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A critical review of the Mortgage Bill 2007

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The Mortgage Bill 2007 aims to consolidate Ugandan mortgage law now dotted between the Mortgage Act, Registration of Titles Act and Land Act. It also seeks to introduce several innovations.

The good news

A consolidation of the law is of welcome. Some of the other changes proposed are:

Extension of mortgages to customary land

The Bill extends to mortgages to land held under customary tenure. Legal mortgages are currently restricted to land registered under the Registration of Titles Act. With customary tenure as the most common form of land holding in the agricultural areas, this proposal is welcome.

Protection of the matrimonial home

The Land Act gives every spouse security of occupancy on family land and requires prior spousal consent for dealings with family land, rather vaguely defined as land on which is situated the ordinary residence of a family and from which the family derives sustenance; which the family voluntarily agrees shall be treated as such; or which is treated as family land according to the norms, culture, customs, traditions or religion of the family.

Mortgagees have therefore imposed a blanket requirement for consent for their married borrowers.

The Bill seeks to restrict spousal consent to the matrimonial home defined as a building or part of a building in which a husband and wife (or wives), and their children, if any, ordinarily reside together. Unfortunately the Bill does not

repeal the Land Act provisions on spousal consent.

Transfer of mortgages

The Bill provides for the transfer of mortgages by both the mortgagor and importantly the mortgagee. Hopefully this will pave the way for securitization to take our finance industry to another level. The tax implications of this are not addressed.

Tacking

The Bill makes express provision for tacking of mortgages, allowing the lender to increase or decrease the amounts under a mortgage. Tax implications are again not addressed and the mechanics of this process are unclear.

Reinforcement of the equity of redemption

The Bill underscores the equity of redemption and criminalizes the current practice of non-bank lenders requiring the execution of a transfer deed alongside a mortgage.

The bad news

Court's general powers to grant relief to mortgagor

The Bill gives the court general powers to grant relief against a mortgagee realizing a mortgage. The court may cancel, vary, suspend or postpone the remedy sought by the mortgagee for a period it considers reasonable or extend the time for a mortgagor's compliance with a default notice. No grounds are specified for exercising these powers and it would appear that the court could even act out of compassion.

Coupled with this is the power of the court to re-open a mortgage that has been obtained by fraud, deceit, misrepresentation of undue influence, or any other unconscionable conduct by a third party.

While some of these provisions are simply restatements of the Common Law, taken together they simply throw open the doors to the courthouse for all manner of challenges to mortgages, with or without foundation.

If passed into law, this will severely damage the banking industry, already under pressure from the Central Bank's tight loss-provisioning requirements under the Financial Institutions Act 2004.

Voiding of undervalue sales

To curb industry abuses, the Bill makes void any sale of mortgaged property at a price "25% or more below the average price at which comparable interests in the land of the same character and quality are being sold in the open market". With Uganda's overly customized developments it is difficult to establish an average price even in the same neighbourhood. Restricted time periods for sale naturally produce greatly depressed prices.

True the ill exists, but the prescription is wrong. The focus should be on ensuring that the property is widely advertised, preferably with a picture in a newspaper of wide circulation. The market will then speak for itself. The mortgagor remains at liberty to sue the mortgagee for undervalue sales while the purchaser of the security is allowed quiet possession.

Change of interest rates

The Bill provides for 15 working days' notice, to be served personally on the borrower, of any change of interest rates under a mortgage. Market practice has been to peg the interest rate to the bank's base lending rate and to advertise any changes in the base rate, coupled with provisions in the mortgage deed giving validity to these interest rate changes. The proposed requirement may prove expensive and onerous.

Increased notice periods

From a 30-day default notice period, the Bill now prescribes 21 working days coupled with five to 15 working days' additional notice depending on the remedy pursued by the mortgagee. No provision is made for the period of advertising in the event of sale of the mort-

gaged property. The current convention has been a 30-day advertising period for immovable property.

Missing prescribed forms

The Bill provides for various notices to be in the form prescribed. The schedule to the Bill however does not contain these forms. Also missing is the form of a mortgage deed currently prescribed in the 11th Schedule of the Registration of Titles Act.

Duty to explain to a mortgagor

The Bill places the lender under a duty to explain to a mortgagor the terms of the mortgage. While this is welcome given Uganda's high illiteracy and the complexity of mortgage deeds, the troubling feature here is the vague requirement for "genuine" and informed spousal consent. Does a wife anxious to please her debt-ridden husband give "genuine" consent?

A warning from across the border

Tanzania has seen the chilling effect of such heavy mortgagor protection on its mortgage industry and is moving amendments to its Land Amendment Act. At a time that Uganda is seeking prosperity for all, seeing increased investment in the housing sector and more Banks introducing home loans, heavy mortgagor protection cannot foster a climate conducive to broad access to credit.

Lenders will review their mortgage business and may retreat to the zero-risk government securities.

Kampala is bracing itself for the Commonwealth Heads of Government Meeting, scheduled to roll into town in November this year. Constructors are working overtime as Uganda gets ready to host the prestigious event with many big hotels and apartment blocks being built to house the 30 presidents and 4000 delegates during their stay. The government is keen to make a good impression and is offering tax breaks to anyone building.

But building projects of another kind are an increasingly important asset to Uganda's economy. Energy infrastructure is attracting investment from both inside and outside the country. Last year Heritage Oil Corporation, a Canadian company, listed on the Kampala Stock Exchange and lawyers report that more investment from international oil companies is on the way.

Uganda has been blighted by power cuts in recent months so the government is keen to generate power that can be sold to the national grid. Market commentators have noticed an upturn in interest in thermal and larger hydro-electric power generators and lawyers will hope that this signals the beginning of more investment in Uganda's unreliable electricity network.

Katende Ssempebwa & Co

Katende Ssempebwa & Co is one of the largest firms in Uganda. Founded in 1969 the firm has grown to its current size of more than 60 permanent staff. The firm has expertise in all areas of law but has a particular focus on banking and corporate mandates.

A property development provided the firm with one of its most significant deals of the year. Katende Ssempebwa was engaged to advise on the building of a large hotel in the capital, Kampala, in preparation for the Commonwealth Meeting in November 2007. Kingdom Hotels International is a regular client and retains the firm as its primary counsel in Uganda. Warid Telecom Uganda has also retained the firm to provide advice on the legal aspects of its \$400 million launch as Uganda's third mobile telecoms provider.

But the firm's most notable mandate of the year came from East African Development Bank which has engaged the firm as local counsel in Uganda, Kenya and Tanzania to advise on the establishment of a venture capital fund worth \$100 million in East Africa.

East African Development Bank has also employed the firm – with DFCU, HFCU and National Social Security Fund – on a \$30 million deal to structure the first Ugandan mortgage-backed securitization.

With such innovative deals under its belt, Katende Ssempebwa & Co Advocates has once again justified its spot in the top tier.

MMAKS

MMAKS Advocates has an excellent reputation in Uganda as a banking specialist. Local and international institutions flock to the firm for its expertise in bank lending and this year has been no exception.

Leading lawyer Phillip Karugaba is advising Citigroup on a \$50 million facility to acquire and capitalize a lending company in Uganda, and the firm is assisting Barclays Bank on a \$4 million loan to a Ugandan company. Karugaba also assisted the lenders on a \$2 million facility for Pride Microfinance.

One banking client said: "They are good lawyers, very responsive and, if I don't agree with their approach, we have a discussion. They provide options, take on board my concerns and what I think is the best way forward. There is not a monopoly on knowledge."

Co-managing partners Karugaba and Timothy Masembe Kanyerezi were singled out for particular praise. The impressive duo worked together to guide Crane Bank and Stanhope Finance Company through a \$1 million takeover of a finance company and a foreign exchange bureau.

The firm has also garnered respect from international development organizations. The firm assisted International Finance Corporation (IFC) on a \$5 million facility for a commercial bank and advised Norfund on a similar \$6 million deal.

But the firm's expertise goes far beyond lending work. MMAKS is working on one of Uganda's standout deals of the year, advising a confidential client based in Britain on a \$100 million investment in the telecoms sector.

As one client said: "They are quite helpful and we haven't had a reason to change from them. They are fast, very responsive and do a good job." MMAKS looks set to further consolidate its position as a tier one firm over the coming months.

Leading lawyers

Phillip Karugaba
Timothy Masembe Kanyerezi

Shonubi Musoke & Co

Shonubi Musoke & Co is a big-hitter in the Ugandan legal market, acting on transactions for both international and domestic companies on an impressive scale.

In one highlight this year, leading lawyers Alan Shonubi and Ezekiel Tuma are advising an American hedge fund on the acquisition of

Financial and corporate

Recommended firms	
Tier 1	Katende Ssempebwa & Co MMAKS Shonubi Musoke & Co
Tier 2	Kateera & Kagumire Sebalu & Lule
Tier 3	AF Mpanga Byenkya Kihika & Co JB Byamugisha Lex Uganda
Tier 4	Barugahare & Co Kampala Associated Advocates Kasiryre Byaruhanga Magezi Ibale & Co Semuyaba & Co

a \$70 million debt portfolio. The firm is certainly strong on financial work. This year the firm also assisted Fina Bank on the \$5 million purchase of an aircraft and, displaying its reputation in the aviation sector further, counselled Aga Khan Fund for Economic Development on the commission of an airline.

The firm's popularity in the financial sector helped it secure a role on one of the most significant M&A deals of the year: Barclays Bank Uganda's acquisition of Nile Bank, the highest-value corporate deal of the year so far.

One banking client commented: "We have had a longstanding and fruitful relationship with Shonubi Musoke. They have a good understanding of the banking regulations and requirements in Uganda and are very responsive when any issues are referred to them."

The growth of the real-estate sector is sending the firm a steady stream of work. While the Ugandan market is picking up in preparation for the Commonwealth Meeting in November 2007, Shonubi Musoke was retained by Serena Tourism Promotion Services to advise its subsidiary on the \$15 million acquisition of two hotels in Rwanda.

But money is also pouring into Uganda as interest from Barclays and hedge funds suggests. Rio Tinto bought a vermiculite mine in Uganda in May 2007 and Shonubi Musoke represented the major mining company throughout this \$5 million-plus deal.

"Shonubi Musoke has the qualities of integrity, reliability, and a practical and logical approach," said one industrial client. "All of them are available to fulfil your needs and requirements and they are very attentive, resolving any legal problems at every stage." The firm's approach seems to be working and it can look forward to another busy year in 2008.

Leading lawyers

Alan Shonubi
Ezekiel Tuma

Kateera & Kagumire

Formerly Hunter & Grieg, Kateera & Kagumire is the oldest firm in Uganda with a history dating back to 1903.

The firm has a well established banking practice which has been engaged by the World Bank, Stanbic Bank and Bank of Baroda on transactions in the past. This year the practice has focused its talent on the burgeoning mortgage market.

But despite its pedigree, competitors have noticed a recent drop in the visibility of the firm. It hangs on to a place in tier two this year, but tier three rivals are starting to nibble at its heels.

Sebalu & Lule

Sebalu & Lule's strong team of four partners is led by managing partner and leading lawyer Barnabas Tumusingize. With more than 25 years of experience the firm is unsurprisingly a well respected force in Ugandan law.

Although the firm devotes much of its attention to litigation work, banking and financial transactions makes up more than a third of the firm's workload. Past clients include such international luminaries as Merrill Lynch and Standard Chartered.

But the firm also has a solid projects practice with particular expertise in power and energy. Shell and Total have engaged the firm in past years.

This year however the mining sector provided Sebalu & Lule with one of its biggest mandates. The firm represented the seller of a vermiculite mine in Uganda which went to Rio Tinto for \$5 million, and marked the mining company's entry into the Ugandan market.

Leading lawyers

Barnabas Tumusingize

AF Mpanga

AF Mpanga is a relatively new Ugandan law firm with experience in financial and corporate work.

Founding partner David Mpanga is increasingly well known and respected by the market. One rival said: "David is young, has lots of energy and doesn't bicker about small points." Mpanga was born and educated in London and brings an outward-looking approach to law that appeals to clients.

The firm is regularly engaged by Citigroup and Coca-Cola and does a lot of commercial transactions for IFC.

Another competitor praised Mpanga saying: "He's a very good lawyer – very professional, very upright and has a conscience. He actually goes outside commercial law and investigates political cases."

Leading lawyers

David Mpanga

Byenkya Kihika & Co

Byenkya Kihika & Co maintains a good reputation in the market, gaining respect from its peers for a solid banking practice and its experience working for banks and other financial institutions.

The firm remains in tier three this year but competitors suggest that the firm may soon deserve a spot in the second tier.

This year the firm represented Wamiko Construction, which is in liquidation, on a

US\$50 million (\$29,700) claim made by Premier Engineering, a steel and aluminium manufacturer.

Leading lawyers

Oscar Kihika

JB Byamugisha

Byamugisha & Rwaheru Advocates become JB Byamugisha Advocates this year following the death of Rwaheru a few years ago. Joseph Byamugisha was identified by fellow lawyers as a leading figure in the market. One peer said: "He knows what he's doing and is particularly good on details. I like to work with him on the other side."

The firm more than consolidated its promotion to tier three last year with rivals commenting that the firm could soon be challenging for a spot in tier two. Banking is a particular area of expertise. This year the firm assisted Nile Bank's shareholders during its multi-million dollar sale to Barclays Bank.

"He's a specialist in banking," one client said, "and is very quick to grasp issues. And if I tell him I don't agree with him and have a different opinion, he will always consider it."

Leading lawyers

Joseph Byamugisha

Other notable firms

Barugahare & Co enters the *IFLR1000* rankings for the first time this year following praise from the market. Named partner Patrick Barugahare used to work in Australia and competitors were quick to highlight the degree of his international exposure. This year the firm has been involved in a real-estate deal to build 30 high-end residential properties in a project worth \$7 million, and has also worked for IFC and HSBC. One peer said: "Patrick really distinguishes himself from the pack."