit.[280]

Convenience, disbursement speed and absence of stringent formalities are the primary reasons digital borrowers prefer digital loans to other types of loans.[281]

It is noteworthy that just like other moneylenders, these virtual businesses are not subjected to any form of regulation. As such, they determine the rates of interest to be imposed on borrowers. These are usually very exorbitant. Additionally, they employ brutal debt recollection measures such as physically tracing the borrowers and forcefully seizing their property. They also are notorious for blacklisting defaulting borrowers on the various credit reference bureaus.[282]

Regulation of these digital moneylenders would pose an even greater challenge on regulating authorities as most of them are foreign entities without any physical presence in Kenya.

Recently, the issue of digital moneylenders has rocked the media in Kenya. They are viewed as being notorious for their high interest rates as well as their aggressive marketing that lure and entrap the public on an inescapable bind of over-indebtedness.[283] Other media reports on how the

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[277] Paul Gubbins & Edoardo Totolo (2018) "Digital Credit in Kenya: Evidence from Demand-side Surveys" *FSD Kenya.* Accessed at https://fsdkenya.org/publication/digital-credit-in-kenya-evidence-from-demand-side-surveys/ on 2nd June, 2019. p.4.
[278] *Ibid* at p.17.
[279] *Ibid* at p.19.
[280] *Ibid* at p.22.
[281] *Ibid* at p.36.
[282] *Ibid* at p.44.
[283] Victor Amadala, (13th May 2019) "How Mobile Cash Lenders Fleece You Using Apps" *The Star*. Accessed at www.the-star.co.ke/news/2019-05-13-how-mobile-cash-lenders-fleece-you-using-apps/ on 9th August 2019.

absence of a regulatory framework for these moneylenders has seen them thrive through exploitative practices. Concerns have also been raised over how they handle data of their customers – raising privacy issues.[284]

In response to the concerns, the Central Bank of Kenya has proposed a number of guidelines to regulate the business. The Central Bank of Kenya has noted that services offered by the mobile loans are similar to those offered by banks. They have been termed as 'fancy shylocks'.[285] It is therefore imperative that they are regulated in a similar way under the Kenya Banking Sector Charter.[286] The Charter had lofty aims including increase of financial access to the unbanked, enhance the quality of financial market, and development of more dynamic financial system.

The Central Bank of Kenya indicated that it would make it mandatory for mobile loan apps and banks that offer digital credit products to send text messages to their customers the terms and conditions of the service before approving a loan request. The terms and conditions should not be limited to the in-app version but be also in Unstructured Supplementary Service Data (USSD).[287] The Charter describes what should be included in the terms and conditions including allowance of cooling off period, customer complaint processes, protection of consumer data and privacy.[288] To ensure transparency, all lenders are required to post all external and internal fees on their websites. The institutions will be held liable for any wrong or misleading information.[289]

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[284] Elvis Ondieki, (19 May 2019) "Outcry as mobile lenders use 'cruel' tactics to recover loans" *Sunday Nation.* Accessed at www.nation.co.ke/news/Outcry-as-mobile-lenders-use--cruel--tactics-/1056-5121620-s2dh87z/index.html on 9th August 2019.

[285] The CBK Governor, Dr. Patrick Njoroge, during the Monetary Policy Committee (MPC) briefing in Nairobi on Tuesday, 28th May, 2019.

[286] The Banking Circular No. 1 of 2019 – The Kenya Banking Sector Charter. Accessed at www.centralbank.go.ke/uploads/banking_circulars/1427413049_Banking%20Circular%20No.%201%20of%202019%20-%20Kenya%20Banking%20Sector%20Charter.pdf on 12th August, 2019.

[287] Otiato Guguyu, (30 May 2019) "CBK Sounds Death Knell for Mobile Lenders," *The Standard.* Accessed atwww.standardmedia.co.ke/business/article/2001327715/cbk-sounds-death-knell-for-mobile-lenders on 9th August, 2019.

[288] The Banking Circular No. 1 of 2019 – The Kenya Banking Sector Charter. Accessed at www.centralbank.go.ke/uploads/banking_circulars/1427413049_Banking%20Circular%20No.%201%20of%202019%20-%20Kenya%20Banking%20Sector%20Charter.pdf on 12th August, 2019. p.7.

[289] *Ibid.*

Following this directive, moneylenders such as Branch have updated their websites to include terms and conditions of their loans, the interest rates chargeable, rights and obligations of each party, dispute resolution mechanisms, as well as applicable law among other provisions.[290]

Recently, the CBK issued a directive to financial institutions who offer digital credit services that no borrower should be listed in the Credit Reference Bureaus as a defaulter without a time lapse of six months. This directive was issued through a circular that gave notice on the amendment of the Data Specification Template (DST) in a bid to cater for non-traditional forms of credit such as digital loans.[291] This was in response to the public outcry regarding the rampant listings. This position is also contemplated in the Draft Credit Reference Bureau Regulations, 2019. Unfortunately, this is only in respect of banks, deposit taking microfinance institutions and deposit taking Saccos.[292]

A new development in the digital moneylending industry is the establishment of the Digital Lenders Association of Kenya (DLAK),[293] which was incorporated earlier this year and launched in June, 2019. It is an attempt at self-regulation. This Association brings together the leading digital loan providers and other stakeholders in a bid to facilitate growth of all the participants in the digital lending industry in Kenya.

The Association's, main objective is to set ethical and professional standards in the industry, work in collaboration with policy makers and all other stakeholders in addressing issues affecting the industry, promote learning and knowledge growth of the stakeholders as well as the

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[290]Branch Website (last updated in 2019) "Branch International Terms of Use and Loan Account Agreement – Kenya: Terms and Conditions for the Opening and Use of a Loan Account with Branch International" Accessed at https://branch.co.ke/tou/ke on 12th August, 2019.
[291]The Banking Circular No. 5 of 2019 – Rollout of New Data Specification Template (Version 4) for Sharing of Credit Information with Credit Reference Bureaus (CRBs). Accessed at https://www.centralbank.go.ke/uploads/banking_circulars/855750209_Banking%20Circular%20No.%205%20of%202019%20-%20Rollout%20of%20New%20DST%20V4.pdf on 12th August, 2019.
[292]Draft Credit Reference Bureau Regulations, 2019.
[293]Digital Lenders Association of Kenya Website (2019) "About." Accessed at www.dlak.co.ke/ on 12th August, 2019.

overall growth of the digital lending and fintech sector in line with the Economic Pillar of the Vision 2030, MTP III and the Big Four Agenda.[294]

At its launch, the Association had a membership of eleven digital lending entities including; Tala, Alternative Circle, Stawika Capital, Zenka Finance, MyCredit, Okolea, Lpesa, Kopacent, Four Kings Investment, Kuwazo Capital and Finance Plan. The membership is expected to rapidly grow.

The Association has developed a Code of Conduct for its members as a step towards achieving its objectives. The Code aims to set acceptable standards of conduct by all Digital Lending Institutions (DLI), that will ensure a high standard of service and the highest possible level of satisfaction for consumers of their services.[295] It makes provision for responsibilities of the DLIs, rules for granting and repayment of digital loans, consumer protection, advertising and marketing, co-operation with intermediaries, acceptable debt collection mechanisms, as well as self-regulation and enforcement mechanisms. Self-regulation mechanisms include provisions outlining disciplinary measures to be taken against noncompliant institutions.[296] It further establishes a Disciplinary Committee which shall responsible for the enforcement of the disciplinary measures.[297] With regards to consumer protection, the Association has gone ahead to establish a customer complaint link on their website through which consumers can report their complaints against a specified institution.[298]

3.9 CONCLUSION

The lack of a comprehensive legal regime on moneylenders in Kenya has exposed consumers to exploitation by the moneylenders. The scanty provisions existing in various laws, for instance

[294]*Ibid.*
[295]Digital Lenders Association of Kenya Code of Conduct, 2019, p.2.
[296]*Ibid* at p.13.
[297]*Ibid* at p.14.
[298]Digital Lenders Association of Kenya Website (2019) "About." Accessed at www.dlak.co.ke/customer-complaint.html on 12th August, 2019.

the Movable Property Security Rights Act, 2017, only reinforces the moneylenders' rights thereby further weakening borrowers. This is an infringement of the socio-economic rights of consumers.

Courts of law are the only line of hope for borrowers. However, as seen above, the courts have on considerable occasions sided with moneylenders. Further, court processes are costly and time consuming keeping in mind that most of these borrowers entered into such agreements because they were in serious financial crises.

The lack of a law that expressly and comprehensively covers the practice of moneylenders is a challenge. The legal regime that properly provided for the business, its regulation, and protection of consumers was repealed nearly four decades ago with no replacement whatsoever. This resulted in a huge vacuum in the law. The moneylenders were left operating in the fringes of the law given that their business already existed and the law regulating them just vanished. This situation further makes it hard for existing financial regulators to take up regulation of moneylenders as no law whatsoever defines them and the nature of their business.

Moneylenders control a substantial part of the financial sector. As such, their role in financial stability, and even macroeconomic stability is not negligible. It is unfortunate that the state has completely left out this industry. Failure to regulate this industry has created an even playing field between it and other mainstream credit service providers. This disadvantages not only the other players, but also the consumer.

Further, the industry could play a positive role in financial inclusion and deepening if properly supervised and regulated to be consumer centred. A lot of Kenyans access credit services through moneylenders. However, they are unable to really benefit from them due to the exploitative terms. Other Kenyans generally avoid moneylenders for fear of extortion.

There is also the issue of illicit financial flows. Failure to regulate moneylenders makes it susceptible to illegal activities such as money laundering and terrorism financing. It is impossible for law enforcement authorities to follow a money trail the moment it gets out of the regulated sector.

The proliferation of the moneylending industry has rendered regulation inevitable. This is moreso because moneylending business has in the recent past developed and embraced technological advancements. More and more moneylenders have started offering their financial credit services through the internet via mobile telephone applications. As a result, the financial regulator, Central Bank of Kenya, has started making interventions in a bid to regulate moneylending and protect borrowers. It is noteworthy that no significant intervention has been made so far.

Regulation of moneylenders is as important as is the regulation of any other financial services provider. As discussed in earlier chapters, moneylending has been part of the financial sector since ancient times. There is no sign that this will change in the foreseeable future. As such, failure to regulate it poses the same danger to the consumers, the stability of the financial sector, and the macro-economic stability in general. This is moreso because of the rapid growth and development of this industry in the recent past. Scholars have emphasised the importance of a comprehensive financial sector regulatory regime that focuses on all aspects of the financial system without discriminating any sector.[299]

[299] Griffith-Jones Stephany (2009) "How to Create Better Financial Regulation and Institutions" *FES Briefing Paper 2.*

CHAPTER FOUR

LESSONS FROM THE UNITED KINGDOM AND UGANDA

4.1 INTRODUCTION

As discussed earlier in Chapter Two, moneylenders have existed all around the globe since time immemorial. Over time, legal, and social systems around the world have treated them differently with earlier regimes being strictly against their business. With time, the perception of moneylenders changed positively with many jurisdictions developing legal regimes to regulate their business.

Some jurisdictions have developed more elaborate and comprehensive regulatory systems than others. This has in turn resulted in an optimum business environment for both the moneylenders and their customers. Jurisdictions such as the United Kingdom and Uganda have express laws for the regulation of moneylenders. They also have designated regulatory authorities for the same. In addition, they have constantly reformed their legal regimes to keep up with the changing dynamics of the industry.

This chapter looks at the legal regimes in relation to moneylenders in the United Kingdom and Uganda, and the lessons thereof for Kenya.

4.2 MONEYLENDERS IN THE UNITED KINGDOM (UK)

4.2.1 Background

As discussed in Chapter Two, moneylenders (usurers) have been in existence in the UK since the medieval ages. However, the first usury law was enacted in 1713 setting the ceiling rate of interest at 5 percent of the amount borrowed.[300] In 1854, all the laws that banned usury were

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[300] Sarah Brown (2006) *Consumer Credit and Over-Indebtedness: The Parliament Response: Past, Present and Future,* PhD thesis, University of Leeds, School of Law, p. 9.

repealed leaving no laws whatsoever to regulate moneylenders between 1854 and 1900. Moneylenders used this gap in the law to their advantage, sometimes abusively. The Report of the House of Commons Select Committee on Moneylending in 1898 included testimony from one moneylender who admitted he charged 3,000% interest, while another had worked under 34 different aliases to avoid having notoriety associated with his name. It is this Report that paved way to the enactment of the Money Lenders Act of 1900.[301]

Regulation of the moneylenders in the UK, just like any other financial services industry, has been characterised by the major arguments about whether or not it should be regulated. Some policy regulators have decried government interference in the free market and would rather the freedom of the parties to engage in contract formation be respected. Judges and Members of Parliament taking the attitude that there was no reason to interfere with fairly concluded contracts, nonetheless, other judges did not shy away from rewriting contracts that they felt disadvantaged the borrower.[302]

On the other hand, regulators have called for more robust protections to safeguard the interests of the vulnerable consumers by stating that inequality of the bargaining between the parties necessitated government intervention.[303] The law has always tried to strike a delicate balance between the two competing interests.

[301] House of Commons, Select Committee on Money Lending (1898) *Report from the Select Committee on Money Lending: Together with the Proceedings of the Committee, Minutes of Evidence, Appendix, and Index.* Great Britain Parliament, Printed for H.M.S.O, London.
[302] Margot Finn, (2003) *The Character of Credit: Personal Debt in English Culture, 1740-1914*: Cambridge University Press, Cambridge, p. 259.
[303] Craig M. McMahon (2018), "The Regulation and Development of the British Moneylending and Pawnbroking Markets, 1870-2016," Doctoral Thesis, *University of Cambridge*. Accessed at https://doi.org/10.17863/CAM.21698 on 20th August, 2019, p. 122.

4.2.2 Development of the Legal Framework

a) The Money Lenders Act, 1900

The Money Lenders Act of 1900 defined money lenders in a bid to avoid confusion with banks, insurance companies, pawnbrokers, friendly societies or any other company mandated by Parliament to lend money.[304] It also created a registry of money lenders that was to be run by the Inland Revenue.[305] The Act, however, failed to include licensing requirements and there was no body charged with the important function of supervision. This led to unscrupulous moneylenders operating in blithe disregard of the laws.[306] The Act proved ineffective when it came to deal with the issue of interest rates as the vague and subjective harsh and unconscionable test led to varied determinations.[307]

b) The Money Lenders Act, 1927

In 1927, a second Moneylenders Act was enacted. This law, in addition to the provisions of 1900 Act, provided for mandatory licensing as well as registration of moneylenders. Further, it forbade moneylenders from employing agents, canvassers or sending out unsolicited advertisements.[308] The Act set a maximum interest rate chargeable at 48 percent per annum or 4 percent per month.[309] The burden of proof on whether the transaction was harsh and unconscionable was shifted to the moneylender. The Act prohibited preliminary fees, the contract to state the loan date, principal an interest rate to be calculated according to the statutory formula and the contract

[304] section 6 of the Money Lenders Act, 1900.
[305] *Ibid* at sections 2 and 3.
[306] Craig M. McMahon (2018), *supra*, p. 133.
[307] Charles Collard, (1912) *The Money-Lenders Acts, 1900-1911* Butterworth, London.
[308] Section 6 of the Money Lenders Act, 1927.
[309] section 7 of the Money Lenders Act, 1927.

to be provided within seven days.[310] A failure to meet these conditions made the contract unenforceable.

Unfortunately, the 1927 Act also covered commercial transactions. People lending money in a commercial area, with the exception of banks, had to adhere to the provisions of the Act. Consequently, any slight infraction resulted in their loans being rendered completely irrecoverable.[311] This was partially solved by a provision introduced by the Companies Act, 1967,[312] which allowed the Board of Trade to issue certificates to certain traders allowing them to be treated as banks for purposes of the Moneylenders Acts of 1900 and 1927, thereby exempting them from the provisions of these laws.[313]

c) The Crowther Committee Report, 1971

Despite the enactment of the Money Lenders Acts of 1900 and 1927, the same problems of high interest rates and inefficient regulation still persisted. First the court sometimes disregarded the harsh and unconscionable test and ruled in favour of moneylenders to the detriment of borrowers based on technicalities. The lack of a supervisory and regulatory body meant that the law was hardly enforced. This spurred the government to act in a bid to bring the outdated laws in line with the socioeconomic changes that now existed.[314]

The Crowther Committee was set up to explore better forms of regulation and rectify the inadequacies of existing regulation on consumer credit including pawnbrokers, hire purchase and moneylenders. Its major aims were to increase consumer freedom, improve market efficiency and consumer protection. The committee appreciated the important role that moneylenders

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[310] Craig M. McMahon (2018), *supra*, p. 145.
[311] Timothy Edmonds (2014) "Consumer Credit Regulation" *Briefing Paper Number 06842, House of Commons Library*.
[312] Chapter 81 of the Laws of the UK.
[313] *Ibid* at section 123 (1).
[314] K. E Lindgren, 'The Consumer Credit Act 1974: Its Scope' (1977) The Modern Law Review Vol. 40.

played to low income earners and instead of demonising them, it sought to ensure the regulatory framework would act as enabler to their businesses.[315]

The Committee rejected the idea of instituting price controls that it deemed to be impractical as each loan was different and unique in its own way.[316] The harsh and unconscionable test that had given judges so much discretion was reviewed with the committee proposing that any rate exceeding 48 per cent per annum to be deemed as harsh and unconscionable.[317]

The committee strongly supported disclosure terms which would increase competition and ensure that the consumer is protected from false information. It advocated for uniformity when it came to calculating the interest rate to be charged and the terms to be disclosed. On advertising, the Committee recommended that the restrictions that existed be lifted and misleading advertisements were to be regulated by the existing fraud laws.[318]

The final proposal was the creation of an independent regulatory body that would enforce, monitor and supervise consumer credit. It would also be involved in licensing. The body would be headed by a Consumer Credit Commissioner.[319]

The reaction to the report from consumer and business organisations was overwhelmingly positive, but the government initially did nothing, since the Department of Trade and Industry wanted time to work out the particular details of any Acts. Its hand was eventually forced a year later by Baroness Phillips, who initiated a debate in the House of Lords on the matter.[320] In February 1973 the government formulated a Voluntary Code which they expected those lending

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[315] Royston Goode, (1979) *The Consumer Credit Act*: *A Student's Guide,* Butterworth, London.
[316] Committee on Consumer Credit Law `Consumer Credit: Report of the Committee' (1971), 1.3.33, 6.6.9.
[317]*Ibid.*
[318] McMahon, C. M. (2018), *supra*.
[319] Committee on Consumer Credit Law (1971) *supra*, 7.1.6.
[320] The House of Lords (1972) "Consumer Credit: The Crowther Report" *HL Deb 28 June, 1972 Vol. 332 cc928-77.* Accessed at https://api.parliament.uk/historic-hansard/lords/1972/jun/28/consumer-credit-the-crowther-report 22nd August, 2019.

to observe. The Code set out guidelines for loaning money to individuals and disclosing the cost of the loan. Later the same year, the government issued a white paper titled Reform of the Law on Consumer Credit indicating the intention to implement the Crowther Committee's recommendations.[321] These developments led to the enactment of the Consumer Credit Act of 1974.

4.2.3 Legal, Regulatory and Institutional Framework

Money lending in the UK is currently regulated by the Consumer Credit Act (CCA) of 1974 that was later amended by the Consumer Credit Act of 2006 which sought to bring more robust measures to protect the consumers. The Financial Services Act, 2012 transferred all regulatory functions of consumer credit from the Office of Fair Trading (OFT) to the Financial Conduct Authority (FCA) which was deemed to be more flexible and responsive to issues regarding moneylending as it could set its own rules. Some parts of the CCA were also repealed and replaced by the rules set by the FCA.

a) Consumer Credit Act, 1974

The Consumer Credit Act, 1974 repealed the earlier Money Lenders Act of 1927 among other laws that dealt with consumer credit. It is an ambitious attempt in unifying the regulatory framework of consumer credit including moneylenders, pawnbrokers and hire-purchase business. The Act applies to loans between 30 pounds and 5000 pounds issued to individuals and non-corporate bodies.[322]

[321] Timothy Edmonds (2014) *supra*, p.43.
[322] Elgar E.; Karan C. R. (2008) "Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974," *Slaughter and May*, Accessed at www.slaughterandmay.com/media/760154/consumer_credit_act_2006_amendments_to_the_consumer_credit_act_1974.pdf on 15th August, 2019.

Price controls and guidance rate have been eliminated because the application of a single rate to such diverse loans would be impractical and limit the courts' discretion. The courts are given discretion to reopen and rewrite transactions that it found to be extortionate. It defines a transaction to be extortionate if the payments were grossly exorbitant or grossly contravened ordinary principles of fair dealing. The Act goes on to lay down some of the factors the court could consider such as age of the borrower, the prevailing interest rate among other factors.[323]

A moneylender is mandated to disclose the full cost of credit both in cash and percentage per annum. The money lender was required to disclose matters such as payment schedules, sum borrowed, duration, date of execution, creditor and debtor information. Misleading advertisements are also criminalized.[324]

The Act establishes the office of the Director General of Fair Trading whose role is to administer the licensing system, monitor the enforcement and working of the act and exercise adjudicating functions conferred to him by the Act.[325] The Director General is required to maintain a register containing all appropriate information related to licenses and applications for licenses.[326] The Director General is to be appointed by the Secretary of State and is also responsible for providing advice and recommendations to him.

b) Consumer Credit (Amendment) Act, 2006

The passage of time and its attendant socio-economic changes rendered some of the provisions of the Consumer Credit Act, 1974 outdated. Credit volumes grew exponentially and new and diverse loan products that the act had not anticipated came into being. This necessitated reforms. Other major drivers for reform were the rise of illegal moneylenders, over-indebtedness that

[323] Sections 137-140 of the Consumer Credit Act, 1974.
[324] *Ibid* at section 46.
[325] *Ibid* at section 1.
[326] *Ibid* at section 35.

predisposed vulnerable individuals to exploitative terms and the failure of customers to understand the confusing and technical contractual terms and advertisements.[327]

The 2006 Act brought about many changes. For instance, the 25000 pounds' limit that had been put in place by the 1974 Act was abolished.[328] Further, section 140 of the 1974 Act was amended by replacing the extortionate credit bargains with the unfair relationship test. This test empowers the courts to consider all relevant matters concerning the agreement when it comes to determine its fairness or unfairness. The court also has discretion to even rewrite the credit agreement and order compensation.[329]

The Act has introduced the Financial Ombudsman Service that allows customers to refer disputes to them after raising them with the lenders business or when they are not satisfied by the lender dispute resolution service.[330] In addition to this, the Act has introduced the option of alternative dispute resolution which is cheaper than litigation.

The customer also has to be regularly updated with information about status of their accounts and notification about non-payment along with added default charges. An obligation has also been placed on the moneylenders to continually update the consumer about additional charges, failure to which such consumers will not bound to pay the additional charges thereof.[331] The other change is on provision of information by the business to the Office of Fair Trading, or as it is the case now to the FCA which enables it to sensitise the public.[332]The Office of Fair Trading

[327] Department of Trade and Industry, (2003) 'Fair, Clear and Competitive-The Consumer Credit Market in the 21st Century.'
[328] section 2 of the Consumer Credit (Amendment) Act, 2006.
[329]*Ibid* at sections 19 and 20.
[330]*Ibid* at section 59.
[331]*Ibid* at sections 6 and 7.
[332]*Ibid* at section 8.

was also empowered to carry out their regulatory, investigatory and monitoring functions, as well as imposition of sanctions on wayward moneylenders as per.[333]

There is also established the Consumer Credit Appeal Tribunal which is mandated to handle appeals of licensing decisions made by the licensing authority.[334]

The Act has also removed the automatic unenforceability of non-compliant or defective contracts. The courts are required to weigh the potential harm that is to be experienced by the aggrieved party.[335] This rule protects both the consumer and the moneylenders by preventing one from using a technicality to avoid their obligations.[336]

c) Consumer Credit (Agreements) Regulations, 1983

Under the 1974 Act, the Secretary of State is empowered to make Regulations covering the format that contracts must take, and to otherwise implement the Act.[337] The Consumer Credit (Agreements) Regulations, 1983, came into force in 1985.

These Regulations prescribe the form and content of all the consumer credit agreements regulated under the 1974 Act. The prescriptions are with regards to execution, and modification of the said agreements. They also prescribe statutory forms to be filled during various applications.

d) The Financial Conduct Authority (FCA)

The Financial Conduct Authority is the conduct regulator for 59,000 financial services firms and financial markets in the UK and the prudential regulator for over 18,000 of those firms. The

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[333] *Ibid* at sections 38 and 39.
[334] *Ibid* at section 55.
[335] *Ibid* at section 15.
[336] Edward Vaughan, (2006) 'Consumer Protection – A Guide to the Consumer Credit Act 2006' *Glover Solicitors.* Accessed at www.glovers.co.uk/news_article205.html on 5th August, 2019.
[337] Section 60 of the Consumer Credit Act, 1974.

Authority is established in 2013 through an amendment to the Financial Services and Markets Act, 2000. It was established to replace and take over the functions and powers of the Financial Services Authority.[338]This is the body tasked with the regulation of all financial services institutions including consumer credit firms, which is where moneylenders fall.[339]

The FCA has introduced some rules to protect consumers such as imposing a cap on cost of credit. The interest and fees should not exceed 0.8% per day of the amount borrowed. Another measure was limiting default fees to 15 pounds and the interest on default charges should not exceed the initial rate. Borrowers are also not to pay more in interest and fees than the amount borrowed.[340]

Additionally, it has introduced new measures to deal with the issue of rollover. This practice stems from the moneylenders preying on vulnerable borrowers by rolling over the loans and adding new fees. The FCA has now limited the number of times a loan may be rolled over to two. The FCA also required the moneylenders to subscribe to comparison websites where consumers can be able to compare rates.[341]The Authority has further prohibited UK-based debt administrators from enforcing or exercising rights on behalf of lenders under such high-cost short term credit agreements.[342]

The major challenge of the UK legal regime on moneylenders is that the laws have given too much unfettered discretion to the courts particularly with regards to the unfairness test. This test

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[338] Section 1A of the Financial Services and Markets Act, 2000.
[339] Financial Conduct Authority Website (last modified in 2019) "Consume Credit Firms." Accessed at www.fca.org.uk/firms/consumer-credit on 22nd August, 2019.
[340] FCA, (2014) 'FCA Confirms Price Caps Rules for Payday Lenders' *FCA*, <https://www.fca.org.uk/news/press-releases/fca-confirms-price-cap-rules-payday-lenders> (accessed on 5 August 2019).
[341] Tim Edmonds, (2018) "High Cost Consumer Credit: The New Regulatory Regime" *Briefing Paper CBP -07978*, Chapter 3.
[342]Nicholas Harding (2014) "FCA Regulation of the Peer-to-Peer Lending Industry"*Lending Works Website. Accessed at* www.lendingworks.co.uk/blog/peer-to-peer/fca-regulation-p2p-lending-industryon 12th August, 2019.

is vague and imprecise and it may lead to extremely variant decisions when dealing with similar cases as it is very subjective.[343]

4.3 MONEYLENDERS IN UGANDA

4.3.1 Background

Moneylenders in Uganda have existed for as long as trading activities have. However, Uganda traces the legal regime on moneylenders from the United Kingdom. The business began thriving during the colonial times and particularly upon the enactment of the Moneylenders act of 1952.[344] This law was basically a transplant of the Money Lenders Act, 1900 of the UK.

Uganda recognises the important role played by moneylenders in their economy. To them, moneylenders fill the gap in access to credit left by conventional financial institutions from whom high risk borrowers can't access credit facilities. The informality associated with moneylenders, as well as other factors such as speed of processing loans, willingness to finance lifestyles and other social needs besides business needs has bridged the gap left by banks.[345]

The poor have extremely limited access to money through formal financial sector institutions in Uganda. Most banks don't give small businesses access to finances or if given, the facilities are short term because of high security risks that comes with SMEs. Studies have indicated that access to credit and borrowing was very low in Uganda with only 4 percent of the adult population accessing credit from formal bank institutions. Similarly, only 4 percent of the

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[343]Financial Conduct Authority, (2014) Review *of retained Provisions of the Consumer Credit Act: Final Report.*
[344] Chapter 273 0f the Laws of Uganda.
[345] Uganda Law Reform Commission (2014) "Reform of the Moneylenders Act Cap. 273" *Issue Paper.* Accessed at www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwi564_p05fkAhVqxMQBHU14C6sQFjAAegQIABAC&url=https%3A%2F%2Fwww.ulrc.go.ug%2Fsystem%2Ffiles_force%2Fulrc_resources%2Fmoney-lenders-act-issues-paper.pdf%3Fdownload%3D1&usg=AOvVaw0N87PKJaeB2Lz7oULVLQfy on 18th August, 2019.

population accessed credit from non-bank formal financial institutions, while 20 percent accessed credit from informal sources.[346]

Some of the reasons cited by the public for failure to access credit facilities included; fear of debts, high interest rates, and lack of collateral. A majority of the public dealt with these challenges by seeking credit services from informal lenders including but not limited to moneylenders.[347]

It is evident that informal means of borrowing has for a long period of time been prominent in Uganda. It is also noteworthy that prior to the reform of the law, moneylenders often disregarded the law. They operated without licenses and charged excessive interests on their credit facilities.[348] All these factors led to the clamour for a reform of the legal regime. Hence, the enactment of the Tier 4 Microfinance Institutions and Money Lenders Act in 2016.

4.3.2 Development of the Legal Framework

a) Moneylenders Act, 1952[349]

As stated above, this Act was more or less a reproduction of the Moneylenders Act, 1900 of the UK. The Act had major deficiencies such as the lack of a designated regulator for the business, broad and imprecise definitions, lenient and non-deterrent fines, and sentences and less than stringent safeguards to protect the consumer.[350]

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[346]Levenson, Rachel Ariana, (2012) "Rational Irrationality: Borrowing from Informal Moneylenders in Uganda." *Honors Theses – All, Wesleyan University*. Accessed at https://wesscholar.wesleyan.edu/etd_hon_theses/813/ on 21st August, 2019. p.813.

[347] Andy Carlton, Hannes Manndorff, Andrew Obara, Walter Reiter, Elisabeth Rhyne (2001) "Microfinance in Uganda" *L&R Social Research.* Accessed at www.oecd.org/countries/uganda/35481055.pdf on 12th September, 2019, p. 20.

[348] Charles Musinguzi (2015) "Factors Constraining the Implementation of the Moneylenders Act - Insights from a Survey of Public Administrators and Money Lenders in Fort Portal" *Mountains of the Moon University Occasional Papers No. 5*, p.4.

[349] Chapter 273 0f the Laws of Uganda.

[350] Lastone Gulume Balyainho (2016) *supra*.

The Act defined a moneylender to include every person whose business is that of moneylending or who holds himself out as a moneylender whether he or she has other sources of income despite moneylending.[351] This definition encompassed both artificial and natural persons. It was too vague thus allowing lenders to claim and disclaim being moneylenders when it was convenient for them.[352] Despite this broad definition, the courts tried to limit some of its adverse effects and stated that not everyone who lent money is a moneylender as envisaged by the Act.[353] Further, the courts noted that lending money does not necessarily make one a moneylender. For one to qualify as a moneylending business, there must be the '*notion of system, repetition and continuity'*.[354]

The 1952 Act was notable for its glaring omission of a designated regulatory authority. This resulted in disregard of its provisions as there was no one to implement and enforce the Act. The Act required moneylenders to obtain certificates from the magistrate within their jurisdiction as a precondition to practice. The magistrate was mandated with the assessment of the fitness of the potential moneylender. These certificates were to be issued annually to enable moneylenders renew their licenses from the Resident District Commissioner. The effectiveness of the magistrate in discharging this duty was also questionable as they had other pressing matters such as their judicial duties to deal with.[355]

The Act also required the moneylending contracts to be in writing, signed by the parties or their agents before money is lent or security is given. There was no prescribed form in which the

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[351] Section 1(h) of the Moneylenders Act, Cap. 273 of the Laws of Uganda.
[352] Kyeyune Albert Collins, (2013) 'The Barrage of Private Money Lending Business in Uganda: The Need for the Reform of the Law' <https://www.academia.edu/6050579/MONEY_LENDERS_ARTICLE-KAC_REVISED-14-2-2013> (accessed on 7 August 2019).
[353] Noel Nuwe Kyapaka v Phillip Ronald Baguma & Peter Mukiiza, HCT - 00 - CC - CS - 1 – 2007.
[354] Edge Low v MacElwee [1918] 1 K.B. 205.
[355] section 3 of the Moneylenders Act, Cap. 273 of the Laws of Uganda.

contract should take but it had to contain terms of the contract, date on which the loan was made, amount of the principal amount of the loan and the rate of interest.[356]

It also imposed certain obligations upon the moneylender including; issuance of receipts on every amount repaid, keeping of records of every transaction, disclosure of information upon demand by the borrower, and tendering of a reasonable sum of expenses. The Act further prohibited moneylenders from employing canvassers or agents for the purpose of soliciting borrowers for the lender, as well as the imposition of harsh and unconscionable interest rates and specifically those that exceeded 24 percent per annum.[357] Failure to adhere to these rendered the contract unenforceable. Further, such a moneylender would be liable to a prescribed fine for each day during which the offence continues.[358] A weakness of the act is that it did not provide for a limit up on which interest could accumulate.[359]

The Act failed to provide for the mode of repayment of money borrowed and the realisation of the collateral given as security. This gap was exploited by rogue moneylenders who could disappear on the final day of payment so that they could recover the collateral of the borrower under the pretext that the borrower had defaulted. Some moneylenders also disguised the contract as a transfer or sale of the property as opposed to a credit agreement.[360]

4.3.3 Legal, Regulatory and Institutional Framework

a) The Tier 4 Microfinance Institutions Act and Money Lenders Act[361]

This is the operative law that regulates all moneylending activities in Uganda. It repealed the pre-colonial Moneylenders Act[362] that was deemed to be outdated and ineffective. The Act seeks to

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[356] *Ibid* at section 6.
[357] *Ibid* at sections 8 to 13.
[358] Section 9 of the Moneylenders Act, Cap. 273 of the Laws of Uganda.
[359] Uganda Law Reform Commission (2014) *supra*.
[360] *Ibid.*
[361] No. 18 of 2016.

streamline the moneylending business in Uganda and the microfinance institutions that are not regulated by the Central Bank.[363] The Act has heralded major reforms that aim to ensure that the consumer is protected from exploitative moneylenders such as prohibiting compound interest. Some of the provisions of the previous Act such as disclosure of information have been retained. Unlike its predecessor, this Act it is more detailed and comprehensive.[364]

The purpose of the Act is to legitimise and build confidence in microfinance institutions, Saccos, self-help groups, non-deposit-taking and community-based microfinance institutions, and moneylenders who, for a long time, had remained outside the radar of any regulator. The enactment of the Act was not just a recognition of the important role that informal lending arrangements play in promoting financial inclusion by reaching Uganda's large unbanked population but was also meant to streamline the laws relating to borrowing and lending in Uganda.

The Act provides that moneylending business may only be carried out by incorporated companies. The business is to be licensed by the Uganda Microfinance Regulatory Authority (UMRA), which license is renewable annually.[365] Operation without a valid license is an offence.[366] The Act limits the extent allowed advertisement of the moneylender's business while also providing sanctions for false or misleading statements. The sanctions include; a fine not exceeding fifty currency points or a jail term not exceeding two years, or both, upon conviction.[367]

[362] Chapter 273 0f the Laws of Uganda.
[363]Tier 4 Microfinance Institutions and Moneylenders Act 2016, s 3(2).
[364]Lastone Gulume Balyainho, (2016) *supra*.
[365] Section 78 of the Moneylenders Act, Cap. 273 of the Laws of Uganda.
[366]*Ibid* at section 84 (1).
[367] *Ibid* at section 91.

The Act also makes provision for the moneylending contract which is crucial in the execution of the money lending business. The moneylending contract is to be in writing, signed by both parties, and witnessed by a third party. This is unlike the previous law that only required the borrower to personally sign the contract. The contract should be in the form of a note that contains all the terms of the contract. Unlike before, this Act also gives the borrower the right to early repayment of the loan before its due.[368]

This law outlaws compound interest by rendering any contract that directly or indirectly provides for payment of compound interest or increase of interest of interest on outstanding sum on grounds of default. The Minister of Finance is empowered to control interest charged by the moneylenders.[369]

b) *The Tier 4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018*

The Act empowers the Minister of Finance to make regulations for the better carrying out of the provisions of the Act. In exercise of these powers, the Minister has formulated the Tier 4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018. Part III of these Regulations provide for the licensing and operation of moneylending business in Uganda.[370]

The Regulations require moneylenders to submit particulars of their directors and secretary when applying for the license. The license is to be displayed at all the moneylenders' business premises.[371]

[368]*Ibid* at section 85.
[369]*Ibid* at sections 86-90.
[370]*Ibid* at section 112.
[371] Regulation 3 (2) of the Tier 4 Microfinance Institutions and Money Lenders Regulations (Money lenders) Regulations 2018.

The Regulations outline some of the obligations of moneylenders including; having a physical address, notify the Authority (UMRA) of any change in address within seven days after the change, furnish the borrower with a copy of the loan agreement, display interest rate charges at all times in a conspicuous place at their business premises, and maintaining of records concerning the business for a period of at least 10 years. Any moneylending transaction disguised as a sale or transfer of property is subject to nullification and the moneylender may lose their license. The Regulations outlaw the holding of documents such as National Identification Cards, Passports, ATM cards or codes by the moneylender as collateral. Further, a moneylender can only dispose the collateral after 60 days of notifying the borrower.[372]

The Regulations highlight on how interest can be computed. Interest charged on a loan by a moneylender shall be computed on the monthly outstanding balance of the principal remaining after deducting from the original principal the total payments made by or on behalf of the borrower which are appropriated to the principal. Additionally, the moneylender shall disclose to the borrower the method of calculating the interest rate.[373]

Further, they provide for confidentiality and non-disclosure. A moneylender shall keep confidential the information furnished by the borrower and shall not disclose the information to a third party without the written consent of the borrower. The borrower may, at any time, upon request made in writing to the moneylender, access information from the moneylender regarding their moneylending transaction.[374]

c) Uganda Microfinance Regulatory Authority (UMRA)

The Tier 4 Microfinance Institutions and Moneylenders Act, 2016, establishes the Uganda Microfinance Regulatory Authority which regulates licenses and supervises moneylenders and

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[372] *Ibid* at regulations 17-18.
[373] *Ibid* at regulation 21.
[374] *Ibid* at regulations 24-25.

the tier 4 microfinance institutions. UMRA Is a body corporate with an official seal. The Act guarantees UMRA independence and autonomy.[375]

The functions of UMRA include; the licensing of tier 4 microfinance institutions, promotion of programmes and interventions that are necessary for the development of tier 4 microfinance institutions, protection of the interests of the members and beneficiaries of tier 4 microfinance institutions – including the promotion of transparency and accountability by applying non prudential standards, promotion of the stability and integrity of the financial sector through ensuring the stability and security of tier 4 microfinance institutions, ensuring of the sustainability of the microfinance sector with a view to promoting long term capital development, establishment and enforcement of standards of sound business and financial practices for tier 4 microfinance institutions, collection and publishing of statistics related to the operations of tier 4 microfinance institutions, and the management of a savings protection scheme and a stabilisation fund for tier 4 microfinance institutions.[376]

UMRA is empowered to exercise oversight over the moneylenders. It may conduct inspection, examine books of accounts of the moneylenders, and conduct an inquiry into the business of moneylending. UMRA has also been empowered under section 4 of the regulations to scrutinize the fitness of the management a moneylender and any person employed or does business with it. UMRA is required to keep a register of all moneylending businesses as well as sensitise the public on moneylending business.[377]

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[375]Sections 6-10 of the Tier 4 Microfinance Institutions and Moneylenders Act, 2016.
[376]*Ibid* at section 8.
[377]*Ibid* at section 77.

It also has the power to receive payment of the loan from the borrower and transmit it to the moneylender.[378] This was to prevent the unconscionable behaviour of moneylenders of refusing to receive payments in order they can acquire the security that was pledged for the loan.

The major challenge of the reformed legal framework on moneylenders in Uganda is that it poses a danger of overregulation. It also imposes a lot of operation costs on the moneylenders which will most likely be passed on to the consumer.[379]

Another major concern is that the law prohibits unincorporated bodies as well as natural persons from carrying on moneylending business. This creates a narrow and limited scope of people that may carry on the business. It also, in a way, defeats its objective of financial inclusion by limiting the entities that may carry on the business.

4.4 CONCLUSION

The legal regimes in both the UK and Uganda have demonstrated that it is possible to regulate the business carried on by moneylenders. Upon the repeal of the Money Lenders Act[380] in 1984, Kenya was left without a law regulating moneylenders leaving vulnerable Kenyans at the mercy of unscrupulous dealers. It is important that Kenya borrows from the developed regimes of the UK and Uganda to help regulate the already growing moneylending industry. This will be important in protection of the consumers from exploitative practices, as well as the general growth of the financial sector.

It is also clear that, if left unregulated, moneylenders will almost certainly exploit their customers to benefit their selfish interests. Some have charged interests at rates as high as 3000 percent.

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[378]*Ibid* at section 95.
[379] Shellomith Irungu and Esther Nafula, (2017) 'New Regulations on Money Lending' *Africa Legal Network*. Accessed at www.africalegalnetwork.com/uganda/news/legal-alert-new-regulations-money-lending/ on 3 august 2019.
[380] Chapter 528 of the Laws of Kenya.

With such possibilities, it is imperative that their conduct is regulated. The government owes a duty to its citizenry to protect their economic and social rights.

From the study of the Ugandan regime, and particularly its reform process, it is evident that moneylenders, alike other informal financial service providers, play a vital role in the socio-economic development of a society. Moneylenders promote financial inclusion and bridge the gap left by formal financial institutions. They ensure the high risk as well as the economically challenged members of society have access to credit facilities. It is therefore the government's duty to intervene and ensure such members of society are protected, hence, ensuring they benefit from such services.

This comparative study has also demonstrated that moneylending business evolves over time. new dynamics are introduced with the changes in technology and target customers. As such, the laws need to keep up with the changing business environment to ensure it meets its objectives of promoting the industry and protecting consumers.

Licensing and supervision of moneylenders is an effective way of regulating the conduct of their business for the benefit of all the stakeholders of the players of this market. In the UK, moneylenders are mandated to procure annually renewable licenses to enable them carry on the business of moneylending. Operation without a license is an offence that attracts criminal sanctions. This is the same case in Uganda. Licensing of moneylenders enables the government to keep track of all those carrying on this business. It also facilitates the weeding out of unscrupulous dealers through prescription of conditions to be met in order to secure a license. This has helped raise the integrity of the business.

The two regimes have well established authorities with the mandate of regulating and supervising moneylenders. the laws elaborately empower these authorities with powers to

license, monitor, inspect, investigate, and impose sanctions on moneylenders. additionally, moneylenders are mandated to keep records of all their transactions and allow the designated authorities to inspect them, and to generally co-operate with these authorities. This is important in creating certainty and order in the business. It is also important in the protection of the interests of the various stakeholders.

CHAPTER FIVE

CONCLUSION AND PROPOSALS FOR REFORM

5.1 CONCLUSION

This paper sought to study the moneylending phenomenon in Kenya. It intended to point out the legal gap created by the movable collateral regime that legitimised the business of moneylenders but failed to provide a regulatory framework thereof. The study was grounded on the theories of economic regulation being public interest and private interest theories of economic regulation, and sociological approaches to law.

The study discussed the chronological development of the legal position of moneylenders including a look at moneylenders in ancient civilisations such as Rome and Greece. It also discussed the development of the modern moneylender in various parts of the world. It established that the moneylending phenomenon is as old as history itself and that moneylenders have existed throughout history regardless of whether or not the society approved of their business.

Further, it was established that, historically, the society's perception of moneylenders was negative. They were viewed as thieves and their business equated to heinous vices. This was mainly due to their way of business which was characterised by extremely high interest rates on loans, brutal enforcement mechanisms, and exploitative credit terms. The issue of moneylenders was so central to the societal development that it was addressed by prominent philosophers and scholars including Aristotle and Thomas Aquinas just to mention a few.

The earlier scholars strongly spoke against moneylenders. This changed with time as at the turn of the 17th century, scholars and economists endorsed moneylending business with recommendations for regulation and supervision to be put in place. It is noteworthy that at this

point in time, the influence of the church over commercial morality had significantly declined. Further, Protestantism which had just emerged did not vilify commercial profit.[381] This development laid the basis for the enactment of the first laws to regulate moneylenders. This started in the UK and spread to other regions such as the USA, Asia and Africa.

A study of the legal framework indicated that Kenya did have a statute[382] that regulated moneylenders. This law comprehensively made provisions for the conduct of moneylending business. It defined the business, provided for licensing, supervision, as well as regulation of moneylenders. It empowered the regulator to monitor, inspect and impose sanctions in case of non-adherence with the law. Further, it made provisions for the rights and obligations of both the moneylenders and the borrowers. It ensured the protection of the consumers. Unfortunately, this law was repealed in 1984 leaving moneylenders to operate on the fringes of the law and thrive on exploitation of unprotected borrowers.

The study further discussed the other laws that in one way or another, affected or were relevant in respect of the business of moneylenders. It demonstrates how the existing laws and regulatory authorities have neglected the regulation of moneylenders, just like other informal financial services providers. This is despite the fact that moneylenders occupy a significant part of the financial sector.

It established that moneylenders are not really protected under Kenyan law. They have encountered problems when it comes to recovery of debts in the event of default by borrowers. Default is rampant due to the high interest rates imposed, and short repayment periods. Most moneylenders therefore employ informal and brutish debt recovery measures such as issuing threats to borrowers, selling off the collateral held, or taking forceful possession of borrowers'

[381]Sarah Brown, (2006) *supra*, p.9.
[382] The Money-Lenders Act, Chapter 528 of the Laws of Kenya.

assets, consequently selling them. Only a few moneylenders proceed to court to enforce their debt agreements.

As a measure to ensure debt recovery, most moneylenders use items that can easily be resold as collateral. In the event of use of land or motor vehicles as collateral, the moneylenders transfer, albeit fraudulently, such collateral to themselves upon issuance of loans to avoid loss that may be occasioned by default.

The Movable Property Securities Rights Act, 2017, and its role in legitimisation of moneylenders was discussed. This Act reinforces the position of moneylenders in the financial market. It empowers them register their security interests, at the e-registry established under the Act, in the collaterals obtained against credit facilities offered. Consequently, this has empowered moneylenders to legally use all the enforcement options provided for under the Act including; forceful possession of the collateral, disposition of collateral, and to seek remedies in courts of law just to mention a few. This law makes no provisions to regulate or supervise moneylenders. Neither does it make provisions for protection of borrowers against brutal business practices such as exorbitant interest rates or unfair loan terms.

Neither the Movable Property Security Rights Act, 2017, nor any other law provides for the regulation of moneylenders. Not even the proposed new microfinance law will help. The Microfinance Bill, 2019 does not include moneylenders in their definition of non-deposit-taking microfinance business,[383] but it may be inferred. No prescription of their conduct of business, no regulation or supervision whatsoever is provided.

This paper did also look at case law regarding moneylenders. It is evident that courts all around the country have handled moneylending disputes and in a couple of cases helped moneylenders

[383] Sections 2 and 3 of the Microfinance Bill, 2019.

enforce their debts regardless of their unfair terms. Only a few courts have attempted to protect the interests of borrowers in their decisions.

New developments such as the emergence of digital moneylenders have also further enhanced the problem of non-regulation. It was noted that the regulatory authorities have in the recent past attempted to put in place measures to protect borrowers from these digital moneylenders. This has been in relation to protection of private information and credit information sharing – particularly blacklisting of defaulters. However, nothing formal has been done in this respect. There are no plans for legislation thereof. Further, nothing has been done in relation to luring of potential borrowers and charging of exploitative interests on loans. It was also established that individuals in rural areas represent the majority of digital borrowers, wealthier digital borrowers obtain higher sized loans in absolute terms, and that employed workers are by far the most active users of digital credit. Convenience, disbursement speed and absence of stringent formalities are the primary reasons for preference of digital loans to other types of loans.[384]

The paper also looked at a number of international instruments relevant in financial regulation. These instruments established the importance of regulation of the financial sector in a bid to ensure financial stability, macroeconomic stability, prevention of criminal activities, as well as consumer protection. For this to be achieved, it is important for the entire financial sector, including the informal sector, of a jurisdiction to be supervised and regulated. The international instruments set international standards in financial regulation.

In its fourth chapter, the paper critically analysed the moneylenders' legal regimes in the UK and Uganda with a view to draw important lessons for Kenya. The legal, regulatory and institutional frameworks in these jurisdictions are well established. Both have statutes specifically enacted for

[384] Paul Gubbins & Edoardo Totolo (2018) *supra* pp.4-44.

the regulation of moneylending business. Further, they both have well established regulatory authorities mandated with the regulation of moneylending business. The laws have elaborate provisions for the conduct of business including licensing, the rights of the parties, interest caps and other consumer protection measures, as well as sanctions for non-compliance. These have enhanced integrity of the business in these jurisdictions. It is also noteworthy that both the UK and Uganda have been continuously reforming their laws in order to keep up with the changing dynamics and technological advancements in the market. This ensures the law is not rendered redundant.

During the reform of the moneylending law in Uganda, it was established that the informal financial sector including moneylenders is important in promotion of financial inclusion. Moneylenders had played an important role in ensuring the high risk borrowers and the generally poor members of society had access to credit. What was required therefore was to ensure that there is a conducive environment for the business as well as ensuring the interests of all the players are protected. It was important for the state to promote the business.[385] The role that moneylenders play in Kenya is not any different.

5.2 PROPOSALS FOR REFORM

It is imperative that reforms are made in order to bridge the gap in law as well as to conclusively deal with the shortcomings of the moneylending industry in Kenya. These include legal, regulatory and institutional framework reforms, as well as other market reforms.

5.2.1 Legal and Regulatory Framework

Undoubtedly, the state needs to enact a law to comprehensively provide for the regulation of the business of moneylenders in Kenya. This is important in ensuring that moneylenders operate

[385]Uganda Law Reform Commission (2014) *supra*.

within the confines of the law. A legal framework will play a crucial role in establishment of a regulatory authority, market restrictions including determining rules of entry into and exit from the market, business structuring of moneylenders, institution-customer relationship, information sharing and advertising requirements, accountability structures, sanctions, and dispute resolution mechanisms.[386]

This study has indicated that it is impossible to get rid of the moneylending phenomenon. Further, the study has demonstrated that the notion that the moneylending business had become obsolete, leading to the repeal of the only law that regulated their conduct, was misinformed and incorrect. This is evidenced by the upsurge of moneylending business following the repeal of the moneylenders Act. As such, the best cause of action is regulating the conduct of their business. The law should be a stand-alone statute specifically for regulation of moneylenders. this will ensure it is comprehensive as it will be streamlined to cater for this industry.

A law, preferably grounded on the repealed Money-Lenders Act with the relevant reforms and updates suitable for the 21st century situation, particularly the technological advancements, would be apt. The law may borrow from jurisdictions with developed regimes such as Uganda and the UK. This law should clearly define what constitutes moneylending business. It should be clear enough to ensure certainty. For instance, the Ugandan statute[387] expressly provides that moneylending business can only be conducted by incorporated entities. Nevertheless, the Kenyan law should allow a wider range of entities, including individuals to carry on the business. This is important in widening the scope of options for borrowers. The definition of moneylenders should expressly exclude banks, microfinance banks, Saccos, and other financial

[386] James R. Barth; Gerard Caprio Jr.; and Ross Levine (2013) "Bank Regulation and Supervision in 180 Countries from 1999 to 2011." *National Bureau of Economic Research, Working Paper No. 18733*. p.19.
[387] Tier 4 Microfinance Institutions Money Lenders Act, 2016.

services providers established under other laws. This will ensure there is no overlapping of laws or overregulation.

It is also imperative that the law to be enacted makes provision for licensing of moneylenders. Licensing is essential in monitoring and controlling the conduct of moneylenders. It regulates entry into and exit from the market. Licensing ensures that only suitable persons are allowed to carry on the business while the unscrupulous ones are barred, or kicked out, as the case may be. Licensing is also important for statistical purposes – measuring the size and growth or otherwise of the industry. This is important in macroeconomic planning. Additionally, licensing is a source of revenue for the government. It is imperative that the licensing is done annually, for effective regulation of the business.

The law needs to elaborately state the rights and obligations of both the moneylenders as well as the borrowers. It needs to balance the rights of all the stakeholders to promote business while at the same time protect public interest. Moneylenders should be prohibited from luring potential borrowers by sending unsolicited invitations to borrowers to take up loans. Digital moneylenders are notorious for this behaviour. Irresponsible advertising that misleads and misguides ill-informed and vulnerable borrowers has contributed towards over-indebtedness and enabled predatory lending.

The law should put a cap on the maximum rate of interest that may be chargeable on a credit facility to ensure that borrowers are protected from exorbitant interests. The law should also outlaw the use of compound interest and also place a limit on the amount that may be paid as penalties for defaulting. This should be done with moneylenders in mind to avoid setting up rates that will result in unprofitable businesses. Further, the terms of contracts should not be varied without the consent of the borrower. Moneylenders should be prohibited from taking deposits.

The proposed legal regime should also protect consumers through safeguards such as imposing disclosure requirements on the business and penalties for mishandling of consumer private data. Disclosure requirements should ensure the information is provided in a form and manner that the consumer can understands all the costs of the credit facility. There is also need to ensure such records are kept confidential to ensure protection of borrowers' private information. The moneylenders should be mandated to keep records of all their transactions for a prescribed period of time and allow the designated regulators access for inspection thereof.

This law should make provision for sanctions for non-compliance with the law. These may range from suspension or revocation of licenses to criminal sanctions including fines and imprisonment. Moneylenders engaging in unscrupulous conduct should have their licenses suspended or even revoked in extreme cases. Fraudulent activities and violation and other unlawful actions should result in criminal sanctions. Convicted offenders should be liable to fines or imprisonment, or both. The prison terms and fines for various offences should be expressly stated. It is important that the sanctions imposed under the law are deterrent to help improve the integrity of the industry. The law should establish an authority tasked with the imposition of sanctions.

Another important issue to be taken into account is the ease of doing business. The law should ensure that its provisions do not hinder the ease of doing business. The process of establishment of moneylending business should be simple and clear. Any incorporated or otherwise registered business with moneylending as one of their objectives, as well as natural persons should be allowed to carry on the business of moneylending on condition that they acquire licenses to do so. This will be unless they are expressly prohibited from carrying on such business by any other law. The licensing fees and any other charges should be reasonable. Transactions may be stamp duty exempt to further promote ease of doing business.

The Movable Property Securities Rights Act, 2017, should be applicable in relation to creation of security rights, third party effectiveness, priority, enforcement, and other provisions relating to movable collateral security rights. Moneylenders should be allowed to register their security interests in e-registry, acquire priority rights as provided for under this Act, and explore enforcement options available thereof.

5.2.2 Institutional Framework

The state needs to put in place an authority that will facilitate implementation of the proposed law. Such an authority should have clearly prescribed functions and powers. It is important that the authority is composed of technocrats with the relevant knowledge of the financial sector and its regulation. The authority should be mandated with the supervision and regulation of moneylenders. It will be in charge of licensing of moneylenders, vetting and determining entry into and exit from the market. This authority will also be in charge of formulating policies and guidelines to ensure efficient and proper functioning of the industry.

As seen in chapter four, both the UK and Uganda have established authorities charged with the regulation of moneylenders. The existence of a designated authority is therefore key in the regulation of moneylenders. In both jurisdictions, the authorities charged with regulation of moneylenders regulate other businesses in the industry. Besides moneylenders, the Uganda Microfinance Regulatory Authority (UMRA) regulates self-help groups, non-deposit-taking microfinance institutions, community based microfinance institutions and saccos.[388] The Financial Conduct Authority (FCA) of the UK is tasked with the regulation of all financial

[388] Section 4 of the Tier 4 Microfinance Institutions Money Lenders Act, 2016.

services institutions including consumer credit firms, which is where moneylenders fall.[389] From the foregoing, it is clear that there is no need to create a new body to regulate moneylenders.

The existing financial regulators may have the scope of their authority widened to include regulation of moneylenders. The most appropriate authority in the Kenyan case is the Central Bank of Kenya (CBK). The CBK regulates other financial institutions that offer credit services such as banks and deposit-taking microfinance institutions.[390] It sets market policies, licenses them and regulates interest rates. It is therefore the apt authority to regulate moneylenders. this is also important for the efficient and cost effective regulation of the industry. There will be no need to incur further taxpayer funds in creation of a new regulator. Efficiency is brought about by having one authority regulate businesses offering similar services. In any case, the CBK has initiated measures to regulate moneylenders, in particular digital moneylenders.

In addition to the above proposed roles, the authority will also be in charge of monitoring the conduct of the market, inspecting business records. This may either be on sight inspection or by requiring moneylenders to periodically file returns with it. It may also institute investigations in case of suspicious conduct. Regular monitoring and inspections are important preventive measures and promote compliance. The authority may impose sanctions such as suspension or revocation of licenses, order corrective action, or reprimand moneylenders where it deems fit. It may also institute criminal proceedings where necessary. It shall put in place measures to ensure the interests of the public are protected as envisaged under the proposed legislation.

There are other institutions that will be relevant in the implementation of the proposed moneylenders law. These include the Business Registration Service in respect of registration of security rights, as well as registration of businesses and companies, and the Cabinet Secretary for

[389] Section 1A of the Financial Services and Markets Act, 2000.
[390] Section 4 of the Central Bank of Kenya Act, Chapter 491 of the Laws of Kenya.

the National Treasury and Planning for purposes of formulation of regulations to help in implementation of the proposed law. It is therefore imperative that the scope of these institutions are widened to ensure moneylenders are within their scope.

5.2.3 Other Proposals for Reform

The state needs to sensitise the public, particularly potential borrowers on moneylending business, the legal position of moneylenders today, and the protections offered under the existing laws. Sensitisation will help create a public that is vigilant and alert to the gimmicks of moneylenders. As discussed in the case laws in chapter three, most moneylenders use coercion, threats and treachery to defraud borrowers. Many of them coerce borrowers to sign blank documents, or sign supposed loan agreements without getting a chance to confirm the contents thereof. Borrowers also fail to get copies of these agreements for their records. This makes it hard for them to pursue legal redress in case they are defrauded by moneylenders. This may not be a very effective solution as moneylenders prey on the desperation of these borrowers. Nevertheless, it may be a temporary remedy until a lasting solution in form of a legislation is made.

In conclusion, regulation of moneylenders is a very delicate balancing act. A rigid regulatory system increases the barriers of entry into business that may starve a huge segment of the population much needed credit. On the other hand, a flexible and lax regulatory system may fail to rein-in rogue and exploitative moneylenders. Kenya should try to have a balance of the two in order achieve the best of both worlds.

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