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EXAMINING THE LAW ON DISPOSITION OF DERIVATIVE LAND RIGHTS BY NON-CITIZENS IN TANZANIA

*Aron Kinunda**

Abstract

This paper examines the law governing foreign investors' disposition of derivative rights to land in Tanzania. It employs a doctrinal approach by examining statutes, case laws, books, parliamentary hansards, reports and journal articles on the subject matter. The law recognizes three categories of land: general land, village land, and reserved land. Tanzanian land law recognizes the right of occupancy as its land tenure, which is in the form of a leasehold, as all land is public land. Non-citizens cannot own land under the right of occupancy except through derivative rights for investment purposes. The study further establishes that a foreign investor holding a derivative right to land can make disposition of such right through sale, mortgage or sub-leasing. This can only take effect after obtaining a written consent of the Tanzania Investment Centre (TIC), which holds a right of occupancy creating the respective derivative rights.

Keywords: *right of occupancy, non-citizen, foreign investment, derivative right, non-citizens, disposition, Tanzania Investment Centre.*

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1. INTRODUCTION

Non-citizens' ownership of land rights in Tanzania is restrictive. Tanzania's land tenure is the right of occupancy, either in the form of granted or customary right of occupancy. A non-citizen is restricted from acquiring land in Tanzania as a right of occupancy. However, as presented in this paper, a non-citizen can acquire land rights as a derivative right created out of occupancy for investment purposes as approved or issued under the Tanzania Investment Act or the Export Processing Zones Act. Furthermore, a non-citizen can be granted a right of occupancy or a derivative right for residential purposes, provided that such land is acquired for as secondary or ancillary purpose to the investments approved under the Tanzania Investment Act.¹ According to the Land Act, apart from natural persons, non-citizens include corporate bodies formed under the Companies Act or whose majority shareholders or owners are non-citizens.² It is important to note that the law excludes charitable organizations,³ foreign Governments, institutions wholly owned by a foreign Government, and International Institutions or organizations from this restriction.⁴ This means that such entities can acquire land by way of a right of occupancy, irrespective of the fact that they are non-citizens. Furthermore, the law prohibits

¹ Land Act, Cap. 113 [R.E. 2019], s. 25(1A).

² Id, ss. 19(2), and 20(4).

³ These are not-for-profit foreign or local corporation or organization of the relief of poverty or distress of public or provision of health or other social services for the advancement of religion or education under an agreement to which the Government of Tanzania is a party, and where no such agreement exists, the Minister is satisfied that such corporation or organization is established solely for the purpose of the relief of poverty or distress for the public, or for provision of health or other social services or for the advancement of religion or educations.

⁴ Land Act, s.19(3).

the transfer of interests in land to a non-citizen. According to the Land Act, disposition or an attempted disposition of a right of occupancy to a non-citizen is good cause for the President to revoke the right of occupancy.⁵

The Land Act does not define a non-citizen. It is essential to examine what the law provides as to who is a citizen in Tanzania in order to understand who a non-citizen is. According to the Registration and Identification of Persons Act, a citizen is defined as any citizen of the United Republic per the relevant law of citizenship.⁶ This definition does not provide a clear understanding of who is a citizen. Instead, it requires considering citizenship laws to comprehend who a citizen is.

The Tanzania Citizenship Act does not define a citizen. It, however, determines how a person becomes a citizen: by birth, naturalization and descent.⁷ A citizen by birth is for persons born in Mainland Tanzania and Zanzibar before the Union Day and was immediately before that day a citizen of either Mainland Tanzania or Zanzibar. Furthermore, every person born in the United Republic on or after Union Day is deemed a citizen of the United Republic with effect from the date of his birth.⁸ Thus, any person born in the United Republic is a citizen by birth except where neither of the parents is or was a citizen of Tanzania, the father was a foreign diplomat or any of the parents was an enemy, and the birth occurred under enemy occupation.⁹

⁵ *Id.* ss. 45(2), & (2A).

⁶ The Registration and Identification of Persons Act, No. 11 of 1986, s. 3.

⁷ The Citizenship Act, No. 6 of 1995, ss. 3, 4 and 8.

⁸ *Id.* ss. 4(1), & 5(2).

⁹ *Id.* s. 5(2).

A citizen by descent refers to any person born outside of Tanzania on or after Union Day to a father or mother who is a citizen of Tanzania.¹⁰ Moreover, it also refers to persons born outside of Tanganyika or Zanzibar before Union Day who was immediately before Union Day a citizen by descent of Tanganyika or of Zanzibar.¹¹

Citizen by naturalization refers to any person who is not a citizen of Tanzania, who is of full age and capacity, becomes a citizen upon applying to the Minister to be naturalized as a citizen of the United Republic and is granted a certificate of naturalization.¹² This is also for any person of full age and capacity born outside the United Republic to a father who was a citizen by descent at the time of that person's birth.¹³ The law requires the applicant to renounce or indicate a willingness to renounce their citizenship or nationality concerning any other country.¹⁴ A minor may be naturalized as a citizen on an application made by a parent or guardian of the child.¹⁵

Thus, for acquiring land rights under the Land Act, a person not falling within the above categories of citizens is considered a non-citizen and thus not eligible to acquire a right of occupancy in Tanzania. As already observed, this extends to corporations under the Companies Act whose majority shareholders are non-citizens. This is to say, for land acquisition in Tanzania, the

¹⁰ *Id.*, s. 6.

¹¹ *Id.*, s. 4(3).

¹² *Id.*, s. 9(1).

¹³ *Id.*, s. 9(2).

¹⁴ *Id.*, s. 9(3).

¹⁵ *Id.*, s. 10(1).

nationality of a company is determined by the citizenship of the shareholders or owners. Where the majority shareholders of the company are citizens of Tanzania, such a company is considered a Tanzania company. Where the majority shareholders are not citizens of Tanzania, such a company is regarded as foreign company.

Existing literature on the subject have addressed the position of the law on the acquisition of land in Tanzania.¹⁶ These literature have focused on examining the position of the law on foreigners' access to land Tanzania leading to the conclusion that non-citizens cannot be granted land in Tanzania except for investment purposes. While these studies have clearly indicated that a non-citizen cannot acquire or be allocated land in Tanzania except for investment purposes, there has not been a study on whether a non-citizen can dispose the land acquired for investment purpose and under what conditions. Therefore, there is limited understanding on the position of the law regarding dispositions of derivative rights by non-citizen. This study, thus, expounds from the existing literature by examining the position of the law

¹⁶ Rwegasira, A. *Land as a Human Right: A History of Land Law and Practice in Tanzania*, (Dar es Salaam: Mkuki na Nyota Publishers Ltd, 2012) p. 100; Musa L., "Foreign Investments and the Future of Customary Land Rights in Tanzania: Examining Legal Challenges Under the Land Acts", *Vol.2, Issue2, Nyerere Law Journal*, (2014): pp. 1-23; Tenga R. W. and Mramba S. J., *Theoretical Foundations of Land Law in Tanzania*, (Nairobi: Law Africa Publishing (K) Ltd, 2017) pp. 129, 110 – 117; Massay, G. E., "Compensating Landholders in Tanzania: The Law and the Practice" in *Handbook of Research on In-Country Determinants and Implications of Foreign Land Acquisitions*, ed. Evans Osabuohien, (Germany: Covenant University, Nigeria & German Development Institute: Germany, 2015) pp. 374 – 388; Larsen, S. "Foreign Land Acquisitions in Tanzania : Global Ideology, Local Perspectives", (Master Thesis in Human Geography Department of Sociology and Human Geography, University of Oslo, 2012) p. 51.

on disposition of derivative right to land by foreign investors in Tanzania.

The paper aims at establishing a specific position of the law on the disposition of land by foreigners in Tanzania. The legal question which this paper examines is whether a non-citizen can legally dispose a derivative right. This paper examines the position of the law for foreign investors to make disposition of a derivative right in Tanzania. The study employs a doctrinal approach as it explores the position of the law on disposition of land by foreign investors. It examines the law on land acquisition and disposition by foreigners in Tanzania. Thus statutes, case laws, books parliamentary hansards, reports and articles relevant to the subject matter are examined in order to appreciate the position of the law.

Therefore, this paper examines the law on the disposition of a derivative right to land granted to a non-citizen for investment purposes under the law. It points out the restrictions attached to a derivative right of occupancy for its disposition.

2. LAND OWNERSHIP IN TANZANIA

According to the Tanzanian land laws, all land in the country is regarded as public land vested in the President as a trustee for and on behalf of all the citizens of Tanzania.¹⁷ As such, the law requires the President and every person exercising the powers of the President under the Land Act to discharge duties as a trustee of all the land in Tanzania for the economic advancement and

¹⁷ Land Act, ss. 3(1)(a), 4(1), and Village Land Act, Cap. 114 [R.E. 2019], s. 3(1)(b).

social welfare of the citizens of Tanzania.¹⁸ The powers of the President over land matters are also exercised by the Minister responsible for land matters and the Commissioner for Lands as the President's appointees.¹⁹ Government officials or institutions also exercise such powers as delegates. Therefore, the law requires such delegates to exercise delegated powers and discharge their duties as a trustee of all the land to advance the economic and social welfare of the citizens. The law vests radical title to land in the President; thus, the state is a superior landlord, and the citizens are the tenants of the superior landlord. The President is vested with administrative and oversight powers over the use and development of all land in Tanzania. During the discussion of the Bill by members of the parliament, it came out clear that this position was supported by many on the argument that land should be vested in the President in order to protect the land interests of present and future generations of Tanzanian citizens. It was also argued that it would help to protect and control land grabbing by few wealthy people and foreigners.²⁰

The law in Tanzania categorizes land into three categories: reserve land, general land, and village land. The categorization is for the management of public land.²¹ The powers to administer and manage reserved land and general land are vested with the Commissioner for Lands in the Ministry responsible for land in accordance with the Land Act.²² On the other hand, village land

¹⁸ Land Act, s. 4(2).

¹⁹ *Id.* s. 9(1).

²⁰ Parliament of United Republic of Tanzania, *Parliamentary Hansard*, 14th Parliamentary Session sat on 9th February, 1999: 26, 31, 38, 39 and 53.

²¹ Land Act, s. 4(4).

²² *Id.* s. 10.

is administered and managed by the Village Council, which must manage the land in accordance with the principles applicable to a trustee. It must manage the property as a trustee for the villagers and other persons in the village.²³

The laws recognize the right of occupancy as the only land tenure system which is defined as a title to the use and occupation of land including the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land under customary law.²⁴ The right of occupancy is divided into two categories: the “granted right of occupancy” and the “customary right of occupancy”. The right to occupy land in Tanzania under the right of occupancy is reserved to the citizens of Tanzania.²⁵

Apart from the two land tenure systems prevalent in the country, a person can also acquire land rights through derivative rights. A derivative right means a right to occupy and use land created out of a right of occupancy. It includes a lease, a sublease, a licence, a usufructuary right and any interest analogous to those interests.²⁶ This is a right to occupy and use land derived from a right of occupancy, either granted or customary.²⁷ From the definition, a derivative right takes the form of a lease, a sublease, a licence, a usufructuary right or any other secondary interest.

²³ Village Land Act, s. 8(1)&(2).

²⁴ Land Act, s. 2.

²⁵ *Id.*, s. 19, Village Land Act, s. 12(2).

²⁶ Land Act, s. 2.

²⁷ *Id.*, s. 19(1)(b) read together with Village Land Act, ss. 31 and 32.

3. AN OVERVIEW OF THE RESTRICTIONS OF ACCESS TO LAND BY NON-CITIZENS

Access to land is an aspect of human rights, that is, right to land. Property rights, including land rights, are essential to the enjoyment of other human rights including rights to food, adequate housing, health, work, a healthy environment, development, and without access to land, many peoples and communities find themselves deprived of their means of subsistence. Thus, enjoyment of all human rights, including the right of peoples to decide their future, depends on policies and legislation concerning land.²⁸ Thus, land is a fundamental resource of the nation state without which there cannot be nation. Housing, agriculture, natural resource use, and national security concerns are all based upon land management and use.²⁹ Due to this, some states have adopted protectionist approach of not allocating or granting land to non-citizens. Non-citizens are granted or allocated land subject to certain restrictive and/or prohibitive conditions. Historically, states classified those who were not citizens as foreigners or aliens. As a result of such status, they were deemed not to be appropriate recipients of full rights of land ownership and use. However, with the global development, increases in foreign investments and growth of international trade, states have started to mutually accept the rights of each other's citizens to receive the same treatment as their own citizens. However, as regards land, many states still

²⁸ Europe-Third World Centre (CETIM), *The Right to Land*, (Geneva: CETIM 6 rue Amat, 1202 Genève, Suisse, 2014) p. 2.

²⁹ Hodgson S., Cullinan C. and Campbell K., "Land Ownership and Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and Use of Land by Foreigners", *FAO Legal Papers Online*, December 1999: p. 1.

restrict its ownership and use by foreigners.³⁰ The restrictions on ownership and use of land by foreigners are attributable to various reasons including but not limited to the following:

First, some countries consider foreign land ownership as a potential threat to national security. This is based on the assumption that foreigners may use the land for purposes that may undermine national security and the security of its citizens. In the United States, for instance, a concern has been raised that foreign investments on land may have consequences for U.S. national security.³¹ Studies indicate that some jurisdictions restricted foreign land ownership for national security or similar interests. These include countries such as Australia, Finland, Russia, and Spain, to mention just some.³² According to Allison Brownell Tirres, the concerns underlying restrictions on property ownership were political concerns related to the fear of foreign invasion. The argument being that, if land had to fall into their hands who owe no allegiance to the crown, then the defence of the kingdom would have been defeated. This means that foreign landholding was a threat not only to the land tenure system, which depended on ties of loyalty, but also to the kingdom itself.³³ National interest and national security are often advanced as the main reasons for the imposition of restrictions on foreign ownership of land or other land-based resources. National

³⁰ *Ibid.*

³¹ See <https://www.gao.gov/blog/foreign-investment-u.s.-agricultural-land-raising-national-security-concerns>.

³² Staff of the Global Legal Research Directorate, “Restrictions on Land Ownership by Foreigners in Selected Jurisdictions”, *The Law Library of Congress, Global Legal Research Directorate* <http://www.law.gov>, 2023, p. 2.

³³ Tirres A. B., “Ownership without Citizenship: The Creation of Noncitizen Property Rights”, *Michigan Journal of Race and Law*, Volume 19, p. 12.

interest encompasses concerns around food security, protection of coastal and sensitive land and water protection, communal lands, national monuments, security or military installations, and other areas of national strategic importance.³⁴ This also appears to be the reason advanced by the parliament in Tanzania in imposing restriction of land ownership and land dealings by foreigners.³⁵

Second, the prevention of land speculation is another reason for restricting land ownership by foreigners. Foreign investors might purchase land as a speculative investment. The nature of foreign acquisitions and use of land is in most cases influenced by the relative financial superiority of the non-nationals against the local citizens. As a result, there is a need to restrict land speculation which is a potential source for distortion of agricultural and housing land market prices. Restrictions can help ensure that land is used productively and contributes to the local economy. It is common for land speculators to acquire vast acres of land simply to raise prices and resell. It is considered that allocating land to foreigners may bring foreigners who acquire land for speculation purposes only.³⁶ For instance, Hungary has expressly included restrictions on foreign ownership to deal with this perceived threat in a time when demand exceeds supply and prevent land speculation on the basis of rising prices.³⁷ In Tanzania, the

³⁴ Report and Recommendations by the Panel of Experts on the Development of Policy Regarding Land Ownership by Foreigners in South Africa Presented to the Minister of Agriculture and Land Affairs, Hon. Lulu Xingwana, Pretoria, City of Tshwane, August 2007: p. 28.

³⁵ Parliament of the United Republic of Tanzania, *Parliamentary Hansard*, pp. 22 and 56.

³⁶ Tirres A. B., Ownership without Citizenship: above note 33, p. 21.

³⁷ Hodgson S., Cullinan C. and Campbell K, 1999, p. 19.

Minister responsible for land in presenting the Bill on 9th February, 1999 observed that the law was enacted with the view of preventing land speculations and disposition of land to foreigners contrary to legal requirements.³⁸

Third, some states justify restricting allocating land to foreigners based on sovereignty and self-determination. Land being an essential natural resource, its ownership is a matter of national sovereignty for many nations. Thus, restricting foreign ownership guarantees states to assert their right to control, to manage and use their own land. International jurists primarily considered sovereignty and property claims in the context of changes in, and disputes over, territorial control.³⁹ Scholars have argued that land provides the basis for political organization as there is no state without land, and land often constitutes the most important measure of the space where sovereignty is exercised.⁴⁰ During debating the Bill, members of parliament of Tanzania supported restriction on allocating and granting land to foreigners arguing that Tanzanian land is for Tanzanians and not foreigners.⁴¹

Fourth, preventing foreign economic domination is another reason which states use to restrict allocating land to foreigners. This concern is more common for states with weak and undervalued currencies.⁴² However, similar fears of foreigners

³⁸ The Parliament of the United Republic of Tanzania, *Parliamentary Hansard*, 14th Parliamentary Session sat on 9th February, 1999: p. 22.

³⁹ Cotula L., “Land, Property and Sovereignty in International Law”, *Cardozo J. Of International & Comp. Law* [Vol. 25:219, (2017) p. 220.

⁴⁰ *Id.* at p. 221.

⁴¹ The Parliament of the United Republic of Tanzania, *Parliamentary Hansard*, 14th Parliamentary Session sat on 9th February, 1999: pp. 41 and 42.

⁴² Hodgson S., Cullinan C. and Campbell K, 1999, p. 19.

“taking over” led the United States to impose various restrictive measures at both state and federal levels irrespective of its economic power. The border protection measures in Mexico apart from fulfilling national security objectives; it may also directly address concerns about the creation of foreign enclaves in the border areas with Mexicans having only subservient roles.⁴³

It is important to note at this juncture that restrictions of access to land by foreigners in various states take different forms. The restrictions may relate to limiting the amount of land that may be held; limiting the length of time that land may be held; and those prohibiting acquisition or ownership without regard to the amount of land, the duration held, or the type of land.⁴⁴

4. ACQUISITION OF LAND INTERESTS BY NON-CITIZENS IN TANZANIA

As it has already been observed, the law in Tanzania generally restricts acquisition of land interests by non-citizens. The law categorically prohibits allocation and grant of land to non-citizens. Despite the general restriction imposed by the Land Act for non-citizens to acquire land in Tanzania, there are other avenues through which a non-citizen can access land in Tanzania. These include access through TIC, Joint Venture and Company Incorporation, purchase in the market, and inheritance as explained here below.

⁴³ *Ibid.*

⁴⁴ Huizinga J. A., “Alien Land Laws: Constitutional Limitations on State Power to Regulate”, *Hastings Law Journal Volume 32, Issue 1* (1980), p. 255.

4.1 Access through Tanzania Investment Centre

Generally, it is through a derivative right that non-citizens can acquire land in Tanzania, which should be for investment purposes or for residential purposes provided it is secondary or ancillary to investment purposes. Under the law, a derivative right is used to create interest in land for investment purposes. Tanzania's law prohibits granting the right of occupancy to non-citizens.⁴⁵ Instead, non-citizens can legally acquire a derivative right for investment purposes. For non-citizens to acquire such rights, the right of occupancy is granted to the Tanzania Investment Centre (TIC) as the primary title holder. The foreign investor holds a derivative right as a leasehold of lesser years. A person, a group of persons, or a corporate body who is or are non-citizens, including a corporate body the majority of whose shareholders or owners are non-citizens, may only obtain land for investment purposes as approved under the Tanzania Investment Act and the Export Processing Zones Act.⁴⁶ The High Court of the United Republic of Tanzania sitting at Arusha in *Peter Oloitai vs Rebeca Toan Laizer and 6 Others* High Court of Tanzania at Arusha, Land Case 26 of 2017, p.18, Mzuna, J observed:

This Court has powers under section 99 (1)(d) of the Land Registration Act, Cap 334, RE2004 for rectification of the land register if there is proof that registration over the title was obtained by fraud. *The defendants have successfully shown that there was fraud because at the time when John Faull and his wife owned that suit plot without the indigenous Tanzanian the law which did not allow foreigners to own land was in force under*

⁴⁵ Land Act, s. 19(2)(b).

⁴⁶ *Id.*, s.19(2).

section 20 (4) and (5) of the Land Act, Cap 133 RE 2002.
(Emphasis supplied)

The Judge went further to state:

I say so because Taon Laizer (5th defendant) resigned as a Director on 30 June, 2011 while the said law came in force on 1st day of May, 2001 vides GN No. 485 of 2001. This is a matter of policy. The remedy is revocation under section 45 of the Land Act, Cap 113.

The Judge then ordered the land to revert to the Village Council and restrained the plaintiff and the defendants from dealing with the land. The High Court, in this decision, cemented the position that a non-citizen cannot claim ownership of the right of occupancy in Tanzania.

It is important to note that when a derivative right held by a non-citizen or a foreign company expires, terminates or extinguishes, the interests in and over the land revert to Tanzania Investment Centre or any other authority as the Minister may describe.⁴⁷ This means that under this form of interest in land, just as it is with a lease, the landlord has the right of reversion in and over the land, which is the subject of the derivative rights by a non-citizen.

4.2 Joint Venture or Company Incorporation

This applies where a non-citizen enters into a contractual relationship with Tanzanian citizens to form a joint venture or incorporate a corporate entity. For these vehicles to qualify for land acquisition in Tanzania, the law requires the majority shares

⁴⁷ *Id.*, s. 20(5).

to belong to the citizens of Tanzania. According to Section 19(2)(a) of the Land Act, a corporate body whose majority shareholders or owners are non-citizens is considered a foreign entity and thus does not qualify to be granted or allocated land except for investment purposes. This position is also emphasized by section 20(4) of the Land Act, which provides to the effect that a body corporate with non-citizens as majority shareholders is a non-citizen or foreign company.

Similarly, the sale of a right of occupancy without unexhausted improvement may be made to a citizen of Tanzania, and it is lawful if that land is sold in a partial transfer of an interest in land for a joint venture to facilitate compliance with development conditions.⁴⁸

This position also applies to village land. The Village Land Act provides to the effect that a customary right of occupancy is in every respect of equal status and impact to a granted right of occupancy, and it is capable of being allocated by a village council to, among others, a partnership or a corporate body whose majority members or shareholders are citizens.⁴⁹

Therefore, from the above position, a non-citizen can enjoy land rights in Tanzania by forming joint ventures or incorporating a company where the majority shareholders are citizens. The notable disadvantage under this arrangement to a non-citizen is that, being a minority shareholder, he is not in control of the affairs of the joint venture or the company.

⁴⁸ Id, s. 37(9)(b).

⁴⁹ Village Land Act, ss. 18(1)(a) & (g), 17(1)(c).

4.3 Purchases

As already observed, the law in Tanzania prohibits granting or allocating a right of occupancy to non-citizens. The law is silent about whether a non-citizen can purchase land from another landholder. Since what is prohibited is grant or allocation, the purchase of land in the open market, on the other side, is not prohibited as the same is neither grant nor allocation. However, as already observed, disposition or an attempted disposition of a right of occupancy to a non-citizen is good cause for the President to revoke the right of occupancy.⁵⁰ There is no clear and direct provision in the laws prohibiting land sale to non-citizens particularly in informal sales of unregistered land where the authorities do not have direct control. It is important to note that relevant authorities are in a position to regulate the disposition of the right of occupancy and its transfer to a non-citizen through the requirements of either approval or notification, as the case may be and thus invoke the powers of the President to revoke the right of occupancy.⁵¹

However, this is not valid when the land subject to the sale is unregistered land. The situation is different where land is not registered. In such cases, sales and purchases of unregistered parcels of land occur without the control and oversight of the relevant authorities. Most of the land in Tanzania remains unsurveyed and unregistered. Many Tanzanians occupy land informally in both urban and rural areas.⁵² Such occupiers privately transact over their land rights without the control of the

⁵⁰ Land Act, s. 45(2), & (2A).

⁵¹ *Ibid.*

⁵² See Ministry of Lands, Housing and Settlement Development, Budget Estimates Speech for the 2024/2025 Financial Year.

state. Therefore, they can easily transfer land to a non-citizen without the relevant authorities' authorization.

4.4 Inheritance

Property ownership passes from one person to another in different ways. One of them is through inheritance. The Land Act refers to it as transmission, defined as passing a right of occupancy, a lease, or a mortgage from one person to another by law on death, insolvency, or otherwise.⁵³ Therefore, it should be understood that the rights of the holder of a right pass to their heirs upon death by transmission. Under the law governing probate and administration of estates, property holders may wish to write a will where they express their wishes on how their estates should be owned and managed upon death. One may pass landed property to a non-citizen by way of a Will. A non-citizen who acquires land through inheritance cannot be said to have acquired it through grant, allocation, disposition or transfer. The High Court of Tanzania (Fauz J.) in *Emmanuel Marangakis (as Attorney of Anastasios Anagnostou) v the Administrator General*,⁵⁴ whether it is legally proper to bequeath a right of occupancy belonging to a deceased's estate to an heir who is not a Tanzanian made the following observation:

Having transgressed a bit in order to look at some relevant provisions of the law, let me now return to the central issue as to whether it is legally proper to bequeath a right of occupancy belonging to a deceased's estate to a heir who is not a Tanzanian. Indeed, the issue raises some other

⁵³ Land Act, s. 2.

⁵⁴ High Court of Tanzania at Dar es Salaam, Civil Case No. 1 of 2011, (unreported).

pertinent questions, such as whether a non-Tanzanian son or daughter of an owner of land in Tanzania can succeed his/her parent in the ownership of landed property in view of the restriction imposed by section 20 (1) of the Land Act.⁵⁵

The Judge went further to state:

I do not think it will be within the spirit of this provision to say that a deceased's heir cannot inherit landed property unless he/she is a Tanzanian. Indeed, from the legal position as I have endeavoured to explain above, it is clear to me, and I so hold, that a bequest of a deceased's property upon his/her death is neither a grant nor an allocation of a right of occupancy. ***Consequently, it is legally possible for a bequest to be made in favour of a non-citizen.***⁵⁶ [Emphasis supplied]

He also went on to state:

It is also of some significance to say that nowhere in the Land Registration Act, Cap 334, is there a restriction against a transmission by operation of law in terms of section 68 of the said Act, against a non-Tanzanian. That is the law of the land as I understand it.⁵⁷

The Judge concluded by stating as follows:

As intimated earlier, and as correctly argued by both learned Counsel, Mr. Zake for the Plaintiff and Mr. Kitainda for the Defendant, the dispute before me does not relate to a grant of a right of occupancy. Neither does it

⁵⁵ Id p. 8.

⁵⁶ Id p. 9.

⁵⁷ Id pp. 9-10.

relate to an allocation of land. None of those is being contested here. What is being contested is an intended bequest, a transmission by operation of law of a property in the estate of the late Diana Artemis Ranger. As I hope I have been able to demonstrate, the process of acquiring title by inheritance is not a grant or allocation of land. It cannot, therefore, be said to be restricted under section 20 (1) of the Land Act. It was plainly not the legislature's intention to place any such restrictions.⁵⁸

From the above analysis, it is lawful and legal for a non-citizen to acquire land in Tanzania through inheritance. A Tanzanian citizen can pass over their right of occupancy to a non-citizen through inheritance.

5. DISPOSITION OF A DERIVATIVE RIGHT OF OCCUPANCY BY FOREIGN INVESTORS

As already observed, a non-citizen may hold interests in and over land under the derivative right through the Tanzania Investment Centre for investment purposes. This means that the primary purpose of acquiring such land rights is to facilitate foreign investments and not otherwise. The law in Tanzania permits a non-citizen to acquire interests in land for investment purposes through the Tanzania Investment Centre.⁵⁹ The mode of acquisition by the foreign investor could be either directly through the Tanzania Investment Centre or through purchase from a citizen who then transfers such interests to the Tanzania Investment Centre. The law requires that land for investment

⁵⁸ Id p. 10.

⁵⁹ Land Act, ss. 19(2) and 20(1)

purposes be identified, gazetted, and allocated to the Tanzania Investment Centre for creating derivative rights for investors.⁶⁰

The right of occupancy is registered in the name Tanzania Investment Centre. After that, the foreign investor enters into lease arrangements with the Tanzania Investment Centre. The Centre agrees to lease the right of occupancy to the foreign investor as a derivative right for at least ten days less than the period for which the right of occupancy was granted.⁶¹ Therefore, under this arrangement, the Centre is the holder of the right of occupancy and the lessor. Likewise, a foreign investor is the lessee regarding the relationship between the Centre and the investor. This part, therefore, examines the position of the law on the disposition of the derivative rights held by the foreign investor in Tanzania. A holder of land interest can dispose of such interest in the form of sale, lease, mortgage or sublease. The forms of disposition which a derivative may take the are: sale, lease and mortgage.

5.1 Disposition of the Mortgage by Way of Sale

The key question to be addressed here is whether a non-citizen/foreign investor, having acquired land under derivative right through Tanzania Investment Centre, can sell or transfer such derivative right to another non-citizen and under what conditions. Section 2 of the Land Act defined disposition as any sale, exchange, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer. It includes the creation of an easement, a usufructuary right or other servitude or any other

⁶⁰ *Id.* s. 20(2).

⁶¹ *Id.* s. 78(2).

interest in a right of occupancy or a lease and any other act by an occupier of a right of occupancy over that right of occupancy or under a lease whereby his rights over that right of occupancy or lease are affected and an agreement to undertake any of the dispositions so defined.

Section 2 of the Land Act defines "sale", as used concerning a right of occupancy, to mean the transfer of an interest in or over land on conditions attached to a granted right of occupancy. Since a derivative right is created out of a right of occupancy in the form of a lease, the definition of "sale" under the Land Act also applies to the sale of a lease or a derivative right held by a non-citizen for investment purposes through the Tanzania Investment Centre. However, the sale of a derivative right of occupancy is subject to the conditions stipulated under the law. The conditions for the sale of a derivative right are provided for under section 84 of the Land Act, which states:

Where a Lease contains a condition, express or implied, by the lessee that he *will not transfer, sublet, mortgage or part with the possession of the land leased or any part of it without the written consent of the lessor*, no dealing with the lease shall be registered until the consent of the lessor has been produced to, and authenticated to the satisfaction of the Registrar.
[Emphasis supplied]

Furthermore, since derivative rights are held under the Lease Agreement between Tanzania Investment Centre and the foreign investor, other terms and conditions are found under the respective lease agreement. Such lease agreements also contain an express provision which restricts a foreign investor (lessee) from

making disposition of the derivative rights without the Tanzania Investment Centre's (Lessor) consent. One of the clauses contained in the Lease Agreements between Tanzania Investment Centre and the foreign investor reads:

NOT make any disposition to the leased land without prior consent of the lessor. In case of seeking lessor's consent regarding mortgaging of the respective land, the lessee should present to the lessor a project evaluation report showing that the level of development on the land is at least 60% of the total investment cost as indicated in the investment business plan.⁶²

The Land Act requires the lessee not to transfer, mortgage, charge, sublease or otherwise part with the possession of the leased land or buildings or any part of it without the previous written consent of the lessor, that consent not to be unreasonably withheld.⁶³ However, the law requires the lessor not to unreasonably withhold consent to taking that action by the lessee.⁶⁴

Therefore, it is concluded that a foreign investor who holds a derivative right of occupancy can dispose of its interests in the land subject to obtaining prior written consent from the Tanzania Investment Centre. As it has already been observed, a disposition under the law may take different forms, including but not limited to sale, exchange, transfer, grant, partition, exchange, lease,

⁶² This is one of the general clauses contained in the prescribed forms of contracts between Tanzania Investment Centre and foreign investors.

⁶³ The Land Act, s. 89(1)(i).

⁶⁴ *Id.* s. 93(1).

assignment, surrender, or disclaimer. The general condition for disposition is obtaining prior written consent from the Centre.

5.2 Disposition by Way of a Mortgage

As mentioned above, mortgage is one of the dispositions of a right of occupancy or a lease in Tanzania. Section 2 of the Land Act defines a mortgage as an interest in a right of occupancy or a lease securing the payment of money or money's worth or the fulfilment of a condition. It also includes a sub-mortgage and the instrument creating a mortgage. According to this definition, the interests that may be subject to mortgage property are either in the right of occupancy or a lease, which, in this case, includes a derivative right. Landed property is the most preferred form of security for a loan because of its immovable and non-perishable nature. Therefore, a landowner may grant an interest in his land as security in the form of a mortgage in favour of a person in return for a loan. This confers security on the creditor for his loan. If the debtor defaults on repayment, the creditor can take the land, sell it and discharge the money owed. Such a creditor is secured and takes priority over unsecured creditors when the debtor is in liquidation or insolvency.⁶⁵

A holder of derivative rights can mortgage his interest in the land equally to secure a loan. As already observed, the disposition by way of a mortgage is subject to contractual and statutory compliance conditions. The main condition is related to obtaining the lessor's consent and, in this case, Tanzania Investment Centre. According to section 84 of the Land Act any lease which

⁶⁵ Goo S. H., *Source Book on Land Law*, (London, United Kingdom: Cavendish Publishing Limited, 2002) p. 813.

contains a condition, among others, that the lessee should not mortgage the leased land without the written consent of the lessor, such transaction should not be registered. That is, the Registrar is required not to register such mortgage unless and until the consent of the lessor has been obtained. This brings forth the need to examine whether or not such conditions are provided for in the lease agreements between Tanzania Investment Centre and foreign investors. Examination of general clauses in the lease agreements executed between Tanzania Investment Centre and foreign investors reveals the existence of a condition requiring the investor not to make any disposition without obtaining written consent from Tanzania Investment Centre. According to the respective clause, to procure the required consent, the investor is required to present to Tanzania Investment Centre a project evaluation report indicating that the level of development on the land is at least sixty per cent (60%) of the total investment costs as indicated in the investment business plan.

Therefore, this means that a foreign investor with land interests through derivative rights can only mortgage the interests for the advancement of credits for creditors if written consent is obtained from the Tanzania Investment Centre, which can only be obtained upon proof that the level of development on the land is at least sixty percent 60% of the total investment cost as indicated in the investment business plan.

A foreign investor can mortgage the land's interests with local or foreign banks. Following the amendments in 2018,⁶⁶ the law in Tanzania permits a person to mortgage any land to obtain money from the local or foreign bank or local or foreign financial institution to develop his land or make any other investment.⁶⁷ This applies to a mortgage of a right of occupancy, a lease of a right of occupancy or a derivative right.⁶⁸ It does not apply to land held under the Certificate of Customary Right of Occupancy.⁶⁹ The law requires that the money obtained be utilized for further land development, investments, or other purposes where the mortgaged land has already been developed. If the mortgaged land is undeveloped or underdeveloped, the mortgage money should be utilized to develop part or whole of such mortgaged land.⁷⁰ The term "underdeveloped" regarding land is used to mean land that has not been developed per the conditions of relevant rights of occupancy.

On the other hand, the term "undeveloped" land means land without improvement in, on, under or over such land or without any change of substantial nature in the use of such land. In the case of land used for agricultural, pastoral or mixed agricultural and pastoral purposes, it is considered undeveloped if it has not been used for cultivation and/or pasture at any time for twenty-four months.⁷¹ The law requires that mortgage money obtained from either a local or foreign bank be invested in Tanzania. The

⁶⁶ Written Laws (Miscellaneous Amendments) Act, No. 1 of 2018.

⁶⁷ Land Act, s. 120A (1).

⁶⁸ The Land (Procedure for Mortgage of Land) Regulations, 2019, reg. 2.

⁶⁹ Land Act, s. 120C.

⁷⁰ *Id.*, s. 120A (2).

⁷¹ *Id.*, s. 120B (3) (b), the Land (Procedure for Mortgage of Land) Regulations, 2019, reg. 4(1)(a).

Commissioner is mandated to oversee that the money is invested in Tanzania and used to develop the mortgaged land.⁷² This is an avenue for which a foreigner who holds a derivative right to mortgage it to obtain money for investments over the same land. The law also recognizes the mortgage of a derivative right in Tanzania.⁷³ It should be noted that failure to comply with the requirement constitutes a breach of the conditions of a right of occupancy.⁷⁴

Thus, it is submitted that the amendments to the Land Act by the Written Laws (Miscellaneous Amendments) Act,⁷⁵ and the Land (Procedure for Mortgage of Land) Regulations, 2019 permits the mortgaging of undeveloped and underdeveloped land including land held under derivative right. This position defeats the development requirement of at least 60% imposed by the lease agreements between Tanzania Investment Centre and foreign investors. Therefore, with the current position of the law an investor may mortgage the derivative right and obtain credits from local and foreign banks without requiring a report indicating that the level of development on the land is at least sixty per cent 60% of the total investment cost. The only condition is that the money borrowed should be invested in Tanzania, for the development of the mortgaged land and a report to that effect is submitted to the Commissioner.

⁷² Land Act, ss. 120A (3), 120B (1), (2), the Land (Procedure for Mortgage of Land) Regulations, 2019, regs. 5, & 7.

⁷³ The Land (Procedure for Mortgage of Land) Regulations, 2019, regs. 2, 5(1)(a) & 6(1)(a).

⁷⁴ Land Act, s. 120D, read together with s. 45(2).

⁷⁵ Act No. 1 of 2018.

Furthermore, the requirement imposed on the mortgagor of a derivative right to make declarations and submit reports to the Commissioner is a bit wanting. This is because the Commissioner has direct control over the right of occupancy and not the derivative right. As it has already been explained, a derivative right is created out of the right of occupancy by the Tanzania Investment Centre, who is the holder of the respective granted right of occupancy. Administratively, the holder of the right of occupancy is accountable to the Commissioner, and the foreign investor who is the holder of the respective derivative right is responsible to Tanzania Investment Centre. Since what is mortgaged is a derivative right, the mortgagor ought to make such declarations and submit the required reports to Tanzania Investment Centre, which, in turn, would have to be transmitted to the Commissioner. Imposing these requirements on the foreign investor has two implications. First, it may imply that it takes away the legal mandate of Tanzania Investment Centre on the oversight of the transaction made over the right of occupancy issued to it. Second, it may impose dual compliance requirements on the investor, who has to make reports to the Commissioner and Tanzania Investment Centre. This defeats the spirit behind establishing Tanzania Investment Centre, a one-stop centre for investors and the Government's primary agency to coordinate, encourage, promote and facilitate investment in Tanzania.⁷⁶

Therefore, the above analysis leads to the findings and conclusion that a foreign investor who holds land through Tanzania Investment Centre can mortgage a derivative right under the law.

⁷⁶ Tanzania Investment Act, No. 10 of 2022s. 4(4), 18.

Disposition by way of mortgage is possible upon fulfilling the conditions imposed by the law and the lease agreement between Tanzania Investment Centre and the investor. Furthermore, an investment can mortgage a derivative right for the purpose of developing the respective land.

5.3 Disposition by Way of subleasing the Derivative Rights

Since derivative rights are in the form of a lease, rules governing leases also apply. This is due to the fact that section 2 of the Land Act defines derivative right to include lease and subleases. The law defines a lease as a lease or sublease, whether registered or unregistered, of a right of occupancy and includes a short-term lease and agreement to lease.⁷⁷ This definition does not help us comprehend the meaning of a lease. In the case of *Bruton v London & Quadrant Housing Trust*,⁷⁸ Lord Hoffmann, while referring to the decision in *Street v. Mountford*,⁷⁹ observed:

... "lease" or "tenancy" is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents.

⁷⁷ Land Act, s. 2.

⁷⁸ [1999] UKHL 26.

⁷⁹ [1985] A.C. 809.

Simply put, a lease is a contract in which a person granting the lease, commonly referred to as the lessor, transfers interests in land to another person, widely referred to as the lessee, for a limited time in return for payments called rent. A lease usually grants the lessee a right of exclusive possession for a finite period in consideration of rent. Upon grant, the lessor retains an interest known as reversion, which may be assigned to another person. The lessee also can assign his lease to another person.⁸⁰ Section 2 of the Land Act defines a lessee to include a person who has accepted the transfer or assignment of the lease. This means that a lessee can transfer the lease by creating a sublease for a shorter period than the main lease. In such a case, the lessee becomes the sub-lessor, and the person to whom the lease has been transferred becomes the sub-lessee.

With a sublease, the law is clear that a lessee may create a Sublease for a period less than the head lease with the lessor's consent. This means that a foreign investor holding a derivative right can sublease such right to another person upon obtaining the consent of the Tanzania Investment Centre. The duration of the sublease should be less than the period of the derivative right. According to section 89(1)(i) of the Land Act, a lessee is restricted from subleasing a lease without the previous written consent of the lessor. As already observed, a similar position is also contained in the lease agreements between Tanzania Investment Centre and foreign investors.

⁸⁰ Tenga R. W. and Mramba S. J. *Conveyancing and Disposition of Land in Tanzania: Law and Practice*, (Nairobi: LawAfrica Publishing (K) Ltd, 2017), p. 129.

From the above exposition, it can be concluded that the law in Tanzania and the lease agreement allow foreign investors to sublease the entirety or part of their derivative rights. This is only possible upon obtaining written consent from Tanzania Investment Centre.

6. CONCLUSION AND RECOMMENDATIONS

Based on the above discussion, it can be concluded that a non-citizen cannot acquire the right of occupancy in Tanzania except for a derivative right to be acquired for investment purposes as approved under the Tanzania Investment Act and the Export Processing Zones Act. It is also concluded that Non-Profit Foreign Corporations or Organisations, provided that such organizations are engaged in the relief of poverty or distress of public or provision of health or other social services, for the advancement of religion or education under an agreement to which the Government of Tanzania is a party and in the absence of the agreement, the Minister is satisfied that such corporation or organization is established solely for such purposes can acquire right of occupancy in Tanzania. Furthermore, foreign Governments and International Organisations can be granted or allocated land in Tanzania.

It is further concluded that a foreign investor holding a derivative right may dispose of the interests in the land by sale, mortgage or sublease. This can only take effect after obtaining a written consent of the Tanzania Investment Centre.

It is further concluded that the 2019 Land (Procedure for Mortgage of Land) Regulations permit the mortgaging of

undeveloped and underdeveloped land, including the mortgage of derivative rights. Therefore, a foreign investor can mortgage the derivative right and obtain credits from local and foreign banks provided that the money borrowed is invested in Tanzania, and a report to that effect is submitted to the Commissioner. These Regulations purport to take away the mandates of the TIC over the derivative right as far as mortgaging is concerned.

It is recommended that Land (Procedure for Mortgage of Land) Regulations should be amended to the effect that declarations stating that the mortgage money to be invested and reports on how the mortgagor of a derivative right has utilized the mortgage money should be submitted to Tanzania Investment Centre. This is because a derivative right is registered in the name of Tanzania Investment Centre. Thus, by implication, Tanzania Investment Centre is accountable to the Commissioner and not a foreign investor. This recommendation is to ensure that Tanzania Investment Centre, the lessor, oversees mortgages created by the foreign investor over the derivative right and realizes the spirit of the Tanzania Investment Centre as a one-stop Centre for foreign investors.