



MAKERERE UNIVERSITY

EFFECTS OF ILLEGALITY ON LOAN RECOVERY IN MORTGAGE TRANSACTIONS
BY COMMERCIAL BANKS

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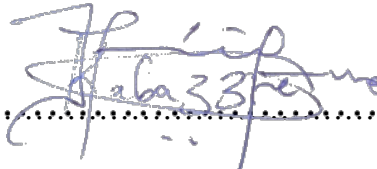
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DECLARATION

I, Kabazzi Maurice Lwanga, do hereby declare that this dissertation is my original work and has never been submitted to any University or Academic institution for any award or examination.

Signature and date:


Kabazzi Maurice Lwanga.

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APPROVAL

This is to certify that this LLM dissertation has been written with my supervision and is submitted with my approval



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DEDICATION

I dedicate this dissertation to the dedicated staff of banking institutions in Uganda and across Africa. Their tireless efforts to uphold the law and comply with regulations are vital in protecting consumers, especially borrowers, in the financial services sector.

ACKNOWLEDGMENT

I thank the Almighty God, the guardian and protector of my mind, soul and body, for the everlasting favour-grace-and-opportunity to excel in my work. I aim to do well my job as a student and lawyer because of God's grace.

I am deeply grateful to Associate Professor Winifred Tarinyeba Kiryabwire for her guidance on this LLM dissertation and for encouraging me to produce my best work. I am proud to have the top expert in corporate governance and banking law guiding the intellectual development of this research. Even with my limited contribution to the topic of loan recovery in the banking sector, I am honored to have learned under Prof. Tarinyeba's mentorship.

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I have gained practical exposure in various legal environments that influenced my contributions to this research study. These include the Local Government Finance Commission (LGFC), Public Interest Law Clinic (PILAC), the Commercial Court under

Justice Alividza, the Uganda Law Reform Commission (ULRC) and law firms. I also had the privilege to work with a leading commercial lawyer Mubiru Steven Kalenge from Kalenge, Bwanika, Kisubi & Co. Advocates, also at AF Mpanga Advocates (formerly Bowmans) as well as NGOs like Human Rights Awareness and Promotion Forum (HRAPF), Teens for Change (T4C) Foundation and Afya na Haki.

During this stage of writing my LLM dissertation, I aim to contribute to field of regulation and compliance to ensure social justice for borrowers and protection for commercial banks.

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commercial setting. The banks must abide by the rule of law as well as ensure the legality, lawfulness and legitimacy of their dealings with the public.

The experiences of my family starting with Ms. Ritah Nakimbugwe, an ambitious mother who afforded me access to the best schools and whose reminder that I am a 'Professor' always fuels my passion to quest for knowledge in the mundane subjects of academic interest. To my Dad, Jeero Charles Lwanga. To my brothers Marvin Ddamulira, Arthur Kabuubi, Vincent, Gerald Walukagga and Pius Ssekabira.

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ABSTRACT

This study aimed to investigate the effects of illegality on loan recovery in mortgage enforcement by commercial banks in Uganda. The study examined the loan recovery options available to banks and the aspects of illegality that affect these alternative recovery options.

Uganda's legal frameworks governing loan transactions is split and different for every loan transaction. There is a high cost of noncompliance and illegality on financial institutions which encounter significant challenges in enforcing recovery due to procedural and substantive illegalities. These issues frequently result in unenforceable contracts, prolonged mortgagor litigation, and substantial financial losses.

The study is grounded in legal doctrinal method and qualitative approaches, examining the effects of illegality on loan recovery and exploring available options for mortgage enforcement. The study analyzes 27 Ugandan court case decisions from Uganda Legal information institute exposing mortgage disputes involving commercial banks, supplemented by key informant interviews with banking and legal experts. Key findings illustrate those procedural illegalities, such as improper notice of default and invalid collateral registration, often render mortgage agreements unenforceable, with courts nullifying recovery actions in a notable percentage of cases. Additionally, substantive

illegalities, including fraudulent loan documentation and unlawful sales, can lead to civil forfeiture, loss of the right to realize the security and significantly increase recovery costs. The study found that there is a strict interpretation and application of compliance requirements, particularly under Sections 19 and 22 of the Mortgages Act cap 239, where even minor procedural breaches can invalidate entire loan recovery processes. The study also finds that there are alternative loan recovery mechanisms, such as receivership and out-of-court settlements.

The study concludes with recommendations for consolidation of loan recovery laws in Uganda by way of passing a Loan Recovery Bill to enhance regulatory reforms, enhanced legal risk mitigation strategies, and capacity building within the judicial and banking sectors to improve compliance and efficiency in loan recovery outcomes. Strengthening regulatory oversight and dissemination of loan recovery information to borrowers is crucial to addressing the systemic illegalities that undermine the effectiveness of mortgage enforcement in Uganda.

LIST OF STATUTES

Anti-Terrorism Act cap 120

Anti-Money Laundering Act cap 118

Anti-Corruption Act cap 116

Companies Act cap 106

Contracts Act cap 284

Financial Institutions Act cap 57

Insolvency Act cap 108

Mortgages Act cap 239

Data Protection and Privacy Act cap 97

Debts (Summary Recovery) Act cap 285

Penal Code Act cap 128

Security in Moveable Property Act cap 293

Land Act cap 236

Limitation Act cap 290

Registration of Titles Act cap 240

Civil Procedure Act cap 282

Mortgage Regulations 2012

Security Interest in Movable Property Regulations, 2019 (SIMPA Regulations)

Land Regulations 2004

Insolvency Regulations 2013

Financial Institutions (Credit Reference Bureau) Regulations, 2022

LIST OF CASES

1. Kanyima v Mercantile Credit Bank Limited and Another (Miscellaneous Application 85 of 2021) [2023] UGCommC 42 (30 January 2023)
2. Macdowell Food & Beverages Limited v. Stanbic Bank Uganda Limited & Myriad Investment Club Limited, Miscellaneous Application No. 568 of 2020 (arising from HCCS No. 222 of 2019)
3. Sendagire Stephen and Nanyombi Gladys v DFCU Limited, Kabiito Karamagi and Kirumira Godfrey Kalule HCCS No. 26 of 2008
4. Alice Okiror & Michael Okiror v Global Capital Save 2004 Limited & Ben Kavuya H.C.C.S No. 149 of 2010
5. Ham Enterprises Ltd, Kiggs International (U) Ltd, Hamis Kiggundu v. Diamond Trust Bank (U) Ltd & Diamond Trust Bank (K) Ltd (Civil Appeal 13 of 2021) [2023] UGSC 15 (6 June 2023)
6. Formula Feeds & 3 Others vs KCB, SCCA 13 of 2020
7. Belex Tours & Travel Ltd v. Crane Bank Ltd & Anor (Civil Appeal No. 071 OF 2009)
8. Baitwa & 2 Others v. Standard Chartered Bank (U) Limited (Miscellaneous Cause 70 of 2024) [2024] UGCommC 210 (23 July 2024)
9. Otaok v. Equity Bank (U) Ltd (Civil Suit No. 335 of 2010)

10. Ochama v. Post Bank Uganda Ltd (Civil Suit No. 418 of 2016) [2016] UGCommC 98 (17 October 2016)
11. Crane Bank (in receivership) v. Meera Investments & Anor (Civil Appeal-2019/252) [2020] UGCA
12. Cwezi Properties Limited v. Uganda Development Bank (Miscellaneous Application No. 1315 of 2022)
13. Letshego (U) Ltd vs Col. Felix Kulayigye ORIGINATING SUMMONS NO. 5 OF 2020
14. Meera Investments Ltd v. DFCU Bank HIGH COURT CIVIL SUIT NO. 94 OF 2017
15. Jeane Frances Nakamya v DFcu Bank Ltd & Anor, CACA No. 105 of 2013
16. Kyobutungi v Guma & Another (Civil Suit 846 of 2020) [2024] UGCommC 122
17. Bank of Africa Uganda v Ganyana & Anor (Civil Suit No. 477 of 2011) [2017] UGCommC 3 (24 February 2017)
18. Excellent Assorted Manufacturers Ltd & Ephraim Ntaganda v. DFCU Bank Ltd & The Commissioner Land Registration, Civil Suit No. 338 of 2017 (Uganda)
19. Progressive Group of Schools Ltd & Ab'Mooti Investments Ltd & Kahiwa Erisa Amooti v. Barclays Bank of Uganda Ltd t/a ABSA Bank (U) Ltd & Luwi Anzi Academic Foundation, Civil Appeal No. 349 of 2020 (Uganda)
20. Victoria Candles Limited v. Bank of Africa Uganda Limited, Misc. Cause No. 0284 of 2023 (Uganda)

21. Kabiito Karamagi (Receiver/Manager of Spencon Services Limited in Receivership) & DFCU Bank Limited v. Yanjian Uganda Company Limited & Native Power Company Limited
22. Tropical Bank v. Were Muhwana (S.C.C.A No. 4 Of 2011)
23. Zaabwe v Orient Bank Ltd and 5 Others (Civil Appeal 4 of 2006) [2007] UGSC 21 (10 July 2007)
24. KCB Bank Uganda Ltd vs Eddie Nsamba & Others, Civil Suit No. 640 of 2013 decided in 2021
25. Meera Investment Limited vs DFCU Bank Ltd & Anor, CS 948 of 2017
26. Civil Appeal No. 56 of 2015 Barclays Bank of Uganda Ltd vs Golf View Inn (U) Limited decided on the 4th of August 2023
27. Emerald Hotel Limited & 3 Ors v. Barclays Bank Uganda Limited & 4 Ors (High Court Civil Suit No. 0170 of 2008) (Commercial Division)
28. ALP Investments Limited v. Bank of India (U) Limited Originating Summons No. OOO1 of 2024
29. Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor [1982] UGSC 2 (8 April 1982)

LIST OF ACRONYMS

BoU	Bank of Uganda
CERUDEB	Centenary Rural and Development Bank Limited
DFCU Bank	Development Finance Company of Uganda Bank Limited
DPPA	Data Protection and Privacy Act
FI	Financial Institution
KCB (Bank)	Kenya Commercial Bank Group
KYC	Know Your Customer.
LPM	Loan Portfolio Management
NPL	Non-Performing Loans
RCMP	Risk & Compliance Management Process
SI	Statutory Instrument
SIMPA	Security in Moveable Property Act
ULII	Uganda Legal Information Institute

CHAPTER ONE

1.1 Introduction

This chapter provides the background to the research, the methodology of collecting data, the theoretical frameworks that underpin the research study and its attendant objectives and research questions.

1.2 Background

According to Jonathan Eaton¹, if contracts² are costlessly enforceable then insolvency is the only reason for non-repayment of loans. The borrower's incentive to repay, it has typically been assumed that the penalty suffered by a debtor in default is imposed automatically and without cost to the lender.

Reflecting on Jonathan Eaton's statement, illegality is one aspect of law that affects repayment of loans. The Black's Law Dictionary 8th Edition at page 763 defines the term "illegal" to mean forbidden by law; unlawful. Similarly, illegality is defined to mean an act that is not authorised by law. The doctrine of illegality in private law of contracts posits that contracts deemed contrary to law or public policy are inherently void. The rationale for the doctrine of illegality is to deter crime through criminal sanctions. The

¹ Eaton, Jonathan. 1985. "Lending with Costly Enforcement of Repayment and Potential Fraud." NBER Working Paper No. 1697. National Bureau of Economic Research at pg. 3

² Loan recovery is embedded in the private law of contract.

deterrent function of criminal sanctions is only effective where there is empirical evidence that such sanctions work.

Loan recovery is the means in which a creditor such as a bank attempt to collect unpaid debt, usually through a third party³. Loan recovery in the context of mortgages means measures used by lenders to realise the mortgage security to repay the loan/advances from the borrower/mortgagee. A mortgage⁴ is a contract between the proprietor of land known as the mortgagor on the one hand and another person known as the mortgagee to whom the land is conveyed as security on the other hand.⁵ This consideration may be a monetary loan or some other debt, benefit or detriment granted by, or suffered by, the mortgagee. This requirement for consideration is founded on the general law of contract and is also implicit in the statutory law⁶.

A mortgage transaction generally consists of two separate but related legal instruments: (1) a loan agreement that creates the debt obligation, and (2) a mortgage deed that provides security for that debt by charging the borrower's property. In this study, a loan

³ Sharma, A. J. (2016). When debt comes knocking. *Emerald Emerging Markets Case Studies*, 6(4), 76-121.

⁴ "Mortgage" includes any charge or lien over land or any estate or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money or money's worth or the performance of an obligation and includes a second or subsequent mortgage, a third party mortgage and a sub mortgage per the interpretation section of the Mortgage Act

⁵ *Essays in African Banking Law and Practice* 2nd Edition (2009) at page 359, Grace Patrick Tumwine Mukubwa

⁶ Peter Walubiri, 'Securities for Banker's Advances: Mortgages' in *Essays in African Banking Law and Practice* (2nd edn, 2009) 359.

contract⁷ is an agreement whereby the lender agrees to pay money to the borrower or to his designate, on terms that the borrower will repay the money with interest.⁸ Such an agreement is governed by the Contracts Act cap 284. Section 10 (1) of the Contracts Act cap 284 typically defines an agreement as *a mutual understanding between two or more parties about their rights and obligations. Specifically, it outlines that an agreement consists of a proposal by one party and an acceptance of that proposal by another.*

Legally, a loan agreement must meet certain criteria to be enforceable. First, there must be offer and acceptance. This means that one party, the lender, must make a clear offer, and the other party, the borrower, must accept it. This mutual agreement forms the basis of the contract and is essential for its validity.

Second, there must be an intention to create legal relations. The parties involved must intend for their agreement to have legal consequences. This intention distinguishes casual agreements from those that are legally binding. Third, the consideration is a necessary element. This refers to the requirement that there must be something of value exchanged between the parties. Consideration can take many forms, such as money, services, or goods, and is crucial for the agreement's enforceability. Fourth, the parties must have capacity. This means that they must possess the legal ability to enter into the agreement. This includes being of legal age and having sound mental capacity.

⁷ The terms "loan contract" and "lending contract" are often used interchangeably, but they can have slightly different connotations depending on context.

⁸ LexisNexis. (2024). Loan contract definition. Legal Glossary. Retrieved September 8, 2024, from <https://www.lexisnexis.co.uk/legal/glossary/loan-contract> accessed on 8/09/2024

Lastly, the agreement must meet the criterion of Legality. The purpose of the loan agreement must be lawful; agreements that involve illegal activities are not enforceable in court. Together, these elements ensure that a loan agreement is legally binding and enforceable.

A loan is a debt. A “debt” means direct, indirect or contingent obligation incurred by an individual or entity with a third party under the *Financial Institutions (Credit Reference Bureau) Regulations, 2022*. For the agreement to constitute a loan, the payment must be made with a view to giving the borrower financial accommodation, however there is no definition for financial accommodation. Examples of loan contracts are mortgages, overdrafts, credit card arrangements and check trading arrangements.

Loans in general may be secured or unsecured. In secured loans⁹ the borrower pledges to the creditor a collateral in the form of movable or immovable assets (by mortgages, pledges and other comparable contractual or legal devices), in order to secure the credit against the possibility of default. In a loan agreement, the two main parties involved are: the lender and the borrower. A bank which means any company licensed to carry on banking business as its principal business and includes all branches and offices of that company in Uganda¹⁰.

⁹ In a secured loan, the lender has a legal claim against a borrower’s assets. If the borrower defaults, the lender can convert the assets to cash to be repaid.

¹⁰ Financial Institutions Act cap 57

A primary expectation of the lender is the repayment of the principal, meaning that the borrower is required to return the original borrowed amount within the agreed timeframe. In addition to principal repayment, the lender anticipates receiving interest payments on the loan, which serve as compensation for the risk taken in providing the funds. This interest not only compensates the lender for the opportunity cost associated with the loan but also reflects the perceived risk of lending to the borrower. Failure to meet these expectations can lead to various recovery actions, highlighting the importance of maintaining the terms of the lending agreement.

The borrower is an individual, a business, or another entity that receives the loan, and they have several key obligations outlined in the loan agreement. First and foremost, the borrower must repay the principal amount borrowed according to the terms of the agreement. Additionally, the borrower is required to pay interest as specified in the lending contract, which compensates the lender for the risk involved in providing the funds. Compliance with all terms and conditions of the agreement is also essential; this includes maintaining any collateral and providing necessary financial updates to the lender. Furthermore, the borrower should notify the lender of any significant financial changes that could impact their ability to repay the loan, ensuring transparency and fostering a positive lender-borrower relationship.

The borrower's obligations are central to the lending contract and typically encompass several critical responsibilities. First and foremost, the borrower must repay the principal

amount within the agreed timeframe. Failure to do so constitutes default, which can trigger a series of penalties and recovery actions from the lender. Timely repayment is essential to maintain trust and uphold the terms of the agreement.

In addition to repaying the principal, the borrower is also responsible for making interest payments as per the agreed schedule, whether that be monthly, quarterly, or annually. These interest payments serve to compensate the lender for the risk taken and the opportunity cost of providing the loan. Adhering to this schedule is crucial for avoiding additional fees and potential legal repercussions.

Moreover, borrowers must comply with all contractual terms outlined in the lending agreement. This includes maintaining any collateral in good condition, submitting required documentation or financial statements, and ensuring timely communication with the lender. Borrowers are obligated to inform the lender of any significant changes in their financial circumstances that could affect their ability to repay the loan. Such transparency is vital for fostering a cooperative lender-borrower relationship and mitigating risks for both parties.

Arslanov and Khabirov¹¹ challenge the traditional view in civil law doctrine that the loan agreement is a unilateral contract, where the borrower only has a duty to repay the loan and the lender has limited "creditor duties." Instead, they argue that the loan agreement has a bilateral binding character, with the borrower possessing various rights under the

¹¹ Arslanov, K. M., & Khabirov, A. I. (2020). The bilateral binding character of the debt contract. *3C Empresa. Investigación y pensamiento crítico*, 9(3), 125-137. <https://doi.org/10.17993/3cemp.2020.090343.125-137>

contract. The authors identify different categories of borrower rights, including pre-contractual rights (like the right to reliable information) and contractual rights. They also differentiate between monetary loan contracts and commodity/real loan contracts, noting the borrower has additional rights under commodity loan contracts, similar to a buyer under a sales contract. First, both according to the loan agreement, in general, and under the contract of a consumer loan, in particular, the borrower is given certain rights that allows to draw a conclusion on bilaterally binding character of the loan agreement. The rights of the loan agreement parties can be classified on precontractual and contractual; on the rights connected with emergence, execution and termination of the contract of a loan; on the property and non-property rights.

The loan agreement has bilaterally binding character. The rights of the loan agreement parties can be classified on precontractual and contractual; on the rights connected with emergence, execution and termination of the contract of a loan; on the property and non-property rights. Under the contract of a monetary loan the borrower has 1) the right ahead of schedule to return the sum of an interest-free loan, as well as the sum of the loan granted under percent to the borrower citizen for the personal, family, house or other use which is not connected with business activity; 2) the right to challenge the loan agreement on its lack of money; 3) the right to demand acceptance of appropriate execution; 4) the right to demand to issue it the voucher of execution completely or in the corresponding part or to return the debt document, and at impossibility of return to point to it in the receipt issued to them; 5) the right for free execution of the liability under the contract of

a consumer loan; 6) the right to forbid a concession the creditor to the third parties of the rights (requirements) for the contract of a consumer loan; 7) right for refusal of the conclusion of additional contracts; 8) the right for refusal of receiving the additional services connected with the contract of a consumer loan; 9) the right for the free choice of contractors concerning additional services.

When a borrower defaults on their obligations, lenders possess several recovery options to mitigate their losses. First, lenders may impose late fees and penalties as outlined in the lending agreement, which can significantly increase the total amount owed by the borrower. In addition, lenders have the right to demand immediate repayment of the entire outstanding balance, a process commonly referred to as "acceleration" of the loan. If the loan is secured, the lender can legally seize the collateral to recover the owed amount, a process governed by specific laws and the terms stipulated in the contract. Moreover, lenders may initiate legal action to obtain a judgment against the borrower, which could result in wage garnishment or bank account levies to recover the debt. Finally, lenders often engage third-party debt collection agencies to pursue outstanding debts, employing various collection tactics while adhering to applicable regulations. These measures underscore the importance of borrower compliance with the terms of the lending agreement and highlight the potential consequences of default.

While lenders have rights to recover debts, certain actions can violate legal and ethical standards, complicating the recovery process. For instance, engaging in aggressive

collection tactics may inadvertently facilitate money laundering if lenders fail to verify the legitimacy of repayment sources, thereby risking their credibility and legal standing. Moreover, the lack of spousal consent in loan agreements is a significant legal issue that can frustrate loan recovery efforts. If a loan is obtained without the necessary agreement from a spouse, it can render the contract unenforceable, leading to disputes and potential legal liabilities for the lender. This oversight not only complicates the recovery process but also exposes lenders to claims of misrepresentation and violation of borrower rights. Therefore, adherence to regulatory standards and ethical practices is crucial for lenders to ensure effective and lawful debt recovery.

Loan recovery options¹² are those mechanisms that a commercial bank can use to recover a loan. These include debt restructuring, debt refinancing, receivership, mortgagees' power to lease, taking possession, insurance, action against sureties and guarantors, action for money secured by mortgage, foreclosure/sale of the security and liquidation. Several considerations affect commercial banks as creditors in recovery of loans. Illegality affects debt recovery by a bank. The issue of illegality presents several challenges including non-enforcement of contractual obligations between the creditor and the debtor. Illegality as a claim or defence essentially affects the loan recovery by banks and sometimes the lent money is lost even after spending a lot of money on legal fees to recover the loans through court action.

¹² PwC. "Emerging Tax and Legal Trends in Debt Recovery Management." December 7, 2021. Accessed August 28, 2024. <https://www.pwc.com/ug/en/assets/pdf/debt-recovery-webinar-presentation.pdf>.

This research study seeks to understand the effects of illegality on debt recovery options in relation to mortgage debt. In this study, the researcher considers a proactive approach to mitigate illegal conduct rather than a reactionary approach to mitigate the consequences of illegality after the fact or when the offence/breach has taken place.

Illegality renders debt recovery unenforceable, based on policy preferences¹³, such as the idea that the rule of law should not be undermined by enforcing an illegality and that the court should not assist a plaintiff who comes to court without clean hands.

Illegality may be a necessary tool for accountability in debt transactions but it may also run afoul of sound public policy by inadvertently creating incentives to enter into additional illegal agreements and engage in more illegal activities when non-enforcement allows a party to retain a windfall, undermining the very purpose for the non-enforcement rule¹⁴. This study is unique in that it sought to document some best practices and strategies by commercial banks to counter illegality in loan recovery. Understanding the legality of lending contracts, including the obligations of borrowers and the recovery options available to lenders, is crucial for both parties.

¹³ The first is *ex turpi causa non oritur actio* which roughly means that no action arises from a cause tainted by turpitude. The second maxim is in *pari delicto potior est conditio defendentis*, which provides that where both parties are tainted by wrongdoing, the position of the defendant is stronger

¹⁴ M.P. Furmston, *The Analysis of Illegal Contracts*, 16 *U. TORONTO L.J.* 267, 284 (1966) (noting that “[i]t is notorious that the effect of declaring a contract illegal is often to confer an undeserved reward on one party”); John W. Wade, *Benefits Obtained Under Illegal Transactions*, 25 *TEX. L. REV.* 31, 55 (1946) (pointing out that “[t]o a defrauder, the knowledge that the law will permit him to keep illgotten gains will be an incentive to induce another to participate in an illegal contract”).

For purposes of this study, these are the working definitions for the key concepts.

According to the Black Law Dictionary, debt recovery represents the lawful process or the ways to get the amount you have given to someone. Loan recovery is significant since it is directly related to an individual's credit score. Once a person is summoned by debt recovery service, it implies that there is a record that one has defaulted on a loan and currently have delinquencies¹⁵.

Loan recovery is a process involving the procedures a commercial bank uses to collect its money from debtors and this may take the form of calling clients by telephone, sending reminders letters, contracting collection agencies, and legal actions. In this study, loan recovery is used to denote legal enforcement actions which are stipulated under the default laws particularly foreclosure, receivership under the Mortgages Act cap 239, the Companies Act cap 106 and the Insolvency Act cap 108.

A mortgage is a transaction whereby an interest in land is given as security for the repayment of a loan¹⁶. The debtor¹⁷/proprietor of the mortgaged land is called the 'mortgagor' and the creditor is the 'mortgagee'. The secured sum with interest is the mortgage debt.¹⁸

¹⁵ Kipsang, B. (2020) Effect of debt recovery strategies on loan performance of fintech companies in Kenya. United States International University Africa. <https://erepo.usiu.ac.ke/handle/11732/6056>

¹⁶ Matambulira v Kimera CA No. 37 of 1972 (unreported)

¹⁷ A debtor as defined in Black's law dictionary is any person who owes another, the creditor a certain sum of money or owes performance or service arising from some legal basis. When a debtor fails or neglects to pay their debt on due date, a creditor will institute a debt collection process for the recovery of the debt. Debt collection is the process of pursuing a debtor to pay debts owed.

¹⁸ Other securities include pledge, debenture, and floating charge. In Uganda a mortgage of land is the most common form of security. From John T. Mugambwa, Principles of Land law in Uganda. Foutnain series in law and business studies.

The concept of illegality is used in this study to connote conduct that is prohibited by the law¹⁹. A transaction is illegal or at least affected by illegality if the transaction or some aspect of it is prohibited by the law²⁰. Although illegality is a concept of varying and diverse applications, in each case the difficulty will turn on two main issues; whether there is illegality and, if there is, what is its effect²¹. The study deals with the effects of illegality on civil law dealing with claims such as those arising in contract, restitution and property law with respect to loan recovery in Uganda.

1.3 Statement of the Problem

The banking industry thrives on performing loans and efficient recoveries of loaned monies from borrowers. According to the Uganda Bankers Association Annual report 2023-2024, the core purpose of commercial banks and the determinant of financial performance lies in their investment in loans and advances. Both commercial banks as well as Tier 2 and Tier 3 financial institutions predominantly hold customer loans and advances as the largest component of their portfolios²². Over the past six years, from 2018 to 2023, these loans and advances have averaged 43% of the total assets for commercial

¹⁹ This means conduct which is in breach of the statutory provisions under the Mortgages Act

²⁰ Enonchong notes that not all transactions fit neatly into one clear-cut category as either unenforceable, void or illegal. This study considers only those transactions which are prohibited by the statute and not those which are void by reason of public policy

²¹ Archbolds (Freightage) Ltd v. Spanglett Ltd [1961] 1 QB.B 374, 393

²² Uganda Bankers Association, Uganda's Banking Sector Report for the Year 2023 and June 2024 (Annual Report, 2024)

<https://ugandabankers.org/Uganda's%20Banking%20Sector%20Report%20for%20the%20year%202023%20and%20June%202024%20.pdf>

banks and 57% for Tier 2 and Tier 3 financial institutions²³. These substantial proportions highlight the critical importance of lending activities in the financial strategies and performance metrics of these institutions, reflecting a shared focus across different tiers of the banking sector on leveraging loans and advances as key drivers of growth and profitability. An earlier report by Uganda Bankers Association revealed that the 79% of the banks that is, 19 out of 24 derive more than 60% of their income from Net Interest Loan revenues as opposed to non-interest revenues yet only 1.6 million borrowers in the banking system.²⁴

Despite the need for healthy loan portfolios, there are certain risks involved in recoveries including the inadequacy of the collateral security, destruction of the secured property and illegality itself. Loan recovery processes are prone to improper conduct which may amount to irregularity, unlawfulness and sometimes illegality.

There are cases of distressed loan defaulters claiming illegality in courts of law to frustrate loan recovery processes by banks on account of fraud, breach of contract and illegality. These cases have demonstrated the need to clarify what amounts to procedural and substantive illegality in loan recovery and the impact of such illegality on the loan or the process of loan recovery.

²³ Uganda Bankers Association (n 17) pg 15.

²⁴ Uganda Bankers Association Annual report 2018 <https://ugandabankers.org/wp-content/uploads/2019/09/UBA-report-2018-Final.pdf>

1.4 Research Objectives

The general purpose of the study is to understand the causes and effects of illegality on loan recovery.

1.4.1 Specific Objectives

The more specific objectives of the study are:

- i. To determine the loan recovery options for commercial banks
- ii. To examine the nature and impact of illegality on loan recovery in mortgages.
- iii. To propose recommendations to mitigate risk of loss resulting from illegality in mortgage (loan recovery) processes

1.4.2 Research Questions

This study will answer the following questions:

- i. What are the loan recovery options available to commercial banks?
- ii. What is the impact of illegality on loan recovery by commercial banks via mortgages?
- iii. What strategies and best practices can be implemented by commercial banks to mitigate the risks associated with illegality during the loan recovery process?

1.5 Scope of Study

The scope for this study relates to illegality in loan recovery focusing on mortgages. The research takes as its point of departure a broad framework of the ways in which illegal conduct affects debt/loan recovery by commercial banks. The term 'illegality' may be understood in many senses.²⁵ Illegality or the word 'illegal' may be seen as covering only

²⁵ Butt v. Monteaux (1854) 1 K. & J. 98, 121, per Sir W. Page Wood V.-C cited by Nelson Enonchong 'Illegal Transactions'

any conduct not in conformity with the law. This paper conceptualizes illegality as prohibited conduct in 'loan recovery'. This paper focuses on conduct that is prohibited and such conduct in loan recovery that is prohibited renders the whole process void and may vitiate the whole loan recovery process or delay realization of the collateral. The ultimate effect of illegality on loan recovery claims such as those arising in contract, restitution, tort and property law is cancellation and ineffective recovery.

1.6 Significance of the Study

The study is timely to show the strategies banks use for protecting defaulting borrowers as well as safeguard loan recovery from illegality. Addressing illegality in debt recovery or enforcement helps commercial banks to ensure compliance and legal accountability to the borrowers. This is because illegality is uncertain and complicates litigations for loan recoveries yet huge sums of money end up being held up in commercial disputes with huge cost implications on the lender. These lending institutions, repeatedly involved in lending, have an incentive to enforce contracts that individual lenders lack. They can consequently sustain more lending. For their reputations as enforcers of contracts to have value for money requires that banks earn strictly positive profits. Maintaining the value of bank equity also provides an incentive for bank owners to invest deposits rather than to use these funds fraudulently²⁶.

²⁶ Eaton, Jonathan. 1985. "Lending with Costly Enforcement of Repayment and Potential Fraud." NBER Working Paper No. 1697. National Bureau of Economic Research.

This study seeks to make the following contributions to the risk mitigation strategy of banks and raise awareness on the risk of illegality in loan recovery. First, it offers a deeper understanding of what strategies commercial banks undertake to counter illegality at the stage of loan recovery. Secondly, this is intended for both managers of banks and policymakers to benchmark best practices in loan recoveries to mitigate illegality.

For professionals working in commercial banks, the findings would provide valuable insights into the legal and regulatory environment governing loan recovery, allowing them to navigate these constraints more effectively. Compliance officers and risk managers in the banking sector could use the findings to strengthen their understanding of the legal risks and implement appropriate controls. The study would contribute to the broader theoretical and conceptual understanding of the legal and regulatory environment governing commercial banking operations, particularly in the context of loan recovery.

1.7 Research Methodology

This study employed both a legal doctrinal and qualitative approach, integrating qualitative research methods to provide a comprehensive understanding of loan recovery in mortgage transactions by commercial banks.

The qualitative aspect involved use of *qualitative methods*. Qualitative methods were used to generate views, perceptions and opinions on this subject matter to identify issues of

illegality in loan recovery, while integrating data from interviews with key informants on the practical challenges and solutions to illegality in loan recovery processes.

The study also employed a *doctrinal legal research method*, concentrating on the analysis of existing legal principles and frameworks. The use of a legal doctrinal method, also referred to as "black letter" methodology, is particularly suited for a study examining illegality and its impact on loan recovery in Uganda. This approach focuses on the precise text of the law rather than its practical application, allowing for a thorough and detailed analysis of the relevant legal rules governing loan agreements and recovery processes. By utilizing this methodology, the researcher can systematically gather, organize, and describe the applicable laws, including statutes and regulations related to loan recovery and the implications of illegality in financial transactions.

This study also relies on primary data obtained in form of interviews from selected respondents and documents accessed from the commercial banks, law firms representing the bank clients as well as those representing the banks.

In the context of Uganda, where the legal landscape can be complex and nuanced, the doctrinal method enables the researcher to critically analyze specific legal provisions related to loan recovery. This includes identifying legal rules regarding enforceability, the consequences of illegality, and how these rules interact within the broader legal framework. The methodology allows for a comprehensive exploration of underlying principles, such as public policy considerations and the doctrine of unjust enrichment, providing insights into how these principles affect the recovery of loans deemed illegal.

Additionally, the study heavily relies on secondary data, that is, data that has been collected by other sources prior to this study and that has been made publicly available. It also relies on various laws within Uganda's legal regime on debt.

1.7.1. Review of mortgage recovery cases

The review of cases involved the selected commercial banks which include: Standard Chartered Bank, DFCU bank Ltd, Absa Bank formerly Barclays Bank Ltd, Centenary Bank and Equity Bank Ltd. These commercials are licensed by Bank of Uganda and engages in a variety of business lines and operations, with a significant focus on loan generation and the recovery of those loans. It is important to note that the selected commercial banks were purposively selected based on the frequency of cases filed against them involving loan default and allegations of illegality.

In analyzing the cases reviewed in the study, it became evident that a considerable number of litigated cases regarding loan recovery disputes were associated with these four banks. This trend highlights the complexities and challenges these institutions face in managing their loan portfolios effectively. The disputes often arise from various factors, including borrower defaults, misunderstandings regarding loan terms, and the enforcement of repayment agreements. As these banks navigate the intricate landscape of loan recovery, the findings from this case study provide valuable insights into the operational risks and legal challenges that are inherent in the banking sector in Uganda.

The four commercial banks – Stanbic Bank Uganda, DFCU Bank, Centenary Bank, and Equity Bank Uganda – offer a diverse range of business lines and operations that cater to both individual and corporate clients. Primary focus was on the decisions of court in relation to mortgages and their various modes of debt recovery from foreclosure, repossession up to receivership.

The first data collection method will be a case analysis of the decisions from High Court to Supreme court of Uganda. A total of 27 cases was randomly selected and reviewed, specifically targeting instances of illegality in debt recovery. This case review approach was necessary to determine the number of cases relevant to the issue of illegality and also which banks to be selected for the study. An example of how the review of cases facilitated to establish the number of banks which were affected by loan recovery disputes relating to mortgages is illustrated in Table 1.

Table 1: Frequency Analysis of the mortgage recovery cases against commercial banks

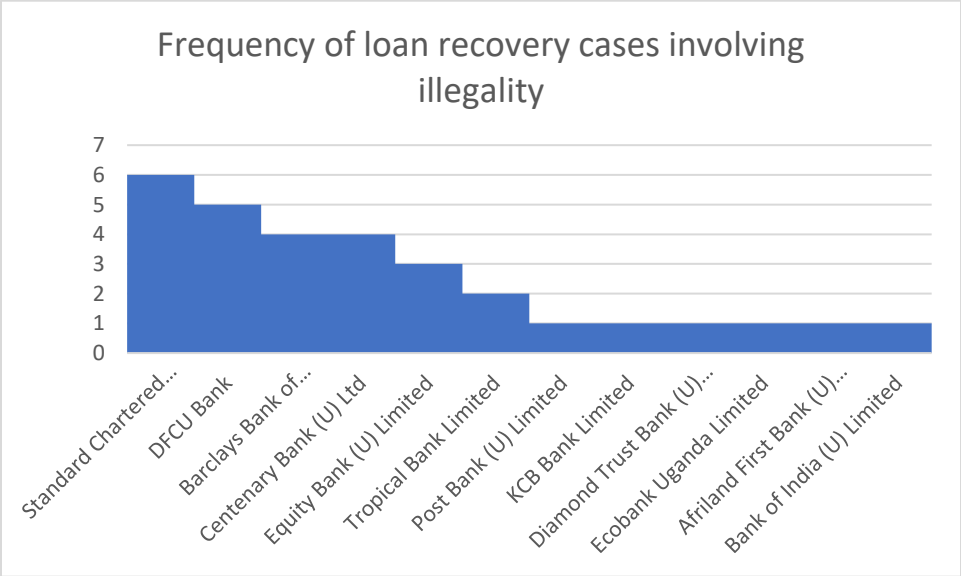
Table 1: Frequency Analysis of the loan recovery cases

Bank Name	Frequency
Standard Chartered Bank (U) Limited	6
DFCU Bank	5
Barclays Bank of Uganda Ltd	4
Centenary Bank (U) Ltd	4
Equity Bank (U) Limited	3

Bank Name	Frequency
Tropical Bank Limited	2
Post Bank (U) Limited (now Pearl Bank)	1
KCB Bank Limited	1
Diamond Trust Bank (U) Limited	1
Ecobank Uganda Limited	1
Afriland First Bank (U) Limited	1
Bank of India (U) Limited	1

Table 2 of reported cases from Uganda Legal Information Institute ulii (researcher's construct)

Table 2: frequency of cases



Summary of the table

- Standard Chartered Bank (U) Limited has the highest frequency with 6 cases.
- DFCU Bank follows closely with 5 cases.

- Barclays Bank of Uganda Ltd and Centenary Bank (U) Ltd each have 4 cases.
- Other banks have fewer cases, with Equity Bank (U) Limited having 3 cases and a few others having 1 or 2 cases.

This frequency distribution of cases across the commercial banks was relied upon to select which commercial banks to involve in this study. The banks were selected based on the volume of cases filed against them relating to loan recovery and citing issues of illegality.

1.7.3. Data Collection Methods

1.7.3.1. Key Informant interviews

Key informant interviews were conducted to complement and supplement the information obtained from the questionnaires. Three categories of key informants were interviewed in order to obtain information about the loan recoveries and the financial regulation of banks. The study employed key informant interviews with 6 key stakeholders at Standard Chartered Bank, DFCU Bank, Absa Bank Ltd²⁷ formerly Barclays Bank Ltd, Centenary Bank and Equity Bank. The respondents were selected using purposive sampling to include at least 3 loan recoveries officers from the selected commercial banks, 3 lawyers acting on behalf of commercial banks, 3 lawyers acting on

²⁷ Monitor. "ABSA Uganda Officially Drops Barclays Brand Name." November 12, 2019. <https://www.monitor.co.ug/uganda/business/finance/absa-uganda-officially-drops-barclays-brand-name-1858746>.

behalf of borrowers/clients of the banks and 2 experts on secured transactions and contract law.

Purposive sampling technique was used to select respondents for the interview who were mainly heads of mortgage departments in banks, officials from the select commercial banks and officials from court and Bank of Uganda. While the number of interviewees from interviews is relatively small and easy to identify, that of the case decisions from the Courts of judicature is large and indeterminate.

Table 3: list of respondents for the study

Interviewee	Role	Commercial Bank
Respondent 1	Loan Recoveries Officer	Standard Chartered Bank
Respondent 2	Loan Recoveries Officer	DFCU Bank
Respondent 3	Loan Recoveries Officer	Absa Bank Ltd
Respondent 4	Lawyer (Banks)	Absa Bank Ltd
Respondent 5	Lawyer (Borrowers)	Centenary Bank
Respondent 6	Expert on Secured Transactions	Independent expert
Respondent 7	Valuation surveyor expert	Independent expert
Respondent 8	Lawyer (Banks)	DFCU Bank
Respondent 9	Lawyer (Banks)	Equity Bank

The respondents were selected using purposive sampling methodology. The respondents were carefully selected based on their roles and expertise. The study employed key informant interviews with loan recovery officers, who can provide insights into the daily challenges and strategies employed in recovering debts. Additionally, legal officers/practitioners acting on behalf of banks and borrowers were consulted to understand the legal implications of various debt recovery cases and the frameworks that govern these processes.

The study also employed semi-structured interviews which were conducted to gather qualitative data from key stakeholders involved in the debt recovery process. The decision to use structured interviews ensured consistency in the information collected and facilitated comparability across responses.

With respect to selection of respondents for the interviews, purposive sample of 12 respondents was relied on.

Category of respondent	No.	Purpose
Loan Recoveries Officers	3	To understand recovery practices, processes and challenges
Lawyers (Banks)	3	To gain insights on legal aspects of loan recoveries
Lawyers (Borrowers)	3	To explore borrowers' perspectives, key obstacles and experiences
Experts	2	To provide expert opinions on secured transactions

1.7.3.2 Review of Laws

The final data collection method involves a thorough review of relevant laws and statutory instruments that govern debt recovery practices. This review focused on specific pieces of legislation that are crucial for understanding the regulatory framework within which banks operate in the context of debt recovery generally and in mortgages specifically. Key laws that were examined include the Financial Institutions Act cap 57, which outlines the regulatory obligations for banks in relation to loan recovery and compliance. Additionally, the Mortgages Act cap 239, the Land Act cap. 236, the Insolvency Act cap 108 were reviewed to analyze the procedures and legal implications associated with defaulting borrowers.

By detailing the specific aspects of these laws, the study identified gaps or challenges in the existing legal frameworks and how they impact the effectiveness of debt recovery options. This review of laws provided a solid foundation for understanding the interplay between regulatory requirements and practical debt recovery strategies.

1.8. Ethical Considerations

The major ethical consideration is informed consent. Respondents must at all times knowingly, voluntarily and intelligently manifest their consent. The researcher obtained the informed consent of the respondents before the interviews are conducted.

Respect for anonymity and confidentiality were also observed. Respondents who did not desire to be named explicitly are referred to as Respondent 'ID 1' and 'ID2' for instance.

This is to ensure the respondents are free to give but also withhold as much information as they wish.

1.9 Limitations of the study

There was limited data on illegality in Uganda but there were case decisions that contributed to the nuanced understanding of the subject of loan recovery from the limited sample size of four banks. Also, the research relied on a small sample size, focusing on only four banks. While these institutions provided valuable insights, the narrow scope restricts the ability to represent the entire banking sector in Uganda. Each bank's policies and experiences may vary considerably, which means the findings might not capture the full diversity of practices and challenges in loan recovery.

The study also depended heavily on existing case law and judicial decisions to understand the nuances of illegality in loan recovery. Although the legal rulings offered critical perspectives and interpretations, the dynamic nature of case law means that emerging or unreported decisions could alter some conclusions drawn in this research.

The reliance on precedents available at the time of the study limits insight into ongoing legal developments.

Additionally, the study's focus on procedural and substantive illegality aspects did not extensively cover socio-economic factors influencing loan recovery and illegality, such as de-valuation of the mortgage security, borrower behavior, bank culture, or high credit risk.

1.10 Theoretical framework:

1.10.1 Deterrence theory on illegality

The overall object of the defense of illegality and the forfeiture rule is the protection of the public through deterrence of crime and other illegal conduct²⁸. Enonchong observes that the effect of the courts refusing to enforce illegal transactions is to act as a deterrent to crime.

Curry and Doyle²⁹ formalize Posner's suggestion that criminal law aims to induce putative criminals to achieve their objectives through voluntary market exchanges³⁰ – a notion that is easier to accept for some crimes (property theft) than others (rape or battery). When market exchange is added to the choice between committing a crime or doing nothing, Curry and Doyle show, maximizing social welfare becomes equivalent to minimizing the cost of crime. Because the offender's gain is not part of this cost, there is no need to decide whether gains of some offenders should count or not. Curry and Doyle's³¹ analysis explains several features of criminal law such as the use of criminal history in sentencing and the necessity defense.

In 1994, it was held in the House of the Lords, in *Tinsley v. Milligan*³², that the defense of illegality is based on a policy of deterrence. Enonchong argues that:

²⁸ Enonchong (1998) *Illegal transactions* at pg. 15 *supra*

²⁹ Curry, Philip A., and Matthew Doyle. 2016. "Integrating Market Alternatives into the Economic Theory of Optimal Deterrence." *Economic Inquiry* 54:1873–83.

³⁰ Posner, Richard A. 1985. "An Economic Theory of the Criminal Law." *Columbia Law Review* 85:1193–1231

³¹ Curry, Philip A., and Matthew Doyle. 2016. "Integrating Market Alternatives into the Economic Theory of Optimal Deterrence." At pg.4

³² [1993] UKHL 3, [1994] 1 A.C. 340.

“If indeed the policy behind the principle of illegality is deterrence, then it may be argued that for the deterrent effect to have force there must be a clear rule which is applied strictly by the courts and is known, at least by lawyers who advise members of the public.”

The deterrence theory is limited in its scope because unlawful or illegal loan recovery may not be criminal. This means that the deterrence theory of illegality may be extended to transactions that are not necessarily tainted by criminality but also those which are necessarily prohibited by civil laws. Despite the limitations of the deterrence theory, the researcher supplemented this study with another theory of public interest.

1.10.1.2 Application of the Deterrence theory on illegality to the study

The application of the Deterrence theory, rooted in the Economic analysis of law by Posner, provides a sound theoretical basis for regulating Uganda's banking sector and consumer credit market. The theory correctly frames the goal as achieving "market deterrence" by reducing overall societal harm that would arise from unregulated financial dealings. Given that Uganda's economic stability relies on the rule of law and maintaining public trust in financial institutions, the argument that laws, policies, and institutions are necessary to prevent market abuse and irregularities is pertinent.

The deterrence theory is anchored in the *Economic analysis of law* by Posner who notes that rectification of wrongs³³ may be achieved in ways based on differing principles for example compensation, injunction, fault, punishment in the form of retributive justice, deterrence, economic efficiency sometimes known as market deterrence and loss

³³ Alex Raskolnikov, Deterrence Theory: Key Findings and Challenges, CAMBRIDGE HANDBOOK OF COMPLIANCE, BENJAMIN VAN ROOIJ & D. DANIEL SOKOL (EDS.), CAMBRIDGE UNIVERSITY PRESS (2021). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2576

distribution³⁴. 'Market deterrence' is thus obtained by reducing the overall harm that society might otherwise have suffered³⁵.

Uganda's banking sector thrives on rule of law and consumer credit protection. Where there are no laws, policies and institutions to regulate and control illegalities, there is prone to be market abuse, irregularities and loss of trust in the legal system. Consumer credit is paramount for several individuals and improves access to capital and livelihood for people. The theory of deterrence is critical to enable the laws, policy and institutions to determine lawful and unlawful behaviour in the credit market including mortgages by banks. The deterrence theory is limited in its scope because unlawful or illegal loan recovery may not be criminal. This means that the deterrence theory of illegality may be extended to transactions that are not necessarily tainted by criminality but also those which are necessarily prohibited by civil laws. African Countries such as South Africa³⁶ and Ghana³⁷ have consumer credit laws. The Global North including England and Wales has the Consumer Credit Act 1974 and the Financial Services and Markets Act 2000 which are good references for Uganda's approach to regulation of loan recovery especially loans secured by mortgages. The regulation of loan recovery helps to deter improper dealings and illegalities through sanctions and punishment.

³⁴ Halstead, P., & Birch, V. (2005). *Key facts: Jurisprudence* (1st ed.). Routledge at pg. 115

³⁵ Halstea, P., & Birch, V. (2005). *Key facts: Jurisprudence* (1st ed.). Routledge at 114.

³⁶ The National Credit Act (2005) regulates credit providers and protects consumers against reckless lending.

³⁷ Borrowers and Lenders Act, 2020

The deterrence theory justifies the courts intervention and power to alter credit relationship's including mortgages and stop illegalities in the decisions from the various case laws that have been identified and analyzed.

1.10.3 Public interest theory

The Public interest theory postulates that government regulation seeks to protect and benefit the public³⁸. According to this theory, government regulation is instrumental in overcoming the disadvantages of imperfect competition, unbalanced market operation and undesirable market results. Thus, the theory assumes that markets are extremely fragile and likely to operate very inequitably if left alone, resulting in market failures³⁹.

In relation to illegality, the researcher found that illegal loan recover processes must be sanctioned and corrected to protect the public interest. For instance, the issue of spousal consent in mortgage transactions is intended to protect the interest of family and the spouse. Given that illegal loan recovery undermines public policy and therefore public interest, the researcher found it applicable to adopt it. However, the Public Interest theory is criticized for its ambiguity. Critics suggest that it is difficult to determine when the interests of the public have been served when many other governmental interests are being served as well.

³⁸ Hantke-Domas, Michael, "The Public Interest Theory of Regulation: Non-Existence or Misinterpretation", *European Journal of Law and Economics* (2003)15 (2): 165-194.

³⁹ Den Hertog, J. (2010). Review of economic theories of regulation (Discussion Paper Series 10-18). Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Utrecht University. https://www.uu.nl/sites/default/files/rebo_use_dp_2010_10-18.pdf

1.10.3.1 Application of the Public interest theory to the study

The application of the Public Interest theory is coherent and strongly relevant to Uganda, particularly in the realm of banking and mortgage law. The theory is properly anchored in John Rawls' concept of the *Priority of Justice over Efficiency/Welfare*⁴⁰, which justifies regulatory intervention even if a market-driven system seems more economically efficient but results in injustice⁴¹. This aligns perfectly with the historical justification for consumer credit protection, which is the recognition of the unequal bargaining position between powerful financial institutions and individual borrowers. In Uganda, where most mortgages secure a bank loan, this inequality is a serious concern, making government regulation instrumental in overcoming market imperfections and ensuring just outcomes.

The public interest theory is also anchored in the contemporary legal theory of Justice by John Rawls whose distribution principle provides for *Priority of Justice over Efficiency Welfare*. His notion of lexical distribution means that even if a suggested system of distribution is more economically efficient than another, it cannot be utilised if it would result in injustice to some of the potential recipients⁴². Mortgage law and consumer credit law are concerned with the protection of the individuals who is granted mortgage, credit or hire facilities. There has been a perceived need for protection over the centuries

⁴⁰ Rawls, J. (1971). *A Theory of Justice: Original Edition*. Harvard University Press, Belknap Press. Available at <https://doi.org/10.2307/j.ctvjf9z6v>.

⁴¹ Rawls, J. (1971). *A Theory of Justice: Original Edition*. Harvard University Press, Belknap Press. Available at <https://doi.org/10.2307/j.ctvjf9z6v>.

⁴² Halstead, P., & Birch, V. (2005). *Key facts: Jurisprudence* (1st ed.). Routledge.

arising largely from the unequal bargaining position of the parties⁴³. The regulation of consumer credit essentially relates to control and prescription of the contract between the parties but also extends to the promotion of consumer credit and hire business and enforcement of the contract⁴⁴. The justification for public interest theory is based on the need for consumer credit protection. The interest in credit protection in the context of mortgage transactions is well-founded because the concept of credit means the right granted by a creditor to a debtor to defer payment of a debt⁴⁵. In Uganda, most mortgages are created based on a loan transaction. The credit in form of bank loan is given and the lending is secured by mortgage.

According to the public interest theory, government regulation is instrumental in overcoming the disadvantages of imperfect competition, unbalanced market operation and undesirable market results. Ugandan economy benefits from consumer credit protection through court's intervention against illegalities in loan recovery. Uganda's loan recovery laws are intended for consumer credit protection in various credit transactions including mortgages. However, the public interest theory applies to justify the government's regulatory efforts in the mortgage markets by banks. For instance, the preamble of the Mortgage Act:

⁴³ Rosenthal, D., & Rosenberg, R. (2023). *Consumer credit law and practice: A guide* (6th ed.). Bloomsbury Professional at pg 2.

⁴⁴ Rosenthal, D., & Rosenberg, R. (2023). *Consumer credit law and practice: A guide* (6th ed.). Bloomsbury Professional at pg. 17.2.

⁴⁵ Rosenthal, D., & Rosenberg, R. (2023). *Consumer credit law and practice: A guide* (6th ed.). Bloomsbury Professional.

'to provide for remedies of mortgagors and mortgagees in respect of mortgages; to provide for the power of court in respect of mortgages and for related matters⁴⁶.'

The remedial approaches provided for under the Act align with the public interest of consumer credit protection and extend to the rule of law in that the banks are not above the law in their realisation of security or recovery of debt under mortgage transactions.

1.11 Literature Review

This section discusses the literature related to the objectives of the research.

1.11.1 Defining Illegality, deterrence and public interest

The Black's Law Dictionary 8th Edition at page 763 defines the term "illegal" to mean forbidden by law; unlawful. Similarly, illegality is defined to mean an act that is not authorised by law.

The doctrine of illegality in private law of contracts posits that contracts deemed contrary to law or public policy are inherently void. The rationale for the doctrine of illegality is to deter crime through criminal sanctions. The deterrent function of criminal sanctions is only effective where there is empirical evidence that such sanctions work. By using the rational choice argument, an offender will always choose to commit a crime where the probability of detection and success of prosecution is minimal. For the deterrence of crime to be effective in the context of private law, the deterrence is only effective where offenders are aware of the threat of the sanctions. Due to the minimal success in

⁴⁶ Preamble of the Mortgage Act cap 239

prosecuting illegal action relating to loan recoveries, the deterrent function of criminal sanctions does not work.

In the context of a literature review on illegality and loan recovery, Arvind's chapter serves as a foundational text. It lays the groundwork for further exploration of how the doctrine of illegality impacts various contractual relationships, especially in financial transactions⁴⁷. Subsequent studies could build on Arvind's insights by examining case law and practical outcomes in loan recovery scenarios involving illegality, thus providing a comprehensive overview of the legal landscape and its practical implications.

1.11.2 Loan recovery in mortgage transactions

Loan recovery is a means in which a creditor such as a bank attempt to collect unpaid debt, usually through a third party⁴⁸. Loan recovery in the context in which it is sued in this study means measures used by lenders to recover or receive payment in situations where borrowers have defaulted on their payment obligations.

A study by Acharya and Subramanian⁴⁹ in the context of emerging markets found that stringent legal enforcement mechanisms, including effective bankruptcy laws and creditor rights, significantly improve loan portfolio performance. The research demonstrated that countries with stronger legal frameworks for debt recovery had lower

⁴⁷ Arvind, T. T. "Protecting the Public Interest: The Doctrine of Illegality." *Contract Law*, 3rd ed., Oxford University Press, 2022. <https://doi.org/10.1093/he/9780198867777.003.0014>.

⁴⁸ Sharma, A. J. (2016). When debt comes knocking. *Emerald Emerging Markets Case Studies*, 6(4), 76-121.

⁴⁹ Viral V Acharya and Krishnamurthy Subramanian, 'Bankruptcy Codes and Innovation' (2009) 22 *Review of Financial Studies* 4949

non-performing loan (NPL) ratios. Specifically, they observed a 15% reduction in NPLs in countries that had reformed their bankruptcy laws to favor creditors. This suggests that a legal environment that supports swift and fair resolution of default cases is crucial for maintaining a stable loan portfolio.

According to Kamar and Ayuma⁵⁰, debt recovery strategies are a very essential component of the performance of any financial institution since they play a key role in guaranteeing that the significant objective of the organization is to give credits that outcomes into the favoured result of making a net revenue past the advances progressed. The nearness of obligation recuperation systems guarantees the borrowers to pay their obligations.⁵¹

In his study on lending rates and loan performance, Ngondo argues that financial institutions have employed penalties for delayed debt payments as part of their debt recovery strategies for several decades. Chava⁵² contends that such penalties serve as a proactive measure, as they inform borrowers of the consequences associated with defaulting or making late payments. Additionally, Chava notes that waiving penalties and interest can be an effective incentive to encourage timely repayment. Kamar and Ayuma further emphasize that the choice of debt recovery techniques is significantly influenced by the nature of the relationship between the institution and the borrower.

⁵⁰ Kamar, H., & Ayuma, C. (2016). Effect of Debt Recovery Techniques on Performance of Selected Financial Institutions in Eldoret Town. *International Journal of Humanities and Social Science Invention*, 1-15

⁵¹ Heller, D., & Truman, E. (2017). *International Financial Regulatory Cooperation and Digital Currencies*. *Georgetown Journal of International Affairs*, 18(3), 59-66.

⁵² Chava, S. (2014). Environmental Externalities and Cost of Capital. *Management Science*, 60(9), 23-47.

Moreover, debt recovery can be costly for lenders, as it often involves additional expenses.

Kamar and Ayuma conducted a study on the effects of debt recovery techniques on the performance of selected financial institutions in Eldoret town, revealing a significant association between debt recovery and performance. Migwi examined credit monitoring and recovery strategies employed by commercial banks in Kenya, finding that all banks actively monitor loans to ensure timely repayments. Njenga⁵³ investigated the effects of credit management practices on loan performance in deposit-taking microfinance institutions in Kenya, concluding that maintaining a proper balance between credit provision and collections is crucial for the survival and success of these institutions.

Over the past decade, commercial banks have adopted various loan recovery practices, including restructuring loans, intensifying collection efforts, and enhancing credit risk management frameworks. These measures have been prompted by lessons learned from the 2008 global financial crisis, which highlighted the critical need for robust risk management practices.⁵⁴

⁵³ Njenga, B. (2014). *The Effects of Credit Management Practices on Loan Performance in Deposit Taking Microfinance Institutions in Kenya*. Nairobi: UON .

⁵⁴ Namaganda, P. (2024). 'Loan recovery practices and loan portfolio performance of commercial banks in Uganda: A case of Stanbic Bank Mbale Branch' [Bachelor's thesis, Uganda Christian University]. <https://scholar.ucu.ac.ug/server/api/core/bitstreams/b9f17f35-e628-40bf-8ebf-8c610d0d5733/content>

1.11.4 The concept of illegality

Legal maxims, such as *ex turpi causa non oritur actio* (no action arises from a base cause), play a crucial role in judicial interpretations of illegal contracts. MacQueen and Cockrell⁵⁵ emphasize that courts often refuse to enforce loan agreements that are deemed illegal, which complicates recovery efforts for financial institutions. The inconsistent application of these maxims across jurisdictions creates uncertainty, as highlighted by Botha, who notes that some contracts may be declared void while others are considered unenforceable but valid. This ambiguity can lead to disparate outcomes in loan recovery cases. The author recommended that courts need not continue to insist that the *ex turpi rule* is inflexible as the courts have always enforced illegal contracts in appropriate circumstances.

1.11.3 Loan Recovery Options Available to Commercial Banks

Commercial banks employ various loan recovery options to mitigate risks associated with defaults. One common method is a suit by the mortgagee/legal action and then realisation of the security. The latter is also called collateral enforcement. It is a significant recovery option; many loans are secured by collateral, and in cases of default, banks can repossess assets to recover outstanding amounts. A mortgage is a contract between the proprietor of land known as the mortgagor on the one hand and another person known

⁵⁵ MacQueen, H., & Cockrell, A. (2004). Illegal Contracts in Mixed Legal Systems. In R. Zimmermann, D. Visser, & K. Reid (Eds.), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*

as the mortgagee to whom the land is conveyed as security on the other hand.⁵⁶ This consideration may be a monetary loan or some other debt, benefit or detriment granted by, or suffered by, the mortgagee. This requirement for consideration is founded on the general law of contract and is also implicit in the statutory law⁵⁷. Both the Registration of Titles Act and mortgage Act make implicit references to consideration.

Most of the standard form mortgage deeds prepared by bankers contain a provision under which the mortgagor acknowledges receipt of a stated sum of money. The mortgagor may execute such a mortgage while in actual fact he has not received the stated sum at the time of execution or when in fact he has received much less. In *Fakhruddin Mohamedali Jafferi v Ahmedili Abdulhussein Lukman* a mortgagor who had been sued for the mortgage money pleaded that the recital in the mortgage to the effect that he acknowledged receiving shs, 2,000 was not correct and that the mortgage deed was a fictitious document. Sheridan J with whom the other members of the Court of Appeal for Eastern Africa agreed held that:

Although the defendant admitted in the mortgage that the consideration money had been received by him, it is clear from section 92 of the Indian Evidence Act and the authorities quoted thereunder that this recital is not conclusive evidence of such payment, and it may be rebutted by parole evidence of non-payment. The recital, however, raises a strong presumption of the payment of such consideration and the onus was on the defendant to rebut it.

⁵⁶ Essays in African Banking Law and Practice 2nd Edition (2009) at page 359, Grace Patrick Tumwine Mukubwa

⁵⁷ Peter Walubiri, 'Securities for Banker's Advances: Mortgages' in Essays in African Banking Law and Practice (2nd edn, 2009) 359.

In another case of *Vallabhdas Pragji v. Nasani Lubega*⁵⁸, the court allowed a mortgagor to give parole evidence to prove that he received a sum less than that acknowledged in the mortgage deed. Sheridan J held that:

If the oral evidence does not go to contradict the mortgage deed, I do not see why, by parity reasoning, a lesser as well as an additional consideration should not be proved in this way.

It is also possible for the consideration to be advanced in instalments both before and after execution of the mortgage deed/instrument⁵⁹.

1.11.4 Impact of Illegality on Loan Recovery via Mortgages

The impact of illegality on loan recovery via mortgages can be profound. Loans based on illegal activities or agreements may be deemed void, which prevents banks from enforcing recovery. Legal precedents also indicate that courts often rule against banks when illegal loans are involved, thereby limiting their recovery options (Williams, 2019). Moreover, engaging in or financing illegal activities can damage a bank's reputation, complicating future lending and recovery efforts.

1.11.5 Strategies and Best Practices for compliance in mortgage transactions

To mitigate risks associated with loan recovery in mortgage transactions, banks implement several strategies. Conducting thorough due diligence by performing

⁵⁸ [1964] E.A. 659

⁵⁹ See the case of *Coast Brick & Title Works Limited & Others v. Premchand Raichand Limited & Another* [1966] E.A. 154

comprehensive credit assessments and background checks on borrowers can significantly reduce default risks. Ensuring that loan agreements are legally sound and clearly outline terms helps protect banks in recovery situations. Regular monitoring of borrower performance and market conditions allows banks to respond proactively to emerging risks. Finally, investing in staff training on risk management and legal compliance enhances the overall effectiveness of recovery processes.

1.11.6 The effect of illegality on financial transactions

Bakibinga⁶⁰ identifies three forms of illegality in private law of contract. That is statutory illegality and illegality by common law. He further explains that illegality generally renders a contract void. Enonchong observes that even after the transaction or some aspect of it has been determined to be in violation of the provisions of an Act of Parliament, the courts will still have to answer the question whether the intention of the Act was to prohibit the transaction to render it illegal. Generally, a transaction will be illegal as being in contravention of a statute if (a) that transaction is to do something which the statute forbids, or (b) the transaction itself is one which the statute forbids, or (c) the transaction, although lawful in itself, is made for a purpose which the statute renders unlawful, or (d) the transaction although lawful in itself, is intended to be performed in manner which the statute prohibits⁶¹.

⁶⁰ David J. Bakibinga, *'Law of Contract in Uganda'* (The Written word publications, 2013)

⁶¹ *Yango Pastoral Co. Pty Ltd v. First Chicago Asustralia Ltd* (1978) 139 C.L.R 410, 413 per Gibbs A.C.J approved in *Fitzgerald v. F.J Leonhardt Pty. Ltd* (1977) 71 A.L.J.R 653, 654

Although a distinction is made between a contract which is unenforceable by one party and one which is unenforceable by both parties thereto. His discussion is apposite to contextualize illegality as part of the private law of contract but also understand its effect of unenforceability by one party and between both parties. This study builds on this position of unenforceability in private law to argue that illegality can be in loan recovery beyond the lending contract itself. It is hoped that this study can clarify on the prohibited conduct/illegalities in loan recovery beyond the loan agreement.

Enonchong explains the policy objectives for illegality- deterrence and unjust enrichment.⁶² The former protects the integrity of the judicial system while the latter seeks to right wrongs by preventing unjust enrichment. He argues that to promote the ends of deterrence by denying relief will in some cases result in unjust enrichment. Such a result requires the policy against injustice and windfall gain. On the other hand, satisfying the desires of justice (by allowing a guilty plaintiff to recover) may work against the policy of deterrence and hurt the integrity of the judicial system. Although Enonchong provides a detailed analysis of mostly common law English cases since 1700s involving illegality, he admits that there is no universal rule because this area of the law on Illegality is particularly difficult because of competition among policy objectives. The study applies the policy objectives/ theories of deterrence and protection of the integrity

⁶² Dr. Nelson Enonchong (1998) *Illegal Transactions*-University of Leicester published London Hong-Kong.

of the judicial system yet emphasizing key distinctions between the cases in common law Uganda and parameters of what illegal conduct is prohibited by the debt recovery laws.

Enonchong further notes that where a claim is defeated by the defence of illegality, the plaintiff loses everything. If a person supplies goods under a contract which was found to be illegal, the illegality may prevent him from recovering wither the contract price (in a contractual claim) or the value of the goods (in a restitutionary claim)⁶³. The consequence will be that the defendant will retain the goods for his own use and not pay for them, even though he may be just as guilty as the plaintiff. This is manifestly unjust as between the parties. Even Lord Mansfield who laid down the defence of illegality recognised that this result is 'contrary to real justice' between the parties.⁶⁴ This policy of preventing injustice and windfall gains should also be considered as the policy of deterrence and protecting the integrity of the judicial system are not the only policy considerations.

Thorsten Beck⁶⁵ in his study "*Law, Finance, and Economic Growth: An Empirical Assessment of the Impact of Financial Regulation on Banking Sector Performance*" explores how the legal and regulatory environment affects the development and performance of the banking sector, drawing on the law and economics perspective. The researcher analyses how

⁶³ William Swadling, 'The Role of Illegality in the English Law of Unjust Enrichment' (2000) Oxford University Comparative Law Forum 5 <https://ouclf.law.ox.ac.uk/the-role-of-illegality-in-the-english-law-of-unjust-enrichment/>

⁶⁴ *Holman v. Johnson* (1775) 1 Cowp. 341, 343

⁶⁵ Beck, T. (2003). *Law, Finance, and Economic Growth: An Empirical Assessment of the Impact of Financial Regulation on Banking Sector Performance* (Doctoral dissertation, University of Virginia).

factors like property rights protection, contract enforcement, and regulatory policies impact bank efficiency, access to finance, and economic growth.

Traditional law and economics read market actors behaviour as furthering their interest through rational means, as argued in classical economics⁶⁶. The economic analysis of law as a descriptive tool, is politically and philosophically agnostic as it is centred on the actual preferences on the actors involved⁶⁷ This paper only focuses on the potential impact of illegality as a matter of law and its impact on the behaviour of actors, that is the effects of such prohibitions within the debt market.

1.11.7 The legal system

The legal system plays a crucial role in shaping the financial decisions of firms, particularly in the context of mortgage loan recovery. As emphasized by Modigliani and Miller⁶⁸ debt and equity represent legal claims on a firm's cash flow, making the enforcement of these claims vital in financial transactions. In scenarios involving

⁶⁶ For an overview of rational choice theory as a behavioural heuristic in the legal scholarship see in general Richard A Posner, *Economic Analysis of Law* (2d ed, Little, Brown 1977); Andrew T Guzman, *How international law Works: A Rational Choice Theory* (Oxford University Press 2008); Joel P Trachtman, *The Economic Structure of international law* (Harvard University Press 2009)

⁶⁷ See also Richard A Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 *The Journal of Legal Studies* 103. There have been criticism against this claim, essentially rooted in the fact that efficiency or self-maximisation as a criterion for 'good law' is far from being depoliticised but rather biased in favour of wealth-holders.

⁶⁸ Ahmeti, Faruk and Prenaj, Burim, *A Critical Review of Modigliani and Miller's Theorem of Capital Structure* (June 2015). *International Journal of Economics, Commerce and Management (IJECM)*, Vol. III, Issue 6, June 2015, Available at SSRN: <https://ssrn.com/abstract=2623543>

mortgage loans, the legal framework dictates how lenders can recover debts, influencing the overall risk and cost of borrowing.

Jensen and Meckling⁶⁹ highlight that the nature of contracts used to mitigate agency problems is heavily influenced by statutory laws and their enforcement. This is particularly relevant in the mortgage sector, where the rights of creditors and the processes for recovery are established by national laws. Countries with robust legal systems ensure better protection for lenders, enhancing their ability to recover loans in cases of default.

Differences in legal systems—specifically between common law and civil law traditions—affect the mechanisms of mortgage loan recovery. Common law jurisdictions, characterized by judicial independence and reliance on precedents, often provide stronger protections for creditors. This can lead to more favorable outcomes in mortgage recoveries, as courts are typically more adaptive to evolving financial practices and borrower behaviors.

In contrast, civil law systems, which rely heavily on codified statutes and legal scholarship, may present challenges in mortgage recovery. The rigidity of these systems can inhibit swift legal recourse for lenders, complicating the recovery process. Moreover,

⁶⁹ JENSEN, M. C. & MECKLING, W. H. 1976. Theory of the firm: Managerial behavior, agency costs and ownership structure. *Journal of financial economics*, 3, 305-360

as La Porta et al.⁷⁰ indicate, investor rights are generally stronger in common law countries, leading to lower ownership concentration and a more favorable borrowing environment. This dynamic can significantly affect the willingness of lenders to extend mortgage loans, impacting overall access to financing.

The effectiveness of a legal system in enforcing property rights is paramount in mortgage recovery. Demirguc-Kunt and Maksimovic⁷¹ assert that a strong legal framework is essential for obtaining long-term financing, as it minimizes the risk of opportunistic behavior by corporate insiders. In the context of mortgage loans, this protection extends to safeguarding lenders' interests, ensuring that they can efficiently recover owed amounts.

1.12 Outline of the dissertation

Chapter one describes the research methods and literature review, establishing the context for understanding how illegality affects loan recovery practices in Uganda's banking sector.

Chapter two focuses on the concept of illegality within debt recovery and financial laws, tracing its origins and defining its principles through key seminal works. It examines the

⁷⁰ Shleifer, A. and Wolfenzon, D., 'Law and Finance' (2002) Harvard University https://scholar.harvard.edu/files/shleifer/files/law_finance.pdf

⁷¹ Demirgüç-Kunt, A., & Maksimovic, V. (1998). Law, finance, and firm growth. *The Journal of Finance*, 53(6), 2107-2137. <http://links.jstor.org/sici?sici=0022-1082%28199812%2953%3A6%3C2107%3ALFAFG%3E2.0.CO%3B2-Y>

impact of illegality on financial transactions, highlighting its relevance in the context of loan recovery.

Chapter Three on Loan Recovery in Mortgage Transactions discusses the complexities of loan recovery, emphasizing the challenges banks face in pursuing unpaid loans. It explores various lawful recovery options available to commercial banks, assessing their compliance with legal frameworks and best practices.

Chapter Four on the effects of Illegality on Loan Recovery in mortgage transactions examines the implications of illegality on mortgage loan recovery by commercial banks, distinguishing between procedural and substantive illegality.

Chapter Five Conclusion, Summary of Findings, Recommendations provides a conclusion and summary of findings from the study, focusing on loan recovery options for commercial banks and the implications of illegality. It outlines key findings, including effective strategies to mitigate illegal acts in the recovery process, and offers recommendations aimed at improving compliance and operational effectiveness in loan recovery practices.

CHAPTER TWO

THE CONCEPT OF ILLEGALITY AND THE LAWS GOVERNING LOAN RECOVERY IN MORTGAGE TRANSACTIONS

2.1 Introduction

This chapter expounds on the concept of illegality as well as the legal frameworks governing loan recovery. It commences by defining the concept of illegality and its nexus to deterrence, compliance and public interest. It then examines the dimensions of laws relevant to loan recovery. The issue of illegality in this study is guided by deterrence theory, which posits that the doctrine of illegality and the forfeiture rule aim to protect the public by deterring crime and other illegal conduct.

The deterrence approach emphasizes the creation of clear legal rules and their consistent application, suggesting that the law can be an effective tool to discourage unlawful behavior. This section will elaborate on how the defense of illegality deters illegal conduct in financial transactions, highlighting the importance of robust legal frameworks in promoting compliance and ethical behavior within the banking sector.

Additionally, the chapter highlights the relationship between illegality and public interest, emphasizing how safeguarding the public interest can protect the weaker party in financial transactions. Without effective regulation of illegality, lending can become

risky, potentially leading banks to face significant challenges in recovering debts from borrowers involved in illegal activities. This section will connect public interest theory to deterrence theory, illustrating how both concepts serve to protect the public and ensure fair practices in financial dealings.

Through this comprehensive analysis, the chapter aims to provide an understanding of how illegality affects loan recovery processes and the overarching legal landscape in Uganda.

2.2 The nexus between Deterrence and Illegality

Deterrence is an old idea and has been discussed in academic writing at least as far back as eighteenth-century treatises by Adam Smith⁷², Jeremy Bentham⁷³, and Cesare Beccaria⁷⁴. There are three core concepts embedded in theories of deterrence—that individuals respond to changes in the certainty, severity, and celerity (or immediacy) of punishment.⁷⁵

The deterrence theory posits that when an act's external harm exceeds its private gain, the act is socially undesirable and should be deterred at the lowest social cost.⁷⁶ The

⁷² Stalley, R. (2012) Adam Smith and the theory of punishment. *Journal of Scottish Philosophy*, 10 (1). pp. 69-89. ISSN 1479-6651 <http://eprints.gla.ac.uk/64892>

⁷³ Bentham, Jeremy. 1789. *An Introduction to the Principles of Morals and Legislation*. Oxford: Clarendon Press

⁷⁴ Beccaria, Cesare. 1764. *On Crimes and Punishments*. Oxford: Clarendon Press, 1957.

⁷⁵ Katherine M. O'Regan, 'The Effect of Neighborhoods on Housing Choices: Evidence from the Moving to Opportunity Experiment' (2014) 52(3) *Journal of Economic Literature* 647.

⁷⁶ Raskolnikov, Alexei, "Deterrence Theory" (2007) Columbia Law School Faculty Scholarship. Available at: https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?params=/context/faculty_scholarship/article/3580/&path_info=Raskolnikov_Deterrence_Theory.pdf

deterrence theory is centered on the idea that the defense of illegality and the forfeiture rule aim to protect the public through deterrence of crime and other illegal conduct. This aligns well with the focus of this study, which is to examine the debt recovery rules and their potential deterrent effect on illegal conduct in loan recovery processes.

According to Raskolnikov, “the government deters individuals by imposing sanctions. In the basic setup, sanctions take the form of either fines (viewed as costless for the government to impose) or imprisonment (viewed as costly for the government to impose). Whatever the sanction’s form, the regulator must choose its magnitude... the regulator must decide whether to sanction all individuals causing external harm (by setting up a strict liability regime) or only those whose actions cross some government-determined threshold (by enacting what is often called a fault-based or negligence regime).”

Governments regulate for many reasons, and deterring future undesirable acts is surely one of them⁷⁷. Deterrence provides a clear and well-established theoretical foundation for understanding how legal frameworks can be employed as tools to discourage unlawful actions, which is central to this study's investigation of illegal conduct in loan recovery. Under the Mortgage Act, there is a duty to disclose information (section 4): The penalties for failing to disclose relevant information serve to deter dishonest behavior by

⁷⁷ Raskolnikov, A. (2021). Deterrence Theory: Key Findings and Challenges. In B. van Rooij & D. D. Sokol (Eds.), *Cambridge Handbook of Compliance*. Cambridge University Press. <https://doi.org/10.1017/9781108759458.014>

mortgagors and mortgagees. The consent to Mortgage of Matrimonial Home (section 6) ensures that mortgagees take reasonable steps to protect the spouse.

The deterrence approach emphasizes the importance of creating clear legal rules and ensuring their consistent application. This consistency not only clarifies legal expectations but also reinforces compliance among financial institutions and borrowers alike.

2.2.1 DETERRENCE THEORY OF ILLEGALITY AND LOAN RECOVERY

2.2.1.1 Legitimacy of loan transactions

Deterrence through strict laws compels parties to enter into clear, lawful agreements, thereby reducing the instances of breaches that arise from illegal conduct. If individuals understand that engaging in illegal activities (like fraud or misrepresentation) will lead to unfavorable legal repercussions, they may be more inclined to adhere to the terms of legitimate contracts. In the Australian case of *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*⁷⁸, the defendants sought to avoid payment under mortgages and guarantees given to the plaintiff bank. They argued that since the bank had not obtained the statutory authorisation required to carry on banking business, the mortgages and guarantees were impliedly prohibited by statute. The Australian High Court said that the effect of finding an implied statutory prohibition would mean that all contracts entered into by the bank were impliedly prohibited and therefore unenforceable. This would

⁷⁸ (1978) 139 CLR 410

include not only contracts by which the bank had agreed to lend money, but also those by which it had agreed to receive money from depositors. The result of accepting the defendants' argument might therefore be that innocent depositors, who had placed money with a bank which was carrying on unauthorised business, would be unable to seek the assistance of the courts to recover it.⁷⁹ The Court concluded that it was not rational to suppose that Parliament intended to inflict such dire consequences on innocent depositors and that therefore the statute did not prohibit and thereby invalidate contracts entered into in breach of the relevant section

2.2.1.2 Prevention of Harms and Duty of Care

Deterrence in tort law addresses the duty of care. The concept of assuring efficient levels of care can also apply to lenders and borrowers in financial transactions. By establishing clear legal standards and expectations, the law can deter negligent behaviour that may lead to illegalities in loan recovery, such as failing to disclose important information or engaging in predatory lending practices.

⁷⁹ (1978) 139 CLR 410, 415, per Gibbs ACJ; 427, per Mason J

2.2.1.3 Public enforcement

Public enforcement ⁸⁰ underscores the importance of regulatory frameworks in preventing socially harmful conduct⁸¹. Polinsky and Shavell's masterful review of the economic theory of public enforcement of law, also known as the theory of optimal deterrence which investigates how the government may achieve its objective given the individual decision-making strategy. The government objective is to maximize what deterrence scholars often refer to as social welfare. The meaning of that term, however, is typically restricted to efficiency or just to net gains. Thus, Polinsky and Shavell define social welfare as "the benefits that individuals obtain from their behavior, less the costs that they incur to avoid causing harm, the harm that they do cause, the cost of catching violators, and the costs of imposing sanctions on them (including any costs associated with risk aversion)"

In the realm of recovery or mortgage loans, effective enforcement of laws related to financial transactions deters illegal practices, such as fraudulent loan applications or the exploitation of vulnerable borrowers. Strong regulatory oversight not only protects consumer public but also maintains the integrity of the financial system. Similar considerations led the Court of Appeal in *Hughes v Asset Managers plc*⁸² to hold that investment management agreements entered into by an unlicensed agent in breach of the

⁸⁰ Polinsky, A. Mitchell, and Steven Shavell. 1994. "Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?" *Journal of Law, Economics and Organization* 10:427-37

⁸¹ Shavell, Steven. 1985. "Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent." *Columbia Law Review* 85:1232-62.

⁸² ⁸² [1995] 3 All ER 669

Prevention of Fraud (Investments) Act 1958 were not impliedly prohibited. The plaintiffs had invested £3m with the defendant investment managers pursuant to various investment management agreements. Following a fall in the stock market the value of the plaintiffs' investments fell by £1m. The plaintiffs brought the action to recover the loss on the ground that the individual agent who had signed the investment agreements on behalf of the defendants was not licensed as required by the 1958 Act and that as a consequence the agreements were rendered void. The Court of Appeal readily accepted that the 1958 Act had been passed in order to protect the investing public. However, it held that there was no basis in the words of the legislation, the type of prohibition or considerations of public policy for the assertion that Parliament must be taken to have intended that such protection required that any deals made through the agency of an unlicensed person should automatically be struck down.

By effectively implementing deterrence strategies, the law can minimize the occurrence of illegal conduct in loan recovery. For instance, the threat of legal repercussions for engaging in unlawful practices can dissuade banks and borrowers from pursuing or participating in such actions. This section will further explore how specific interpretations and applications of debt recovery laws can enhance their deterrent effect, ultimately contributing to a more ethical lending environment.

2.2. The Nexus between Illegality and Compliance

Deterrence theorists often use the terms compliance and deterrence interchangeably. But, in general, the two terms have very different meanings. Deterrence (meaning optimal deterrence) is an economic concept referring to welfare (or efficiency) maximization. Compliance is a legal concept referring to actions that do not violate legal commands, however efficient or inefficient these commands happen to be.

The same question may produce different answers from the deterrence and compliance perspectives. Raskolnikov, *Harmful, Harmless, and Beneficial Uncertainty in Law*, findings show that lower legal uncertainty may or may not be good for deterrence, but it is good for compliance. They further show that uncertainty is harmful if the expected sanction depends on the extent to which the agent's compliance effort deviates from the regulator's view of what the law demands. Uncertainty is harmless when the expected sanction is independent of the agent's compliance decision. Uncertainty is beneficial when the agent must seek preapproval from a cautious regulator before engaging in conduct governed by a vague standard. Finally, and consistent with the literature, the cost of uncertainty to the agent is itself uncertain if the probability of sanction depends on the agent's compliance decision but not on the extent of the violation.⁸³

2.3 The Nexus between Illegality and Public Interest

Public interest theory posits that regulations are designed to protect the public good, ensuring that the interests of society as a whole are prioritized over individual interests.

⁸³ Scott Baker & Alex Raskolnikov, *Harmful, Harmless, and Beneficial Uncertainty in Law*, 46 J. LEGAL STUD. 281 (2017). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2667

Under this theory, the government acts as a protector of public welfare, intervening in markets to correct failures, prevent harm, and promote social justice.

The mortgage of matrimonial home (section 5) of the Mortgage Act protects family rights and ensures that spouses are aware and consenting, aligning with public interest principles. There are implied covenants by the mortgagor (section 18) of the Act and this provision holds mortgagors accountable for maintaining their property, which benefits the community by preventing neglect and ensuring property standards. The public interest is promoted when illegality results in protecting the weaker party in a financial transaction. If illegality is not regulated, lending to borrowers can be risky because banks would face a high risk of not recovering from borrowers where illegality is involved. The public interest theory is related to the deterrence theory as both concepts are centered on the idea that the illegality is intended to protect the public through deterrence of crime and safeguarding the weaker party in a transaction.

2.4 Characterization of Illegality in mortgages

English law⁸⁴ establishes a framework under the doctrine of illegality to prevent contracts that contravene public policy or involve illegal activities from being enforceable⁸⁵. Similarly, there is a policy consideration of preserving the integrity of the legal system and not allowing persons to profit from their illegal conduct.

⁸⁴ Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (Law ComCP No 154, 1999); Law Commission, *The Illegality Defence in Tort* (Law Com CP No 160, 2001); Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP No 189, 2009); Law Commission, *The Illegality Defence* (Law Com No 320, 2010).

⁸⁵ TT Arvind, 'Protecting the Public Interest: The Doctrine of Illegality' in *Contract Law* (3rd edn, Oxford University Press 2022) <https://doi.org/10.1093/he/9780198867777.003.0014> accessed 25 December 2024

If there is one point in respect of which there is widespread agreement regarding the illegality doctrine, it is that the relevant law is in far from a satisfactory state.⁸⁶

Illegality in loans by land or mortgages is characterised by various principles of public policy and statutory law. Traditionally, two Latin maxims have often been referred to without greatly illuminating the legal position: *ex turpi causa non oritur actio* ('no action arises from a disgraceful cause') and in *pari delicto potior est conditio defendentis* ('where both parties are equally in the wrong the position of the defendant is the stronger').⁸⁷

The illegality doctrine requires turpitude but that not all wrongdoing constitutes turpitude for the doctrine's purposes. To trigger the doctrine of illegality, there must be an act that 'engage[s] the interests of the state or, as we would put it today, the public interest. Torts (other than those of which dishonesty is an essential element), breaches of contract, statutory and other civil wrongs, offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected.

⁸⁶ James Goudkamp, *The Doctrine of Illegality: A Private Law Hydra* (2015) UK Supreme Court Yearbook 254-277 <https://ora.ox.ac.uk/objects/uuid:43a18e4a-1dea-46a5-8a11-8b254bfa01d9/files/m90b29b17cc996545b34b4c3b6b7eb9c0> accessed 25 December 2024.

⁸⁷ Jonathan Mance, 'Ex Turpi Causa - When Latin Avoids Liability' (2014) 18 *Edinburgh LR* 175, 192; Jonathan Sumption, 'Reflections on the Law of Illegality' (2012) 20 *RLR* 1, 8-12.

Mtui⁸⁸ notes that there are other forms of illegality in obtaining spousal consent in mortgages. Mtui notes that when consent has been obtained through illegal means, such as misrepresentation or undue influence, it raises significant legal concerns. She points out that, despite the outlined steps that banking institutions are required to follow, the author does not elaborate on the methods these institutions can employ to enforce a mortgage in situations influenced by undue influence. This gap highlights the need for clearer guidelines and practices within the banking sector to address the complexities of enforcing mortgages under such circumstances. In this study, the aspects of illegality such as fraud, undue influence and lack of spousal consent are conceptualised as substantive illegality in mortgage transaction. Other hand, the process-related aspects of loan recovery or mortgage enforcement such as valuation of security, advertisement are considered procedural illegality in mortgages.

Illegality in the law of contract - as developed from those Latin maxims - was governed by a series of rules which tended to distinguish, for example, between illegality in formation and illegality in performance. Unfortunately, commentators and courts have found it very difficult to state those rules with confidence and precision. Hence the textbook treatments not only differ from each other but are characterised by long-winded attempts to explain the law. Sharp propositions when offered by the courts or the books

⁸⁸ Mtui, Y. V. (2019). *Enforcement of mortgages by commercial banks in circumstances influenced by undue influence: Analysis of the law and practice* (Master's thesis, Mzumbe University, Faculty of Law). Retrieved from <https://scholar.mzumbe.ac.tz/server/api/core/bitstreams/64c1a4de-03d4-47bc-b845-30eea50e6abb/content>

have to be qualified by reference to cases or hypothetical examples that do not fit those rules; and convincing justifications of those rules have proved elusive.

In *Yarmouth v France* (1887) 19 QBD 647, 653, Lord Esher MR said:

“I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.”

In *Hall v Hebert*⁸⁹, the owner of a car allowed a passenger to drive it in the knowledge that he had drunk a large amount of beer during the course of the evening. The car overturned and the driver suffered head injuries. The Supreme Court held that the driver’s claim against the owner in negligence was not barred by illegality, but that there should be a reduction in damages for contributory negligence. The judgment of the majority was given by McLachlin J.

McLachlin J in *Hall v Hebert* stated:

“As the doctrine of illegality rests on the understanding that it would be contrary to public policy to allow a person to maintain an action on a contract prohibited by statute, then it is only appropriate to identify those policy considerations which outweigh the applicant’s prima facie right to unemployment insurance benefits. ... While on the one hand we have to consider the policy behind the legislation being

⁸⁹ [1993] 2 SCR 159

violated, the Immigration Act, we must also consider the policy behind the legislation which gives rise to the benefits that have been denied, the Unemployment Insurance Act.”

As mentioned earlier, this study conceptualises illegality in form of procedural illegality as well as substantive illegality.

Procedural illegality in loan recovery is unlawful or prohibited acts in the process of recovering debt. Substantive illegality means acts or omissions in a loan transaction that are so fundamental and breach of which results into a total loss of consideration because statutory law prohibits such illegal activities. These include contraventions of penal laws, fraud, money laundering, terrorism among others.

2.4.1 Procedural Illegality

This involves failing to adhere to legal processes without necessarily invoking moral wrongdoing. The procedural illegality arises where the commercial bank breaches some lawful processes in a bid to recover a loan. For example, in relation to mortgages where the lender fails to serve the requisite notices before foreclosure. Procedural illegalities arise where the lender fails in its obligations to follow procedure that must be taken in a structured way to achieve an effective loan recovery, for instance failure to serve a demand notice, failure to conduct valuation before foreclosure, failure to advertise and failure to obtain consent in a sale by private treaty.

In a well-received intervention for the borrowers, the High Court in the case of *Sendagire Stephen and anor v DFCU Bank Limited and anor*⁹⁰ laid down the best practices that underpin a lawful foreclosure to avoid procedural illegalities:

- The Bank should not act in secret, should obtain the best price and act in good faith.
- The Bank should establish the value of the property before sale to establish the current market value and forced sale value.

Additionally, the Bank should not sell under forced sale or undervalue.

- Before sale, the property should be advertised after the Borrower has been notified
- A Public auction should be the preferred mode of sale because it is competitive.

In the event that a sale is to be concluded by private treaty, it is preferable that the Borrower is involved and given access to information.

The laid down steps establish the procedures for recovery of debt secured by legal mortgage; hence, breach of these requisite steps amounts to procedural illegality as well.

2.4.2 Substantive Illegality

This involves actions that are fundamentally illegal in the actual loan transaction itself. These actions violate laws that are so serious that they can nullify the entire loan contract. For substantive illegality to be recognized, the illegal act usually needs to be serious

⁹⁰ HCCS No.26 of 2008

("great turpitude"). This means the action must be significantly wrong to trigger legal consequences. These include money laundering, terrorism, failure to obtain spousal consent⁹¹, mortgage of land situated in a prohibited zone such as wetland⁹², mortgage of illegal interest by noncitizens etc.

Substantive illegality arises where the commercial bank breaches mandatory requirements of law, such conduct extends to conduct that is expressly prohibited by statute or principles or principles of law such as common law⁹³. Substantive illegality is the contravention of a statutory provision⁹⁴ that voids the whole loan contract extinguishing the bank's right to recovery the loan in its entirety whereas the procedural illegality is in relation to the process of loan recovery which does not extinguish the contractual rights of the commercial bank.

2.5 The Legal Framework Affecting Loan Recovery in Uganda

The legal framework governing loan recovery in Uganda is multifaceted, comprising several key statutes that delineate the rights and obligations of lenders and borrowers. This section provides an overview of the primary laws relevant to loan transactions and recovery processes, including the Contracts Act, which establishes the basis for loan

⁹¹ Mugalula J (2010) "Mortgaging Matrimonial Home: Unveiling the Law and Practice of Banks and other Financial Institutions in Uganda", Occasional Paper No.3/2010

⁹² KCB Bank Limited v. Gichohi and 2 Others (Civil Appeal 323 of 2023)

⁹³ Ferdinand Marthinu Botha , 'Determining the consequences of illegal contracts' (LLM thesis Stellenbosch University, 2022)
https://scholar.sun.ac.za/bitstream/handle/10019.1/124604/botha_consequences_2022.pdf?sequence=1
(accessed at 08/05/2024)

⁹⁴ A breach of the provisions is not a mere irregularity since it goes to the core of the Act. Non-observance leads to fatality. (Galleria in Africa Ltd vs UEDC Ltd SCCA No. 8 of 2017).

agreements, and the Mortgages Act, which regulates mortgage transactions and requires spousal consent, notices, valuations among others.

Additionally, the Security Interest in Movable Property Act enhances access to credit by allowing movable assets to be used as collateral. The Land Act is relevant to the study to show the interests in land including family land, occupancy rights which affect loan transactions including mortgages. Other important statutes include the Limitation Act, which sets time limits for debt recovery, the Insolvency Act, which outlines procedures for insolvency, and the Civil Procedure Act, which governs civil suits, including those related to loan recovery. Lastly, there are statutory instruments including the Mortgage regulations No. 1 of 2012, Financial Institutions (Credit Reference Bureau) Regulations, 2022, and various mortgage and land regulations support responsible lending practices and the enforcement of mortgage rights

The governing law is the Contracts Act cap 284 which relates to the loan transaction throughout the lifetime of the debt. This study specifically focuses on loans secured by property in land specifically mortgages created by commercial banks. The relevant law concerning mortgage loans is the Mortgages Act (Cap 239). The laws applicable to loan transactions also depend on the nature of the property involved; for instance, immovable property requires consideration of the Registration of Titles Act, while movable property is governed by the Security Interest in Movable Property Act (Cap 293). Additionally, the laws applicable to debt or loans are diverse and depend on the type of debt. For example, debentures and charges are regulated under the Companies Act (Cap 106), while debt securities are governed by the Capital Markets Authority Act.

2.6 The Ugandan Loan Recovery Framework

2.6.1 An illustration of the statutes, codes and regulations affecting loan recovery in Uganda.

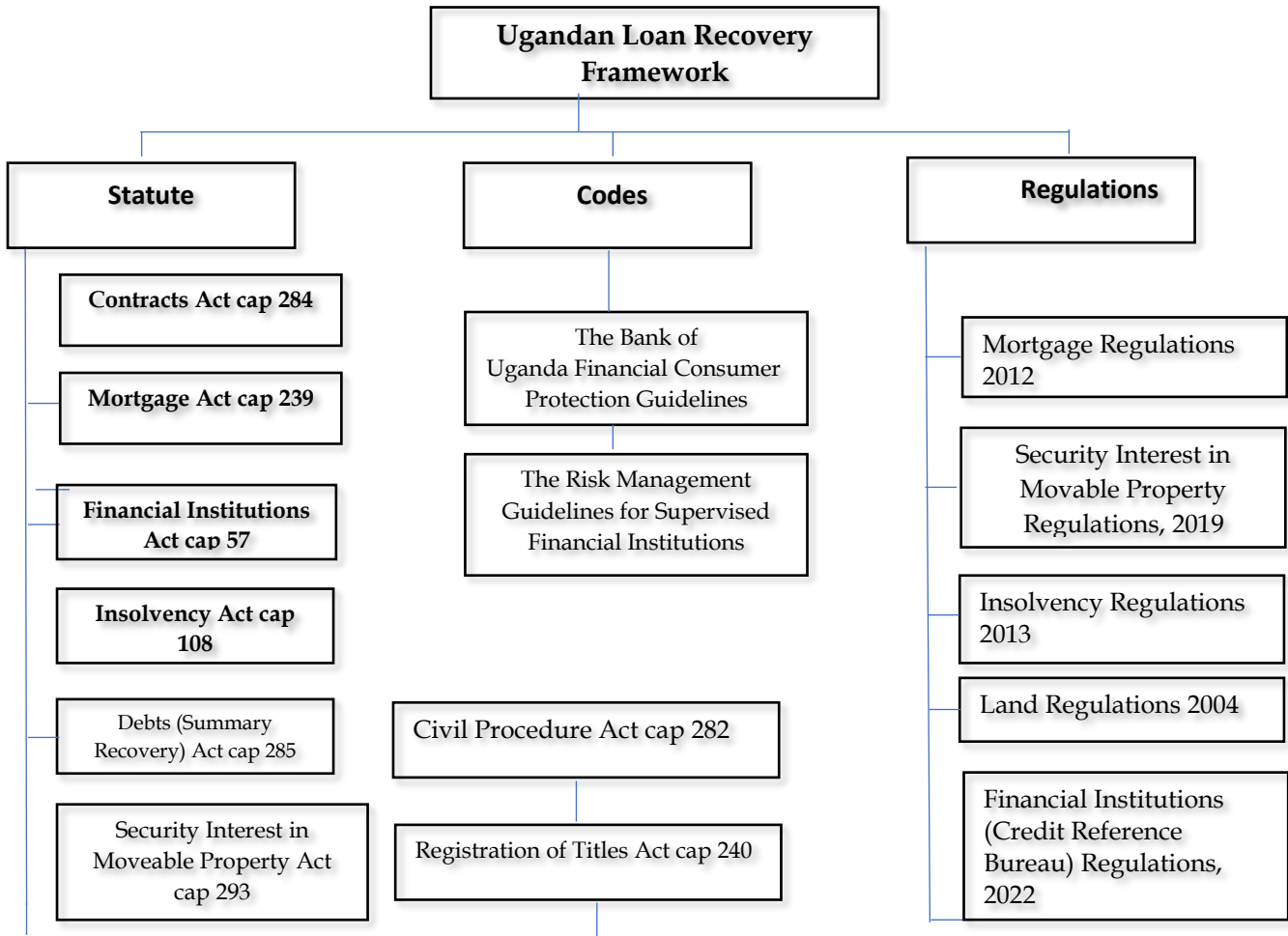


Fig. 1 Ugandan loan recovery legal framework

Loan recovery laws/policy 2

2.6.2 The Contracts Act cap 284

Repayment of a loan is a contractual obligation. Loan repayment is regulated by the Contracts Act because commercial banks enter into loan agreements with the borrower to establish the debt separately and then create security for the loan through another contract called a mortgage deed. The mortgage deed is also a contract regulated specifically for creating a security on the immovable property pledged by the borrower. A mortgage deed stipulates the terms and conditions of the repayment of the loan in addition to the creation of security on the mortgaged property. It is submitted that the Contracts Act also applies to mortgage deeds creating a security interest in immovable property. There are also contracts of guarantee which are regulated by the Contracts Act. The borrower may provide further assurance of repayment of the loan through third party arrangements such as providing a guarantor. A contract of guarantee refers to an agreement, whether oral or written, to discharge the liability of a third party in case of default. As was held in the case of *Alice Norah Mukasa v Centenary Bank Limited & Anor*⁹⁵, a guarantor assures the lender that they will pay in case the borrower fails to repay the loan. Similarly, third party mortgagees are also used to secure a loan for the borrower with security on the mortgaged property owned by a third party.

⁹⁵ High Court Civil Suit No.77 of 2010

2.6.3 The Mortgages Act cap 239

This is the principal legislation for mortgages in Uganda. This is the principal law governing the creation of security in immoveable property such as land in financial transactions involving a loan among others. The Act provides for the remedies of a mortgagor including the power of sale, possession, action on personal covenant, appointment of a receiver and foreclosure. The Mortgage Act provides for remedies to the mortgagee in case of default in the required standard and procedure in recovery of the principal sums on the mortgage.

The Act makes it mandatory to obtain spousal consent, failure of which renders the transaction illegal. For instance, the case of *Nakayaga vs. Fina Bank Ltd & Anor*⁹⁶ underscores critical issues regarding loan recovery and the requirement of spousal consent in mortgage transactions. In this case, the applicant, Nakayaga, was the wife of Mr. Nywevu John Bosco, the registered proprietor of a property that served as their matrimonial home. The property had been mortgaged without her consent, leading her to seek legal redress. The court's decision to grant an injunction allowed for the examination of the spousal consent issue, highlighting the legal protections intended to prevent one spouse from unilaterally encumbering the family home.

The absence of spousal consent can significantly complicate the enforcement of a mortgage, potentially rendering it void or unenforceable. This situation poses challenges for lenders in their efforts to recover loans, as illustrated in the Nakayaga case. If a

⁹⁶ *HCT-00-CCMA 471 OF 2014*

mortgage is contested on the grounds of lacking spousal consent, it may lead to prolonged legal disputes, delaying recovery processes and punishment to the lender as a form of deterrence. Spousal consent is a substantive compliance issue that results into substantive illegality where the lender, a commercial bank fails to obtain spousal consent.

2.6.3.1 The Mortgage regulations SI 2 of 2012

The Mortgage Regulations, 2012 (Statutory Instrument 2 of 2012) provide essential guidelines that establish clear framework and procedures governing mortgage transactions in Uganda. These regulations play a significant role in mitigating illegality within the mortgage sector. For instance, regulation 4, which mandates that all mortgages must be documented in a prescribed form, serves to prevent illegal agreements. Without proper documentation, the legitimacy of a mortgage can be called into question, exposing both lenders and borrowers to potential disputes and exploitation. By enforcing this requirement, the regulation ensures that all parties are protected under the law, thus reducing the risk of engaging in unlawful transactions.

Another critical regulation is regulation 7, which requires that mortgages be registered with the relevant authorities. This registration is crucial for establishing the legal standing of the mortgage and protecting the rights of the mortgagee.

In addition to addressing illegality, the regulations also provide a structured approach to debt recovery, which is vital for protecting the rights of both lenders and borrowers. Regulation 12 stipulates that a mortgagee must issue a notice of default to the mortgagor. This requirement ensures that borrowers are adequately informed of their default status before any recovery actions are initiated. Failure to provide such notice could render the subsequent recovery actions illegal, as the mortgagor would not have been given a fair opportunity to remedy the situation.

Moreover, regulation 15 grants mortgagors the right to redeem their property before foreclosure. This provision emphasizes the importance of fair treatment in debt recovery, ensuring that borrowers have a chance to settle their debts. By allowing this right, the regulation prevents aggressive and potentially illegal debt recovery tactics that could lead to unwarranted loss of property.

Finally, regulation 18 outlines the procedures that must be followed for lawful foreclosure, including requirements for property valuation and the sale process. Adhering to these procedures is essential for ensuring that the foreclosure process is conducted legally and transparently. If lenders fail to follow the prescribed steps, they risk engaging in illegal foreclosure practices, which can undermine the integrity of the mortgage.

2.6.4 The Security Interest in Moveable Property Act cap 293

This Act regulates creation of security in movable property as collateral for credit and of creating and perfecting security interests as well as prioritising, registering, enforcing, and searching the security interests created.

Pre-2019, the repealed Chattels Security Act, 2014 governed security in movable property but this legislation adopted a narrow view of property that could be used by individuals and businesses as security for credit.

The Security Interest in Movable Property Act cap 293 seeks to enhance the use of movable assets as collateral for credit in Uganda. Section 12 of SIMPA stipulates different methods of perfecting security interests in collateral. In essence, more than one method may be used to perfect a security interest and changed at any time and the security interest shall remain perfected regardless of a change in perfection, provided that at all times, the security remains perfected. The methods of perfection are: (1) entering a notice of the security interest in the register of Security Interest in Movable Property (registration); (b) taking possession of the collateral; and (c) taking control of a deposit account that is given as collateral.

By broadening the definition of acceptable collateral to include intangible assets like intellectual property, the Act addresses significant gaps in existing legislation. It provides clear procedures for the creation and perfection of security interests, making it easier for creditors to secure their loans and improving overall access to credit for businesses.

2.6.4.1 Effectiveness of Security Interests

According to the law, an agreement to create a security interest is typically effective according to its terms and enforceable against third parties⁹⁷. However, this principle is contingent on the legality of the underlying obligation. Should the debt be deemed illegal, the security interest may no longer hold water, leaving creditors without recourse. This highlights the importance of ensuring that all obligations are lawful, as any illegality can undermine the security framework intended to protect creditors.

When it comes to managing collateral, secured creditors are granted rights to use or operate the collateral to preserve its value or as directed by a court order. Yet, if the debt is illegal, any attempt to utilize the collateral could come under legal scrutiny. This complication arises from public policy considerations that discourage the enforcement of rights stemming from illegal agreements. Consequently, creditors may find themselves in a precarious position, with their rights to manage the collateral potentially challenged in court.

The Act also allows for the cancellation⁹⁸ of security interests when the underlying obligation is extinguished. In instances where a debt is found to be illegal, creditors may register a cancellation notice, effectively terminating their security interest. This provision could leave creditors vulnerable, as they may lose their claims without any compensation

⁹⁷ Section 5 of the Security interest in moveable property Act

⁹⁸ Section 24 of the Security interest in moveable property Act

or alternative recourse, further emphasizing the risks associated with engaging in transactions involving illegal debts.

Finally, the Act permits priority of security interests in scenarios where multiple creditors claim rights over the same collateral.⁹⁹ A perfected security interest is given priority over an unperfected one. However, if an obligation is deemed illegal, the perfection status of the security interest may be affected, altering its priority in the event of competing claims. This can lead to significant financial losses for creditors who believed their interests were securely protected, underscoring the necessity for caution when dealing with potentially illegal debts.

2.6.4.1 The Security Interest in Movable Property Regulations, 2019 (the SIMPA Regulations).

The Security Interest in Movable Property Regulation, 2019 provides a legal framework for creating, registering, and enforcing security interests in movable assets in Uganda. It aims to facilitate access to credit by allowing lenders to secure loans against movable property, thereby enhancing the effectiveness of the financial system.

⁹⁹ Section 30 of the Security Interest in Moveable Property Act

2.6.5 The Land Act cap 236

The Land Act Cap 236 is a critical piece of legislation governing land use and ownership in the jurisdiction. It addresses various aspects of land rights, including the management of family land, which is defined as the land that serves as the primary residence of a family and is essential for their sustenance.

Specifically, section 40 of the Land Act Cap 236 prohibits the mortgaging of family land except with the prior consent of a spouse. Section 40 of the Land Act cap 236 gives every spouse security of occupancy on family land which means a right of access to and a right of residence therein. It provides that every spouse shall in every case have the right to use the family land and to give or withhold his or her consent to any transaction referred to under section 40 which may affect his or her rights. Family land is defined to mean land on which is situated the ordinary residence of a family and inclusive of where the family derives sustenance.

The Act also restricts ownership of land by noncitizens is only permissible by way of lease under the Land Act. An example of breaching land restrictions amounts to substantive illegality. This was considered in the decision of *KCB Bank Limited v. Gichohi and 2 Others* (Civil Appeal 323 of 2023) This case involved mortgage of an illegal interest in land. In the *KCB Bank Limited* (the appellant) loaned M/s *Formula Feeds Limited* a sum of UGX 3.7 billion, secured by personal guarantees from the respondents (*Gichohi Ngari, Anne Wangui Gichohi, and Samson Gichohi Ngai*) and title deeds for 18 plots of land. The respondents later contested the enforceability of the mortgage and the guarantees, leading to a partial consent judgment where they admitted liability for UGX 2.159 billion.

Subsequent legal proceedings declared the mortgage deed null and void but upheld the enforceability of the personal guarantees. The Court of Appeal and subsequently the Supreme Court confirmed this decision, emphasizing that the leasehold titles should have been issued instead of *mailo* land titles due to the respondents being non-citizens.

2.6.5.1 The Land regulations 2004

Land regulations govern the use, ownership, and management of land within a jurisdiction. They establish the legal framework for land tenure, land transfers, and land rights, ensuring that land transactions comply with the law. These regulations typically cover aspects such as land registration, zoning, and environmental considerations, aiming to promote sustainable land use and protect the rights of landowners and users. In many jurisdictions, land regulations also address issues related to land disputes, providing mechanisms for resolution and enforcement of land rights.

Regulation 64 (3) of the Land regulations provides that consent of a spouse(s) required for any land transaction under the Act shall be in Form 41 specified in the First Schedule to these Regulations. Regulation 57 (8) (6) provides for the release of mortgage. It states that when the borrower has fulfilled the terms and conditions of a mortgage or a pledge the lender shall execute a release of the mortgage or pledge in Form 36 specified in the First Schedule to these Regulations.

Similarly, regulation 20 of the mortgage regulations 2012 provide for release of mortgage; a release or discharge of a mortgage by the mortgagee shall be in Form 3 in Schedule 2.

2.6.6 The Limitation Act cap 290

According to section 13 of the Limitation Act, the limitation period of a mortgage is 12 years. It reads that: *'When a mortgagee of land has been in possession of any of the mortgaged land for twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him or her.* Section 18 of the Act limits actions to recover money secured by a mortgage or charge, the limitation period is also 12 years. In section 18(2) of the Limitation Act does not render the mortgage illegal not the loan recovery process unlawful, it only renders the mortgagor's rights unenforceable to the extent that they cannot foreclose the mortgaged property

2.6.7 The Insolvency Act, Cap 108

The Insolvency Act cap 108 serves as a pivotal legal framework in Uganda for addressing insolvency issues. Its primary aim is to provide structured procedures for receivership, administration, liquidation, and bankruptcy. By consolidating previous laws, it enhances clarity and efficiency in handling insolvency matters, thereby protecting the interests of creditors while offering a pathway for debtors to rehabilitate or resolve their financial difficulties. This dual focus on creditors' rights and debtors' rehabilitation reflects a balanced approach to insolvency, promoting fairness in financial dealings.

A significant provision of the Act is the criteria for determining a debtor's inability to pay debts. It stipulates that a debtor is presumed unable to meet financial obligations if they fail to comply with a statutory demand or if their property is under the control of a

receiver. This presumption facilitates timely legal intervention and helps prevent further financial deterioration for both debtors and creditors. However, the Act also allows for other means of proving insolvency, which introduces flexibility in legal proceedings and acknowledges the complexities of financial situations.

The mechanism of statutory demands outlined in the Act serves as a critical tool for creditors. It provides a formal process for demanding payment, thereby creating a clear pathway towards initiating insolvency proceedings if the demand is ignored. This process is designed to encourage debtors to address their obligations promptly, reducing the likelihood of prolonged disputes. The time-sensitive nature of responding to a statutory demand emphasizes the urgency in resolving debts, highlighting the Act's goal of expediting insolvency resolutions.

2.4.7.1 The Insolvency Regulations 2013

Statutory Instrument No. 36 of 2013 establishes a comprehensive regulatory framework for insolvency in Uganda. It aims to manage the process of insolvency effectively, ensuring that the rights of creditors, employees, and other stakeholders are protected while promoting ethical financial practices.

One key regulation is regulation 12, which outlines the responsibilities of directors of companies in financial distress. This regulation mandates that directors must act in the best interests of the company and its creditors when a company is approaching insolvency. If directors fail to fulfil these duties, they can be held personally liable for the company's debts. This provision aims to prevent illegal actions, such as fraudulent

trading, where directors may continue to incur debts despite knowing the company cannot pay them, thereby protecting the integrity of the corporate structure.

Another important regulation is Regulation 18, which addresses the issue of fraudulent conveyances. This regulation explicitly prohibits any transfer of assets made with the intent to defraud creditors. If a debtor is found to have engaged in such conduct, the transfer can be voided, and the assets may be reclaimed for the benefit of the creditors. This serves as a strong deterrent against fraudulent behaviour, signalling that attempts to evade financial obligations will have serious consequences.

Furthermore, regulation 25 focuses on the treatment of employees in cases of insolvency. It establishes that employees should be prioritized in the distribution of any available assets. This provision underscores the public interest by ensuring that workers are protected, especially in times of financial distress. The regulation aims to alleviate the impact of insolvency on employees, who may otherwise suffer from unpaid wages and job losses.

2.6.8 The Registration of Titles Act, Cap 240

The Registration of Titles Act maintains its relevance in securing loans and recovering debts, despite the establishment of mortgages under a separate legal regime. The Act provides a clear framework for land registration, which is crucial for lenders seeking to secure loans against real estate. By ensuring that land titles are properly registered, the

Act facilitates the verification of ownership and the establishment of priority in claims, allowing lenders to confidently extend credit based on the value of the property.

In terms of recovering loans, the Act outlines procedures for dealing with land transactions, including the registration of transfers and the lodging of caveats. This ensures that lenders can take appropriate legal action to reclaim their investments in cases of default. Additionally, the provisions for caveats serve as a protective measure, allowing lenders to secure their interests against competing claims.

Moreover, the statutory protections for registered proprietors, along with clear guidelines for rectifying titles and resolving disputes, contribute to a more stable lending environment. Overall, while mortgages operate under a different framework, the Registration of Titles Act remains integral to the processes of securing and recovering loans.

2.6.9 The Financial Institutions Act

The minimum capital requirements outlined in section 11 of the Financial Institutions Act are pivotal for ensuring that banks maintain a robust financial foundation. Local banks are required to have a minimum paid-up capital of not less than five hundred million shillings, while foreign banks must have at least one billion shillings. This capital serves as a buffer against potential losses from non-performing loans, enabling banks to absorb shocks and continue operations even in challenging financial conditions. By establishing these thresholds, the Act aims to instil confidence among depositors and promote stability within the banking sector.

In conjunction with the capital requirements, section 12 mandates ongoing capital adequacy standards, requiring banks to maintain a core capital of at least 4% of total risk-adjusted assets. This regulation is essential for effective loan recovery since it compels banks to monitor their lending practices closely and manage the risks associated with their loan portfolios. By enforcing these standards, the Act ensures that banks are better equipped to handle defaults, thereby protecting the interests of both the institution and its depositors.

The provisions for liquidation in section 29 highlight the procedures that banks must follow if they choose to voluntarily cease operations. This section emphasizes the importance of prioritizing depositors' claims over other creditors, ensuring that the interests of customers are safeguarded during the winding down of a financial institution. The orderly liquidation process allows for the fair distribution of assets, which is crucial for recovering loans owed to the bank, while also adhering to legal obligations.

2.6.9.1 The Financial Institutions (Credit Reference Bureau) Regulations, 2022

The Financial Institutions (Credit Reference Bureau) Regulations, 2022 play a pivotal role in improving loan management and recovery processes in Uganda. By mandating the collection of both negative and positive credit information, these regulations enable lenders to make informed decisions based on a comprehensive view of a borrower's financial behavior. Access to detailed credit reports helps financial institutions assess the

creditworthiness of potential borrowers more accurately, reducing the risk of lending to high-risk individuals and promoting responsible lending practices.

In addition to enhancing credit assessments, the regulations facilitate proactive loan recovery mechanisms. Financial institutions are required to report non-performing loans to credit reference bureaus, which helps potential lenders identify borrowers with a history of defaults before extending new credit.

Furthermore, the regulations establish a framework that supports both consumer rights and lender accountability. Regulation 19 (2) guarantees borrowers' right to access their credit information and dispute inaccuracies, fostering transparency in the lending process. The regulation requires a credit reference bureau to seek the authorisation of the data subject or customer of a financial institution among others, to compile positive information regarding economic, financial and commercial obligations of such customer or data subject in order to determine their overall debt exposure and capacity to repay. This not only empowers consumers but also incentivizes financial institutions to maintain accurate records and ethical lending practices. By creating a structured environment for credit management, the regulations ultimately contribute to a healthier financial ecosystem that benefits both lenders and borrowers in Uganda.

2.6.10 The Civil Procedure Act, Cap 282

The Civil Procedure Act provides the legal framework for the conduct of civil litigation in a particular jurisdiction. It outlines the procedures for filing and managing civil suits, including rules for jurisdiction, service of process, pleadings, and the conduct of trials. The Act aims to ensure fair, efficient, and accessible judicial processes for resolving civil disputes. It includes provisions on various aspects such as evidence, judgment enforcement, and appeals, guiding the courts in administering justice. By establishing clear procedures, the Civil Procedure Act helps maintain order in the legal system and protects the rights of parties involved in civil matters.

Sections 19-22 of the Act outline how suits should be instituted and the procedural requirements for serving defendants. Proper service of documents is crucial in loan recovery cases to ensure that the debtor is informed of the claims against them. Adhering to these requirements helps prevent delays and potential dismissals due to procedural errors. Section 25 discusses how a court pronounces judgment after a case is heard. In loan recovery cases, the court may issue a decree for the amount owed, which can include interest up to the date of judgment. This legal recognition of the debt is essential for lenders to enforce their claims.

Section 26 allows the court to determine interest rates if the agreed-upon rate is deemed harsh. This provision is relevant in loan recovery cases where the lender seeks to enforce interest as part of the recovery process. Courts have the discretion to adjust rates to ensure fairness.

The provisions under Part III regarding execution (Sections 28-39) are critical for loan recovery. They detail how decrees can be enforced, including the attachment of property and arrest of judgment debtors. This legal framework ensures that lenders have mechanisms to recover their loans through the judicial system.

Section 35 outlines time limits for executing decrees, which is important for lenders to understand. If action is not taken within the specified time, recovery efforts may be barred. This emphasizes the need for lenders to act promptly in pursuing decrees.

Section 37 discusses the liability of legal representatives of deceased debtors. This is significant when a debtor dies before the loan is repaid, as it allows creditors to pursue recovery from the deceased's estate. This provision helps protect lenders' interests even in the event of a debtor's death.

The Civil Procedure Act provides a comprehensive framework for loan recovery through its detailed provisions on jurisdiction, procedural requirements, judgment enforcement, and limitations.

2.6.10.1 The Civil Procedure rules S.I. 71-1

The Civil Procedure rules provide the legal framework for the conduct of civil litigation in a particular jurisdiction. The rules provide for modes of institution of court action. The commercial bank can file a suit for recovery of a loan. For instance, a summary suit is a streamlined procedure for cases where the claim is straightforward and undisputed, allowing for quicker resolution. This is provided by Order 36 of the Civil Procedure Rules,

summary suits are often used in loan recovery cases where the borrower has acknowledged the debt or failed to respond within a stipulated time.

On the other hand, an ordinary plaint is a more comprehensive legal document used for cases that may involve complex issues, requiring detailed pleadings and defenses. This is provided by Order 5 Rule 1(2) of the Civil Procedure Rules. If the loan recovery involves disputed facts, such as the validity of the loan agreement or allegations of illegality, a plaintiff must file an ordinary plaint. This allows for a thorough examination of the case, including witness testimonies and evidence.

2.6.11 The Bills of Exchange Act cap 281

The Bills of Exchange Act plays a crucial role in the context of loan recovery in Uganda, providing a structured framework for the creation and enforcement of financial obligations. The Act defines what constitutes a bill of exchange and a promissory note, which are essential instruments in formalizing loans. For instance, section 2 of the Act specifies that a bill of exchange is an unconditional order in writing requiring payment of a sum certain, establishing a clear legal obligation for borrowers. This definition is foundational, as it transforms informal agreements into enforceable contracts, ensuring that both parties understand their rights and responsibilities.

Negotiability is another key feature of the Act, as outlined in section 7 of the Bill of Exchange Act. The Act details the rights and powers of the holder of a bill in Section 37. This section empowers the holder to initiate legal proceedings in their own name,

providing a straightforward mechanism for enforcing repayment. It simplifies the recovery process, enabling lenders to act promptly in the event of non-payment.

2.6.12 The Arbitration and Conciliation Act, Cap 5

Arbitration plays a crucial role in loan recovery for banks in Uganda by providing an efficient and binding alternative dispute resolution mechanism. It allows parties to resolve disputes outside the traditional court system, facilitating faster resolutions that benefit banks seeking timely loan recovery. Under the Arbitration and Conciliation Act, agreements to arbitrate can be incorporated into loan contracts, legitimizing the arbitration process and creating an obligation for both parties to adhere to it. Additionally, Section 5 enables a court to stay legal proceedings if an arbitration agreement exists, further streamlining the recovery process. However, it is essential to note that if the underlying loan agreement is illegal or contrary to public policy, as outlined in Section 34, the enforceability of any resulting arbitral award may be challenged. If a loan agreement is found to be illegal or contrary to public policy, a party can challenge the enforceability of an arbitral award arising from that agreement.

2.6.13 The Companies Act, Cap 106

The protections of loan recovery are available under the company law regime. It is however, only available to secured creditors against corporate entities. For instance, section 79 (2) of the Act provides that a debt incurred or security given in excess of the

limit is not invalid or ineffectual except in the case of express notice to the lender or the recipient of the security at the time when the debt was incurred or security given.

Section 18 of the Companies Act cap 106 provides for lifting the corporate veil. This means that if illegal acts are committed, including fraud or falling below statutory membership requirements, the court can disregard the company's separate legal personality. This allows creditors to pursue claims against individuals behind the company.

2.6.14 The Penal Code Act, Cap 128

Criminal laws become applicable when instances of fraud, criminal breach of trust, embezzlement, or money laundering are detected. In such situations, the role of investigative and law enforcement agencies becomes pivotal in addressing the criminal aspects of the borrower's actions.

Section 309 defines fraud and details penalties for those who deceive others to acquire property or money. If a debt collector misrepresents their authority or the consequences of failing to pay a debt, this could be classified as fraud.

Under Section 23, which addresses offenses against public order, any conduct that amounts to harassment or intimidation during debt collection can be prosecuted. This includes threatening behaviour or any acts intended to coerce a debtor unlawfully.

Section 124 addresses unlawful detention. If a debt collector unlawfully detains a debtor – either physically or by using coercive tactics – this is a criminal offense.

While banks and financial institutions must initiate and continue their efforts to recover loans, they are equally obligated to adhere to Bank of Uganda guidelines concerning potential criminal aspects of these accounts and internal accountability procedures.

2.6.15 Anti-Money Laundering Act, Cap 118

Banks need to conduct thorough due diligence to ensure that loans are not extended for illegal purposes. This is critical for compliance with anti-money laundering (AML) regulations and to mitigate financial risk.

2.7 Other legislations relevant to loan recovery

2.7.1 The Evidence (Bankers Books) Act

The Evidence (Bankers' Books) Act primarily governs the admissibility of evidence from bankers' books in legal proceedings. The Act allows for entries in a bank's books to be accepted as prima facie evidence. This means that if a bank needs to prove a loan transaction or recovery, it can present a copy of the relevant entry from its records as evidence in court. Banks are not compelled to produce their books in legal proceedings where they are not a party unless specifically ordered by the court. This protects banks from being forced to disclose sensitive information unless necessary.

The Evidence (Bankers Books) Act not specifically stipulating online/inter net books and transactions for evidence purposes. UBA in the reforms of the banking sector report recommends to align the Evidence Banker's Books Act to the Electronic Transactions Act, 2011. It also recommends to amend the Evidence Banker's Books Act to align it to the Electronic Transactions Act, 2011 which is to the effect that data shall not be denied

admissibility as evidence because it is in the form of electronic evidence/record. Electronic evidence recognised in the law, further boosting confidence in digital transactions¹⁰⁰.

2.7.2 Data Protection and Privacy Act

This law is critical in management of data processing and transfers by banks. There have been recommendations to review the Outsourcing Guidelines to Oblige service providers. Require SFIs to use tightly committal data security and Non-Disclosure Agreements (NDAs) with service providers which bind the service providers not to use the data for any other purpose than the requirements of the outsourcing services and in case of termination, the data should be retrieved or destroyed. The extreme cases of service providers flouting this agreement should impact on them, not the SFI¹⁰¹.

Section 2.10.2 of the BoU Outsourcing Guidelines does not clearly define what amounts to “major part of its data processing function” thus requiring a local SFI to have a robust back-up system and contingency plan in an acceptable jurisdiction outside Uganda. Clarify and align “data processing function”. The phrase “data processing function” should be well explained and aligned to the definition the Data Protection and Privacy Act (DPPA), or be deleted from the guidelines since data processing is now regulated under a specific legal framework (the DPPA).

¹⁰⁰ Uganda Bankers Association, *Proposed Regulatory Reforms in the Banking Sector* (FRIENDS Consult Ltd 2021) [https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20\(1\).pdf](https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20(1).pdf) accessed 27 March 2025.

¹⁰¹ Uganda Bankers Association, *Proposed Regulatory Reforms in the Banking Sector*

2.8 Conclusion

This chapter examined the concept of illegality and its implications for loan recovery in Uganda. By addressing both procedural and substantive illegality, the chapter highlights the importance of adhering to legal frameworks that protect the interests of all parties involved. The interplay of various laws, including the Contracts Act, Mortgages Act, and others, creates a comprehensive legal environment that facilitates responsible lending practices while safeguarding public interests.

The legal framework governing debt and loan recovery in Uganda is multifaceted, comprising various statutes and regulations that collectively aim to facilitate lending while protecting the rights of both lenders and borrowers. Central to this framework are the Contracts Act, the Mortgages Act, the Security Interest in Movable Property Act, and the Land Act, each playing a distinct role in shaping the obligations and rights associated with loan agreements and collateral.

The Contracts Act establishes the foundational principles of contracts, including loan agreements and guarantees, ensuring that obligations are clearly defined and enforceable. The Mortgages Act provides specific remedies and protections for mortgagees, emphasizing the importance of spousal consent to safeguard family property, which is crucial for both legal compliance and the protection of spouses' rights.

The Security Interest in Movable Property Act enhances access to credit by allowing a broader range of movable assets to be used as collateral, thereby stimulating economic growth, particularly for marginalized groups such as women and youth entrepreneurs. Meanwhile, the Land Act reinforces the necessity of consent in transactions involving family land, reflecting societal values regarding familial and property rights.

The Limitation Act and the Insolvency Act introduce time-bound measures and structured procedures for addressing defaults and insolvency, ensuring a balance between creditor rights and debtor rehabilitation. Furthermore, the Registration of Titles Act and the Civil Procedure Act provide essential frameworks for securing loans against real estate and facilitating efficient legal proceedings in debt recovery cases.

Additional regulations, such as the Financial Institutions (Credit Reference Bureau) Regulations, support informed lending practices and proactive debt recovery, enhancing transparency and accountability in the financial sector. The Mortgage Regulations and Land Regulations further delineate the processes for mortgage enforcement and land transactions, ensuring compliance with legal standards.

In summary, the interplay of these laws and regulations creates a robust legal environment for debt recovery in Uganda. However, the complexities arising from requirements such as spousal consent and the need for compliance with procedural norms underscore the importance for lenders to navigate these legal landscapes carefully. By adhering to the established legal frameworks, financial institutions can better secure their interests, promote responsible lending, and contribute to a more stable economic environment.

CHAPTER THREE

LOAN RECOVERY OPTIONS: REALISATION OF THE SECURITY IN MORTGAGE TRANSACTIONS

3.0 Introduction

This chapter provides the various mechanisms available to commercial banks to recovery loans in mortgage transactions, the various options established by the Mortgage Act to realise collateral and recover the loan where the borrower/mortgagor is in default.

3.1 Loan recovery options for banks

There are various recovery options by lenders specifically commercial banks which include receivership, mortgagee's power to lease, foreclosure, liquidation, taking possession.

Loan recovery is the process of pursuing loans which have not been repaid and managing to recover them¹⁰². In this study loan recovery means measures used by lenders to recover or receive payment in situations where borrowers have defaulted on their payment obligations. Recovering loans is not an easy task as clients will go out of their way to prove inaccessible to the lender (bank). There are various lawful loan recovery options.

¹⁰² Kiflu, E. (2015). Assessment of loan recovery performance in Development Bank of Ethiopia (Master's thesis, St. Mary's University). Addis Ababa, Ethiopia at pg. 6. Available at <http://repository.smuc.edu.et/bitstream/123456789/2232/1/ENDALE%20KIFLU.pdf> accessed 08/09/2024

Understanding the lawful options available for loan recovery is essential for banks to navigate this complex landscape. This chapter highlights the various methods employed by commercial banks to recover loans, highlighting their compliance with legal frameworks and best practices that guide these efforts. By examining the intricacies of loan recovery, this chapter seeks to provide valuable insights into how banks can enhance their recovery strategies while maintaining compliance with applicable laws.

The mortgagee may as an alternative or additional remedy to legal action realize the security under the mortgage by appointing a receiver, taking possession of the mortgaged land or by foreclosure. Realizing the collateral by bank is a process of ensuring compliance with the terms of an agreement or recovery of money owing. The action of realizing the collateral is triggered by default. This falls under Part V of the Mortgage Act- Powers of Mortgagee.

Section 18 of the Mortgage Act states that where money secured by a Mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment. Where the Mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage, the mortgagee may serve on the mortgagor a notice in writing of the default and require the mortgagor to rectify the default within forty-five working days.

Counsel Rezida Alex stated:

‘The notice required by sub-section (2) shall be in the prescribed form. The bank has to specify nature of default. If the default was payment of money, then the amount.

If the default is failure to perform any covenant, then specify the default and give 21 days to rectify.

If there is no rectification in the specified time then the mortgagee may exercise any of the other options under s.19. Indeed, s.18 is in effect a Mortgagors cure provision.'

The content above and that in 3.1.1 speak to the same issue so they should all be under one sub-heading

The lender must notify the mortgagor of the default and demand repayment. A demand letter, also known as a notice of demand and notice of default, are a crucial legal tool in the recovery of loans. The notice of default and demand notice serve to formally notify the debtor of the outstanding debt, outlining the specific amount owed and the circumstances under which the debt was incurred. The notice of default is a remedy in the sense that when the borrower repays, the matter is closed. On the other hand, it is also a procedural requirement to the exercise of all remedies available to a mortgagee in a loan recovery process.

Before a mortgagee can exercise this power, particularly outlined in section 26 of the Act, they are required to provide the mortgagor with notice. This notice must be in the prescribed format, known as Form 9, as specified in Schedule 2 of the Act. Court decisions have established *"a lawful demand notice has to be made which is unequivocal and unconditional and it is for all the moneys owing; and has to be in writing to create a default in payment"*¹⁰³.

Under the Mortgage Act, a notice on default is a crucial mechanism that allows the mortgagee to formally address a situation where the mortgagor fails to meet their

¹⁰³ Refer to General Parts (U) Ltd vs. Non-Performing Assets and Recovery Trust SCCA 05/1999

payment obligations. If the money secured by the mortgage is payable on demand, a written demand creates a default. When the mortgagor defaults on any payment of the principal, interest, or other obligations, the mortgagee may issue a notice requiring the mortgagor to rectify the default within 45 working days. This notice must clearly outline the nature and extent of the default, specify the amount due to rectify any non-payment (with at least 21 working days to make the payment), and indicate any actions required to remedy other covenant breaches. Furthermore, it informs the mortgagor that failure to address the default within the specified timeframe may result in the mortgagee exercising their remedies as outlined in the Act. Importantly, a mortgagor will be deemed in default if they do not fulfil their payment obligations within 30 days of the due date, thus activating the mortgagee's right to serve the notice. A bank lawyer¹⁰⁴ noted:

'It may seem unfair to the lender, it is just giving the borrower more time to pay the loan. The mortgagor has about 75 days and more due to notices that have to be complied. This is intended to protect the consumer such that they pay aback the mortgage moneys.'

Compliance is paramount when drafting a demand notice and notice of default. The notice required before a mortgagee takes possession of the mortgaged land, as stipulated in Regulation 26 and outlined in Form 10 of Schedule 2 of the Mortgage Act, is a critical component in the process of enforcing a mortgage. This notice serves to formally inform the mortgagor (the borrower) of the mortgagee's intention to take possession, ensuring that the borrower is made aware of the impending action and the reasons for it. By

¹⁰⁴ In an interview with a bank lawyer, 10th March, 2025

providing this notice, the mortgagee demonstrates compliance with legal obligations, which not only fosters transparency but also gives the mortgagor an opportunity to address any defaults before possession is enforced. This process is analogous to issuing a demand notice, as both serve to protect the rights of the debtor while allowing the creditor to pursue their legal remedies in a structured manner. In essence, these notices are integral to maintaining fairness in the creditor-debtor relationship and ensuring that all parties are adequately informed of their rights and obligations.

In the event the borrower complies by paying up the loan arrears, the borrower is released from the obligations of the mortgage. This release is also known as a 'discharge'¹⁰⁵, it occurs once the borrower has paid all amounts due, including any interest and fees, and has fulfilled all conditions outlined in the mortgage agreement. The act of repayment triggers the mortgagee's obligation to provide a formal discharge of the mortgage, which effectively removes any claims or liens on the property.

The Mortgage Act creates procedural standards for all modes of loan recovery. Failure to follow these standards results into irregular or procedural illegality being conceptualized in this study. For instance, in the case of *Otaok v. Equity Bank (U) Ltd*¹⁰⁶, the bank's repossession of a vehicle without prior notification was deemed illegal, highlighting the repercussions of neglecting procedural requirements. Such failures can not only result in

¹⁰⁵ Section 14. The right to discharge under the Mortgage Act and section 15 provides for the release of mortgage

¹⁰⁶ (Civil Suit No. 335 of 2010) [2012] UGCommC 122 (21 September 2012)

the invalidation of recovery actions but also expose creditors to potential legal challenges from debtors.

3.2 Options for Loan Recovery in Mortgage Transactions

3.2.1 Appointment of a Receiver

Where the mortgaged property is capable of generating income say by way of rent, receivership is a convenient mode of realising the security¹⁰⁷. A receiver has powers to enter possession of the mortgaged land to collect, by demand or action in the name of either the mortgagor or mortgagee, all the income, including arrears accruing to the mortgaged land and give a valid receipt therefor. The receiver is authorised to do all other things necessary for the proper management of the land including making of repair and improvements directed in writing by the mortgagee and approved by the mortgagor or court.

The power to appoint a receiver is vested in the mortgagor if there is an express covenant providing for such appointment in the mortgage. Where there is no such express covenant the power is vested in the Court upon application by the mortgagee. The appointment whether by the mortgagee or court must be in writing. Any appointment not in writing and which is not consistent with the provisions of the Mortgage Act is void and of no effect. The Supreme Court in **Grindlays Bank (U) Ltd. V. Edward Boaz**¹⁰⁸,

¹⁰⁷ Receivership is a legal process where a court appoints a receiver to manage the assets and liabilities of a company that is unable to meet its financial obligations.

¹⁰⁸ Civil Appeal No. 23 of 1992, Unreported

declared void a verbal appointment of a receiver by the mortgagee's lawyers since it contravened the requirement for written appointment prescribed in the Mortgage Decree. The purported sale by such a receiver was declared illegal and set aside.

A receiver can be appointed in any mortgage transaction where there is a default. However, the likelihood and ease of appointment may increase in transactions that also involve a debenture due to the additional rights conferred. Section 20(b) and 22(1) of the Mortgage Act provides for appointment of receiver by mortgagee where mortgagor is in default, Order 42 of the Civil Procedure rules also provides for court appointment of a receiver.

Receivership in Black's law dictionary is defined as the state or condition of being in control of a receiver¹⁰⁹. The main objectives are to protect the assets, reorganize the company, and ensure that creditors are paid.

Receivership serves as a key debt recovery option for banks, particularly in the context of secured lending. When a borrower defaults on a loan secured by a mortgage, the bank (mortgagee) may appoint a receiver to manage the mortgaged property and collect income generated from it. This process is governed by specific provisions, which include serving notice to the mortgagor, ensuring that the appointment is documented in writing, and allowing for the removal and replacement of the receiver as necessary. The receiver

¹⁰⁹ Black's law dictionary 9th Edition pg 1411

acts as the agent of the mortgagor, meaning that the mortgagor remains responsible for the receiver's actions unless otherwise stipulated in the mortgage agreement.

The appointment of a receiver in mortgage agreements represents a critical mechanism designed to protect the interests of mortgagees during instances of borrower default. Under the prevailing legal framework, the mortgagee is granted the implied right to appoint a receiver to manage the income generated from the mortgaged property. This provision serves as a safeguard, ensuring that the mortgagee can take proactive measures to mitigate financial losses while also providing the mortgagor with a structured process to rectify defaults.

3.2.2 Rules and standards on appointment of receivers

Before a receiver can be appointed, the mortgagee must serve a notice on the mortgagor, as stipulated in section 22(2) of the Mortgages Act, allowing fifteen working days for the borrower to respond. This procedural requirement underscores the principles of fairness and transparency in mortgage transactions. The appointment must be executed in writing, signed by the mortgagee, according to Section 22(3). This emphasis on documentation ensures that both parties are aware of their rights and obligations in the mortgage agreement.

3.2.3 Powers and Responsibilities of the Receiver

Once appointed, the receiver acts as the agent of the mortgagor, endowed with significant powers to collect income and manage the property effectively. This includes the authority to demand rents, recover income, and issue valid receipts. The receiver's role is paramount in maintaining the cash flow necessary to cover outstanding debts and preserve the value of the mortgaged asset. Furthermore, the receiver is responsible for managing expenses related to property maintenance, which is crucial for safeguarding the mortgagee's investment.

3.2.4 Remuneration and Financial Priorities

The receiver is entitled to retain a commission and reimburse expenses incurred during their tenure, as specified in section 22(8). The law stipulates a clear hierarchy for the application of funds received, prioritizing essential payments such as taxes, property maintenance, and other outgoings, as detailed in section 22(9). This structured approach not only ensures that the property remains viable but also aligns with the interests of both the mortgagee and the mortgagor. By addressing necessary expenses first, the receiver helps to mitigate risks associated with property deterioration, thereby enhancing the likelihood of recovering the outstanding loan.

The appointment of a receiver has substantial effects on the loan recovery process. By effectively managing and collecting income from the mortgaged property, the receiver plays a crucial role in minimizing the financial losses faced by the mortgagee. Additionally, the ability to undertake repairs and maintain the property ensures that its

value is preserved, which is essential in the event of foreclosure or sale. Overall, the receivership mechanism serves to create a more efficient and structured environment for recovering debts, balancing the rights and responsibilities of both parties involved.

The advantages of appointing a receiver include the ability to efficiently manage and preserve the value of the collateral, thereby maximizing recovery for the bank. The receiver has the authority to demand and recover income, providing a mechanism for generating cash flow to offset the outstanding debt. Additionally, the receiver can deduct their costs and expenses from the collected funds, which ensures that the process remains financially viable. This mechanism not only helps banks recoup losses but also provides a structured way to handle the asset while the borrower attempts to resolve the default situation.

The case of *Kabiito Karamagi v. Yanjian Uganda Company Limited*¹¹⁰ provides a compelling illustration of the complexities surrounding receivership. In this instance, Kabiito Karamagi was appointed as the Receiver/Manager of Spenco Services Limited after the company defaulted on its financial obligations and became insolvent. This appointment allowed him to manage the company's assets and navigate the intricacies of its liabilities, guided by legal frameworks such as the Insolvency Act and Civil Procedure Rules. A key aspect of the case involved the rights of creditors, particularly

¹¹⁰ *Kabiito Karamagi (Receiver/Manager of Spenco Services Limited in Receivership) & DFCU Bank Limited v. Yanjian Uganda Company Limited & Native Power Company Limited*, Miscellaneous Application No. 1202 of 2021 and Miscellaneous Cause No. 0032 of 2023 (Consolidated), High Court of Uganda, Commercial Division, Kampala, 11 August 2023.

Yanjian Uganda, which had secured a judgment against Spenco for unpaid work. The dispute also highlighted the implications of caveats and attachments, as Yanjian lodged a caveat on the properties to assert its claim. The court ultimately consolidated two applications to resolve overlapping issues regarding the management of assets under receivership, emphasizing that the existence of a mortgage does not exempt property from attachment. This ruling underscored the necessity for receivers to balance the interests of both the company and its creditors, reinforcing the legal obligations they must adhere to. Overall, the case serves as an important reference point for understanding the dynamics of corporate insolvency and the receivership process in Uganda.

3.3 Foreclosure and Consequent Sale

Foreclosure is the judicial process through which the mortgagor's equity of redemption is lost and the mortgaged property sold by order of Court. It is normally the remedy of the last resort when receivership and possession have failed to raise enough income to discharge the mortgage debt. The remedy for foreclosure is similar to a suit to recover money is also subject to the 12 year limitation period.¹¹¹ The effect of such a sale is to destroy the equity of redemption in the land and to constitute the mortgagee exercising the power of sale a trustee of the surplus proceeds, if any, after satisfying his own charge, first for the subsequent incumbrancers and ultimately for the mortgagor. The sale defeats all the rights of subsequent incumbrancers whose remedy then is only against the

¹¹¹ Limitation Act s.19

proceeds of the sale¹¹². Where there is a breach of the covenant to pay by the mortgagor, the mortgagee is entitled to apply to court to foreclose the mortgagor's right of redemption.

Foreclosure is a legal remedy that allows a mortgagee to terminate a mortgagor's right to redeem the mortgaged property due to default on the loan. Foreclosure¹¹³ was recognised in the decision of *Alliance Building Society vs. Shire*¹¹⁴ where it was held that *"as soon as the mortgage money has become due, that is, as soon as the date fixed for repayment has passed; the legal mortgagee has statutory power, which may be varied or extended by the parties or excluded all together, to sell the mortgaged property provided that the mortgage has been made by deed"*

In making loans with mortgage collateral, the lender has two basic options for asserting a claim if the borrower does not pay. Firstly, on the basis of a claim against the property secured by the mortgage, the bank may satisfy its claim through auctioning the mortgaged real estate in a judicial process established under the Civil Procedure Act. Secondly, through non-judicial foreclosure in accordance with procedures established in the Mortgage Act. In the case of *Ecumenical Church Loan Fund Uganda Ltd v Ways KM Uganda Ltd*¹¹⁵ the court addressed the issue of foreclosure and the sale of mortgaged property as a means of debt recovery. The plaintiff, Ecumenical Church Loan Fund,

¹¹² Peter Walubiri, 'Securities for Banker's Advances: Mortgages' in *Essays in African Banking Law and Practice* (2nd edn, 2009) at pg 396.

¹¹³ "Where the money secured by mortgage is payable by installments, the power of sale arises as soon as an installment is due and payable". - See *Twentieth Century Banking Corporation vs. Wilkinson* [1977] CH. 99. [1976] 3 ALL ER 361.

¹¹⁴ [1952] CH 581, 5 ALL ER 1033

¹¹⁵ (Civil Suit No 11 of 2014) 2015 UGCommC 4 (12 January 2015),

sought foreclosure on a mortgage due to the defendant's failure to repay a loan of UGX 40,000,000 within the stipulated time frame. The plaintiff's application was based on the provisions of the Mortgage Act and relevant Civil Procedure Rules concerning the foreclosure process.

In *Ecumenical Church Loan Fund Uganda Ltd v Ways KM Uganda Ltd*, the plaintiff argued for the foreclosure of the defendant's right to redeem the property, citing the defendant's failure to make repayments as per the loan agreement. However, the court found that the plaintiff had not adequately complied with the statutory requirements outlined in the Mortgage Act, specifically the need to provide a written notice of default and allow the mortgagor a period for rectification.

The court emphasized that for a foreclosure application to succeed, the mortgagee must demonstrate adherence to the legal procedures, including serving proper notices and affording the mortgagor the opportunity to rectify any defaults. In this instance, the absence of clear evidence regarding the service of demand notices and the lack of a physical address for the defendant led the court to dismiss the originating summons. The judge ruled that the plaintiff could not pursue foreclosure without fulfilling these mandatory obligations, thus reinforcing the legal safeguards designed to protect mortgagors from arbitrary actions by mortgagees. A legal officer with bank observed, 'For foreclosure, the mortgage deed must permit recourse a sale without resort to court. Where the deed is silent, the loan agreement must specifically provide for the sale of security. The property must be valued at least 6 months before the date of sale, the market value and forced sale value must be established.'

She further noted, 'After payment of the loan, of course you need to deposit the proceeds of sale to the bank account of the borrower. The bank will deduct all dues, principal, interest, taxes, penalties from the proceeds and the remainder can be left on the bank account for the borrower to use it as they wish.'

Regulation 11 (3) of the mortgage regulations provides that the valuation shall contain the current pictures of the property.

"One of the ways in which mortgagees – endeavor to ensure that they comply with the duty to sell for the market value is to ensure that they make an independent valuation of the property before selling it..... provided that reliance has been placed in a competent, qualified valuer... the mortgagee would have done all that was necessary"¹¹⁶.

Another requirement before a mortgagee can exercise its power to sell the mortgaged property is "to serve a notice to sell the mortgaged land on to the mortgagor in the prescribed form as required by S.26 (2) and (3) of the Mortgage Act and Regulations 25 of the Mortgagor Regulations, by giving the Mortgagor 21 working days. A copy of the said notice must be served on (a) a mortgagor; (b) any spouse (s) of the mortgagor in respect of any matrimonial home; (c) a surety; (d) an independent person as provided under the Act, or (e) in case of customary law; the children and the spouses(s)".

The Mortgage Act S.28 (2) and Regulation 8 (2) and (4) of the Mortgage Regulations, require advertisement of the sale of the mortgage by public auction, to be made by the mortgagee for at least thirty days.

¹¹⁶ [2002] EWCA CIV 1965 See also Textbook on Land Law, Judith Anne Mackenzie & Mary Philips 14th Edith P.457 paragraphs 15 24.10.4. The liability of the mortgagee is an equitable duty. – Refer to Raja vs. Auctine Group (a firm)

3.4 Taking Possession Of Mortgaged Land

The mortgagee's power to take possession of the mortgaged land is detailed in section 24 of the Mortgage Act. In the case of *Kehar Singh & Another v. B.D. Bhatt*¹¹⁷, where there has been a sale of the mortgaged property, the mortgagee has no right to take possession. The right to possession is exercisable against the mortgagor himself or any other person deriving interest from the mortgagor after the creation of the mortgage. Similarly to all other remedies available to a mortgagee this right to enter possession must first be exercised within the 12 years period of limitation. The mortgagee in possession is bound by leases, profits, and licenses entered into by the mortgagor after the mortgage. A mortgagee in possession shall apply all the monies received by him or her to the same payments and in the same order as apply to a receiver and as set out in section 2 of the Mortgage Act. After the specified period in section 19, and following a notice of at least five working days, the mortgagee may enter possession of the property. This provision allows the mortgagee to secure their investment by taking physical control of the property or asserting management over it through notices to lessees. The date of possession is marked by either the physical entry into the property or the first receipt of rent, as stated in section 24(3).

The power of a mortgagee to take possession of mortgaged land is a significant aspect of mortgage law, as outlined in section 24 of the Mortgages Act. This provision allows mortgagees to reclaim control over a property when a mortgagor defaults on their

¹¹⁷ [1962] EA 759

obligations. However, this power is not absolute and is subject to specific procedural requirements, which aim to balance the rights of the mortgagee and the mortgagor.

Before a mortgagee can take possession, they must serve a notice of at least five working days to the mortgagor, indicating their intention to do so.

Regulation 26. Taking possession of the mortgaged land
Before taking possession of the mortgaged land under section 24 of the Act, the mortgagee shall give notice to the mortgagor in Form 10 in Schedule 2

The notice required before a mortgagee takes possession of the mortgaged land, as stipulated in Regulation 26 and outlined in Form 10 of Schedule 2 of the Mortgages Act, is a critical component in the process of enforcing a mortgage. This notice serves to formally inform the mortgagor (the borrower) of the mortgagee's intention to take possession, ensuring that the borrower is made aware of the impending action and the reasons for it. By providing this notice, the mortgagee demonstrates compliance with legal obligations, which not only fosters transparency but also gives the mortgagor an opportunity to address any defaults before possession is enforced. This process is analogous to issuing a demand notice, as both serve to protect the rights of the debtor while allowing the creditor to pursue their legal remedies in a structured manner. In essence, these notices are integral to maintaining fairness in the creditor-debtor relationship and ensuring that all parties are adequately informed of their rights and obligations.

While the mortgagee's right to take possession is a powerful tool for loan recovery, it has significant implications for both parties involved. For the mortgagee, possession allows for the management of the property and the collection of rents or profits, which can mitigate losses from the defaulted loan. However, this power does not equate to full ownership or transfer of title; rather, it is a temporary measure to protect their interests until the debt is resolved.

For the mortgagor, being subject to possession can be distressing, as it limits their control over the property and can lead to financial instability. The mortgagee's right to manage the property and collect income places additional pressure on the mortgagor, especially if they are already facing financial difficulties. Moreover, the mortgagee remains liable for any actions that could impair the property's value, ensuring that they act prudently and in good faith. The provisions governing possession highlight that this action is not a full transfer of title nor a receivership arrangement. While a receiver has a broader mandate to manage income and expenses, the mortgagee's possession is specifically tied to the enforcement of the mortgage agreement. This distinction is crucial because it implies that the mortgagee must operate within the bounds of the law and the mortgage agreement.

Illegality may arise in several scenarios related to loan recovery. If a mortgagee takes possession without following the required notice period, or if they use excessive force

during physical entry, such actions could be deemed illegal. Furthermore, if a mortgagee mismanages the property or fails to account for profits appropriately, they could be held liable for damages incurred by the mortgagor.

In terminating the possession, the bank is required to issue a notice to withdraw from possession. The notice to withdraw from possession of the mortgaged land, as stated in Section 27 of the Mortgages Act, is typically issued by the mortgagee, which is usually the bank or financial institution that provided the mortgage loan. This notice, formatted as Form 11 in Schedule 2 of the Act, serves to formally inform the mortgagor (the borrower) that the mortgagee is relinquishing possession of the property.

The case of *Otaok versus Equity Bank (U) Ltd* serves as a pertinent example to explore the complexities and legal implications of repossession in debt recovery. In the case of *Otaok v Equity Bank (U) Ltd*, the plaintiff, Otaok Charles, entered into a leasing agreement to purchase a vehicle for his taxi business. After defaulting on his loan repayments, the bank repossessed and sold the vehicle without providing prior notice, leading to a legal dispute. This case underscores the importance of adhering to contractual obligations regarding notice periods and highlights the legal implications of failing to follow proper repossession procedures.

The issues raised in this case emphasize the necessity for banks to implement transparent and lawful repossession practices. The plaintiff's argument centered on the bank's failure to conduct a proper valuation and to advertise the vehicle before the sale, which are

critical to maximizing the asset's value. Moreover, the case illustrates the potential risks banks face if repossession is handled improperly, including costly litigation and reputational damage. By ensuring compliance with legal standards and considering alternatives to repossession, such as loan restructuring, banks can better navigate the complexities of debt recovery while maintaining positive relationships with their clients.

In the another High court decision in the case of *Eco Bank Uganda Limited v Kakooza Musa Trading Co. Ltd*¹¹⁸, the High Court of Uganda examined repossession as a method of debt recovery within the context of mortgage agreements. Following the Defendant's failure to repay the loan, the bank sought to foreclose on the mortgaged property. The court found that the bank had complied with the necessary legal requirements, including issuing a default notice, which the Defendant did not contest, thus implying acceptance of the claims regarding the debt.

The court's ruling affirmed Eco Bank's right to sell the mortgaged property to recover the outstanding debt of UGX 1,732,411,026. It highlighted that repossession serves as an effective tool for creditors, provided they adhere to legal procedures and give borrowers the opportunity to rectify defaults. By ordering the sale to be conducted through public auction, the court ensured transparency in the process. This case illustrates the balance

¹¹⁸ (HCT-00-LD-OS-0014-215) [2016] UGHCLD 3.)

between creditor rights and borrower responsibilities, emphasizing the importance of timely action by borrowers to protect their interests.

3.5 Leasing Mortgaged Land

According to section 20 (c) of the Mortgage Act, the mortgagee bank can lease the mortgaged land or where the mortgage is of a lease, sublease the same. In this context, the lease agreement is intended to raise income from the mortgaged land to repay the loan. Under section 20(c) of the Mortgage Act, if the mortgagor defaults on the mortgage, the mortgagee has the authority to lease the mortgaged land or sublease it if it pertains to a lease. This allows the lender to take control of the property to generate income.

If the mortgagor does not own the land but is instead leasing it, the mortgagor acts as the lessee under a lease agreement with the lessor, who owns the land. When the mortgagor defaults, the lender can enforce the mortgage agreement and take possession of the property. By doing so, the lender becomes the lessor, leasing the property to new tenants to recover the outstanding loan amount while managing the asset effectively.

Mortgagee's Power of Leasing

Under section 23(1) of the Mortgage Act, a mortgagee has the authority to grant leases for the mortgaged property unless the mortgage instrument explicitly states otherwise. This power includes accepting the surrender of any lease granted by either the mortgagee or the mortgagor. Prior to granting a lease, the mortgagee must serve a notice to the mortgagor, allowing fifteen working days for the borrower to respond, as specified in section 23(2) of the Mortgage Act. This requirement underscores the necessity for

transparency and fairness in the leasing process, providing the mortgagor an opportunity to address concerns.

3.5.1 Conditions and Limitations of Leasing

Every lease granted by the mortgagee must adhere to specific conditions outlined in Section 23(3). These include reserving the best rent reasonably obtainable, ensuring the lease term does not exceed fifteen years or the length of the mortgage, and incorporating reasonable terms that respect the interests of all parties involved. Notably, if a receiver has been appointed, the lease must include a declaration of that appointment, ensuring all parties are informed of the receiver's role. Furthermore, section 23(4) stipulates that a lease created by a mortgagee is not binding on any party holding a prior mortgage unless that party consents, thereby protecting the rights of higher-ranking creditors.

3.6 Court Action for Money Secured by Mortgage

The provisions of section 20 (1) -(3) of the Mortgage Act govern a mortgagee's action for money secured by a mortgage establish a structured approach to addressing defaults by the mortgagor. Specifically, the mortgagee can initiate legal proceedings under defined circumstances, such as when the mortgage deed stipulates that the entire amount becomes payable upon default, or when the mortgagor or surety is personally liable for repayment. This framework is designed to protect the interests of both parties, ensuring that the mortgagee has clear grounds for recovery while also providing safeguards for the mortgagor against unwarranted claims. To avoid illegality, it is crucial for mortgagees

to adhere strictly to the conditions outlined in the mortgage agreement, including the requirement to serve proper notices before commencing any legal action.

Where there is a judgment made in favour of the creditor, be it judgement by consent, summary judgement, default judgement or even a judgment given by the court after an opposed hearing or a trial, a creditor can enforce that judgement to recover what is owed to him by the debtor¹¹⁹. Enforcing judgments in mortgage cases is a crucial aspect of the law governing creditor-debtor relationships. When a creditor, such as a mortgage lender, obtains a judgment for unpaid debts, various legal mechanisms are available to enforce that judgment. These mechanisms are essential for ensuring creditors can recover what is owed while protecting debtors' rights.

Enforcing judgments in mortgage cases involves several legal mechanisms designed to ensure creditors can recover debts while protecting the rights of debtors. Key enforcement methods include writs of execution, garnishee orders, and civil imprisonment. A writ of execution allows creditors to seize and auction the debtor's property, while garnishee orders enable the freezing of assets held by third parties, such as banks. These methods, while effective, must adhere to legal protocols to prevent wrongful actions that could harm debtors unduly.

¹¹⁹ It is important to note that legal action is typically considered a last resort when all attempts to regularize the account have failed, or when the borrower is no longer financially capable of overcoming their financial distress.

Consent judgments and default judgments also play significant roles in the enforcement process. A consent judgment occurs when a debtor acknowledges liability, streamlining recovery efforts. In contrast, a default judgment is obtained when a debtor fails to respond to a summons, allowing creditors to act without the debtor's input. However, these processes must be conducted transparently and fairly; otherwise, they can lead to legal challenges and claims of injustice, particularly if debtors were not adequately notified or allowed to present their cases.

Creditors who engage in unlawful actions, such as improper seizures or coercive tactics, risk facing legal repercussions, including lawsuits and financial penalties. Moreover, such actions can damage a creditor's reputation, leading to a loss of public trust and potential long-term business consequences. Therefore, maintaining compliance with legal standards is crucial to uphold the integrity of the mortgage recovery process and ensure fairness for all parties involved.

Section 2 (9) of the Mortgage Act grants that a sum secured by a mortgage shall be deemed to be a civil debt recoverable summarily. Summary procedure is a special procedure that enables the court to dispose of unmeritorious and abusive claims at the preliminary stage of a judicial proceeding. According to Chauhanjnum¹²⁰

'Summary Judgment is described as a blunt instrument that can abruptly terminate litigation. While a Summary Judgment is not a substitute for regular trial, it is a tool that allows Courts to weed out cases that do not need a trial to be resolved. It also allows the Court to simplify

¹²⁰ Chauhanjnum 'Summary Judgment: A Robust Tool To Curb Unnecessary Trial'
<https://www.lexorbis.com/summary-judgment-a-robust-tool-to-curb-unnecessary-trial/> (accessed on 08/12/2022)

and streamline the cases so that trial is more efficient and focused on the areas of actual dispute.'

Summary Procedure is based on a liquidated demand¹²¹. According to Order 36 rule 2 of the Civil Procedure Rules, summary procedure is applicable in all suits: - a) where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest e.g. upon a contract, expressed or implied, inter alia. There are various interpretations of what amounts to a "liquidated demand.

3.7 Guarantors' Liability in Mortgage Recovery

There are other loan recovery options including the guarantor actions although a guarantee a special species of security for debt. It is supplementary to the mortgage transaction.

The Mortgages Act permits a mortgagee to sue for money secured by mortgage as against the a guarantor/surety by virtue of section 20(1) (c) of the Mortgage Act. The Act defines "surety" means a person who offers security in the form of money or money's worth to ensure the payment of any monies secured by a mortgage and includes a guarantor. Further guidance can be found in the Contracts Act cap 284 which provides for liability of guarantors. In section 71(1) of the Contracts Act, the liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract.). The principle of joint and several liabilities is crucial in this context, as it allows lenders to pursue either the principal debtor or the guarantor for the full amount owed, including any accrued interest and fees. This legal structure ensures that banks have multiple

¹²¹ Noah Sekabojja-Mawaggali (1991) thesis "*The Importance of Summary suits in Uganda*", Makerere University.

avenues for recovery, reinforcing the importance of understanding the implications of acting as a guarantor.¹²²

In practice, banks often require guarantors for mortgage agreements, particularly when dealing with borrowers perceived as high-risk. The inclusion of a guarantor serves as an additional layer of security for lenders¹²³, providing assurance that debts will be repaid even if the borrower defaults. Recourse to guarantor is not upon default but after exhausting recovery options, which may involve civil litigation or the enforced sale of mortgaged properties, it was considered in the case of Paul Kasagga and Anor v Barclays Bank (U) Ltd¹²⁴.

Furthermore, the legal right of indemnification allows guarantors who have settled debts to reclaim their losses from the principal debtor, ensuring that they are not left financially exposed (Stanbic Bank Limited v Cellular Galore & 2 others.¹²⁵

Loan recovery from guarantors in mortgage transactions involves several steps that banks must navigate meticulously. Initially, when a borrower defaults, the lender is typically required to issue a formal notice of default to the principal debtor, outlining the specifics of the default and the outstanding amount. This procedural step not only serves as a legal formality but also as a means of ensuring that the debtor is provided with an opportunity to rectify the situation. This may involve civil litigation, where the bank must present evidence of the default and the guarantor's obligation under the guarantee

¹²² Alice Norah Mukasa v Centenary Bank Limited & Anor -High Court Civil Suit No. 77 of 2010.

¹²³ Cristal Advocates. 2023. "Contracts of Guarantee: The Law and Practice in Uganda." Cristal Knowledge Series. Accessed December 31, 2024. <https://cristaladvocates.com/?mdocs-file=22439>.

¹²⁴ HCT-00-CC-MA 113 of 2008).

¹²⁵ High Court Civil Suit No. 50 of 2010

agreement. The legal process can often be lengthy and complex, underscoring the importance of well-drafted contracts that clearly define the terms of the guarantee, the extent of liability, and the rights of all parties involved.

3.8 Conclusion

There are several loan recovery options in mortgage transactions. The options by banks are triggered upon default on the repayment obligations by the borrower in a mortgage transaction. The options are remedial in nature and facilitate the loan recovery process by a mortgagee. Each of the loan recovery options commences with notices which signify procedural aspect of the recovery process, there are fundamental steps the banks take which are also procedural in nature to ensure legality and lawfulness of the recovery.

CHAPTER FOUR

ILLEGALITY AND IMPLICATIONS FOR LOAN RECOVERY IN MORTGAGE TRANSACTIONS

4.0 Introduction

This chapter highlights the implications of illegality on loan recovery of mortgages by commercial banks. Illegality can manifest in two primary forms: procedural and substantive. Procedural illegality refers to failures in following the requisite legal processes, such as inadequate notification, improper valuation, and lack of necessary consents. Substantive illegality, on the other hand, encompasses issues that undermine the foundational legality of the loan itself, including fraud, lac of spousal consent and unauthorized transactions.

The cost or impact of illegality can be gleaned from the case decisions whereby the bank is compelled to pay damages, pay costs, cancel the loan recovery, set aside the process and sometimes to risk loss of the mortgagee's rights.

Using the dataset of 27 cases decided by Ugandan courts of judicature accessed online through the Uganda Legal Information Institute website, the researcher assessed the implications of illegality from the holding of the court to show impact. Additionally, the general principles of illegality and how they impact on transactions were generally discussed to highlight the possible implications on loan recovery.

4.1 Legal Effects of Illegality on Mortgage Transactions

The effects of illegality are both legal and practical in the sense that the law provides legal consequences for instance unenforceability, forfeiture whereas the practical effects include litigation costs, reputation costs, cancellation by court order, suspension, injunctions and award of damages.

4.1.1 Loss of the Right to Realise the Security

Loss of the right to realize the security entails failure to exercise any of the powers of the mortgagee including appointment of receiver, leasing, possession and foreclosure. Loss of the right to realise security is a huge risk of a collateral that banks must avoid at all costs. Counsel Rezida¹²⁶ noted, 'realising the security is critical for mitigation of risk for lenders whereby collateral reduces the risk for lenders. If a borrower defaults, the lender can sell the collateral to recoup their losses. This makes lending more secure, especially for large sums of money. It is of note that collateral provides a fall back position in the event of default. It does not necessarily reduce risk and considering the time and cost it takes to realise collateral, many times it presents. Lenders may be more willing to provide higher amounts if they have collateral to fall back on. It helps to improve improved access to credit Collateral serves as a compensating factor for lenders when assessing credit risk.'

When the banks lend money, they book interest income and that is what contributes to their profits. When a borrower defaults, the banks lose interest income and their profit drops. At this point the collateral is not helpful to the lender. The banks try to mitigate the loss of default by realising the collateral. This is a lengthy process requiring notices,

¹²⁶ Presentation made to Bar Course Students of the Law Development Centre by Alex Rezida, Senior Partner, M/s Nangwala, Rezida & Co. Advocates on 13th March 2025.

valuation, sometimes court battles. When a bank sells the collateral, it is of note that the bank does not always recover the full amount of the defaulted loan. It always depends. This recovered amount is written back into the accounts of banks as recoveries and it helps offset the losses from loan defaults.

Generally, the doctrine of illegality impacts the ability to realise collateral, it deters the parties from benefitting from the transaction which is affected by illegality. Research shows that illegal transactions are unenforceable and courts cannot aid them.

In the execution proceedings in the case of *Formula Feeds Limited and Anor v. KCB Bank Uganda Limited and 2 Ors*¹²⁷ the High Court ruled that the sale of land by KCB Bank to Southgate Properties was illegal, as it occurred without proper notice and at an undervalued price. The court emphasized that the registration of the land in the names of non-Ugandan nationals was unlawful, as non-citizens cannot hold land under the mailo land tenure in Uganda. Consequently, the court set aside the sale, declared the execution of the decree unlawful, and ordered the refund of any proceeds from the sale, highlighting those illegal acts cannot be sanctioned by the court.

4.1.2 Void Transfer of Property under Illegal Mortgage

There are challenges to void transfer of title in property under an illegal transaction¹²⁸. The Supreme Court of Canada's decision in *Clark v. Hagor*¹²⁹ strongly supports the principle that no legal title can be transferred through an illegal transaction. In this case, the court ruled that if the consideration for a property conveyance is unlawful, the deed – no matter how properly executed – cannot transfer any valid estate. The dispute centered

¹²⁷ (Civil Miscellaneous Application No. 208 of 2020)

¹²⁸ Higgins, M. J. (1962). The transfer of property under illegal transactions. *The Cambridge Law Journal*, 21(1), 1-15. <https://doi.org/10.1111/j.1468-2230.1962.tb02198.x>

¹²⁹ (1898) 22 Can.sup.Ct.Rep. 510.

on an illegal mortgage, where the mortgagee had deeded the property back to the mortgagor in fee simple as part of the agreement.

The court emphasized that the validity of the mortgage depended on the legality of its consideration. Since the consideration – the deed conveying the property – was tied to an illegal and immoral transaction, the mortgage itself was void. Consequently, the deed and the estate it purported to transfer were also deemed null and void. This reasoning underscores the broader legal principle that courts will not enforce rights arising from unlawful agreements, ensuring that no party can benefit from an illegal exchange.

One key exception protects bona fide purchasers who acquire property for value and without notice of the original illegality¹³⁰. If a transferee under an illegal transaction later sells the property to an innocent party, the law may shield the new owner from claims by the original transferor or their successors. This exception balances the need to deter illegal agreements with the practical necessity of maintaining stability in property transactions, ensuring that those who act in good faith are not unjustly penalized for the misconduct of others.

Additionally, courts may allow claims against the original transferee or those who knowingly benefit from the illegal transaction, even while protecting innocent subsequent purchasers. This distinction ensures that while the initial illegal transfer

¹³⁰ Higgins, M. J. (1962). The transfer of property under illegal transactions. *The Cambridge Law Journal*, 21(1), 1-15. <https://doi.org/10.1111/j.1468-2230.1962.tb02198.x>

remains unenforceable, the legal consequences fall primarily on the wrongdoers rather than on unwitting third parties. By recognizing these exceptions, the law maintains its deterrent effect against illegality while preventing undue disruption to legitimate commercial dealings.

4.1.3 Criminal Sanctions and Penalties

The Mortgage Act creates criminal sanctions for fraud and commission of illegalities in mortgage transactions. Impersonation, forgery, and fraudulent misrepresentation in mortgage transactions are serious illegal offenses. Under the Act, impersonating a mortgagor's spouse, presenting a non-spouse as a spouse to a mortgagee, or forging documents to fulfill legal obligations are all criminal acts. These offenses undermine the integrity of mortgage agreements and can lead to significant financial harm. The penalties for such violations are severe, including fines ranging from 48 to 120 currency points and imprisonment for 24 to 60 months, or both. These strict consequences highlight the gravity of fraudulent behavior in mortgage dealings.

Another illegal act is the unauthorized purchase of mortgaged property in violation of Section 30 of the Act. This offense disrupts lawful mortgage processes and can deprive rightful owners of their property. Similarly, a mortgagee who sells mortgaged property in breach of their duty under Section 27(1) commits an offense, as they fail to act in the mortgagor's best interest. Both offenses carry heavy penalties, including fines and potential imprisonment, emphasizing the legal system's stance against such misconduct.

Additionally, a mortgagee's refusal or neglect to release a mortgage as required under Section 14 is illegal. This failure can unjustly burden the mortgagor and hinder their financial freedom. While the penalty for this offense is a fine of up to 200 currency points, the law ensures accountability to prevent abuse of power. These provisions collectively safeguard against fraudulent and unethical practices in mortgage transactions, ensuring fairness and legal compliance.

The impact of procedural illegality on loan recovery in mortgage transactions. In foreclosure cases, the procedural illegalities have no impact on the sale. In an interview with a bank lawyer, he noted: 'According to Mortgage regulation 16, a sale is not to be vitiated by irregularity.'

It is evident from the Mortgage Act that the law is silent on the effect of some procedural illegalities. This can be established from case decisions. The Act and the regulations do not specify what is irregular as to avoid confusion on which aspects of the loan recovery process are procedural illegality or substantive illegality, therefore, there may be injustices resulting in loss of credit or principal loan by the bank where the particular steps are treated to be material to the extent of vitiating the sale. This is not good news for some banks whose reputation is at stake.

In the case of mortgage recovery by appointment of receivers, it is evident that the appointment will be vitiated.

4.1.4 Substantive Illegality Effects in Mortgage Recovery

Substantive illegalities already tackled in Chapter 2 of the dissertation unwind the loan transaction. This involves actions that are fundamentally illegal in the actual loan transaction itself. These actions violate laws that are so serious that they can nullify the entire loan contract. For substantive illegality to be recognized, the illegal act usually

needs to be serious ("great turpitude"). This means the action must be significantly wrong to trigger legal consequences. These include money laundering, terrorism, failure to obtain spousal consent¹³¹, mortgage of land situated in a prohibited zone such as wetland¹³², mortgage of illegal interest by noncitizens etc.

An example of substantive illegality was contributed by by Munanura Kamuteera¹³³ who notes:

'The powers of courts to review mortgages have been expanded beyond the scope of the Mortgage Act. A mortgage will now be voided upon proof that it was obtained by the fraud, deceit, or misrepresentation of the mortgagee. This means that banks and other lenders must ensure that all mortgage transactions are free of any acts of fraud or misrepresentation on their part. Moreover, to the extent that the acts of the lenders' agents such as bank officers, valuers, advisors, and any other third parties acting on their behalf may be attributable to the lenders, additional caution must be taken to ensure that no aspect of the mortgage transaction is tainted with fraud.'

Munanura Kamuteera¹³⁴ further illustrates the effect of fraud which qualifies for substantive illegality using the case of *Cwezi Properties Limited v. Uganda Development Bank, Miscellaneous Application No. 1315 of 2022*, 'by this case, the High Court has expanded its mandate to void mortgages beyond that granted under the Mortgage Act. The Mortgage Act allows courts to review mortgages obtained through the fraud, deceit, or misrepresentation of the *mortgagor*. Until challenged and set aside, the position of law now as established in this case is that the High Court may, by virtue of its inherent powers, review and cancel a mortgage obtained through the fraud, deceit, or misrepresentation of the *mortgagee*'.

¹³¹ Mugalula J (2010) "Mortgaging Matrimonial Home: Unveiling the Law and Practice of Banks and other Financial Institutions in Uganda", Occasional Paper No.3/2010

¹³² KCB Bank Limited v. Gichohi and 2 Others (Civil Appeal 323 of 2023)

¹³³ Munanura Kamuteera, A. (2023, February 13). *The effect of fraud on mortgage transactions*. DLA Piper Africa. <https://www.dlapiperafrica.com/en/uganda/insights/2023/the-effect-of-fraud-on-mortgage-transactions.html>

¹³⁴ Munanura Kamuteera, A. (2023, February 13). *The effect of fraud on mortgage transactions*. DLA Piper Africa. <https://www.dlapiperafrica.com/en/uganda/insights/2023/the-effect-of-fraud-on-mortgage-transactions.html>

In *Cwezi Properties Limited v. Uganda Development Bank*¹³⁵, the applicant in this case sought a review of the mortgage executed between the parties on the premise that the respondent bank concealed material facts concerning the mortgaged property, particularly, a fraudulent alteration of the condominium plan. According to the applicant, the initial condominium development plan for the property registered in 2005 included a parking area and a swimming pool as part of the common area. The respondent financed the purchase of the property and executed a mortgage deed with the applicant in 2012. However, when the Applicant obtained the condominium titles from the respondent in 2021, the condominium plan for one of the blocks had been fraudulently altered by the previous owner to exclude those amenities.

The applicant alleged that the respondent fraudulently conspired or concealed the fact that the new condominium plan excluded the parking area and swimming pool, and sought a review of the mortgage granted in 2012 for having been secured through the fraud of the mortgagee.

In evaluating the evidence in this case, the court rejected the applicant's assertion that the respondent bank undertook the issuance of the condominium titles and concealed the fraudulent alteration of the condominium plan. The court observed that: (i) the registration of the original plan was done by the developer in 2005; (ii) any subsequent modifications to the property titles could only be done by the condominium corporation – of which the applicant was a member; (iii) the respondent was not party to the transaction between the applicant and the previous owner; and (iv) the applicant could not abdicate its responsibility as a purchaser to conduct due diligence during the purchase of a property to the respondent.

On that basis, the court concluded that it was insufficient for the applicant to merely allege that the respondent knew or ought to have known of the fraudulent modification

¹³⁵ Miscellaneous Application No. 1315 of 2022

of the condominium plan by the property's previous owner, and had failed to prove fraudulent concealment by the bank that would justify a cancellation of the mortgage.

Another significant area of illegality in mortgage agreements is the absence of spousal consent, which automatically invalidates the mortgage and releases the mortgage security. In the case of *Wamono Shem v. Equity Bank Uganda Ltd and Anor*¹³⁶, the court ruled that: he court held that 'a statutory declaration under section 5(3) imposes a duty on the mortgagee to obtain a marriage certificate... The duty to take reasonable steps by investigating whether the intending mortgagor is married or not is not satisfied merely by obtaining a statutory declaration from the intending mortgagor.' Furthermore, if the property is a matrimonial home, the bank must explain the mortgage terms to the spouse in the presence of an independent person, as required under the Mortgage Act."

A statutory declaration under section 5(3) imposes a duty on the mortgagee to obtain a marriage certificate. This duty requires the mortgagee, in this case, the first respondent, to take reasonable steps to determine whether the intending mortgagor is married and whether the property to be mortgaged is a matrimonial home. This provision does not apply if the mortgagor is unmarried.

Furthermore, a statutory declaration under subsection 3 must be obtained from the spouse or spouses of the mortgagor as proof of marriage. If it is claimed that the mortgagor is unmarried, the need for a statutory declaration does not arise. The obligation to take reasonable steps to investigate the marital status of the intending mortgagor cannot be met merely by obtaining a statutory declaration from the mortgagor.

If it is established that the property in question is a matrimonial home, as in the current case, the bank must ensure that it explains to Darius' wife, in the presence of an

¹³⁶ [2013] UGCommC 98

independent person, the terms and conditions of the mortgage, as required under section 6(a)(i) of the Mortgage Act. Additionally, the bank must inform Darius in writing that his spouse should seek independent advice regarding the mortgage terms, as mandated by section 6(1)(a)(ii) of the Mortgage Act.

An independent person, as defined in section 6(2) of the Mortgage Act, includes any government officer, justice of the peace, advocate, notary public, bank manager, minister of religion authorized to celebrate marriages, medical practitioner, or any other person authorized by the Minister through statutory instrument.

4.2 The Practical Effects of Illegality on Loan Recovery In Mortgage Transactions

4.2.1 Time and Cost Associated with Mortgagor Litigation

Some mortgage disputes in courts of law span for decades which keeps the lenders out of their money for a long time. Substantive or procedural illegality can lead to increased mortgagor litigation costs and operational inefficiencies. For example, cases like *Macdowell Food & Beverages Limited v. Stanbic Bank Uganda Limited* illustrate how procedural failures can elongate the recovery process, resulting in financial strain for creditors. A legal officer with bank¹³⁷ said:

‘The mortgagee is prohibited from buying the mortgage property on foreclosure.’ There are suits by mortgagors against the bank involving disclosure of information. It is of note that the litigations take long in courts of law which holds up the bank’s ability to realise the security and also the legal costs associated with the litigation are substantial.

¹³⁷ In an interview with a bank legal officer, dated 6th March 2025

In a presentation by Alex Rezida¹³⁸ delivered to Law Development centre on 13th March 2025; he noted that

‘Failure to disclose all the necessary information under the mortgage transaction can be treated as fraud. Nevertheless, court has recourse to section 4 of the Mortgage Act which places a duty on the mortgagee and mortgagor to disclose information.’

Injunctions. There are temporary injunctions and permanent injunctions that have the effect of preventing the bank from realising the security. Usually there is an underlying dispute, the major dispute between the bank and borrower could be founded on breach of contract by default on the mortgage obligations, it could be unlawful interest, illegality among others. The borrowers litigating raises issues that are procedural or substantive concerning the loan recovery by the bank. In the case of Solomon Champlain Lui & Anor. V. Stanbic Bank Uganda Limited¹³⁹, it was an application for injunction whose grounds were that the respondent bank’s mortgage deeds were illegal and unenforceable as the respondent breached the contract by applying illegal interest and unlawful debits. Secondly, the scheduled sale was illegal for want of a statutory demand and a notice of sale. The suit properties were in immediate danger of alienation since they were scheduled to be sold on the 2nd and 4th of March 2016 as the respondent's auctioneer has issued a notice of eviction lapsing on the 24th of February 2016. Thirdly, the applicants stood to suffer irreparable damage to which adequate compensation would not be sufficient if this order was not issued owing to the suit land's strategic location by the road side along Munyonyo and also because of scarcity of land in that area.

The court granted the injunction. However, the court decision highlights the aspects of illegality the mortgagor rely on to contest loan recovery by a bank.

¹³⁸ Presentation made to Bar Course Students of the Law Development Centre by Alex Rezida, Senior Partner, M/s Nangwala, Rezida & Co. Advocates on 13th March 2025.

¹³⁹ MISCELLANEOUS APPLICATION NO 766 OF 2016 [ARISING FROM CIVIL SUIT NO 592 OF 2016]

In this application, the court granted the injunction on the condition that the applicants should deposit with the respondent a sum of US\$ 287,159.1 representing about 30% of the demand of the respondent which deposit should be made within 45 days from the date of this order.

The time cost of mortgagor litigation affects the mortgagee bank. Procedural illegality prevents creditors from proceeding with recovery processes when the court finds absence or lack of adherence to the procedural requirements. Usually the suspension of recovery process is a result of the institution of court proceedings. The court actions have the effect of suspending the loan recovery process by mortgagee. Bank lawyers have found ways to mitigate the interruptions of court action by drafting no-recourse-to-court clauses in the settlement or consent judgement orders. In the case of Mubende Parents Limited versus Uganda Development Bank Limited, the procedural requirements are so fundamental that they can vitiate a sale of the mortgage security by the lender. In this case, there was a consent judgment between the plaintiff/borrower and the defendant bank which stayed the initial sale after it had advertised the sale of security. The plaintiff further defaulted on the consent judgment which pre-empted the bank to sell without further recourse to the procedural requirement of re-advertising.

The court found that in his cross examination DW2 confirmed that the 1st defendant did not re-advertise after the initial but rather proceeded by calling the bidders in the initial advert. The sale was based on the initial advert. In his re-examination he stated that it was because of the clause in the Consent Judgment which stated that "without further recourse to Court".

The court gave the ordinary interpretation of the clause would imply; "*no further suits, applications, proceedings etc to be brought to Court thereafter*", but would not exclude or waive the requirement for recourse to the Mortgage Act, which is the governing law.

The court found that the omission by the 1st defendant to comply with the procedural requirements stipulated under S.19 of the Mortgage Act, after a stay of the initial sale had been granted, invalidated the purported sale.

4.2.2 Review of Mortgage Transaction for Fraud or Illegality

A mortgagee's right to enforce a loan recovery may be set aside on grounds of fraud or illegality. An example is where a mortgage deed's validity is challenged for validity for not complying with section 115, 147(a) and 148 of the Registration of Titles Act cap 240. The case of *Nakamya v. DFCU Bank Limited and Another*¹⁴⁰ is illustrative. In this case, the plaintiff argued for invalidation of the mortgage on grounds that when the first respondent's Managing Director and Secretary executed the mortgage deed, they neither did so under power of attorney by the Bank and there was no execution thereof witnessed by any attesting witnesses as required by section 147(1)(a) of the RTA.

The plaintiff further argued that the signature of the mortgagor is contested for not having been in Latin character as required by section 148 of the RTA. The Appellant relied upon the decision in *General Parts (U) Ltd v Non-Performing Assets Recovery Trust (NPART)*¹⁴¹, that signatures to a mortgage that are not in Latin character would invalidate a mortgage deed. The court in dismissing the appeal found that the mortgage was validly executed.

This position was considered in the decision of *Fredrick J. K. Zaabwe v Orient Bank Ltd & 5 Others*¹⁴², where it was held that if a person is to be deprived of his property, then substantive justice requires that the law should have been followed in its entirety.

4.2.3 Compensatory Damages against the Mortgagee

¹⁴⁰ [2021] UGCA 59, Court of Appeal of Uganda, 23 August 2021

¹⁴¹ Supreme Court Civil Appeal No. 5 of 1999

¹⁴² Supreme Court Civil Appeal No. 4 of 2006

Damages are the pecuniary recompense given by process of law to a person for the actionable wrong that another has done him. The law presumes damage in respect of any unlawful act. The essence of this rule is that wherever there is a breach of a contract or any injury to a legally enforceable right or interest, nominal damages are recoverable even though the plaintiff may not be able to prove actual damage¹⁴³.

General damages, according to Lord Macnaghten in the oft-cited case of *Stroms v. Hutchinson*¹⁴⁴, are such as the law will presume to be the direct natural or probable consequence of the act complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly.

In the decision of *Mubende Parents School Limited versus Uganda Development Bank Limited*¹⁴⁵, the court made final orders to the effect that:

‘ the Plaintiff is awarded Ugx. 50,000,000/= in general damages to be paid jointly and severally by the defendants and that the Plaintiff is awarded Ugx. 10,000,000/= in exemplary damages to be paid jointly and severally by the defendants.’

4.2.4 Unlawfulness of Sale

Once an illegality is brought to the attention of court, it has the effect of invalidating the sale for being unlawful. It does however result in retransfer of legal title to a lawful

¹⁴³See *Ongom & Another v. Attorney-General* [1979] HCB 267; *Bhadelia Habib Ltd. v. Commissioner General, URA* [1997-2001] UCL 202; *Ssendi Edward v. Crown Beverages Ltd* [2005] 2 ULSR 7; *Karim Hirji v. Kakira Sugar Works Ltd.* [2005] 2 ULSR 60

See *Katureebe, B M, 'Principles Governing the Award of Damages in Civil Cases'* (Paper presented at the Induction Course of Newly Appointed Judges of High Court of Uganda, Entebbe Resort Beach Hotel, 18 June 2008).

https://www.academia.edu/4721796/Katureebe_paper_on_damages

¹⁴⁴ [1905] AC 115

¹⁴⁵ (Civil Suit No. 662 of 2015)

purchaser without notice of the illegality. In one of the cases reviewed in this study, the legality of bank sale in foreclosure was discussed in the case of Mubende Parents School Limited v Uganda Development Bank. In preliminary objections, the defendants said that since the matter being raised by Mubende Parents School had been raised in an earlier suit (HCCS No. 59 of 2015) which matter was resolved by mutual consent, which among others meant that Mubende Parents School had lost the right to re-litigate the case. The judge however dismissed the preliminary objections, saying they lacked merit as what was at trial was not the indebtedness but rather the illegal sale, the illegal appointment of the receivers and their subsequent negligent and unlawful misconduct’.

From the foregoing, it becomes necessary for the bank to watch out for illegalities as they may vitiate the sale and also impact on the indebtedness.

4.2.5 Invalidation of the Indebtedness/Mortgage

Illegality renders the loan transaction void and legally unenforceable. The subsequent efforts to enforce the mortgage or any loan repayment must also be nullified/invalidated. Substantive illegality as opposed to procedural illegality affects the fundamental legal validity of the mortgage or loan itself. This type of illegality occurs when the underlying transaction is marred by issues such as fraud, unauthorized dealings, or violations of statutory requirements.

In *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd*¹⁴⁶, the Mortgage law is similar to the Mortgage Act of Uganda. In this case, the respondent lent to the appellant the sum of \$132,600 secured by a mortgage over property belonging to the latter. On default in repayment by the appellant, the respondent brought an action to recover the loan. The appellant pleaded that the loan was illegal and void for contravention of the Banking Act 1959 (Cth.). The respondent was successful in enforcing the mortgage

¹⁴⁶ [1978] HCA 42; 139 CLR 410; 53 ALJR 1; 21 ALR 585

against the appellant in the trial court, the Court of Appeal of the Supreme Court of New South Wales and the High Court of Australia. The High Court held that the contract was "not rendered void, either expressly or impliedly, by the Act" . The intention of the legislature was not to vitiate such contracts but only to impose a heavy penalty upon the offender. The contract was found to be collateral to the breach of the statute. A contrary decision would have penalized the innocent depositors who kept their money in the respondent bank in good faith. Mason J. said: "In this case it is not for the court to hold that further consequences should flow, consequences in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent leaders or investors.

Mocatta J. in *Credit Lyonnais v. Barnard* was concerned with the consequences of prohibition of export of bills in foreign currency. Rejecting the defence of illegality his Lordship said:

‘Looking at the policy of the Exchange Control Act, 1947, which was plainly to protect the currency and not parties to bills of exchange ... I can find no justification for reaching the conclusion that by implication the result of the prohibited export of the accepted bills pending maturity renders subsequent enforcement of those bills upon dishonour in this country illegal. ‘

The case of *Christine Hope Kanyima versus Mercantile Credit Bank Limited and Chris Kanyima*¹⁴⁷ exemplifies the significant repercussions of substantive illegality. In this case, Christine Hope Kanyima, the applicant, and her husband, Chris Kanyima, were involved in a legal dispute over a property registered in Chris's name at Kyadondo Block 243 Plot 1116, Luzira, Kampala. Christine claimed this property was their matrimonial home, while Chris argued that their actual matrimonial home was in Rukungiri District. From 2014 to 2019, Chris secured multiple loans against the property without Christine’s

¹⁴⁷ Miscellaneous cause no. 0085 of 2021

consent, using an impostor to sign necessary documents. Christine only discovered these actions in August 2021, which led her to file an application for a review of the mortgages and cancellation of the agreements.

The High Court found that the property was not a matrimonial home since Christine had not lived there since moving to the UK in 2001. The court ruled that it also did not qualify as family land, as it was not the family's ordinary residence or source of sustenance. While fraud was established due to the use of an impostor's signature, the court deemed this fraud inconsequential to the mortgage's validity, resulting in the dismissal of Christine's application. Costs were awarded to the first respondent, Merchantile Credit Bank Limited, while no costs were awarded against Chris due to his fraudulent actions. The implications of substantive illegality are profound, as they directly undermine the enforceability of loans. Creditors may find themselves unable to recover funds, which can create considerable liquidity challenges and impact overall financial stability. Additionally, engaging in practices that lead to substantive illegality exposes creditors to legal risks, including potential penalties and sanctions.

4.2.6 Unjust Enrichment to the Borrower

If the loan transaction is found illegal, it may not be recovered by the bank resulting into total loss and unjust enrichment to the borrower. Giliker¹⁴⁸ reports that:

(Equally, the effect of such a finding is difficult to state clearly. At times, it will leave the parties to the transaction without any claim at law, but several complex exceptions have been developed by the courts to deal with the perceived injustice of refusing assistance to all claimants who may be innocently or collaterally involved in an illegal transaction. To extrapolate the current legal position in

¹⁴⁸ Giliker, Paul. "Restitution, Reform and Illegality: An End to Transactional Uncertainty?" *Singapore Journal of Legal Studies*, vol. 2001, pp. 102-129. Available at: <https://law.nus.edu.sg/sjls/wp-content/uploads/sites/14/2024/07/1717-2001-sjls-jul-102.pdf>.

relation to illegality is therefore a difficult, if not impossible, task. As Lord Goff remarked in the leading House of Lords case of *Tinsley v Milligan*¹⁴⁹ ‘the principle is not a principle of justice: it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation’.)

Given that illegality is not a principle of justice, it is likely that the bank which lends money will suffer the consequence of unjust enrichment. Enonchong notes that where a claim is defeated by the defence of illegality, the plaintiff loses everything. If a person supplies goods under a contract which was found to be illegal, the illegality may prevent him from recovering wither the contract price (in a contractual claim) or the value of the goods (in a restitutionary claim)¹⁵⁰. The consequence will be that the defendant will retain the goods for his own use and not pay for them, even though he may be just as guilty as the plaintiff. This is manifestly unjust as between the parties. Even Lord Mansfield who laid down the defence of illegality recognised that this result is ‘contrary to real justice’ between the parties.¹⁵¹ This policy of preventing injustice and windfall gains should also be taken into account as the policy of deterrence and protecting the integrity of the judicial system are not the only policy considerations.

4.3 Strategies to Mitigate Effects of Illegality in Loan Recovery

¹⁴⁹ [1994] 1 AC 340, 355.

¹⁵⁰ William Swadling, ‘The Role of Illegality in the English Law of Unjust Enrichment’ (2000) Oxford University Comparative Law Forum 5 <https://ouclf.law.ox.ac.uk/the-role-of-illegality-in-the-english-law-of-unjust-enrichment/>

¹⁵¹ *Holman v. Johnson* (1775) 1 Cowp. 341, 343

Regulatory and governance strategies play a critical role in addressing the challenges posed by illegality in mortgage loan recovery. These strategies not only establish a normative framework but also influence the relationships between principals (lenders) and agents (borrowers). By setting clear rules and standards, regulatory frameworks aim to constrain undesirable behaviors and ensure compliance with legal requirements.

The effectiveness of these strategies relies on their enforceability and the clarity of stipulated norms. They create a structured approach for evaluating behavior, fostering trust and cooperation in the loan recovery process. Legislative intervention is key, as it establishes the operational dynamics of mortgage agreements and recovery mechanisms.

In this context, robust regulatory frameworks are essential for mitigating the impact of illegality on mortgage loan recovery. They enhance legal compliance, protect the interests of stakeholders, and promote a stable financial environment, ensuring that both lenders and borrowers navigate the complexities of recovery within a secure legal context.

4.3.1 Regulatory Strategies

The commercial banks are able to avoid effects of illegality in loan recovery by following the standards and requirements of the statutory laws. Regulatory strategies serve a crucial normative function and, through substantive regulation, influence the relationships between principals (lenders) and agents (borrowers). These strategies aim to either constrain the behavior of the agent by establishing a framework for their actions or stipulate certain requirements prior to the formation of agent-principal relationships.

The effectiveness of regulatory strategies is contingent upon legislative intervention; their success relies on the enforceability of stipulated requirements and the ability to identify compliance with prescribed normative behaviors.

Good faith in section 4 of the Mortgage Act. To avoid the consequences associated with illegality in mortgage transactions, it is crucial for both mortgages and mortgagors to adhere to a regulatory strategies that ensure compliance with procedural requirements to avoid procedural illegality . This involves a mutual obligation to disclose all relevant information related to the mortgage, including financial status and property conditions. Failure to comply can result in significant legal consequences, including fines of 48 to 120 currency points and imprisonment ranging from 24 to 6 months. Therefore, implementing internal compliance mechanisms, such as regular training on disclosure obligations and maintaining thorough documentation, is essential for ensuring adherence to legal standards and fostering a secure transaction environment. The Act fails to mention what is relevant information to the mortgagor as far as loan recovery is concerned.

Best Practice to avoid procedural illegalities

The High Court in the case of Sendagire Stephen and anor v DFCU Bank Limited and anor¹⁵² provided some guidelines to mitigate procedural illegalities.

Transparency	The Bank should not act in secret and must operate with transparency in the foreclosure process.
Best Price	The Bank should strive to obtain the best possible price for the property during the sale.
Good Faith	The Bank must act in good faith throughout the foreclosure process.

¹⁵² HCCS No.26 of 2008

Property Valuation	The Bank should establish the current market value and forced sale value of the property before sale.
Forced Sale	The Bank should not sell under forced sale conditions or undervalue the property.
Notification to Borrower (Service of notice)	The Borrower must be notified before the property is advertised for sale.
Advertising the Property	The property should be advertised to attract potential buyers before the sale.
Mode of Sale	A public auction should be the preferred mode of sale due to its competitive nature.
Involvement of Borrower	If a private treaty sale occurs, the Borrower should be involved and given access to relevant information.

*Researcher's construct from the high court decision in the case of Sendagire Stephen and anor v DFCU Bank Limited and anor*¹⁵³

4.3.2 Independent Legal Advice

Banks in enforcement of mortgages conduct due diligence by way of seeking spousal consents, family consents and statutory declarations from loan applicants/mortgagors.

Mtui¹⁵⁴ in her study recommends that:

¹⁵³ HCCS No.26 of 2008

¹⁵⁴ Mtui, Y. V. (2019). *Enforcement of mortgages by commercial banks in circumstances influenced by undue influence: Analysis of the law and practice* (Master's thesis, Mzumbe University, Faculty of Law). Retrieved

‘ the spouse should have the opportunity to nominate her own legal advisor and seek independent legal advice. The legal advisor should hold a separate meeting with the wife without the husband or the lender present. The bank should provide the wife’s solicitor with the necessary financial information relating to the mortgage transaction. For example, details of the amount and terms of the facility, the purpose of the facility and the potential amount of the husband's indebtedness. The bank should obtain a written confirmation from the wife's solicitor stating that the nature and effect of the security documents have been fully explained to her together with their practical implication. This will keep the commercial banks in a safe place in case the borrower defaults, as the process of enforcement of mortgage will take place in a peaceful and clear manner since it was exercised in a reasonable and diligence care.’

Counsel Alex Rezida¹⁵⁵ in his presentation noted, ‘There are banks that are sensitive to protecting their reputation, those are the kind of considerations banks take into account in advising their clients. He further noted, ‘In reality, financial institutions and prudent lenders are typically reluctant to accept matrimonial homes as collateral due to the difficulties associated with foreclosure, which is often seen as nearly impossible. Dispossessing a family of their dwelling presents a significant political and social challenge. Consequently, for each advance of money or enhancement of an existing loan, fresh spousal consent is required, as highlighted in *High Court Land Division Civil Suit No. 201 of 2012, Samalie Katumba v. Stanbic Bank Ltd & Others* (Dr. Bashaija J.). Additionally,

from <https://scholar.mzumbe.ac.tz/server/api/core/bitstreams/64c1a4de-03d4-47bc-b845-30eea50e6abb/content>

¹⁵⁵ Presentation made to Bar Course Students of the Law Development Centre by Alex Rezida, Senior Partner, M/s Nangwala, Rezida & Co. Advocates on 13th March 2025.

when a mortgagor has more than one spouse, determining which spouse resides in the mortgaged matrimonial home introduces further complications and risks, as evidenced in *High Court Land Division Civil Suit No. 591 of 2013, Namayanja Mariam Kiwanuka v. Bank Ltd & Mohammed Ssebagala.*'

4.3.3 Consents and Declarations

The Mortgage Act S.5 provides for spousal consent, requiring that the mortgagor's spouse or spouses consent to mortgage their matrimonial home. Banks in enforcement of mortgages conduct due diligence by way of seeking spousal consents, family consents and statutory declarations from loan applicants/mortgagors.

Counsel Rezida shared insights about the requirements of spousal consent in mortgage transactions. The bank is required to reduce in writing the consents and signed by the spouse if married. Where the spouse is unmarried, they are supposed to give a statutory declaration to that effect. Matrimonial property is defined by case law to include that property that spouses choose to call home and which they jointly contributed to.¹⁵⁶ Well, it's a complex issue. In reality, financial institutions are cautious, and political leaders are often unwilling to accept matrimonial homes as collateral, primarily because foreclosure is nearly impossible. Dispossessing a family from their dwelling poses significant political hurdles. For any advance of money, even a refinancing of an existing loan, fresh spousal consent is required.

This was highlighted in the case of *Samalie Kitumba vs. Stanbic Bank Ltd*, where the complexities arise when one spouse claims rights over a mortgage involving a matrimonial home. Such situations increase the risks and challenges for lenders, particularly when multiple spouses assert their rights, as seen in the High Court Land Division case, *Namayanja Mariam Kiwanuka vs. Stanbic Bank Ltd*. These cases underscore the intricate legal and social dynamics that financial institutions must navigate when dealing with matrimonial properties.

Counsel Alex Rezida¹⁵⁷ noted, 'There are banks that are sensitive to protecting their reputation, those are the kind of considerations banks take into account in advising their

¹⁵⁶ Muwanga versus Kintu High court divorce Appeal no. 135 of 1997

¹⁵⁷ Presentation made to Bar Course Students of the Law Development Centre by Alex Rezida, Senior Partner, M/s Nangwala, Rezida & Co. Advocates on 13th March 2025.

clients. He further noted, 'In reality, financial institutions and prudent lenders are typically reluctant to accept matrimonial homes as collateral due to the difficulties associated with foreclosure, which is often seen as nearly impossible. Dispossessing a family of their dwelling presents a significant political and social challenge. Consequently, for each advance of money or enhancement of an existing loan, fresh spousal consent is required, as highlighted in *High Court Land Division Civil Suit No. 201 of 2012, Samalie Katumba v. Stanbic Bank Ltd & Others* (Dr. Bashaija J.). Additionally, when a mortgagor has more than one spouse, determining which spouse resides in the mortgaged matrimonial home introduces further complications and risks, as evidenced in *High Court Land Division Civil Suit No. 591 of 2013, Namayanja Mariam Kiwanuka v. Bank Ltd & Mohammed Ssebagala.*'

This leaves the mortgagee exposed to litigation risk when the mortgagor gives false or incomplete

information. S.38 of the Land Act states that every spouse shall enjoy security of occupancy on family land, which means a right to have access to it and to live on it. S.39 of the same Act provides that no person shall sell, exchange, transfer, pledge, mortgage, or lease family land without the consent of the spouse.

According to the Banking reforms report¹⁵⁸:

' There are polygamous marriages in Uganda. This creates legal challenges especially when a borrower does not disclose and obtain consent from all his/her spouses. There is also failure to disclose the existence of a spouse in monogamous marriages. This happens mostly in cases of traditional marriages. As a result, there is an increasing number of litigations where the spouse who was not disclosed and did not give

¹⁵⁸ Uganda Bankers Association. 2021. *Proposed Regulatory Reforms in the Banking Sector*. Kampala: FRIENDS Consult Ltd. Accessed March 27, 2025. [https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20\(1\).pdf](https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20(1).pdf) at pg 57

consent challenges the sale of a security in a civil suit.¹⁵⁹ Limit spousal consent requirement on collateralised property to matrimonial homes, and fully criminalise false or incomplete disclosure’

There are issues of spousal consent and false disclosures in mortgage transactions. Mortgage Act S.6 requires that the mortgagor’s spouse or spouses consent to mortgage of their matrimonial home. This leaves the mortgagee exposed to litigation risk when the mortgagees, in case of polygamous marriage the mortgagor gives false or incomplete information¹⁶⁰. Also, persons in monogamous marriages may not disclose their spouses especially where there are customary marriages.

The Bank Reforms report further states¹⁶¹:

‘While S. 39 of the Mortgage Act cap 239 makes it an offence to present a person who is not a spouse for spousal consent, it is not wide enough to cover all offences in respect of disclosure. Amend the Mortgage Act cap 239 to criminalise a mortgagor’s incomplete disclosure or disclosure of false or misleading information on spouses. Banks should be able to recover damages from the borrower who gives false information. Furthermore, amend the Mortgage Act cap 239 to require that only the signature of the spouse who lives in the mortgaged property at the time of the loan agreement will suffice. Spouses should thus be required to lodge caveats only in cases of matrimonial homes, not on any other kind of property.’

4.3.3 Registration of Mortgage Instrument

¹⁵⁹ Helen Kipsoy Wafula v Equity Bank (U) Ltd Civil Suit 153 of 2013 the threatened sale of the suit property by the 1st defendant was stopped on the grounds that her requisite spousal consent was not obtained for the mortgage. *Bukenya and another v Kirumira and 2 others Civil suit 220 of 2008*

¹⁶⁰ Uganda Bankers Association. 2021. *Proposed Regulatory Reforms in the Banking Sector*. Kampala: FRIENDS Consult Ltd. Accessed March 27, 2025. [https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20\(1\).pdf](https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20(1).pdf) at pg. 57

¹⁶¹ Uganda Bankers Association. 2021. *Proposed regulatory reforms in the Banking sector* supra

Section 54 of Registration of Titles Act provides that no instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render the land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be.

In the context of mortgage transaction, loan recovery and registration of mortgage interest are critical elements that ensure commercial banks can recover their funds in case of default. Three primary rationalizations have been provided for why some bank loans are backed by pledged collateral: (1) signalling, or overcoming information asymmetries and adverse selection problems, (2) managing credit risk, and (3) reducing moral hazard problems.

Leeth and Scott¹⁶² outline several other costs and benefits of collateral to both the borrowing and lending firm: reducing the lender's monitoring and administrative costs, reducing both the borrower's cost of preparing additional reports and the costs associated with more restrictive asset usage, reducing conflicts of interest between unsecured and secured claimants, and limiting the possible dilution of legal claims on a borrowing firm's assets. In the existing literature, there are many different theoretical models and empirical findings that either confirm or weaken the arguments for these rationalizations.

4.3.4 Compliance Department/Monitor in Recoveries

¹⁶² Leeth, J. and J. Scott, 1989. The incidence of secured debt: Evidence from the small business community, *Journal of Financial and Quantitative Analysis* 24, 379-393.

The idea of compliance departments is borrowed from the BoU Risk Management Guidelines, 2010 which state that ‘Supervised financial institutions are required to establish adequately staffed autonomous compliance departments/ divisions. UBA report on reforms in the banking sector suggests permitting effective Compliance function to exist without having a department dedicated to it for small banks, as long as the role profile is senior and independent enough. This will reduce the cost of risk governance and management. The report also recommends lowering cost of compliance without reducing effectiveness. The employment of compliance teams in loan recovery/mortgage enforcement will go a long way in reducing illegality in the process.

4.5 CONCLUSION

In conclusion, the implications of procedural and substantive illegality in loan recovery are profound, affecting the dynamics of creditor-debtor relationships and the overall integrity of the financial system. Procedural illegality can lead to the invalidation of recovery actions, costly litigation, and reputational damage for creditors, while substantive illegality threatens the very legitimacy of the loans themselves. The issue of procedural illegality can be gleaned in the case of **Otaok v. Equity Bank (U) Ltd**¹⁶³ whereby the bank’s repossession of a vehicle without prior notification was deemed illegal, highlighting the repercussions of neglecting procedural requirements. Such failures can not only result in the invalidation of recovery actions but also expose creditors to potential legal challenges from debtors.

It is imperative for creditors to implement robust compliance measures and uphold best practices in their recovery processes. By doing so, the banks not only protect their

¹⁶³ (Civil Suit No. 335 of 2010) [2012] UGCommC 122 (21 September 2012)

interests but also contribute to a more trustworthy and equitable financial landscape, ultimately benefiting all parties involved in the lending process.

CHAPTER FIVE

CONCLUSION, SUMMARY OF FINDINGS, RECOMMENDATIONS

5.0 Introduction

This chapter provides the conclusion, summary of findings and recommendations from the study.

5.1 Summary of Findings

The study sought to explore the loan recovery options available to commercial banks, assess the implications of illegality on loan recovery, and identify effective strategies to mitigate illegal acts or omissions in the recovery process. The key findings are as follows:

5.1.1 Objective 1 findings

The first objective involved determining the loan recovery options in mortgage transactions by commercial banks.

As highlighted in chapter two of the dissertation, the actions in mortgage transactions that are illegal were divided into two categories of substantive or procedural illegality. Some of the procedural steps in mortgage transactions such as notices were linked to procedural illegality whereas the substantive issues established by the Mortgage Act such as fraud, lack of spousal consent were found to be substantive illegality. Most of the cases reviewed reflected procedural illegality as the most prevalent via litigation. The study found that illegality significantly affects the loan recovery process, leading to potential loss of the right to realise the collateral with a resultant failure to utilise the loan recovery

options such as foreclosure by banks. The bank can still enforce its rights as an unsecured creditor even when the collateral is deemed out of reach for loan recovery.

The study revealed that when a bank loses its right to realise collateral, It results in loss of time and increases costs of loan recovery due to litigation by mortgagors. Substantive illegality impacts the bank's ability to use the collateral for instance mortgaging matrimonial property without spousal consent, however, the bank can retain its contractual rights where there is procedural illegality but does not lose its right to collateral.

5.1.2 Objective 2 findings:

The second objective of the study was to examine the nature and implications of illegality on loan recovery in mortgages. The findings of this objective are found in chapter three of the dissertation.

It was determined that commercial banks have several loan recovery options, but the effectiveness of these options is often compromised by procedural or substantive illegality. The research further identified that while commercial banks possess a variety of loan recovery options, their effectiveness is frequently undermined by both procedural and substantive illegality. Options such as litigation, arbitration, and negotiation are often compromised due to lapses in adherence to legal protocols, leading to delays and increased costs. Furthermore, the study indicated that banks may hesitate to pursue recovery options that could be perceived as aggressive or coercive, risking reputational

damage. This underscores the necessity for banks to enhance their operational frameworks and ensure that recovery strategies are legally sound and ethically implemented

5.1.3 Objective 3 findings:

This objective sought to explore strategies by banks to mitigate illegality. As discussed in chapter four of the dissertation, the objective was to propose recommendations to mitigate risk of loss resulting from illegality in loan recovery in mortgage transactions.

The results show that illegality has far-reaching implications on loan recovery and may result in total failure of recovery of the principal loan and interest thereof. The findings indicated that illegality not only jeopardizes the recovery of principal loans and interest but can also culminate in reputational damage and increased litigation costs for banks. The risks associated with illegality can lead to a total failure of recovery efforts, highlighting the need for proactive measures.

The findings further illustrate that the implications of illegality on loan recovery extend far beyond financial losses, potentially culminating in the total failure to recover both the principal and accrued interest. Illegality not only jeopardizes recovery efforts but also poses significant risks, including reputational harm and escalating litigation costs that can strain bank resources. The study emphasized that the pervasive risks associated with illegal practices necessitate proactive measures, such as comprehensive training for staff on legal compliance and ethical recovery practices. By fostering a culture of adherence to legal standards, banks can mitigate these risks and enhance their overall recovery success.

5.2 Recommendations

5.2.1 Adopt a Culture of Compliance by Bankers

The Banking staff must be the ambassador of the banking institution. They should exercise due care and lawfulness in their performance of duties. They should mitigate the risks associated with procedural illegality; commercial banks should establish robust loan recovery manuals that outline clear protocols for bank staff. These manuals should detail best practices for due diligence, compliance with legal requirements, and proper documentation processes.

5.2.2 Reforms on Spousal Consent and Disclosures

It is imperative for commercial banks to conduct a thorough review of spousal consents. The Mortgage Act should criminalize all mortgage laws' incomplete disclosure or misleading information on spouses.¹⁶⁴ Although s. 38 of the Mortgage Act cap 239 makes it an offence to present a person who is not a spouse for spousal consent, it is not wide enough to cover all offences in respect of disclosure. Spousal consent should be required only in matrimonial homes, not on any other kind of property¹⁶⁵.

According to UBA, it is critical to make mortgages more enforceable in a lawful way, to raise lender confidence and enhance appetite for lending to customers¹⁶⁶.

¹⁶⁴ Uganda Bankers Association. 2021. Proposed Regulatory Reforms in the Banking Sector. Kampala: FRIENDS Consult Ltd. Accessed March 27, 2025. [https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20\(1\).pdf](https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20(1).pdf). At pg 57

¹⁶⁵ Uganda Bankers Association. 2021. *Proposed Regulatory Reforms in the Banking Sector*. Kampala: FRIENDS Consult Ltd. Accessed March 27, 2025. [https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20\(1\).pdf](https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20(1).pdf).

¹⁶⁶ Uganda Bankers Association. 2021. *Proposed Regulatory Reforms in the Banking Sector*.

5.2.2 Risk Management in Loan Recoveries

It is imperative for commercial banks to conduct a thorough review of their risk management frameworks and recovery processes. This review should focus on identifying vulnerabilities related to illegality and developing strategies to address them. By integrating regular audits and compliance checks into their operational procedures, banks can enhance their ability to detect and prevent unlawful recovery practices, thereby preserving their reputation and fostering trust with clients.

5.2.3 Strengthen the Penal Sanctions for Fraud in Mortgaging Matrimonial Home

The Parliament of Uganda should increase the penalty for fraud by borrowers who manipulate and forge spousal consents. Borrowers should be encouraged to seek legal advice when entering loan agreements as a standard practice. The Mortgage Act limits obtaining independent legal advice to a spouse who gives their spousal consent to mortgage of a matrimonial home¹⁶⁷. It is however necessary to adopt seeking independent legal advice from legal professionals to help borrowers understand the terms of their agreements, identify potential issues of illegality, and explore available remedies. Access to legal counsel can empower borrowers to protect their interests and navigate complex legal landscapes.

5.2.4 Use of Compliance Notices

To strengthen loan recovery policies, banks should focus on developing, disseminating their loan recovery framework policies to ensure access to information and give notice to the borrowers on how the loan recovery process will be managed.

¹⁶⁷ See section 5 of the Mortgage Act on matrimonial home

5.2.5 Licensing of Creating Mortgages by Foreign Banks/Companies and Syndicates

The current Financial Institutions Act needs to clarify what international, non-Ugandan lender should be subjected to and what they should not especially in terms of creating foreign mortgages by foreign lenders/banks in Uganda.

According to the Proposed Regulatory Reforms in the Banking sector¹⁶⁸:

‘ In a growing economy with upcoming large ventures and limited means to finance them locally, syndicated lending is often a good solution. A typical arrangement is that a group of banks (including foreign ones) lend money to a borrower at the same time in a coordinated way, to enable project or venture build up and start operations. The banks in a syndicate cooperate with each other for the duration of the project, even if they are competitors. It is common for Ugandan banks to syndicate with regional or international banks in this regard. Recently, however, gaps in relation to syndicate lending were exposed where one or more of the lending parties is not a Uganda registered institution.’

Uganda Bankers Association in the *Proposed Regulatory Reforms in the Banking Sector report* gives an account of the decision in *Ham Enterprises v Diamond Trust Bank*¹⁶⁹

‘where the 2nd respondent admitted being licenced in Kenya but had conducted a lending business in Uganda, in syndicate with a Ugandan lender. The applicant contended that the 2nd respondent was carrying on business in Uganda without a licence under the Financial Institutions Act. The respondent contended that the applicant applied for a credit facility in Kenya, which was obtained in Kenya and transferred to his account in Uganda. The court stated that the 2nd respondent was a foreign bank. Section 117 of the Financial Institutions Act requires a foreign bank

¹⁶⁸ Uganda Bankers Association, Proposed Regulatory Reforms in the Banking Sector (FRIENDS Consult Ltd 2021) [https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20\(1\).pdf](https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20(1).pdf) accessed 27 March 2025.

¹⁶⁹ Misc. Application 654 of 2020

to seek authorisation of Bank of Uganda before it can engage in "financial services business" in Uganda (which is defined as taking deposits and lending). The court noted that the 1st applicant was an agent of a foreign bank, which contravened Financial Institutions Regulations No. 5. The court concluded that the respondents acted illegally, unethical and in breach of Trust. '

The merits of the case are not discussed but the UBA recommends an amendment of the Financial Institutions Act to clarify what international, non-Ugandan lender should be subjected to and what they should not.

5.2.6 Reforms on Notices

According to the UBA report¹⁷⁰, the Mortgage Act in relation to section 18 on service of notice of default which fails to clearly spell out types of service or conditions for validity of service. The report recommends as follows:

- i. Clarify what constitutes effective notice of default and service thereof - specify that the service should be at last address declared by mortgagee or online service like email, SMS, or recorded voice message.
- ii. Clarity to avoid diversion and delaying tactics around the issue of notice in foreclosure situations, further helping SFIs to lend more.

The report further calls for amendment of the Mortgage regulations to clarify that service of notice of default shall be made to the last known address disclosed. Service may also be affected online by email, SMS, recorded voice message or WhatsApp to last disclosed

¹⁷⁰ Uganda Bankers Association. 2021. *Proposed Regulatory Reforms in the Banking Sector*. Kampala: FRIENDS Consult Ltd. Accessed March 27, 2025. [https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20\(1\).pdf](https://ugandabankers.org/Banking-Sector-Regulatory-Reform-Report%20(1).pdf).

address. Service may also be affected by affixing notice of default on mortgaged property if the mortgagor is in possession or occupation¹⁷¹.

5.2.7 Establish a Specialised Debt Recovery Tribunal

There are several cases filed by banks against defaulters, and others filed by defaulters against banks. However, the disposal rate by courts is slow. At the unveiling of the Alternative Dispute Resolution Framework for the Banking and Finance Sector on March 23, 2019, in Kampala by the Bank of Uganda Deputy Governor, Louis Kasekende, said:

“It is estimated that, on average, commercial litigation requires four years to be completed. Delays of this magnitude are extremely costly for financial institutions ... This in turn raises the cost of credit or induces banks to curtail the volume of their lending.’

The creation of the Commercial court has not entirely resolved the issue of case backlogs at High Court. It is time to adopt the proposal by Kabiito-Karamagi to establish a specialized court for insolvency¹⁷². The author makes modification to this insolvency court by adding that it should also handle debt recoveries as a tribunal.

5.2.8 Towards a Loan Recovery Bill for consumer credit protection

The Parliament of Uganda should implement a domestic legislation that consolidates the Loan Recovery laws to enhance regulatory reforms for consumer credit protection.

¹⁷¹ Uganda Bankers Association. 2021. *Proposed Regulatory Reforms in the Banking Sector*.

¹⁷² Kabiito Karamagi, ‘Innovations and Salient Features of the Insolvency Act - Judge's Presentation’ (n.d.) <https://judiciary.go.ug/files/downloads/Inovations%20and%20Salient%20features%20of%20the%20Insolvency%20Act%20-%20Judge's%20presentation.pdf> accessed 27/03/2025

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APPENDICES

APPENDIX 1: RESEARCH BUDGET

ITEM	COST
Research Assistants 2	400,000
Recorder	150,000
Transcription costs	300,000
Data collection costs	500,000
Printing and dissemination	150,000
Total Estimated Budget:	1,500,000

APPENDIX 2: CONSENT FORM

Dear Participant,

This letter is a request for you to take part in a case study of four commercial banks investigating Illegality in debt recovery risk and consumer protection. You have been selected as a participant because of your involvement at this bank as an administrator, manager, or staff member. You will be one of about twenty four to be interviewed as part of the case study. This project is being conducted by Kabazzi Maurice Lwanga, an LLM candidate at the School of Law, Makerere University under the supervision of Prof. Winifred Kiryabwire Tarinyeba, to fulfill requirements for a Master of Laws.

If you decide to participate, you will be asked to take part in an interview via Zoom video-conference (or face-to-face if researcher is permitted to travel) and to be available via email for possible fact-checking. Questions will focus on your role at the bank and knowledge of the debt recovery law and policy. Your participation in this project will take approximately one hour. You must be 18 years of age or older to participate. The personal benefit to the study will include the opportunity to reflect broadly on the successes and challenges of debt recovery particularly in the context of the bank.

The societal benefit includes the public good resulting from a national approach to debt consumer protection and mitigation of Non-performing Loans. Risks are limited to potential personal discomfort in responding to certain interview questions. Your involvement in this project will be kept confidential. The finished product of this study will be published as a PhD dissertation. Thus your stories, anecdotes, and direct quotes may appear in print. Before beginning the interview, I will ask permission to record the interview. The recording will be deleted from my computer after three years.

Your participation is completely voluntary. You may skip any question that you do not wish to answer and you may discontinue at any time. This project has been acknowledged by the Research Ethics Committee of Makerere University. I hope that you will participate in this research project, as it could help us better understand debt recovery through a national comparison involving the commercial banks in Uganda.

In appreciation for your participation, I will enter your name into a drawing for a book of your choice which I will mail to you. If you have any questions about this research project, please feel free to contact me at 0700557017 or by e-mail at kabazzilwanga@gmail.com. If you would like to talk to someone other than the researcher about; (1) concerns regarding this study, (2) research participant rights, (3) research-related injuries, or (4) other human subjects' issues, please contact:

Prof. Winifred Tarinyeba Kiryabwire,

The supervisor of this project

Makerere University School of Law,

Telephone: +256- E-mail:

APPENDIX 3: LIST OF COMMERCIAL BANKS IN UGANDA

BANK NAME	WEBSITE
1. Absa Bank Uganda Limited	www.absa.co.ug
2. Bank of Africa Uganda Limited	www.boauganda.com
3. Bank of Baroda Uganda Limited	www.bankofbaroda.ug
4. Bank of India (Uganda) Limited	www.boiuganda.co.ug
5. Cairo International Bank Limited	cbu.co.ug
6. Centenary Rural Development Bank Limited	www.centenarybank.co.ug
7. Citibank Uganda Limited	www.citigroup.com/citi
8. DFCU Bank Limited	www.dfugroup.com
9. Diamond Trust Bank Uganda Limited	dtbu.dtbafrica.com
10. Ecobank Uganda Limited	www.ecobank.com
11. Equity Bank Uganda Limited	www.equitybankgroup.com
12. Exim Bank Uganda Limited	www.eximbank-ug.com
13. Finance Trust Bank Uganda Limited	www.financetrust.co.ug
14. Housing Finance Bank Uganda Limited	www.housingfinance.co.ug
15. I&M Bank (Uganda) Limited	www.imbankgroup.com
16. KCB Bank Uganda Limited	www.ug.kcbgroup.com
17. NCBA Bank Uganda Limited	www.ug.ncbagroup.com
18. Post Bank Limited	www.postbank.co.ug
19. Stanbic Bank Uganda Limited	www.stanbicbank.co.ug
20. Standard Chartered Bank Uganda Limited	www.sc.com/ug
21. Tropical Bank Limited	www.trobank.com
22. United Bank of Africa	www.ubauganda.com

Appendix 4 : Dataset of decided cases affecting commercial banks as defendants in mortgage dispute on ground of illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
1. Kanyima v Mercantile Credit Bank Limited and	Mercantile Credit Bank	Effect of fraud on mortgages	Substantive statutory illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
<p>Another (Miscellaneous Application 85 of 2021) [2023] UGCommC 42 (30 January 2023)</p>			
<p>2. Macdowell Food & Beverages Limited v. Stanbic Bank Uganda Limited & Myriad Investment Club Limited, Miscellaneous Application No. 568 of 2020 (arising from HCCS No. 222 of 2019).</p>	<p>Stanbic Bank</p>	<p>Insider transactions contrary to section 30 of the Mortgages Act</p> <p>Absence of a record of bids from a public Auction</p> <p>Purchase by employees of a mortgagee</p> <p>-Section 30 (51 of the Mortgage Act 2009 provides that where the mortgagee sells</p>	<p>Substantive illegality</p>

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
		the mortgaged land in contravention of this section, the sale shall be voidable at the option of the mortgagor.	
3. Sendagire Stephen and Nanyombi Gladys v DFCU Limited, Kabiito Karamagi and Kirumira Godfrey Kalule HCCS No. 26 of 2008.	DFCU Bank	Requirement to give notice, public advertisement of the security property, valuation of the mortgage property before sale by qualified and competent valuers Consent of the mortgagor to sale by private treaty	Procedural illegality
4. Alice Okiror & Michael Okiror V	No bank	Effect of failure to obtain spousal	Procedural illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
Global Capital Save 2004 Limited & Ben Kavuya H.C.C.S No. 149 of 2010		consent in mortgages	
5. Ham Enterprises Ltd, Kiggs International (U) Ltd, Hamis Kiggundu v. Diamond Trust Bank (U) Ltd & Diamond Trust Bank (K) Ltd Civil Appeal 13 of 2021 [2023] UGSC 15 (6 June 2023)	DTB Bank	That personal guarantees of directors of a borrower are directly enforceable even where the rest of the security documentation, specifically a mortgage deed, is found to be invalid and unenforceable.	Statutory illegality
6. <u>Formula Feeds & 3 Others vs KCB, SCCA 13 of 2020</u>	KCB Bank	o Illegal loan for illegal interest in land mortgaged by noncitizens	Statutory illegality
7. Belex Tours & Travel Ltd v. Crane	Crane Bank	o Illegality in failure to	Procedural illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
Bank Ltd & Anor Civil Appeal No. 071 OF 2009		conduct a proper valuation before sale of property	
8. Baitwa & 2 Others v. Standard Chartered Bank (U) Limited Miscellaneous Cause 70 of 2024 [2024] UGCommC 210 (23 July 2024)	Standard Chartered Bank	o Illegal and irregular advertisement of mortgaged property prior to service of notices of default on the applicants	Procedural illegality
9. <i>Otaok versus Equity Bank (U) Ltd</i>	Equity Bank	o The defendant bank repossessed and sold the vehicle without providing prior notice	Procedural illegality
10. Ochama v. Post Bank Uganda Ltd (Civil Suit No. 418	Post Bank	Dispute over loan recovery processes and the	Procedural illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
of 2016) [2016] UGCommC 98 (17 October 2016)		bank's compliance with statutory duties.	
11. Crane Bank (in receivership) v. Meera Investments & Anor Civil Appeal-2019/252 [2020] UGCA	Crane Bank	Transfer of illegal interest in land and failure to obtain consent before transfer by receiver	Procedural illegality
12. <i>Cwezi Properties Limited v. Uganda Development Bank Miscellaneous Application No. 1315 of 2022</i>	UDB	Fraud on mortgages	Substantive illegality
13. Letshego (U) Ltd vs Col. Felix Kulayigye	No Bank involved	Effect of sale by private treaty without consent of mortgagee	Procedural illegality
14. Meera Investments Ltd versus DFCU Bank	DFCU Bank (no loan involved but property sold of	Effect of failure to obtain consent of the lessor before transfer of property	Procedural illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
	Crane Bank (in receivership)		
15. Jeane Frances Nakamya v DFcu Bank Ltd & Anor, cAcA No.1o5 of 2o13	DFCU Bank	-Failure to conduct a valuation -Validity of mortgage for want of execution	Procedural illegality
16. Kyobutungi v Guma & Another (Civil Suit 846 of 2020) [2024] UGCommC 122	CERUDEB	Spousal consent	Procedural illegality
17. Bank of Africa Uganda v Ganyana & Anor (Civil Suit No. 477 of 2011) [2017] UGCommC 3 (24 February 2017)	Bank of Africa	Undervaluation of collateral security on sale	Substantive illegality
18. Excellent Assorted Manufacturers Ltd & Ephraim Ntaganda v. DFCU	DFCU Bank	Bank's audit report authored by an unlicensed and unqualified	Procedural illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
Bank Ltd & The Commissioner Land Registration Civil Suit No. 338 of 2017 (Uganda)		accountant under The Accountants Act	
19. Progressive Group of Schools Ltd & Ab'Mooti Investments Ltd & Kahiwa Erisa Amooti v. Barclays Bank of Uganda Ltd t/a ABSA Bank (U) Ltd & Luwi Anzi Academic Foundation Civil Appeal No. 349 of 2020 (Uganda)	ABSA bank	o Failure to conduct a pre-sale valuation and illegal eviction of school owners	Procedural illegality
20. Victoria Candles Limited v. Bank of Africa Uganda Limited Misc. Cause No. 0284 of 2023 (Uganda)	Bank of Africa	Assignment of debt payment o Failure to comply with the Anti- money laundering Act	Procedural illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
		in freezing of the applicant's Account and withholding its money was illegal	
21. Kabiito Karamagi (Receiver/Manager of Spencon Services Limited in Receivership) & DFCU Bank Limited v. Yanjian Uganda Company Limited & Native Power Company Limited	DFCU Bank	Issue: Dispute regarding the rights and obligations of parties in receivership and the enforcement of creditor rights.	
22. Tropical Bank -V- Were Muhwana (S.C.C.A No.4 Of 2011)	Tropical Bank	Registration of mortgages	Procedural illegality
23. Zaabwe v Orient Bank Ltd and 5 Others (Civil	Orient Bank	Fraud in mortgage transaction, want	Procedural and

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
Appeal 4 of 2006) [2007] UGSC 21 (10 July 2007)		of execution, abuse of powers of attorney and non-use of Latin characters in the mortgage deed	substantive illegality
24. KCB Bank Uganda Ltd vs Eddie Nsamba & Others, Civil Suit No.640 of 2013 decided in 2021 for instance.	KCB Bank	Illegal valuation by unauthorised valuer Fraudulent and wrongful valuation of collateral security	Substantive illegality
25. Meera Investment Limited vs DFCU Bank Ltd & Anor, CS 948 of 2017	DFCU Bank	Takeover and transfer of security without consent	Procedural illegality
26. Civil Appeal No.56 of 2015 Barclays Bank of Uganda Ltd vs Golf View Inn (U) Limited decided on the 4 th of August 2023	Barclays Bank	Debits exceeding the loan recovery amount	Substantive illegality

Case title & Citation	Bank involved	Issue under the mortgage/loan recovery	Nature of illegality
<p>27. EMERALD HOTEL LIMITED & 3 ORS -VERSUS - BARCLAYS BANK UGANDA LIMITED & 4 ORS (High Court Civil Suit No. 0170 of 2008) (Commercial Division).</p>	<p>Barclays Bank</p>	<p>Failure to make proper notice to the mortgagor in the appointment of receiver contested for illegality</p>	<p>Procedural illegality</p>
<p>28. ALP INVESTMENTS LIMITED VERSUS BANK OF INDIA (U) LIMITED ORIGINATING SUMMONS NO. 0001 OF 2024</p>	<p>Bank of India</p>	<p>Applicability of the mortgage regulations to a sale pursuant to a court order Regulation 11 of the Mortgage Regulations is mandatory and there is nothing that can be used to justify failing to value the property before any sale.</p>	<p>Procedural illegality</p>

APPENDIX 5: KEY INFORMANT INTERVIEW GUIDE

Below are a set of key questions that will guide interviews with some key stakeholders in the banking sector.

Policy makers (government e.g bank/loan officer, bank lawyer, Contract law expert, valuer, regulatory-enforcement authorities).

- a) What is your name and what do you do (where)?

This study is premised on the concept of illegal loan recovery which is in the interests of banks to avoid or mitigate. *What perspective do you contribute to this study? Of a loan recovery officer, a lawyer for bank, a lawyer for borrowers or expert on commercial transactions?*

- b) What types of loans do you know of?
- c) Do you consider a mortgage a loan and why?
- d) What options or modes do you know that can be used to recover loans?
- e) What due diligence steps can you take to ensure legality of loan transactions?
- f) What is the difference between legal and illegal loan?
- g) What is the benefit of prohibitions of illegal conduct in loan recovery?
- h) What is your understanding of illegality, how do you experience it and how does it affect debt recovery?
- a) What strategies can you think of to cure illegality or deter illegal conduct in loan recoveries?
- b) Do you think there is need for consolidation of the law on debt or loans?
- a) What measures can be taken to mitigate the risk of loss arising from an illegal?
- b) How do you think a commercial bank should avoid illegality in debt recovery processes?
- c) Do you think adherence to the rule of law contributes to the success of loan recovery by the bank?
- d) What aspects of loan recovery measures do you think are most pressing for reforms under the Mortgage Act?

APPENDIX 6: Loan recovery options diagram below:



Source: from PwC. (2021). *Emerging tax and legal trends in debt recovery management*. Retrieved from <https://www.pwc.com/ug/en/assets/pdf/debt-recovery-webinar-presentation.pdf>