

**“Land As Security For Lending In Kenya: A Review Of The Legal,  
Institutional And Policy Frameworks”**

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Degree, University of Nairobi.**

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**DECLARATION**

I declare that this is my original work and has not been presented to any college and/or university for the award of any degree or master degree.

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Date..... 7<sup>th</sup> JULY 2012

**SUPERVISORS DECLARATION**

This research proposal has been submitted for examination with my approval as the university supervisor

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Date..... 14/07/12

## **DEDICATION**

I wish to dedicate my work to my loving and adorable parents Mr. Wilson Jalang'o and Mrs Grace Jalang'o, They have been a source of inspiration and encouragement and I owe them my success.

## **ACKNOWLEDGEMENT**

First and foremost I would like to thank Almighty GOD for his divine presence in my life and his guidance all through.

I am indeed thankful to my family, relatives and friends for their prayers, encouragement, financial support and motivation in making my studies and this project a success.

Special thanks to go to my supervisor Prof. Paul Musili Wambua for his tireless guidance and support towards my overwhelming success in this research.

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# CHAPTER ONE

## BACKGROUND

The practice of giving rights over land as security for debt is of great antiquity<sup>1</sup>. Until the end of the twelfth century, the transaction was by way of lease by the mortgagor to the mortgagee. This was done by either a living pledge ('vivum vadium')<sup>2</sup> or a dead pledge ('mortum vadium')<sup>3</sup>. The chosen pledge depended wholly on whether the income from the land was or was not, used in the discharge of the debt<sup>4</sup>. Currently, mortgages and charges constitute the use of land as security<sup>5</sup>.

Land can be used as a lien or pledge for a loan of money. The land is given as a gage to be forfeited in default of payment.

The idea of mortgages is said to have originated from the ancient Roman Law and practice although it has also been accepted that Mohammedan Law as well as Common Law traits which point to these forms of transactions<sup>6</sup>. Under ancient Roman Law two forms of mortgage transactions can be identified the first aspect of the mortgage institution to develop under this law was the form that was known as the *Fiducia* as a form of mortgage this involved a fiduciary relationship between a lender and a borrower whereby the property in question was given to the lender extending the facility in return for a loan and it was a condition under this arrangement that upon default such property would be forfeited to the lender regardless of the value comprised in it.

The second aspect of the mortgage institution under Roman law was identified as the *pignus* which entailed a transfer of possession of the property of the property pledged as security but without the element of forfeiture as was the case in the first example. Upon default the property

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<sup>1</sup> Edward FC&Ian Clarke, *Cousin on the Law of Mortgages*, 2<sup>nd</sup> edition, (London: sweet&Maxwell,2001), p11.

<sup>2</sup> 'Vivum vadium' was an agreement requiring the lender to take possession of the property to recover what was owed in the form of principal sum advanced together with interest on such loan. (Ibid).

<sup>3</sup> 'Mortum vadium' was an arrangement that the lender received benefits of the property towards the discharge of the element of interest i.e. the benefits of the property was to be applied towards the discharging interest accrued rather than the principal amount advanced. . (Ibid, note one).

<sup>4</sup> Op cit n, 1,pp 11.

<sup>5</sup> Onalo P.L, *Land Law and Conveyancing in Kenya*, ( Nairobi: Heinemann, 1986), p126

<sup>6</sup> Ojienda T, *Conveyancing: Principles and Practice*, (Nairobi: LawAfrica Publishing (K) Ltd, 2008), p164.



in question was merely sold and not forfeited so that there was a possibility of the borrower getting back something that in the event that the property fetched something more than owed<sup>7</sup>.

There was a third realm distinct from the first two with different rules being applicable it was known as the *Hypotheca* involved a pledge without the need for the property being delivered instead what the creditor had was a kind of power of sale which could be exercised in the event of there being a default. When such a power was invoked the duty to render accounts for the proceeds from such a sale arose and it is a much stricter requirement than the practice involved in the *pignus*<sup>8</sup>.

At Common Law, the institution of mortgage took the form of the pledge of a property to the lender coupled with the transfer of possession rather than title. Originally the mortgage institution at common law manifested itself by way of pledge of a property to the lender not title thereto. This eventually developed into what is known as the English mortgage which is a form of conveyance of the property in question with the understanding that the mortgagee will reconvey the property in question to the mortgagor upon repayment of the principal sum and any interest that may have accrued. Over the years the institution developed in various forms so that by the 12<sup>th</sup> century two forms of pledges evolved. The living pledge and a dead pledge.

The living pledge, as noted earlier, otherwise known as '*Vivum Vadium*' which was an arrangement requiring the lender to take possession of the property recover what was owed in the form of principal sum advanced together with interest on such loan and thereafter discharge the property<sup>9</sup>. In the case of the dead pledge '*Mortum Vadium*' the lender received benefits from the property towards the discharge of the element of interest only leaving the principal sum to the borrower so that any benefits to the property was to be applied towards discharging interest accrued rather than the principal amount advanced<sup>10</sup>.

Initially, the practice was that a borrower, upon defaulting in repaying the loan, had to forfeit the land which he had conveyed as security for the loan to the lender. Consequently, he would lose

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<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Edward FC& Ian Clarke, (2001) *Supra*, note 1, at page 11.

<sup>10</sup> Ibid

the land regardless of its value, which was quite harsh<sup>11</sup>. Indeed, before 1925 in the United Kingdom the owner of a legal or equitable interest conveyed in full the interest to the lender, making it very easy for the lender to enforce the security. The consequences for the borrower in case of default in payment on the due date<sup>12</sup> were severe. This is because the borrower lost the land entirely.

Fortunately equity intervened to remedy the situation in the United Kingdom (UK), adopting the policy position of '*once a mortgage always a mortgage*'. This meant that the borrower was entitled to a re-conveyance of the land should the borrower pay the full charges due under the mortgage, even though the legal date of payment has passed. This then was the background to the changes made by the Law of Property Act of 1925 in UK to the methods by which mortgages could be created.

The general principle that underscored the 1925 property reforms in UK was that, as far as possible, the owner of the land should retain the fullest interest possible in their own property even when seeking a mortgage, against the title of the property. The above legislative reforms and equity intervention, have adequately protected the mortgagor. There have been legislative reforms after 1925 that have endeavored to put in place measures that ensure that no mortgage may take effect by absolute *conveyance* of land<sup>13</sup>. Indeed the 1925 legislative reform mitigated the difficulties faced by the mortgagor<sup>14</sup>. However the said reforms have on the other hand exposed the mortgagees to serious challenges and problems that have negatively affected the efficacy of land securitization.

The Law of Property Act of 1925 has had considerable effect in the Kenyan situation. This is attributed to the fact that the law of mortgages and/or charges is a product of common law, equity and statutes in England. It is pertinent to appreciate that, common law and equity are received law, subject to restrictions<sup>15</sup> imposed by the Judicature Act of 1967<sup>16</sup>. The relevant

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<sup>11</sup> Ojienda T, (2008), *Supra note 6*, at page 165.

<sup>12</sup> Legal date of redemption

<sup>13</sup> Martin JD&Gerwyn HG, *Q&A Land Law*, 7<sup>th</sup> edition, (Taylor & Francis Ltd, 2011), p195.

<sup>14</sup> Lord Chorley, *Law of Banking*, 3<sup>rd</sup> edition, (London: Pitman & Sons Ltd, 1950), p268.

<sup>15</sup> They shall only be applicable to the Kenyan inhabitants in so far as the circumstances of Kenya permit, subject to such qualifications as those circumstances may render necessary. Section 3(1) (c) of the Judicature Act Cap 8 Laws of Kenya

<sup>16</sup> Onalo PL, (1986) *Supra note 5*, at page, 128.

statutes<sup>17</sup> governing interest in land in Kenya are drafted in a manner that the rights of the mortgagor are intact, and ferociously guarded.

However, the study addresses issues concerning the lenders/mortgagees and whether their interests are adequately protected by the law. There are challenges faced by the lenders, when the date of redemption is extended by legislation or by the court. The overemphasis of mortgagor's protection has ended up being the greatest predicament to the mortgagees/lenders in land securitization.

The challenges facing the mortgagors/lenders include: court injunctions<sup>18</sup>, defaults in payments of land rates<sup>19</sup>(section 17(6) of the Rating Act Cap 267, the High Courts may order for the sale of land for purposes of enforcement of payment of rates due to the local authority), liquidity problem (land is not easily realizable security)<sup>20</sup>, multiple laws some which are incompatible, corruption and fraud perpetrated by officials at the ministry of lands, cancellation of illegally acquired titles used in land securitization and also professional negligence. The said challenges are discussed aptly in chapter two and three.

The study identifies the necessary legislative, institutional and policy reforms that would ensure the above challenges and difficulties faced by the lenders are mitigated. The study has analyzed and reviewed the Legal, Institutional and Policy frameworks of land securitization in Kenya with a view of identifying the challenges faced by lenders and ultimately, suggested possible solutions thereof.

### **STATEMENT OF THE PROBLEM**

There has been no single codified National policy framework on land securitization in Kenya. The lack of a single and clearly defined policy on land securitization brings about a cloud of confusion to the various stakeholders including banks who are the lenders/mortgagors, making

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<sup>17</sup> Registration of Title Act (Cap281), Registered Land Act (Cap 300), Government Land Act (Cap280), Land Titles Act (Cap 282), Trust Land Act (Cap288), Land (Group Representatives) Act (Cap 287), Sectional Properties Act No.21 of 1987, India Transfer of Property Act

<sup>18</sup> The borrowers/customers usually use the court to obtain injunctions and other orders to frustrate the banks when they try to realize the security. The situation is further compounded by the huge backlog of cases in all courts.

<sup>19</sup> Mwaniki Wahome, "*City Land Owners face huge fines over rates defaults*" Daily Nation: Smart Company Weekly Business Magazine 2<sup>nd</sup> November 2010.(The article notes that the mortgage firms, banks and financiers are most likely to be affected. The city council issued a notice warning Banks, mortgage firms and financier to ensure that their clients have paid land rates for properties where they hold lien. The council has commenced legal action against rate defaulters with view of recovering the same through auction and banks risks losing their interest in such properties.)

<sup>20</sup> David P and Philip F, *Element of Banking*, 2<sup>nd</sup> edition, (London: Pitman Publishing Ltd, 1988), p 494.

the management of land securitization problematic if not chaotic. Indeed the policy informs the enactment of up to date laws that would ensure lenders are protected fully. Consequently the legislative framework must be underpinned by a sound policy framework to ensure effective enforcement. The sessional paper no.3 of 2009 gave birth to the National Land Policy. Chapter 3 statement of policy no. 87 provides for land markets operations which include among others mortgage of interests in land. According to the National Land policy<sup>21</sup>, efficient land markets can facilitate access to land.

Having regard to the foregoing the study analyses the impact and/or effects of lack of National Land Securitization Policy on the efficacy of mortgages and charges transactions in Kenya. The study addresses the emerging themes arising from the National Land Policy (herein after referred to as NLP), and determine whether or not there are challenges arising from the same, to lenders who take land as security for loans advancement. Further, the study considers and views as a problem that the NLP does not solve all the problems that affect the efficacy of land securitization, the policy framework on land securitization is thus inadequate to the detriment of lenders. The study considers whether or not there is need to have an immediate, holistic and systematic policy attention to land securitization.

On the other hand, the Legal framework of land securitization in Kenya also faces numerous challenges. First and foremost, the existence of multiple land laws (eight statutes<sup>22</sup>), some of which are incompatible, has resulted in a complex land management and administration system that has hampered efficacy of land securitization. Banks that engage in land securitization transaction must be aware which legislation is applicable and/or relevant with regard to the parcel to be taken as security. There is also the problem of injunctions issued by courts barring the lenders/mortgagors from exercising the remedies of statutory sale or forfeiture of the said land in case of default. The above challenges together with the mandatory statutory requirement of notice to sell the land comprising the security as provided for by Registered Land Act Cap 300 makes land not easily realizable security thereby causing liquidity problems.

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<sup>21</sup> Policy no. 88 provides that the government shall facilitate the commercialization of land rights subject to principles of equity, sustainability and public policy considerations such as security.

<sup>22</sup>Registration of Title Act (Cap281), Registered Land Act (Cap 300), Government Land Act (Cap280), Land Titles Act (Cap 282),Registration of Documents Act (Cap285), Trust Land Act (Cap288), Land (Group Representatives) Act (Cap 287), Sectional Properties Act No.21 of 1987, India Transfer of Property Act

From the above premise, the main problem that this research seeks to address is that the current laws and regulations governing land securitization in Kenya do not largely address the above mentioned legislative issues that are a challenge to lenders. This research views the existence of loopholes within the existing legal framework to be of great concern particularly given to the increased use of land as security. The study attempts to establish whether or not there is need to enact one property law to address the above mentioned legislative issues or amend the existing statutes so to address the legislative challenges.

The Institutional framework faces its own unique challenges. It's highly centralized, complex and exceedingly bureaucratic, hence informing the rampant corruption and blockade of land transaction in various institutions. There has been failure and/or near collapse of professionalism in the institutions involved in land securitization transactions to the detriment of the lenders/mortgagors. The land registries, Land Control Boards, Courts, Financial Institutions and Law firms do not coordinate to ensure that the land securitization process benefits both the borrowers and lenders. Proper coordination and cooperation of all the above institutions would ensure that the lenders interests are protected.

The study addresses the various challenges and/or problems, arising out of the legal, institutional and policy frameworks of land securitization in Kenya and, the effect of the same to lenders. The study suggests various reforms that are necessary to ensure proper legal, legitimate and effective use of land to increase the accessibility to credit facilities from financial institutions. Further, the study proposes the ways and means by which land could be made the safest security for credit advancement.

### **JUSTIFICATION OF THE STUDY**

Significant portion of the total loan portfolio in Kenya is backed by land security. Statistics released by the Central Bank of Kenya in February show the real estate sub-sector received loans totaling Shillings 52.8 billion in the 12 months ending December 2009. According to the figures, the credit facilitation to the sub-sector accounted for 19.3 per cent of the total credit extended to the private sector after trade<sup>23</sup>. If the above figure is anything to go by, then it affirms the position that indeed significant loan portfolio is backed by land as security. As will be noted in the following discussion land is crucial security that can be used to access credit facilities (loans)

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<sup>23</sup> Harold A, *Billion at Stake over Revoked Titles*, Standard News paper, 27<sup>th</sup> May 2010.

from banks and other financial institutions. The purpose of land securitization to the lenders/banks is to enable the lender/banks to take the property in whole or partial in satisfaction of the debt if the borrower fails to repay the loan<sup>24</sup>. The said purpose is the summary of the remedies available to the banks/lenders in case of default on the part of the borrower.

However land issues in Kenya are very emotive and thus require extra care and due diligence by any transacting party. High demand by competing interest groups, inefficiency at the lands registry, corruption, irregular land allocations, frequently changing land policies, numerous laws dealing with land and land clashes in various parts of the country have made the discussion come at an appropriate time when the country has just enacted new constitution. Chapter five<sup>25</sup> of the new Constitution of Kenya makes provisions on land and environment. Further, the discussion is very important to the lenders because it has identified challenges of taking land as security and reforms that will ensure that the land securitization is perfected to enable easier and increased access to finances (loans) by land owners' thereby steering economic growth in the country. The study is also important to the policy makers because it may inform their decisions in formulating policies that ensure the efficacy of land securitization transactions. Finally the study is also important to the legal practitioners because it will provide practical insight to the prevalent issues in land securitization hence assist them in service delivery to their clients.

## **THE GOAL/MAIN OBJECTIVE OF THE STUDY**

The main objective of the study is to undertake an in depth analysis and review of the legal, institutional and policy framework on land securitization in Kenya for purposes of ascertaining the pitfalls and/or challenges faced by lenders and ,additionally, identify the urgent and/or necessary reforms that would guarantee the efficacy of the above process.

## **SPECIFIC OBJECTIVES**

- a) To examine the policy framework in order to test the efficacy of the same in so far as it affects the use of land as security for lending
- b) To identify institutional challenges that affects the use of land as security for lending

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<sup>24</sup> Judith and Mary, *Land Law*, 8<sup>th</sup> edition, (London: Blackstone Press Ltd), p 390.

<sup>25</sup>. According to **article 60(1)** provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. The constitution enumerates several principles<sup>25</sup> that shall govern land management in Kenya.

- c) Identify the legal impediments that hinder the efficacy of land securitization.
- d) Explore the various policy, legal and institutional reforms that would ensure the perfection of land securitization.

## RESEARCH QUESTIONS

The research project aims to answer the following research questions:

- a).What are the policy, legal and institutional challenges that affect land securitization in Kenya?
- b).What are the best practices of land securitization in other selected jurisdictions?
- c).What are the legal, institutional and policy reforms required to ensure perfection of land securitization?

## HYPOTHESIS

The weak legislative framework, lack of policy framework and ineffective institutional framework is arguably one of the major causes of challenges facing lenders who take land as security for lending thereby hindering the efficacy of process. The study seeks to assess to what extent the laws, institutions and policies are inadequate thereby resulting to challenges facing lenders who engage in land securitization transactions. Finally, the research makes proposals for correcting such inadequacies where appropriate.

From the above, the hypothesis that this research seeks to prove or disprove is that the inadequacies that exist in the current laws, institutions and policy governing land securitization in Kenya has resulted to various challenges to lenders thereby hindering the efficacy of the process.

## THEORETICAL FRAMEWORK

The study focuses principally on the **Legal theories of mortgages and Economic Analysis of Law Theory**. The theories are pertinent because mortgages are the most common methods of land securitization in Kenya<sup>26</sup>. Therefore the study is premised on the transactions in mortgages and also charges that amount to a burden on land offered as security. A mortgage involves the transfer of an interest in land as security for loan or other obligation. The same view was underscored by *Lindley MR.* in the case of *Santley Vs Wilde*<sup>27</sup> where he described mortgage as

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<sup>26</sup> P.L. Onalo, *Supra note 5*, at page 126.

<sup>27</sup> (1899) 2 Ch 474

a conveyance of land or an assignment of chattels as security for the payment of a debt or discharge of some other obligation for which it is given.

The great English jurist **Sir Edward Coke (1552-1634)** explained the rationale of the mortgages. It seemed to him that it had to do with the doubtfulness of whether or not the mortgagor will pay the debt. If the mortgagor does not, then the land pledged to the mortgagee as security for the debt “is taken from him for ever, and so dead to him upon condition, and if he doth pay the money, then the pledge is dead as to the mortgagee.”<sup>28</sup> Coke considered the question of uncertainty between mortgagor and mortgagee and concluded that if someone takes out a mortgage and does not handle the debt, then the real property mortgaged is handed over and the pledge is dead. Similarly, should the mortgagor pay off the debt, the pledge is likewise dead. Sir Edward Coke, made sense of the etymology within his compilation of English common law<sup>29</sup>.

### **The Legal Theories of mortgages**

The two Legal theories of mortgages that provide theoretical underpinning of the study are the **Title theory** and **Lien theory**. Title theory of mortgages evolved from the common law of England, the mortgage was an outright conveyance of real property by the borrower to the lender. The borrower could reposes his property only on repayment of the entire debt on a certain due date. If the borrower failed to make the full payment on the exact date, the lender had unconditional title to the property<sup>30</sup>.

Further, the title theory considered the doctrine that a mortgage is a conveyance of the legal title to property. According to the title theory<sup>31</sup>, title to the mortgaged property is conveyed to the lender through a mortgage deed or through a trust deed. If the borrower defaults the lender may take possession of the property. A defeasance clause included in mortgages in title theory, provides that the conveyance of title by the borrower to the lender is defeated when the borrower meets all of the terms and conditions of the mortgage. The defeasance clause, therefore, is the vehicle by which the borrower regains title after the debt has been paid<sup>32</sup>.

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<sup>28</sup> [www.thehistoryof.net/history-of-home-mortgages.html](http://www.thehistoryof.net/history-of-home-mortgages.html) last accessed on the 8<sup>th</sup> April 2011

<sup>29</sup> [www.randomhistory.com/1-50/037mortgage.html](http://www.randomhistory.com/1-50/037mortgage.html) last accessed on the 8<sup>th</sup> April 2011

<sup>30</sup> Gaines G, Coleman D, Crowford L, *Florida R.E, Principles Practices and Law*, 3<sup>rd</sup> edition, (Dearborn Financial publish INC Chicago), p 242.

<sup>31</sup> Title theory.

<sup>32</sup> Ibid



The title theory provides a useful framework for examining the legal, institutional and policy frameworks of land securitization in Kenya. It underscores the provisions of **section 58 (e)** of the **Indian Transfer of Property Act 1882 ITPA** where the title is transferred to the lender during the loan period. The above section elucidates the first basic requirement of title theory that there must be a conveyance of legal title from the borrower to the lender. Under **section 58(e) of ITPA** the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgage property absolutely to the mortgagee subject to the proviso that the mortgagee will retransfer it to the mortgagor on repayment of the mortgage debt<sup>33</sup>. This contributes and largely constitutes the requirements of title theory.

Further Title theory relates to the problem under investigation as far as mortgage transactions are concerned because it provides for the options available to the lender in case of default. According to the Title theory, if the loan is not paid the lender would retain ownership of the property, keeping it for its own benefit or selling it. The retaining of ownership might not be the prudent option since the banks are not engaged in the business of owning land. The other option of selling the security faces its own unique challenges. The process might be long<sup>34</sup> and expensive. The courts may block the sale of the land through an order of injunctions issued by the courts. In some instances the banks might fail to get a buyer. Consequently the transfer of ownership from the borrower to the lender as envisaged in Title Theory doesn't in itself solve the problems facing the lenders when they engage in mortgage transactions.

The title theory that was prevalent in the feudal England was draconian and harsh because the Mortgagor never intended to give up title to his property when creating a mortgage. Although a mortgage gives the lender ownership of the property mortgaged, this is not really what the lender wants. The lender is simply looking for security whilst the borrower merely sought to give a lien over their property in case of default. Equity stepped in and developed the **lien theory** which was expressed in the maxim that "once a mortgage, always a mortgage". In this case the title to the property remains with the mortgagor during the period of loan. No longer, therefore, did the mortgagee stand to gain by obtaining a property which might be worth more than the debt.

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<sup>33</sup> P.L. Onalo, *Supra note 5*, at page 130.

<sup>34</sup> Due to backlog of cases in the court, dispute takes long before conclusion and /or determination. Thus a bank seeking court order for the sale of the land may be frustrated by the long litigation process.

Equity compelled the lender to treat the property no more than a lien for the money owed. This lien is a mere passive right of retention, giving no right to sell or otherwise deal with the property. It is therefore merely a means of coercing the debtor to pay, rather than a security against payment not being made<sup>35</sup>.

Under the **Lien theory** the borrower retains the title to the property. The lender is protected with a lien on the real property to secure the payment of the mortgage debt. The courts of equity have from quite an early date regarded the mortgagee as having a lien or charge to secure his debt. The lien theory considers the concept that a mortgage is a form of lien on the property that does not grant the mortgagee any ownership rights until foreclosure. Thus the borrower holds the deed to the property during the mortgage term and promises to make all payments to the lender and the mortgage becomes a lien on the property, but the title remains with the borrower.

The lien theory also provides a useful framework for examining the legal, institutional and policy frameworks of land securitization in Kenya. It underscores the provisions of **section 65(4)** of the **Registered Land Act** where the charge does not operate as a transfer but only have the effect of security only. Similarly by virtue of **section 46** of the **Registration of Titles Act** a lender can advance on security of a registered charge to operate as security only and not a transfer. The charge creates an interest in land securing the payment of money. The above interest can be treated as lien. This is because the borrower is prevented from disposing, alienating or dealing with the land in a manner that will affect the rights of the lender. Thus the most appropriate theory that will underpin charges created under Kenyan law is the lien theory.

Further the lien theory relates to the problem under investigation as far as charges are concerned because it elucidates the rights of both the lender and the borrower. Under the lien theory legal title remains with the mortgagor unless there is foreclosure. The borrower is however prevented from disposing, alienating or dealing with the land in a manner that will affect the rights of the lender. It's important to note that part of the greatest challenge facing lenders is realization of the security in case of default. The borrower might be prevented from disposing and/or alienating the land but that is not a guarantee that the lenders are adequately protected. The remedy of

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<sup>35</sup> Robert M, William W, *The Law of Real Property*, 6<sup>th</sup> edition, (London: Sweet & Maxwell), p 1169.

foreclosure as provided by the lien theory is made difficult by the fact that the borrower holds the title to the property.

### **Economic Analysis of Law Theory**

Justice Oliver Wendell Holmes Jr. cited in Bix<sup>36</sup> stated that *'for the rational study of law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.'* The economic analysis of law<sup>37</sup> stipulates that there is a sense in which the law correlates with economics thereby presenting a vital practical approach which should be used to evaluate a legal instrument or provision. When conducting a review or analysis of laws, one should ask whether a proposed change will reduce the evil in question or whether there might be adverse long term effects that may harm the group one is trying to protect. For the purposes of this research, it is crucial that when assessing whether the existing laws, institutions and policies are adequate in achieving their purpose of ensuring efficacy of land securitization in Kenya, the theory of the economic analysis of law is appropriately considered.

Richard Postner (1939 - ) was one of the most influential figures in the law and economics movement<sup>38</sup>. He argued that the underlying rationale of common law adjudication is economic in nature<sup>39</sup>. The true basis of legal prohibition according to Postner is economic efficiency.<sup>40</sup> The important issue according to Postner's argument is that legislation and rules produced should be efficient. Therefore, a review or analysis of any laws including those dealing in land securitization according to Postner must be based on the principle of efficiency, that is, consideration of the effect such review or analysis will have on the economic forces of the market.

Consequently, the study aims to review the laws, institutions and policies in land securitization in Kenya thereafter make recommendations or proposals for variation or changes to such laws, where it is deemed necessary in order to achieve increased efficacy in the process. The economic

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<sup>36</sup> Bix B, *Jurisprudence: Theory and Context*, 4<sup>th</sup> edition (London: Sweet and Maxwell, 2006) at page 189.

<sup>37</sup> Some of those who propounded the economic analysis of law include amongst others Ronald Coase (1910) with the Coase theorem which stipulates that the efficient distribution of goods depends on a free market where activities respond to prices and costs without the distortion of subsidies which reduce the cost of production resulting in more of the goods being supplied than would otherwise have been the case. Other theorists include Richard Postner.

<sup>38</sup> Ibid

<sup>39</sup> Harris J.W, (2<sup>nd</sup> Edition, 2004), *supra* at page 48.

<sup>40</sup> For example, Postner explained that laws penalize a thief not because the theft is morally or in some non-economic sense wrong but because it wishes to persuade such a thief to use the market. Further, he argued that whether the law penalizes through tortious liability or criminal sanction is a question of technique.

analysis of the law, which is grounded in part on the theory of utilitarianism, is therefore an appropriate and relevant theory for the conduct of this exercise.

## **METHODOLOGY**

In carry out the research, data collection was from two main sources; primary and secondary. Secondary sources included relevant documents, texts, journals and reports. Secondary data was collected by reviewing available literatures/publication in relation to the topic. Primary sources include data collected from selected respondents using target respondent interviews using questionnaire. Questionnaires were administered to the government officials at the ministry of lands, bank managers and judicial officers who were purposefully selected. Interviews were preferred because they gave an opportunity to probe and obtain detailed information on an issue.

The data has been analyzed in a qualitative manner whilst the work heavily relied on qualitative research, which was conducted in an analytical manner. Qualitative data analysis sought to make general statements on how categories' or themes of data are related. The data will be in the form of texts and materials which described occurrences

## **LITERATURE REVIEW**

There have been numerous publications on "land securitization" however majority have been analysis of other jurisdictions. According to David Palfreman and Philip Ford, *Elements of Banking*, 2nd edition, Pitman Publishing, 1988, underscores the importance of bank lending. According to the book, of the traditional activities pursued by the commercial banks, lending is the one which has always been the principal profit earner and so it remains today despite the growth of ancillary services. It's noted in the book that lending money is easy; it is ensuring that loans are repaid that skill is required<sup>41</sup>. The purpose of taking security for an advance is to acquire some right to sue the customer if repayment according to the terms of the loan is not made.

The writers discuss land as a type of security. They endeavor to point out the advantages and disadvantages of taking land as security. A mortgage of land has one overriding advantage: land never completely loses its value. Land always appreciates in value .The disadvantages includes: Land being difficult to value for security purposes, greater difficulty and formality to attach to a

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<sup>41</sup> David & Phillip F, (1988), *supra note 20*, at page 456.

mortgage of land than other forms security, land is not easily realizable security and finally an equitable mortgagee/lenders must seek the court's sanction in any action for realization of the security<sup>42</sup>.

The above disadvantages are some of the challenges facing lenders in Kenya when they take land as security. The lenders in Kenya grapple with difficulties of enforcing land incase of default. The authors correctly note that land is not easily realizable. The seeking of court's sanction in an action for realization as indicated by the authors has always been the greatest challenge facing lenders in Kenya. However the book fails to explain how the seeking of court's sanction before the realization of the security is challenge to the lenders. In Kenya the huge backlog of cases in our courts, long litigation process and injunctions have made realization of land very cumbersome to lenders. Further the book doesn't address some of the challenges facing lenders in Kenya which includes; defaults in payments of land rates <sup>43</sup>(section 17(6) of the Rating Act Cap 267, the High Courts may order for the sale of land for purposes of enforcement of payment of rates due), multiple laws some which are incompatible, corruption and fraud perpetrated by officials at the ministry of lands and judicial officers and cancellation of illegally acquired titles.

Edward F. Cousin in his book, "The Law of Mortgages", 2nd edition, Sweet& Maxwell London, 2001 discusses the nature of a mortgage which is very pertinent to the study. He states the difficulty of describing a mortgage in a satisfactory manner by use of case law. **Lord Macnaghten** was moved to say in the case of **Samuel Vs Jarrah Timber and Wood Paving Corporation**<sup>44</sup> that no one, by the light of nature, ever understood an English mortgage of real estate. The writer further discusses the history of the law of mortgages<sup>45</sup> and also points out that the essential features of distinction between a mortgage and a charge. Mortgage is a security

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<sup>42</sup> Ibid, pg 494

<sup>43</sup> Mwaniki Wahome, "*City Land Owners face huge fines over rates defaults*" Daily Nation: Smart Company Weekly Business Magazine 2<sup>nd</sup> November 2010.(The article notes that the mortgage firms, banks and financiers are most likely to be affected. The city council issued a notice warning Banks, mortgage firms and financier to ensure that their clients have paid land rates for properties where they hold lien. The council has commenced legal action against rate defaulters with view of recovering the same through auction and banks risks losing their interest in such properties.)

<sup>44</sup> (1904) AC 323 at 326

<sup>45</sup> The practice of giving rights over land as security for debt is of great antiquity<sup>45</sup>. Until the end of the twelfth century, the transaction was by way of lease by the mortgagor to the mortgagee. This was done by either a living pledge ('vivum vadium')<sup>45</sup> or a dead pledge ('mortum vadium')<sup>45</sup>. The chosen pledge depended wholly on whether the income from the land was or was not, used in the discharge of the debt<sup>45</sup>. In default of repayment on the appointed day the mortgagee took the land. Edward FC& Ian Clarke, (2001) supra, note 1, at page 11.

accompanied by a transfer of property rights, whilst a charge is an appropriation of property to the satisfaction of an obligation without any such transfer of title.

The above distinction by Edward is relevant to the study and also important as far as lenders (banks) are concerned because they do have at law rights which differ according to whether the lender is a mortgagee or a chargee. Edward Cousin notes that the chargee only has certain rights over the property charged. The mortgagee but not a chargee should have the right to foreclose or to go into possession while both should have the right to appoint a receiver or to realize the security by sale. Edward further notes that the distinction is not only clouded by judicial indifference but also by the draftsmen of the 1925 property legislation. In the definition section of the Law of Property Act<sup>46</sup> a mortgage is described as including “a charge or lien on any property for procuring money or money’s worth” whereas a mortgagee includes “ a chargee by way of legal mortgage”.

The above book does not address the problems or the shortcomings of land securitization and the effects of the same to lenders. The author correctly distinguishes a charge from a mortgage and goes ahead to list the rights and remedies available to parties involved in land securitization. In Kenya the issues affecting land securitization goes beyond the distinction of charge and mortgage which the book doesn’t address. The availability of rights and remedies is one thing and the enforcement is totally another issue. The problems experienced by lenders in Kenya makes the enforcement of their rights difficult. The author has not captured and/or addressed the challenges faced by lenders when they attempt to enforce the security. In an attempt to fill the above gap and address the above issues the study shall center on the legal, policy and institutional frameworks of land securitization in Kenya.

Judith and Mary in their book “Land Law” postulates that the main purpose of land securitization to the lender/banks is to enable the lender to take the property in whole or partial satisfaction of the debt if the borrower fails to repay the loan. They demystify the wrong use of the term mortgage in land securitization transactions. The authors point out that the common usage these days speaks of the house buyer as ‘getting a mortgage’ and newspaper headlines announce more ‘mortgages from building societies’. This implies incorrectly that it is the loan which is the

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<sup>46</sup> LPA 1925, Section 205 (1)(XVI)

mortgage, and this terminology is sometimes adopted by students with resulting uncertainty about which party is a mortgagor or mortgagee. In fact it is the borrower (mortgagor) who grants the mortgage over his property as security for the loan made to him by the lender<sup>47</sup>.

Judith and Mary discussion on purposes of land securitization is very relevant to the study. According to them the true nature of a mortgage is that it is the lenders security for money lent to the borrower. The book is further relevant to the study because it highlights the correct usage of the term mortgage. In technical terms, a mortgage is regarded as a conveyance of an estate in land to the mortgagee. The understanding of term mortgage helps one to know the rights available to both the lenders and borrowers. In the above book the author lists the remedies available to the mortgagee incase there is default in repayment of the loan. They include: An action on the express covenant, exercise right of possession, exercise right to appoint a receiver and finally remedy of foreclosure.

Judith and Mary avoid examining in detail the challenges faced by the banks /lenders when they try to enforce the security. In an attempt to exercise the above mentioned remedies the lenders end up spending a lot of money either in long litigations which doesn't guarantee success or either consume a lot of time trying to comply with the conditions set out in the legislations before exercising certain remedies. One of the greatest omission that is evident from the above book, is the failure to recognize the fact the Lenders usually face a lot of challenges when trying to enforce their remedies. As stated earlier the listing of remedies is one thing while the exercise or enforcement of the remedies is a different matter altogether.

According to Tudor Jackson<sup>48</sup> the land law of Kenya is a long complicated subject. The factors which account for the length and complexity of laws is the fact that many statutes, notably registration ones, have been passed without repealing the former statutes, or codifying them into one Act, with the result that it is not easy to tell which statutes applies to a given parcel of land. Further the author lists four classes<sup>49</sup> of legal mortgage as provided for under **section 58** of the **I.T.P.A.** According to Tudor, the most valuable mortgage as far as the lender is concerned is the

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<sup>47</sup> Judith & Mary, *Land Law*, 8<sup>th</sup> edition, (London: Blackstone press Ltd, 1999), pg 390.

<sup>48</sup> Tudor Jackson, *The Laws of Kenya*, 3<sup>rd</sup> edition, (Nairobi: Kenya Literature Bureau), 249

<sup>49</sup> Simple mortgage, usufructuary mortgage, mortgage by conditional sale and English mortgage.

English mortgage. Under this mortgage a lender has all the basic remedies provided in **section 67-69 I.T.P.A.** In practice, this is the kind of mortgage concluded between borrowers and lenders. The simple, usufructuary and mortgages by conditional sale are defective as securities, in that one or more of the remedies are not available to the lender<sup>50</sup>.

Tudor Jackson captures the problem of existence of multiple laws some of which are incompatible resulting in a complex land management and administration system. However the above author fails to discuss the effect of the multiple laws on land securitization transactions. Indeed the existence of many land laws some of which are incompatible has hampered efficacy of land securitization. Banks that want to take land as security have to be aware which legislation is applicable. Further the author discusses the remedies available to lenders but avoids mentioning the challenges faced by lenders in an attempt to exercise the available remedies. As stated earlier the listing of remedies is one thing while the exercise or enforcement of the remedies is a different matter altogether.

According to P.L. Onalo<sup>51</sup> mortgages and charges constitute the use of land as security. Land can be used as a lien or pledge for a loan of money. The land is given as a gage to be forfeited in default of payment. The author list the types of mortgages as provided for in **section 58** of the **I.T.P.A.** The **I.T.P.A** creates other four different forms of mortgage which are lacking in one or more **remedies**. These four are hardly used in practical financial lending transactions. He refers to them as defective forms of mortgage<sup>52</sup>. According to Onalo the legal mortgage and statutory charge constitute the usual forms of security in Kenya. The legal mortgage is based on the pre 1926 English mortgage Legal mortgage. It is the form security for land registered under G.L.A and L.T.A to which the substantive law is **I.T.P.A.** The **I.T.P.A** provides the basic remedies of foreclosure, sale, possession, and appointment of receiver<sup>53</sup>.

The above author also fails to mention the challenges faced by the lenders in enforcing the security incase of default. The challenges facing the mortgagors/lenders include: court

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<sup>50</sup> Tudor Jackson, *Supra note 47*, p249.

<sup>51</sup> Onalo PL, *Supra note 5*, at page 126.

<sup>52</sup> Simple mortgage, usufructuary mortgage, mortgage by conditional sale and English mortgage.

<sup>53</sup> Onalo PL, *Supra note 5*, at page 130.



injunctions, defaults in payments of land rates<sup>54</sup>, liquidity problem (land is not easily realizable security)<sup>55</sup>, multiple laws some which are incompatible, cancellation of illegally acquired titles used in land securitization and also professional negligence. The author has not discussed any of the above challenges. These challenges will be discussed aptly in chapter two.

Smokin C Wanjala, in his book "Essays on Land Law" University of Nairobi, 2000, at pg 35 comments about the Mortgage Institution and how it affects rights to access to land. According to the book one of the arguments in favour of individualization of tenure was that it would enable the registered proprietor to offer his title to financial institutions in return for credit. Registration confers "security of tenure" upon the proprietor which in turn assures the lenders (banks, finance houses, building societies) of the possibility of realizing their security upon default. Apart from offering security of tenure, registration is very important in land securitization transactions. It is pertinent to note that the registration of land rights improves access to formal credit as it is a source of collateral for large loans.

Smokin notes that the mortgage institution has increasingly serve as an instrument of disinheriting the peasantry who engage in mortgage transactions and yet they don't have any entrepreneurial skills or experience in credit management. Smokin argues that most people in the rural areas have encumbered their titles in the form of mortgages and charges without fully appreciating the implications. Registered owners of land have found themselves dispossessed of their land due to default in the repayment of the loan plus interest. The remedy mostly resorted to by the respective mortgagees and chargee in such situations has been the exercise of their statutory power of sale.

Smokin correctly captures the predicament that faces borrowers/land owners incase of default in payment of the money advanced. The statutory power of sale is one of the remedy available to lenders in the event of default in payment of the money advanced. The writer fails to address issues affecting the lenders when they try to realize the security incase of default. The lenders in Kenya usually face numerous challenges when they try to realize the security in the event of

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<sup>54</sup> Mwaniki W, *City Land Owners face huge fines over rates defaults*, Daily Nation: Smart Company Weekly Business Magazine 2<sup>nd</sup> November 2010.(The article notes that the mortgage firms, banks and financiers are most likely to be affected. The city council issued a notice warning Banks, mortgage firms and financier to ensure that their clients have paid land rates for properties where they hold lien. The council has commenced legal action against rate defaulters with view of recovering the same through auction and banks risks losing their interest in such properties.)

<sup>55</sup> David P and Philip F, *supra note 20*, pg 494

default. Further, Smokin ignores the fact that the lenders usually offer free advice to the borrowers before they take the land as security and also inform them the implications in case of default. The study attempts to address the challenges facing the lenders when they take land as security.

Kivutha Kibwana, “*Efficacy of State Intervention in Curbing the Ills of Individualization of Land Ownership*” Smokin on *Essays on Land Law*, Faculty of law, University of Nairobi, 2000 at pg 126 notes that Kenya has currently five registration systems and three substantive land law systems. The registration systems are covered by the Registration of Documents Act Cap 285, the Land Titles Act Cap 282, the Government Lands Act Cap 280, the Registration of Titles Act Cap 281 and the Registered Land Act Cap 300. The substantive land law systems are the Indian Transfer of Property Act Cap 1882 (as amended) and the Registered Land Act. The above laws are very important as far as land securitization is concerned. The R.L.A deals with statutory charge whereas the R.T.A deals with both the charges and mortgages. The legal mortgage is the form of security for land registered under G.L.A and L.T.A which the substantive law is I.T.P.A.

Kibwana captures the problem of existence of multiple laws some of which are incompatible resulting in a complex land management and administration system<sup>56</sup>. According to him the multiplicity of law is largely a function of history however government policy is geared to collapsing the above systems into one system of land registration and substantive land law. This intended streamlining would no doubt simplify land law in Kenya and perhaps ensure land transactions are easy to conclude<sup>57</sup> including transactions in land securitization. The challenge facing the mortgagors/lenders include liquidity problem (land is not easily realizable security)<sup>58</sup>. Transactions in land usually take long before they are concluded hence making land not easily realizable.

Kibwana captures the problem of existence of multiple laws some of which are incompatible resulting in a complex land management and administration system. However the above author

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<sup>56</sup> Smokin C. Wanjala, *Essays on Land Law*, (Nairobi: Faculty of law, University of Nairobi, 2000), pg 186

<sup>57</sup> *Ibid*

<sup>58</sup> David P and Philip F, *Element of Banking*, 2nd edition, (London: Pitman publishers, 1988), pg 494.

fails to discuss the effect of the multiple laws on land securitization transactions. Indeed the existence of many land laws some of which are incompatible has hampered efficacy of land securitization. Banks that want to take land as security have to be aware which legislation is applicable. Further the author avoids mentioning the other challenges facing lenders in land securitization transactions. The study addresses the challenges facing the lenders in Kenya when they take land as security by reviewing the policy, legal and institutional frameworks on land securitization.

Ojienda Tom in his book, "Conveyancing Principles and Practice", LawAfrica Ltd, 2008 at pg 163, discusses the origin and historical context of the idea of mortgages and charges. The idea of a mortgage is founded on very ancient Roman law<sup>59</sup>, Mohammedan law<sup>60</sup>, English common law<sup>61</sup> and Hindu. The discussion of the origin and historical context of the mortgages and charges offers an insightful and informative background of the study. The discussion of the English common law explains the origin of the current legislative framework of mortgages and charges in Kenya. This attributed to the fact that common law and equity are received law, subject to restrictions<sup>62</sup> imposed by the Judicature Act of 1967<sup>63</sup>. Ojienda points out that there are

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<sup>59</sup>Under the Roman law, the first aspect of the mortgage institution to develop was the *fiducia*. Essentially, it was a fiduciary relationship between a lender and a borrower. Property was given to the person lending in return for a loan. Upon default, the same was forfeited to the lender regardless of its value. The second limb was the *pignus*. This one entailed a transfer of possession but without the element of forfeiture as in the *fiducia*. Upon default, the property was merely sold and not forfeited. The third one was the *hypotheca*. This one merely entailed a pledge without delivery of possession but the creditor had the power of sale which he could exercise upon default. Ojienda Tom, *Conveyancing Principles and Practice*, (Nairobi: LawAfrica Ltd, 2008), at pg 164.

<sup>60</sup>Under the Mohammedan law, the idea of interest is alien/offensive to this religion. Accordingly, they developed the *Bye-Bil-Wafa* which is equivalent to the English usufructuary mortgage where the borrower would pledge his property to the lender had the right to take rent from the property without accounting for it until such a time when he fully recovered the principal. Ibid.

<sup>61</sup>Under common law, the mortgage institution was originally characterized by a pledge of property to a lender coupled with transfer of possession only and not title. Eventually this developed into what is currently known as the English mortgage which is basically a conveyance of property with a proviso known that the mortgagee will re-convey the property in question to the mortgagor upon the payment of the debt. Two types of pledges evolved by the 12<sup>th</sup> century: the living pledge (*vivum vadium*) and the dead pledge (*mortum vadium*). Under the living pledge, the lender took possession of the land, recovered profits and rents as discharge of both the principal sum and the interest on the loan. On the contrary, the lender received rents and profits as discharge of the interest only under dead pledge. It is these two types' pledges that developed eventually into the English mortgage. Ibid.

<sup>62</sup>They shall only be applicable to the Kenyan inhabitants in so far as the circumstances of Kenya permit, subject to such qualifications as those circumstances may render necessary. Section 3(1) (c) of the Judicature Act Cap 8 Laws of Kenya

<sup>63</sup>Onalo PL, *Land Law and Conveyancing in Kenya*, (Nairobi: Heinemann Kenya, 1986), pg 128

two broad categories of mortgages that have evolved as a result of the historical pattern discussed above. These are legal mortgages<sup>64</sup> and equitable mortgages<sup>65</sup>.

Ojienda further notes that the whole purpose of a mortgage is to provide security which the mortgagee can realize if the mortgagor fails to repay the loan. The mortgagee can always sue in contract for the repayment of the loan. The author correctly notes that this is a long process in which enforcing payment even after judgement is obtained can be difficult<sup>66</sup>. According to him mortgage institution has developed several remedies for the mortgagee including the right to use the mortgaged/charged land to repay the loan often without the need for any court proceedings. He lists the remedies as foreclosure, judicial sale, statutory power of sale, appointment of receiver and right to consolidate.

The lenders in Kenya grapple with difficulties of enforcing land incase of default. The author correctly notes that land is not easily realizable. The enforcing payment even after judgement is passed by court in an attempt for realization as indicated by the author has always been the greatest challenge facing lenders in Kenya. However the book fails to explain how the seeking of court's sanction before the realization of the security is challenge to the lenders. In Kenya the huge backlog of cases in our courts, long litigation process and injunctions have made realization of land very cumbersome to lenders.

The Kenya scenario offers more peculiar and complex problems which lenders face in land securitization transactions. The said problems stem from the legal, institutional and policy frameworks of land securitization in Kenya. Thus the study explores the peculiar challenges that lenders in Kenya face in land securitization transactions which are not addressed aptly by other writers. The challenges include among others corruption and fraud in institutions dealing with

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<sup>64</sup> Section 58 of the ITPA creates four types of legal mortgages recognizable under Kenyan law: simple mortgage, mortgage by conditional sale, usufructuary mortgage and English mortgage.

<sup>65</sup> Equitable mortgages under the English system are creatures of equity and as such, statutes do not create them. In Kenya, however, equitable mortgages are created by statute particularly the Equitable Mortgages Act Cap291. Ojienda T, *Conveyancing Principles and Practice*, (Nairobi: LawAfrica Ltd, 2008 )at pg 168.

<sup>66</sup> Ibid

land transactions, irregular land allocations, long court cases, numerous legislations dealing with land securitization. The above challenges have impacted negatively on the lenders making it almost impossible for them to enforce the security.

## **CHAPTER BREAKDOWN**

**Chapter one** deals with background to the problem, statement of the problem, objectives, research questions, hypothesis, and justification of the study, literature review and theoretical framework, methodology and chapter breakdown.

**Chapter two** reviews both the legal and institutional framework on land securitization in Kenya. The chapter discusses aptly the challenges arising from both the legal and institutional frameworks of land securitization and how the said challenges affect the lenders.

**Chapter three** deals with the policy framework on land securitization in Kenya as provided by the National Land Policy. Finally the chapter discusses the challenges arising from the policy framework of land securitization and the impact of the same to lenders

**Chapter four** deals with the findings of the study and discussion of the results

**Chapter five** deals with the summary of findings, conclusion and recommendations

## CHAPTER TWO

### THE LEGAL AND INSTITUTIONAL FRAMEWORKS ON LAND SECURITIZATION IN KENYA

#### INTRODUCTION

The chapter reviews both the legal and institutional framework on land securitization in Kenya. The chapter further discusses aptly the challenges arising from both the legal and institutional frameworks on land securitization and how the said challenges affect the lenders. The challenges as already noted in the previous chapters include: corruption, court injunctions, numerous laws, liquidity problem, information asymmetry and cancellation of illegally acquired titles. The chapter discusses the challenges in two main topics namely, the legal framework on land securitization and the institutional framework on land securitization. The study shall examine whether the legal and institutional frameworks on land securitization addresses the above mentioned challenges and identifies the necessary legislative and institutional reforms that would ensure the above challenges and difficulties faced by the lenders are mitigated.

Under the first topic of legal framework on land securitization the study centers on the several pieces of legislations, which as already noted in both the previous chapters constitute Kenya's source of law in land securitization. The starting point is discussion of relevant provisions of the constitution which is the supreme law of the republic of Kenya and which binds all persons and all state organs<sup>67</sup>, which will be followed by the discussion of other relevant statutes that deal with land securitization. Thereafter the study discusses the challenges arising from the legal framework on land securitization. The challenges include the numerous laws dealing with land matters, liquidity problem due to the stringent requirement of notice as provided in the statutes and finally the legality of cancellation of illegally acquired titles and the effect of the same to lenders.

Under the second topic of Institutional framework on land securitization the study examines three categories of institutions which perform important functions and/or roles in land securitization process. The first category deals with institutions that advance credit (lenders) including Financial Institutions, Banks and Mortgage Finance Companies. The second category deals with Judiciary an institution which interprets laws on land securitization and also resolves

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<sup>67</sup> Article 2(1) of the Constitution

disputes arising from the same. The final category includes the ministry of lands which formulates policies relevant in land securitization and also which supervises very key departments like Land Registries, Land Control Boards and the proposed Land Commission. The study addresses the challenges arising from the Institutional framework on land securitization. The challenges include corruption in some institutions, liquidity problem caused by lack of proper coordination among the institutions and also the challenge of court injunctions that inhibits the realization of security incase of default.

Finally the chapter examines whether both the legal and institutional frameworks on land securitization addresses the above mentioned challenges and identifies the necessary legislative, institutional reforms that would ensure the above challenges and difficulties faced by the lenders are mitigated.

### **THE LEGAL FRAMEWORK ON LAND SECURITIZATION IN KENYA**

The general laws that deal with land matters and also land securitization issues in Kenya include: The 2010 Kenya Constitution, Registration of Title Act (Cap281), Registered Land Act (Cap 300), Government Land Act (Cap280), Land Titles Act (Cap 282), Trust Land Act (Cap288), Land (Group Representatives) Act (Cap 287), Sectional Properties Act No.21 of 1987, Indian Transfer of Property Act, Equitable Mortgages Act (Cap 291), Banking Act, Central Bank of Kenya Act and Civil Procedure Act (Cap 21). The specific provisions of the above laws that provides for charges and mortgages shall be examined in detail to ascertain their positive and/or effective contribution to the regulation of land securitization and whether there are legislative gaps and/or overlap that might hinder the above process to the detriment of lenders.

### **THE 2010 CONSTITUTION OF KENYA**

The 2010 Constitution of Kenya was drawn up to replace the 1963 independence Constitution. The Constitution was presented to the Attorney General of Kenya on April 7, 2010, officially published on May 6, 2010, and was subjected to a referendum a on August 4, 2010. The new Constitution was approved by 67% of Kenyan voters. The Constitution was promulgated on 27 August 2010<sup>68</sup>. As discussed in chapter two, the National Land Policy notes that the previous constitution did not recognize the uniqueness of land and as a result lumped it with other

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<sup>68</sup> [Http://en.wikipedia.org/wiki/constitution\\_of\\_kenya](http://en.wikipedia.org/wiki/constitution_of_kenya)

categories of property. The current constitution in chapter five sets out the broad principles<sup>69</sup> for the governance of land, and establishes an efficient and equitable institutional framework for land ownership<sup>70</sup>, administration and management<sup>71</sup>.

Article 60(1) of the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. The constitution enumerates several principles<sup>72</sup> that shall govern land management in Kenya. Two principles are pertinent in land securitization, the principle of security of land rights and the principle of transparent and cost effective administration of land. Article 60(2) of the Constitution provides that the above principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.

The principle of security of land rights ensures that rights of both the lender/mortgagee and borrower/mortgagor are protected by the constitution. The above principle is a milestone as far as legal framework of land securitization is concerned. The constitution ensures that any land rights including but not limited to those of the lenders/mortgagees and borrowers/mortgagor are secured. The second principle of transparent and cost effective administration of land envisages that dealings in land securitization shall be transparent and cost effective as provided by the constitution. Indeed as noted in chapter two, operations at the lands registry have been very costly due to the rampant corruption. There are numerous cases of missing files and irregular land allocations due to lack of transparency in land transactions including transactions in land securitization.

The constitution doesn't expressly refer to mortgages and charges but contains clear principles that should govern land securitization transactions. It's important to note that the law of mortgages or charges is a product of common law, equity<sup>73</sup> and statute in England. In Kenya it is

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<sup>69</sup> Article 60 provides for the principles governing land.

<sup>70</sup> Article 61 of the 2010 Kenya constitution.

<sup>71</sup> Paragraph 36 of the National Land Policy underscores the need for the constitution to have broad principles for governance of land.

<sup>72</sup> Article 60

<sup>73</sup> Common Law and Equity are received law subject to the restrictions imposed by the Judicature Act of 1967 and the Kenyan statutes



the Kenyan statutes<sup>74</sup> that provide for the mortgages and charges. Below is a discussion of various statutes that provide for charges and mortgages.

### **The Constitutional Principles for the governance of land**

Under article 60 (1) of the Constitution provides the land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles- equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.

Article 60 (2) provides that the above principles shall be implemented through a NLP developed and reviewed regularly by the national government and through legislation. Thus it follows that the Constitution bestows the important role of the implementation of the constitutional principles for the governance land to be done through the NLP and also through the enactment of relevant legislation.

The above mentioned Constitutional principles are very relevant in land securitization. Below is a brief discussion of the Constitutional principle and their relevance to land securitization. The principle of equitable access to land ensures that all Kenyans have equal right to own land and thus an opportunity to engage in land securitization. The lack of access to land limits the engagement in land securitization to few individual who own land in Kenya. The ownership of land is mandatory requirement for one to engage in land securitization.

The principle of security of land rights ensures that rights of both the lender/mortgagee and borrower/mortgagor are protected by the constitution. The above principle is a milestone as far as legal framework of land securitization is concerned. The constitution ensures that any land rights including but not limited to those of the lenders/mortgagees and borrowers/mortgagor are secured. The principle of transparent and cost effective administration of land envisages that dealings in land securitization shall be transparent and cost effective as provided by the constitution. Indeed as noted in chapter one, operations at the lands registry have been very costly due to the rampant corruption. There are numerous cases of missing files and irregular

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<sup>74</sup>Onalo P, *supra* note 5, at page128.

land allocations due to lack of transparency in land transactions including transactions in land securitization.

The other principle of elimination of gender discrimination in law, customs and practices related to land and property in land ensures that women are also actively engaged in land securitization transactions. In Kenya women contribute up to 80 % of the workforce yet they only hold 1% of registered land titles in their names and around 5-6 % of registered titles held in joint names.<sup>75</sup> Women constitute 52% of the 36 million Kenyan population.<sup>76</sup> It is a pity that women who comprise over half of the Kenya's population, rarely own land and do not even make major decisions pertaining to allocation and use of land in land securitization.

The constitution doesn't expressly refer to mortgages and charges but contains the above clear principles that should govern land securitization transactions. Consequently, land policy reforms have got boost due to the current sound constitutional framework. According to the National Land Policy, the need for land reforms in Kenya largely arises from the failure of the previous constitution to establish an efficient, accountable and equitable institutional framework for land ownership, administration and management. The failure has resulted to a major challenge facing lenders in Kenya namely, lack of governmental accountability in land governance leading to irregular allocation of public land and also constitutional protection of private property rights even where they are acquired in an illegitimate manner<sup>77</sup>. As noted earlier panic is rife among properties owners and financiers after the Lands minister<sup>78</sup> revoked 137 titles illegally acquired. The commercial banks that issued loans with documents as securities are at tight spot as they may lose shillings 1 billion according to an evaluation made by quantity surveyors<sup>79</sup>.

The importance of Chapter five of the Constitution can't be overstated as far as land securitization is concerned. Part one of Chapter five deals with Land whereas part two deals with Environment and natural resources. Under part one the principles of land policy are integrated into the Constitution<sup>80</sup>. The relevance of the principles of land policy in land securitization has

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<sup>75</sup> Kenya Land Alliance, 2003, Women and Land in Kenya.KLA

<sup>76</sup> Estimates from the Central Bureau of Statistics, the last census was carried out in 1999.

<sup>77</sup> Paragraph 37 of the National Land Policy

<sup>78</sup> Hon. James Orengo

<sup>79</sup> The Standard News Paper, pullout section B of, *Billions at Stake over Revoked Titles*, 27<sup>th</sup> May 2010.

<sup>80</sup> Article 60 of the Constitution

been discussed. Further under chapter five, the Constitution provides for the establishment of the National Land Commission<sup>81</sup> herein after referred to as NLC. The yet to be established NLC is a key institution as far as institutional framework of land securitization is concerned. The important roles and/or functions of NLC in land securitization shall be discussed in chapter three.

Finally under chapter five, the Constitution provides that Parliament shall revise, consolidate and rationalize existing land laws<sup>82</sup>. The study identifies that the multiplicity of laws dealing with land impedes and/or hinder the efficacy of land securitization. The existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system that has hampered efficacy of land securitization. The consolidation and rationalizing of the above laws will ease the process of land securitization and also registration of land rights and facilitate speedy dealing with the land to access finance from the banks. The parliament is also mandated to revise sectoral land use laws in accordance with the principles set out in article 60 (1) and enact other legislations. There are several Acts of parliament that are anticipated by the Constitution and the NLP.

#### **THE ACTS OF PARLIAMENT ANTICIPATED BY THE CONSTITUTION**

Under chapter five of the Constitution there are several Acts of parliament that are anticipated. The first Act of parliament anticipated under chapter five of the Constitution is the statute to give effect to article 63 of the Constitution. Article 63 provides that Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Article 63 (5) provides that parliament shall enact legislation to give effect to this article. Thus any dealings including land securitization transactions on Community land shall be governed by the above legislation.

The second Act of parliament anticipated under chapter five of the Constitution is the statute to give effect to article 65 of the Constitution. Article 65 (1) provides that a person who is not a citizen may hold land on the basis of leasehold tenure only for a period not exceeding 99 years. Article 65 (4) provides that parliament may enact legislation to make further provision for the operation of this article. It follows that there shall be a legislation to regulate non citizen who

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<sup>81</sup> Article 67 of the Constitution

<sup>82</sup> Article 68 of the Constitution

hold land on the basis of leasehold in Kenya. However it's not clear whether the said legislation shall deal with land securitization involving non citizen or whether the non citizen would still be govern by the same land securitization laws governing Kenya citizens.

The third Act of parliament anticipated under chapter five of the Constitution is the legislation to give effect to article 66 of the Constitution. Article 66 (1) provides that the state may regulate the use of any land, or any interest in or right over any land, in interest of defence, public safety, public order, public morality, public health, or land use planning. Article 66 (2) provides that parliament shall enact legislation ensuring that investments in property benefit local communities and their economies. The above Act aims to ensure that investment in property including land securitization benefit the local communities.

The fourth Act of parliament anticipated under chapter five of the Constitution is the legislation to give effect to article 67 of the Constitution. Article 67 provides that there is established the National Land Commission. As noted earlier the yet to be established NLC is a key institution as far as institutional framework of land securitization is concerned. The important roles and/or functions of NLC in land securitization shall be discussed in chapter three. Article 67 (3) provides that the NLC may perform any other functions prescribed by national legislation.

Article 68 provides that parliament shall revise, consolidate and rationalize existing land laws. The consolidation and rationalizing of the above laws will ease the process of land securitization and also registration of land rights and facilitate speedy dealing with the land to access finance from the banks. The parliament is also mandated to revise sectoral land use laws in accordance with the principles set out in article 60 (1) and enact other legislations. There are seven Acts of parliament that are anticipated under article 68 (c) of the Constitution<sup>83</sup>.

Finally it's pertinent to note that enactment of the above laws is not an easy task and like all tasks of profound importance and of such scale it is not without challenges. One the challenge to the enactment of the anticipated legislation is the poor time management. There is delay in the enactment of crucial laws that would actualize and operationalize the articles on land chapter and

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<sup>83</sup> The legislation to prescribe minimum and maximum land holding acreages in respect of private land, the legislation to regulate the manner in which any land may be converted from one category to another, the legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage, the legislation to protect, conserve and provide access to all public land, the legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality, the legislation to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land and the legislation to provide for any other matter necessary to give effect to the provision of this Chapter.

the NLP. The parliament made history by passing 15 Bills<sup>84</sup> that required to be enacted by 27<sup>th</sup> August 2011 in a record four days. The 15 Bills are part of the 19 that the House was supposed to pass before the 1<sup>st</sup> anniversary of the promulgation of the new constitution. Notwithstanding the parliament's effort to pass the above laws there is no law on land chapter which has been passed. The enactment of the above laws will greatly influence transaction in land securitization.

### **THE INDIAN TRANSFER OF PROPERTY ACT (ITPA) OF 1882**

The ITPA (1882) is the main substantive law governing transactions in land registered under the Land Titles Act (LTA Cap 282), Government Lands Act (GLA Cap 300) and Registration of Titles Act (Cap 281)<sup>85</sup>. The ITPA<sup>86</sup> defines a mortgage as: "...the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability." The above Act also allows for the creation of a charge under section 100. The section gives the chargee and chargor the same rights as between themselves as if they were a mortgagee and mortgagor. Again ITPA creates four different forms of mortgage which are lacking in one or more of the basic remedies<sup>87</sup>. Section 58(5) lists the classes of the mortgages as simple mortgages, mortgages by conditional sale, English mortgages and equitable mortgages.

Some forms of mortgages are hardly used in practical financial lending transactions. It will suffice to merely mention these defective forms of mortgage before discussing the important forms of security. Of the four defective forms of security, there is the Simple Mortgage under section 58(b) of the ITPA. This is a mere agreement to pay with a provision that the mortgagee can cause the property to be sold on default. There is the Mortgage by Conditional sale under section 58(c) of the ITPA. The property is sold on condition that it will be returned to the

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<sup>84</sup> The Bills passed are the Elections Bill, the National Gender and Equality Bill, the Kenya National Rights Human Commission Bill, the Political Parties Bill, the National Police Service Bill, the Ethics and Anti-Corruption Commission Bill, the Commission on Administration of Justice Bill, the Employment and Labour Relation Bill, the Kenya Citizenship and Immigration Bill, the National Government Loans Guarantee Bill, the Contingencies Fund and County Emergency Fund Bill and the Commission on Revenue Allocation Bill.

<sup>85</sup> Ojienda T, *Conveyancing Principles and Practice*, (Nairobi: LawAfrica Publishing (K) Ltd), pg 23

<sup>86</sup> Section 58

<sup>87</sup> Onalo P.L, *Land Law and Conveyancing in Kenya*, (Nairobi: Heinemann Kenya), pg128

mortgagor by resale on payment of the debt. When payment is done, the sale becomes void and when the payment is not effected, the sale becomes absolute<sup>88</sup>.

There is also the Anomalous Mortgage under section 98 of the ITPA. It resembles none of the mortgages under the ITPA and is a combination of none. It's up to the conveyancer to come up with any improvised form of mortgage under this section<sup>89</sup>. There is the Usufructuary Mortgage under section 58(d) of the ITPA. The usufructuary mortgage does resemble the living pledge<sup>90</sup> and the dead pledge<sup>91</sup> in the development of mortgages in history of England. Mortgages were looked at as pledges. The living pledge discharged all the entire debt whereas the dead pledge did not bring about the eventual discharge of the debt. The four codified forms of defective mortgages were introduced in Kenya from India<sup>92</sup>.

### **The Legal Mortgage as provided in ITPA**

In Kenya the Legal Mortgage is referred to in the alternative as the English mortgage. The legal mortgage and the Registered Land Act statutory charge constitute the usual forms of security in Kenya. They are used and rightly so as the yardstick of the effectiveness of other forms of mortgages and charges<sup>93</sup>. The Legal mortgage is based on pre 1926 English Mortgage. By English Mortgage under section 58(e) of ITPA the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgage property absolutely to the mortgagee subject to the proviso that the mortgagee will retransfer it to the mortgagor on repayment of the mortgage money. This contributes and largely constitutes the definition of mortgage proper.

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<sup>88</sup> Ibid

<sup>89</sup> Onalo P.L. *supra* note 86, at page 129

<sup>90</sup> Living pledge in form of mortgage known as '*Vivum vadium*' was an agreement requiring the lender to take possession of the property to recover what was owed in the form of principal sum advanced together with interest on such loan.

<sup>91</sup> Dead pledge in form of mortgage known as '*Mortum vadium*' was an arrangement that the lender received benefits of the property towards the discharge of the element of interest i.e. the benefits of the property was to be applied towards the discharging interest accrued rather than the principal amount advanced.

<sup>92</sup> Onalo P.L., *op cit* note 88, p129.

<sup>93</sup> Ibid

### **Remedies available to lenders under the ITPA**

The ITPA does provide for remedies to the lender in case of default of payment by the borrower. The Act provides the basic remedies of foreclosure, sale, possession, and appointment of receiver. Foreclosure is a method by application to the court for an order barring the defaulting mortgagor from having his land back. The mortgagee acquires the mortgaged land for himself and is empowered to have it sold for recovery of his debt, interest and costs. The mortgagee and chargee can also exercise power of sale without having to go to court under ITPA and RLA. This is known as the statutory power of sale<sup>94</sup>.

### **THE EQUITABLE MORTGAGES ACT CAP 291**

Section 2 (1) of the Equitable Mortgages Act provides that nothing shall render invalid mortgages or charges made in Kenya by delivery to a person or his agent of a document or documents of title to immovable property with intent to create a security thereon. It follows that in Kenya there is also the Equitable Mortgage which is created by delivery to the lender of the document of title relating to the borrower's land, provided that the intention to treat the land as security. Further section 2 (2) of the above Act provides that the delivery shall be subject to the provisions of the Government Land Act<sup>95</sup>, the Registration of Titles Act<sup>96</sup> or the Registration of Documents Act.

In England where this kind of security developed, there was no need for writing. The deposit of title deeds would be considered as an Act of part performance and was construed as an agreement to execute a legal mortgage. An agreement to create a legal mortgage is backed up by the maxim of Equity that equity regards as done that which ought to be done.

### **Remedies available to Lenders under the Equitable Mortgages Act**

Section 4 of the Equitable Mortgages Act provides for the remedies available to lenders. According to the above provision, there is nothing that shall prejudicially affect any rights, powers or remedies conferred on a mortgagee or chargee by deposit of a document or documents

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<sup>94</sup> Prior to 1959 the English Mortgage or Legal Mortgage lacked power to appoint a receiver and to exercise power of sale without going to court. This was remedied by the I.T.P.A. Amendment Act no.7 of 1959.

<sup>95</sup> Section 101(2) (g) of the GLA provides for the creation of the equitable mortgage by the deposit of the title deeds with the mortgagee and the registration of the memorandum of such deposit in the lands office,

<sup>96</sup> Section 66 of the RTA allows a charge by deposit of documents of titles and stipulates for registration of the memorandum.

of title by the ITPA as applied to Kenya. Thus it follows that the remedies available to lenders under the ITPA<sup>97</sup> are also available to lenders under the Equitable Mortgages Act.

### **THE REGISTERED LAND ACT CAP 300**

Under Registered Land Act (herein after referred to as RLA) only one form of security can be created. This is the charge. Thus there is only the legal charge envisaged under section 65(1) thereof. Section 65(1) provides that a proprietor may, by an instrument in the prescribed form, charge his land lease or charge to secure the payment of an existing or a future or a contingent or other money or money's worth or the fulfillment of a condition. Section 3 of the RLA defines a charge as an interest in land securing the payment of money or money's worth or the fulfillment of any condition and includes a subcharge and the instrument creating a charge.

A charge under the RLA is completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument<sup>98</sup>. It's important to note that under section 65(4) of the Act, the charge shall not operate as a transfer but shall have effect as security only. The above provision clearly brings out the fundamental distinction between a charge and mortgage. The distinction is that the former (charge) does not operate as a transfer but it shall have effect as security only whereas the later (mortgages) the security is transferred to the lender.

### **Remedies available to lenders under the Registered Land Act**

The RLA provides the chargee with three basic remedies in case of default on the part of the chargor in payment of the principal or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in the charge. These remedies stated under section 74 of the Act include: appointment of a receiver, statutory power of sale and Action on the personal covenant to repay the money lent. Under the RLA there is no remedy of foreclosure or possession. Section 80 of the RLA states that for avoidance of doubt, it is declared that the chargee shall not be entitled to foreclose, nor to enter into possession of the charged land or receive the rents and profits thereof by reason only that default has been made in the payment of the principal sum or of any interest or other periodical payment or any part thereof or in the performance or observance of any agreement expressed or implied in the charge.

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<sup>97</sup> The Act provides the basic remedies of foreclosure, sale, possession, and appointment of receiver

<sup>98</sup> Section 65 RLA



Its imperative note that before the chargee avails himself the use of the above remedies, the chargor must be in default for a continued period of one month and the chargee may serve the chargor with a notice in writing requiring him to pay the principal<sup>99</sup>. Even then, it is after the chargor fails to comply, within three months of the date service, with the aforementioned notice, that the chargee may appoint a receiver or sell the charged property<sup>100</sup>.

### **THE REGISTRATION OF TITLES ACT (RTA)**

Section 66 of the RTA allows a charge by deposit of documents of titles and stipulates for registration of the memorandum. According to RTA this security is equivalent to equitable mortgages. Further by virtue of section 46 of the RTA a lender can advance on a security of a registered charge.

### **Remedies available to Lenders under the RTA**

Section 100 A (1) of ITPA as amended in 1959 provides that a charge under a charge executed in accordance with the provisions of section 46 of RTA and duly registered under that Act shall have the same rights, powers and remedies as if the charge were an English mortgage. It follows that the remedies available to lenders under the English mortgage are also the same remedies applicable under the RTA.

### **The Central Bank of Kenya Act Cap 491 and Banking Act Cap 488**

The Central Bank of Kenya ACT and Banking ACT have specific provisions which apply in land securitization transaction. Under the Central Bank of Kenya Act there is a requirement that lending institutions must take security in the course of advancing loans to borrowers<sup>101</sup>. The Banking Act Cap 488 initially appeared not to accommodate this particular requirement of insisting of security before any loans are advanced and prior to an amendment where section 2 provided that lending was to be done at the risk of individual banks but this was altered by Act no. 9 of 1999 which made the security mandatory and the change came after traumatizing experiences when a number of indigenous banks went under or collapsed without having anything to turn to or to enable them realize their security so that particular loophole has since been sealed.

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<sup>99</sup> Section 74s(1) RLA

<sup>100</sup> Section 74(2) RLA

<sup>101</sup> Ojienda T, *Conveyancing Principles and Practice*, (Nairobi: LawAfrica Publishing (K) Ltd), pg 166

## THE RATIONALE OF STATUTORY REVIEW

The above statutory review aims to achieve the specific objective of the study which is to undertake indepth analysis and review of the legal framework on land securitization in Kenya for purposes of ascertaining the challenges faced by lenders. The statutory review clearly confirms that there are numerous legislations that deal with land securitization transactions in Kenya. The abovementioned laws contain provisions relating to mortgages and charges and also remedies available to lenders. However the existence of too many laws dealing with land securitization brings about unique challenges to lenders. The challenges are comprehensively discussed under the next topic.

The statutory review further identifies that there is no uniformity in terms of remedies available to lenders. There are some remedies lacking in some of the statutes. Under the RLA there is no remedy of foreclosure or possession<sup>102</sup>. The ITPA does provide for remedies of foreclosure, sale, possession, and appointment of receiver but doesn't provide for the remedy of Action on the personal covenant to repay the money lent. There is urgent need to have uniformity in terms of statutory remedies available to lenders for purposes of ensuring they are adequately protected.

The above recommendations shall be comprehensively discussed under chapter four.

The statutory review further exposes the legal hurdles and/or requirements which the lenders must fulfill before the exercise of the above remedies. The chargor must be in default for a continued period of one month and the chargee may serve the chargor with a notice in writing requiring him to pay the principal<sup>103</sup>. Even then, it is after the chargor fails to comply, within three months of the date service, with the aforementioned notice, that the chargee may appoint a receiver or sell the charged property<sup>104</sup>. The above process makes land not easily realizable incase of default thereby leading to liquidity problem.

Finally the statutory review has laid the proper premise for discussing the challenges arising from the legal framework on land securitization in Kenya. The challenges are discussed herein below.

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<sup>102</sup> Section 80 RLA.

<sup>103</sup> Section 74(1) RLA and Section 69 A of the ITPA

<sup>104</sup> Section 74(2) RLA

## THE CHALLENGES ARISING FROM THE LEGAL FRAMEWORK

There are several challenges arising from the legal framework on land securitization. The challenges include: numerous laws dealing with land matters, liquidity problem arising from long procedural requirements<sup>105</sup> as provided in the statutes and also the legality of cancellation of illegally acquired titles. The above challenges are addressed herein below.

### Numerous Laws Dealing with Land

The study identifies that the multiplicity of laws dealing with land impedes and/or hinder the efficacy of land securitization. The existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system that has hampered efficacy of land securitization. As noted earlier in the discussion of the law relating to mortgages in Kenya, there are several statutes<sup>106</sup> that deal with land. Banks that want to take land as security have to be aware which legislation is applicable to the said land to be taken as security. Indeed there are too many statutes dealing with the registration of land rights and also in other transactions dealing with land including land securitization.

Due to the numerous laws there has been no uniformity in terms of remedies and rights available to lenders. There are some rights and/or remedies lacking in some of the statutes. Under the RLA there is no remedy of foreclosure or possession<sup>107</sup>. The ITPA does provide for remedies of foreclosure, sale, possession, and appointment of receiver but doesn't provide for the remedy of Action on the personal covenant to repay the money lent. Further the RLA provides for notice before the exercise of the remedies whilst the ITPA doesn't mention about notice. There is urgent need to have one statute which ensures uniformity in terms of statutory rights and remedies available to lenders for purposes of ensuring they are adequately protected.

No attempt have been made to harmonize these statutes to ease the process of land securitization and also registration of land rights and facilitate speedy dealing with the land to access finance from the banks. The process of carrying out a search to ascertain the authenticity of the title forwarded to be held as security for loan advanced is usually very long and frustrating. The rampant corruption at the lands offices makes the process sometimes impossible due the cases of missing files.

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<sup>105</sup> Requirement of notice and registration process

<sup>106</sup> Registration of Title Act (Cap281), Registered Land Act (Cap 300), Government Land Act (Cap280), Land Titles Act (Cap 282), Trust Land Act (Cap288), Land (Group Representatives) Act (Cap 287), Sectional Properties Act No.21 of 1987, India Transfer of Property Act

<sup>107</sup> Section 80 RLA.

Further, some legislation deals with mortgages whilst others deal specifically with charges and others deal with both the charges and mortgages. According to section 3 of the Registered Land Act Cap 300, charge is defined as an interest in land securing payment of money or moneys worth or fulfillment of any condition and includes a subcharge and instrument creating a charge. The legislation doesn't mention nor refer to a mortgage whatsoever. The fundamental distinction between a charge and a mortgage is that the former (charge) does not operate as a transfer but it shall have effect as security only whereas the latter (mortgage) the security is transferred to the lender. However for the purposes of our study land securitization denotes both the mortgages and charges.

There is need to have one statute that will regulate land securitization transactions and also expressly provide for all the necessary remedies and rights to lenders. The RLA and RTA provide for charges, the ITPA deals with both the mortgages and charges and the Equitable Mortgages Act deals with equitable mortgages. Further in terms of remedies available to lenders under the RLA there is no remedy of foreclosure or possession whilst under the ITPA all the four remedies are available to lenders. The harmonization of the above laws into one property law statute will go along way to mitigate the challenge of numerous laws faced by lenders when they try to enforce the security.

### **The Liquidity Problem**

The criticism leveled against land securitization is that land is not easily realizable security. There are writers who have held similar view that land is not an easily realizable security<sup>108</sup>. The study identifies that liquidity problem is a challenge that arises from the long procedural requirements as provided by the statutes which form part of the legal framework on land securitization. Commercial banks seeking to enforce land security have to contend with various hurdles before they can exercise the remedies<sup>109</sup> available to them. There are various challenges that are faced by the banks in enforcing land security. The object of remedies is to recover capital and to obtain a final settlement from mortgagor.

In an attempt to exercise the above mentioned remedies as provided in the statutes lenders sometimes end up losing more money in the process and in other instances they eventually fail to

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<sup>108</sup> David Palfreman and Philip Ford, *Elements of Banking*, 2<sup>nd</sup> edition, (London: Pitman Publishing, 1988), pg 494.

<sup>109</sup> According to Cousin, he states that foreclosure, sale and the personal action on the covenant for payment may be termed as final remedies arising from the nature of the land security

secure the money advanced. One of the hurdles includes statutory requirements under the RLA. The chargor must be in default for a continued period of one month and the chargee may serve the chargor with a notice in writing requiring him to pay the principal<sup>110</sup>. Even then, it is after the chargor fails to comply, within three months of the date service, with the aforementioned notice, that the chargee may exercise the remedies<sup>111</sup>. The above process makes land not easily realizable security for lenders in case of default by the borrower.

Further the issue of notice coupled with court sanctioning of the sale (court order) and/or Action on the personal covenant to repay the money lent<sup>112</sup> makes the realization of the security very difficult. The scenario is further compounded by the long litigations that take forever before completion and also the statutory requirement that no action shall be commenced until a notice served in accordance with **section 74 (1)** has expired<sup>113</sup>. The liquidity problem arising from the long litigation process shall be comprehensively addressed under the Institutional framework.

### **The Cancellation of Illegally Acquired Titles**

The other challenge arising from the legal framework is the cancellation of the illegally acquired title. An article in the pullout section B of the Standard news paper<sup>114</sup>, “Billions at Stake over Revoked Titles” summarized in a precise way the predicament that banks will face after a revocation of 100 titles illegally acquired. According to the article panic is rife among properties owners and financiers after the Lands minister<sup>115</sup> revoked 137 titles illegally acquired. The commercial banks that issued loans with documents as securities are at tight spot as they may lose shillings 1 billion according to an evaluation made by quantity surveyors.

Statistics released by the Central Bank of Kenya in February show the real estate sub-sector received loans totaling Shillings 52.8 billion in the 12 months ending December 2009. According to the figures, the credit facilitation to the sub-sector accounted for 19.3 per cent of the total credit extended to the private sector after trade. If the statistic is anything to go by, it is obvious that the revocation of title deeds is impacting negatively on financing of the sub-sector<sup>116</sup>.

Commercial banks are suffering most because the law dictates that business transactions conducted on the basis of the cancelled titles is null and void. Economists say that the ongoing

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<sup>110</sup> Section 74(1) RLA

<sup>111</sup> Section 74(2) RLA

<sup>112</sup> Section 74 RLA

<sup>113</sup> Section 74 (3) RLA

<sup>114</sup> Dated 27<sup>th</sup> May 2010

<sup>115</sup> Hon. James Orengo

<sup>116</sup> Harold Ayado, *Billion at Stake over Revoked Titles*, Standard News paper, 27<sup>th</sup> May 2010.

repossession of prime property would affect the economy because investors, for fear of discovering that the title deeds they possess are invalid, will be hesitant to develop their properties. However according to the law the government should compensate people who bought land faithfully and later revoked under mistakes of the state. For instance, a faithful buyer who conducted official searches at the lands offices and given a go ahead should be compensated should turn out to be fraudulent. What is not clear is whether the banks that advanced the loan on the basis of the title which is now cancelled fall under this category. Will they be compensated? It is difficult for the banks to get compensation because the contract involved the bank and its customers and not the government.

The revocation of titles by the state exposes the banks and mortgage finance institutions to great risks<sup>117</sup> and leaves them with limited options. Firstly, the above institutions can file suits to restrain government from canceling the title deeds, arguing their losses would run into billions. Secondly, the affected commercial banks can also ask borrowers in writing to replace the cancelled title deeds as security. Finally, the above institutions can also file suits against the borrowers towards recovery of the balance of money advanced as loan.

### **The Legality of canceling illegally acquired titles by public officers**

Having discussed the challenge of cancellation of illegally acquired its pertinent to establish the legality of revoking title deeds by public officers. The above issue was settled in the case of **Kuria Green Limited Vs Registrar of Titles & another**<sup>118</sup>, the main issue for determination was whether the Registrar of Titles had power to revoke a Certificate of Title under the RTA or any other law. The court held that there is no provision under the RTA or any other Act that bestow on the Registrar of Titles or Commissioner of Lands or the government at that, power to revoke a registered titles in the absence of a court order to that effect.

In terms of the legal framework there are due procedures to be followed for purposes of revoking a title deed. **Section 23(1)** of the **RTA** gives an absolute and indefeasible title to the owner of the property and such title could only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Thus there ought to be notice given

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<sup>117</sup> The security becomes a worthless piece of paper. Comment by manager Cooperative Bank of Kenya.

<sup>118</sup> ([www.kenyalaw.org](http://www.kenyalaw.org)) High Court, at Nairobi, June 14<sup>th</sup> 2011.

to the owner and thereafter the state through its officers either initiate the process of compulsory acquisition of the said land and thus pay full and prompt compensation to the owner of the land in question or file a suit in the High Court challenging the title and await the courts determination.

From the above it's clear that no public officers including minister of lands, Registrar of Title or the Commissioner of lands can purport to arbitrarily revoke any land title without notice and most importantly without following the due process of law.

The above mentioned challenges arising from the legal framework underscore the urgent need of a review of the legal frameworks of land securitization for purposes of mitigating the challenges faced by the lenders. Although the laws cannot solve all the problems of land securitization but effective laws can minimize or mitigate the same. The laws need to be backed by effective and efficient institutions that would enforce and/or interpret the said laws to achieve the intentions of the legislators. In the following paragraphs the study discusses the institutional framework on land securitization in Kenya and the challenges arising from the said framework.

**INSTITUTIONAL FRAMEWORKS ON LAND SECURITIZATION IN KENYA**

Under the Institutional framework on land securitization, the study examines three categories of institutions which perform important functions and/or roles in land securitization process. The first category deals with institutions that advance credit (lenders) and they include Financial Institutions, Banks and Mortgage Finance Companies. The second category deals with Judiciary an institution which interprets the earlier mentioned laws on land securitization and also resolves disputes arising from the same. The final category consists of the departments under the ministry of lands which perform important functions in land securitization. The key departments that are discussed are the Land Registries, Land Control Boards and the yet to be established National Land Commission. The study addresses the emerging challenges that face the above mentioned institutions. The challenges include corruption in some institutions, liquidity problem caused by lack of proper coordination among the institutions and also the challenge of court injunctions that stops the realization of security incase of default.

## THE BANKS, MORTGAGE FINANCE COMPANIES AND FINANCIAL INSTITUTIONS

The **Banking Act, Cap 488**<sup>119</sup> defines institution to mean a bank or financial institution or a mortgage finance company. The abovementioned institutions are very important as far as land securitization is concerned. **Section 15 (1)** of the **Banking Act** stipulates that a mortgage finance company shall make loans for the purpose of the acquisition, construction, improvement, development, alteration or adaptation for a particular purpose of land in Kenya; and the repayment of which, with interest and other charges, is secured by first mortgage or charge over land with or without additional security or personal or other guarantees. On the other hand bank means a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank<sup>120</sup>. According to the Act, lending<sup>121</sup> is part of “banking business”.

Understanding the abovementioned roles of the institutions<sup>122</sup> is very important for purposes of reviewing the institutional frameworks on land securitization. The said institutions do perform a very important role in land securitization. They are the lenders and they do advance loan to the chargor and mortgagor who offer their land as security. As discussed earlier under the legal framework there are several remedies available to the abovementioned lenders in case of default. The remedies vary depending on the nature of the transaction and the law applicable.

There are rights and remedies available to the above institutions when they take land as security for loan advanced. It's important to mention the remedies available to the banks in case of default in repayment of the loan. According to Cousin<sup>123</sup>, he states that foreclosure, sale and the personal action on the covenant for payment may be termed as final remedies arising from the nature of the land security; the object of the stated remedies is to recover capital and to obtain a final settlement from mortgagor. Entry into possession and appointment of a receiver are normally final remedies.

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<sup>119</sup> Section 2 of the Banking Act Cap 488

<sup>120</sup> Section 2 of Banking Act

<sup>121</sup> Lending in terms of mortgages and charges

<sup>122</sup> Section 2 of Banking Act defines institution to mean a bank or financial institution or a mortgage finance company.

<sup>123</sup> Edward FC&Ian Clarke, *Cousin on the Law of Mortgages*, 2<sup>nd</sup> edition, (London: sweet&Maxwell,2001), pg 253



Notwithstanding the availability of the abovementioned rights and remedies there are challenges faced by the above lenders in an attempt to exercise the statutory remedies available to them in case of default. The challenges include corruption in some institutions, liquidity problem caused by lack of proper coordination among the institutions and also the challenge of court injunctions that stops the realization of security in case of default. Below are few cases to show the jurisprudence developed by courts with regard to injunctions.

The necessary ingredients considered by Courts for the grant of an injunction are as set out and established in the case of **Giella Vs Cassman Brown Ltd**<sup>124</sup>. First the applicant must make out a *prima facie* case with a probability of success at trial. Secondly, that normally an injunction will not be granted unless it is shown that the applicant will suffer irreparable injury which cannot be adequately compensated in damages and thirdly, that if the court is in doubt it should decide on a balance of convenience. While the said three principles are the guiding principles, the Courts may also look at all the relevant circumstances.

In the case of **Trust Bank Limited Vs Eros Chemists Limited and Whitestone**

**Auctioneers**<sup>125</sup> the High Court sitting at Nairobi granted an application for interlocutory injunction restraining Trust Bank Limited from exercising its statutory power of sale in respect of the suit property pending the hearing and disposal of the substantive suit. The facts grounding the grant of the injunction were that the 1<sup>st</sup> respondent was the proprietor of the suit property while the bank was the holder of the legal charge over the property. The bank caused a notice to be published in the daily newspaper advertising the sale by Public Auction of the suit property. It is then that the chargor's rushed to court to abate the impending doom, principally on the ground that the chargee had breached mandatory provisions of section 69(A) (1) pertaining to service of statutory notice. In granting the injunction the Court held that none of the various notices given by the bank constituted notice under section 69(A) (1) of the ITPA (1882).

Notwithstanding the applicability of the above principles in the issuance of injunctions by Courts, the borrowers usually take advantage and/or abuse the long Courts process to prolong the realization of securities. In the case of **John Nduati Kariuki T/A Johester Merchants Vs National Bank of Kenya (2006) e KLR**. In 2001 the Bank served a statutory notice of its intention to sell the three charged properties within three months in default of payment of Kshs

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<sup>124</sup> (1973) EA 358

<sup>125</sup> Civil application number 80 of 1991 at Nairobi

20, 366, 217.85. The notice was not acted upon immediately despite non-compliance therewith but subsequently notification of sale was served and the properties were due for auction in 30.04.03. The applicant went before the superior Court on 30.10.03 and filed a suit against the bank. He sought a permanent injunction to restrain the bank from selling the properties and also declarations that the statutory power of sale had not arisen due to invalidity of charges; that the notifications of sale were invalid; and that applicant had fully redeemed his loan account with the bank. Finally he sought orders that the bank should discharge the charges and return the titles to him.

The applicant took out a chamber summons seeking a temporary injunction to stop the intended auction and for the *status quo* to be maintained pending the hearing of the suit. He obtained an *ex parte* order stopping the scheduled auction but withdrew the application before it was heard inter parties. The bank sought to realize the securities again in 2004 but another application was filed and an *ex parte* injunction was obtained to stop the sale on 18.06.04. The main suit was scheduled for hearing on 3.05.04 but was dismissed for non-attendance by the applicant. It was reinstated by consent on 26.11.04. Another auction was scheduled for 16.03.05 but the applicant obtained an *ex parte* stopping it on 14.03.05. The application was withdrawn at the interparty hearing. When the bank tried to re-advertise property for sale on 27.04.05, the applicant brought yet another application on 26.04.05 and obtained an *ex parte* injunction stopping the auction.

The above case took approximately five years before the case was determined in favour of the lender. The borrower was taking advantage of the court process to frustrate the lenders by taking temporary injunction stopping them from realizing the security and yet it's clear that the borrower was in breach of the charge agreement amounting to over 20 million Kenya shillings. The above case summaries the predicament facing lenders when they are faced with court cases in land securitization.

## **THE MINISTRY OF LANDS**

Connected with the Government's efforts to rationalize a complex state of land law, a Ministry of Land and Settlement was set up<sup>126</sup>. The Ministry of Lands was formed in 1903. In 1905,

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<sup>126</sup> Onalo P.L.: "*Land Law and Conveyancing in Kenya*" Heinemann Kenya Nairobi, pg 5

survey and lands were separated to form two different departments but both under control of the Commissioner of Lands. Later in 1919 the departments were combined including Registration. The ministry has grown with over 50 Lands offices countrywide. It has four main departments which include Lands, Physical Planning, Survey and Land Adjudication and Settlement<sup>127</sup>. In order for the Government to deal executively with the powers of regulation, alienation and forfeiture given it by statute, a lands office was set up under the Ministry.

There are two important sections of the lands office that would be discussed herein below and which play key role in land securitization. They include, the Lands Registry and the yet to be established Land Commission. Though the Land Control Board doesn't fall under the Ministry of lands the discussion of the same would be pertinent due to its crucial role in land securitization. Section 231 of the NLP provides that the government will set up three key land management institutions: the National Land Commission, the District Land Boards and Community Land Boards. The above institutions will serve a very central role as far as land securitization is concerned.

### **The Land Control Board**

The **Land Control Act Cap 302** under **section 2 (5)** establishes the Land Control Board which is a very important institution as far as land securitization is concerned. The Act further provides that mortgage includes charges<sup>128</sup>, they are the only way in which land could be used as security for lending in Kenya. According to the above Act, all transaction in mortgage is void for all purposes unless the land control board in the control area or division in which the land is situated has given its consent in respect of that transaction<sup>129</sup>. It's important to note that the Act applies in all the dealings in Agricultural land<sup>130</sup>.

The requirement of consent under the Land Control Act was underscored by the Court of Appeal in the case of **Leonard Njonjo Kariuki Vs Njoroge Kariuki**<sup>131</sup> the Court of Appeal noted that the appeal vividly illustrated the injustices which so often flow from the operations of the Land Control Act Cap 302. The brief facts of the case are that in 1971 the respondent agreed in writing to sell the suit plot to his brother the appellant for 5000 Ksh. The appellant paid 3000 Ksh and

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<sup>127</sup> <http://www.ardhi.go.ke>

<sup>128</sup> Section 2 of the Land Control Act

<sup>129</sup> Section 6 of the Land Control Act

<sup>130</sup> Agricultural land means, land that is not within a municipality or township

<sup>131</sup> Civil Appeal no.26 of 1979

went into possession and built a house on the plot. The respondent refused to transfer the plot to the appellant, no doubt because the value of the land had gone up considerably since 1971. He contends that it is agricultural land, and that as the consent was never obtained to the transfer, the transaction is void for all purposes under section 6 (1) of the Act.

The appellant sued in 1975 for an order that the contract of sale specifically enforced, in the Resident Magistrate Court in Kiambu. The Resident Magistrate gave judgement for the appellant. He held that although the consent required by section 6 of the Act had not been obtained, the Act could not be used as an instrument of fraud, and he relied on the judgement of Sachdev Ag J (as he then was) in *Munana Kimani Vs Wahothi Kimani and another* (High Court Civil Case No. 19 1975). In that case the learned Judge said

“For the appellant to now come before court and attempt to seek refuge under the Land Registered Act or the Land Control Act, is tantamount to fraudulently backing out of commitments which he has knowingly entered into. This Court will do substantial justice to the parties and will not countenance such attempts which clearly negate the spirit of section 3 of the Judicature Act.”

The court held that the Judge was in error. The Court of Appeal noted that when a transaction is clearly stated by the express terms of an Act of parliament to be void for all purposes for want of necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.

From the above court’s decision it’s clear that there can be no valid mortgage and/or charge transactions in agricultural land without the consent of the land control board. The lender and the borrower must obtain consent for their mortgage and/or charge contract to be valid. **Section 9** of the **Land Control Act** states the circumstances under which consent may be granted or refused. On consent or refusal consideration ought to be given to the economic development of the land concerned or the maintenance or improvement of standard of good husbandry within the Land Control Area. The above consideration makes it automatic for the board to give consent in mortgage transactions.

The issue of time management is another challenge that faces lenders who take agricultural land as security for the loan advanced. There must be an application made in a prescribed form to the land control board<sup>132</sup> within six months upon entering into the said transaction. The above requirement prolongs the time for advancing loans; the lenders have to wait for the approval for their agreement to be valid. In any business transaction time is usually of essence, the more time required to fulfill legislative requirements discourages the usage of the agricultural land as security. Lenders and borrowers end up using an alternative security which is easy to process like deposit of log book which only takes a day for a borrower to have his loan processed. The lenders might be willing to advance the credit immediately upon entering into an agreement with borrower but they have to wait for the consent from the land control board for their agreement to be valid.

The mortgage transactions ought to be exempted from the above requirement of consent because it doesn't add any contractual value and/or obligations to parties who engage in land securitization process. Similar views was elucidated in the case of **Gatere Njamunyu Vs Joseck Njue Nyaga**<sup>133</sup> the court held that consent does not impose any obligation upon the seller or buyer to perform the agreement, though it cannot be performed without it. The parties are free to cancel the agreement mutually even after consent and not to proceed to completion. A party to the agreement may also rescind the agreement but he does so at his peril. The cancellation or rescission of the as aforesaid is not prohibited because consent has been given. Consent has no bearing upon it. Consent is the statute's approval of a proposed dealing in agricultural land. Consequently once a person has offered his land as security there is no need to have consent from the land control board. The consent doesn't offer any help or/and remedy to both the lenders and borrowers incase there is breach of the contract. There is need to reduce legislative hurdles that hinder the easier use of agricultural land as security.

### **The Lands Registries**

Under **section 6** of the **Registered Land Act** provides for the maintenance in each registration district a land registry, in which it shall be kept the register<sup>134</sup>, registry map, parcel files containing the instruments which support subsisting entries in the land register and any field plans. The Land registries play a key role in land securitization this is because under **section 6**

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<sup>132</sup> Section 8 of the Land Control Act

<sup>133</sup> Civil Appeal no. 20 of 1982

<sup>134</sup> To be known as the land register(section 6(1) (a) RLA

(1) (e) of the RLA provides that register shall indicate the proprietors of land, leases, charges, showing the number of parcels in which they are interested.

Save for the above functions carried out by the lands registries there have been criticisms leveled against the land registries. The corruption at the lands ministry<sup>135</sup> and most notably at the lands registry has impacted negatively on land securitization process. The above institutions have been unable to enforce the security due to problem of missing files perpetrated by the corrupt registry officials working at the lands registry<sup>136</sup>. On the 1<sup>st</sup> March 2010 the permanent secretary of the ministry of found thousands of the missing files hidden by a cartel of rogue officers at the ministry. Banks seeking all-important papers for either for enforcement of the security or for purposes of loan advancement are usually told that the files could not be traced or were simply lost. There are brokers who have made a career out of colluding with officers at the lands ministry to make files “disappear” and reappear once the bribes have been paid<sup>137</sup>. As discussed earlier corruption has had a serious negative effect on the efficacy of land securitization and also in the management of land as a resource.

Consequently as noted in the previous chapter the National Land Policy attempts to address above the challenge of corruption at lands registries. The policy suggests the decentralization of land registries to enhance the efficiency at land registry thereby reducing corruption<sup>138</sup>. The policy mandates the government to re-organize, update and authenticate existing land records<sup>139</sup> and also provide better information about land transactions. Lack of proper record keeping has been the source of corruption at the land registries; one has to part with substantial amount of money for you to get relevant documents including search certificates on time<sup>140</sup>. The re-organisation and updating of land records will minimize corruption by easing access to information at the land registry and also prevent the numerous cases of missing files. The bank

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<sup>135</sup> According to the Transparency International Global Corruption Barometer 2009, one fourth of the surveyed citizens reported to have paid bribe to land services. Some of the surveyed citizens stated that the consequence of refusing to pay a bribe was a denial of service by the Ministry of Lands, as illustrated in Transparency International Kenya the East African Bribery Index 2009 ([www.business-anti-corruption.dk/kenya/corruption../land-admin](http://www.business-anti-corruption.dk/kenya/corruption../land-admin))

<sup>136</sup> The coordinator of the Kenya Land Alliance reports that all land registries, land boards, the land rents collecting offices and the central registry in Nairobi are very prone to corruption. (<http://www.fig.net/pub/fig2006/paper/tc50/tc50-02-vandermolen-tuladhar-0690.pdf>)

<sup>137</sup> Murithi Mutiga, Daily Nation: New Land Policy Made Public, 16<sup>th</sup> May 2010 pg 11

<sup>138</sup> Paragraph 165 (a) of National Land Policy

<sup>139</sup> Paragraph 163 (e) of National Land Policy

<sup>140</sup> The Kenya Bribery Index 2005(TI2005 c), shows that 67.5% of the people visiting the Ministry of Lands might be asked for a bribe, 36.3% of declinations resulted in service denial.

(<http://www.fig.net/pub/fig2006/paper/tc50/tc50-02-vandermolen-tuladhar-0690.pdf>)

mangers interviewed supported the idea of re-organizing and updating of existing land records as it will ease the process of land securitization. They claimed that the poor record keeping usually derails the usage of land as security for lending since the process can't be completed without the services of lands office. They proposed for proper coordination and consultation between the Banking Institutions and the Lands offices for purposes of mitigating the challenges caused by cases of missing files.

### **The National Land Commission**

The National Land Commission is also a very important institution as far as land securitization is concerned. **Article 67 (1)** of the Constitution provides for the establishment of the National Land Commission. The yet to be established National Land Commission is also key institution as far as institutional framework of land securitization is concerned. The roles and/or functions of National Land Commission are provided for under article 67 (2) of the constitution<sup>141</sup>. The National Land policy<sup>142</sup> lists other functions to be performed by the National Land Commission<sup>143</sup>. The notable function of the above Commission which is pertinent to land securitization transaction is the mandate to ensure the realization of the multiple values of land, namely, economic productivity among others<sup>144</sup>. Land securitization is one of the ways in which land could be used to create capital hence economic productivity of the same as required by the National Land Policy.

The Commission is further mandated to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya<sup>145</sup>. Land adjudication, consolidation and registration have not been completed in most part of the country. Clarissa and

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<sup>141</sup> Functions include: To manage public land on behalf of the national and county governments; to recommend a national land policy to the national government; to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land using planning throughout the country. According to **article 67 (3)** of the constitution, the National Land Commission may perform any other functions prescribed by national legislation.

<sup>142</sup> Sessional paper no. 3 of 2009 on National Land Policy

<sup>143</sup> Chapter four, Sessional Paper no. 3 Of 2009 on National Land Policy

<sup>144</sup> Ibid

<sup>145</sup> Article 67 (2) (c)

Klaus in a World Bank study<sup>146</sup> notes that only 15% of land in Kenya is covered by land titling and cadastral system. The study also notes that registration of a title takes upwards of 6 months to 10 years. Most people therefore live on land without any documentation of title. The National Land Policy<sup>147</sup> notes that the existing institutional framework for land administration and management is highly centralized, complex, and exceedingly bureaucratic. As a result, it is prone to corruption and has not been able to provide efficient services. The policy affirms the position that due to weaknesses in the institutional framework registration can even take forever before it's completed hence making land securitization impossible on non registered land.

The challenge of land registration in Kenya adversely affects the efficacy of land securitization. It is pertinent to note that the registration of land rights improves access to formal credit as it is a source of collateral for large loans. The issue of security of title to land is a major concern in Kenya. The multiplicity of laws<sup>148</sup> governing land, combined with the politics of property in the country has failed to inject certainty in this sector, especially with respect to security of title<sup>149</sup>. Where ownership of the land is difficult to trace and validate and has no recognizable governing set of rules, the land has little economic use as it cannot be used to obtain surplus value through multiple transaction (including land securitization) because of their unfixed nature and this uncertainty leaves to much room for misunderstanding, faulty recollections and reversal of agreements<sup>150</sup>.

The Land National Commission faces an enormous task of advising the national government on a comprehensive programme for registration of title in land in throughout Kenya. The success of the Commission in performing the above task will be milestone as far as land securitization is concern. Both the lenders/mortgagee and borrowers/mortgagors will benefit. Lending will increase due to the availability of secure titles of land thereby promoting and improving land

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<sup>146</sup> Clarissa Augustinus and Klaus Deninger, *Innovations in Land Tenure, Reform and Administration in Africa*, UNDP-International Land Coalition Workshop: Land Rights for African Development: From knowledge to Action Nairobi. <http://www.undp.org/drylands/it.workshops> last accessed on 4<sup>th</sup> October 2006.

<sup>147</sup> Chapter four, Sessional Paper no. 3 Of 2009 on National Land Policy

<sup>148</sup> Chapter three to discuss the legal framework

<sup>149</sup> Njonjo Report: Commission of inquiry into the land law system in Kenya.

<sup>150</sup> Raymond Talinbe Abdulai, *Is land title registration the answer to insecure and uncertain property rights in sub-Saharan Africa?* RICS Research Paper series volume 6, no.6 April 2006



securitization. In recommending a national land policy to the national government<sup>151</sup> the Commission ought to have an in depth consideration to land securitization transactions for purposes of enhancing access to credit.

There are challenges that will hinder the Commission from fulfill its mandate to promote, facilitate and improve land securitization in Kenya. First and foremost the Commission is yet to be established. There is need for an Act of parliament to operationalize the Commission. The parliament made history by passing 15 Bills<sup>152</sup> that required to be enacted by 27<sup>th</sup> August 2011 in a record four days. The 15 Bills are part of the 19 that the House was supposed to pass before the 1<sup>st</sup> anniversary of the promulgation of the new constitution.

Notwithstanding the parliament's effort to pass the above laws, the National Land Commission Bill has not been passed. The importance of the National Land Bill can't be overstated but it's the law that shall operationalize the National Land Commission. The success of the Commission shall depend on the enactment of effective and up to date laws governing the same. Thus it's clear that the legislative framework is equally important to ensure the efficacy of land securitization more so the performance of the National Land Commission.

The Commission faces implementation challenges. The challenges to the implementation process can be loosely classified as financial, political and timelines. These are:

- 1. Financial challenges.** The yet to be established National Land Commission falls under the Ministry of Lands. According to the lands minister, the land ministry is the least funded, getting about Kenya shillings 3 billion a year despite its mandate and size<sup>153</sup>. The implementation process of the National Land Commission would be hindered by lack of enough resources if the current funding of the Land Ministry is anything to go by. There is need to approach donors to facilitate and/or support the implementation process and also put to good use the limited resources we have.

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<sup>151</sup> Article 67 (2) (b) of the Constitution

<sup>152</sup> The Bills passed are the Elections Bill, the National Gender and Equality Bill, the Kenya National Rights Human Commission Bill, the Political Parties Bill, the National Police Service Bill, the Ethics and Anti-Corruption Commission Bill, the Commission on Administration of Justice Bill, the Employment and Labour Relation Bill, the Kenya Citizenship and Immigration Bill, the National Government Loans Guarantee Bill, the Contingencies Fund and County Emergency Fund Bill and the Commission on Revenue Allocation Bill.

<sup>153</sup> Jacob Ng'etich, "Orengo comes out guns blazing over charges of sleeping on the job" Daily Nation, dated 23<sup>rd</sup> July 2011.

2. **Political Influence:** The appointment of head of the Commission is a political<sup>154</sup> matter that may affect the performance of both the office holder and the entire institution. Indeed most appointees usually pay allegiance to the politicians who appointed them to the Commission at the expense of service delivery. They do maintain the status quo for purposes of preserving their jobs. Thus the much anticipated review of the policy and institutional framework on land matters including land securitization may suffer a serious setback if the appointments to the yet to established institution like the Land Commission are hinged on horse trading between the President and the Prime Minister at the expense of competency and merit.
3. **Timelines.** Similarly to the above mentioned negative politics the implementation of the Land Commission may suffers the setback of poor time management. There is delay in the enactment of crucial law that would actualize the Land National Commission it's still unclear when the said law would be passed.

## THE JUDICIARY

The three arms of the government are the Judiciary, the Executive and the Legislature. They operate under the doctrine of separation of powers, offering checks and balances on each other in the execution of their respective mandates<sup>155</sup>. The mandate of the Judiciary is administration of justice. According to the constitution, the Judiciary fulfils its mandate through the Supreme Court, the Court of Appeal, the High Court and Magistrates Court.

The Mission of the Judiciary is *“to provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the Constitution of Kenya.”*

The mandate and the Mission of the Judiciary underscore the importance of the above institution as far as land securitization is concern. According to the Mission of the Judiciary, it strives to provide a responsive forum for just resolution of disputes including dispute emanating from land securitization. Further, the Judiciary is mandated to protect all rights and liberties guaranteed by the Constitution including the rights of the lenders/mortgagee.

The key function of the Judiciary is hearing and determination of both criminal and civil disputes including disputes emanating from land securitization. As noted in the study, one of the

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<sup>154</sup> The political crisis that faced the country when the president purported to appoint the Chief Justice, Attorney General, Director of Public Prosecution and controller of budget

<sup>155</sup> Judiciary Strategic Plan 2009-2012 pg 1

challenges facing lenders is the court injunctions that prevent them from realizing the security incase of default. There is also the challenge of backlog of cases which brings about liquidity problem. Cases take long time before they are decided and/or determined; lenders who seek courts intervention have been unable to exercise their remedies available due to pending court cases.

Indeed one of the major problems facing the Judiciary today and for which there is public outcry is the delay in determining cases. There is huge backlog of cases in all courts. There are several factors, which explain this state of affairs. Court processes are manual as is the retrieval of records. There is no internal case tracking system to ensure speedy disposal of cases. There is no internal case tracking system to ensure speedy disposal of cases. There is serious shortage of judicial staff to handle the ever increasing case load<sup>156</sup>.

The borrowers/customers usually use the court to obtain injunctions and other orders to frustrate the banks when they try to realize the security. The situation is further compounded by the above discussed huge backlog of cases in all courts. In the case of **Bridge-Up Container Services Vs Consolidated Bank of Kenya**<sup>157</sup> the Court held that Commercial banks are in the business of advancing loans to clients on profit. If clients who default in payments of such loans are permitted to block realization of such securities by way of such injunction, then this automatically condemns the banks to suffer a loss which will hamper their business yet the plaintiff has benefited from the loan. The above decision summarizes precisely the effect of injunctions to the lenders who have advanced colossal amounts of money as loans.

Traditionally the Judiciary has been a respected institution that is looked upon to administer justice impartially to all. However, due to the increasing cases of corruption and delays in administration of justice, this respect appears to decline. Presently people are prone to questioning the quality of decisions made by the courts. It has not been possible to predict case determination both in terms of duration it would take and its likely outcome<sup>158</sup>.

There have been court decisions which have left the lenders losing colossal amounts of money they advanced to borrowers who offered their land as security. In the case of **National Bank of**

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<sup>156</sup> Judiciary Strategic Plan 2009-2012 pg 21

<sup>157</sup> Civil Case no. 300 Of 2008 High Court Mombasa.

<sup>158</sup> Ibid

**Kenya Ltd Vs Wilson Ndolo Ayah**<sup>159</sup> the court held that the instrument of charge and deed of Guarantee were null and *void ab initio* thus the money secured which had grown from the initial figure at Kshs 10 million to **Kshs 57,308,137.50** was irrecoverable. The two documents were drawn by V. Nyakundi who did not hold a current Advocate Practicing Certificate, and was therefore not qualified to draw those documents in view of the provisions of section 34 of the Advocates Act, Cap 16 of the laws of Kenya.

The lenders were made to suffer for acts done by their advocate contrary to the law without prior notice to them. The court emphasized on the need to enforce the law and avoid perpetuating acts of illegality notwithstanding the large sums of money which would be lost and the innocence of the lenders. Whether the above decision is right or wrong is a debate for another day but one thing which is certain is that the lender suffered a huge economic setback notwithstanding their innocence.

## CONCLUSION

There are several laws which regulate land securitization in Kenya and also institutions that perform very key functions in the same. Specific provisions dealing with land securitization have been discussed with bias on remedies and rights available to lenders. The study also addressed the roles played by the lenders<sup>160</sup>, Ministry of lands<sup>161</sup> and the Judiciary in land securitization transaction. Notwithstanding the availability of laws and institutions dealing with land securitization the study identifies challenges faced by the lenders which include: corruption, court injunctions, numerous laws, liquidity problem, information asymmetry and cancellation of illegally acquired titles. The challenges arise as a result of the weak legislative framework and ineffective institutional framework on land securitization. The challenges underscore the urgent need of a review of both the legal and institutional frameworks on land securitization with a view of mitigating the said challenges to enhance the efficacy of land securitization. The proposed legislative amendments and institutional reforms that would mitigate the challenges faced by lenders shall be comprehensively addressed in chapter five.

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<sup>159</sup> Civil Appeal No. 119 Of 2002

<sup>160</sup> The banks, mortgage finance companies and financial institutions

<sup>161</sup> Three important departments under the ministry of land discussed include: land control board, land registry and National Land Commission.

## CHAPTER THREE

### THE POLICY FRAMEWORK ON LAND SECURITIZATION IN KENYA

#### INTRODUCTION

The chapter examines the policy framework on land securitization in Kenya as provided by the NLP and also traces succinctly the situation before the formulation of the NLP. The study also addresses the emerging themes<sup>162</sup> arising from the said policy framework on land securitization that have been a challenge to lenders and consequently proffers some policy statements for their redress to ensure the efficacy of land securitization.

Prior to the recently enacted NLP, Kenya has not had a clearly defined or codified NLP since independence. This, together with the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system. From the advent of colonialism, Kenya has been grappling with the land question, which subsequent regimes have been unable to or are unwilling to solve. The land question has manifested itself in many ways including fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict<sup>163</sup>.

It's from the above backdrop that necessitated the formulation of the NLP. However save for the formulation NLP, there is no single and codified National Policy on Land Securitization. The lack of a single and clearly defined or codified National Policy on Land Securitization brings about a cloud of confusion to the various stakeholders and institutions including banks that are the lenders/mortgagors, making the management of land securitization problematic if not chaotic. Indeed the policy informs the enactment of up to date laws that would ensure lenders are protected fully. Consequently the existence of policy needs to underpin the legislative framework to ensure effective enforcement. As noted earlier the study discusses the policy framework on land securitization in Kenya with the main focus on specific and relevant provisions of the

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<sup>162</sup> The discussion shall be premised on the following emerging themes namely: corruption, court injunctions, numerous laws, record keeping, liquidity problem, information asymmetry and cancellation of illegally acquired titles.

<sup>163</sup> <http://www.ilegkenya.org/pubs/docs/DraftNationalLandpolicy.pdf-windowsIntern>

recently formulated National Land Policy and the impact of the same on land securitization transactions.

In the analysis of the policy framework on land securitization in Kenya it's pertinent to note that land securitization transactions, that is, transactions in mortgages and charges are basically borrowing transactions which have gained great significance in capitalist economies including Kenya. According to Lord Upjohn, "it has been the policy of the law for over a hundred years to simplify and facilitate transactions in real property. It is of great importance that persons should be able to freely and easily raise money on the security of their property."<sup>164</sup>

When analyzed in social and human terms, mortgage finance can be said to play a vital part in the realization of the life chances and aspirations of a large section of the population in Kenya. As noted early, significant portion of the total loan portfolio in Kenya is backed by land security. Statistics released by the Central Bank of Kenya in February show the real estate sub-sector received loans totaling Shillings 52.8 billion in the 12 months ending December 2009. According to the figures, the credit facilitation to the sub-sector accounted for 19.3 per cent of the total credit extended to the private sector after trade<sup>165</sup>. If the above figure is anything to go by, then it affirms the position that land securitization requires special attention and consideration.

From the above it's clear that the formulation of the NLP couldn't have come at a better time than now when the significant portion of the total loan portfolio in Kenya is backed by land security and yet the lenders in Kenya are grappling with various emerging issues that have been mentioned above. **The Sessional Paper No. 3 of 2009** gave birth to NLP. The Sessional Paper was adopted by the Parliament on 3<sup>rd</sup> December, 2009. Nearly six years in the making the policy integrates and aligns land issues under seven major concerns and places a strong, new emphasis on citizen participation in the decision-making process in the administration of land and management. The policy is a framework that seeks to meet the needs and aspirations of Kenyans on matters related to equity, stability, wealth creation and economic growth. At a time when the need for land reforms have never been greater or its management challenges more demanding,

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<sup>164</sup> Provincial Bank Limited Vs Hastings Car Mart Limited(1965) AC 1175at 1233

<sup>165</sup> Harold Ayado, *Standard News paper, Billion at Stake over Revoked Titles*, Daily Nation, dated 27<sup>th</sup> May 2010.

this policy offers clear guidance for the road ahead. It lays the foundation for review of existing laws and enactment of new ones to redress articulated land issues in Kenya<sup>166</sup>.

The National Land Policy is based on views and expert opinions collected through a structured all-inclusive and consultative process that brought together stakeholders drawn from the public, private and civil society organizations. The broad based process of consultations was carried out around identified thematic areas that formed the nuclei of stakeholder's engagement and consensus building, and conducted through workshops, seminars, submission of memoranda and topical research papers<sup>167</sup>.

Notwithstanding the land ministers' comments that the National Land Policy was formulated through a consultative process, it's not clear whether all the other stakeholders including lenders were involved in the process of drafting the National Land Commission Bill that seeks to operationalize and actualized some provisions of the 2010 Constitution and NLP. Currently the Institute of Surveyors of Kenya has accused the ministry of lands of lack of goodwill in drafting the National Land Commission Bill claiming the stakeholders were ignored<sup>168</sup>. The lenders ought to be in the fore front in the participation in the process of formulating a comprehensive National Land Commission Bill. This is because significant portion of the total loan portfolio in Kenya is backed by land security<sup>169</sup>.

### **THE INTERGRATION OF THE NLP IN THE 2010 KENYA CONSTITUTION**

The minister of lands has counted the integration of the National Land Policy in the 2010 Kenya Constitution as one of his success stories<sup>170</sup>. **Chapter 3 paragraph 34** of the National Land Policy provides that land is a central category of property in Kenya. It is the principal source of livelihood and material wealth, and invariably carries cultural significance for many Kenyans. Since the policy was formulated prior to the promulgation of the constitution, it suggested that

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<sup>166</sup> Statement by Dorothy N. Angote, the permanent secretary ministry of lands, commenting on the Sessional policy no. 3 of 2009 on National Land Policy.

<sup>167</sup> Statement by James Orengo, minister for lands, on the sessional paper no. 3 of 2009 on National Land Policy.o9

<sup>168</sup> Jacob Ng'etich, "*Orengo comes out guns blazing over charges of sleeping on the job*" Daily Nation, dated 23<sup>rd</sup> July 2011.

<sup>169</sup> Harold Ayado, Standard News paper, *Billion at Stake over Revoked Titles*, Daily Nation, dated 27<sup>th</sup> May 2010.

<sup>170</sup> Jacob Ng'etich,op cit note 167

fundamental issues in the policy should be anchored in the constitution that led to the inclusion of the **article 60** of the 2010 Constitution.

The NLP in **section 36** had suggested that the Constitution should set out the broad principles for the governance of land. This led to the current constitution to include in chapter five the broad principles<sup>171</sup> for the governance of land, and establishes an efficient and equitable institutional framework for land ownership<sup>172</sup>, administration and management<sup>173</sup>. Below is a discussion of the Constitutional principles that govern the management of land in Kenya.

#### THE POLICY FRAMEWORK ON LAND SECURITIZATION AS PROVIDED BY THE NATIONAL LAND POLICY

The National Land Policy contains the overall framework in all land matters. In chapter 1 of the policy, provides that the NLP is a living document which comprises an overall framework and set of principles to guide sectoral, legislative and institutional reforms in land administration and management. Similarly chapter 5 paragraph 270 provides that the NLP will inform the basis for, and be recognized as the overall guide to all other land related policies. It's from the above premise that the study centers on the specific provision in the National Land Policy that provide the policy framework on land securitization.

As noted earlier in the previous chapter, Kenya has no single and codified National Land Securitization Policy however from the above it's clear that the NLP comprises of the overall framework on all matters concerning all land matters. It contains land policy principles to guide the legislative and institutional reforms in land administration. The study identifies the specific relevant provisions in the NLP that deal with land securitization and examines whether land securitization issues are adequately covered to address challenges facing lenders.

The NLP contains a very important provision that deals with **land market operations**. In **chapter 3, land markets** deals with value, transfer, lease and mortgages of interests in land. According to the policy<sup>174</sup>, efficient land markets can facilitate access to land and enhance land securitization. According to the above chapter the government shall facilitate the

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<sup>171</sup> Article 60 provides for the principles governing land.

<sup>172</sup> Article 61 of the constitution.

<sup>173</sup> Paragraph 36 of the National Land Policy underscores the need for the constitution to have broad principles for governance of land.

<sup>174</sup> Paragraph no. 88 provides that the government shall facilitate the commercialization of land rights subject to principles of equity, sustainability and public policy considerations such as security.



commercialization of land rights subject to principles of equity, sustainability and public policy consideration such as security. The government is also mandated to develop structures and instruments that will make the land market operations more efficient and effective, including streamlining existing land transaction procedures<sup>175</sup>. It follows that land market operation as envisaged in the policy includes the transactions in charges and mortgages. The government is thus mandated to streamline transactions in charges and mortgages by developing structures and instruments that will ensure the efficacy of the said transactions

There are several emerging themes that arise from the NLP and which have always been a challenge to lenders. The emerging themes include: corruption, court injunctions, numerous laws, liquidity problem, information asymmetry and cancellation of illegally acquired titles. Below is a discussion and analysis of the abovementioned themes with a view to ascertain whether the NLP has comprehensively addressed the same and whether there are outstanding policy issues which needs to be addressed so as to make land the safest and most reliable security for credit advancement.

### **THE LIQUIDITY PROBLEM**

One of the emerging themes and also a great challenge facing lenders is liquidity problem (land is not easily realizable security)<sup>176</sup>. This due to the long procedures involved in land transactions. The process of investigation of title, search to establish the legal ownership of land and presence or absence of encumbrances and obtaining consent of the commissioner<sup>177</sup> for lands may take months or forever. In many business transactions time is usually of essence. The criticism leveled against land securitization by bank officials is that land is not easily realizable security. There are writers who have held similar view that land is not an easily realizable security<sup>178</sup>. Commercial banks seeking to enforce land security have to contend with various hurdles before they can exercise the remedies available to them.

The NLP attempts to address the challenge of liquidity problem by providing for the policy option for the government to develop structures and instruments that will improve and streamline land market operations including transactions in charges and mortgages thereby making the process and procedures efficient and effective. Conversely it's not clear which structures and

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<sup>175</sup> Paragraph no.88 of the National Land Policy.

<sup>176</sup> David Palfrem and Philip Ford, *Element of Banking*, 2<sup>nd</sup> edition (London: Pitman Publishing Ltd), pg 494

<sup>177</sup> Ojienda T, *Conveyancing Principles and Practice*, (Nairobi: LawAfrica publishing (K) ltd, 2008), pg44.

<sup>178</sup> David Palfreman and Philip Ford, *op cit note 175*, pg 494

instruments that government will put in place to solve the above problem. However it's a step in the right direction for the government to have policy option that focuses on streamlining existing lands transaction procedures. The existing procedures have been a bottleneck as far as land securitization is concerned making land not easily realizable security by lenders. The streamlining the existing land transaction procedures will go a long way to solve the liquidity problem that has been a challenge to lenders.

### **THE CORRUPTION AT THE LANDS MINISTRY**

The other emerging theme which arises out NLP and has also been a challenge to lenders is corruption. The preamble of the Anti-Corruption and Economic Crimes Act, 2003 stipulates that it's an Act of parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith. The above Act defines corruption to mean bribes, fraud, embezzlement or misappropriation of public funds, abuse of office, and breach of trust or an offence involving dishonesty<sup>179</sup>. Why discuss about corruption? The discussion is pertinent because one of the criticisms leveled against the ministry of lands are rampant demands for bribes to find lost files<sup>180</sup>. In the above definition of corruption, bribes are one form of corruption. The legal fraternity led by the Law Society of Kenya chairman Ken Akide and Prof Lumumba had organized a demonstration in Nairobi, accusing Mr. Orengo of being soft on corrupt officials in his ministry<sup>181</sup>.

Further, the discourse on corruption is relevant because the same has impacted negatively on land securitization process thereby offering a great challenge to lenders. The lenders have been unable to enforce the security due to problem of missing files perpetrated by the corrupt registry officials working at the lands registry. All the land officers interviewed stated that the vice of missing files is perpetrated by officials working in lands offices<sup>182</sup>. On the 1<sup>st</sup> March 2010 the permanent secretary of the ministry of found thousands of the missing files hidden by a cartel of rogue officers at the ministry. Borrowers who default in payment of the loans usually engage the

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<sup>179</sup> Section 2 of the Anti-Corruption and Economic Crimes Act, 2003.

<sup>180</sup> The Kenya Bribery Index 2005(TI2005 c), shows that 67.5% of the people visiting the Ministry of Lands might be asked for a bribe, 36.3% of declinations resulted in service denial. (<http://www.fig.net/pub/fig2006/paper/tc50/tc50-02-vandermolen-tuladhar-0690.pdf>)

<sup>181</sup> Jacob Ng'etich, *Orengo comes out guns blazing over charges of sleeping on the job*, Daily Nation, 23<sup>rd</sup> July 2011.

<sup>182</sup> Table 1.13 on findings

rogue officers at the ministry to hide the files to prevent the banks from enforcing the security. Banks seeking all-important papers for either for enforcement of the security or for purposes of loan advancement are usually told that the files could not be traced or were simply lost. There are brokers who have made a career out of colluding with officers at the lands ministry to make files “disappear” and reappear once the bribes have been paid<sup>183</sup>.

The lands minister has defended the ministry and challenged the Kenya Anti- Corruption Commission (KACC) to investigate and prosecute any officials found culpable. He further pointed out that since his appointment, he had increased revenue collection from Kenya shillings 800 million to Kenya shillings 8.3billion despite the ministry being least funded, getting about Kenya shillings 3billion a year despite its size<sup>184</sup>. The minister stated that he had succeeded in ending land grabbing and also worked together with KACC in the recovery of 600public land titles. The minister stated that the ministry is committed to fight corruption and further counted the integration of the NLP in the 2010 Kenya Constitution as one of the greatest achievements<sup>185</sup>. Land official interviewed denied that the corruption is perpetrated by land official but stated that the cases of missing files are attributed to poor record keeping.

Having discussed accusation and counter accusation of corruption in the ministry of lands its important to ascertain the policy option to address the above challenge. Does the NLP address the issue of corruption? The discussion notes that NLP addresses the challenge posed by corruption. The NLP notes that the development of vibrant land markets is hindered by inadequate information, bureaucratic inefficiencies, **corruption**, speculation, insecure and unclear land tenure arrangements, and the absence of innovative market mechanisms such as real estate investment trusts and community land trusts. Thus in order to enhance the efficiency of land markets the government is mandated to decentralize land registries, facilitate allocation of serviced land for investment purposes, encourage the development of new land markets by providing better information about land transactions<sup>186</sup>.

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<sup>183</sup> Murithi Mutiga, *New Land Policy Made Public*, Daily Nation, 16<sup>th</sup> May 2010, pg 11

<sup>184</sup> Jacob Ng’etich, *Orengo comes out guns blazing over charges of sleeping on the job*, Daily Nation, 23<sup>rd</sup> July 2011.

<sup>185</sup> Ibid

<sup>186</sup> Paragraph 165 of the National Land Policy

The study notes that corruption has been a great challenge to lenders. The NLP confirms that indeed corruption hinders the development of vibrant land markets including land securitization. According to paragraph 226 of the policy corruption has had serious and negative effects on the distribution and management of land as resource.

The NLP attempts to address above the challenge of corruption at lands registries. The policy suggests the decentralization of land registries to enhance the efficiency at land registry thereby reducing corruption<sup>187</sup>. The policy mandates the government to re-organize, update and authenticate existing land records<sup>188</sup> and also provide better information about land transactions. Lack of proper record keeping has been the source of corruption at the land registries; one has to part with substantial amount of money for you to get relevant documents including search certificates on time. The re-organisation and updating of land records will minimize corruption by easing access to information at the land registry<sup>189</sup> and also prevent the numerous cases of missing files.

According to the minister of lands, computerization remains the most urgent agenda and that the parliamentary Committee on lands has recommended that the ministry of lands be allocated 1 billion Kenya shillings for the above computerization project<sup>190</sup>. The ministry of lands will spend sh 3.8 billion to computerize its records countrywide. The new system is expected to curtail the loss of documents and deter land grabbing. The project is expected to come fully into effect in January 2012. Ms Angote<sup>191</sup> said the computerization was being funded by the Swedish International Development Agency<sup>192</sup>. Some Sh 44million had been used to build a records banking hall. Old records that were no longer in use were being scanned and stored in the system. When complete, Kenyans will be able to access information through Short Message Services (SMSs) and the Internet. Falling under the ministry are lands registries, physical planning, survey, mapping, lands adjudication and settlement departments, all of which will be

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<sup>187</sup> Paragraph 165 (a) of National Land Policy

<sup>188</sup> Paragraph 163 (e) of National Land Policy

<sup>189</sup> According to the Transparency International Global Corruption Barometer 2009, one fourth of the surveyed citizens reported to have paid bribe to land services. Some of the surveyed citizens stated that the consequence of refusing to pay a bribe of service by the Ministry of Lands, as illustrated in Transparency International Kenya the East African Bribery Index 2009 ([www.business-anti-corruption.dk/kenya/corruption../land-admin](http://www.business-anti-corruption.dk/kenya/corruption../land-admin))

<sup>190</sup> Jacob Ng'etich, Supra note 183

<sup>191</sup> Permanent Secretary Ministry of Lands

<sup>192</sup> [www.nation.co.ke/News/-/1056/656712/-/item/0/-/rdb86xz/..](http://www.nation.co.ke/News/-/1056/656712/-/item/0/-/rdb86xz/..) (last accessed on 27<sup>th</sup> July 2011)

centralized in the new system. The ministry has so far processed 244,620 land records; 5,621 are complete while more than 5,000 reports have been entered into the property valuation database<sup>193</sup>. Further the NLP notes that existing laws dealing with corruption only provide for the prosecution of offenders. As a result there has been limited recovery of the land acquired through corruption and the compensation of the victims of corruption. Further public education on corruption in land matters is minimal<sup>194</sup>. However **section 51** of the **Anti-Corruption and Economics Crimes Act** provides that a person who does anything that constitutes corruption or economic crimes is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered. Thus it follows that incase lenders suffers losses as a result of corruption perpetrated by ministry officials, they ought to be compensated the money lost or the loss incurred. In order to address the problem of corruption in the land sector the government is mandated to pay attention to recovery of asset as an anti-corruption measure and also to facilitate and implement of public education and awareness creation programmes. The banks that have lost money and/or property due to corruption may have a reprieve if the government undertakes to implement the above proposals

### **THE CHALLENGE OF INFORMATION ASYMMETRY**

The other emerging theme is the challenge of information asymmetry that exists between the lenders and borrowers in land securitization transactions. The same has been addressed by the National Land Policy. It's pertinent to note lenders might not be aware of the hidden issues affecting the land they are taking as security, the only information they usually have is that contained in the search certificate which includes; the names of the owner, size of the land, encumbrances. The search certificate fails to capture other information or/and transactions in that land that might affect the ownership of the same. The search certificate doesn't capture and/or detect issues of illegally acquired land.

Due to lack of important information concerning acquisition of the land, banks have advanced billion of shillings to customers who have given illegally acquired title deeds. An article in the pullout section B of the Standard news paper<sup>195</sup>, "Billions at Stake over Revoked Titles" summarized in a precise way the predicament that banks will face after a revocation of 100 titles illegally acquired. According to the article panic is rife among properties owners and financiers

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<sup>193</sup> Ibid

<sup>194</sup> Section 226 National Land Policy

<sup>195</sup> Dated 27<sup>th</sup> May 2010

after the Lands minister<sup>196</sup> revoked 137 titles illegally acquired. The commercial banks that issued loans with documents as securities are at tight spot as they may lose shillings 1 billion according to an evaluation made by quantity surveyors.

The above problem is solved by the inclusion of the **Land Information Management Principles** in the land policy. To facilitate the establishment of an efficient land information management system, the government is mandated among other things, re-organize, update and authenticate existing land records, establish a comprehensive, computer based land information system. The above system will solve the problem of advancing loans on the basis of land whose title is illegally acquired and also issue of missing files that is so common in the land registries.

### **THE MULTIPLICITY OF LAWS**

The other emerging issue which has been a great challenge to lenders is the existence of numerous laws. The NLP notes in the executive summary that the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system. NLP notes in **section 22** that since independence Kenya has had two land tenure systems, namely customary and statutory land tenure systems operated under the following statutes: Registration of Titles Act Cap281, Government Lands Act Cap 280, Land Titles Act Cap282, Registered Land Act Cap 300, Land (Group Representatives) Act Cap287, Trust Land Act Cap 288 and Sectional Properties Act No. 21 of 1987. The study also notes that the existence of multiple land laws (eight statutes<sup>197</sup>), some of which are incompatible, has resulted in a complex land management and administration system that has hampered efficacy of land securitization. Banks that engage in land securitization transaction must be aware which legislation is applicable and/or relevant with regard to the parcel to be taken as security.

The NLP confirms the challenge of existence of numerous statutes dealing with land but offers some proposals to address the same. Paragraph 149 of the policy notes that there has been no attempt made to harmonize the above statutes to ease the process of registration of land rights and facilitate speedy access to land registration information. According to the policy there is

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<sup>196</sup> Hon. James Orengo

<sup>197</sup> Registration of Title Act (Cap281), Registered Land Act (Cap 300), Government Land Act (Cap280), Land Titles Act (Cap 282), Registration of Documents Act (Cap285), Trust Land Act (Cap288), Land (Group Representatives) Act (Cap 287), Sectional Properties Act No.21 of 1987, India Transfer of Property Act

need to harmonize the above statutes to enhance the efficiency, transparency and accountability of all transactions in land. The government is mandated to enact a “Land Act” to govern all categories of land<sup>198</sup>. Thus the government intends to harmonize existing modes of statutory tenure under the “Land Act”. The proposed harmonization would enhance the efficacy of land securitization by providing for uniformity in legal regulation of charges and mortgages in Kenya. There will be procedural uniformity in issues of charges and mortgages under one statute. Lenders who engage in land securitization will only address themselves to a single legislation that regulates the operations of charges and mortgages rather the numerous statutes which are incompatible thereby complicating the entire land securitization transactions.

### **CRITIQUE OF THE POLICY FRAMEWORK ON LAND SECURITIZATION**

As noted earlier there has been no single and codified National Policy on Land Securitization. However the National Land Policy (NLP) attempts to fill that gap by providing the overall framework<sup>199</sup> and overall guide<sup>200</sup> in all land matters including the policy framework on land securitization. The National Land Policy fails to capture and/or address other pertinent issues of land securitization making the policy framework on land securitization as provided by NLP to be inadequate thereby failing to address some of the challenges faced by lenders.

The NLP fails to address the issue of enforcement that has always been a challenge to lenders. There are various challenges that are faced by the lenders in enforcing land security. The whole purpose of a mortgage is to provide security which the mortgagee/chargee can realize if the mortgagor fails to repay the loan. Obviously the mortgagee, like any other lender, can always sue in contract for the repay of the loan, but this may be a long process in which enforcing payment, even once judgment is obtained can be difficult. The mortgage institution, therefore, has developed several remedies for the mortgagee/chargee<sup>201</sup>. It's important to mention the remedies available to the banks incase of default in repayment of the loan. According to Cousin<sup>202</sup>, he states that foreclosure, sale and the personal action on the covenant for payment may be termed as final remedies arising from the nature of the land security; the object of the stated remedies is

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<sup>198</sup> Paragraph 58 of the National Land Policy

<sup>199</sup> Section 10 National Land Policy

<sup>200</sup> Section 270 National Land Policy

<sup>201</sup> Ojienda T, *Conveyancing Principles and Practice*, (Nairobi: LawAfrica publishing (K) Ltd,2008), pg 169

<sup>202</sup> Edward F. Cousin, Ian Clarke, *Cousin on the Law of Mortgages*, 2<sup>nd</sup> edition, (London sweet&Maxwell,2001), pg 253

to recover capital and to obtain a final settlement from mortgagor. Entry into possession and appointment of a receiver are normally final remedies.

The availability of rights and remedies to lenders is one thing and the enforcement is totally another issue. The challenges<sup>203</sup> experienced by lenders in Kenya makes the enforcement of their rights difficult. The NLP has not captured and/or addressed the challenges faced by lenders when they attempt to enforce the security. Why discuss about enforcement? Enforcement provides the lenders with a chance to invoke and operationalize the remedies available to them. Lack of efficient or viable enforcement mechanisms reduces the remedies to a mere mirage thereby impacting negatively to the lenders. The essence and/or rationale of land security is to secure the lenders in the event of default of payment of the money advanced. Thus any impediment or bottleneck in enforcement or realization of the security goes against the main basis of mortgage institution. There is dire need to have a policy direction that comprehensively deals with the issue of enforcement.

Most banks try to circumvent above challenge of enforcement by emphasizing on high interest rates and also have policy that insists on servicing as opposed to security According to a survey conducted jointly by Central Bank of Kenya and the World Bank, money lending institutions charge an average interest rate of between 12.2 per cent and 14.1 per cent on mortgage<sup>204</sup>. The above percentage is considered to very high. President Kibaki has asked mortgage lender to reduce the cost of borrowing to enable more Kenyans to own homes. The President proposed development of mechanism that will make property financing affordable to majority of middle and low income population<sup>205</sup>.

The study shows that enforcement of the security incase of default is equally or even more important than the ability to service. This is because a person may be able service his or her mortgage today but unable to do the same tomorrow. This can be attributed to loss of

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<sup>203</sup> Court injunctions, defaults in payments of land rates (section 17(6) of the Rating Act Cap 267, the High Court may order for the sale of land for purposes of enforcement of payment of rates due to a local authority), liquidity problem (land is not easily realizable security), multiple laws some which are incompatible, corruption and fraud perpetrated by officials at the ministry of lands, cancellation of illegally acquired titles used in land securitization and also professional negligence.

<sup>204</sup> Dave O, *Cut Mortgage Rates, Kibaki urges banks*, Daily Nation, 16<sup>th</sup> June 2011.

<sup>205</sup> Ibid



employment, decline of business engagement or any other financial loss that may affect the credit worthiness of an individual. Thus the banks over reliance on ability to pay and not the land taken as security may not be prudent. The banks policy should also focus keenly on streamlining enforcement as it is equally important as ability to pay. Chapter four shall discuss the recommendation on enforcement.

The NLP fails and/or omits to include the financial institutions as important sector in land use. Section 142 of the NLP notes, effective land management requires coordination and cooperation among different sectors. It's further provided that the policy should be understood and implemented taking into account all related sectors such as agriculture, livestock, water, energy, human settlement, industry, tourism, wildlife, forestry and fisheries. The government is mandated to facilitate an integrated and multi-sectoral approach to land use<sup>206</sup>. From the above it's clear that the financial institutions have been sidelined and omitted in the coordination and cooperation among different sectors in land use matters. The failure to include financial institutions puts the lenders at precarious position as far as mortgage institution is concern. This is because the enforcement and realization of the security requires the coordination and cooperation of other sectors. As noted earlier enforcement has always been a great challenge to the lenders thus the omission of financial institution in the coordination and cooperation among different sector is a big blow to the lenders.

There is need to have policy direction that would streamline the coordination and cooperation in all relevant sectors that are involved in land securitization. There is lack of proper cooperation among the stakeholders including: Land Boards, Courts, Land Registries and the ministry of lands. The lack of coordination makes the land securitization process to be long and laborious. In many business transactions time is usually of essence. The criticism leveled against land securitization by bank officials is that land is not easily realizable security. There are writers who have held similar view that land is not an easily realizable security<sup>207</sup>. Commercial banks seeking to enforce land security have to contend with various hurdles before they can exercise the

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<sup>206</sup> Section 143 (a) NLP

<sup>207</sup> David P and Philip F, *Elements of Banking*, 2nd edition, (London: Pitman, 1988), pg 494.

remedies available to them due to lack of proper and clearly defined cooperation and coordination among the concerned stakeholders.

Finally it's pertinent to note that implementation of the NLP is not an easy task and like all tasks of profound importance and of such scale it is not without challenges. The challenges to the implementation process can be loosely classified as behavioral, financial, political and timelines. These are:

1. **Knowledge and understanding of the NLP.** A majority of Kenyans display insufficient knowledge of the NLP. Provisions of the NLP are not well understood and Kenyans are yet to internalize the NLP. These calls for targeted civic education to ensure that public officers, the private sector and other non state actors and individuals are well educated on the NLP and their respective roles in implementation of the same.
2. **Negative Politics.** It has to be affirmed that certain political utterances and actions have presented challenges to the implementation process. It may be presented in the form of disrespect for, or lack of recognition of constitutional institutions, such as Courts or independent Commissions. This probably arises from focus by politicians on short-term political gains rather than ignorance of the law. Politicians are mainly focused on the 2012 elections, forming of political alliances, increment of their salary and exemption to the payment of taxes at the expense of enactment of crucial laws that would actualize the NLP. Our legislators need to have their priorities right so as to enhance the implementation process by enacting the relevant laws that have recommended in the NLP.
3. **Timelines.** Similarly to the above mentioned negative politics the implementation of the NLP suffers the setback of poor time management. There is delay in the enactment of crucial laws that would actualize the NLP. Further as it will be noted below, lack adequate finances has affected the speedy implementation of the NLP.
4. **Financial challenges.** The lands minister stated that the ministry is the least funded, getting about Kenya shillings 3billion a year despite its mandate and size<sup>208</sup>. The implementation process of the NLP has been hindered by lack of enough resources to facilitate the same. Computerization as envisaged by the NLP suffers similar fate. The

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<sup>208</sup> Jacob Ng'etich, *Orengo comes out guns blazing over charges of sleeping on the job*, Daily Nation, dated 23<sup>rd</sup> July 2011.

parliamentary Committee on lands has recommended that the ministry of lands be allocated 1 billion Kenya shillings for the above project<sup>209</sup> however the ministry of lands will be required to spend sh 3.8 billion to computerize its records countrywide. There is need to approach donors to facilitate and/or support the implementation process and also put to good use the limited resources we have.

#### **COMPARATIVE ANALYSIS OF LAND SECURITIZATION POLICY IN SOUTH ASIA.**

In South Asia there is a policy option to improve the framework for housing and housing finance including land securitization. Although economies in south Asia share a common need for expansion in the housing and housing finance markets including mortgage finance, each country is at a very different level of market development, and specific policy direction have been suggested in each country appendix to address carefully the specific area of importance in each system. Four common priority topics emerge across the region and are noted below; land administration, market information provision, access to long-term funding and servicing low-income groups through innovative housing finance solution<sup>210</sup>

According to the policy, a number of steps need to be taken to improve land ownership, registration, and titling must be put in place and enforced in South Asia. Clear and consistent laws and regulations on land registration and titling must be put in place and enforced. In each country, a designated authority should be assigned to take charge of dealing with land –related regulations and titling procedures. The policy further suggests that titling process need to be made less costly and more efficient because cumbersome procedure involving many steps lead to corruption and inefficiency. Stamp duty and legal charges should be reduced significantly<sup>211</sup>

The policy recommends that land registration should be carried out in a transparent manner with clear record keeping. Computerized information and registration systems, property and ownership database, and cadastral surveying would increase transparency and the enforcement of creditor's rights. Land transfer procedures also need to be revised, simplified, and homogenized across different country regions. As land administration systems become simpler, cheaper, faster and more reliable, an increasing number of transactions will be formalized, thus eliminating

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<sup>209</sup> Ibid

<sup>210</sup> [Siteresources.worldbank.org/.../Chapter7SARHousingOctober2010](http://Siteresources.worldbank.org/.../Chapter7SARHousingOctober2010).

<sup>211</sup> Ibid

uncertainty in property ownership and easing ambiguities resulting from application of tradition and Islamic laws<sup>212</sup>

The above policy offer a very good premise for the improvement of the legal, policy and institutional frameworks on land securitization in Kenya. The South Asia policy captures very pertinent issues that affect the efficacy of land securitization in Kenya. The priority topic of "land administration" discussed above offer good recommendations that would improve the efficacy of land securitization in Kenya if adopted and enforced. The above policy suggests the improvement of land ownership, registration and titling process. In Kenya the three processes<sup>213</sup> have always been marred with confusion and corruption.

Land adjudication, consolidation and registration have not been completed in most of country. According to Clarissa and Klaus<sup>214</sup> in a world bank study notes that only 15% of land in Kenya is covered by land titling and cadastral system. The study also notes that registration of title takes upwards of 6months up to 10 years. Most people therefore live on land without any documentation of title. It is widely accepted thought the world that the registration of land rights, improves access to formal credit as it is a source of collateral for large loans. Where ownership of assets is difficult to trace and validate and has no recognizable governing set of rules, the asset has little economics.<sup>215</sup>

The Policy notes that titling process need to be made less costly and more efficient because cumbersome procedures involving many steps lead to corruption and inefficiency. Stamp duty and legal charges should be reduced significantly<sup>216</sup>. The mortgagor/lender in Kenya usually faces the challenge of corruption and fraud. The corrupt cartels at the land ministry have hampered the effective use of land as security for loan advancement. Banks have been unable to enforce the security due to, inter alia; the strange problem of missing files perpetrated by corrupt registry officials working at the land registry. On March 2010, the permanent secretary in the

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<sup>212</sup> Ibid

<sup>213</sup> Land ownership, registration and titling

<sup>214</sup> Clarissa Augustinus and Klaus Deninger, *Supra*, note146.

<sup>215</sup> Raymond Talinbe Abdulai, *Is land title registration the answer to insecure and uncertain property rights in sub-Saharan Africa?* RICS Research Paper series, volume 6, no.6 April 2006

<sup>216</sup> Ibid

ministry of land stumbled upon thousand of the missing files hidden by a cartel of rough officers at the ministry. There are brokers who have made a career out of colluding with officers at the land ministry to facilitate files to appear and disappear once the bribes have been paid<sup>217</sup>.

The challenge of corruption and fraud can be attributed to the registration and titling process and weakness of the institutions charged with the responsibility of affecting the above process. The ministry of land should borrow a leaf from the above South Asia Policy and formulate policies that would inform enactment of clear and consistent laws and regulations on land registration, titling and most importantly land securitization.

## CONCLUSION

The inclusion and/or integration of the NLP in the 2010 Kenya is a milestone achievement as far as the policy framework on land securitization is concerned. The Constitution provides for the Constitutional principles for the usage and management of land in Kenya including regulation of land securitization. The relevance of the Constitutional principles to land securitization has already been discussed in the previous chapter. The inclusion of the NLP to the Constitution couldn't have come at a better time than now when lenders are grappling with various challenges<sup>218</sup> emanating and/or arising out of the policy, legal and institutional frameworks of land securitization in Kenya. The said challenges have partly been addressed by the NLP in broad manner but not in detail. There is need to enact some legislations that would operationalize and also actualize the NLP.

The proper handling of the above issues will go along way to enhance the efficacy of land securitization to the benefit of lenders. However it's clear from the discussion that NLP does not solve all the problems that affect the efficacy of land securitization, the policy framework on land securitization is thus inadequate to the detriment of lenders. On account of the discussed challenges facing lenders, immediate, holistic and systematic policy attention to land securitization is needed. The study recommends in chapter five the formulation of the National Land Securitization Policy that would address in depth various issues affecting land securitization. The policy makers should embed suitable clauses in the proposed National Land Securitization Policy that emphasize the need to address the challenges facing lenders.

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<sup>217</sup> Murithi M, *New Land Policy Made Public*, Daily Nation 16<sup>th</sup> May 2010 pg 11

<sup>218</sup> The challenges include: corruption, court injunctions, numerous laws, liquidity problem, information asymmetry and cancellation of illegally acquired titles.

## CHAPTER FOUR

### FINDINGS AND DISCUSSION OF RESULTS

#### INSTRUMENT RETURN RATE

The researcher issued out 100 questionnaires to the respondents of which 80 were returned. 15 questionnaires were sent to judicial officers but only 10 were returned. 60 questionnaires were sent to land officers but only 50 were returned. 25 questionnaires were sent to bank officials but only 20 were returned. The breakdown of the responses was as tabulated in table 4.1 below.

**Table 1.0 category of respondents**

		Category of respondent			
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Land	50	62.5	62.5	62.5
	bank	20	25.0	25.0	87.5
	magi	10	12.5	12.5	100.0
	Total	80	100.0	100.0	

Table 1.0 shows 50 respondents were land officers, 20 respondents were bank officials and 10 respondents were judicial officers. The total response rate is 80% which is good percentage to infer into challenges and/or problems, arising out of the legal, institutional and policy frameworks of land securitization in Kenya and, the effect of the same to lenders. From the above table 62.5% of the respondents came from the lands department. The high number is attributed to the several departments at the lands offices namely, Land Administration office, Physical Planning office, Land Adjudication office and Surveys office. According to the table 25% of the respondents came from the Banks whereas 12.5% of the respondents came from the Judiciary (magistrates).

**Table 1.1 Indicating level of education of the respondent**

Level of education of respondents is as shown in table and fig below.

	Level of education					
	Diploma		University degree		Post graduate degree	
	Department		Department		Department	
	Count	%	Count	%	Count	%
-Land administration	4	40.0%	7	11.7%	1	10.0%
-Physical planning	2	20.0%	10	16.7%	1	10.0%
-Land adjudication	1	10.0%	8	13.3%	2	20.0%
Surveys			13	21.7%	1	10.0%
Bank officials	3	30.0%	14	23.3%	3	30.0%
Judicial officers			8	13.3%	2	20.0%

Source: Research Data (2012)

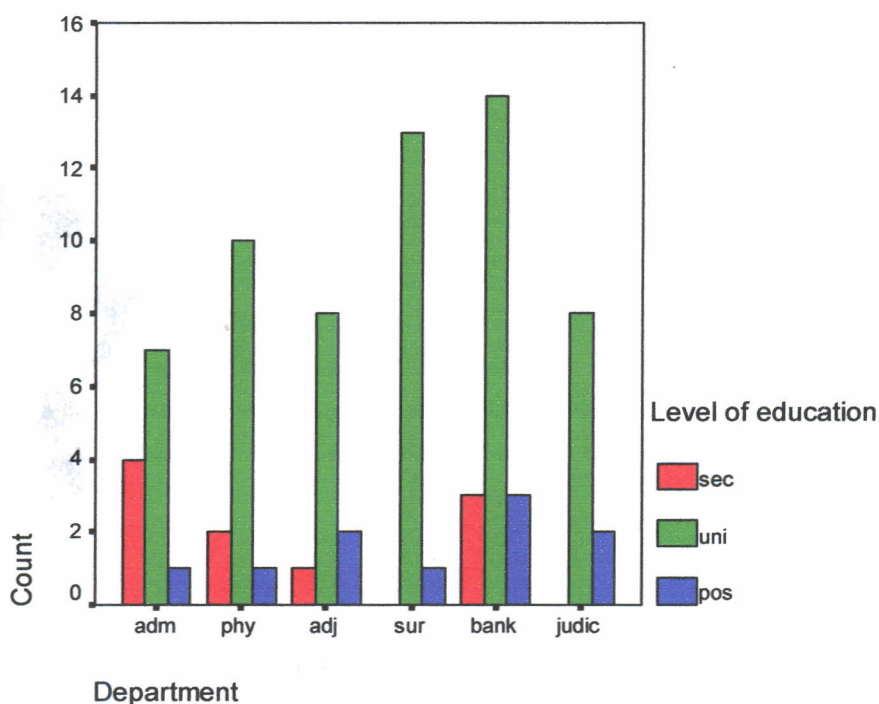


Table 1.1 and graph shows the following respondents had Diploma level of education; 4 respondents in land administration, 2 respondents in the physical planning, 1 respondent in the land adjudication department and 3 respondents from the banks. Majority of the respondents from the bank (17 respondents out of 20) and Judiciary (10 respondents out of 10) have university education and postgraduate studies whereas only 43 respondents out of 55 of lands officials have university degree. The research reveals that the above level of education can be

attributed to the recruitment policy adopted by three institutions. All the Judicial officers and the Bank managers have university degrees. The entry level of both the bank managers and judicial officers required them to have university degree. The level of education of the respondents is very important as far as the knowledge and understanding of issues on land securitization is concerned. The research found that majority of the respondents who have university education were able to understand the pitfalls and/or challenges that face lenders in land securitization and also they had indepth understanding of the policy, legal and institutional frameworks on land securitization. The high numbers of respondents from lands department don't have university degree. This can be attributed to the recruitment policy adopted by the lands department. The lack of relevant university education exposes the institutional challenges in the lands department.

Source: Research Data (2012)

Table 1.2 Respondent's knowledge of mortgages and charges.

	Knowledge on charges			
	yes		no	
	Department		Department	
	Count	%	Count	%
adm	9	17.3%	3	10.7%
phy	4	7.7%	9	32.1%
adj	4	7.7%	7	25.0%
sur	5	9.6%	9	32.1%
bank	20	38.5%		
judic	10	19.2%		
Total	52	100.0%	28	100.0%

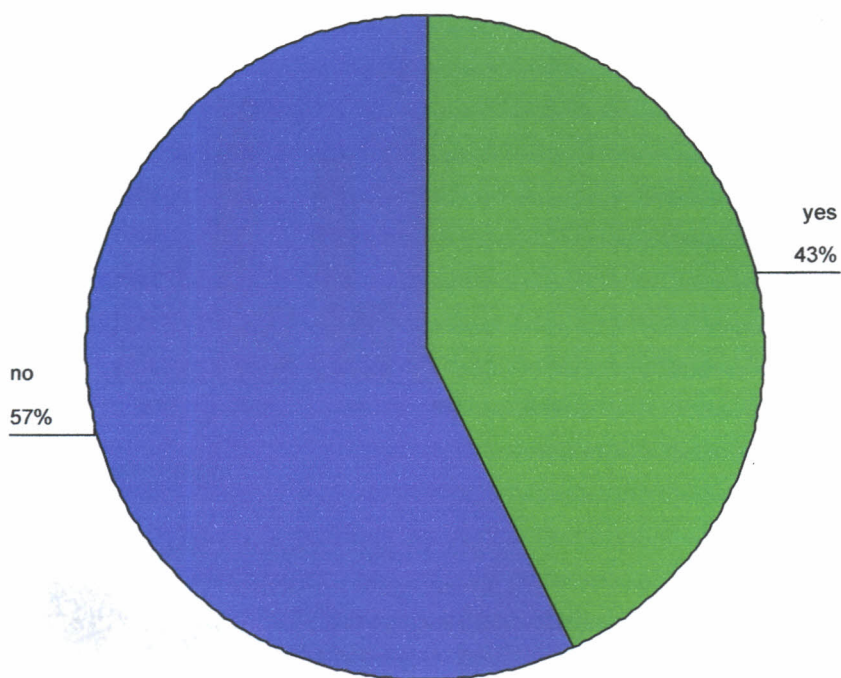
	Knowledge on charges	
	Count	%
yes	52	65.0%
no	28	35.0%
Total	80	100.0%

Table 1.2 indicates that all the respondents from the bank 38.5% and judiciary 19.2% have knowledge in mortgages and charges whereas some land officers 28 %respondents have no knowledge of the same. The lack of knowledge in mortgages and charges exposes one the institutional challenges that affect the efficacy of land securitization and the above can be attributed to the findings in table1.1 where some of the lands officials didn't have university degree. The research found that some of the land officers were unaware of their critical role of their institution in land securitization process thereby making the lands department as a hindrance and ineffective institution in the lands securitization process. The lack of knowledge can be attributed to the level of education of the respondents and also lack of training. Consequently the lack of knowledge in mortgages and charges is a great challenge to efficacy of the land securitization process.

Source: Research Data (2012)



**Chart 1.3 Specialized training on mortgages and charges.**



**Chart 1.3** indicates 57% of the respondents have specialized training on mortgages and charges whereas 43 % have not received any training. The lack of specialized training of some officers (43%) is attributed to lack of training and also is an indicator that the institutions are not keen on advancing the knowledge of their employees on the major role of their institutions in land securitization and the importance of the same thereby making the institutions ineffective.

**Table 1.4Corruption as a challenge**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	34	42.5	48.6	48.6
	No	36	45.0	51.4	100.0
	Total	70	87.5	100.0	
Missing	System	10	12.5		
Total		80	100.0		

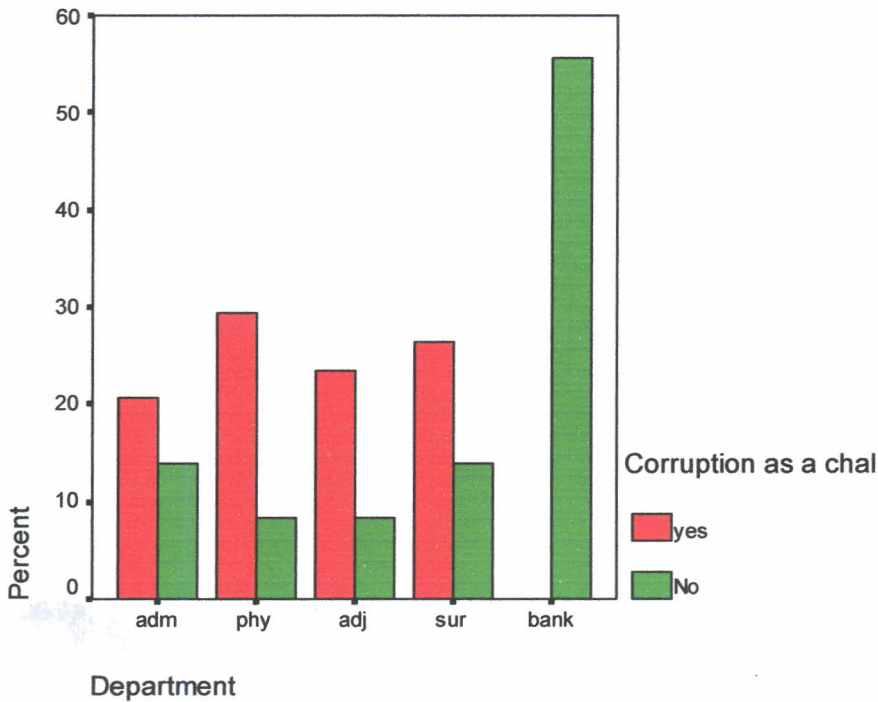


Table 1.4 and graph 1.4 shows that 51.4% of the respondents don't view corruption as a challenge to land securitization whereas 48.6% view corruption as a challenge to land securitization. The 48.6 % of the respondents attributed corruption to institutional challenges emanating from poor record keeping in lands departments and also due to lack of cooperation between various institutions involved in land securitization. The research further finds that numerous laws dealing in land makes the management of land complex thereby informing the rampant corruption. The said corruption exposes the institutional, legislative and policy challenges in land securitization.

**Table and graph 1.5 the challenge of cancellation of illegal titles**

	Category of respondent	
	Count	%
Land	37	52.9%
bank	20	28.6%
Total	57	81.4%

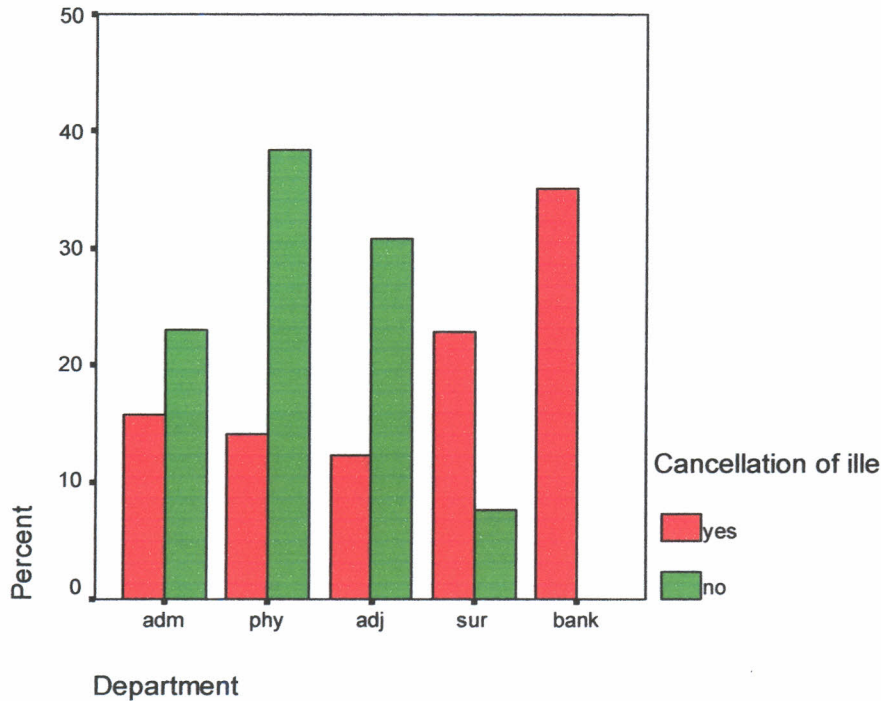


Table and graph 1.5 shows that 81.4% of the respondents view cancellation of illegal titles as a challenge to land securitization. The respondents attributed the cancellation of illegally acquired title to corruption at the lands offices as noted in table 1.4. The research finds that cancellation of illegally acquired titles is attributed to weakness in the legislative and institutional frameworks. The above weaknesses necessitated the acquisition of title in illegal manner. The research further finds that the current legal, institutional and policy frameworks doesn't curb the acquisition of title in illegal ways. Consequently the cancellation of illegally acquired title leaves the lenders exposed and with no security. The above challenge confirms weak legislative and ineffective institutional frameworks on land securitization.

**Table 1.6 the challenge of numerous laws**

	Challenge of numerous laws	
	Count	%
Yes	59	73.8%
No	21	26.3%

Table 1.6 shows that 73.8% of respondent view numerous laws dealing with land as a challenge in land securitization whereas 26.3 view numerous laws dealing with land as not a challenge. The majority of respondents have noted that the multiplicity of laws dealing with land impedes and/or hinder the efficacy of land securitization thereby confirming the weak legislative framework on land securitization. The research finds that the existence of many land laws, some

of which are incompatible, has resulted in a complex land management and administration system that has hampered efficacy of land securitization. Due to the numerous laws there has been no uniformity in terms of remedies and rights available to lenders.

**Table 1.7 advocate of one property law**

	Advocate for one law on property rights	
	Count	%
yes	63	78.8%
no	17	21.3%
Total	80	100.0%

Table 1.7 shows that 63% of the respondents advocate for one property law to govern land securitization whereas 17% of the respondents don't advocate for one property law. Majority of the respondents noted that enactment of one property law would mitigate the challenges attributed to the numerous laws thereby enhancing the legal framework on land securitization. The study finds that the enactment one law will harmonize the current numerous laws some of which are incompatible thereby enhancing the legal, institutional and policy frameworks on land securitization.

**Table 1.8 the challenge of missing files.**

Vice perpetrated with knowledge of staff yes

	Problem of missing files			
	yes		no	
	Department		Department	
	Count	%	Count	%
adm	9	33.3%		
phy	4	14.8%		
adj	3	11.1%		
sur	11	40.7%		
Total	27	100.0%		

Table 1.8 shows that all the respondents at the four lands departments view the missing files as a challenge in land securitization and which is a vice perpetrated with knowledge of staff. The challenge is attributed to weak institutional framework as far as record keeping is concerned as noted in table 1.4. Further investigation reveal that the problem of missing files is attributed to corruption at the lands offices. The corrupt cartels at the land ministry have hampered the effective use of land as security for loan advancement. Banks have been unable to enforce the security due to, inter alia; the strange problem of missing files perpetrated by corrupt registry officials working at the land registry. The research finds that the problem of the missing files impacts negatively on the efficacy of the use of land as security for lending. The study reveals that computerization of all land records shall facilitate the delivery of efficient, cost-effective and reliable services to both lenders and borrowers.

**Table 1.9 national policy on land securitization**

	National policy to govern land	
	yes	
	Category of respondant	
	Count	%
Land	50	62.5%
bank	20	25.0%
magi	10	12.5%
Total	80	100.0%

Table 1.9 shows that all 80 respondents advocate for one national policy to govern land securitization in Kenya. The respondents have noted that the lack of a single and clearly defined policy on land securitization brings about a cloud of confusion to the various stakeholders thereby making the management of land securitization problematic. The respondent supported the formulation of one National Policy on Land Securitization because the policy informs the enactment of up to date laws that would ensure lenders and borrowers are protected fully. The research reveals that the legislative framework must be underpinned by a sound policy framework to ensure effective enforcement

**Table 1.10 Other factors hindering use of land as security for lending**

	Factors hindering use of land as security	
	Count	%
Familydis	19	23.8%
doc	6	7.5%
Enc	7	8.8%
cot	15	18.8%
compo	27	33.8%
coown	6	7.5%
Total	80	100.0%

Table 1.10 shows that 19 respondents view family disputes as a factor hindering use of land as a security for lending. The family disputes are attributed to ownership wrangles over family property (land), when it comes to succession and/or inheritance. There are some communities which don't allow women to own land.

6 respondents view lack of necessary lands documents as a factor hindering use of land as a security for lending. The study notes that only 15% of land in Kenya is covered by land titling and cadastral system. The study also notes that registration of title takes upwards of 6 months up to 10 years. Most people therefore live on land without any documentation of title

7 respondents view encumbrances as a factor hindering use of land as a security for lending.

15 respondents view court injunction as a factor hindering use of land as a security for lending. The study reveals that the borrowers/customers usually use the court to obtain injunctions and other orders to frustrate the banks when they try to realize the security. The situation is further compounded by the huge backlog of cases in all courts.

6 respondents view co ownership as a factor hindering use of land as a security for lending. 27 respondents view all the above factors as challenge to land securitization. The respondents have attributed the above challenges to the weak legislative framework, lack of policy framework and ineffective institutional framework on land securitization.

**Table 1.11 Reforms in Land Securitization**

	Reforms to ensure efficacy							
	computerization		Policy on land sec		Harmonization of Laws		Combination of all	
	Count	%	Count	%	Count	%	Count	%
adm	1	3.7%	6	37.5%	4	17.4%	1	7.1%
phy	3	11.1%	1	6.3%	5	21.7%	4	28.6%
adj	5	18.5%	1	6.3%	3	13.0%	2	14.3%
sur	7	25.9%	2	12.5%	4	17.4%	1	7.1%
bank	10	37.0%	2	12.5%	5	21.7%	3	21.4%
judic	1	3.7%	4	25.0%	2	8.7%	3	21.4%
Total	27	100.0%	16	100.0%	23	100.0%	14	100.0%

Table 1.11 shows that 27 respondents recommended computerization of documents in land offices to address the institutional challenges occasioned by poor record keeping. The study identifies that poor record keeping has necessitated the challenge of missing files (table1.8) and corruption (table1.4) at the lands offices. The study reveals (table1.8) that computerization of all land records shall facilitate the delivery of efficient, cost-effective and reliable services to both lenders and borrowers.

16 respondents recommended one policy to govern land securitization to mitigate the challenges attributed to the lack of a single codified national policy framework on land securitization. The respondent supported the formulation of one National Policy on Land Securitization because the policy informs the enactment of up to date laws that would ensure lenders and borrowers are protected fully. The research reveals that the legislative framework must be underpinned by a sound policy framework to ensure effective enforcement

23 respondents recommended harmonization of laws dealing in land securitization to address the challenge of numerous laws. The research finds (table1.6) that the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system that has hampered efficacy of land securitization. 14 respondents recommended all the above reforms.

## CHAPTER FIVE

### SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATION

#### INTRODUCTION

The chapter deals with the summary of the findings, conclusion and recommendations that would enhance the policy, legal and institutional frameworks on land securitization in Kenya thereby effectively address challenges faced by the lenders. The chapter also incorporates the various suggestions and comments given by the respondents in the questionnaires. The survey was set out to establish the various challenges and/or problems, arising out of the legal, institutional and policy frameworks of land securitization in Kenya and, the effect of the same to lenders.

#### BRIEF SUMMARY OF FINDINGS

The objective of the study was to undertake an in depth analysis and review of the legal, institutional and policy framework on land securitization in Kenya for purposes of ascertaining the pitfalls and/or challenges faced by lenders and ,additionally, identify the urgent and/or necessary reforms that would guarantee the efficacy of the above process.

The research findings largely confirmed and/or proved that the inadequacies that exist in the current laws, institutions and policy governing land securitization in Kenya exposes lenders to various challenges thereby hindering the efficacy of the process.

The findings confirm the existence of the following challenges facing the mortgagors/lenders in Kenya;

**Lack of Specialized Training on mortgages and charges:** The research findings revealed that lack of training is a challenge to lenders. 28% of the respondents had no knowledge of mortgages and charges whereas 43% never had not received any specialized training on the same. The lack of training limits the efficiency of the employees working in the institutions involved in land securitization. The employees were unable to effectively discuss to various issues affecting lenders who take land as security.

**Court injunction:** The research findings confirmed that Court Injunctions are a challenge to lenders who engage in land securitization. 42 respondents view court injunction as a factor hindering the use of land as a security for lending. The study further reveals that the borrowers/customers usually use the court to obtain injunctions and other orders to frustrate the banks when they try to realize the security. The situation is further compounded by the huge

backlog of cases in all courts. It's argued that the above injunctions make land not easily realizable security thereby a challenge to lenders.

**Multiple/Numerous laws:** The research findings further confirm that the availability of numerous laws dealing with land as a challenge to lenders. 73.8% of respondent view numerous laws dealing with land as a challenge in land securitization. It's argued that the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system that has hampered efficacy of land securitization.

**Corruption and Fraud:** The research findings confirm that corruption and fraud is another challenge facing lenders who engage in land securitization. 48.6% view corruption as a challenge to land securitization. The 48.6 % of the respondents attributed corruption to institutional challenges emanating from poor record keeping and also a vice perpetrated by officials at the ministry of lands. Further investigation reveal that the problem of missing files is attributed to corruption at the lands offices. The corrupt cartels at the land ministry have hampered the effective use of land as security for loan advancement. Banks have been unable to enforce the security due to, inter alia; the strange problem of missing files perpetrated by corrupt registry officials working at the land registry.

**Cancellation of illegally acquired titles:** The research finding identified cancellation of illegally acquired title as a challenge to lenders who take the land as security. 81.4% of the respondents view cancellation of illegal titles as a challenge to land securitization. The respondents attributed the cancellation of illegally acquired title to corruption at the lands offices. Further investigation reveals that cancellation of illegally acquired titles is attributed to weakness in the legislative and institutional frameworks. The research further finds that the current legal, institutional and policy frameworks doesn't curb the acquisition of title in illegal ways. Cancellation of illegally acquired title leaves the lenders exposed and with no security.

**Lack of National Policy on Land Securitization:** The findings confirmed that the lack of a National Policy on Land Securitization as a challenge to both lenders and borrowers. 80 of the respondents noted that the lack of a single and clearly defined policy on land securitization brings about a cloud of confusion to the various stakeholders thereby making the management of land securitization problematic. The respondent supported the formulation of one National Policy on Land Securitization because the policy informs the enactment of up to date laws that would ensure lenders and borrowers are protected fully



From the above premise its correct to infer that the research findings largely confirmed and/or proved the hypothesis that the inadequacies that exist in the current laws, institutions and policy governing land securitization in Kenya exposes lenders to various challenges thereby hindering the efficacy of the process.

## CONCLUSION

In the analysis and review of the legal, institutional and policy framework on land securitization in Kenya the study confirms the several pitfalls and/or challenges faced by lenders<sup>219</sup>. The challenges have been attributed to weak legislative framework, lack of a single codified national policy framework and ineffective institutional framework on land securitization. The lack of a single and clearly defined National Policy on Land Securitization brings about a cloud of confusion to the various stakeholders including lenders/mortgagors, making the management of land securitization problematic and complex. The policy informs the enactment of up to date laws that would ensure lenders are protected fully. As noted; the numerous and incompatible laws dealing with land securitization have hindered the efficacy of the said process. The matter is compounded by the ineffective institutions that engaged in land securitization. Consequently the above issues underscore the urgent need of a review of policy, legal and institutional frameworks on land securitization with a view of mitigating the said challenges to enhance the efficacy of land securitization

## THE RECOMMENDATIONS

### **The recommendations on policy framework on land securitization in Kenya**

Under the policy framework on land securitization the study recommends the formulation of National Land Securitization Policy herein after referred to as NLSP. All the 80 respondents stated the need to have one national policy to govern land securitization<sup>220</sup>. The Government, lenders, and all the stakeholders should embark on the formulation of a NLSP through a widely consultative process with the aim of producing a NLSP whose vision is **“to ensure efficient, reliable and ideal usage of land as security for the benefit of both the lenders and borrowers”**. The stakeholders from the public, private and civil society should contribute towards the formulation of the above policy.

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<sup>219</sup> court injunctions, liquidity problem (land is not easily realizable security), multiple laws some which are incompatible, corruption and fraud perpetrated by officials at the ministry of lands and cancellation of illegally acquired titles used in land securitization.

<sup>220</sup> Table1.16.

The formulation of the NLSP aims to address the earlier mentioned challenges emanating from the policy framework on land securitization, and also seeks to meet the needs and aspirations of financial institutions, banks, mortgage finance institutions, borrowers and all the other stakeholders that engage in land securitization transactions in Kenya. Under the proposed NLSP there is need to have specific policy directions that would address carefully the specific challenges in land securitization. Consequently the core aim of NLSP shall be to ensure effective management and administration of land securitization. Proper and clear administration of land securitization is important for purposes of ensuring efficacy of the process.

### **The recommendations on legal framework on land securitization in Kenya**

Under the legal framework on land securitization the study recommends the enactment of a single property law dealing with the charges, mortgages and which will regulate and harmonize all land securitization matters. The study notes that there is need to have one statute that will regulate land securitization transactions and also expressly provide for all the necessary remedies to lenders. According to the research findings 63% of respondents stated the need to have one law to regulate land securitization<sup>221</sup>. The enactment of one law to govern land securitization would ensure harmonization of the numerous laws which as early noted has been a challenge to lenders.

The above proposal is supported by the research finds of the 37 respondents who recommended the harmonization of the law to ensure efficacy of land securitization<sup>222</sup>. The said law needs to provide for all the various types mortgages and charges and also have a specific provision distinguishing between mortgages and charges. Further under the proposed law the study recommends inclusion of provision that would ensure uniformity in terms of statutory remedies available to lenders for purposes of ensuring they are adequately protected.

The harmonization of the above laws will go along way to mitigate the challenge of numerous laws faced by lenders when they try to enforce the security. The new law shall incorporate policy directions aimed to address challenges that impede the efficacy of land securitization. Finally the proposed law needs to address the registration of land rights. The above function shall solve the current problem of too many statutes dealing with the registration of land rights. The proposed

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<sup>221</sup> Table 1.10.

<sup>222</sup> Table 1.18

law shall aim to harmonize all the statutes dealing with land registration to ease the process of registration of land rights and facilitate speedy access to land registration information which has been a challenge to both the lenders and borrowers.

### **The recommendations on the institutional framework on land securitization in Kenya**

Under the institutional framework on land securitization the study recommends the expedite establishment of the land management institutions as anticipated in the Constitution and NLP.

**Article 67 (1)** of the Constitution provides for the establishment of the National Land Commission. The yet to be established National Land Commission is also key institution as far as institutional framework of land securitization is concerned. The roles and/or functions of National Land Commission are provided for under article 67 (2) of the constitution<sup>223</sup> are pertinent in management of land securitization. Further section 231 of the NLP provides that the government will set up three key land management institutions: the National Land Commission, the District Land Boards and Community Land Boards. The above institutions will serve a very central role as far as land securitization is concerned.

The study also recommends computerization of all land records to facilitate the delivery of efficient, cost-effective and reliable services to both lenders and borrowers. The above recommendation is supported by 41 respondents who advocated for computerization of all land documents to ensure efficient service delivery<sup>224</sup>. The NLC shall ensure the development and operation of effective digital land information management systems to enable easier access to information by both lenders and borrowers thereby solving the challenge of information asymmetry.

The study recommends institutional cooperation by the various institutions that deal in land securitization. Under institutional cooperation the study recommends the formation of County Land Securitization User's Committee in the 47 counties. The mandate of the committee is to

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<sup>223</sup> Functions include: To manage public land on behalf of the national and county governments; to recommend a national land policy to the national government; to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land using planning throughout the country. According to **article 67 (3)** of the constitution, the National Land Commission may perform any other functions prescribed by national legislation.

<sup>224</sup> Table 1.18

harmonize the management and ensure efficacy of land securitization in their respective counties. The committee shall offer a forum which brings together all the institutions involved in land securitization in 47 counties for purposes enhancing institutional cooperation. The membership of the committee shall include but not limited to, representatives from the following institutions: Ministry of lands, Judiciary, banks, county council, and businessmen. The above committee shall develop its own calendar of activities aimed at handling any challenges arising from land securitization in their respective counties. The committee shall recommend various policy directions on land securitization to the NLC.

The study proposes information sharing among the various institutions involved in land securitization. The above proposal is meant to achieve **Land Information Management Principles** as provided by the land policy. To facilitate the establishment of an efficient land information management system, the government is mandated among other things, re-organize, update and authenticate existing land records, establish a comprehensive, computer based land information system. The sharing of information would mitigate the various institutional challenges occasioned by lack of information.

Institutional reforms under Judiciary shall center on cases of court injunction and/or delays in administration of justice which as noted in the previous chapter have hampered the efficacy of land securitization. The study recommends the employment of more judicial officer to clear the backlog of cases which also include cases in land securitization. The study appreciate that the present set up is grossly overstretched and overstaffed, but this state of affairs is about to change. The Judicial service Commission recently employed seven Court of Appeal Judges, 28 High Court Judges and intends to hire more 150 Judges and 160 magistrates<sup>225</sup>. The above employment would reduce the backlog of cases that have hindered the efficacy of land securitization.

The study further recommends strict adherence of the Civil Procedure Rules by the courts which now give a defined time limit to determine injunctions which as noted has been a challenge to lenders. All injunction applications under the new rules must be heard expeditiously and in any event within 60 days from the date of filing unless the court, for good reasons extends the

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<sup>225</sup> Standard News paper dated 23 October 2011, editorial/justice pg 12.

time<sup>226</sup>. The ruling must be delivered either at once or within 30 days from the date of inter party hearing<sup>227</sup>. Where an interlocutory injunction is granted and the suit is not determined within a period of 12 months from the date of grant the injunction shall lapse unless the court, for sufficient reason extends the time<sup>228</sup>. Needless to say, the new rules will now make it easier for injunctions to be determined thereby solving the challenge posed by the same.

In the interest of justice, the study recommends the courts to require debtors to deposit the undisputed amount of the loan as a condition to granting of the injunction over and above the sequential steps and/or conditions in granting of the same. Currently the applicant must first show a prima facie case with probability of success. Secondly, that irreparable injury will be suffered if the injunction is not granted and finally, if in doubt, on a balance of convenience.

Finally the study recommends the immediate establishment of the Environment and Land Court. The Environment and Land Court Act, 2011, is an Act of Parliament to establish a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land pursuant to Article 162(2) (b) of the Constitution and to provide for its jurisdiction and functions and for connected purposes. The above Court shall facilitate the faster determination of disputes arising out of land securitization transaction thereby reducing the backlog of cases. Currently the Judiciary has advertised for the vacant positions of 15 Judges who will preside over the above Court. The number is small considering the numerous cases arising out of dealings in land. The study recommends the hiring of additional 50 Judges to the above positions.

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<sup>226</sup> Order 40 rule 4 of the Civil Procedure Rules

<sup>227</sup> Order 40 rule 5 of the Civil Procedure Rules

<sup>228</sup> Order 40 rule 6 of the Civil Procedure Rules

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## APPENDIX I

### QUESTIONNAIRES TO BE ADMINISTERED TO THE BANK MANAGERS

#### Introduction Letter

The purpose of this questionnaire is to collect data for research project leading to the degree of Master in Law (LLM) Public Finance and Financial Services Law option of Nairobi University.

Your honest responses will be held in strict confidence and will be used for academic purposes only.

#### 1.0. General Information

1.1 Gender                      Male                          Female   

1.2 Name of institution

Specify the bank or the institution \_\_\_\_\_

1.3 In which of the following categories do you belong?

Senior level management staff   

Middle level management staff   

Specify the position \_\_\_\_\_

1.4 For how long have you held the position \_\_\_\_\_

1.5 What is your level of education?

Primary                          Secondary   

University/College   

Others (specify) \_\_\_\_\_

1.6 Have you undergone any specialized training on lending? Yes  No

1.7 If yes can you describe the nature and the length of training undertaken?

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1.8 Are you deployed according to your training? Yes  No

**2.0. Land Securitization**

2.1 Do you have knowledge about charges and mortgages? Yes  No

*2.2 Role of the department in land securitization.*

Have you received any training on land securitization?

Yes

No

Briefly explain your role in land securitization:

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2.3 Do you perform the above function to the satisfaction of all the concerned stakeholders or there aspects which can be improved?

Yes

NO

Briefly explain your answer:

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#### 2.4 *Challenges*

Has your department faced the following challenges in the performance of its role in land securitization?

2.4.1) Corruption      Yes       No

If yes briefly explain the nature of corruption experienced.

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2.4.2) Liquidity Problem      Yes       No

If yes briefly explain the nature of liquidity problem experienced

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2.4.3) Cancellation of illegally acquired title

Yes  No

If yes briefly explain nature and the reason for the cancellation

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**3.0 Legislative issues**

Has the existence of numerous laws dealing with charges and mortgages ensured efficacy of the said

transactions? Yes  No

Briefly explain your answer:

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3.1 Would you advocate for one law on property rights which has uniform provisions on securitization?

Yes  No

If so state the reasons

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**4.0 Institutional Issues**

4.1 To your knowledge is there corruption at the lands registry?

Yes  No

If so what form does it take?

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4.2 Does corruption affect the efficacy of land securitization?

Yes  No

Briefly explain your answer:

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4.4 Kindly specify any other challenges faced by your institution in the performance of its function in land securitization

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4.5 How would you rate the understanding of issues that influence the performance your department in land securitization? (10 if excellent 5 if average 1 if poor)

1 2 3 4 5 6 7 8 9 10

4.6 Has your department established long term objectives to handle issues on land securitization?

Yes

NO

4.7 How important is it to establish long-term objectives for your department in land securitization?

Very important

Important

Rather important

Not important at all

### 5.0 Policy Issues

Does your department have any policy on land securitization?

Yes

No

5.1 What is the policy of your department on land securitization? Briefly state the policy:

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5.2 Would you recommend one policy to govern all the institutions involved in land securitization?

Yes

No

6.0 In your own opinion, what are the other factors that have hindered use of land as security for lending?

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7.0 What reforms would you suggest to ensure efficacy of land securitization in Kenya?

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***Thank you for your cooperation***

## APPENDIX 2

### QUESTIONNAIRES TO BE ADMINISTERED TO THE LAND OFFICERS

#### Introduction Letter

The purpose of this questionnaire is to collect data for research project leading to the degree of Master in Law (LLM) Public Finance and Financial Services Law option of Nairobi University.

Your honest responses will be held in strict confidence and will be used for academic purposes only.

#### 1.0. General Information

1.7 Gender                      Male                          Female   

1.8 In which department of the ministry of lands do you work?

Administration                                            Physical planning

Land adjudication and settlement                       Surveys

1.9 In which of the following categories do you belong?

Senior management Staff                     

Technical/professional                     

Specify the position \_\_\_\_\_

1.10 For how long have you held the position \_\_\_\_\_

1.11 What is your level of education?

Primary                          Secondary   

University/College



Others (specify) \_\_\_\_\_

1.12 Have you undergone any specialized training on lending? Yes  No

1.13 If yes can you describe the nature and the length of training undertaken?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

1.8 Are you deployed according to your training? Yes  No

**2.0. Land Securitization**

2.1.1 Do you have knowledge about charges and mortgages? Yes  No

2.1.2 *Role of the department in land securitization.*

Have you received any specialized training on land securitization?

Yes

No

Briefly explain your role in land securitization:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2.3 Do you perform the above function to the satisfaction of all the concerned stakeholders or there aspects which you think need improvement?

Yes  NO

Briefly explain your answer:

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#### 2.4 Challenges

Has your department faced the following challenges in the performance of its role in land securitization?

2.4.1) Corruption Yes  No

If yes briefly explain the nature of corruption experienced.

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#### 2.4.3) Cancellation of illegally acquired title

Yes  No

If yes briefly explain nature and the reason for the cancellation

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**3.0 Legislative issues**

Has the existence of numerous laws dealing with charges and mortgages ensured efficacy of the said transactions?    Yes     No

Briefly explain your answer:

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3.1 Would you advocate for one law on property rights which has uniform provisions on securitization?

Yes                       No

If so state the reasons

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**4.0 Institutional Issues**

4.1 Has your department experienced the problem of missing files?

Yes                       No

4.2 If yes, do you think the above vice is perpetrated with the knowledge and connivance of staff of the ministry?

Yes

No

4.3 Does corruption affect the efficacy of land securitization?

Yes

No

Briefly explain your answer:

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4.4 Kindly specify any other challenges faced by your department in the performance of its function in land securitization

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4.6 Has your department established long term objectives to handle issues on land securitization?

Yes

NO

4.7 How important is it to establish long-term objectives for your department in land securitization?

Very important  Important

Rather important  Not important at all

**5.0 Policy Issues**

Does your department have any policy on land securitization?

Yes  No

5.1 What is the policy of your department on land securitization? Briefly state the policy

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5.2 Would you recommend one national policy to govern all the institutions involved in land securitization?

Yes  No

6.0 In your own opinion, what are the other factors that have hindered use of land as security for lending?

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7.0 What reforms would you suggest to ensure efficacy of land securitization in Kenya?

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**2.0. Land Securitization**

2.1 Do you have knowledge about charges and mortgages? YES  NO

**3.0 Legislative issues**

3.1 Has the existence of numerous laws dealing with charges and mortgages ensured efficacy of the said transactions?

YES  NO

Briefly explain your answer:

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3.2 Has the existence of numerous laws impacted in anyway the adjudication of disputes in land securitization?

YES  NO

3.1 Would you advocate for one law on property rights which has uniform provisions on securitization?

Yes  NO

4.4 Kindly specify any challenges faced by your institution in the performance of its function in land securitization

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5.2 Would you recommend one national policy to govern all the institutions involved in land securitization?

Yes  No

6.0 In your own opinion, what are the other factors that have hindered use of land as security for lending?

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7.0 What reforms would you suggest to ensure efficacy of land securitization in Kenya?

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***Thank you for your cooperation***