

LAND LAW NOTES

CO-OWNERSHIP

Although there are many situations where a person is the sole owner of land and no other individual shares ownership of it, a more complex/ relationship is always required e.g where a couple whether married or living together purchase a house in which to live, it is unlikely that they intend that only one of them will be the owner of the house. Instead, they intended to share the ownership so that they are both owners of it at the same time. In English land law; all forms of concurrent sharing of land ownership must take place behind a trust on the land.

A trust is a relationship which involves separation of legal title to the land which is held by the trustees from the equitable or beneficial interest which is enjoyed by the beneficiaries. Although it is possible for the ownership of the legal title to be shared between a number of persons so that they will be multiple trustees, the reality of co ownership takes place in relation to the beneficial interest and the beneficiaries are the true owners of the land.

FORMS OF CO-OWNERSHIP

English law recognizes two forms of co ownership i.e 1) joint tenancy 2) tenancy in common. Although both of these facilitate sharing of the ownership of land, they are essentially different in terms or conception of the nature of rights that are conferred on the co-owners.

JOINT TENANCY

Nature

Where coownership exists in the form of a joint tenancy, the co-owners are regarded as being wholly entitled to hold all the property that is co-owned. In respect to land, this means that each of the joint tenants is regarded as simultaneously owning the whole of the land concerned and that they cannot be regarded as holding specific shares of the property e.g. if Kate and Martin are joint tenants of a cottage, it is not appropriate to regard them as each owning half share of it. Irrespective of whether they have contributed equally to the purchase or not if they have expressly taken the land as joint tenants, they are each as much entitled to the whole of the cottage as the other. If the question was to be asked who owns the cottage, the appropriate answer would be that Kate owns the whole of the cottage and that Martin also owns the whole of the cottage and that Martin also owns the whole of the cottage at one and the same time.

Expressed negatively, there is no part of the cottage that they do not each own. The expression joint tenancy was expressed by Lord Browne Wilkinson in the case of *Hammersmith LBC v Monk* [1992] 1 AC 47 at 492, “in property law, a transfer of land to two or more persons jointly operates as to make them viz-a-viz the outside world one single owner”

The Four Unities:

A joint tenancy will only exist if what has been described as the four unities are present. If any of the essential unities are absent, the parties are not properly said to be wholly entitled to the whole of the land.

1. Unity of Possession

The co-owners must be entitled to possess the whole of the co-owned land and that no joint tenant is entitled to exclude the others from possession of any part thereof. -*Wiseman v Simpson* [1988] 1 WLR 35 at 42. There would be no unity of possession and therefore no joint tenancy if Kate was entitled to exclude Martin from the first floor of the cottage and Martin was entitled to exclude Kate from the lounge. Although unity of possession may subsequently be qualified by the intervention of the court often because of a breakdown of the relationship between the co-owners, it is nevertheless an essential prerequisite at the outset of co ownership by joint tenants.

2. Unity of Interest

The interest of each joint tenant must be identical in nature and duration. There cannot be a joint tenancy where no one owner has a leasehold interest in the land and another a freehold. If Kate was the freehold owner of the land and Martin was entitled to a 99 year lease, they cannot be joint tenants. Likewise, if Martin was the freehold owner and Kate only entitled to life interest. Similarly, there cannot be joint tenancy where one co-owner is entitled to a greater share of rent from the land than the other. In such situations, the owners will be tenants-in-common and not joint tenants.

3. Unity of Title.

Joint tenants must derive their identical interests in the land by an identical means through the same act or document e.g. if they have derived title by the same act of adverse possession from a single conveyance.

4. Unity of Time

This requires that the interests of the joint tenants must have been acquired at the same time. *AG Securities v Vaughan* [1988] 3 ALLER 1058, the appellants owned a four bedroom house under separate contracts entered into at different times. They granted a right of occupancy to occupy a flat to four individuals referred to as the flat sharers. The contract entitled each occupant to use the premises in common with other people who might from time to time have

a similar right. The rent payable by each occupant varied. CA held that the occupants held the flat in joint tenancy. The House of Lords reversed unanimously this decision on the ground that the arrangement was as said by Lord Jauncey, 'notably deficient in the four unities of interest, title, time and possession' There was no unity of interest because each commenced his or her occupation of the flat under a different document. There was no unity of time because the agreement covered different periods and provided for different payment for that occupation.

SURVIVORSHIP

The most practicable difference between a joint tenancy and a tenancy in common is that the principle of survivorship operates between co-owners who are joint tenants. The essence of survivorship –*jus accrescendi*– is that when one of the joint tenants dies, his interest in the land automatically passes to the remaining joint tenants. This is a logical consequence of the fact that all the joint tenants are regarded as being wholly entitled to the whole of the land. In a sense, when one of the joint tenants dies, the extent of the interest of the others in relation to the land remains unchanged. They are entitled to no more than they were entitled to before the death of the joint tenant namely the whole of the land.

The main impact of the principle of survivorship is that a joint tenant is incapable of disposing of his interest in the land by means of a will. Nor if he dies intestate with those entitled under the rules of intestacy to succeed to his interest e.g if Kate was to die leaving a will stating that she wanted her sister Annet to inherit her interest in the cottage co owned with Martin as joint tenants, Annet would gain no interest in the cottage at Kate's death because survivorship would operate between Kate and Martin and he would be left a sole owner of the cottage.

One potential problem with the operation of survivorship has been anticipated by statutes especially to determine the order of death where joint tenants have died in circumstances where it is impossible to tell who died first.

If Martin and Kate were to be killed instantly in a car crash, would the cottage pass under the will of Martin or Kate as a survivor?

The LPA 1925 S.184 adopts the somewhat arbitrary solution that where "two or more persons have died in circumstances rendering it uncertain which of them survived another or others", it shall be presumed that the elder died first and the younger survived them. Thus if Kate were six months younger than Martin, she would be deemed to have survived him and the cottage would pass under her will to her heirs at will if she died intestate

SEVERANCE.

Where property is co-owned by means of joint tenancy, a tenant can effectively separate his interests from that of other tenants by means of severance.

Severance has an effect that the interest in the land is transformed from entitlement to the whole of the land to a notional heir of the ownership e.g. if Martin decided to sever the joint tenancy he enjoyed for the cottage with Kate, his interest would be transferred into a half share of the land as a tenant-in-common. Inevitably, Kate's interest would also become a half share as a tenant in common because she is the only other joint tenant. However, if there are more than two joint tenants, only the person who severs his interest will become a tenant-in-common and the others will remain joint tenants e.g. if Martin and Kate had purchased the cottage along with his parents, Olive and Peter as joint tenants and Martin subsequently severed his interest, he would become a tenant in common of $\frac{1}{4}$ share of the cottage and Kate, Olive, Peter would continue as joint tenants of the remaining $\frac{3}{4}$. Once a joint tenant has severed his interest, the principle of survivorship no longer operates in relation to his interest as a tenant in common nor does he take any right to benefit from the operation of the right of survivorship between the remaining joint tenants. Therefore, if Olive and Peter were killed in a plane crash, Kate would acquire their interests by way of survivorship and she would acquire $\frac{3}{4}$ of the interest as a joint tenant and Martin would still be entitled to $\frac{1}{4}$ share he previously severed.

TENANCY IN COMMON

- 1) Entitled to shares on the land. A person who enjoys an interest in property as a tenancy in common is not regarded as owning it in its entirety. Instead, he is regarded as enjoying a notional share of the ownership which is owned by him and by him alone. If M and K were tenants in common of the cottage, they would be entitled to a $\frac{1}{2}$ share each. It should be noted that there is no requirement that the shares of the tenant in common must be equal in proportion.
- 2) Shares are undivided. Although tenants in common can be regarded as owning separate shares in the land, this does not mean that the land can be divided physically between them in proportion to their shares. The shares only exist in the metaphysically abstract ownership of the land and not the physical land itself e.g. K and M as tenant in common of $\frac{1}{2}$ shares in the cottage cannot then divide the property in two so that K can claim the lounge, bathroom and Back bedroom exclusively and M the dining room, kitchen and front bedroom. It would not be possible for K to maintain an action of trespass against M if he were to attempt to make use of the bathroom. The undivided nature of the shares and inability to demarcate the land physically follows from the fact that unity of possession remains a necessary requirement for a tenant in common thus entitling a tenant in common to possession of every part of the land. This entitlement to universal possession applies irrespective of the size of the share owned. Thus a tenant in common with a $\frac{1}{10}$ share of

land is as much entitled to possession of the whole of the land as the tenant in common owning the remaining 9/10th.

- 3) No survivorship. The principle of survivorship has no application to people who are tenants in common. Their respective shares will not pass automatically to the other tenants on death and can instead be respectively dispersed off by will or in event of intestacy will pass on persons thereby entitled. Tenants in common differ from joint tenants in that tenants in common hold land in individual shares. In other words each tenant in common has a distinct share in the property what makes the parties co owners is that they all have shares in a single piece of land though land is not physically divided amongst them because each tenant in common has a fixed share in the land the doctrine of survivorship does not apply. Hence if one of the tenants in common dies, his/her undivided share of the land passes under his will or intestacy. Although the unities may be present in a tenancy in common, the only essential one is unity of possession. E.g A and B can be tenants in common even though they acquired their respective interests by different documents and at different times and their shares are unequal.

CREATION OF JOINT TENANCY AND A TENANCY IN COMMON

Common law and equity differed in their approach to the creation of joint tenancies and tenancies in common. The common law leaned in favour of joint tenants because the operation of the Dos inevitably led to the vesting of the property in one person.

Therefore at common law where a grant was made to two or more persons, it will presume that the grantor intended to create a joint tenancy of the legal interest e.g in *Re Murram Murter 18 KLR 65*. A testator granted his estate to a trustee to apply for the benefit of G and J; the issue was whether G and J were to hold the estate as joint tenants or tenants in common. It was held that where property is given to several persons concurrently, prima facie, they take as joint tenants. In this case since there was nothing to suggest a tenancy in common, it was held that the testator intended G and J to hold in joint tenancy. The presumption of joint tenancy is discharged either where the grant contains words of severance. The words of severance are expressions that indicate the grantor's intentions that each grantee should take a separate and distinct share in the property.

In *Robertson v Fraser*, Lord Hartherly said, "anything which in the slightest degree indicates the intention to divide the property must be held to abrogate the idea of joint tenancy and create a tenancy in common. Examples of words which have been held to constitute severance include "share and share alike", "amongst", "in equal share", "equally", "participate", "equity".

In equity as at common law, a grant of property to two or more persons without words of severance creates a joint tenancy and a grant with words of severance creates a tenancy in

common. However, equity leans in favour of tenancy in common because equity is concerned with justice. According to Megarry, “preferred the certainty and equality of a tenancy in common to the chance of all or nothing which arose from the right of survivorship ie the attributes of a tenancy in common were certainty and equality but for joint tenancy, it was mere chance of all or nothing which arose. Hence in certain situations, even in the absence of words of severance, equity presumes that the co-owner intended to create a tenancy in common and not a joint tenancy unless there is clear evidence to the contrary.

Traditionally, there were three such situations in which persons who were joint tenants at law were compelled by the court of equity to hold the legal estate upon trust for themselves as equitable tenants in common. This is called a resulting trust. These were;

1. Where the property was purchased with funds contributed in unequal shares.
2. Where the property constituted partnership assets.
3. Where the property was held as security for a loan advanced by the joint tenants.

CREATION OF COOWNERSHIP UNDER THE RTA

Joint tenancy and tenancy in common is created by registration under the RTA as joint tenancy or tenancy in common respectively. S.53 and s.93 RTA, instruments presented that would transfer an estate or interest to two or more persons should set out the manner in which the co-owners hold the estate/interest. Where persons desire to hold as joint tenants, the instrument of transfer should state that the transfer was made to the transferees “as joint tenants”. If they desire to hold as tenants in common, the instrument should state likewise and the proportions in which the land is held. Registration of the co-owners of joint tenants and tenants in common is conclusive evidence as concerns third parties who act in reliance upon the registrar.

However, between the parties, registration is not conclusive because evidence may be adduced to establish that notwithstanding registration as joint tenants, the parties intended to hold the beneficial interest to tenant in common. The equity presumption discussed above operates in appropriate cases to establish the intention of the parties. Under s.53 RTA where the instrument of transfer to two or more persons is registered with the specification of the nature of co-owners, the holders are presumed to hold in joint tenancy.

In *Re Foley- Deceased Public Trustee v Foley*, the High Court of Newzealand interpreting a similar provision held that its objective to make registration conclusive so far as concerns third parties who act in reliance of the registered proprietors, the presumption was rebuttable e.g as illustrated in the case of *calvery v Green* evidence may be adduced to show that those parties were registered as joint tenants in equity owned the land as tenants in common.

Right of Enjoyment Amongst co owners

Co-owners of land enjoy certain rights and they owe each other certain rights in their dealings with the land. The most important right is the right to possession and enjoyment of the entire co-owned land irrespective of the size of his/ her share.

No Liabilities for trespass or occupational rent

Because each co-owner has an equal right to occupy the land, neither can sue each other for trespass to the common land nor can a co-tenant demand rent from the other even if the other occupies the whole land. *Jones (AE) v Jones (FW)* (1997) 1WLR 438, the plaintiffs and defendants were tenants in common of a certain house owning $\frac{1}{4}$ and $\frac{3}{4}$ shares of the property respectively. For several months, the defendant lived in the house. In an application for sale of the house, the plaintiff claimed from the defendant for sole occupation of the house. The trial judge ordered the defendant to pay $\frac{3}{4}$ of a fair rent to the plaintiff. On appeal to the court of Appeal, the decision was reversed. Lord Denning MR emphasized that common law clearly says that tenants in common are equally entitled to occupation of the land. Consequently, one tenant in common is not entitled to demand rent from a co-tenant even if the latter occupies the whole. However, where a co-owner is in sole occupation of common property on the understanding with the other co-owner that he/she will pay occupational rent then he/she is liable to pay rent as promised. See *Leigh v Dickenson* [1881-85] ALL ER 1099. The agreement to pay rent may be inferred from the circumstances and conduct of the parties e.g. in *Uganda Thrift Co Ltd v JM Nambale*, a group of 10 people including the defendant together bought land and constructed thereon several houses for renting. The co-owners incorporated the plaintiff company with a view to transfer to the plaintiff title to the land. For several months before the title was transferred to the plaintiff, the defendant occupied one of the houses and paid rent to the plaintiff. Upon default, the plaintiff brought these proceedings for arrears and eviction. The defendant pleaded that as a tenant in common, he was neither bound to pay his rent nor co-owners bound to evict him. It was held that the parties bought the land for commercial purposes and when the defendant occupied the house in question, he did so on the understanding that he was renting it just like a stranger, hence he was bound to pay for his occupation and if he failed, he could be evicted.

A co-owner may also be liable for occupational rent, and or trespass if he/she ousts or evicts another co-owner from occupation of the common property. The co-owner who is ousted by another co-owner is entitled to sue for trespass and claim for occupational rent from him/her (the evictor) from the time he was evicted from occupation. For this purpose, exclusion need not be expressed. It could be implied from the conduct of the offending co-owner e.g. in *Denis v Macdonald* [1981] 2 ALL ER 633, the defendant and plaintiff lived together in a de facto relationship in a house they owned in tenancy in common. After several years, the plaintiff left the house because of domestic violence leaving the defendant in sole occupation. In an application for the sale of the house, the plaintiff claimed occupation rent from the defendant for the period he was in sole occupation. It was held that a co-owner is liable for occupational rent if he/she is responsible for the other being out of occupation.

In the above case law, the defendant did not actually oust the plaintiff for all practical purposes; his violence toward her was tantamount to eviction because it would be unreasonable to expect her to occupy the house in such circumstances.

No Compensation for Improvements.

A co-owner who of his/her own accord extends money on improvements or repairs of the common property cannot demand compensation from them. However in equity, upon termination of the co-ownership, whether sale, partition of the common property, a co-owner may claim expenses he/she incurred in carrying out improvements of the property. The reason is that it would be unfair for non-contributors to take advantage of the increased value of the a recover only to the extent to the improvements will result in the present in the enhancement of the value of the property if any e.g suppose B and N own a building in Tenancy in common/ in joint tenancy. B spend I million to renovate the house. If B spends the money on her own accord, she cannot demand any contribution from N but if upon sale of the house, it transpires that the cost of the renovations, its value has increased by 2 million; B would be entitled to reimbursement from the proceeds of her expenses to a maximum of 1 m shillings. If on the other hand, the increase in value is only by ½ m, where inspite of her expenses, the house does not increase in value, she will not be entitled to any for reimbursement.

No Liability to account for profits.

At common law, since each co-owner has a right to possession and enjoyment of the entire common property, a tenant who receives more than his/her share of the profit isn't accountable to the other co-owner. Jones: *Fannington v Forrester* [1893]2 Ch.261. *Henderson v Eason* [1851] 17 QB 701. However in equity, the courts may hold the co-owner accountable for profits either on the basis of equities' inherent jurisdiction order account between co-owners or as incidental to a partition suit.

The liability to account in equity is limited to profits received from a third parties' use or occupation of the common property e.g where a co-owner leases the common land to a third party he/she must share the rent with the other co-owners but where a co-owner uses the common land to grow commercial crops he/she has no obligation to account for the crops. See *Henderson v Eason*.

FORM OF COOWNERSHIP AND LEGAL TITLE

Historically, the legal title to land would be co ownership either in the form of a joint tenancy or tenancy in common. The availability of multiple forms of co ownership of the legal title coupled with the possibility of unlimited number of legal owners caused severe problems in conveyance practice. If the legal title was owned only by joint tenants, it would only be necessary to investigate the title of one of the joint tenants. Since the presence of the four unities would not necessary to investigate the quality of title of each and every one of them which could prove a long and laborious process. In order to eliminate such problems, the property legislation of 1925 provides that legal title of land can only ever be held by co owners as joint tenants. S.1(6) LPA 1925, provides that a legal estate in land is not capable of subsisting or be created in an individual share in land.

Severance of joint tenancy of legal title.

It follows logically from this process that where there's joint tenancy of legal title of land, joint tenant cannot sever their interests to give rise to a tenancy in common. Such a possibility is expressly prevented by the Law of Property Act 1925. S.36(2) providing that no severance of a joint tenancy of the legal estate so as to create a tenancy in common of land shall be permissible whether by operation of law or other-wise." This does not however prevent a joint tenant of legal title releasing his interest to the other joint tenant and dropping out of the legal ownership of the land.

A maximum number of co-owners of the legal title.

As well as preventing a tenant in common of the legal title of land, the legislation of 1925 removed a further obstacle to efficient conveyancing by limiting the number of persons who may have the legal title of the joint tenancy. S.34(2) TA 1925, provides that where the legal title to land is conveyed to more than five persons as joint tenants, the four first named who are able and willing to act shall alone be the trustees. Therefore if land was transferred to A,B,M,D,E,F, only ABMD would take the legal title. Although E and F could be appointed as replacement trustees if a vacancy were to occur, they will not automatically succeed to a position of trusteeship if such a vacancy does arise e.g by the death of one of the trustees. It is important to note that although there can be a maximum of four joint tenants of the legal title, there is no limit to the number of persons who can share entitlement to the equitable interests, they may not necessarily be registered as the legal owners.

Joint Tenants of the legal title are trustees for the beneficial owners of the land.

Whenever there is a multiple ownership of the legal title to land, it is inevitable there will be a trust and the joint tenants of the legal title will be holding the land as trustees for the benefit of the beneficiaries. As such, they enjoy the powers conferred on trustees of land as well as the obligations arising thereby. Trustee' powers and duties in the context of the relationship between trustees and beneficiaries of trust land.

Determining the nature of the beneficial interest of a trust on land

Coownership in equity: Irrespective of whether the legal interest of land is held by a sole trustee or a number of trustees as a joint tenancy, it is necessary to identify who is entitled to a beneficial interest in the land as held. Three important questions have to be addressed.

1. Who are the beneficiaries of the trust?
2. Do the beneficiaries enjoy their interests as joint tenants or tenants in common?
3. If they are tenants in common, what is the extent of their respective shares in the land?

Although the general principles which address these questions are straight forward, complex arrangements are possible so that they may at one and at the same time be some beneficiaries who enjoy their interests as joint tenants and others as tenants in common. At a starting point, it is necessary to distinguish between trusts which have been expressly created by parties and those created formally whether under resulting or constructive trusts.

Co ownership under an express trust

- a. Absolute freedom to define the beneficial entitlements of co-owners. Where a trust plan is created expressly by the party/ parties competent to create it, it is open to them to define the extent of the entitlement of the beneficiaries in regard as to whether they are to be joint tenants or tenants in common. If they are tenants in common, the proportion of their shares. Such an express relation of the nature of the parties' interest will take priority or any implication which will be drawn from the facts as to the nature of the ownership. This was confirmed by the CA in *Goodman v Gallant* [1986] 1 ALL ER 311, where it held that an express declaration of the beneficial interest in land was exhaustive and conclusive of the position and left no room for the doctrines of resulting or constructive trusts to be involved. A declaration of a trust of land will only be enforceable if necessary formalities have been observed, namely, that the declaration is evidenced in writing.
- b. Declaration of a trust of land by the existing legal owner. A trust of land may be created by a person who is already a legal owner e.g if K is the sole legal owner of a cottage and then decides that when M moves in with her, K she wants him to enjoy a share of the ownership; she can declare a trust of the cottage as joint tenants.

If she declares that they own the cottage jointly, she will hold the legal title for both of them as a joint tenant of the beneficial interest. Only if she makes clear in her declaration that they are to enjoy specific shares of the ownership with such a declaration be construed as giving rise to an express tenancy in common. If she was to declare that M was to enjoy a half share in the cottage, this would give rise to a tenancy in common with K holding the legal title on trust and each and each enjoying a half share of the equitable ownership thereof. If an express trust is declared of unequal shares in the land, it is inevitable that the beneficiaries must hold their interests as tenants in common since such an arrangement cannot be given effect by a joint tenancy. Thus, if K declared that she held the cottage on trust for herself and M in shares of a 3rd and 2/3rd respectively, this would create a tenancy in common.

Conveyance of the land to the legal title owners as trustees.

Alternatively, a trust on the land may be created by a transfer of land to the new legal owners often on the sale of the land e.g if M and K were purchasing the cottage, the conveyance may expressly state the tenancy under which the land may be held. The conveyance may state that the land may transfer to K and M on trust for themselves as joint tenants or alternatively on trust for themselves in equal shares. The first example would create a express joint tenancy of the beneficial interest. The second, tenancy-in- common.

Coownership where there is no express declaration of the beneficial entitlements.

- a. Lack of an express stipulation although the parties creating a trust of land are free to define their respective beneficial entitlements as they wished, they may have failed to do so. In such cases, the law will have to presume or imply the nature of their official entitlements from their conduct. This will also clearly be necessary where a trust of land is created by means of a constructive or a resulting trust.
- b. Conveyance of the land into the names of more than one person.
 - i. A general presumption that there is to be a joint tenancy: where land is conveyed into the name of more than one person and there is no express declaration of how the equitable ownership is to be shared, the general presumption is that legal owners will hold the property on trust for themselves as joint tenants. If the land is conveyed in the name of more than four persons, only the first four names can take the legal title and the remainder will enjoy interests only as joint tenants of the beneficial interest.
 - ii. Special circumstances where the presumption will be displaced by a tenancy in common: although a joint tenancy of the beneficial interest will generally be presumed where the legal title to land is conveyed to more than one owner, in some circumstances, the law is prepared to displace that conclusion in favour of a tenancy in common because the nature of the relationship between the co-owners suggests that they did not intend the principle of survivorship to operate between themselves. This was recognized by the *Privy Council in Malayan credit ltd v Jack Chia MPH ltd (1986) AC 549* Lord Brightman stated that the circumstances in which joint tenants at law would be presumed to hold, the beneficial entitlements as tenants in common and not strictly circumscribed by the law and that equity may infer a tenancy in common wherever appropriate. If the parties acquire land jointly as commercial partners, they will not hold the legal title as joint tenants but as tenants in common of equal shares. *Lake v Craddock [1932]*

The Privy Council held in *Malayan credit ltd* that a tenancy in common was to be inferred where a tenancy of business premises had been taken by a number of persons jointly at law to enable them to pursue their separate business purposes.

Mortgagees who lend money on a joint legal mortgage are also inferred to hold their interests as tenants in common in equity although they are joint tenants at law- *Re Jackson [1887] 34 CLD 732*

Another very significant circumstance where a tenancy in common would be preferred to a joint tenancy in the absence of an express declaration is where the legal owners have contributed to the purchase price of the land in unequal proportions. A tenancy in common in equity is the only means of giving effect to the relative disparity of the contributions. This was a fairer reason for finding that there was a tenancy in common of the lease in *Malayan Credit Ltd v Jack*. The plaintiff and defendant had agreed between themselves prior to the grant of the lease how they would apportion the space available and roughly meant the defendant occupying 62% of the floor area and the plaintiff the remaining 38%. They divided their liability for rent and service charge in unequal shares in accordance with the area occupied. The Privy Council held that this was a feature of the relationship which pointed unequivocally to a tenancy in common. A similar conclusion was reached in relation to residential property in *Walker v Hall (1984) 5 FLR 126* where a house had been purchased in the joint names of a man and his mistress. The court of Appeal held that the property was held by them as trustees of the legal title in unequal shares as tenants in common of $\frac{1}{4}$ and $\frac{3}{4}$ of the beneficial interest because the woman had contributed of the purchase price and the man the remainder.

- iii. Conveyance of land into the names of more than one person as tenants in common. Slightly different difficulties arise if land is conveyed at law in the names of more than one person as tenants in common since the legal title cannot be held by co owners other than in the form of a joint tenancy. The consequence is that the persons named in the conveyance or if they are more than four, the first four who are willing and able to act as trustees will take the legal title as joint tenants and they will hold the land on trust for the persons named in the conveyance as tenant in common in equity.
 - c. Coownership through resulting and constructive trusts of land.
- i. Contexts of informal trusts. There are many cases where a trust of land will be imposed on the legal owners by means of a resulting or constructive trust. Most commonly, this has been so in cases of cohabitation of residential property where only one of the cohabitantes is the legal owner of the land. If the other can establish that he is entitled to a share of the equitable ownership then, a question will arise as to whether it is shared as joint tenancy or tenancy in common.
- ii. Co ownership under a resulting trust. A person will be entitled to a resulting trust interest in land if they have contributed directly to its purchase price. The extent of his or her interest is determined by means of an exact mathematical equivalence with the proportion of the contribution. See *Midland Bank v Cooke [1995] 4 ALL ER 562*. Only in circumstances where the contributions of the parties are exactly equal could a joint tenancy of the beneficial interest arise. In cases where the

contributions and therefore respective shares of ownership are unequal, the parties must hold their interests as tenants in common. *Bull v Bull* [1955] 1 QB 234

CO OWNERSHIP UNDER A CONSTRUCTIVE TRUST

A constructive trust arises not because a person's financial contribution to the purchase price of the property but on the basis of a common intention with the legal owners that he/she was to be entitled to a share of the equitable ownership. See, *Lloyds Bank v Rosette* [1991] 1 AC 107. Only if the court finds that the common intention was that the parties were to share the property equally will it be possible to find that there was a joint tenancy of the beneficial interest. However since the finding is usually that the party was entitled to a specific share of the ownership, equity will generally prefer to find that the parties were tenants in common e.g in *Midland Bank v Cooke* [1995] 4 ALL ER, the CA held that where there was a common intention that a husband and wife were to share the ownership of a house, the wife was entitled to an 'equal share' of the beneficial interest. Where a constructive trust gives rise to an equal share of the beneficial interest as in *Eaves v Eaves* [1975] 1 WLR 1338, where a cohabiting girlfriend was held to be entitled to an interest in a quasi-matrimonial home, the interest can only be given effect through a tenancy in common.

SEVERANCE OF JOINT TENANCY OF EQUITABLE OWNERSHIP OF LAND

Consequences of severance

Where there is a joint tenancy, the co-owners are wholly entitled to the whole and the principle of survivorship operates between them. Severance is the process by which a joint tenant is able to separate his notional share of ownership of land from that of the other joint tenants so that in relation to his share, he cease to be a joint tenant but becomes a tenancy in common. As Dillon LJ in *Harris v Goddard* [1983] 1 WLR 203 at 210, 'severance is the process of separating off a share of a joint tenancy so that the concurrent ownership will continue but the right of survivorship will no longer apply. The parties will hold separate shares as tenants in common.' As that quotation indicates, one of the consequences of severance is that survivorship no longer operates to the share of the tenant in common and the tenant in common no longer enjoys the possibility of survivorship as regards the interests of the remaining joint tenants if any. When a joint tenancy is severed, the party serving will be entitled to a share of the beneficial ownership, equivalent to an equal share with all the joint tenants. *Goodman v Gallard* [1986] 1 ALL ER 311. This will be the case even where the initial contributions of the joint tenants to the purchase price of the property were unequal e.g if there are two joint tenants and one severs, they will become tenants in common of half shares. One of six joint tenants was to sever his share, he became a tenant in common of a sixth share of the beneficial interest and the others would continue as joint tenants of the remaining 5/6th. These principles were stated by Russel in *Bedson v Bedson* [1956] 2 Q.B 666, "on severance, the beneficial joint tenant becomes a beneficial tenant in common in undivided shares and the right of survivorship no longer obtains. If there be two beneficial joint tenants, severance produces a beneficial tenancy in common in two equal shares.

If there be three beneficial joint tenants and only one severs, he is entitled to 1/3 undivided shares and there is no longer survivorship between him and the other two though the others may remain inter se beneficial joint tenants of the other 2/3.

Although the general rule is that a joint tenant severing his interest will be entitled to an equal share as a tenant in common, the parties may agree to a different arrangement between themselves so that an equal share is severed.

Conversion in sole ownership

On the death of all but one of the joint tenants, the survivor becomes the sole owner by virtue of the rule of *jus accrescendi*. Under s.201, RTA, the survivor may apply to the register to be registered as the sole proprietor of the land and upon registration he is deemed to be the proprietor thereof. Severance describes the process where by a joint tenancy is converted into a tenancy in common. Though strictly speaking a joint tenant owns no distinct share in common property, equity recognizes that each joint tenant had a potential share in the property which he/she could sever during his or her lifetime. Severance cannot be effected by will because a will only takes effect after death of the tenant. Sir William Page Wood VC declared three ways of severance of a joint tenancy in the case of *William v Hensman*- i) unilateral action ii) mutual agreement iii) course of dealing. That, “a joint tenancy may be severed in three ways; an act of any one of the person interested operating upon his share may create a severance as to that share. Secondly, a joint tenancy is severed by mutual agreement. Thirdly, severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as consisting a tenancy in common*.

There are general limitations to the right to sever in *Bedson v Bedson*, Lord Denning suggested that it was a general rule where husband and wife are beneficial joint tenants of land and it is possessed by at least one of them, the joint tenancy cannot be severed. LJ Russell dissented saying, ‘I am unable to accept the legal position of Lord Denning that where husband and wife are joint tenants of legal estate in a matrimonial home and also beneficial joint tenants in respect of it neither can so long as one is in possession sell his/her beneficial interest therein or otherwise sever the beneficial joint tenancy. The proposition is, I think, without the slightest foundation in law or in equity’ This rejection of the supposed limitation has been approved by all subsequent cases and it seems that there is no inherent limitation in the right of joint tenants to sever their interests.

Unilateral Severance

A joint tenant may unilaterally sever a joint tenancy by creating an act which destroys any four of the unities e.g where x and y are joint tenants, if y during her lifetime transfers her share of the property to z, joint tenancy is severed because unity of title and time is destroyed. In this regard, y does not need to seek x’s consent let alone inform him prior to granting her interest to z. At law, a

transfer to a third party becomes effective to sever a joint tenancy when the interest of the transferee is transferred to the third party. Hence, where the joint tenancy is registered under RTA, severance becomes effective on registration of the transfer. However, in equity, severance is recognized as operative even before registration of the transfer to the third party provided that there is a contract of transfer (specifically enforceable in equity between the transferor and the transferee) where the intended transfer to the third party is by way of a gift, it won't be effective to sever the joint tenancy in equity unless the grant is completed prior to the grantor's death.

Mutual Agreement. MA

Severance by MA is where all the joint tenants agree to hold all their titles in tenancy in common. There is valuable consideration for the agreement i.e. that each joint tenant agreed to relinquish the beneficial interest in the common interest including the right of survivorship in return for a share of a tenancy in common. The fact that the agreement is verbal or otherwise, incapable of specific performance does not appear to be important. S.4(2) of the Contract Act Cap 75, a contract to transfer interest in land is impossible even if it is in writing- *Mayanja Nkangi v National Housing*. Once the joint tenants have agreed to sever the joint tenancy, it is immediately irreversibly severed. Where the joint tenants are registered as joint proprietors, under the RTA, from the moment they agree to sever they will hold the property as trustees for themselves as tenants in common and in equal shares.

Course of Dealing

Joint tenancy is severed by course of dealing where conduct of the joint tenants towards each other reveals a mutual understanding that the joint tenancy should be severed. Whether this is so essentially is a question of fact depending on the circumstances of each case. Severance by MA and by course of dealing may in some cases overlap. However, there are separate distinctive methods of severance. The difference is that severance by MA encompasses express agreement to sever a joint tenancy, whereas severance by course of dealing covers circumstances which do not involve any agreement but where it could be inferred from the circumstances that the parties formed a common intention to hold their property as tenants in common e.g. *Burges v Rawnsley* [1975] 1 Ch 429- it was held that court may be entitled to infer common intention to sever by course of conduct on the basis of negotiations carried out by joint tenants even though those common intentions did not result in an agreement.

Other ways of severance

In addition to the three ways of severance declared in *Williams v Hensman*, there are two other types of severance

1. Severance by court order. Once it makes an order inconsistent with continuation of joint tenancy, the joint tenancy is severed from the date of the judgment though the parties continue to hold as joint tenants until the order is executed and the necessary legal transfers made e.g. if a husband and wife hold their matrimonial home in joint tenancy and in divorce proceedings, the court makes an order for a settlement of property, the effect of the order

for a settlement of property, the effect of the order would operate to sever the joint tenancy in equity. Thus it is submitted that if before the order is implemented, one of them dies, the rule of survivorship would not apply in favour of the survivor.

2. Severance may occur as a consequence of unlawful killing by one joint tenant of his/her joint tenant. It is a rule of public policy of general law that a person shall not be permitted to profit by his/her own. Equity will prevail on him to hold the legal interest on a constructive trust for himself and the estate of the deceased in tenancy in common in equal shares e.g in *Re Stene (1989)*, the respondent and his late wife were registered as joint tenants of their matrimonial house when he strangled her. He was convicted of manslaughter because of diminished responsibility. It was held that the respondent's action in killing the wife caused a severance in the land (JT). Court observed that the respondent acquired his interest at law as joint tenant but he held it on trust for whoever was entitled to it under the wife's estate.
- 3.

Partition

Joint tenancy may be terminated by partition. The rules for partition are exactly the same as those of tenancy in common.

Termination of Tenancy in common

Both joint tenancy and tenant in common can be determined by sale or partition of the common land. Termination by sale is where land is sold and the proceeds distributed among those co owners in accordance with their shares subject to any appropriate adjustment, such as fees for sole occupation and reimbursement for expenses incurred in improvement. Partition on the other hand is the physical division of land among co owners. Co-owners may voluntarily agree to sell and share the proceeds of partition of the property as they so wish subject to relevant planning regulations. Where one of the parties is unwilling to partition the co-owned property, the courts have inherent equitable jurisdiction to compel a partition if in the circumstances, it is just to do so. The legal position is less clear whether the courts in an application or partition can at their discretion order a sale in view of a partition. Both at law and equity, the courts could not refuse to a pre partition however inconvenient where a mandate is made by one of the co-owners- *Mayfair property company ltd v Johnson [1894] 1 ch. 508*.

In England, the situation was rectified by the enactment of the partition Act of 1868 and 76 which gave courts discretion to decree a sale and division of the proceeds instead of partition. In *singh v Kaur [1936] 17 (1) KLR*- It was held that the partition Acts were statutes of general application in Kenya. Arguments deduced in this case would have been of high persuasive value for the application of the Acts in Uganda, but for the fact that the statutes of general application do not

apply to Uganda. In the event it is thought that without a statutory base, the courts in Uganda have no jurisdiction to make a compulsory order for sale of co-owned land where an application is made for partition. A strict application of common law in this regard might lead to an economic land fragmentation. It is arguable that for this reason, the courts may through the exercise of their powers under s.16(3) of the Judicature Act 1996 decline to follow the common law rule on the ground that its application is not suitable for circumstances of this country and its people. In that case, the absence of any other rule might make an order for the land to be sold or any such other as JSC of the case so demands. S.16 (2)©

Practical application of co ownership

Many people who own land in tenancy in common or joint tenancy are not clear in their minds of the advantages of joint tenants over the other. Where it is the wish of the co-owners that whoever is the survivor should enjoy the property in solo, they would put on hold the property in joint tenancy. Normally, joint tenancy is best suited for married people because upon the death of either spouse, survivor automatically becomes the sole owner without need of probate.

It is also a convenient manner of holding legal title by administrators of estates and trustees. This is because where there are two or more administrators or trustees and one of them dies by operation of the doctrine of *jus accrescendi*, a survivor would have legal power to administer the estate- s.186 Cap 139 Laws of Uganda provides that “when probate has been granted to several executors and one of them dies, the entire representation of the estate accrues to the surviving executor or executors” see also s.275 SA and s.19 (1) TA

For the same reason, it is advantageous for partners to be registered as joint tenants. Upon death of one of the partners, the firm normally dissolves and the survivor has legal obligation to wind up the business which usually involves sale of partnership property. By operation of right of survivorship, the remaining partner will have power to sell off the partner’s property without the consent of the representatives of the deceased partners unlike if it were a tenancy in common.

The beneficial interest of the estate of the deceased in the partnership is protected by the presumption that the beneficial interest is held in tenancy in common. Joint tenancy as a manner of holding property can be a trap for the unwary in particular because of the draconian operation of the right of survivorship.

VARIOUS FORMS OF LAND RECORDING

It is important to note that the interests in land are recorded and interests in their land transactions too. This serves three purposes;

1. The proof that the transaction or interest took place.
2. Record will serve as notice to third parties of the existence of the interest of transaction especially where the record is public.
3. The existence of the record assists the investigation of title of interests in land.

In Uganda, before colonial rule, there was no system of land recording as such. This is because the society was illiterate and so could not record. The concept of individual ownership of land had not developed. This was because land was still communally owned. Without individualistic interest in land, there is no basis for land record. Land recording is a result of individualization of the land

and commercialization of the land. Once a land market develops, it is imperative that there develops a system of recording to show what goes on.

Over the centuries, three basic forms of land recording have developed viz;

1. Private conveyancing.
2. Registration of deeds.
3. Registration of title.

PRIVATE CONVEYANCING

It is the earliest known form of land recording. Under this system, persons privately keep the documents that evidence their ownership on land or interest on land. Such documents may include initial grants of land by sovereign/state. Where such is the case, the record of subsequent dealings on the land e.g a will, a settlement, gift, sale, agreement, deed of lease or mortgage. These documents made between the parties will be kept as evidence of records. These documents are kept by concerned individuals and are not registered in offices. It is a simple and inexpensive system of land recording. It does not involve bureaucracy in the form of state officials, no fees or taxes. The problem with this system is that if you wanted to investigate ownership or title to a piece of land, you would have to examine all the privately held documents related to a piece of land, trace a good root of title to the land, you must establish an unbroken chain of documentation that are traceable to the first owner of the land. Documents or people in custody of documents are not available or one is not aware of them. This makes it cumbersome to get the chain to the present claim. To solve this, a period was set up to reduce or to cut off the years from which to trace. Even if it is 20 years, you have to have a solicitor to draw a chain up to the present holder which is still cumbersome.

REGISTRATION OF DEEDS.

This system cuts down on the disadvantages of private conveyancing but stops short of providing a system that gives a good recording of title.

Under this system, copies of records relating to land are deposited in public registry or depository. Such a depository may be exclusive- handle records relating to land or other subject matter like business documents. The documents must be deposited by persons having them and received by a state official in the form in which they are presented. Officer receiving them does not investigate their authenticity upon payment of a fee. Even forged wills can be received. The mere fact that documents exist in a public registry does not confer upon them authenticity.

The advantage is that there is at least a central place when one is to investigate title on a given piece of land. There is easier and cheaper investigation. However the system is not full proof because of two draw backs;

1. Some vital records relating to the land may not have been deposited especially where there is no law compelling such deposit.
2. Because the documents are not scrutinized before acceptance at the registry, they are only indicative that transactions may have taken place but does not guarantee legal transaction Investigation thus goes beyond these documents e.g asking the signatories of the previous owner if they really signed.

The system still survives although with diminishing use e.g England, Zambia and once the only system in Uganda -1904 when the registration of deeds ordinance was enacted. The ordinance was amended and is now cap 80 of the laws of Uganda. Under this law, a registry of documents was set up with a registrar of titles being appointed.

Registry was intended for all manner of documents and those relating to land. Under s.4, a person claiming interest can present an instrument for registration.

s.5, registration is a simple exercise since it merely entails filing a copy of registry after registrar filing it as a true copy. They are filed in serial order in which they are presented- s.6

S.7- registrar endorses on the document or memorandum that he has endorsed the document
Memorandum serves as prime facie evidence that document was duly registered

S.8 registrar is to keep an abstract book to register names of parties to document, dates and number of document ie summary of document. Abstract book is useful for investigation of documents one is interested in.

s.15 members of public can search copies of the records and even take copies upon payment of a fee. The register kept by register general also registrar of companies; birth and death marriages etc.

s.14 shows the defect of registration of deeds . it provides that registration of a document does confer upon it any effect / validity which it won't have had but for registration .ie document is registered with all its imperfections. Thus the system isn't perfect.

REGISTRATION OF TITLES.

This was the last system to evolve. Under it a specific office was established by the state to register land of all records evidencing land dealings, Normally the law would set formalities to which document which are to be registered may conform eg language, size wording mode of execution, for fees and duties of document.

Before the records are registered, a public official e.g Register General, first investigates the records he is presented with to ascertain the genuineness of this document. He\She will only register if he is satisfied that document is authentic. Once document is registered, its state guaranteed as it is it is cured of any defects upon registration. Members of the public can rely on the registered document as representation of the time, interest on the land. If it turns out that the documents weren't authentic, that public was misled, then the person who incurs loss as result of inaccuracy of registrar is entitled to compensation by the state. This system makes investigation of title cheap and fast .Since there is a registry where a definitive search can be guaranteed, there is no need to carry out investigations beyond registry, this ensures, finality and surety in investigation of title.

Land conveyancing is in this sense simplified and the theory is that this leads to a more rapid development of land market and there is an improved pace of economic development. The future is not that flowery because under this system, there are formal requirements that must be complied with e.g writing documents in proper language,, way, paper, signed and witnessed by proper way and people paying stamp duties etc. If these requirements are not complied with, registrars will not record the document. Invariably the parties to the land transaction may need help from experts like lawyers which needs money so the poor may not afford.

In Uganda, the earliest attempt to introduce a system of land registration of title was under the land Regulations of 1897. The registration is under which the first alienation of land by the colonial government took place. Under Reg. 1, the commissioner for the protectorate could, if he thought fit grant to any person a certificate authorizing him to occupy and hold a piece of land described in the certificate for a period not more than 21 years. The form of the certificate was given in the schedule. Under Regulation 3, the certificate had to be accompanied by a plan of the land approved by or signed by a government surveyor.

Regulation 4- certificate would be made in duplicate copy, given to the grantee of land and the other retained by the commissioner. This is as far as the regulations went. There was provision for grant of land but not for subsequent registration. If land was sold by grantee or mortgaged, there was no procedure for registration of the subsequent transaction That remained so till 1908 when registration of land Titles Ordinance No.11 was enacted. It was a brief ordinance of only twelve sections.

S.2 of this ordinance, the land registry was established and from that date, where land was surveyed and demarcated by government surveyor, the land officer was mandated to pay a duplicate, all crown grounds on such land and to issue certificate of title.

S.3, the land officer would then register such title in accordance with the Act. Eventually, this job was transferred to a separate officer- Registrar of Titles.

S.3 is the most important development since once the land was registered under the ordinance by virtue of the first grant, subsequent transactions affecting such land/ purporting to transfer land or

extinguish any rights or interest had to be registered under this ordinance. For purposes of such registration, a register book was created under s.5 where subsequent transactions were registered. There was a sanction under s.6 for failure to register viz, that no evidence could be received in any civil court of any sale, lease, transfer, mortgage etc was affected by an instrument in writing and the name of the purchaser had been written or inscribed in the registrar of titles.

S.7 of the ordinance, entries on the land register were deemed to be evidence of the facts stated therein ie some form of guarantee by state. And the registered dealing under s.8 which was so registered for value without notice of a prior unregistered dealing was accorded priority over the unregistered dealing even if such unregistered dealing was subsequently registered. This was a sanction against people who delay registering their dealings.

The government undertook under s.9 to make compensations to persons who would be deprived of an interest in land as a consequence of registration through fraud or error or omission or misdirection ie where state official was negligent, government offered compensation.

Because a system to register land was set up, s.12 provided that registration of documents ordinance 19* be stopped applying to titles of land registered under the new ordinance. The 1908 ordinance was repealed by 1912 ordinance which came into place in 1924 which is now cap 230 which put in place a compensation system of registration of title. A system that is one of the variant systems of the registration of title is to be discussed in detail.

In Uganda, beyond these three systems, there also is;

- i) Registration of customary tenure.
- ii) Recording interests of lawful and bonafide occupants.

Outside of Uganda, there is also a system known as Title insurance. It is from America.

THE TORRENS SYSTEM OF LAND CONVEYANCING

THE AUSTRALIAN ORIGINS OF THE SYSTEM

Australia was a British colony and was thus subject to the British system of conveyancing of deeds. The political, social and economic situations of the UK and Australia were different. UK was small and land was intensively utilized. It had a substantial learned group of people who took care of intricacies of private conveyance. Australia was vast and sparsely populated still occupied by neo settlers, had no developed legal profession and learned group of people.

The problem of investigating and providing title both under private conveyance and registration of deeds became glaring in the Australian setting especially in view of the lack of a developed legal system. It was imperative that some better system be devised. In UK, there was a proposal of establishing of registration of title but the situation was very compelling in Australia. This is where the genius of Sir Robert Torrens came in. He had gone to South Australia in 1840 as customs

officer and later became an MP. Due to his efforts, a new system of land recording started especially in South Australia and later to other parts of the world. Torren lobbied parliament to champion the cause. At the time he was agitating; two other people were also doing the same in the UK. He attacked the complexity of the English system that lawyers conspired to maintain the mischief of the English system to acquire income. Torrens initiated a new system. He thought he could not reform the English system. He said the old system was confused. Its biggest problem was the dependent nature of the titles because of the problem of tracing one document to another. Validity of a document depended on the previous document. He advocated for independent titles. His new concept was influenced partially by his career as customs officer since he was familiar with registration of ships ie register for each ship showing owner, insurer, pertinent information etc. so he wanted the same thing for land too. This kind of thing had existed in Hamburg but had never been fully developed. He basically advocated for a system where of independent titles. By that, he meant that in essence, upon registration of any transaction in land, the land was being surrendered back to the state and the state would re-grant it to the transferee by the act of registration. Registration would be like a re-grant since it was confirmed by the state so one would not depend on the previous owner ie move back investigating. Registration gave new lease of title independent of previous transactions, whose authenticity never depended on the present registration. This is because one now could not investigate beyond the registered transaction. Torren was aiming at creating an indefeasible title ie a perfect title cured of defect by the mere fact of registration. A title that would not depend on any other investigation outside that title on the register. His proposal was that there should be a single document as evidence of title to each demarcated parts of land. This document he said should be called a certificate of title.

It replaces the numerous transactions on the land all put on one document. Document would be held by the Registrar General (public officer) and would be available for public inspection. The document would be issued in duplicate so that the other copy would be given to the owner of land and owner would have to produce his own copy so that the transaction be recorded on it.

The other thing Torrens proposed was that he would replace the existing document of conveyance used by lawyers. They would be replaced by simple forms designed by the Registrar General. Simple forms would be used by lay men to complete their transactions. They pick the form, fill it and sign then take to the Registrar General who registers. This would help take away the monopoly hitherto secured in the legal profession. It would stop extract of excess charges or the revival of statuous or perplexing methods of the lawyers.

Torren's proposals were enacted into law in the 1858 Real Property Act, South Australia. In the subsequent years, other territories enacted the same system which later spread to other colonies of the British. It was introduced in Uganda in 1924. It would make investigation of title fact and cheap, readily understood by people.

ESTABLISHMENT OF THE TORRENS SYSTEM IN UGANDA

Between 1908 and 1922, there were efforts to establish a comprehensive titling system in Uganda. It culminated into the enactment of the Registration of titles Ordinance no 2/22. It never came into force immediately. It was extensively amended in 1923 by ordinance 12 and it came into force in 1924.

Initially, it was then said that our law would be based on the South Australian statute but eventually our law was modeled on the transfer of land Act of the state of Victoria.

It was then the most modern in Australia then. The statute operated for about 14 years and had some problems as seen by the administration. In 1937, a study was commissioned by government headed by Shepherd and came up with a report on survey and titling system in Uganda in 1938. He was quite critical on the Australian law on which our statute was based. He thought that it was obtuse* and illegal phraseology and the most complicated machinery of record to be found in Australia. In his view, it was unfortunate that such legislation was chosen as a model for Uganda. Shepherd reasoned that the different law was necessary for each of the Australian states. It followed that no particular Australian Act would suit another country and he added far less a primitive African country like Uganda. In his view, there was no state of difference between Victoria and Uganda in terms of laws, customs, size, so the law was inappropriate for Uganda.* He advocated for a simple ordinance based as far as possible on local custom adopted to the conditions of life in Uganda and readily understood by African land owners. Unfortunately, these proposals of a simple ordinance tailored around local customs were not embraced.

Operation in Uganda

The first step was establishment of the office of titles. The system is administered by the office of titles. S.3 of the RTA, Registrar of Titles is to be appointed hence the charge and control of the office of titles. He is assisted by a deputy and other registrar. S.3 (2) these officers are public officers like any other.

S.4 requires all courts, judges and persons acting as judicial officers to take judicial notice of the signature of the registrar.

S.5 office of titles has to have a seal that fits the description set up in that section and all certificates of title and other documents purporting to be sealed with such seal and signed by the registrar. If a fact has to be proved and a certificate of title is given without seal, it is taken to be proven unless the other party proves otherwise ie contrary evidence is adduced by the other party.

The office of titles established branches – mailo office in Mukono, Mityana and Masaka, Rukungiri, Kabale, Mbarara and Fort portal to register land granted under the Toro and Ankole agreements- native freeholds.

Under the land Act, there would be distinct registries- s.60 (6) Land Act.

2nd establish land register itself. S.37 (1) register is obliged to keep a register book where he/she registers all titles and particulars of their dealings in priority; it may not be practical to keep a real book. S.37 (2)(a) provides for the register to have a loose leaf.

You can keep it in two parts, relating it to districts, counties or any geographical or any geographical area. In practice a register is kept in loose leaf and each loose leaf is given a number as a folio and 25 folios constitute a volume, for a seal, you'll meet freehold registration volume 1 folio 1.

The mailo register is also kept in loose leaf and is grouped in blocks and plots. Each county e.g Busiro, Kyagwe, Kyadondo would be broken into blocks e.g block 1. The loose leaf certificate of titles end up as a registry book consequently. Authenticity of this is from s.38(1) this is when the registrar endorsed it as a volume and a folio number or plot and block number because this is the identification of each piece of land.

s.38(1) prescribes the form of certificate of title to that as provided in the third schedule of the Act, basically there are three variants whichever one chooses, a certificate of title has three parts.

Part 1 Description of the property ie volume and folio references/ the plot and block numbers where the property is situated. It will also give the physical element in terms of measurement. It also gives the tenure of the land, lease mailo etc.

Part2. This deals with proprietorship (ownership), here you will see the name and address of the property (required by s.38 (3)). You will know the date on which ownership was acquired and the number of the instrument under which the proprietorship was acquired.

Part 3 This part deals with encumbrances ie interests and claims which burden the rights of the proprietor things that reduce the value of the owners interests, mortgages, caveat e.g it shows details of the encumbrance and particulars, date and instrument number of registered etc.

There must be a seal of the office of titles. The seal must be endorsed on the certificate of title. S.53. Subsequent endorsement of certificate of titles discharges must be endorsed on the title under the signature of the registrar. Under s.48 and 49, once an instrument is registered, you don't only endorse the entry on the certificate of title but the registrar must also endorse memoranda on the instrument to show that it has been entered in the register. When an instrument is presented for registration e.g mortgage, it is given a number and time of presentation e.g 10.00 AM 26/03/02. It may not be signed immediately. It could even be after a week for purposes of priority. S.42 says that the effective date of registration was when it was given a number so that if 3/4 documents are brought differently, they follow that priority.

Under s.55, the proprietor of land is entitled to be issued with a certificate of title/COT and if he is a minor/ under a disability, the registrar should state the age of the minor or the state of disability to protect them. If you want to subdivide land you can surrender your certificate under s.67 and

you are issued with others. Sometimes, people lose their duplicate certificate. S.67 provides for insurance of special certificates of title after following procedure in s.67. It is also possible to issue a COT under s.68 where the land has been sold pursuant to court order and certificate has not been surrendered.

The legislature also envisaged misplacement or mismanagement of files by public servants and thus loses of COT making the register useless.

S.71 RTA authorizes the replacement of the original title in case it goes missing. This is called a substitute title. There are four types of title.

1. Original – Register book kept in office of titles.

2. Duplicate – owner/ issued to proprietor.

3. Substitute- given when original is lost s.71

s. special – given when duplicate is lost s.67

COT is important in terms of the law because once issued, it is conclusive evidence of title. S.56

How Land is brought under the register?

Land here is looked at in two categories:

i. Land that was already alienated before the Act came in force- 1924. Land distributed under agreements in Buganda, Toro etc, 1897 Land Regulations, 1902 Land ordinance. S.11-30 RTA which shows procedure to be followed in land alienated before RTA came into force which had not been registered in the 1908 register.

S.31-35 dealt with transferring land from 1908 register to the new register. Under s.34 (1) the old register was closed but not destroyed.

ii. Land that was alienated or allocated after the Act had come into law which includes those registered under 1998 Land Act. S.9 (1) RTA provided that all future grants of land would have to be registered under the new Act. The procedures are to be found in the respective legislations e.g crown land ordinance etc.

Under the Land Act, land boards can grant leases which have to be registered, they can be a conversion of customary freehold which has to be registered.

How do you handle subsequent transactions under this system of registration of instruments?

There are a number of transactions which can be encountered, subdivision, transfer by sale, by a gift, will, mortgagee, lease, sublease, pledge, easement, right of way and various other transactions.

The RTA prescribes the form of document that evidences transactions. This document is called an instrument. That instrument has to be registered before an interest can pass in land, there must be stressed that the mere act of the parties executing the instrument does not grant interest. Legal title is created upon registration of instrument- S.51 RTA.

Daudi Busulwa v Texas Company. Here the appellant sued the proprietor of land at principle court in Mengo to recover the land. Court held that the land was to be returned to Busulwa before the land could be transferred to Busulwa, the defendant deposited his title with Texas company as security for a loan. Company lodged a caveat as an equitable mortgage. Busulwa could not enforce the judgment and applied to be registered as proprietor of land. In High Court, the judge was sympathetic but the thing was his dealing was not registered and could not pass any interest by virtue of s.51 and since Texas dealing was registered, they took priority.

Before an interest is registered by the registrar, he has to investigate it to ensure that it complies to the land short of which s.51 RTA deals with a defective instrument. The Registrar will send back the instrument for correction by the party who has presented it for registration if not corrected by time set out in the section (21 days) the instrument will be rejected and ½ the fee paid will be forfeited to the consolidated bank.

Under s.44 instruments will be accorded priority according to their date of registration. S.51 envisaged a very unusual situation where two people would chase each other with rival instruments of the same piece of land ie caveat and mortgage and they reach at the same time at the registrar's the section provides that the registrar shall endorse the instrument of the one who produces a duplicate COT first.

Under s.61 RTA, the estate of a registered proprietor is paramount, the only exception is fraud. *Gibbs v Messr*- the Privy Council gave the rationale of the registered interest being paramount. It rationalized the object of the Torrens system. The proprietor from the trouble and expense of going beyond the register trying to investigate history of owner's title that then is accomplished by providing that every bonafide purchaser of value and enters his deed of transfer on the register shall thereby acquire an indefeasible right notwithstanding the author's title.

LEASES

Under s.24(5) Land Act a leasehold tenure is defined as a form of tenure whereby one party grants to another exclusive possession of land, for a period usually but not necessarily in turn for a monetary consideration called rent. The term lease or tenancy refers to the estate grant (demise or term) and the 'reversion' is the interest retained by the grantor during the currency of the lease. The party leasing is known as the landlord and the other party is the lessee or tenant. In practice, the expression tenant and landlord are respectively used to refer to the lessee and the lessor of residential premises and short term lease. While lessee and lessor are used for other leases*, in practice but this distinction has no legal significance so the terms can be used interchangeably. Leases are classified into fixed term and periodic leases.

A fixed term lease is a lease whose duration is fixed by the parties at the onset so that once the term expires; the lease comes to an end. For example, a lease for 12 months or 49 years is a fixed term lease and it expires at the end of the term. A periodic lease is a lease which continuously renews from one term to another until terminated by the proper notice served by either party.- *Prudential Assurance co ltd v London Residuary [1992] 3 ALL ER.*

Periodic leases may run on a weekly, fortnightly, monthly, quarterly or yearly basis. The type of periodic tenancy depends on the agreement of the parties. In the absence of an express agreement,

the mode by which rent is paid determines the nature of the tenancy. Thus where rent is payable on a weekly, monthly or yearly basis, it's implied that the parties intend to create a weekly, yearly or monthly tenancy respectively.

There are other types of tenancies which don't fall in either of the above classifications ie tenancy at will and tenancy at sufferance (TAS). At common law, a tenancy at will (TAW) is implied when a landowner allows another person to enter into possession as a tenant without specification of the terms of the agreement. Either party may terminate the tenancy at any time. But if a TAW begins to pay rent calculated on a regular periodic basis, a yearly, monthly, weekly or other periodic tenancy will be implied. In contrast to a TAW, a TAS is implied where a former tenant remains in possession after expiration of a fixed term without consent or decent of the land owner. Like a TAW, a TAS is terminable at any time without notice.

The Land Act creates a new type of tenancy known as tenancy by occupancy. This is a new tenancy subject to statutory rules and customary law.

LEASES AND LICENCES DISTINGUISHED

A licence is permission to enter across land for some specified purpose which otherwise would have been trespass. *Goldsack v Shore [1950] KB 708 at 714*. The main distinguishing feature between a lease and a license is that a lease creates an interest in land while a license does not. One of the legal consequences of this distinction is that a license unlike a lease only binds the licensee and the licensor but not other persons dealing with the land. *Runda Coffee estates v Ujager Singh [1966] EA 564*. Moreover as a licensee has no interest in the land, he cannot sue in trespass or nuisance persons interfering with his occupation of the land.

Essential Features of A lease

At common law, a lease has two basic features.

1. Certain duration
2. Exclusive possession.

Though a lease is normally granted for monetary consideration, this is not an essential feature. S4(d) Land Act states that a lease may be created even where there's no requirement for rent payment.

Duration

At common law, a lease can be of any duration but a lease must have a certain or ascertainable beginning and ending before it takes effect. Otherwise, it is void as a lease. The classical example of the application of this rule is in *Lace v Chantler [1944] 1 ALL ER 305*. The plaintiff during the 2nd world war sublet a house to the defendant for the duration of the war. It was held that the lease was void for uncertainty of duration because at the time, the purported lease took effect it was

neither certain nor ascertainable when the war would end. The requirement of certainty of duration has been criticized in several English cases and academic writing as unnecessary. Indeed in some cases, judges have attempted to undermine the rule by giving it a broader definition or giving it artificial exceptions e.g in Ashburn *Ansdalt v Arnold* [1998] 2 ALL ER 147-the respondents granted the appellant a right to occupy their premises rent free for an indefinite period. The agreement was subject to a proviso that the respondents could not terminate the arrangement if they required the land for redevelopment by giving three months' notice. The notice had to be accompanied by a certificate from a reputable developer stating that the respondents were ready to develop the land. It was held that the lease was void for uncertainty of duration. Court of Appeal held that the duration of lease was not uncertain because the circumstances under which the lease could be determined was objectionably unascertainable 3 months notice of notice termination and certification of the developer. However the House of Lords in *Prudential Assurance v London Residuary* [1992] 3 ALL ER 504, the HOLs brought the attempt to reform the rule to an abrupt end. There the Lord Templeman affirmed the classical common law rule that duration of a lease must be certain or ascertainable at the time the purported lease is supposed to take effect. His Lordship was emphatic that at common law, the land lord and tenant had no power to create a term which was uncertain. In Uganda, the definition of the lease under the Land Act seems to override the common law definition. S.4 (5) © states that the duration of a leasehold tenure is usually but not necessarily defined by reference to a specific date of commencement and to a specific date of termination or ending. It is submitted that the phrase "usually but not necessarily" indicates that parties intend to dispense with the common law requirement that the defendant beginning and ending of a lease must be certain. Hence a lease agreement such as that granted in *Lace v Chantler* would not be void for uncertainty under the Land Act. Of course when the terms of a lease agreement including its duration are so uncertain that the court cannot objectively determine the obligation of the parties, the agreement would be void in accordance to the general law of contract.

Exclusive possession

S.4 Land Act defines a lease as a form of tenure under which a landlord grants or is deemed to grant exclusive possession of the land. Thus, exclusive possession is the linchpin of a lease and is what distinguishes a lease from a mere license. *Street v Mountford* [198_] 2 ALL ER 289 at 292. A grant of exclusive possession is a right to use land to the exclusion of everyone else including the land owner for the duration of the grant. Whether the occupier has exclusive possession depends on the intention of the parties objectively to determine from all terms of the agreement and the surrounding circumstances. *Karamat v Champion shoe co* [1949] 16 EACA 15.

An express statement purporting to grant exclusive possession is neither necessary nor conclusive of the occupier's legal status. The extent of the control over the land retained by the land owner determines whether the occupier has exclusive possession. *Desai v Cooper* [1950] KLR 32. If the land owner retains general control over the premises, its strong intention is that the occupier has no exclusive possession and therefore she is a mere licensee e.g in *KCC v Mukiibi* [1967] EA 368, the plaintiffs leased certain premises to the defendant subject to a covenant that the tenant shall

not part with possession or sublet without their consent. The defendant allowed hair dressers to use the premises paying him a daily fee. The plaintiffs sought to terminate the lease on the ground that the defendants parted with possession in breach of the tenancy agreement. The court held that a tenant is not in breach of covenant not to part with possession or sublet unless he gives exclusive possession to some other person. In this case, the court found that although the defendant allowed hair dressers to use the premises subject to payment of a daily fee, he did not give them exclusive possession. Sir Udo Udoma CJ observed that a point of great importance which supports the case of the defendant is that he never at any time parted with possession of the premises is a fact that he was always in charge of the key. It was this practice to always open the premises in the morning and admit the hair dressers and close the premises in the evening or after collecting his dues to lock up the premises and retain the keys with him. It is clear from the evidence that the hair dresser could only make use and occupy the premises with the leave and license of the defendant who could turn them out at any time.

QN. Does exclusive possession mean there is a lease?

EXPROPRIATED PROPERTY ACT

In 1972, Idi Amin announced an economic war whose effect was the massive expulsion of persons of Asian origin from Uganda. Thousands of properties belonging to the Asians were expropriated by court. It should be noted that after Amin's fall, legislation was enacted under which most of the properties were either returned to the former owners or sold off. According to s.2 (1) the assets of the departed Asians Decree 1973 – every departing Asian leaving Uganda had to declare on forms of PRO/1 or PRO/2 specified in schedule 2 of the Decree, his assets and liabilities including those relating to any business interest supply to the minister such other particular information relating to such assets and the liabilities as the minister would require.

NB. According to s.4 (1) ADAD, any asset declared by any departing Asian who failed to prove his citizenship at the time in the manner specified by the government rested in government without any further authority.

This means that there was no need of government being on the COT to claim ownership of such property because it was automatic. All such property, business, interest and any liabilities vested in government by virtue of s.1 of ADAD transferred to the Departed Asians Custodian Board.

The Board in this case had the powers to take over, manage all assets transferred to it by virtue of s.13 Decree, discharge liabilities on the property and it could sell or otherwise deal with such asset in the same way as the departed do.

However, the expropriated property Act of 1992 was an Act to provide for the transfer of the properties and businesses acquired or otherwise expropriated during the military regime to the ministry of finance to make provision for the return to former owners or disposal of the same by the government to provide for other matters connected to that property like claims for interest.

The Act defines expropriated properties in s.1 (1) (a) to include any property in business which was vested in the government and transferred to the departed Asians property Custodian Board under the ADAD 1973.

In the same Act, it is provided that the property shall from the commencement of the Act remains vested in the court and managed by the ministry of finance. It is important to note that by virtue of s.1(2)(a) any purchase, grants on or any dealings of whatever kind with such property or business was nullified.

In the case of *Victoria Tea Estates ltd v James Bemba* CA 49/96, it was held that once it is proved that the property was expropriated it becomes the statutory property of government and any dealings in it are nullified.

The minister was empowered under this law to appoint any person to manage any property or business vested in the government. Until he did so, the Departed Asians Property Custodian Board DAPCB was to continue to manage it. Under the same law, s.3 provided that any former owners of the property or business vested in the government under s.1 of the Act could within 90 days of the commencement of the Act apply to the minister in writing for repossession of the property or business.

It is amazing to note that though property was repossessed there was restriction of the sale of such property according to s.7 of the Act 1992. The property could not be sold or otherwise disposed off without the written consent of the minister until after 5* from the date of such transfer.

In the case of *Halling Manzoor v Serwan Singh Bahia HCCS 95*, before acquiring a repossession certificate, the defendant purported to sell his property to the plaintiff who sued for specific performance on the property. According to counsel for respondent, the respondent could not have passed on a good title to the plaintiff without the minister's consent as required by s.7. Court agreed on this point and further held that the defendant had not repossessed his legal interest and could not pass on title at the time purported sell.

According to s.11 (2) of the 1982 Act on repossession, the owner of the property had to pay for the value of any improvements on the property to the person who effected such improvements.

According to rule 8, the expropriated properties (repossession and disposal) regulation 1983, any person with any interest of whatsoever description in any property/ business affected by the Act other than a clam for repossession could within 90 days from the commencement of the Act lodge such claims with the verification committee by writing to the committee. According to *Habre*

International co v Ibrahim A Larakia Kassam CA 4/99 rule 8(1) only applies to claims before the expropriated property Act 1992. It did not apply to claims which arose 10 years after the commencement of the Act. So later, claimants weren't bound by that provision.

It is important to note that where property/ business had been transferred to any person/ body for value, such property/ business was returned to former owner or otherwise dealt with in accordance to the expropriated property act 1992. The government was liable to pay compensation to such person/ body. The compensation payable would be the purchase price less the income derived or which ought to have been derived from the said property/ business from the date of such transfer.

According to s.11(2) compensation was to be paid over such a period in such a manner as the minister may determine or negotiate with the person or body to be compensated. In the case of *Pyrali Abdul Ismail v Aedrian s.130 Alai Kia CC 9/97*, S.11(6) was challenged as being unconstitutional. For compensation to be reasonable it must be assessed on the market price at the day of judgment or at the time of the trial hence s.11 (4) and (6) of the EPA could not conform to legal principles and should be construed to conform to the provision of Article 26 1995 Constitution by virtue of Article 273 of the Constitution.

MORTGAGES

A mortgage is a transaction whereby an interest in land is given as security for the repayment of a loan. This was in the case of *Mutambulire v Kimera CA 37/72*. The debtor or proprietor of the mortgage land is called the mortgagor and the creditor is called the mortgagee. The secured sum with interest is the mortgaged debt. At common law, a mortgage took the nature of a conveyance of a debtor's title to the creditor on the condition that upon repayment or performance of some other obligation, the creditor should re-convey the title to the mortgagor. The above was enunciated in *mutambulire's* case e.g if x wished to borrow money from y on security of his house, he would transfer his legal title to y subject to the condition that upon repayment of the mortgage debt, y should re-convey the title to the debtor. While y had the legal title to the land, x retained his right or equity of redemption. The equity of redemption is an equitable interest which like other equitable interests was enforceable against the creditor and any purchase of a legal title with notice.

The nature of a mortgage under the RTA differs from the common law mortgage. S.116 RTA expressly provides that a mortgage created under the Act takes effect as security over the mortgaged land "but shall not operate as a transfer of the land thereby mortgaged." The above provision was interpreted in the case of *wamala v musoke [1920-29]ULR*

In *Re Forest Trustees Executors and Agency co ltd v Anson*, Herring CJ described the effect of a mortgage created under a corresponding provision of the Transfer of Land Act (Victoria) that it confers on the creditor merely a group of powers to secure the money lent" The debtor mortgagor remains the owner of the land subject to fulfillment of his/ her obligations under the mortgage agreement.

Although a mortgage created under the RTA does not transfer ownership of land to the mortgagee, it creates in the mortgagee's favour a separate and distinct interest in the mortgaged land. Hence, a registered mortgagee is a proprietor within the meaning of the RTA S.2. He/she is a proprietor of a mortgage while the mortgagor is the proprietor of the mortgaged land.

CREATION OF A MORTGAGE

Registered/Legal Mortgage:

S.1 (b) of the Mortgage Decree 1974 defines a mortgage to mean any mortgage, charge, debenture loan agreement or other encumbrance which is registered under the Act. S.155 RTA empowers a proprietor of land registered under the Act to create a mortgage by signing a mortgage instrument in the prescribed form in the eleventh schedule to the Act. Upon registration of the instrument, the land becomes liable as security in a manner set forth in the instrument. The mortgage is protected by s.61 RTA and whoever deals with land does so subject to mortgage as an exception to the principle of indefeasible title. A registered mortgage is sometimes referred to as a legal mortgage to distinguish it from an unregistered or equitable mortgage.

Equitable Mortgage:

In equity, a contract to create a mortgage was treated as a promise by the debtor to execute a legal mortgage when called upon to do so. Since equity regards as done that which ought to be done, such an agreement created an equitable mortgage e.g under the doctrines of equity, a deposit of title deeds by way of security or not accompanied by a memorandum was equivalent to an agreement to execute a legal mortgage and carried with it the entire remedies incidental to a legal mortgage. (*Barclays Bank v Gula Millers*) 1959 EA 540.

S.129 RTA specifically enables the creation of an equitable mortgage under the Act by deposit of a certificate of Title. The section provides that notwithstanding anything in the Act contained, the registered proprietor may create an equitable mortgage of land by depositing his/her certificate of title with a creditor with intent to create a security thereon whether or not accompanied by a memorandum of deposit. Every such equitable mortgage is deemed to create an interest in land. Under the provision, an equitable mortgagee is required to lodge a caveat against the mortgaged land. Several points arising from s.129 RTA need to be stressed.

1. First, to create an equitable mortgage, the COT must be deposited by the proprietor with the creditor with the object of securing the debt. Prima facie, depositing a certificate with the creditor against payment of money raises a strong presumption that the object is to create an equitable mortgage over the entire land described in the certificate and for the whole amount of the debt due. This presumption can be rebutted by proving e.g that the object of depositing a COT was merely for safe custody-*Guarantee Discount Co Ltd v Credit Finance Operation Ltd and another* [1963] EA 345.

2. It is not necessary that a note or a memorandum should accompany the deposit though to avoid controversy in the interest of both parties, there should be a memorandum setting out the object of depositing certificate and the terms thereof.

3. A person named in the certificate as proprietor must deposit the certificate. Where two or more persons are registered as proprietors, all must be involved. E.g in *De Souza Figuerido v Talbot and another* (1961) EA 167, two executors registered as proprietors of the suit property but only one deposited the certificate as security for loan. It was held that the deposit was ineffective to create an equitable mortgage.

4. The section requires an equitable mortgagee to lodge a caveat. On the surface, this requirement appears to be permissive for the equitable mortgagee to protect his/her interests against extinguishment by subsequent registered dealing in the land.

However, it seems that lodging a caveat is in fact a requisite for the creation of an equitable mortgage under s.128. The case in point is *Barclays Bank v Gulu Millers*. The reason is that under s.139 RTA, any person claiming an interest in land is entitled to lodge a caveat against dealings with the subject land. A mortgagee is a person claiming interest in the land.

MORTGAGE OF CUSTOMARY LAND AND TENANCY BY OCCUPANCY

Under s.9 (2)©, land Act, a holder of customary certificate of ownership of land has a right to mortgage his /her land. Likewise, s.35 (1), a tenant by occupancy (lawful and bonafide occupant) is entitled to pledge or undertake any other lawful transaction in respect of the occupancy. The Act does not prescribe the procedure for the creation of a mortgage over land owned under customary tenure or right of occupancy. Since neither customary land nor tenancy by occupancy (T.O) is registered under the RTA, the provisions of that Act do not apply to it. In *Mutambulire v Kimera*, which involved mortgage of a kibanja, the High Court held that where the mortgaged land is not registered under the RTA, the applicable law was common law and the doctrine of equity. Similarly in *Wasswa v Kikungwe* which involved sale of customary land, it was held that where a contract resembling that between natives is sought to be enforced, the court would apply the law of equity applicable to mortgages.

Remedies of a mortgagee:

Subject to any express argument of the parties. S 122 RTA implies certain covenants against the mortgagor in every mortgage made under the Act. These covenants include payment of the mortgage debt, maintenance and repair of mortgage property and the right of a mortgagee to enter to inspect the premises at any reasonable time. In addition, s.1 (2) of the Mortgage Decree implies that in every mortgage, a covenant against a mortgagor in possession to preserve the value of the mortgage property. If the mortgagor is in breach of any term of the mortgage agreement, the mortgagee may pursue the remedies stipulated in the mortgage decree. These are;

- 1) Sue for breach of covenant.
- 2) Appoint a receiver.
- 3) Take possession.
- 4) Foreclosure.

The remedies are cumulative. This means that a mortgagee is free to pursue one or all of them.

Action for Breach of Personal Covenant:

The mortgagee has an action for breach of contract which is not unique to the law of mortgages. If the action is successful, the mortgagee may enforce the judgment against the mortgagor's general assets even though they are not comprised in the mortgage. An action for personal covenant is not particularly a useful remedy while the mortgage is still recurrent. However, if the mortgagee sells the mortgaged land and the proceeds are not sufficient to discharge the costs of the sale and the mortgage debt, the mortgagee may bring an action against the mortgagor based on the personal *debt to recover the balance.

Taking Possession:

Under s.7 (1), Mortgage Decree, where a mortgagor is in breach of any covenant, the mortgagee may enter into possession of the mortgaged land for the purpose of realizing his/her security. The right of possession is not enforceable only against the mortgagor but also against any person who derived title from mortgagor subsequent to the mortgage e.g lessee and an assignee of the mortgaged land.

Prior to taking possession, the mortgagee may serve the mortgagor notice of not less than 60 days of his/her intention to enter possession. The decree does not state how possession may be effected. It is suggested that the mortgagee enters possession by physically entering and taking over control of the mortgaged land from the mortgagor. Where tenants occupy the mortgaged premises, the mortgagee takes possession of the premises by serving them an unequivocal notice to pay rent directly to the mortgagee.

Where the mortgagee enters into possession, he assumes certain powers and duties. His powers include collecting any income from the mortgages land plus arrears which the mortgagee would have been entitled to had he been in possession from the date of the mortgage.

The principle duties of a mortgagee in possession are to account not only for the income(in cash or in kind) he/she actually receives from the mortgaged property but also which he ought to have received by exercise of due diligence.

In addition, the mortgagee is accountable for unreasonable damage or neglect of the property due to his or her negligent act or omission. Despite the responsibilities involved, a mortgagee in

possession is not entitled to any remuneration for personally managing the mortgaged land. However, the mortgagee is entitled to reimbursement for the costs of repair and improvements he carried out to protect or increase the value of the mortgaged land to the extent that the expenses incurred exceed the income from the mortgaged land, they become part of the mortgage debt at the same level of priority as the principal debt and earn the same interest.

Due to the heavy responsibility imposed upon a mortgagee who enters possession, it is not advisable to exercise this remedy except as a preliminary step towards selling the mortgaged property. Alternatively, a mortgagee may avoid the responsibility by appointing a receiver to enter into possession.

Appointment of a receiver

A receiver is a person appointed to receive income of mortgaged land and use the proceeds to decrease the mortgage debt. A receiver may also be charged with the duty to manage the land by e.g. making necessary repairs or carrying out improvements where so directed in writing by the mortgagee with the consent of the mortgagor or court. The mortgagee may appoint a receiver if the power to appoint is expressly reserved in the mortgage agreement. In the absence of such powers, a mortgagee may apply to court to appoint a receiver.

See s.3 Mortgage Decree.

S.6 (4) provides that the appointment of a receiver is null and void unless made in writing and in accordance with the provisions of the section. The above point was also stressed in *Grindlays bank v Edward Boaz* CA 23/29 (Supreme Court). Besides, it is submitted that the power to appoint a receiver does not arise unless the mortgagor is in default for a period of at least one month and fails to pay following a written notice- s.116 RTA. Where a mortgage debt is payable on demand, a written demand for payment equivalent to notice. In that case, the mortgagee may go ahead to appoint a receiver without further notice.

Primarily, a receiver is employed for the security of the mortgage. He/she directly receives the proceeds from the land instead of the mortgagor. After payment of rates, taxes and other outgoings relating to the mortgaged land, the receiver would pay the mortgagee what is due under the mortgage and hand over the net balance if any to the mortgagor. From a legal point of view, the main advantage of a mortgagee appointing a receiver is that although a mortgagee appoints a receiver to protect his or her interests, the receiver acts as an agent of the mortgagor irrespective of any agreement to the contrary. The effect is that the mortgagee is not liable to the mortgagor or secondary mortgagee for the receiver's negligence or willful conduct. It is mainly for this reason that a mortgagee appoints a receiver instead of entering possession. The only drawback is that a receiver has to be paid a commission for his or her income out of the income of the mortgaged property. Indeed, the receiver's remuneration has priority over any payment due from the income collected, therefore, where the property does not generate any income e.g. where the mortgaged

land is a residential house occupied by the mortgagor, appointment of a receiver may not be economical except as a step towards sale of the property.

Power of sale:

This is the most important and common remedy for the realization of security under a mortgage agreement. The right to sale may be exercised without request to court where such right is expressly reserved in the mortgage agreement. Otherwise, the sale must be conducted with sanction of the court. (S.7 and 9) MD

S.10 MD provides that if a mortgage agreement allows mortgagee to sell land without reference to court, the sale must be conducted by public auction unless the mortgagor and subsequent mortgagee if any consent to a sale by private treaty.

The power of sale arises if a mortgagor defaults payment of the mortgage debt or part thereof for a continuance period of one month or such other period as is stipulated in the agreement and the mortgagor fails to pay after a written notice is served on him or her. See S116-RTA.

However, where there is a provision in the mortgage agreement that the loan is payable on demand, the power of sale arises once demand is made and the mortgagor fails to pay e.g in *Barclays Bank Uganda Ltd v Livingstone Katende Lutu*, the mortgage agreement provided that the debt was payable on demand and that in the event of default, the mortgagor has the right to sell the land without court order. It was held that once demand has been made, and the mortgagor defaulted in paying the debt, the bank was entitled to sell without recourse to court.

Given the agreement of the parties- s.9 of the mortgage decree sanctions the power of sale without the reference of the court. Court further held that if a mortgagee has the power of sale without court order, the court has no power to order some other remedy or postpone the sale. The only way the mortgagor may redeem the land is to pay the loan.

The mortgagee's power of sale under s.9 of the mortgage decree is further illustrated by the case of *Barclays Bank Uganda Ltd*. The appellant bank lent money to a third party. The respondent mortgaged his land to the bank as security for the guarantee he gave the bank for the payment of the loan. Under the mortgage agreement, the bank had a right to sell the land if the third party defaulted in payment of the loan. When it defaulted, the bank after serving the third party with notice of its intention to sell the mortgage property, he advertised the land for sale by public auction. The respondents applied to court for an injunction to stop the sale. The trial judge held that notwithstanding the express provision in the mortgage agreement giving the bank the power of sale, that power could not be exercised without court order. The judge also found that in view of the discrepancy between the money owed and the value of the property, the respondent would suffer irreparable loss and hence was entitled to an injunction. On appeal to the Supreme Court, it was held that under a mortgage agreement, the mortgagee has a right to sell upon default; the mortgagee may sell the mortgage property without judicial sanction. In their joint judgments,

justices* held that the position that the mortgagor's right to redeem the land is confined to payment of the loan if the mortgagee has the power of sale, without court ordering the foreclosure, nothing can stop the sale. The High Court decision was accordingly overruled.

Sale with Recourse to Court

Where the mortgage agreement does not empower the mortgagee to sell without recourse to court, the mortgagee must seek a court order to sell the property.

s.8 (1) of the mortgage decree, a mortgagee may apply to court for foreclosure on the mortgagor's right to redeem any time after the breach of any covenant to pay.

It is submitted that unless the debt is payable over the land an application for foreclosure cannot be entertained unless the mortgagee is in default for at least one month and has failed to pay after a written demand. See S.125 and 116 RTA.

See Sajabi v Amrelliwala Wamala [1956] 22 EACA 71

When the application is made, court will assess the amount due and fix a date which must not exceed a period of six months from the date of default within which payment should be made. If the mortgagor fails to pay by the prescribed date, court must order the mortgagor's right to redeem foreclosure and grant the mortgagee a right to sell the property.

A mortgage sale consequent upon an order of foreclosure must be conducted in accordance with the provisions of s.9 of the Mortgage Decree which provides that the sale must be by public auction unless the mortgagor and all subsequent mortgagees of whom the mortgagee has notice of at the date of the foreclosure order agree to a sale by private treaty and the court approves the terms of the sale.

By s.9 (2), it is further provided that the sale must not take place until after at least 30 days have expired from the date of foreclosure order. Presumably, the object of this requirement is to prevent the mortgagee from rushing into disposing of the land without sufficient advertisement and preparation. Besides, the delay allows a cooling off period to allow the mortgagor and mortgagee and other interested parties to attain a mutually agreeable alternative arrangement to a foreclosure sale. It should be stressed though that unless the mortgagee voluntarily agrees it seems that a foreclosure order cannot be reopened to allow the mortgagor to redeem.

s.9(3) requires the mortgagee to give reasonable notice not less than thirty days prior to the sale, of the date and place of the sale to the mortgagor and all the subsequent mortgagees of whom the selling mortgagees has notice at the date of foreclosure notice.

The object here appears to give interested parties a chance to obtain and observe or participate in bidding or seek an injunction if there has been an impropriety.

Failure to notify the mortgagor or subsequent mortgagees does not render the sale void. However the selling mortgagee will be held liable for any loss suffered by the mortgagor or any subsequent mortgagee as a consequence of the omission to notify them.

Duties of a seller (Power of Sale)

The power of sale is given to the mortgagee to realize his or her security in the event of default. Once the power of sale has accrued, the mortgagee is entitled to exercise it for his or her own benefit at the time of their choosing. It has been established in several cases that in the exercising of this power, the mortgagee does not act as a trustee for the mortgagor. Consequently, a mortgagee is entitled to look after his/her own interest where they may conflict with that of the mortgagor.

In *Cuckmere Brick co ltd v Mutual Finance co ltd* [1971] Ch. 948, the property was allegedly sold below its market value at a badly attended auction. In an action for damages against the mortgagee, counsel for the mortgagor submitted that the mortgagee should have postponed the sale because in the circumstances, it was inappropriate to sell. Lord Justice Salmon said that the mortgagee has no duty to speculate as to the most appropriate time for sale; it matters not that the moment may be unpropitious and that by waiting, a higher price could be obtained. He has a right to realize his security by turning it into money when he likes, nor in my view is there anything to prevent a mortgagee from accepting the best deed he can get at an auction even though the auction is badly attended and the bidding exceptionally low providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests as he sees them conflict with those of the mortgagor, the mortgagee can give preference to his own interests which of course he could not do where he acts as trustee of the power of sale of the mortgagor.

Neither the RTA nor the Mortgage Decree imposes any duty of care on the mortgagee in exercising his or her powers of sale. However, the common law imposes on a selling mortgagee a duty to act in good faith and with care. The duty of care is based on Lord Atkin's well-known neighbour principle espoused in *Donoghue v Stevenson*. The proximity between the mortgagee and the mortgagor gives rise to a duty on the mortgagee to take reasonable care to obtain the true market value of the land at the moment that the mortgagee chooses to sell.

One of the precautions that need to be taken by a mortgagee is to make sure that the property is properly advertised before the sale e.g. *Mubiru v Uganda Credits and Savings Bank* [1978] HCB 109, the mortgagee advertised in the newspapers a mortgage sale of the suit property by public auction simply as "the parcel of land being 4.2 acres" The advert omitted to mention that the land had been developed and a permanent house had been constructed thereon. It was held that the failure to state these facts in the advert was negligence because the property could have been valued differently.

In *Sajjabi's* case, it was observed that if a mortgage sale was by public auction which is duly advertised and to all appearances properly conducted, *prima facie*, it is assumed that the mortgagee's dual duty to sell in good faith and with reasonable care was fulfilled. But where the

mortgagee sells by private treaty, it is incumbent upon him/her to make particularly sure that the mortgagor's interests are amply protected. Where the selling mortgagee fails to take reasonable precautions or to observe the preliminary requirements prior to the sale, the mortgagor and any interested party of whom he's* notice may seek an injunction to restrain the sale from proceeding.

Where the sale is completed, the most common remedy available to an aggrieved mortgagor is to institute proceeding for compensation for loss suffered as a result of the unlawful mortgage sale. Damages are awarded in the usual way. E.g *Mubiru v Uganda Credit savings bank*, the mortgagor was awarded damages calculated as a difference between the true market value of the property and the value realized from the improperly conducted mortgage sale. In *sajjabi v wamala*, the court found that the mortgagee sold the land by private treaty without serving the mortgagor the statutory notice and conspired with the purchaser to sell the land below its market value. Court awarded damages against the mortgagee and purchaser measured as the value of the land at the time of the unlawful sale less the amount of money due on the mortgage at that date.

Protection of Purchasers

The title of a purchaser at a mortgage sale is not impeachable merely because the selling mortgagee's power to sell had not arisen or that the sale was otherwise irregular. The purchaser has no obligation to inquire whether or not the condition of sale is complied with.

s.9 (7) MD provides that the title of a purchaser acquired at a mortgage sale consequent upon an order of foreclosure shall not be impeached on the ground that the order for sale was improperly or irregularly done. The scope of this provision is not very clear. It would seem that the provision only protects the purchaser where the court urges* in making a foreclosure order. E.g the purchaser's title will not be affected in a situation where a higher court finds that the sale should not have taken place because the lower court made the foreclosure order when the mortgagor was not in default. However, it is submitted that unlike the repealed section 117 RTA, S.8 (7) MD does not protect a purchaser's title where for example the sale was not properly advertised, nor does it protect the purchaser's title if an irregularity occurs in a mortgage sale conducted under s.9 MD without sanction of court.

Nonetheless, it is submitted that even in such cases, once the transfer is registered under the RTA in the absence of fraud, a purchaser acquires an indefeasible title under s.61 RTA.

Proceeds of sale:

s.10 (1) MD prescribes the priority in which the proceeds from any mortgage sale are to be distributed. First to be paid are the expenses properly incurred or incidental to the sale. Next to be paid are all sums due to the selling mortgagee and any other encumbrances in the same order of priority. The remainder of the proceeds if any is paid to the mortgagor. Court has power to order in the case of a sale consequent upon a foreclosure the proceeds to be deposited to the court for distribution though the court have no power to alter the prescribed order of distribution. To avoid

liability, in most cases, it would be prudent for the mortgagee after paying himself to deposit the remainder of the proceeds to court. It should be noted that if the proceeds are not enough to pay for the costs of the sale and to discharge the mortgage debt, that is not the end of the matter. The mortgagee can bring an action as an unsecured creditor against the mortgagor for a short fall based on the personal covenant to pay. In practice, the action is likely to be pointless because the mortgagee's land would be the only worthwhile property.

Completion of a Mortgage Sale

A mortgage sale transaction is completed by registration of the purchaser as proprietor of the land. The purchaser takes the land free from all interests that were created after the selling of the mortgagee's interests was registered but the purchaser takes subject to any interest which had priority to that mortgage e.g assume that the land is subject to 3 mortgages A, B, and C, registered in that order, if B caused the land to be sold, the purchaser would take the land free of B and C's mortgage but subject to A's mortgage unless the latter is paid off.

Remedies of Equitable mortgagees:

In *Barclays Bank Uganda Ltd v Northcote* and another, Sekandi J observed that while s.138 of the RTA provides for the creation of equitable mortgages by deposit of title deeds as security, neither the RTA nor the Mortgage Decree makes provision for the remedies available to an equitable mortgagee. Accordingly, his honour felt compelled to look elsewhere for such remedies. The issue had already been conversed in the judgment of sir Kenneth O'Connor in *Barclays Bank v Gulu Millers* where he held that the law applicable to equitable mortgages is to be found in the doctrines of equity and the common law. Following this judgment, Sekandi J held that it would appear that the difference between an equitable mortgage and legal mortgage as regards remedies is that where a legal mortgagee may realize his security under the mortgage by exercising most of the statutory powers conferred upon him without recourse to the courts, an equitable mortgagee must of necessity apply to the courts for the exercise of any of his powers.

In accordance to the principle under *Barclays Bank v Gulu Millers*, court may avail to an equitable mortgagee all the remedies available to a legal mortgagee. Sekandi J stated that the appropriate procedure to follow for an equitable mortgagee seeking to realize his security was in the first instance to sue the mortgagee and obtain an order for an account of the outstanding mortgage debt. He should seek a declaration that he is entitled to a charge on the land comprised in the COT referred to in the memorandum of deposit to secure the amount outstanding plus the interest and costs. The declaration should be followed by an application that if payment is not made within a specified time, the mortgagee may realize security by pursuing any other of the remedies provided for in the mortgage decree.

Remedies of Mortgagees of Customary Land and Tenancy by Occupancy

In *Jacana v sekaali*, it was held that the remedies under the mortgage decree apply where a mortgage is created under the RTA. In that case, the plaintiff advanced to the defendant a sum of money. As security for the loan, the defendant deposited title deeds for his land to the plaintiff's advocate. Under the terms of the contract, if the defendant failed to repay money within one year from the date of the contract, then the plaintiff was entitled to sell the land. When the defendant defaulted, the plaintiff brought proceedings for a court order that the defendant pays the outstanding amount or alternatively that the land be transferred in the plaintiff's name. It was held that there was a binding contract that the plaintiff was entitled to the judgment for the amount of money claimed. With respect to the mortgagee, it was held that for the mortgagee to enforce his or her remedy under the mortgage decree, the mortgage had to be registered under the RTA as either a legal or equitable mortgage. In the instant case, there was no evidence that the mortgage was registered under the Act. Therefore, the plaintiff could not rely on s.2 of the mortgage decree to realize his security under the mortgage. It follows from this judgment that the mortgage's remedy under the mortgage decree do not apply to a mortgage under customary land or a mortgage of a tenancy by occupancy. In that case, the mortgagee must resort to the common law for his or her remedies. It should be noted that the common law remedies are the same as those in the mortgage decree. Clearly, there is a need for the legislation to harmonize the law of mortgages. In particular, the mortgage decree needs to be amended e.g presently, it is not clear as to the notices and their length that a mortgagee of customary land or tenancy by occupancy must give prior to the sale enforcement. Since the mortgage decree does not apply to such mortgages, the mortgagee is not bound to follow the procedure prescribed by the mortgage decree. However, it is suggested that the mortgagee should as much as possible at least use the procedure as a guideline.

See s. 139 RTA

Discharge of a mortgage by payment

In practice, most mortgages are discharged by payment within a prescribed period. Once the mortgagor pays off the mortgage debt, the mortgagee signs a discharge form- 12th schedule RTA. Upon its registration, the mortgage is discharged and the land ceases to be subject to a mortgage

Equities' Protection of a mortgagor:

This is summed up in the maxim "once a mortgage, always a mortgage" This maxim applies in two broad ways; the test for a mortgage is substance and not form and that no clogs on the equity of redemption. The former means that whether a transaction is a mortgage or some other transaction which is a question of substance and not form. Thus, if the parties enter into a contract of sale of land by which is in essence a mortgage in equity, it will be regarded as a mortgage and all the consequences of a mortgage will follow. No clogs on equity of redemption means that the court will not permit any attempt by the mortgagee to exclude the mortgagor's right to redeem his property. Lord Lindley in *Samuel v Jarrah Timber and Wood Paving Corporation [1904] AC 323 at 329* explains the matter that, "the doctrine once a mortgage always a mortgage means that no

contract between a mortgagor and a mortgagee made all the time of the mortgage and as part of a mortgage transfer or as one of the terms of the mortgage can be valid if it prevents the mortgagor from getting his property on paying off what is due on the security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage” Equity’s intervention was justified on the ground that mortgages tend to be entered into by needy people who would accept any terms “crafty” creditors would impose upon them e.g in *Matambulire v Kimera*, the plaintiff in desperation to go on a pilgrimage to Mecca mortgaged his land to the defendant on the condition that if the defendant failed to pay off the loan within a specified period, the defendant would become the absolute owner of the land. After the contractual date of payment expired, the defendant claimed ownership of the land and rejected the plaintiff’s subsequent attempts to redeem until his right to do so was foreclosed for by order or the land was otherwise disposed of in the mortgage agreement that gives a mortgagee an option to purchase mortgage property is a clog because it deprives the mortgagor of his right to redeem. *Samuel v jarrah* which added that it is not a clog if the option to purchase is granted in a separate agreement.

Qn. Can a mortgagee purchase property during a mortgage sale?

A clause in a mortgage contract may provide that a mortgage shall not be redeemed earlier than for example ten years from the date of the contract. Where the mortgagor seeks to redeem earlier, a question may arise whether such a clause is a clog on equity of redemption. This can be answered by two English authorities often cited in this regard

Fairclough v swan Brewery co ltd [1912] AC 564, the applicant / mortgagor had a lease over a hotel for a period of 17 years. He mortgaged his lease to the respondent which was a brewery company. The mortgage was subject to the condition that the defendant should not redeem earlier than 6 months before his lease had expired and that during the continuance of the mortgage, only beer brewed by the plaintiff should be sold in the premises. The defendant sought an early redemption so that he could be released from his restriction to secure only the plaintiff’s beer. The issue was whether a clause postponing redemption was a clause on the equity of redemption. Privy Council held that the clause was a clog because the right to redeem was valueless/ illusory.

McNaughton explained the privy council’s reason and said, “the land council on behalf of the respondent admitted as he was bound to admit that a mortgage cannot be made irredeemable ie plainly forbidden. Is there any difference between forbidding and permitting it if the permission is a mere pretense? Here, the provision for redemption is mitigatory. The encumbrance as a lease, the subject of the mortgage according to the letter of the bargain falls to be discharged before the lease terminates. But at the time when it is on the very point of expiry when redemption can be of no advantage to the mortgagor even if he should be so fortunate to get his deeds back before the actual termination of the lease ,for all practical purposes, this mortgage is irredeemable. It was obviously meant to be irredeemable. The above case should be compared with *Knights Bridge estate trust ltd v Byrne and others [1939] Ch. 441*; in this case, a mortgage provided for the repayment of the principle and interest by 80 half yearly installments spread over a period of 30

years. In view of the falling interest rates, the mortgagor sought to redeem early in order to take advantage of a loan elsewhere on better terms. The mortgagor sought a declaration that postponement of redemption for a period of 40 years was unreasonable because of its length and that he was entitled to redeem at any time by serving a 6 months' notice. It was held that there was no rule of law that postponement of redemption per se or for an unreasonable period is a clog on equity of redemption. Following *Fairclough*, the court said that postponement is a clog if it subsists as to make the equity of redemption illusory. However, *Greene MR* added that postponement may be one of the factors court may take into account in deciding whether or not a mortgage agreement should be set aside on the ground that its terms are oppressive and unactionable. On the facts of the case, the court found that the parties were of equal bargaining force. The mortgagor freely accepted the terms of it and it would not use the court to breach its contract. On the basis of these two authorities, it would seem that postponement of the date of the redemption by itself is not ground for judicial intervention unless in the circumstances of particular case, it renders the right to redeem illusory.

Collateral Advantage

A collateral advantage in the context refers to an additional benefit to payment of secured debt and interest which accrues to the mortgagee under a mortgage agreement e.g in *fairclough*, the CA was the monopoly for the marketing of the mortgagee's products. Prior to the 19th century the traditional view of the courts in England was that the essence of a mortgage was to secure money lent. Therefore any other advantage foreign to the basic object was void. Gradually, this rule was relaxed in line with subsequent economic developments and the notion of freedom of contract. As a result, more recent cases support the proposition that a collateral advantage is not necessarily a clog on the equity of redemption especially where the advantage terminates upon redemption.

Other Grounds for Judicial Intervention

The courts have inherent powers to intervene in the mortgage agreements as with any other contract on the ground that the agreement was in restraint of trade. It is an established common law rule that a contract operates as an unreasonable restraint of trade is invalid as being contrary to public policy e.g a provision in a mortgage agreement that for a given period, a mortgagor shall only deal with the mortgage products may be challenged on grounds of unreasonable restraint of trade. Whether indeed the restraint is reasonable will depend on several factors including the duration for the restraint and reasons for it.

Equity may also give relief against terms in any contractual transactions if they are oppressive and unconscionable. It is important to note that the term unconscionable means more than unreasonable. Court will not intervene in a mortgage transaction merely because the terms are unreasonable because it is the parties to decide what they consider to be reasonable. It will only intervene if the terms are shown to be morally reprehensible especially where one party seeks to

take advantage of the other. It should be noted that all the surrounding circumstances will be considered before the court intervenes in a mortgage agreement on equitable grounds.

Rights and Obligations of a Landlord and Tenant

Osama is a registered owner of mailo land at K village measuring 25 acres. He occupies 5 acres with 10 acres leased to Male for a period of 33 years effective 1st January 2000. According to the lease agreement, Osama and Male could sublease or assign his interest. Male subleased 1 acre of the land to K for a period of 20 years effective 1st January 2000, last week sold all his 25 acres Mailo land and transferred the title to x. x is evicting Male from the land on the grounds that he does not need him on the land on the grounds that he does not need him on the land. X has allowed x to stay on the land but has added that x pays to him all rent as it falls due. Male and K don't know what to do.

Rights of mortgagee

Due to failure of performance by the mortgagor of any covenant in the mortgage, mortgagee is entitled to two forms of remedies: i) mortgagee may either sue the mortgagor or obligor if any or both as the case may be on the covenant or he may opt to realize his security under the mortgage in the manner provided for in MD S.1(1)(a)(b)

Suit by mortgagee

Covenant contains clauses where mortgagor undertakes to repay principal sum whether in lumpsum/ installments on a stated date, pay interest at stated rate which is often subject to revision by mortgagee at specified dates. In case mortgagor defaults on payments of principal on interest on fixed dates or breaches any terms, mortgagee can sue the mortgagor and any guarantor on their personal covenant. Since the suit is based on mortgagor's personal covenant, mortgagor remains liable on the covenant even though he has transferred his interest in the mortgaged property- *Kinnaird v Trollope*.

Suits to recover principal sum secured by mortgage are barred unless instituted within 12 years from the date when the right to receive the money accrued- s.19(1) Limitation Act. Action to recover interest becomes statute barred after 6 years from the date on which the interest became due- s.19(5)

When limitation period expires, mortgagee loses his right as mortgagee and cannot maintain an action in court- *Cotterel v Price*. Mortgagee can be satisfied out of any property belonging to the mortgagor or guarantor even where it is not comprised in the mortgage

Priority of mortgages

Where proprietor creates two or more mortgages on the same piece of land, it becomes necessary to determine the priority of the different mortgages especially if the value of the land is in sufficient

to satisfy all the mortgages. The priority of the various mortgages will depend on whether the land is registered or unregistered.

Registered Land

Where land is registered, various mortgages whether legal or equitable have to be registered as required by MD and RTA- S.18 MD. Under the Torrens system of land registration practiced in Uganda, instruments are accorded priority from the date of registration- s.61 RTA. Accordingly, the priority of the different mortgages will depend on their respective dates of registration. It is immaterial that the mortgage is created earlier but not registered. Such an unregistered mortgage though created earlier would rank in priority to a mortgage created subsequently but registered earlier.

However, the different mortgagees are at liberty to agree to a different order of priority. The first or earlier mortgagees may agree to rank *pari pasu* with the second or subsequent mortgagees. It will normally be contained in a security sharing agreement entered into by the various mortgagees. First mortgagee prohibits creation of subsequent mortgagees without his/ her express consent. The subsequent mortgagee will therefore have to obtain the prior mortgagee's consent even to be allowed to rank subsequent to the earlier mortgage.

Unregistered interest.

Priorities between mortgagees of unregistered land is determined in accordance with the agreement of the parties that is mortgagor and mortgagee but where there is no such agreement, then in accordance with equitable doctrines. When there are competing equities, the first in time prevails. Therefore, the absence of any special circumstances the first mortgage to be created on an unregistered land will prevail over subsequent mortgages.-*musitafa ndigejjerawa v kizito and sebana*

FRAUD UNDER THE TORRENS SYSTEM

1. First thing to inquire into is 'what is fraud?' Courts have tried to define fraud. The Court of Appeal in *David Sekajja v Rebecca Musoke* followed the Privy Council definition for fraud in the case of *Gibbs v Messr* and said that fraud has been defined to mean actual fraud or some act of dishonesty and not what is called constructive fraud. It has to be an act of actual dishonesty.

What does actual fraud amount to in a factual situation? *Kato v Kaggwa*- a dispute of plot of land where someone claimed to be the original owner and occupant who had been deprived by the registered proprietor who had obtained a lease. Court said there was fraud because the original owner knew the land belonged to the plaintiff and he still went ahead to obtain a lease and a title so as to defeat the plaintiff's claim. Fraud was also shown where there were no minutes by the Mityana survey council, no survey records or minute from Uganda Land commission to grant the land. Compare with *Kampala Bottlers v Damamico**- owned land on a five year lease, lease expired before completing development. KCC subdivided the land and leased part of it to Damamico who were in the process of registering their own lease when they discovered that Kampala Bottlers had renewed the lease and obtained COT. They sued Kampala Bottlers for recovery of land and cancellation of title certificate on grounds amongst others of fraud. At trial, there was no new minute by KCC granting the land. Documents showed old minute of expired period. High Court said it was evidence of fraud. An order was issued that the title be cancelled. On appeal, the Supreme Court said fraud should not be implied like that. One has to show that KCC had tampered with the minute. There was no evidence since the town clerk and the mayor had signed the document.

Edward v Mbarara Municipal Council- Dispute over Property in Mbarara. This property belonged to two Asians. They had applied for the land from the municipal council and obtained a lease on initial term. They developed the property on the first floor and granted a temporary occupation permit in 1979. At that time, their two year lease had expired and they applied for its renewal. The process was interrupted by the liberation war. Ranganga applied for a lease on the land and got a COT. Later, he was sued for cancellation of title on the grounds of fraud. The majority of the Supreme Court held that title was rightly cancelled by the High Court for fraud and they relied on the fact that the appellant for lease on the plot knowing it was partially developed. At the time of the purported grant by court, there were no councils constituted in any part of Uganda in 1980 to

grant the lease. The appellant knew this as a fact and got a lease from officials who never had the power to grant the lease thus fraud.

Shakatalal Abdullah v Sandrudin- The proprietor of land was expelled from Uganda and came back and found property transferred in 1978 on basis of transfers* signed in 1978. It was witnessed by a lawyer. The plaintiff adduced evidence by way of his passport and other travel documents to prove that he left Uganda in 1972 till Amin's removal there was no way he would be around in 1978 to sign. Secondly that he had been involved in an industrial accident in 1976 in Canada and so he began writing using his left hand and so his signature changed. Signature on transfer form was forgery of his old signature. This was fraud.

Elizabeth Nakanwagi v Sterling Civil Engineering was a case decided on grounds where title was ordered to be cancelled. It was wrongly decided by the judge of the High Court. Nakanwagi applied for land in Uganda Land Commission. Application was accepted and offer given to her and went to the land office to process her title. The bureaucracy defeated her ie could not get her title till after two years. In the meantime, Jinja Kampala road was to be repaired and they had to put construction material on the land. Sterling company applied to the Land Commission and the title was hastily processed and obtained. Nakanwagi sued the Sterling company and Land commission for the recovery of the land. Judge ordered for the cancellation of Sterling's title saying the land had been already leased to her, they could not lease it out again. No ground was pleaded or proved and Sterling Company's title cancelled. Sterling negotiated with the lady since it would be very expensive to appeal.

In *Rose Muwongela** - who were relatives fighting over piece of land. As dispute continued in court, one applied and gained the lease in the land commission. The issue was whether obtaining title when litigation is going on amounted to fraud. Court said that it was not fraud.

Kazora v Rukuba- In 1978, the respondent Rukuba offered to purchase property from its registered proprietor. They (respondent and proprietor) searched Register of Titles and found a caveat on the land by Kazora who was claiming interest on the land. Respondent went ahead to purchase the land aware of the interest or caveat. Respondents took their transfer for registration and the registered proprietor who had applied for the removal of Kazoora's caveat. Notice was issued to Kazoora under s. 149(2) of the RTA. If it lapses, the caveat is removed. After pressure Kazoora is allowed to register another caveat which after a bit of a quarrel, the registrar removes it saying it was registered with error.so the transfer is registered in favour of the respondent. As the parties were wrangling over removal of the caveat, a suit has been filed by the caveator ie matter pending in court. Supreme Court decides on the issue of fraud.

- i. Whether buying of land while aware of the caveat constitutes fraud. Court said the caveat that merely stated that the caveator had an interest in the property did not necessarily preclude a subsequent sale since the caveat itself was not evidence of a sale.

The respondent was a bonafide purchaser notwithstanding his knowledge of the caveat. Mere notice of that claim was not evidence. Court did not refer to s.185

- ii. Whether effecting the transfer while matter was in court was fraudulent. Court in a negative way said there is no *lis penden* rule in Uganda , even if there is a court case, you can transfer without any fraud being committed.

S.145- a purchaser of legal estate can only have his interest defeated by fraud. That purchaser has no duty to inquire into the circumstances under which the registered proprietor who is selling bought the land. The purchaser need not inquire what consideration the vendor paid or how that purchase money is going to be used. The purchaser is not to be affected by any notice, actual or constructive of any trust or unregistered interest. Even if he has such notice of the trust or of any unregistered interest, it is of no legal consequence. That is the position notwithstanding the existence of any rule of law or equity to the contrary. The section is actually doing away with part of the common law doctrine of Bonafide Purchaser. The knowledge of such trust or interest is not itself fraud. You need fraud and not mere notice. The position of the holder of the legal estate is strengthened and that of a non-registered estate weakened.

2. Fraud must be pleaded. One must state in the court papers ie plaint that fraud was committed. It cannot be inferred. There are many decisions to that effect. *Patel v Lalji*- one must plead a fraud. The case of Kazoora and Rukuba demands that there be a clear and distinct allegation of fraud upon the pleadings and though it is not necessary that the word fraud should be used, the facts must be so stated so as to distinctively show that fraud is charged. It is not allowable to leave fraud to be inferred from the facts pleaded. Fraudulent conduct must be distinctively alleged and proved.

3. It must be the transferee who is guilty of fraud

STANDARD OF PROOF OF FRAUD

Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. In civil cases on the balance of probabilities and in criminal cases beyond reasonable doubt.

It is the transferee who must be guilty of fraud. The Supreme Court in *Kampala Bottlers v Domimico** is very clear on the point that fraud must be attributable either directly or by necessary implication to the transferee ie the person in whose name the land is registered. Transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such an act. It is not enough that fraud was committed. You must link a transferee to that fraud. That is why in *Kampala Bottlers*, *Kampala Bottlers* got off the hook since there was no direct link or substantial and to link them to the fraud. The RTA is clear on this point when in s.189 it protects a purchaser who acts bonafide but purchases from one registered through fraud. The section provides that nothing in that act shall be so interpreted as to ...on the ground that the

proprietor ...This means that land belongs to A- registered proprietor and B registers land in his name fraudulently land sold to C who is not party to B's fraud. C gets a good title since he has not been privy to B's fraud. This is a radical departure from the law of chattels. If anybody steals a chattel, he/she cannot pass a good title.

Lwanga v Registrar of Titles- 320 acres of Land in Mityana. Land registered in Mukasa's name. In 1920 Yusuf Galiwango bought the land but died in 1939 before registering the transfer in 1952 Katumba forged an agreement of sale of land saying he bought it from Galiwango. He proceeded to transfer land in his names in 1953. In 1955, this forger Katembe sold land to Salongo which was transferred in Salongo's name. 3 Years later in 1958, Lwanga, a successor to Galiwango discovered Katumba's forgery forcing Katumba to be prosecuted. Katumba was found guilty of forgery and was to serve a term of imprisonment. Court of Buganda in its criminal judgment said that land be transferred in Yusuf's name. Katumba appealed against his sentence and his appeal was dismissed. Lwanga sought to enforce the order by telling registrar to register land in Galiwango's name. Register refused to register him saying i) he should go to the High Court and obtain a consequential order under the RTA and that ii) land had since changed hands and was in the name of Salongo who was not a party to the transaction. The register thus refused to transfer the land to Lwanga.

In the High Court, Salongo came to give evidence. He testified that he did not know that Katumba had committed fraud or he was prosecuted for fraud. He admitted that at some point, he came to know that Katumba had been imprisoned and had been sued by Lwanga in a civil suit which had been abandoned. He knew all this after he had bought the land. The High Court held that Salongo was a bonafide purchaser for value and his title could therefore not be impeached or cancelled notwithstanding that he got his title from one registered by fraud since it had not been proved that he was privy to the fraud perpetuated by Katumba and his title was protected by s.189 RTA. The defence of bonafide purchaser is only available to a person who purchases for valuable consideration. If the transferee obtained the land by a gift, he does not qualify to be a bonafide purchaser under s.189,184(c), speak of a purchaser for valuable consideration. S.145 makes reference to a purchaser for consideration. Law recognises one who purchases with consideration ie protected bonafide purchasers.

4. Fraud must be committed on the register for a person to rely on the defence of bonafide purchaser; the fraud that the person is disowning must be on the register. *St. Mark Education Centre v Makerere University Council*- In 1943, a piece of land between Katanga valley and Mulago hospital was granted to the university by the governor and the university got a freehold title to the piece of land. Land covered hospital and complex. In 1990, nearly 50 years later, some clever person acquired a mailo piece of title over same piece of land and subdivided it into three plots. St. Mark was looking for piece of land to expand their school. They put advert in press to buy land. Mailo owners offered to sell three plots to them. In May 1991, appellants being cautious people wrote to university saying one wanted to sell them the land. University wrote back saying specific plot was not land owned by the university and never objected to appellants acquiring and

developing the land. The appellants wrote to MUK asking them to confirm with the chief planner that plan never conflicted with MUK land. University again denied any interest on the land. On 17th June 1991, MUK said that the plot was not one of those zoned by MUK. The appellants counselled with the local councils who confirmed. The appellants bought and registered in respect of the two plots. After they had got registered, rumours said that they had bought air. Appellants wrote to MUK for clarification and MUK said land never included plot in question. They started to develop the land and MUK realised that it was theirs and sued in 1993. Judge held in MUK'S favour and the Headmaster of St. Mark appealed. Court held that true, St. Mark was not guilty of fraud but the fraud had been created in creating a mailo title on top of a freehold title. The plots in issue were created out of the freehold register and even outside the mailo block land. These titles were fictitious, bogus and hanging in the air. Fraud was not committed in the register and provisions in s.189 could not be evoked to protect nothing. Therefore, the appellants could not evoke s.189 and 145 to protect their bogus titles. Even if the appellants were bonafide purchasers, courts could not interfere with respondent's proprietary interest based on the freehold register of 1943. They also dismissed the issue of estoppels sine MUK was misled on the piece of land they never owned. Court was persuaded that if fraud was allowed, then fictitious and bogus titles may arise even in West Nile where mailo never existed. Court could have relied on s.44. One issue first would be protected and s.184 (e)

BARCLAYS BANK V GULU MILLERS LTD

Respondent company had deposited with the appellant bank certain deeds of title to leasehold land at Gulu and had at the same time executed a memorandum of deposit of title in which it stated that it had deposited the title deeds 'with intent to create a lien or equitable mortgage/ charge' upon all property comprised therein for securing the payment on demand of all the moneys due from the respondent company to the appellant bank. By paragraph two of the memorandum, the respondent company undertook to execute on demand a legal mortgage with such powers of sale as the appellant bank might require. In consequence of failure by the respondent company to pay the appellant bank, the moneys due under the mortgage, the appellant bank sued in the High Court for a declaration that it was entitled to be considered as the legal mortgagee of the land comprised in the COT deposited, that the principal sum and the interest then due and accruing were a charge on the said land, an order for the payment of the amount due and in default that the land be sold and for the possession of the land. The defence was that the claim was unnecessary and premature, that the appellant bank's only remedy was to require the company to execute a legal mortgage which the respondent company had always been ready and willing to give and that the bank had no right to a sale or a foreclosure or any other relief. On appeal by bank, it was said that one of the remedies of an equitable mortgagee under the doctrines of equity was sale by order of the court and that the court should apply the doctrines of equity and order a sale.

Held: Under the doctrines of equity, where there is an equitable mortgage by deposit of documents of title accompanied by a memorandum by the depositor agreeing to execute a legal mortgage with

an unqualified power of sale, the court has power to order a sale and also a foreclosure. The primary remedy of an equitable mortgagee is foreclosure under order of court.

TEJA SINGH AND OTHERS V ISHER SINGH AND OTHERS

Applicants were members of a charitable trust known as the Sikh Temple which was a corporate body registered pursuant to trustees' ordinance. Appellants lodged a caveat with the registrar of titles in respect of certain land which the trustees of the Sikh Temple were owners.

Issue: Whether caveat lodged by a beneficiary claiming under any will or settlement”...

Held: Each member of the charitable trust has a beneficial interest created by the trust instrument in the trust property so can lodge a caveat. Claim interest as members of Sikh temple, a body corporate.

COMMON LAW PRACTICE OF A BONAFIDE PURCHASER

The priority between legal estate and equitable estate in the same piece of land: Often, one may have legal rights in land and other equitable interests. The law has to compromise the bonafide purchasers. *Pitcher v Rawlins* – the plea of a purchaser of a legal estate for value without notice is an absolute unqualified and unsavourable defence to an equitable claim. *Wilkes v Spooner* – puts the burden of proof of the defence on the person settling it up and the one claiming to be a bonafide purchaser. There are five elements to this common law defence;

- a) Good faith: The purchaser of the legal estate setting up his defence must have acted in good faith at the time of purchase ie bonafide *Oliver v Hinton* – the purchaser was acting through an agent to purchase land, the agent was a former clerk of a lawyer. During the negotiations, the agent asked the vendor where the title deed was. The vendor's response was that the deeds also covered other pieces of land but paid later. It turned out that the title deeds were with an equitable mortgagee. The purchaser claimed he bought it in good faith and that his purchase should take priority over the equitable one. Court held that in order for the purchaser's legal estate to be postponed to the priority of the equitable mortgage, it was not necessary to show that the purchaser was guilty of fraud or negligence amounting to fraud, that it was sufficient that the purchaser had been guilty of negligence to render it unjust to deprive the equitable mortgagee his priority. Lack of good faith refers to conduct that ignores to take into account the rights of other people. This can be by negligence.
- b) Value. The purchase must be for value and here we talk about money or money's worth. *Wormald v Maitland*. It suggests that marriage is value. Value should not be confused with consideration. S.91. Consideration need not be value, you can have property transferred for natural love and affection, where there is no value changing hands and property is transferred e.g gift, bequeath then this defence is not available to the transferee.
- c) Legal estate. The person setting up this defence must be possessed of a legal estate which he is defending as against an equitable claim – *Pitcher v Rawlins*.

Ndigejjerawa v Kizito Kubulwa Mwana – A mailo land was owned by Kizito, Kizito signed a document 20/02/48 selling the land to Seban for 320 shillings on 24/02/48. He resold it to Ndigejjerawa for 240 shillings. Ndigejjerawa was the first to try and register the land. Under the RTA it could not be registered because it was not in the right form. Ndigejjerawa sued Seban

and Kizito to recover the land. Court held that the land belonged to Sebana, he appealed to the High Court which held that the prior lodgement of a registered instrument cannot give a party priority so Sebane owned the land.

Read *Cave v Cave* (1880) 15 Ch.D 639

- d) Notice: For a purchaser to successfully set up the defence he/she must have acted without notice of the equitable claim. If he was aware then he cannot obtain priority over the equitable claimant. Common Law has three forms of notice:
- a) Actual notice- A person has actual notice of all facts of which he has had actual knowledge e.g by seeing, hearing, being present. Actual knowledge as in *Lloyd's Bank* does not include rumours.
 - b) Constructive notice: One has constructive notice of facts of which he would have acquired by actual notice and made those inquiries and inspections which he ought reasonably to have made *Boile v Burns* (1894) ch.25 says that the standard of reasonableness is one of men of business of the same circumstances. Using this test, a purchaser will be taken to have constructive notice in cases like
 - i) Where he has actual notice that there was some encumbrance or equitable claim and he deliberately fails to inquire further about it, he will take them to have constructive knowledge. *Jones v Smith* (1959) 1 WLR 1089
 - ii) Possession of land by a tenant- This would be constructive notice of the rights of the person on the land. *Crayen v Consolidated Bank Ltd*- the person in possession of the land held a lease and the purchaser knew that he was a lessee but he did not go ahead to find out the exact terms of the lease. In his laziness he relied on information from the vendor who misinformed him. Court held that the fact that the vendor knew of the existence of the lease and misinformed the purchaser does not divest the onus of inquiry of the purchaser. He was aware of the lease since he knew that it existed.

Hunt v Luck- the purchaser knew that rent from the property was not being paid to the vendor but third party in circumstances clearly inconsistent with the vendor's right to own the property; the purchaser did not find the exact interest of the third party. It was held that he had notice of the third party's rights.

Smith v Jones- This is to narrow the concept of constructive notice. Knowledge that somebody is in possession as a tenant is constructive notice of the tenant's rights but not other rights beyond the tenancy.

- c) Imputed notice: If the purchaser employs an agent to negotiate the sale e.g lawyer/ state agent, any Actual Notice or Constructive notice which the agent receives may be imputed onto the purchaser. *Read Re Alms Com. Charity-*

Jared v Clements- A purchaser was being represented by a solicitor. During the course of the negotiations, the solicitors' purchaser discovered there was an equitable mortgage. He asked the other solicitor for it to be removed. He then showed a receipt that it had been [paid which turned out to be fraud. So the mortgagor sued the plaintiff for the money. Court held that the purchaser's solicitor ought to have taken care to ensure that the equitable mortgage was actually discharged before completing the payment and that because he had failed to do so, the knowledge he had on the equitable mortgage was implied on the purchaser hence his title could not be free from the equitable mortgage.

When an agent acts for both parties, any notice that he acquires may be imputed on both parties. The only exception is where the agent enters into a conspiracy with one of the parties and conceals this information from the other party.

Read Sharp v Foy

- d) The last attribute of this defence deals with successor in title of a bonafide purchaser. Once a purchaser identifies the four elements he becomes bonafide. The rule in *Harrison v Forth* is that the successor of a bonafide purchaser acquires a good title free from prior equitable claims even if such a successor purchased the legal estate with notice of the equitable claim. Megarry's manual gives the rationale. If the successor is not protected, the owner could by widely advertising his equitable claim make it difficult for the bonafide purchaser to dispose off the land for as much as he paid for it. However if he is the original owner who is aware of the claim who is now becoming the successor, he cannot hide in the successor rule- *GordonV Hollan(1913) 82 LJPC 81*

How the doctrine has been modified in Uganda

By virtue of the Judicature Statute, the common law is part of the applicable law in Uganda. However, the common law is applicable in so far as it is not inconsistent with written law, in so far as local circumstances permit. The common law of bonafide purchasers can only apply to the extent that it is not inconsistent with written law and with local circumstances. The written law is the RTA that governs the registration of titled land in Uganda.

S.51 RTA whose effect is that until an interest is registered no interest in land passes. It should be read with s.61 which gives priority to a registered estate over unregistered estate and equitable interest.

S.56 whose effect is that a certificate of title is conclusive evidence of interest on title: As between competing legal estates, s.44 gives priority to the instrument registered first. Where you have a legal estate, it takes priority over any equitable claim. The only exception is where the legal estate was acquired through fraud- s.61. Such a title is void as against all parties privy to the fraud ie s.76

Under s.184, 5 instances are listed under which a person can sue for recovery of land. All the other four deal with a situation where conflicting interests are between people with legal estates e.g a mortgagor and mortgagee b) lessor and lessee in fault c) misdescription of land in the titles ie boundaries e) two titles to the same piece of land ie priority of the titles and basically looking at their priority,

It is only s.184 (c) which is relevant since you have to have equitable and legal interest. There is a possibility of equitable interest having priority if he had been denied priority by registered owner of the land through fraud.

CAVEATS

There are various types of caveats.

1. Caveats forbidding the bringing of land under the operation of the Act. One of the peculiarities of the Torrens system in Uganda is that it is possible to have caveat registered on land not yet brought onto the register, the essence of which is to stop the land being registered. Under s.22 RTA, any person claiming any estate /interest in land may before the registration of such land under the RTA lodge a caveat with the registrar in the fourth schedule of the Act forbidding the buying of the land under the Act, stopping the registrar from issuing a certificate of title to that land. Initially the provision was handy in the days of the mailo settlement. After the mailo settlement, caveats under s.22 were primarily used by customary tenants on crown or public land who disputed their land being leased out to other people by the government under the public Lands Act 1962 and Crown Lands Decree 1903. Protection was given to customary tenants by the Public Lands Act s.24(2) which requires the consent of customary tenants before their land was leased out. The problem of customary tenants disputing title decreased after 1960. In 1975, the Land Reform Decree was put up to revolutionize the land holding system in Uganda

The effect of this was that the land commission had power to allocate land even when it was occupied by customary tenure. Again, there was revival of the use of caveats under s.22 RTA by dispossessed customary tenants against civil servants to protect their land from rich business men who would want to take up their land e.g especially in the late 70's and the 80's and 90's, it continued where customary tenants registered caveats to stop them.

The Land Act has reinforced the position of customary tenants and persons in occupation of land but we cannot rule out corrupt land boards claiming to allocate land which is already owned. Here also, the caveats came in handy if land is grabbed.

S.61(2)(c) There are a number of formal requirements before a caveat can be lodged. They include in s.22

- a) Caveat must be in the form set out in the fourth schedule.
- b) Must be signed by the caveator or his or her agent.
- c) The caveat must particularise the estate claimed

d) If so required by the registrar, caveat must be accompanied by a statutory declaration stating the nature of the interest claimed.

e) The caveator must furnish the postal address at which the notices and proceedings relating to the caveats may be served on her/him. When the registrar receives the caveats, he is obliged under s.23 to:

i) Suspend to register the proceedings until either the caveat is withdrawn, has lapsed or until an order in the matter has been obtained in the High Court and served on him.

ii) The registrar must notify the applicant before registration of land about the caveat. After lodging the caveat, the caveator is not to idle around and do nothing, he/she is under an obligation as per s.24 within one month of lodging the caveat to take proceedings in a court of competent jurisdiction(now includes land tribunal) to establish her title as claimed in the caveat within one month.

Within the same one month, the caveator must give notice to the registrar or obtain and serve on the registrar an injunction or order of the High Court forbidding the bringing of the land under the Act.

If there is no such notice within one month or no order/injunction, the caveat lapses ie ceases to affect the land and cannot be renewed by or on behalf of the same caveator in respect of the same estate or interest on the land. Apparently, court cannot extend the one month period. So one should file the suit and notify the registrar. If the applicant on bringing the land under the Act wants the caveat to be removed, he may under s.23 of the Act summon the caveator to attend before the court to show cause why the caveat should not be removed. The High Court will have mandate to either remove or to leave the caveat.

2. Caveats on registered land.

Under s.148, provision is made on registration of caveats on land under the operation of the Act. But not everybody can lodge a caveat. The person lodging a caveat must have a caveatable interest. This must be a recognisable interest in land. The law recognises a beneficiary or any other person claiming an estate or interest. You do not have to prove the claim. The claim must be in the form of an estate or an interest on the land. A caveat cannot be lodged to protect a mere contractual right/statutory right. One must be claiming an estate/interest in land e.g if one is claiming as a purchaser. John Katarikawe's case, a lawful or bonafide occupant on land has protected interest on land and so can lodge a caveat.

Qn. What about a spouse and children in occupation, s.40 Land Act. Do they have an interest on the land? - Yes.

Mortgagees are recognised and so can lodge a caveat- s.138 . Barclays Bank v Gulu Millers

Beneficiaries are recognised- s.148 as people having interest on land and so can lodge a caveat. Beneficiaries under a trust /intestate estate can lodge too.

Teja Singh and others v Isher singh and others- A caveat was lodged by corporate body and singh temple court recognised that the member of the singh temple had interest in the trust property. The law also recognises contributor to purchase of land as also qualified to lodge a caveat unless the contribution was a gift. Also one who contributes to development of land can lodge a caveat, leases, people who claim easements or with an option to purchase land

Read- *Ramji v Rattansi*, *Haymar v Transport*, *Stromdale v Burden*

3. A caveatable interest may also arise in a contract which gives a proprietary interest in the property e.g land owner makes contract with builder , another remote situation is to have a contract not relating to land but which specifically entitles a party to lodge a caveat on a specific piece of land e.g one borrows a friend's shoe, it is possible for the shoe owner to insist that in as long as he does not return the shoes, he will lodge a caveat on the borrower's land. But the bottom line is that there must be a caveatable interest. *Boyes v Gathure*- the caveator claimed a beneficial interest in the property. The registered proprietor of the land applied to remove the caveat and the caveator went to the court. The High Court of Kenya made an order extending the life of the caveat hence the appeal to the Court of Appeal. Issue: was whether the words beneficial interest sufficiently described the estate or interest claimed by the caveator. CA was of the view that there was no estate or interest that had been disclosed. Newbold stated that 'i don't consider the words beneficial interest a sufficient definition of the nature of the interest claimed as a person may have a beneficial interest in different types of interest in land' The expression a beneficial interest means in another judge's view an interest for one's own benefit and not as nominal or bare legal owners such as a trustee. That there can be various interests in land and to claim merely an interest without stating the nature of the interest is not in my view a compliance with s.57(1)- s.148 of the Act or of the prescribed form which requires the nature of the interest to be stated. JSC gave reason as to why the exact interest must be particularised. He said unless the nature of the claim is disclosed , neither the caveator nor any other person with an interest in the lands knows whether or not to object to the caveat. He thus considered that the caveat was defective and ought to be rejected by the register. *Figuerido and Talbot*(1962), a caveator claimed to be an equitable mortgagee. However, the document he was relying on was headed sublease. The second problem was that the land in issue was owned by two people and only one of them had signed that document and there is no evidence that he had been authorised by the other co-owner to sign. Court held that in the absence of the second signature, the document could not be relied on for its worth.

Mutual Benefits Ltd v Patel and another also followed the same principle. Caveator claimed he had interest as lessee. He was relying on two agreements as evidence that he is a sub lessee. The

land in question belonged to three persons and only one person had signed the two agreements. No evidence that they had authorised their co-owner to sign on their behalf. Court rejected claim by the caveator because on the face of it, the interest could not lie.

Formal Requirements one has to Rely On are in s.148 as follows.

1. A caveat must be in the form in the 15th schedule in the Act.
2. The caveat must state the name and the address of an additional person against whom the caveat is lodged.
3. Caveator or an agent must sign the caveat except where the caveat is lodged by a court order or the registrar himself.
4. If the registrar so requires, a caveat must be followed by an affidavit stating the nature of the interest claimed.
5. Caveat must disclose some address or place in which a bank or credit institution is situated as the appointed place at which notices and proceedings relating to the caveat may be served.

When the registrar receives the caveat and is satisfied with the formal requirements, he/she enters it by registering it in a memorandum in the register book See S.152 RTA.

Requirement under s.149 (1)- Register should give notice of the lodgement of the caveat to the proprietor. Once lodged, a caveat has effect in law.

What is the effect of a caveat?

Under s.150 RTA, so long as the caveat remains in force, the registrar is prohibited from entering any change in proprietorship in register or registering any transfer instrument purporting to transfer or deal with the estate or interest in respect of which the caveat was lodged. There are exceptions to this prohibition:

1. Where the registration of the statutory instrument is done in accordance to some provisions in the caveat e.g where the caveator allows dealings that are subject to the caveat. This means that the subsequent instrument recognises the priority of the caveat.
2. Where the caveat requires the consent of the caveator in writing before a dealing can be registered. Where such consent is obtained, the registrar is at liberty to register subsequent instrument. A caveat is not an absolute bar to registration of subsequent dealings. It only prevents registration of subsequent dealings that affect or purport to affect estate or interest claimed in the caveat. So if a subsequent dealing does not affect the caveat, then it can be registered. S.153 RTA states one

such dealing. The section states that if caveat is lodged by beneficiary under a will or settlement, the registrar may register changes in proprietorship or transfers if in the opinion of the registrar such subsequent dealing is registered by the use of the settlement itself and the caveator does not within 14 days of being notified object to such registration.

A caveat does not add value to the claim of a caveator. It is for the caveator to go to it to prove his/her claim.

How to Remove a Caveat Under s.149 from the Register

Sam Matovu's case (1962) EA 280, Bennet J says at p. 282 that a caveat against the title of the registered proprietor is the creature of statute and can only be lodged in the manner prescribed under s.149 of the Registration of Titles Ordinance. He says then that 'in my opinion, it can only be removed in one of the ways prescribed by the ordinance'

Which are the ways?

1. Withdrawal by the caveator. Under s. 149(1), the caveator can withdraw the caveat, sign a notice of withdrawal of the caveat and this will be registered as an instrument to remove the caveat.
2. The proprietor of land or any other person claiming under the any transfer or other instrument signed by the proprietor e.g the transferee, mortgagee, trustee to summon the caveator to court to show reason as to why the caveat must not be removed. The caveator will apply to court under s.149(1) lead to s.197 and by notice of motion or by original summons- Patel, Chief Registrar. Once a caveator is summoned, court will determine whether the caveat should be remove or should be left in the register.
3. S.149(2) RTA as amended by s.16(3) of the Mortgage Decree 1974, the registered proprietor can apply to the registrar and remove the caveat and only the registered proprietor and not one with the signed instrument. An attempt has been made to remove a caveat and a caveat removed but the caveator challenged the removal in *Wandera v Chief Registrar of Titles* in view of which court upheld the challenge.

Once the application is made, the procedure is as follows:

1. Registrar gives notice to the caveator requiring the caveator to go to the court and obtain an order. The notice would require him to go to court to demand an order within 60 days of service of notice delaying the registrar from removing the caveat. The notice would be sent to the address in the caveat ie paper mail. The question arises how 60 days are calculated. Is it from the date the notice was posted? In *Kazoora v Rukuba*, court looked at s. 35 Interpretation Decree and stated that the notice shall be stated to have reached the

caveator in the ordinary cost of posting ie how long does it take? Once 60 days pass minus court order being obtained and served on the registrar, then the caveat lapses. It cannot be renewed by or on behalf of the same person in respect of the estate or interest.

Where there already is a court order under s.149(1), then the procedure under 149(1) for the removal of a caveat cannot be invoked. *Krisma ltd v Emma* (1964) EA 369, Where a caveator is served with notice under s.149(2), caveator can apply to extend the life of the caveat. Before the court can exercise its discretion whether to extend the caveat or not, the caveator must appear before court and either give an undertaking or secure money cash as the court considers sufficient indemnity against damage or loss to another person that may be occasioned if there is a delay in the disposition of this property by the caveat.

An application for the extension of time must be heard inter-parties. But in exceptional circumstances, the application can be heard ex parte in the absence of the registered proprietor. The idea of an exparte application was recognised in the case of *Mutual Benefits ltd v Patel* and Another e.g if 60 days are expiring very soon and you had problems.

At the hearing of the application, court has discretion as to extension or not of caveat depending on the facts of the case- *Mohammed Abdullah*- one of the judges, Spry VP observed that when handling applications for extension of time for the caveat, the court should follow principles as those in granting temporary injunctions.

That the caveator has a prima facie case with probability of success and if his caveat was removed, he would suffer substantial loss and his injury could not be atoned for with damages.

s.153, A registrar has permission to remove caveats already withdrawn or lapsed or those that have otherwise ceased to affect the land. It is not necessary for an application to be made. *Mayes v Aruka Ranch*, court said that the caveat should not remain on the register after a claim which it perfected has been affected by registration. No instrument to protect by the caveat e.g a lease elapses.

Removal of Caveats on unregistered land

Registrar is permitted to do that under s.178 RTA. To appreciate that, we will go back to the issue of the certificate of title. At the time of registration, there must be a survey plan for the title- s.39(4)(b). There must be a plan approved by land commissioner. Due to the problem of completing Mailo surveys in Uganda, they then amended the law in 1958 and introduced s.39 A +B+C+D which allowed registrar to issue land title minus surveys of land. Puzzles could be removed under s.39 (B) to deal with people refusing to survey the lands. Under s.1479 (1), the registrar is now permitted to register subsequent dealings on this land. But in (2), the registrar could refuse to register dealings on land unless the land is surveyed. When registrar refused to register, one would lodge caveat to protect his interests. Caveats became too many- 17 & D. Where there was a caveat limited as to parcels, the registrar under s. 17__would serve a notice to caveator

requiring caveator to survey the land. If the caveator neglected to effect survey within 6 months or such period extended by registrar, the registrar could remove the caveat..

You must have some basis of lodging a caveat, there are some sanctions if you do not. S.51 provides that anyone lodging a caveat with the registrar without reasonable cause shall be liable to pay damages if the caveat causes loss to the registered proprietor. What is reasonable is a question of fact. Court will look at all the circumstances of the case to determine whether the caveator acted reasonably, they will use the standard of a normal businessman if he would lodge a caveat or not. The complainant has the burden to prove that he incurred loss which will be taken into account when the court considers the measure of damages.

Ostraco Uganda Ltd v AG-This case involved property in Mbuya which belonged too Uganda Times Ltd and in 1985 it was transferred to Ostraco ltd ie 8 b;locks of flats. After the transfer, ministry of information staff who were staying there refused to move claiming no one had been informed so it was fraudulent. Government lodged a caveat on the property, the plaintiff cou;d not deal with the land as long as the caveat was heard- the judgment was heard for the proprietor ie they were bonafide purchasers, one of the grounds for damages were at 50 m

Caveats lodged by Registrar.

Under s.178 (b), the registrar of titles may of his own motion lodge caveats in specified circumstances. There are about four circumstances:

- a) Caveats on behalf of government to protect government interest.
- b) Caveats lodged on behalf of persons under a disability. The disabilities are listed in the subsection; infancy, lunacy, coverture, unsoundness of mind, absence from Uganda. If any of those disabilities exist, the registrar may lodge a caveat to prohibit any transaction dealing with land belonging to or is supposed to belong to them.
- c) To prohibit dealings in land in a case where it appears that an error has been made by misdescription of the land or by an order of court. Where there is a wrongful lodgement of caveat, one can recover damages. Such recovery is not easy with registrars' caveats unless it falls unders.138. It gives the registrar immunity in his work, he is not deemed liable in any respect of matter or act bonafide done by him or omitted to be done by him in the exercise or supposed exercise of any power or duty given under the Act, mere unreasonableness will not condemn the registrar.

QN. S.51, in view of this section- that an interest cannot be passed unless registered and s.61, what is the fate of unregistered interests in the Torrens system?

UNREGISTERED INTERESTS

The initial impression of the Torrens system is that it does not recognise unregistered interests. This is the import got from s.61 and 51 RTA. This may not be entirely correct. There is room within the Torrens system itself and as interpreted by courts to recognise unregistered interests.

The first such recognition is in the RTA and in particular the proviso, s.61 RTA itself recognises a number of interests to which a registered interest is subjected.

1. Rights existing under any adverse possession. These are rights that do not arise under a written or executed instrument itself but which arise out of a long uninterrupted usage/possession of the land. The RTA says it is possible to acquire the land on the basis of adverse possession- s.77- 79 gives the procedure of acquiring / apply to be registered as the proprietor of such land.
2. Public rights of way. People acquiring a right or pass over registered land. It need not be acquired by registered interest or by a long and uninterrupted user.
3. Easements acquired by enjoyment/use/substituting over/upon/ affecting such land. Rights enjoyed by one land owner over the land of another
4. Rights of government over registered land in respect of unpaid rates or other moneys which constitute a charge on the land. Income Tax Act, under this Act, the URA has a right to levy a charge on the tax payer's land. Under the Local Government Rating Decree 1976, Rating Authorities like city councils have a charge on the income of property jurisdiction in respect of unpaid rates.
5. Interests of tenants. If one purchases registered property, the purchase will be subject to the rights of tenants on the land.
6. Rights of Licensees which are recognised. Other than the RTA itself, there are other laws which recognize rights not registered under the RTA e.g unregistered rights under the Land Act like s.32, 42- children + spouses, bonafide and lawful occupants. Registered land is subject to these rights. Laws dealing with public utilities also recognise rights affecting registered land e.g Communications Act e.g Telephone Lines, wires, cables on registered

land subject to compensation. Electricity Authorities under the Electricity Act can enter one's land and put up poles minus entering a written agreement.

7. Registered land is subject to environmental considerations under the National Environmental Management, so one is restricted by NEEMA etc.
8. They (registered land) are subject to country Planning Act Cap 30. So one cannot build a farm in an industrial area and so one will be restrained by the Planning Authorities e.g City Council.

Common law also recognises unregistered interests as between the parties to that interest. If parties enter into an agreement to create an interest in the land, common law will recognise that transaction though not registered under s.51 as a contract inter-parties. Purchasers can sue and obtain right of specific performance ie to obtain registered interest of transfer. Look at the cases on the reading list Please.

Souza Figuerido and co ltd v Moorings Hotel Co ltd- There was a sublease of registered property which was not registered because it was not properly drawn as by law. The sublease under the bad agreement took the land and transferred the sublease to the respondent (moorings Hotel) which was being run as a club. Respondent defaulted in paying rent. On being sued for rent, their principal defence was that the sublease exceeded three years and under the RTA, a lease exceeding three years must be registered- s.100, so if not, there was no enforceable agreement. CA recognised s.51 RTA, no land can be passed unless registered but it does not state that an unregistered instrument cannot operate as a contract inter-parties and can confer on the parties the position of an intending lessee and the right to confer a contract specifically to obtain from intending lessor a registrable lease.

KCC v Mukiibi- involved property in Kampala, shops were subleased but they were not registered in the right form thus unregistered. Mukiibi was one of them to whom the shops was subleased. Issue was whether he had subleased to third party without KCC's knowledge contrary to terms of sublease which prohibited a party with possession subleasing. Mukiibi said sublease had not been registered and KCC could not enforce its rights as a sublease. Sir Udo Udoma agreed that a tenancy agreement was not registered but that it was enforceable against the defendant Mukiibi as an agreement or contract inter-parties.

Somali Democratic Republic v Treon- Treon owned leasehold property before expropriation of 1972, he entered an agreement of sale to Somali Republic. Some money was paid and before balance was paid, Treon and others were expelled in Amin's regime. After the expulsion, the property was vested in the government and managed by the custodian Board. The Board received the money (the balance) and transferred the property to the embassy in 1972. In 1972, law was made – the Expropriated Property Act which allowed former owners of land to claim land from the government. Trion claimed he got an expropriation certificate. He claimed that the transaction after 1972 had been nullified by that law. Courts had to clarify status of agreements before 1972

which agreement was not registered. Court said that even if there was no registered transfer, there was an enforceable transfer perfected by the custodian Board.

Steven Kalani v Satwart Kaur, unregistered surrender of a lease was signed by Satwart before his expulsion in 1972. The surrender was not registered as an instrument as required by s.51 RTA. By 1972, the lease was still subsisting in register; it had not been cancelled since the surrender was not registered. In 1959, Mailo owner registered surrender of lease and so the lease was cancelled from the register. He then transferred the mailo instrument from the lease to Steven Kalani. In 1982, Satwart said he left his lease and the minister gave him certificate to repossess the lease. The repossessing Asian said the surrender was not registered and so he did not lose it ie could not be passed. Court said that the surrender was a contract inter-parties still subsisting. Repossession was cancelled.

Court's decisions in any way protect the unregistered interests in land. The RTA has put up a mechanism to give protection to unregistered interest through the regime of the caveats.

Much as the unregistered interests are sanctities protected, the principle that registered interests take priority makes the position of the owner of the unregistered interest very shaky. Contracts inter-parties only bind parties to these contracts. Third parties are not bound and if they have a registered interest, that contract would be superior to a contract interparty by virtue of s.61. The RTA defines caveats as notices on the register itself to third parties about the existence of the unregistered interests.

THE END