

MORTGAGE FINANCING (SPECIAL PROVISIONS) ACT, 2008

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THE UNITED REPUBLIC OF TANZANIA



No. 17 OF 2008

I ASSENT,

Jassapom Kikwete

President

06 December, 2008

An Act to amend certain written laws with a view to providing further provisions for mortgage financing.

ENACTED by Parliament of the United Republic of Tanzania.

PART I
PRELIMINARY PROVISIONS

1. This Act may be cited as the Mortgage Financing (Special Provisions) Act, 2008 and shall come into operation on the date which the Minister may, by notice in the *Gazette*, appoint.

Short title and commencement

2. The laws specified in this Act are each amended in the manner specified in their relevant Parts.

Amendment of certain laws

PART II
AMENDMENT OF THE LAND ACT, CAP. 113

3. This Part shall be read as one with the Land Act, hereinafter referred to as the "principal Act".

Construction Cap. 113

4. Section 26 of the principal Act is amended by deleting in subsection (1) the phrase "sections 27, 28 and 29 of this Part" and substituting for it the phrase "section 29".

Repeal of Section 26

5. Sections 27 and 28 of the principal Act are hereby repealed.

Repeal of
sections
27 and 28

6. Section 29 of the principal Act is amended in subsection(1) by deleting paragraph (a) and substituting for it the following paragraph:
“(a)” has applied for grant of right of occupancy;”

Amendment
of section 29

7. Section 30 of the principal Act is repealed.

Repeal of
section 30

8. Section 114 of the principal Act is amended by repealing subsection (2) and substituting for it the following new provisions:

Amendment
of Section 114

“(2) For the purposes of subsection (1), it shall be the responsibility of the mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.

(3) A mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant and any spouse identified by the applicant if, by an affidavit or written and witnessed document, the applicant declares that there were spouse or any other third party holding interest in the mortgaged land.

(4) An applicant commits an offence who, by an affidavit or a written and witnessed document, knowingly gives false information to the mortgagee in relation to existence of a spouse or any other third party and, upon conviction shall be liable to a fine of not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.”

9. Section 118 is amended by-

Amendment
of Section 118

(a) repealing subsection (1) and substituting for it the following new provision:

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

(2) A mortgage instrument intended to permit further advances shall include a maximum aggregate amount which may be advanced and outstanding at any point in time.”

(b) remaining subsections (2), (3) and (4) as subsections (3), (4) and (5) respectively;

(c) repealing the current subsection (5) and substituting for it the following new provision:

“(6) Where a mortgage provides for the disbursement of a specified principal sum by the mortgagee by way of installments, whether such disbursements are conditional or unconditional obligations of the mortgagee, the payment of those installments shall not be taken to be a further advance and such disbursements shall rank in priority to all subsequent mortgages up to the amount stated in the mortgage.”

10. Section 120 of the principal Act is amended by adding after subsection (4) the following provision;

Amendment of section 120

“(5) Notwithstanding the preceding provisions of this section, an interest rate which by the terms of the mortgage agreement may be varied periodically in accordance with a formula set out therein, may be changed by a written notice from the lender to the borrower setting forth clearly and in a manner likely to be understood by the mortgagor-

- (a) the new interest rate;
- (b) the date on;
- (c) any change to the amount of the payment due under the secured debt, and the first date on which the new payment is due; and
- (d) the alternative, if provided in the mortgage agreement, to paying an increased interest rate, if that is the case.”

11. The principal Act is amended by adding the following new provision immediately after section 120.

Addition of section 120A

“Contents of notice

120A.-(1) At least five days prior to making a mortgage loan to a borrower for purposes of acquiring, improving or constructing a residential property, a creditor shall provide the consumer in writing and in plain language the following information-

- (a) identification and address of the creditor and any intermediary action for the creditor;
- (b) the purposes for which the loan may be used;

- (c) a description of the payment terms of the loan, including the amount and frequency of payments, the allocation of payments to principal and interest of the loan, respectively, the place and method of payment;
- (d) with respect to loans on which the interest rate may be changed from time to time in accordance with the terms of the mortgage, variable interest rate loans, a description of the formula by which the interest rate shall be varied and the frequency of variation;
- (e) a calculation of the entire cost of the loan to the consumer over the stated duration of the loan, assuming no prepayment, distinguishing between principal and interest and in the case of variable interest rate loans statements of the assumptions underlying the interest calculation and that actual interest paid could be more or less than disclosed;
- (f) a good faith estimate of other costs related to the loan to be paid by the consumer, including costs, insurance premiums, legal, notary and registration fees, as well as appraisal fees;
- (g) whether there is a possibility of early repayment (prepayment) of all or any portion of the loan, and if so, its conditions;
- (h) whether an appraisal of the property is necessary and, if so, by whom it will be carried out;
- (i) a summary of the main terms of the mortgage securing the loan, including any restrictions on use or disposition of the property and the obligations of the consumer for maintenance and insurance of the property; and
- (j) an unambiguous statement that failure to repay the loan may result in loss of the mortgage property and a description of the steps that may be taken by the creditor to enforce the mortgage in the event of the consumer's failure to meet his obligation.

(2) The Minister may, by regulations prescribed the form and content of the written notice to be provided to borrowers and, where so prescribed a notice made under this section shall be in that form and shall be considered void if not in that form, provided that no such notice shall be considered void on the grounds of technical defects alone in the absence of material harm to the recipient.

(3) A notice given under this section shall not be considered defective because of discrepancies between costs estimated diligently and in good faith in accordance with paragraph (f) of subsection (1) and costs actually incurred.”

12. The principal Act is amended by repealing Section 123 and substituting for it the following new provision:

Repeal and
replacement
of section 123

“Mortgage’s
consents
of
transfer

123. Where a mortgage contains a condition, express or implied, by the mortgagor that the mortgagor will not without the consent of the mortgagee transfer or assign or lease the right of occupancy or in the case of a lease or sublease, then no transfer, assignment, lease or sublease shall be registered until the written consent for the mortgagee has been produced to the Registrar and any such transfer shall be null and void as a matter of law with respect to the interests of the mortgagee.”

13. Section 124 of the principal Act is amended by adding the following provisions immediately after subsection (4):

Amendment
of section 124

“(5) Consent given pursuant to paragraph (f) of subsection (1) shall not be construed as subordination of the mortgage to any such lease or sublease in the absence of specific agreement of the mortgagee to such subordination, which agreement may be granted or withheld by the mortgagee in its sole discretion.

(6) It shall not be deemed unreasonable for a mortgagee to require, as a condition of granting consent pursuant to paragraph (g) of subsection (1) that the entire debt secured by the mortgage be repaid in full.”

14. Section 127 of the principal Act is amended in subsection (2) by deleting paragraph 1 and substituting for it the following paragraphs:

Amendment
of section 127

“(c) actions that must be taken by the debtor to cure the default; and

(d) that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land.”

15. Section 132 of the principal Act is amended by-

Amendment
of section 132

(a) repealing subsection (2) and substituting for it the following new provision:

“(2) A mortgagee may exercise the power of sale in relation to any such land as referred to in paragraph (a) or (b) of subsection (5) of section 130.”

- (b) adding the following provision immediately after subsection (3):

“(4) Where a sale of mortgaged property shall be made by means other than public auction, a mortgagee shall be required to give notice of sale of not less than ten days to the mortgagor and to any third party holding a registered interest in the property.”

16. Section 135 of the principal Act is amended by adding the following new provision immediately after subsection (4):

Amendment
of section 135

“(5) A person referred to under subsection (1), whether acting for himself or by or through the mortgagee from whom that person obtained the mortgaged property, shall be entitled to possession of the mortgaged property immediately upon acceptance of a bid at a public auction or contract of sale of that mortgaged property.”

17. Section 139 of the principal Act is amended by-
(a) repealing subsection (1) and substituting for it the following new provision:

Amendment
of section 139

“(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling house to which subsection (5) of section 130 applies brings an action in which he claims possession of the mortgaged land, or a mortgagor brings an action to suspend or stop a sale pursuant to section 132, the court may exercise any of the powers conferred on it by section 140 if it appears to the courts, with a high degree of certainty, that in the event of its exercising that power-

- (a) the mortgagor is likely to be able, within a reasonable period, to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage; and
- (b) there is sufficient value in mortgaged property that despite the delay, in the event that the mortgagor fails to cure his default and pay the sums due, the mortgagee will be likely to recapture the amount of its entire claim from sale of the property.”

- (b) adding the following provision immediately after subsection (3):

“(4) The court’s discretion under this section may be exercised on behalf of the same mortgagor with respect to the same debt for not more than once.”

18. Section 140 of the principal Act is amended by-

Amendment
of section 140

- (a) inserting immediately after subsection (1) the following provisions:

“(2) Notwithstanding any other provision of this Act an action for exercise of a power of sale or for possession of a mortgaged property may be brought in the Land Division of the High Court.

(3) Notwithstanding any other provision of law, and excepting any action on a customary mortgage under section 115, any action brought in a forum other than the High Court to contest, stay, suspend, terminate or seek relief from demand for payment of a debt secured by a mortgage of real property, or an action for possession of mortgaged property, or exercise of a power of sale under this Act shall be transferred to the Land Division of the High Court immediately upon commencement of an action in that forum on the same subject matter and consolidated with such action.

(4) Upon commencement in the Land Division of the High Court of an action for collection of a debt secured by a mortgage of real property, or for possession of mortgaged property or exercise of a power of sale under this Act, no action on the same subject matter shall be entertained in any other forum, but shall be referred to the land Division of the High Court and consolidated with the action commenced therein.”

- (b) renumbering subsections (2) up to (7) as subsections (5) to (10) respectively.

- (c) deleting a full-stop at the end of subsection (5) as renamed and inserting the phrase:

“provided that the period of suspension or postponement shall not exceed a period of six months from the date on which an order of the courts is given.”

- (d) by deleting a full-stop at the end of subsection (6) as renamed and inserting the phrase:
“provided that modifications to the interest rate or the maturity of the secured debts shall not be permitted without the consent of the mortgagee.”
- (e) repealing subsection (7) as renamed and substituting for it the following provision:

“(7) The court may-

- (a) at any time, upon motion of the mortgage, terminate any period of suspension or postponement under subsection (5) upon a showing of change of circumstances posing increased risk that the mortgage will not be repaid, including and without limitation to any failure by the mortgagor to meet the terms of the suspension or any waste or other deterioration to the value of the mortgaged property; and
- (b) from time to time vary or revoke any condition imposed by virtue of subsection (6).”

- (f) repealing subsection (8) as renamed and substituting for it the following new provision:

“(8) A court shall not exercise by virtue of subsection(3) of section 139 the powers conferred by this section unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amount regarded, in accordance with subsection (3) of section 139 as being due on account of the principal sum secured, together with the interest on those amounts, but also that the mortgage is likely to pay-

- (a) any further amounts that he would have expected to be required to pay on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (3) of section 139 for earlier payment;
- (b) any penalties and charges due under the mortgage agreement; and

- (c) and costs incurred by the mortgage on account of the default, including court costs and attorney's fees.”
- (g) adding the following new provision immediately after subsection (10) as renamed:

“(11) The provisions of this section shall apply to any action brought to suspend or stop sale of a mortgaged property by power of sale conferred under this Act.”

19. Section 141 of the principal Act is amended by-

Amendment
of section 141

- (a) inserting the following new provisions immediately after subsection (1):

“(2) Notwithstanding subsection (1), upon receipt from the mortgage applicant and any other third party having interest to the mortgage including any spouse identified by the mortgage applicant, of a signed and witnessed statement that they have understood and consented to the terms and conditions of the mortgage as their own free act and deed, a mortgagee shall have satisfied obligations under subsection (1) and no mortgagee shall be required to make further inquiry regarding such matters and no claim of undue influence shall be permitted as a defence against enforcement of a mortgage or exercise of a power of sale by or on behalf of any person signing the document.

(3) Notwithstanding subsection (1) of this section, upon compliance by the mortgagee with the requirements of subsection (1) of section 120 of this Act there shall arise a rebuttable legal presumption that the mortgagee has not engaged in fraud, deceit or misrepresentation with respect to the terms or conditions of the mortgage.”

- (b) renumbering subsections (2) and (3) as subsections (4) and (5) respectively.

PART III

AMENDMENT OF THE LAND REGISTRATION ACT, CAP. 334

20. This Part shall be read as one with the Land Registration Act, hereinafter referred to as the “principal Act.”

Construction
Cap. 334

21. Section 41 of the principal Act is repealed and substituted as follows:-

Repeal and substitution of section 41

"Disposition of land

41.-(1) The disposition of land shall be registered by the Registrar.

(2) an applicant for disposition of land shall submit to the Registrar all relevant documents accompanied by a prescribed fee.

(3) When so registered, a disposition shall be effectual to create, transfer, vary or extinguish any estate or interest in any registered.

(4) Upon registration, the registrar shall submit notice accompanied by the relevant documents to the Commissioner for Lands who shall enter in the register particulars relating to such change of ownership."

PART IV

AMENDMENT OF THE CIVIL PROCEDURE ACT, CAP. 33

22. This Part shall be read as one with the Civil Procedure Act hereinafter referred to as the "principal Act."

Construction Cap. 33

23. Section 74 of the principal Act is amended -

(a) in subsection (2) by inserting after the phrase "Notwithstanding subsection (1). "the words "and subject to subsection (3)".

Amendment of Section 74

(b) Adding the following provision immediately after subsection (2):

"(3) Subsection (2) shall not apply in relation to a decision or order given in relation to the exercise by the mortgagee of the powers to see or enter in possession of the mortgaged land or in an action brought by a mortgagor to suspend or to stop sale of a mortgaged property."

24. Section 78 of the principal Act is amended -

Amendment of section 78

- (a) in subsection (2) by inserting after the phrase “Notwithstanding subsection (1) “the words “and subject to subsection (3)”
- (b) adding the following provision immediately after subsection (2):
 - “(3) Subsection (2) shall not apply in relation to an application to review a decision or order given in relation to the exercise by the mortgagee of the powers to sell or enter in possession of the mortgaged land or in an action brought by a mortgagor to suspend or to stop sale of a mortgaged property.”

25. The first Schedule to the principal Act is amended in rule 3 of Order XXXV by-

Amendment
of First
Schedule

- (a) deleting a full-stop which appears at the end paragraph (b) of sub-rule (1) and substituting for it a semi-colon;
- (b) adding after paragraph (b) of sub-rule (1) the following paragraph:
 - “(c) in suits arising out of mortgages, where the mortgagor demonstrate that-
 - (i) loan or the portion of the loan claimed is indeed discharged; or
 - (ii) loan was actually not taken”; and
- (c) adding after sub-rule (2) the following provision:
 - “(3) For the purpose of paragraph (c) of sub-rule (1), a mortgagor or an applicant acting on that behalf shall be deemed to have complied with or discharged his responsibility if upon a bank account through which loan was given it is shown that loan is full paid.”

Passed in the National Assembly on 30th October, 2008.



Acting Clerk of the National Assembly