

Uganda

## Mortgage Act, 2009

Act 8 of 2009

Legislation as at 30 October 2009

FRBR URI: /akn/ug/act/2009/8/eng@2009-10-30

There may have been updates since this file was created.

PDF created on 21 February 2024 at 16:20.

*Collection last checked for updates: 31 December 2000.*

[Check for updates](#)



### About this collection

The legislation in this collection has been reproduced as it was originally printed in the Government Gazette, with improved formatting and with minor typographical errors corrected. All amendments have been applied directly to the text and annotated. A scan of the original gazette of each piece of legislation (including amendments) is available for reference.

This is a free download from the Laws.Africa Legislation Commons, a collection of African legislation that is digitised by Laws.Africa and made available for free.

[www.laws.africa](http://www.laws.africa)  
[info@laws.africa](mailto:info@laws.africa)

There is no copyright on the legislative content of this document.  
This PDF copy is licensed under a Creative Commons Attribution 4.0 License (CC BY 4.0). Share widely and freely.

Mortgage Act, 2009  
 Contents

Part I – Preliminary ..... 1

    1. Commencement ..... 1

    2. Interpretation ..... 1

Part II – General ..... 3

    3. Power to create mortgages ..... 3

    4. Duty to disclose information ..... 3

    5. Mortgage of matrimonial home ..... 4

    6. Consent to mortgage of matrimonial home ..... 4

    7. Application of this Act to mortgages on customary land ..... 5

    8. Mortgage of land to take effect as security only ..... 5

    9. Priority ..... 6

    10. Tacking ..... 6

    11. Consolidation ..... 6

    12. Variation of a mortgage ..... 7

    13. Suits by mortgagor ..... 7

Part III – Discharge and release of mortgages ..... 8

    14. Right to discharge ..... 8

    15. Release of mortgage ..... 8

    16. Deposit of mortgage money where mortgagee cannot be found ..... 8

    17. Transfer of mortgage ..... 9

Part IV – Covenants, conditions and powers implied in mortgages ..... 9

    18. Implied covenants by the mortgagor ..... 9

Part V – Powers of the mortgagee ..... 10

    19. Notice on default ..... 10

    20. Remedies of the mortgagee ..... 11

    21. Mortgagee’s action for money secured by mortgage ..... 11

    22. Appointment, powers, remuneration and duties of receivers ..... 12

    23. Mortgagee’s power of leasing ..... 13

    24. Power of mortgagee to take possession of mortgaged land ..... 13

    25. Withdrawal of mortgagee from possession ..... 14

    26. Mortgagee’s power of sale ..... 15

    27. Duty of mortgagee exercising power of sale ..... 15

    28. Powers incidental to the power of sale ..... 15

    29. Protection of purchaser ..... 16

30. Sale by mortgagee to himself or herself .....	16
31. Application of proceeds of sale of mortgaged land .....	17
32. Right of mortgagee to discharge mortgage on payment of sums due any time before sale .....	17
Part VI – Powers of the court with respect to mortgages .....	18
33. Application for relief by mortgagor .....	18
34. Power of court to review certain mortgages .....	18
35. Application to court to exercise powers under section 34 .....	18
36. Exercise of powers under section 34 to review certain mortgages .....	19
37. Extinction of certain rights .....	19
38. Registrar may issue special certificate of title to mortgagor .....	20
Part VII – Miscellaneous .....	20
39. Offences and penalties .....	20
40. Short form of covenant by mortgagor to insure .....	21
41. Regulations .....	21
42. Minister's power to amend First Schedule .....	21
43. Saving of common law and equity .....	21
44. Repeals, savings and transitional provisions .....	21
First Schedule (Section 2) .....	22
Second Schedule (Section 40) .....	23



# Uganda

## Mortgage Act, 2009

### Act 8 of 2009

Published in Uganda Gazette 53 on 30 October 2009

Assented to on 29 September 2009

Commenced on 2 September 2011 by Mortgage Act (Commencement) Instrument, 2011

*[This is the version of this document from 30 October 2009.]*

**An Act to consolidate the law relating to mortgages; to repeal and replace the Mortgage Act; to provide for the creation of mortgages; for the duties of mortgagors and mortgagees regarding mortgages; for mortgages of matrimonial homes; to make mortgages take effect only as security; to provide for priority, tacking, consolidation and variation of mortgages; to provide for suits by mortgagors; the discharge of mortgages; covenants, conditions implied in every mortgage; the remedies of mortgagors and mortgagees in respect of mortgages; for the power of court in respect of mortgages; and for related matters.**

BE IT ENACTED by Parliament as follows:

### Part I – Preliminary

#### 1. Commencement

This Act shall come into operation on a date appointed by the Minister, by statutory instrument.

#### 2. Interpretation

In this Act, unless the context otherwise requires—

“**civil debt recoverable summarily**” means a civil debt recoverable summarily in a court of competent jurisdiction;

“**court**” means a court, not lower than a Grade I Magistrate’s court including a land tribunal, having jurisdiction to hear a case with regard to the value and location of the subject matter;

“**currency point**” has the meaning given to it in the First Schedule to this Act;

“**customary land tenure**” has the meaning given to it by the Land Act;

“**extortionate**” means calculated to obtain property from another induced by wrongful use of actual or threatened force, violation or fear under colour of official right;

“**freehold land tenure**” has the meaning given to it by the Land Act;

“**informal mortgage**” means a written and witnessed undertaking, the clear intention of which is to charge the mortgagor’s land with the repayment of money or money’s worth obtained from the mortgagee and includes an equitable mortgage and a mortgage on unregistered customary land;

“**land tenure**” means a system of holding land and includes, customary land tenure, freehold land tenure, leasehold land tenure and mailo land tenure;

“**leasehold land tenure**” has the meaning given to it by the Land Act;

“**lien by deposit of documents**” means the deposit of any documents referred to in section 3(8)(b);

“**mailo land tenure**” has the meaning given to it by the Land Act;

“**matrimonial home**” means a building or part of a building in which a husband and wife or, as the case may be, wives, and their children, if any, ordinarily reside together and includes—

- (a) where a building and its curtilage are occupied primarily for residential purposes, that curtilage and outbuildings on it; and
- (b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her spouse or in the case of a husband, to his spouses for his, her, or their exclusive use;

“**Mediator**” shall have the meaning as assigned to it by section 89 of the Land Act;

“**Minister**” means the minister responsible for lands;

“**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;

“**mortgagee**” means a person in whose favour a mortgage is created or subsists and includes any person deriving title under the original mortgagee;

“**mortgagor**” means a person who has mortgaged land or an interest in land and includes any person from time to time deriving title under the original mortgagor or entitled to redeem the mortgage according to his or her estate, interest or right in the mortgaged property;

“**receiver**” means a receiver, or a manager, or a receiver and manager in respect of any land, and includes any person appointed as receiver—

- (a) by or under any document; or
- (b) by the court in the exercise of a power to make such an appointment given by any Act or any rule of court, or in the exercise of its inherent jurisdiction,

whether or not the person appointed is empowered to sell any of the property in receivership, and includes a sole receiver or two or more receivers, and any successor in office of a receiver;

“**recorder**” means a recorder appointed under the Land Act;

“**registrar**” means the Registrar of Titles under the Registration of Titles Act;

“**sub mortgage**” means a mortgage of a mortgage;

“**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;

“**third party mortgage**” means a mortgage which is created or subsists to secure the payment of an existing or future or a contingent debt or other money or money’s worth or the fulfilment of a condition by a person who is not the mortgagor, whether or not in common with the mortgagor;

“**trustee**” in relation to a bankruptcy and the bankrupt, means the trustee of the bankrupt’s estate;

“**unconscionable**” means unfair or oppressive, involving procedural abuses relating to terms of contract where the terms of the contract violate reasonable expectations of the parties;

“**working day**” means any day other than a Saturday, Sunday or a public holiday.

## Part II – General

### 3. Power to create mortgages

- (1) A person holding land under any form of land tenure, may, by an instrument in the prescribed form, mortgage his or her interest in the land or a part of it to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition.
- (2) The power conferred by subsection (1) includes the power to create third party mortgages, second, subsequent mortgages and sub mortgages.
- (3) The power conferred by this section shall be exercisable subject to any prohibition or limitation imposed by this Act, by any regulations made under this Act or by any written law; or any restriction contained in an instrument creating or affecting an interest in land which is to be the subject of a mortgage.
- (4) A mortgage created under subsection (1) shall only take effect when registered.
- (5) Notwithstanding subsection (4) an unregistered mortgage shall be enforceable between the parties.
- (6) Where a second or subsequent mortgage is made by a mortgagor whose title is registered under the Registration of Titles Act, the second or subsequent mortgagee may, at his or her own expense, require the first mortgagee to produce any duplicate certificate of title which he or she may hold to the registrar so that the second or subsequent mortgage may be registered.
- (7) Where a second or subsequent mortgage has been registered, the second or subsequent mortgagee shall return the duplicate certificate of title to the first mortgagee.
- (8) Nothing in this section shall operate to prevent a borrower from offering and a lender from accepting—
  - (a) an informal mortgage; or
  - (b) a deposit of any of the following—
    - (i) a certificate of customary ownership;
    - (ii) a certificate of title issued under the Registration of Titles Act;
    - (iii) a lease agreement;
    - (iv) any other document which may be agreed upon evidencing a right to an interest in land; or
    - (v) any other documents which may be agreed upon,to secure any payments which are referred to in subsection (1).
- (9) A sum secured by a mortgage shall be deemed to be a civil debt recoverable summarily.

### 4. Duty to disclose information

- (1) A mortgagee and mortgagor shall—
  - (a) act honestly and in good faith; and
  - (b) in particular, disclose all relevant information relating to the mortgage.
- (2) A mortgagee or mortgagor who refuses, neglects or fails to disclose information relevant to a mortgage and which is in his or her possession commits an offence and is liable on conviction to a fine not less than forty eight currency points but not exceeding one hundred and twenty currency points or imprisonment not less than twenty four months but not exceeding sixty months or both.

## 5. Mortgage of matrimonial home

- (1) Notwithstanding section 39 of the Land Act, a mortgage of a matrimonial home, including mortgage on customary land of a matrimonial home is valid if—
  - (a) any document or form used in applying for the mortgage is signed by or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home;
  - (b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home.
- (2) For the purposes of sub section (1)—
  - (a) an intending mortgagee shall take reasonable steps to ascertain whether an intending mortgagor is married and whether or not the property to be mortgaged is a matrimonial home;
  - (b) an intending mortgagor shall make full disclosure to the intending mortgagee as to his or her marital status and whether or not the property to be mortgaged comprises the matrimonial home.
- (3) The mortgagee shall be deemed to have discharged the duty under subsection (2), if the mortgagee obtains a marriage certificate issued in accordance with the laws of Uganda, and in the absence of it, a statutory declaration from the spouse or spouses of the mortgagor as proof of marriage.

## 6. Consent to mortgage of matrimonial home

- (1) Where a matrimonial home is the subject of an application for a mortgage, a mortgagee shall satisfy himself or herself that the consent of a spouse referred to in [section 5](#) is an informed and genuine consent and that duty is deemed to have been complied with if—
  - (a) the mortgagee has—
    - (i) explained to the spouse or spouses of an applicant for a mortgage in the presence of an independent person, the terms and conditions of the mortgage which is being applied for; or
    - (ii) in writing, advised the applicant for a mortgage that he or she should ensure that his or her spouse or spouses receive independent advice on the terms and conditions of the mortgage which is being applied for; and
  - (b) the spouse or spouses, as the case may be, provide a signed and witnessed document to the effect that they have received independent advice on the mortgage which is being applied for and have understood and assented to the terms and conditions of the mortgage or that they have, notwithstanding the advice from the mortgagee, waived their right to take independent advice.
- (2) In this section an “independent person” means any officer of the Government, a Justice of the Peace, an advocate, a Notary public, bank manager, a minister of any religion authorised to celebrate marriages, a medical practitioner and any other person authorised in that behalf by the Minister by Statutory instrument.
- (3) A mortgagee may take such other steps in addition to the steps set out in this section as he or she considers necessary and desirable to satisfy himself or herself that the assent of the spouse or spouses is informed and genuine.
- (4) Where a person holds out to be providing independent advice as provided for under [section 6\(1\)\(a\)](#) (ii), such a person shall be liable on conviction to a fine not exceeding one hundred twenty currency points or to imprisonment not exceeding sixty months or both.

## 7. Application of this Act to mortgages on customary land

- (1) The creation and operation of mortgages on customary land shall, subject to this Act, continue to be in accordance with the customary law applicable to the land in respect of which the mortgage on customary land is created.
- (2) Where the mortgagee under a mortgage on customary land seeks to exercise any customary remedy which involves or may involve the mortgagor being dispossessed or permanently deprived of the occupation of the mortgaged land, the mortgagee shall, after using the services of the Mediator to try and mediate on the application of the proposed or any other remedy, make an application to the court for an order authorising the exercise of that remedy; and the court shall, in determining whether to authorise the exercise of that remedy, be guided by the provisions of [sections 33](#).
- (3) The mortgagor under a mortgage on customary land may, after making use of the services of the Mediator to try and mediate on the matter with the mortgagee, apply to a court for the mortgage to be reopened on the ground that the terms of the mortgage are—
  - (a) unconscionable; or
  - (b) an unreasonable departure from the normal terms of a mortgage on customary land applicable in the area where the land is located; or
  - (c) disadvantageous to the interests of the dependants of the mortgagor.
- (4) In any case concerning a mortgage on customary land, the court determining the case shall, where it appears to the court that—
  - (a) the customary law applicable to that mortgage is inadequate; and
  - (b) no other system of customary law makes adequate or any provision for the matter in question,be guided by the relevant provisions of this Act, the common law and the doctrines of equity.
- (5) This section shall not apply to customary land which is owned by a community.
- (6) In the case of customary land which is owned by a family, the land may only be mortgaged with the consent of the spouse or spouses and children of the mortgagor.

## 8. Mortgage of land to take effect as security only

- (1) On and after the date of the commencement of this Act, a mortgage shall have effect as a security only and shall not operate as a transfer of any interest or right in the land from the mortgagor to the mortgagee; but the mortgagee shall have, subject to this Act, all the powers and remedies in case of default by the mortgagor and be subject to all the obligations conferred or implied in a transfer of an interest in land subject to redemption.
- (2) Where a mortgagor signs a transfer as a condition for the grant of a mortgage under this Act, the transfer shall have no effect.
- (3) A mortgagee who requires a transfer as a condition for the grant of a mortgage under this Act, commits an offence and is liable on conviction to a fine not exceeding four thousand currency points.
- (4) In the case of the mortgage of a lease, the mortgagee shall not be liable to the lessor for rent or in respect of the covenants and conditions contained or implied in the lease to any greater extent than he or she would have been if the mortgage had been by way of a sublease.

## 9. Priority

- (1) In respect of mortgages of land registered under the Registration of Titles Act, mortgages shall rank according to the order in which they are registered in accordance with section 48 of that Act.
- (2) In respect of mortgages of land held for customary tenure under a certificate of customary ownership, mortgages shall rank according to the order in which they are registered by the recorder and the recorder shall register all such mortgages in the order and as from the time they are presented to him or her for registration.
- (3) Informal mortgages shall rank according to the order of the date and time when they are made.
- (4) Where a mortgagee, subsequent in time to a prior mortgagee under a mortgage, lends money or money's worth to a mortgagor as a consequence of or through the fraud, dishonesty or misrepresentation of the prior mortgagee, either in conjunction with or separately from the fraud, dishonesty or misrepresentation of the mortgagor, that prior mortgagee's right to repayment under the mortgage shall be postponed to the rights of the subsequent mortgagee.
- (5) The rules of priority for informal mortgages shall apply as far as the circumstances permit, to liens by deposit of documents.

## 10. Tacking

- (1) A mortgagee may, subject to this section, make provision in the mortgage instrument to give further advances or to give credit to the mortgagor on a current or continuing account.
- (2) A further advance referred to in subsection (1) shall not rank in priority to any subsequent mortgage unless—
  - (a) the provision for further advances is noted in the register in which the mortgage is registered; or
  - (b) the subsequent mortgagee has consented in writing to the priority of the further advance.
- (3) Except as provided for in this section, there is no right to tack.
- (4) Where a mortgage provides for the payment of a principal sum by way of instalments, the payment of those instalments shall not be taken to be a further advance and such payment shall rank in priority to all subsequent mortgages.

## 11. Consolidation

- (1) Unless there is an express provision to the contrary clearly set out in the mortgage instrument—
  - (a) where a mortgagee has more than one mortgage from a single mortgagor; or
  - (b) where the mortgagee has lent money or money's worth to a single mortgagor on two or more securities,the mortgagor may discharge any or some of the mortgages or securities without having to redeem all the mortgages or securities.
- (2) Notwithstanding subsection (1), a right to consolidate shall not be exercisable to the prejudice of any person acquiring land under any form of land tenure or under a certificate of occupancy or any other interest in land entitling that person to the occupation and use of that land prior to the recording of that right to consolidate in the prescribed register.
- (3) The rules of equity applicable to consolidation shall, from the commencement of this Act, no longer apply to a mortgage.
- (4) For purposes of this section, "consolidation" means the combination of two or more mortgages or securities.

## 12. Variation of a mortgage

- (1) The rate of interest payable under a mortgage may be reduced or increased by a notice served on the mortgagor by the mortgagee which shall—
  - (a) give the mortgagor not less than fifteen working days' written notice of the reduction or increase in the rate of interest;
  - (b) state clearly and in a manner which can be readily understood, the new rate of interest to be paid in respect of the mortgage;
  - (c) state the responsibility of the mortgagor to take such action as he or she is advised by the notice to take to ensure that the new interest rate is paid to the mortgagee.
- (2) The amount secured by a mortgage may be reduced or increased by a memorandum which—
  - (a) complies with subsection (5); and
  - (b) is signed—
    - (i) in the case of a memorandum of reduction, by the mortgagee; or
    - (ii) in the case of a memorandum of increase, by the current mortgagor; and
  - (c) states that the principal moneys intended to be secured by the mortgage are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.
- (3) The term or currency of a mortgage may be shortened, extended or renewed by a memorandum which—
  - (a) complies with subsection (5);
  - (b) is signed by the current mortgagor and by the mortgagee; and
  - (c) states that the term or currency of the mortgage is shortened, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.
- (4) The covenants, conditions and powers expressed or implied in a mortgage may be varied, but not so as to impose any significantly greater burdens on the borrower than those set out in [section 17](#) by a memorandum which—
  - (a) complies with subsection (5);
  - (b) is signed by the current mortgagor and the mortgagee; and
  - (c) states that the covenants, conditions and powers expressed or implied in the mortgage are varied in the manner specified in the memorandum.
- (5) A memorandum for the purposes of subsections (2), (3) and (4)—
  - (a) shall be endorsed on or annexed to the mortgage instrument; and
  - (b) when so endorsed or annexed to the mortgage instrument, operates to vary the mortgage in accordance with the terms of the memorandum.

## 13. Suits by mortgagor

- (1) A mortgagor intending to commence any action in a court in respect of the mortgaged land shall by notice in writing inform the mortgagee or mortgagees of his or her intention and the nature of the action which is to be commenced.
- (2) A mortgagee may, on receipt of the notice referred to in subsection (1), either—
  - (a) require the mortgagor at his or her expense, to join the mortgagee in the action;

- (b) inform the mortgagor that the mortgagee will take over the action and the mortgagor should cease to pursue the action; or
  - (c) take no action.
- (3) Where a mortgagee informs the mortgagor that he or she will take over the action, the mortgagor shall forthwith cease to pursue the action.
- (4) Where as a result of any decree or order of a court arising out of any action taken by the mortgagor under this section, any sum of money becomes payable to the mortgagor by way of damages on account of some damage or injury caused to the mortgaged land by the defendant, a mortgagee may apply to the court for an order that that sum or such proportion of it as the court thinks fit should be paid to the mortgagee in reduction or discharge of the mortgage.

### Part III – Discharge and release of mortgages

#### 14. Right to discharge

- (1) Subject to this section and [section 15](#), on the payment of all moneys and the performance of all other conditions and obligations secured by the mortgage, and on the payment of any costs and expenses properly incurred by the mortgagee in exercising any of his or her rights under the mortgage, the mortgagee shall at the request and cost of the mortgagor release the mortgage at any time and any agreement or provision in the mortgage instrument or otherwise which—
- (a) purports to deprive the mortgagor of that right;
  - (b) seeks to fetter the exercise of that right; or
  - (c) stipulates for a collateral advantage which is unfair and unconscionable and inconsistent with the right to discharge, is void.
- (2) A discharge whether of the whole or a part of a mortgage shall be made in the prescribed form.

#### 15. Release of mortgage

- (1) Upon the presentation for registration of a release of a mortgage registered under the Registration of Titles Act or the Land Act in the prescribed form signed by the mortgagee or his or her transferees, attested by one witness and discharging wholly or in part the land or any portion of the land from the mortgage, the Registrar or Recorder as the case may be shall and upon payment of the prescribed fees, make an entry of the release upon the original and duplicate certificate of title or certificate of customary ownership evidencing the time and date of the registration.
- (2) Upon the entry being made under subsection (1), the land affected by the release shall cease to be subject to the mortgage to the extent stated in the release.

#### 16. Deposit of mortgage money where mortgagee cannot be found

- (1) Where a mortgagee is under a disability or is absent from Uganda or his or her whereabouts are unknown and there is no person authorised to discharge the mortgage at or after the date appointed for the payment of that money, it shall be lawful for the Secretary to the Treasury to receive the mortgage money with all arrears of interest due on it in trust for the mortgagee or other person entitled to it; and the interest upon that mortgage shall then cease to run or accrue.
- (2) In the case of an informal mortgage, where the mortgagee cannot be found, a mortgagor may apply for an order of discharge and the Court may if satisfied that the mortgagor has discharged his or her obligations under the mortgage, make an order discharging the mortgagor.
- (3) The registrar or recorder as the case may be shall, upon the production of the receipt of the Secretary to the Treasury for the amount of the mortgage money and interest, make an entry in

the register, stating the time at which the entry was made; and that entry shall be a valid discharge from that mortgage; and the registrar or recorder as the case may be shall make a corresponding entry on the duplicate certificate of title or customary ownership.

- (4) The Secretary to the Treasury shall from time to time deposit all mortgage monies and interest which are received by him or her under this section, together with all interest which accrues on them, in the Consolidated Fund in trust for the benefit of the persons who are for the time being entitled to them; but nothing in this section shall render the Secretary to the Treasury liable for not so depositing the monies and interest.
- (5) At the request of the mortgagee or his representatives or successor in title, the registrar or the recorder as the case may be, shall address to the Secretary to the Treasury requisitions to pay to such persons the monies to which they are entitled; under this section and the Secretary to the Treasury shall pay the monies accordingly.

## 17. Transfer of mortgage

- (1) The current mortgagor or any person mentioned in subsection (3) may at any time, other than a time when the mortgagee is in possession of the mortgaged land, in writing request the mortgagee to transfer the mortgage to a person named in the written request.
- (2) The current mortgagee may at any time transfer the mortgage by a transfer in a prescribed form and shall give notice of the transfer to the mortgagor.
- (3) Subject to the consent of the mortgagor, which consent shall not be unreasonably withheld, the persons who may make the written request under subsection (1) are any—
  - (a) person who has an interest in the land which has been mortgaged;
  - (b) surety for the payment of the amount secured by the mortgage;
  - (c) creditor of the mortgagor who has obtained a decree of sale of the mortgaged land.
- (4) Where the consent required by subsection (3) is withheld, a person aggrieved by the withholding of the consent may appeal to the court for an order requiring the mortgagor to show cause why the mortgagor cannot give consent, and the court may, in its discretion, dispense with the consent.
- (5) The mortgagee, on receiving a written request made under subsection (1) and on payment by the person or persons making the request of all monies which would have been payable if the discharge of the mortgage had been made under [section 14](#), and the performance of all other obligations secured by the mortgage, shall transfer the mortgage to the person named in the written request.
- (6) Any express or implied term in a mortgage instrument which conflicts with this section is void.

## Part IV – Covenants, conditions and powers implied in mortgages

### 18. Implied covenants by the mortgagor

- (1) There shall be implied in every mortgage the following covenants by the mortgagor with the mortgagee binding the mortgagor—
  - (a) except in the case of a mortgagor under a third party mortgage, to pay the principal money on the day appointed in the mortgage agreement, and, so long as the principal money or any part of it remains unpaid, to pay interest on it or on so much of it as for the time being remains unpaid at the rate and on the days and in the manner specified in the mortgage agreement;
  - (b) to pay all rates, charges, rent, taxes and other outgoings which are at all times payable in respect of the mortgaged land;

- (c) to repair and keep in a reasonable state of repair all buildings and other improvements upon the mortgaged land and to permit the mortgagee or his or her agent at all reasonable times until the mortgage is discharged and after reasonable notice to the mortgagor, to enter the land and examine the state and condition of those buildings and improvements;
  - (d) to insure by insurance or any other means as may be prescribed or as are appropriate, that resources will be available to make good any loss or damage caused by fire to all buildings on the land, and where insurance is taken out, it is done in the joint names of the mortgagor and mortgagee with insurers approved by the mortgagee and to the full value of all the buildings;
  - (e) in the case of a mortgage of land used for agricultural or pastoral purposes, to use and continue to use the land in a sustainable manner and in accordance with the principles of good husbandry and any conditions subject to which the land is held and to comply with all written laws and lawful orders applicable to that use of the land;
  - (f) not to lease, or sublease the mortgaged land or any part of it without the previous consent in writing of the mortgagee, but that consent shall not be unreasonably withheld;
  - (g) not to transfer or assign a lease or a tenancy by occupation or part of it without the previous consent in writing of the mortgagee, but that consent shall not be unreasonably withheld;
  - (h) in the case of a mortgage of a lease, during the continuance of the mortgage, to pay, perform and observe the rent, covenants and conditions contained and implied in the lease, on the part of the lessee to be performed and observed and to keep the mortgagee indemnified against all proceedings, expenses and claims on account of non-payment of the rent or part of it or the breach or non-observance of the covenants and conditions or any of them, and, if the lessee has an enforceable right to renew the lease, to renew it;
  - (i) where the mortgage is a second or subsequent mortgage, that the mortgagor will pay the interest from time to time accruing on each prior mortgage (not being a third party mortgage) when it becomes due and will at the proper time repay the principal money or part of it due on each prior mortgage;
  - (j) where the mortgagor fails to comply with any of the covenants implied by paragraphs (b), (c), (d), (e) and (h) that the mortgagee may spend such money as is reasonably necessary to remedy the breach and may add the amount so spent to the principal money and that amount shall be deemed for all purposes to be a part of the principal money secured by the mortgage.
- (2) The mortgagor shall keep all buildings upon the mortgaged land in a reasonable state of repair, but there shall not be read into any such covenant an undertaking by a mortgagor to put any building or part of it into a better condition than it was in at the commencement of the mortgage.
- (3) The mortgagee shall not spend any money under subsection (1)(j) without giving notice to the mortgagor of his or her intention to do so.

## Part V – Powers of the mortgagee

### 19. Notice on default

- (1) Where money secured by a mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment.
- (2) 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.

- (3) The notice required by subsection (2) shall be in the prescribed form and shall adequately inform the mortgagor of the following matters—
  - (a) the nature and extent of the default made by the mortgagor;
  - (b) where the default consists of the non-payment of any monies due under the mortgage, the amount that must be paid to rectify the default, which amount may be the whole of the monies due under the mortgage, and the time, being not less than twenty one working days, by the end of which the payment in default must have been made;
  - (c) where the default consists of the failure to perform or observe any covenant, express or implied, in the mortgage, the action the mortgagor must take or desist from taking so as to rectify the default and the time, being not less than twenty one working days, by the end of which the default must have been rectified;
  - (d) that if the default is not rectified within the time specified in the notice, the mortgagee will proceed to exercise any of the remedies referred to in [section 20](#) in accordance with the procedures provided for in this Part.
- (4) A mortgagor will be deemed to be in default warranting the mortgagee to serve upon him or her a notice in writing of the default requiring the mortgagor to rectify the default within the prescribed number of days as stated in sub-section (2) if the mortgagor fails to meet any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it under the mortgage after a period of 30 days from the date when the obligation to pay becomes due.

## 20. Remedies of the mortgagee

Where the mortgagor is in default and does not comply with the notice served on him or her under [section 19](#), the mortgagee may—

- (a) require the mortgagor to pay all monies owing on the mortgage;
- (b) appoint a receiver of the income of the mortgaged land;
- (c) lease the mortgaged land or where the mortgage is of a lease, sublease the land;
- (d) enter into possession of the mortgaged land; or
- (e) sell the mortgaged land.

## 21. Mortgagee's action for money secured by mortgage

- (1) The mortgagee may sue for the money secured by the mortgage only in the following cases—
  - (a) where the mortgage deed provides that if there is default by the mortgagor, the money secured by the mortgage becomes payable in full;
  - (b) where the mortgagor is personally bound to repay the money;
  - (c) where a surety has agreed to be personally liable to repay the money in circumstances that have arisen;
  - (d) where the mortgagee is deprived of the whole or a part of his or her security or the security is rendered insufficient through or in consequence of the wrongful act or default of the mortgagor.
- (2) An action shall not be commenced under subsection (1) until the time for complying with a notice served under [section 19](#) has expired.
- (3) The court may, on the application of the mortgagor or a surety, order a stay of any proceedings brought under this section, until the mortgagee has exhausted all his or her other remedies against

the mortgaged land, unless the mortgagee agrees to discharge the mortgage on payment of the money secured by the mortgage.

## 22. Appointment, powers, remuneration and duties of receivers

- (1) It is an implied condition in every mortgage that the mortgagee has the power to appoint a receiver of the income of the mortgaged land.
- (2) Before the appointment of a receiver under this section, the mortgagee shall serve a notice on the mortgagor and shall not proceed until fifteen working days have lapsed from the date of the service of the notice of appointment of receiver.
- (3) The appointment of a receiver shall be in writing signed by the mortgagee.
- (4) A mortgagee may apply to the court for the appointment of a receiver and any such application may be made in an interlocutory application.
- (5) A receiver may be removed at any time and a new receiver appointed in writing signed by the mortgagee.
- (6) A receiver appointed under this section shall be deemed to be the agent of the mortgagor for the purposes for which he or she is appointed, and the mortgagor shall, unless the mortgage instrument provides otherwise, be solely responsible for the acts and defaults of the receiver.
- (7) The receiver shall have the power to demand and recover all the income in respect to which he or she is appointed receiver, by action or otherwise, in the name of the mortgagor, and to give valid receipts for it.
- (8) Subject to subsection (9) the receiver is entitled to retain out of any money received by him or her all costs, charges and expenses incurred by him or her as receiver, and, for his or her remuneration, a commission at such rate not exceeding five per cent of the gross amount of all monies received, as is specified in the appointment, or if no rate is specified at the rate of five per cent or such other rate as the mortgagor and mortgagee may agree or where the appointment of a receiver comes before the court, as the court shall deem fit.
- (9) The receiver shall apply all monies received by him or her in the following order of priority—
  - (a) in the payment of all rents, rates, charges, taxes and other outgoings required to be paid in respect of the mortgaged property;
  - (b) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in respect of which he or she is the receiver;
  - (c) in payment of his or her remuneration and expenses;
  - (d) in payment of all reasonable expenses incurred in the doing of anything which a receiver is required or entitled to do in respect of the mortgaged land, including but not limited to—
    - (i) the payment of any premiums on any insurance policy properly payable under the mortgage instrument; and
    - (ii) the costs of undertaking necessary and proper repairs to any buildings comprised in the mortgaged land as directed in writing by the mortgagee;
  - (e) in the repayment of any money paid or advanced by the mortgagee to meet the reasonable expenses referred to in paragraphs (a), (b), (c), and (d) together with any interest on any amount so paid or advanced at the rate at which interest is payable on the principal sum secured by the mortgage;
  - (f) in payment of the interest accruing and due in respect of any principal sum secured by the mortgage;
  - (g) in and towards the discharge of the principal sum secured by the mortgage, and

- (h) shall pay the residue, if any, to the mortgagor or other person entitled to receive the income from the mortgaged land.

### 23. Mortgagee's power of leasing

- (1) A mortgagee shall, unless the mortgage instrument expressly provides to the contrary, have power, subject to this Act and any other laws applicable to the leasing of land—
  - (a) to grant leases in respect of the mortgaged land or any part of the land; and
  - (b) to accept a surrender of any lease so granted and of any lease granted by the mortgagor, and may, for that purpose, execute, in place of the mortgagor any instrument required to execute that lease or surrender.
- (2) Before granting a lease under this section, a mortgagee shall serve a notice on the mortgagor in the prescribed form and shall not proceed with the granting or execution of that lease until fifteen working days have lapsed from the service of the notice.
- (3) Every lease granted by the mortgagee shall—
  - (a) reserve the best rent that can reasonably be obtained, having regard to the circumstances of the case;
  - (b) be for a term not exceeding fifteen years or the length of the term of the mortgage whichever is the shorter;
  - (c) contain any terms and conditions which are reasonable, having regard to the interests of the mortgagor and of any other persons having an interest in the mortgaged land; and
  - (d) if prior to granting a lease, the mortgagee has appointed a receiver under [section 22](#), contain a declaration that the lender has appointed a receiver, stating the date of the appointment.
- (4) A lease created by a mortgagee under this section shall not be binding on any person holding a mortgage which has priority to the mortgage of the mortgagee who has granted the lease unless that person has consented to it.

### 24. Power of mortgagee to take possession of mortgaged land

- (1) A mortgagee may, after the end of the period specified in [section 19](#), and after serving a notice of not less than five working days of his or her intention to do so, enter into possession of the whole or a part of the mortgaged land.
- (2) A mortgagee may exercise the power of entering into possession of the mortgaged land by—
  - (a) entering into and taking physical possession of the land or a part of it during the day time using only such force as shall be reasonable in the circumstances;
  - (b) asserting management or control over the land by serving a notice in the prescribed form requiring any lessee of the mortgagor or any other occupier of the land to pay to the mortgagee any rent or profits which would otherwise be payable to the mortgagor; or
  - (c) an order of court.
- (3) The mortgagee shall be regarded as being in possession on the date—
  - (a) on which he or she enters into possession in accordance with subsection (2)(a) or (c); or
  - (b) on which he or she first receives any rent or profit from the land.
- (4) A mortgagee who has entered into possession may remain in possession, without prejudice to his or her right to withdraw from possession, so long as the mortgaged land continues to be subject to any liability under the mortgage.

- (5) A mortgagee in possession of any mortgaged land—
- (a) by occupation, shall be entitled to manage the land and take all the profits of the land, but is liable to the borrower for any act or omission by which the value of the land, or any building on, or other permanent improvement to the land is impaired or the mortgagor otherwise suffers loss;
  - (b) whether by occupation or by receipt of rents and profits shall be accountable to the mortgagor not only for the sums actually received by him or her, but also for any additional sums which he or she might reasonably have been expected to receive by the prudent exercise of his or her powers;
  - (c) where the mortgaged land is leased, is liable to the mortgagor to observe and perform all the covenants and conditions contained or implied by any rule of law or custom in the lease subject to which the mortgaged land is leased; and
  - (d) may renew a lease granted by the mortgagor on the same terms as the original lease but may not otherwise grant any lease out of the mortgaged land.
- (6) 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 22\(9\)](#); except that a mortgagee in possession is not entitled to receive any payments under subsection 22(9)(c).
- (7) A person on whom a notice under subsection (1) has been served shall forthwith comply and continue to comply with that notice until—
- (a) a notice of withdrawal in the prescribed form is served on that person by the mortgagee in possession;
  - (b) the mortgagee in possession withdraws from that possession; or
  - (c) a court orders the mortgagee in possession to withdraw from possession.

## 25. Withdrawal of mortgagee from possession

- (1) A mortgagee shall withdraw from possession of the mortgaged land where—
- (a) a court makes an order directing the mortgagee to withdraw;
  - (b) the mortgagee appoints a receiver under [section 22](#);
  - (c) the default which was the cause of the entry into possession has been rectified through the possession of the mortgagee;
  - (d) the mortgagee has exercised the power of sale under [section 26\(2\)](#); or
  - (e) the mortgagor becomes entitled to a discharge of the mortgage under [section 14](#).
- (2) A mortgagee in possession shall be taken to have withdrawn from possession of all or a part of the mortgaged land—
- (a) when the court makes an order under sub-section (1);
  - (b) when the receiver has been appointed in accordance with [section 22](#);
  - (c) when the mortgagee—
    - (i) ceases to occupy the mortgaged land;
    - (ii) where he or she is not in occupation, serves a notice of withdrawal on all persons served with a notice under [section 24\(2\)\(b\)](#);
  - (d) when the purchaser of the mortgaged land enters into occupation of that land; or
  - (e) when the mortgagor obtains the discharge of the mortgage.

- (3) A mortgagee who has withdrawn from possession of mortgaged land may not again enter into possession of that land, otherwise than by complying with [section 24](#).

## 26. Mortgagee's power of sale

- (1) Where a mortgagor is in default of his or her obligations under a mortgage and remains in default at the expiry of the time provided for the rectification of that default in the notice served on him or her under [section 19\(3\)](#), a mortgagee may exercise his or her power to sell the mortgaged land.
- (2) Before exercising the power to sell the mortgaged land, the mortgagee shall serve a notice to sell in the prescribed form on the mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until twenty one working days have lapsed from the date of the service of the notice to sell.
- (3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—
- a mortgagor;
  - any spouse or spouses of the mortgagor in respect of a matrimonial home;
  - a surety;
  - the independent person as provided under this Act; or
  - in case of customary land, the children and the spouse or spouses.

## 27. Duty of mortgagee exercising power of sale

- (1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell under an order of a court, owes a duty of care to the mortgagor, any surety of the whole or any part of the sums advanced to the mortgagor, any mortgagee under a subsequent mortgage including a mortgage on customary land or under a lien, to take all reasonable steps to obtain the best price as prescribed in the regulations.
- (2) A mortgagee shall not be entitled to any compensation or indemnity from the mortgagor, any former mortgagor or any surety in respect of any liability arising from a breach of the duty imposed by subsection (1).

## 28. Powers incidental to the power of sale

- (1) Where a mortgagee becomes entitled to exercise the power of sale, that sale may be—
- of the whole or a part of the mortgaged land;
  - subject to or free of any mortgage or other encumbrance having priority to the mortgagee's mortgage;
  - by way of subdivision or otherwise;
  - by public auction, unless the mortgagor consents to a sale by private treaty;
  - with or without reserve; and
  - subject to such other conditions as the mortgagee shall think fit, having due regard to the duty imposed by [section 27\(1\)](#).
- (2) Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that the sale is publicly advertised in advance of the sale by auction in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land may include but not be limited to the mortgagee placing an advert including a colour picture of the mortgaged property, in a newspaper which has wide circulation in the area concerned, specifying the place of

the auction, and the date of the auction, being no earlier than thirty days from the date of the first advert.

- (3) A transfer of the mortgaged land by a mortgagee in exercise of his or her power of sale shall be made in the prescribed form and the registrar or recorder, shall accept that form as sufficient evidence that the power has been duly exercised.
- (4) Upon registration of the transfer by a registrar or recorder, the interest of the mortgagor as described in it shall pass to and vest in the purchaser free of all liability on account of the mortgage, or on account of any other mortgage or encumbrance to which the mortgage has priority, other than a lease or easement to which the mortgagee had consented in writing.

## 29. Protection of purchaser

- (1) A purchaser in a sale effected by a mortgagee acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice.
- (2) A purchaser is not—
  - (a) answerable for the loss, misapplication or non-application of the purchase money paid for the mortgaged land;
  - (b) obliged to see to the application of the purchase price; or
  - (c) obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
- (3) For the purposes of this section, a purchaser is—
  - (a) a person who purchases mortgaged land excluding the mortgagee when the mortgagee is the purchaser; or
  - (b) a person claiming the mortgaged land through the person who purchases mortgaged land from the mortgagee, but does not include the mortgagee where the mortgagee is the subsequent purchaser.
- (4) A purchaser prejudiced by unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the mortgagee exercising that power.

## 30. Sale by mortgagee to himself or herself

- (1) The following shall not be permitted to purchase the mortgaged land without the leave of court—
  - (a) a mortgagee;
  - (b) an employee of the mortgagee or an immediate member of his or her family;
  - (c) an agent of the mortgagee or an immediate member of his or her family;
  - (d) any person in a position to influence the matter directly or indirectly; or
  - (e) a person in position of any other privileged information with regard to the transaction.
- (2) A court shall not grant leave to a person mentioned in subsection (1) unless the court is satisfied that a sale of the mortgaged land to that person is the most advantageous way of selling the land so as to comply with the duty imposed on the mortgagee by [section 27\(1\)](#).
- (3) Where the mortgaged land is to be sold by public auction, the mortgagee or other persons mentioned in subsection (1) may bid for the mortgaged land at that public auction so long as the price bid for the mortgaged land by the mortgagee is—
  - (a) the highest price bid for that land at the auction; or

- (b) equal to or higher than the reserve price, if any, put upon the land before the auction, which ever amount is the greater; and,
  - (c) immediately after the fall of the hammer, applies to court for an order to conclude the sale.
- (4) Where the court makes an order under subsection (3)(c) the mortgagee shall attach the order of the court to the transfer form.
- (5) Where the mortgagee sells the mortgaged land in contravention of this section, the sale shall be voidable at the option of the mortgagor.

### **31. Application of proceeds of sale of mortgaged land**

- (1) The purchase money received by a mortgagee who has exercised his or her power of sale shall be applied in the following order of priority—
- (a) in payment of any rates, rents, taxes, charges or other sums owing and required to be paid on the mortgaged land;
  - (b) in discharge of any prior mortgage or other encumbrance subject to which the sale was made;
  - (c) in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;
  - (d) in discharge of the sum advanced under the mortgage or so much of it as remains outstanding, interest, costs and all other monies due under the mortgage, including any monies advanced to a receiver in respect of the mortgaged land under [section 2](#);
  - (e) in payment of any subsequent mortgages in order of their priority; and
  - (f) the residue, if any, of the money received shall be paid to the person who, immediately before the sale, was entitled to discharge the mortgage.
- (2) Where a mortgagee holding the proceeds of sale in trust under this section is in doubt as to the proper distribution of all or part of those proceeds, he or she may apply to the court for directions and may, if the court so orders, deposit the proceeds in court; and the costs of any such proceedings shall rank in priority as if they were part of the expenses of the sale.

### **32. Right of mortgagor to discharge mortgage on payment of sums due any time before sale**

- (1) At any time before an agreement is reached between the mortgagee and any purchaser for the sale to that purchaser of the mortgaged land the mortgagor or any other person who is entitled to discharge the mortgage may discharge the mortgage in whole or in part by paying to the mortgagee all monies secured by the mortgage at the time of discharge.
- (2) Where payment is made under subsection (1), the mortgagee shall deliver to the mortgagor—
- (a) a discharge of the mortgage in the prescribed form over the whole or that part of the mortgaged land to which the payment relates; and
  - (b) all instruments and documents of title held by the mortgagee in connection with the mortgaged land.

## Part VI – Powers of the court with respect to mortgages

### 33. Application for relief by mortgagor

- (1) An application to the court for relief against the exercise by the mortgagee of any of the remedies referred to in [section 20](#) may be made—
  - (a) by the mortgagor;
  - (b) if two or more persons are joint mortgagors, by one or more of them on their own behalf;
  - (c) by a spouse or spouses of the mortgagor; or
  - (d) by the trustee in bankruptcy of the mortgagor.
- (2) Where an application under subsection (1)(b) is not made by all the joint mortgagors, then, unless the court orders otherwise, it shall be served on all the other joint mortgagors.
- (3) An application for relief may be made at any time after the service of a notice under [section 19](#), [section 22\(2\)](#), [section 23\(2\)](#) or [section 24\(1\)](#) or [section 26\(2\)](#), or during the exercise of any of the remedies referred to in those sections.
- (4) An application for relief is not to be taken as an admission by the mortgagor or any other person applying for relief that—
  - (a) there has been a breach of a covenant of the mortgage by the mortgagor;
  - (b) by reason of such a breach, the mortgagee has the right to exercise the remedy in respect of which the application for relief has been made;
  - (c) all notices which were required to be served by the mortgagee were properly served; or
  - (d) the period for remedying the breach specified in the notice served under [section 21](#) was reasonable or had expired,and the court may grant relief without determining all or any of those matters.

### 34. Power of court to review certain mortgages

Where a mortgage has been obtained—

- (a) through fraud, deceit, or misrepresentation by the mortgagor; or
- (b) in a manner or containing a provision which is unlawful;

the court may review the mortgage on application by the persons mentioned in [section 35](#) in the interest of justice.

### 35. Application to court to exercise powers under section 34

- (1) An application to the court to exercise any of the powers conferred upon the court by [section 34](#) may be made—
  - (a) by the mortgagor or mortgagee;
  - (b) if two or more persons are joint mortgagors or joint mortgagees, by one or more of them on their own behalf;
  - (c) by a spouse or spouses of the mortgagor;
  - (d) by the trustee in bankruptcy of the mortgagor;
  - (e) by a trustee in bankruptcy, receiver or liquidator of the mortgagee; or

- (f) by a surety.
- (2) If an application made in accordance with subsection (1)(b) is not made by all the joint mortgagors or mortgagees, then, unless the court orders otherwise, the application must be served on all the other joint mortgagors or mortgagees.
- (3) An application under subsection (1) may be made—
  - (a) at any time before the mortgagor has obtained a discharge of the mortgage; or
  - (b) on an application by the mortgagee to the court for an order for possession or the execution of such an order.

### **36. Exercise of powers under section 34 to review certain mortgages**

- (1) Upon an application made under section 34, the court may—
  - (a) declare the mortgage void;
  - (b) direct that the mortgage shall have effect subject to such modifications as the court shall order; or
  - (c) require the mortgagee to repay the whole or part of any sum paid under the mortgage or any related or collateral agreement by the mortgagor or any surety or other person who assumed an obligation under the mortgage whether it was paid to the mortgagee or any other person.
- (2) The court shall not declare a mortgage void unless it is satisfied that the circumstances justify it.
- (3) Where an application is made on the grounds that the mortgage contains any provision which is unlawful, unconscionable or extortionate the court shall to the greatest extent possible, uphold the mortgage with the omission of the unlawful, unconscionable and extortionate provision.
- (4) Where an application is made on the grounds of the exercise of undue influence or other unconscionable conduct, and two or more persons are joint mortgagors or mortgagees, and those grounds are proved to the satisfaction of the court, the court shall uphold the mortgage to the extent of the interests of the joint mortgagors or mortgagees upon whom undue influence was not exercised.

### **37. Extinction of certain rights**

- (1) Where upon an application for the purpose, the Registrar is satisfied that the right of action to recover any security under a mortgage, whether the right is granted in that mortgage or otherwise, has become extinguished by the operation of the Limitation Act, the Registrar shall, after giving notice of not less than thirty days to the mortgagee, remove the mortgage from the title of the land to which it relates; and the mortgage shall be deemed cancelled with effect from the date of the removal.
- (2) Notwithstanding subsection (1), the mortgagee may not later than ninety days from the expiration of the notification under subsection (1) apply to the court for an order restoring the mortgage and his or her right under it.
- (3) Upon application by the mortgagee under subsection (2) the court shall grant the order if the mortgagee satisfies the court—
  - (a) in the case of the cancellation of a mortgage under subsection(1) that, during the period of limitation—
    - (i) the mortgagor or his or her successor in title acknowledged the mortgage debt in writing, and agreed to pay, or settle part of it;

- (ii) the mortgagor was dead and that either no successor had been appointed or there was no one competent to receive the notice requiring the repayment of the loan either as a personal representative or in some other capacity; or
  - (iii) the exercise of his or her powers of sale or foreclosure had been denied by the court; or
- (b) in the case of the cancellation of a mortgage under subsection (1) that the exercise of his or her powers of sale or foreclosure had been denied by the court.

### 38. Registrar may issue special certificate of title to mortgagor

- (1) Where, upon the expiration of time specified under [section 37\(2\)](#) for the mortgagee to apply to the court for the mortgage and his or her rights under the mortgage to be restored, the mortgage and the rights have not been so restored and there are no proceedings pending in court in respect of such application, the Registrar shall, by writing under his or her hand, require the mortgagee or his or her transferee within thirty days to surrender to the Registrar any certificate of title in his or her possession relating to the mortgaged land.
- (2) Any certificate surrendered to the Registrar pursuant to subsection (1) shall be returned to the mortgagor or his or her transferee.
- (3) Where, upon a request by the Registrar under subsection(1), the mortgagee or his or her transferee fails to comply within the time specified, the Registrar shall issue to the mortgagor or his or her transferee a special certificate of title in place of the certificate in the possession of the mortgagee or his or her transferee, and the provisions of section 71 of the Registration of titles Act relating to the validity and endorsement of special certificate of title and the entry of particulars of it in the register book shall, *mutatis mutandis*, apply to the special certificate of title issued under this section.

## Part VII – Miscellaneous

### 39. Offences and penalties

- (1) A person who—
  - (a) impersonates a spouse of a mortgagor;
  - (b) presents to a mortgagee as his or her spouse, a person not being his or her spouse; or
  - (c) forges any document or utters a forged document to any person, for the purpose of fulfilling any duty or requirement under this Act,commits an offence and is liable on conviction to a fine not less than forty eight currency points but not exceeding one hundred and twenty currency points or imprisonment not less that twenty four months but not exceeding sixty months or both such fine and imprisonment.
- (2) A person who purchases mortgaged property in contravention of [section 30](#) commits an offence and is liable on conviction to a fine not less than forty eight currency points but not exceeding one hundred and twenty currency points or imprisonment not less that twenty four months but not exceeding sixty months or both such fine and imprisonment.
- (3) A mortgagee who sells mortgaged property in breach of his or her duty to the mortgagor under [section 27\(1\)](#), commits an offence and is liable on conviction to a fine not exceeding two hundred currency points.
- (4) A mortgagee who refuses, or neglects to release the mortgage under [section 14](#) commits an offence and is liable on conviction to a fine not exceeding two hundred currency points.

#### 40. Short form of covenant by mortgagor to insure

- (1) Where in any mortgage made under this Act the mortgagor uses the form of words contained in column one of the Second Schedule to this Act, the mortgage shall be taken to have the same effect and be construed as if he or she has inserted in it the form of words contained in column two of that Schedule; and every such form shall be deemed a covenant with the mortgagee by the mortgagor binding the latter and his or her heirs, executors, administrators, transferees and assignees in title.
- (2) There may be introduced into or annexed to the form in the first column of the Second Schedule any express exception from or express qualification to the form; and the like exception or qualification shall be taken to be made from or in the form in the second column.

#### 41. Regulations

- (1) The Minister may in consultation with the Central Bank make regulations prescribing anything which may be prescribed under this Act and generally for the better carrying into effect of the purposes and provisions of this Act and removing any difficulties occasioned by the coming into force of this Act.
- (2) Without prejudice to the general effect of subsection(1) regulations under this section may prescribe—
  - (a) the forms and notices to be used under this Act;
  - (b) the manner and form of the conduct of the business of mortgages;
  - (c) the persons on whom notices must be served;
  - (d) the conduct of auctions in connection with the sale of mortgaged land;
  - (e) penalties not exceeding a fine of seventy two currency points or imprisonment not exceeding three years or both for infringing any provision of the regulations.

#### 42. Minister's power to amend First Schedule

The Minister may with the approval of Cabinet by statutory instrument amend the First Schedule to this Act.

#### 43. Saving of common law and equity

The rules of common law and the doctrines of equity applicable to mortgages shall continue in force, in accordance with the provisions of the Judicature Act, except insofar as they are inconsistent with this Act.

#### 44. Repeals, savings and transitional provisions

- (1) The following laws are repealed—
  - (a) the Mortgage Act,
  - (b) sections 115 to 129 of the Registration of Titles Act; and
  - (c) the Eleventh, Twelve and Thirteenth Schedules to the Registration of Titles Act.
- (2) Any rule, order, regulation, direction, notice, notification or other administrative act made, given, issued or undertaken before the commencement of this Act under any land law repealed or amended in a material particular by this Act shall, if it could have been made, given, issued or undertaken under any corresponding provision of this Act, continue in force and have the like effect as if it had been made, given, issued or, as the case may be, undertaken under this Act.
- (3) Unless the contrary is expressly provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the

commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

- (4) Unless the contrary is expressly provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.
- (5) Any instrument executed before the commencement of this Act by which any disposition permitted under this Act is completed, may be presented for registration in the prescribed register and—
  - (a) the question whether any such instrument so presented is to be registered shall be determined by the registrar or recorder as the case may be, by reference to the law in force at the time of its execution; and
  - (b) subject to paragraph (a), this Act shall apply to such an instrument as if it had been executed after the commencement of this Act.
- (6) Where any step has been taken to foreclose a mortgage before the enactment of this Act, a court may, if it considers it just and reasonable to do so, on and after the commencement of this Act, on the application of the mortgagor, issue an injunction to the mortgagee to stop the continuation of any such step; and where a court has issued an injunction under this subsection, the mortgagee to whom the injunction has been issued may commence any action under this Act to bring the mortgage to an end.

## **First Schedule (Section 2)**

### **Currency point**

A currency point is equivalent to twenty thousand shillings

## Second Schedule (Section 40)

### Insurance covenant in mortgage

Column one	Column two
<p>That I will insure against fire in the name of the mortgagee.</p>	<p>That I, my heirs, executors, administrators or transferees will insure and so long as any money remains secured by this mortgage, keep insured against loss or damage by fire in the name of the mortgagee or his or her transferees in some public insurance office approved by him or her or them, all buildings for the time being erected on the land, and of a nature or kind capable of being so insured to the amount either of the principal money secured by this mortgage or to the full value of those buildings, and will when required deposit with the mortgagee or his or her transferees the policy of that insurance, and within two months after each premium becomes payable the receipt of that premium. And that the monies which are received on account of the insurance shall be at his or her or their option be applied either in or towards satisfaction of the monies secured by this mortgage or in rebuilding or reinstating under the superintendence of his or her or their surveyor the buildings destroyed or damaged. And that on any breach or non-observance of this covenant he or she or they shall be at liberty to effect the insurance and continue it for such period as may be deemed fit, and the costs and expenses paid on account of it shall be a charge upon the land and bear interest at the same rate as if principal money is overdue.</p>