

UNIVERSITY OF RWANDA COLLEGE OF ARTS AND SOCIAL SCIENCES  
SCHOOL OF LAW  
LLM-BUSINESS LAW

**TOPIC: ANALYSIS ON THE PROTECTION OF MORTGAGE DEBTORS IN  
COMMERCIAL BANKS**

**CASE STUDY:**

***BANQUE POPULAIRE DU RWANDA, BANK OF KIGALI AND ACCESS BANK***

Thesis submitted in Partial fulfilment of the requirements for  
The award of Master's Degree in Business Law (LLM)

Submitted by: BUTERA Vianney

Registration number: PG 122001362

DIRECTOR: Dr. Faustin NTEZILYAYO

KIGALI, December 2015

**DECLARATION**

I BUTERA Vianney hereby declare that, this Dissertation titled,

Topic: Analysis on the Protection of Mortgage Debtors in Commercial Banks

Case Study: Titled

Banque Populaire du Rwanda, Bank of Kigali and Access Bank

Is my original work and has never been submitted anywhere for any award. Where I have consulted the work of others, they have been acknowledged and indicated in the bibliography.

**Signature .....**

**Date ...../...../ 2015**

**BUTERA Vianney**

## ACKNOWLEDGMENT

I feel indebted to all sources from which I have drawn information and persons from whom I have received help and advice in completing this research report.

First and foremost special thanks go to my research supervisor Dr. NTEZILYAYO Faustin for the dedication of his valuable time and enormous support through quick response, guidance and enlightening comments that have helped me not only to accomplish this research study but also to come up with expected standards sincerely, he deserve all kind of credit.

Secondly, I would like also to extend my heartfelt gratitude to my lectures; Professor Ngagi Alphonse for consumer protection Dr.Kalinda, who taught me advanced research techniques, Dr. Matias, other lecturers and classmates pertaining to Masters of Laws in Business Law 2012/13, intake.

Thirdly, special thanks is extended to the officials from University of Rwanda , college of social sciences and arts school of Law; in particular Mr.Kayibanda Richard , Mr. Rutikanga, and others

Thirdly ; The bank staff of BPR, BK, and Access who allowed me to access internal credit policies and also accepted to be interviewed and feed me with adequate information with regard to my research findings.

Fourthly thanks goes to lovely wife, family, friends and relatives for their relevant support during the study period and for relieving me of some family responsibilities.

**DEDICATION**

This research report is dedicated to my beloved parent Mukarugwiza Addella, Dr.Kyaka Paul Miss .Kyaka Leo, for their great support since my childhood up to now, I cannot repay them but I will always be grateful to them. Also this research is dedicated to my wife MUREBWAYIRE Sylvia (queen), Hon. Musoni James, Kamuhangire Paul, Frank Mubangize, lawyer Frank, Akaidek Kalisa Faustine, Pastor Musisi Peter, Aunt Rusian .These people assisted me morally and materially I recognize them . Last but not least, also dedicated to all my fellow Christians through whom we share the work of God. May Almighty God bless you so much.

**ACRONYMS**

BNR	: National Bank of Rwanda
BK	: Bank of KIGALI
BPR	: Banque Populaire du Rwanda LTD
CCOB	: Mortgage conduct of Business Source book in United Kingdom
CCMA	: Code of Conduct on Mortgage Arrears
C.COM	: <i>Role` commerciale`</i>
CCCL	: Cooperative Societies Law
CCMC	: Code of conduct on Mortgage credit in United Kingdom (U.K)
M.ARP	: Mortgage Arrears Resolution Process in Hungary
CCPF	: Code of on principals of fair conduct by financial organisations engaged on retail Lending
HCC	: Commercial High Court
Ibid	: same author, same book and same page
Idem	: same author, same document, but on different pages
RDB	: Rwanda Development Board
FRW	: Francs of Rwanda
UCC	: Uniform Commercial Code
U.K.	: United Kingdom
VAT	: Value added Tax
VOL	: Volume

## Table of content

DECLARATION .....	i
ACKNOWLEDGMENT .....	ii
DEDICATION .....	iii
ACRONYMS .....	iv
Table of content .....	v
1. General introduction .....	1
1.1. Background to the study .....	1
1.2. Statement of the problem .....	5
1.3. Hypotheses .....	5
1.4. Objectives of the research .....	5
1.5. Research methodology .....	6
1.6. Scope of the research .....	6
1.7. Organizational structure .....	6
CHAPTER ONE: CONTRACTUAL RELATIONSHIPS BETWEEN BANKS AND BORROWERS/DEBTORS .....	7
1.1. Definition, licensing and functions of a commercial bank .....	7
1.1.2. Conditions for bank licensing .....	7
1.1.2. (A) Accreditation of banks in Rwanda .....	8
1.1.2. (B) Commitment letter for compliance with the Central Bank’s regulations .....	8
1.1.2. (C) Submission of financial projections to the Central Bank .....	9
1.1.3. Corporate Governance of Banks .....	9
1.1.4. Lending mission of commercial banks .....	10
1.2. Acquisition of loan .....	11
1.2.1. Validity of the contract partie’s consent .....	11
1.2.2. Capacity to contract .....	13
1.3. Bank’s general obligation in a loan agreement .....	14
1.4. Obligations of the debtor to the bank .....	14
1.5. The basis of the bank-customer relationship .....	14
1.5.1. Common incidents in the relationship baker-customer .....	15

1.6. General parties protection under a loan contract .....	16
1.6.1. Effects of the contract .....	17
1.6.2. Relative effect of contracts .....	17
1.7. Modalities of loan payment .....	18
1.8 Loan payment plan.....	18
<b>CHAPTER TWO: LENDER’S AND BORROWERS’S RIGHTS AND OBLIGATIONS UNDER A MORTGAGE AGREEMENT.....</b>	<b>20</b>
2.1. Responsibilities of the bank/lender under a mortgage agreement .....	20
2.2. Responsibilities of the borrower under the mortgage agreement .....	21
2.3. Commercial banks’ loan conditions to the borrowers .....	22
2.3.1. Overview of the concepts of mortgage and security.....	22
2.3.1.1.Mortgage.....	22
2.3.1.2. Security .....	23
2.3.2. Access bank’s conditions of mortgage loans .....	24
2.3.2.1. Interest rate.....	24
2.3.2.2. Use of facility.....	24
2.3.2.3. Duration of loan payment .....	25
2.3.2.4 Irrevocable domiciliation of business proceeds .....	25
2.3.2.5 Commencement date.....	26
2.3.2.6 Availability of facility.....	26
2.3.2.7 Securities/ Collaterals .....	27
2.3.3. Bank of Kigali’s conditions of mortgage loans .....	28
2.3.3.1. Duration of the loan payment .....	28
2.3.3.2. Collaterals and securities .....	28
2.3.3.3. Termination of loan agreement.....	29
2.4. BPR’s conditions of mortgage loans.....	30
2.4.1.Condition of mortgage loans.....	30
2.4.2. Changing rates .....	30

2.5. Other common conditions imposed by the banks to borrowers.....	31
CHAPTER THREE: CHALLENGES OF THE DEBTOR’S PROTECTION IN THE ENFORCEMENT OF A MORTGAGE AGREEMENT .....	36
3.1. Enforcement on defaulted loans.....	36
3.2.Selected case law on enforcement of mortgage agreements.....	37
3.3. Ensuring a level playing field between the mortgage lender and the mortgage debtor ...	45
4. CONCLUSION AND RECOMMENDATIONS: .....	48
4.1. Conclusion .....	48
4.2. Recommendations.....	51
5. BIBLIOGRAPHY .....	53

## 1. General introduction

### 1.1. Background to the study

A bank is defined as a commercial institution that takes people's deposits and extends loans. Banks are concerned mainly with making and receiving payments on behalf of their customers, accepting deposits and making short term loans to private individuals, companies and organizations.<sup>1</sup> A bank is also referred to as an organization, usually a corporation, chartered by a state or federal government, which does most or all of the following: Receives demand deposits and time deposits, honors instruments drawn on them, and pays interest on them; discounts notes, makes loans, and invests in securities; collects checks, drafts, and notes; certifies depositor's checks; and issues drafts and cashier's checks.<sup>2</sup>

Therefore, a bank is a profit seeking institution having service oriented approach, whose main activity should be to do business of banking which should not be subsidiary to other business. It acts as a connecting link between borrowers and lenders of money. Thus a bank as a commercial industry gives out loans at an agreed interest rate, as one of its main source of income. In order to give out loans to clients, among other requirements, it obliges them a precondition of pledging worthy tangible mortgage which is registered with the Registrar General's office,<sup>3</sup> to guarantee its' replenishment in case of default.

Under the default clause, the law provides that if the consumer fails to fulfil his obligation within the agreed time, the outstanding due liability shall be subject to the rules of interest charged in case of debtor's default laid down in the law regulating contracts and torts. If circumstances that result in consumer's difficult financial situation or other pertinent events beyond the influence of the consumer occur during the period of the agreement, the bank/lessor may, at the consumer's request, declare suspension of payment (moratorium) for a specified period in which the bank/lessor shall not calculate the default interest on past due claims. The

---

<sup>1</sup>Oxford university press, the Oxford dictionary of Finance and banking, fourth edition, edited by Jonson law BA ( Market house of books ltd), 2008, New York , page 34)

<sup>2</sup>[www.moneywalks.com/category/banks/](http://www.moneywalks.com/category/banks/) Accessed on 17/04/2016 also see <http://books.google.rw/books?isbn=0735510032>

<sup>3</sup>Article 1 of the Instructions of Registrar General N°03/2010 ORG of 16/11/2010 on modalities of lease, Sale, Public Auction and Mortgage Acquisition. Published in the official Gazette N° special of 23/11/2010

bank/lessor may by their internal regulations lay down criteria for declaring the suspension of repayment.<sup>4</sup>

However, it is a best practice that a loan contract states that consumers must be informed of details for loan contract including the default clause and “condition precedent” through which the lenders ensure that all necessary legal and other formalities for coming into force of the loan contract have been complied with by the borrower in accordance with the laws of the borrowers ‘s country and if the lender makes a disbursement under the loan agreement , its money is safe and will be legally recoverable from the borrower.<sup>5</sup>

The assurance of loan repayment is further strengthened by the law of mortgage which provides that the receiver shall be responsible for selling the mortgage at the market price after<sup>6</sup>as provided that a permit to sell a mortgage is issued by the Registrar General and that some general selling terms and conditions on the Mortgage<sup>7</sup> are respected. Following the auction process, a successful bidder, “a new owner”, is issued with an certificate of ownership,<sup>8</sup> and then out of the sale proceeds, the loan is paid and the surplus, if any is given to the client ,“the mortgagor”.

However, the law and implementing regulations or instructions remain silent on the possibility of failure to raise the loan amount out of the auction as prices are normally determined by the

---

<sup>4</sup>Article 32 of Serbian law on the protection of Financial services consumers, [www.nbs.rs/.../laws/low\\_financial\\_services\\_consumer\\_protection.pdf](http://www.nbs.rs/.../laws/low_financial_services_consumer_protection.pdf), visited on 22/04/2014

<sup>5</sup> International loan contract , <http://unctc.unctad.org/data/e83iia18a.pdf> , visited on 22/04/2014

<sup>6</sup> Article 3 of Law N°13/2010 of 07/05/2010 Modifying and Complementing Law N°10/2009 OF 14/05/2009 on Mortgages, Official Gazette, Official Gazette n° special of 14/05/2010

<sup>7</sup>Article 8 of the Instructions of Registrar General N°03/2010 ORG of 16/11/2010 on modalities of lease, Sale, Public Auction and Mortgage Acquisition. Public Auction and Mortgage Acquisition. Published in the official Gazette N° special of 23/11/2010

<sup>8</sup>Article 18 of the Instructions of Registrar General N°03/2010 ORG of 16/11/2010 on modalities of lease, Sale, Public Auction and Mortgage Acquisition.Public Auction and Mortgage Acquisition. Published in the official Gazette N°special of 23/11/2010

market forces of supply and demand. These conditional provisions place a client in a situation of feeling that his/her loan value is limited to the mortgage guaranteed.

If one take the example of the provisions of Serbian law on protection of financial services consumers,<sup>9</sup> it is worth noting that the said law is more detailed and clearly states that consumers must be given a pre-contractual information on relevant explanations on the terms referring to the modalities of loan agreements, in the manner that will enable them to compare the loan offers of the provider and assess whether the agreement suits his/her needs and financial situation.

The law states that banks have to alert or warn the banks' clients or consumers of consequences in case of default, conditions, procedure and consequences of termination or cancellation of the credit agreement in conformity with the law governing contracts and torts, as well as information on the conditions and manner of assignment of claim in the event of default.<sup>10</sup> For the assurance of the loan's disbursement, banks requires some securities and determines the possibility of their replacement during the period of credit repayment, as well as conditions for their seizure in the event of default.<sup>11</sup>

The Rwandan laws and instructions relating to the protection of banks' clients still need to be improved as it was even noted by the World Bank "Policy research working paper<sup>12</sup> that some courtiers do not necessarily address the issues specific to financial services'. Due to the fact that the enforcement powers and monitoring capacity are limited in many countries, this obstructs the effective implementation of the existing regulations. Furthermore, independent third party dispute resolution mechanisms are not widespread.

---

<sup>9</sup>Article 17, para.1 of Serbian law on the protection of Financial services consumers. [www.nbs.rs/.../laws/low\\_financial\\_services\\_consumer\\_protection.pdf](http://www.nbs.rs/.../laws/low_financial_services_consumer_protection.pdf), visited on 22/04/2014

<sup>10</sup>Article 19 (11) of the Serbian law on the protection of Financial services consumers. [www.nbs.rs/.../laws/low\\_financial\\_services\\_consumer\\_protection.PDF](http://www.nbs.rs/.../laws/low_financial_services_consumer_protection.PDF), visited on 22/04/2014

<sup>11</sup>Article 19 (13) of the Serbian law on the protection of Financial services, consumers [www.nbs.rs/.../laws/low\\_financial\\_services\\_consumer\\_protection.pdf](http://www.nbs.rs/.../laws/low_financial_services_consumer_protection.pdf), visited on 22/04/2014

<sup>12</sup>Oya Pinar Ardic, et, al, consumer protection laws and regulations in deposit and loan --services January 2011 in world bank' research working paper, p.1; [www.cgap.org/.../CGAP-Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf](http://www.cgap.org/.../CGAP-Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf), accessed on 21/04/2014

To ensure that a loan payment, laws and regulations are put in place for enforcement mechanism, in case of default and this includes reminders to the debtor to pay and finally renting or taking the guarantee or selling it to conclude the loan payment.<sup>13</sup>

Basing on the four mandatory principles of a validly concluded contract, that includes the consent of the contracting parties, the capacity of the latter to the contract, a determinate object that is contemplated by the contract, and a legal purpose (cause),<sup>14</sup> parties to the loan contract are presumed to be equally beneficial since each party's interest doesn't counteract with the interest of the other in anticipation of a worthy interest, but sometimes this ends in dispute. In case, the mortgage fails to cover the loan payment as prior agreed, the bank through the court litigation, auctions the mortgaged and none pledged assets of the debtor. On this note, the researcher will propose recommendations of how best it would work.

In Rwanda, all banks operate under the National Bank of Rwanda (BNR's) supervision and regulation, which has it that loan, would be issued on condition of a given and earmarked worthy mortgaged property by the debtor. In accordance with the law every person has right to private property whether individual owned or in association with others or collectively owned is inviolable. It cannot be interfered with an exception in public interest, in circumstances and procedures determined by the law and subject to fair and prior compensation. Meaning that non pledged properties shouldn't be tempered with, without the consent of the owner, as per the provisions of the Constitution of the Republic of Rwanda.<sup>15</sup>

Banks requires the mortgage (s) because it serves as a guarantee that would be forfeited in the event of defaults. When the debtor has failed to meet his/her contractual obligation of paying the loan, the secured mortgage can be used to compensate the payment, as stipulated by the law,<sup>16</sup> and following the consent of the parties to the contract, the agreement is valid and also

---

<sup>13</sup> Articles 2- 3 of Law N°13/2010 of 07/05/2010 Modifying and Complementing Law N°10/2009 OF 14/05/2009 on Mortgages on mortgages, ( O.G n° special of 14/05/2010)

<sup>14</sup>William A.Schabas and M.Imbleau, “, Introduction to Rwandan Law”Les edition YvonblaisInc .Canadian cataloguing in publication data, 1997, Quebec, Canada p.75

<sup>15</sup>Article 29, of The Constitution of the Republic o f Rwanda of 4th June 2003, as amended to date.(O.G N° special of 4 June 2003)

<sup>16</sup>Supra note 13

provided by the law.<sup>17</sup> This implies that each party to the contract is presumed comfortable, since the creditor has guarantee that is worthy the loan given much as the borrower gets the loan required and secured by his/her mortgage.

## **1.2. Statement of the problem**

The main argument that this paper seeks to tackle, centers on the impact of enforcement of loans to the clients in relation with the breach of obligations to replenish the debt, with regard to protection of debtors. Therefore, based on the research topic, the researcher seeks to find out:

- 1-Does the bank's loan enforcement suit the protection of borrower with regard to loan contract theory and enforcement practice?
- 2-Are banks and clients alike equally protected by the law to conclude their contractual relations and obligations in Rwandan banking industry?
3. What are the limits of banks' powers in following up loan defaulters?

## **1.3. Hypotheses**

From the above problem statement on the issues of loan contract enforcement and protection of consumers in Rwandan banking industry we came up with the following two hypotheses:

- 1-Consumers and bankers in Rwandan banking industry are not equally protected.
- 2-Legal and institutional mechanisms should be improved and strengthened for effective strong consumer protection in Rwandan banking industry.

## **1.4. Objectives of the research**

The principal objective of this research is to identify challenges of banks' enforcement of loan contract against mortgage and the implications of breach of obligations, the overriding laws and instructions of Registrar General<sup>18</sup> and provide recommendations to harmonize the legal provisions, mutual understanding of the parties and fill the lacunae recognized. Another objective is to examine the legal protection of the bank's debtor and find out whether failing to honor his obligation(s) is tantamount to the loan restriction and auctioning both assets granted and none granted securities as embed in the contract.<sup>19</sup> The other objective is to demonstrate that "application of enforcement mechanism" would only fall under the legal law and procedures referred to in the contract.

---

<sup>17</sup>Article 64 of law n°45/2011 of 25/11/2011 governing contracts, Official Gazette n° 04bis of 23/01/2012;

<sup>18</sup>R. Eyler, Money and Banking an international text, Routledge publishing ,2009,London , p.73 (256 pages)

<sup>19</sup>Supra note 17

### **1.5. Research methodology**

Mostly, the research method used in this research is desk top method, for data collection by conducting interviews, reading a number of various related books and internet websites and comparative method. The paper also will compile comprehensive information on decided cases (precedent case laws ) and regulations relevant for consumer protection and discuss a number of challenges related to empirical analyses of financial consumer protection and confront the law with practice so as to enable effective consumer protection. In analyzing this matter, the researcher will use doctrinal materials and case studies (Jurisprudence) and propose a recommendation to improve interaction between the client (Borrower) and the Bank (Creditor).

### **1.6. Scope of the research**

The researcher will look at specific issues including loan contracts and case laws related to the breach of contract obligations by the either of the parties and analyze the impact of enforcement measures applied to debtors and liaise with the provisions of the law and show where the loophole/gaps and conflict of laws appears, and fails to provide the protection of debtors in commercial banks.

The research will however analyze whether or not the existing laws equally protect the banks' customers and investigate into the events of default whether or not selling the client's pledged and none pledged Assets to settle the debt conform to the terms of the contract.

### **1.7. Organizational structure**

This research work is divided into three chapters. Chapter one tackles on contractual relationships between banks (lenders) and borrowers (debtors); Chapter two deals with Lender's and Borrower's rights and obligations under a Mortgage Agreement, whereas Chapter three highlights the challenges of debtor's protection in the enforcement of a mortgage agreement

The work ends with a conclusion and recommendations to both banks and their clients.

## **CHAPTER ONE: CONTRACTUAL RELATIONSHIPS BETWEEN BANKS AND BORROWERS/DEBTORS**

This chapter endeavours to highlight the scope of application for loan contract between commercial banks and their clients. Furthermore, it will deal with the general rules for formation of contracts and analyse the obligations of the parties “Banks/Lenders and Clients/Borrowers “to perform the contract for acquisition of loan. Therefore, making analysis on whether or not the protection of clients from commercial banks is covered or guaranteed requires having the information pertaining to the commercial banks and clients ‘consent for the acquisition of loan, modalities of payment and parties’ legal protection on the impact of the contract. Thereafter we may ascertain whether or not, the protection is viable or vain as highlighted below.

### **1.1. Definition, licensing and functions of a commercial bank**

This section will deal successively with the definition of a commercial bank, the conditions for licensing a commercial bank.

#### **1.1.1. Definition of Commercial bank**

Commercial banks are financial institutions which perform all kinds of banking functions, such as accepting deposits, advancing loans, credit creation, and agency functions. They are also called joint stock banks because they are organized in the same manner as joint stock companies. There are a number of commercial banks in Rwanda; the examples of these include the Access Bank, BPR and BK.

A commercial bank is a financial institution that is authorized by law to receive money from businesses and individuals and lend money to them. It is an institution which accepts deposits, makes business loans, and offers related services<sup>20</sup>. Commercial banks also allow for a variety of deposit accounts, such as checking, savings, and time deposit. While commercial banks offer services to individuals, they are primarily concerned with receiving deposits and lending to businesses.

#### **1.1.2. Conditions for bank licensing**

The law provides that no person or entity shall engage in banking activities within the territory of the Republic of Rwanda without being licensed by the Central Bank nor claim the status of bank

---

<sup>20</sup>[http://www.investorwords.com/955/commercial\\_bank.html#ixzz3hwd46VYs](http://www.investorwords.com/955/commercial_bank.html#ixzz3hwd46VYs) accessed on 5/08/2015

or banker, or use in any language, in its corporate trade name, or any other term evoking any banking activity.<sup>21</sup> Therefore, a registered company that wishes to operate as a bank is required to apply to the Central Bank must meet conditions set out by the Central Bank to get licensed, which includes: Presentation of minimum amount of the future bank's start-up equity capital determined by the Central Bank regulation and that amount has to be deposited in an escrow account opened in the books of the Central Bank.<sup>22</sup>

### **1.1.2. (A) Accreditation of Banks in Rwanda**

In Rwanda, for a company to be named bank and carry out banking actives, must have certificate of registration as a conclusive evidence that all the requirements of this Law as to its registration have been complied with and from the date of registration stated in the certificate, the company is incorporated<sup>23</sup> and thereto be accredited by the regulator 'National bank of Rwanda' "on condition of meeting the requirements for accreditation,<sup>24</sup> which includes; requirements like the minimum paid up cash capital of not less than five billion Rwanda franc (Rwf 5, 000,000,000 ) as provided by the regulations<sup>25</sup>, not only a matter of paying that amount that a bank is accredited , accreditation requires from the applicant to attest that the company has un doubted capacity to effectively carryout banking industry activities and meet the requirement set by the regulator.

### **1.1.2. (B) Commitment letter for compliance with the Central Bank's regulations**

The applicant institution will submit documents to the Central Bank testifying that the future bank will comply with the provisions of laws governing banks as well as Central Bank's regulations<sup>26</sup>. This is so because a commercial institution dealing with peoples 's deposits must

---

<sup>21</sup>Article .4 of law No. 007/20008 of 08/04/2008, concerning organization of banking,O.G.No.12 of 06/2008

<sup>22</sup>Article 5 (1) of Law No.007//2008 of 08/04/2008 concerning the organisation of banking, O.G. No. 12 of 15/06/2008

<sup>23</sup> Article 17 .2 (1,2) Of the law N°07/2009 OF 27/04/2009 Relating to Companies OG N°17bis of 27/04/2009

<sup>24</sup>Art.1.para.3 of Law No. 007/2008 of 08/04/2008 concerning organization of banking, O.G.No.12 of 15/06/2008

<sup>25</sup>Art.1 para.2 of Regulation No.03/2008 on licensing conditions of banks. (O.G.No.51bis of 20/12/2010

<sup>26</sup>Article 5 Para. 2 (A) of law No. 007/20008 of 08/04/2008, concerning organization of banking,O.G.No.12 of 15/06/2008

carry out business activities bearing in mind that should it work contrarily to the regulator's rules and regulations, it will be held accountable by the law.

### **1.1.2. (C) Submission of financial projections to the Central Bank**

The applicant institution will submit to the Central Bank documents indicating that projections concerning the financial status of the bank are documented and demonstrate a sound financial basis for carrying out operations envisaged by the future bank and qualifications of experience of the members of the board, directors and managements of the future bank are relevant, and that all of these individuals are trustworthy and enjoy an impeccable professional reputation and the future bank is a public limited Company Corporation.<sup>27</sup>

### **1.1.3. Corporate Governance of Banks**

Regulation N° 06/2008 on Corporate Governance of Banks applies to the duties, responsibilities and code of conduct for shareholders, directors, chief executive officers and management of a bank as specified in its' provisions.<sup>28</sup> It is so important in consumer protection in Rwandan banking industry because it echoes an important component of having competent staff. When banks are managed by unqualified people it can have an effect on consumers in terms of undesirable service both to the institution and the clients and thereof fail to meet their expectations for example its article states that:

“It is the responsibility of the board to set-up an effective internal audit department, staffed with qualified personnel to perform internal audit functions, covering the traditional function of financial audit as well as the function of management audit”.<sup>29</sup>

The regulation necessitates the board of directors to put in place effective internal audit with qualified employees, it is very crucial for consumers of banking industry to have the regulation on corporate governance. However, the weakness of this regulation is about the liability of banks

---

<sup>27</sup>Article 5. para.2. (c-d,) of law. 007/2008nof 08/04/2008 concerning organization of banking,O.G.No.12 of 12/06/2008

<sup>28</sup>Article 1 of Regulation N° 06/2008 on Corporate Governance of Banks published in *Official Gazette n° 02 of 10/01/2011*.

<sup>29</sup>Article 10 of the Regulation N° 06/2008 on Corporate Governance of Banks.published in official Gazette no.02 of 10/01/2011

which violates the regulation and doesn't mentioned provision for the sanctions to the banks that will have not served the client with the rights he or she deserves.

#### **1.1.4. Lending mission of commercial banks**

commercial banks in Rwanda as a country that operates under the rule of law as stipulated by the Rwandan Constitution <sup>30</sup>, also starts its business of banking operations after being approved and licensed by the Central Bank of Rwanda( BNR) which also operates under the law that establishes it and determines its operations.<sup>31</sup>That empowers it to monitor and regulate bank operations in the country for efficiency and development.

Bank offers commercial services, like dealing with people's money deposits and extending loans to qualified debtors/clients with profit motive.<sup>32</sup>Among its' sources through which it mobilizes money includes; Bank charges for maintenance of clients' accounts, interest on deposits, sales of shares and interest on loans from its' debtors. Therefore, a bank as a commercial entity seeks to maximize its capital by granting loans to clients, after a comprehensive analysis on how best its money can be lent to people and remain guaranteed for its timely reimbursement. .

It is through this conscious position that banks have an obligation to objectively analyze the business plan of a loan applicant as to ascertain that his/her business plan has no risk, and therefore necessitates the client to pledge his or her security , that would support the payment in case of default for any cause.

Banks and clients alike complement each other in terms of addressing their series of issues linked with money, on mutual understanding. A bank starts its banking activities seeking clients to deal with as one of its business source through which the business will be operational. Likewise the client accepts to deposit his/her money and seeks loans from the bank to get a push forward and addresses some of his/her pressing needs. It is on this note that, the client applies for

---

<sup>30</sup>Article 9 para.4 of the Constitution of the Republic of Rwanda of 4th June 2003, as amended (O.G N° special of 4 June 2003)

<sup>31</sup>law no.55//2007 of 30/11/2007 law governing central bank, (Official GazetteN° special of 20/02/2008)

<sup>32</sup>Oxford university press, the Oxford dictionary of Finance and banking, fourth edition, edited by Jonson law BA (Market house of books ltd), 2008,New York , page 34)

a loan to meet his or her interests upon fulfillment of conditions set by the lender for the reciprocal interest.

## **1.2. Acquisition of loan**

The bank's client, borrower or debtor, whether a natural or artificial person is a person who owes payment or performance of an obligation.<sup>33</sup> In respect of the thesis, a client applies to the bank for a loan, as an invitation to treat, detailing his or her feasibility plan for the need of the loan, indicating the repayment possibilities and thereafter submits it to the bank for assessment and response. The bank's response to the offer, as to whether it accepts or rejects it and grants a loan or not, comes after a loan analysis, as to ensure that the loan is granted and made on appropriate terms to clients who can and will repay them back.

The bank will first make analysis of the applicant's capacity to contract and the need for the loan; where by the need is primarily determined by the type of loan and analyse its objectives as to whether or not it will generate income for repayment or the client will pay out of his or her other sources disregarding, the use of the loan granted and predict the applicant's ability, so as to determine the eligibility of the applicant to repay, according to the bank's loan conditions.

If the relevance of the request and eligibility of repayment is proved promising as results of loan analysis showing that there is less or none of the risks for the bank loan,<sup>34</sup> there and then the bank approves the grant of the loan to a client and prepares a loan contract to the client(debtor), that includes the details of the particulars of the client and the money lent including the interest rate at which the debtor will be paying in a scheduled period of time, normally on a monthly basis until the loan is completely reimbursed .

### **1.2.1. Validity of the contract partie's consent**

In order for a contract to be valid, the parties to the contract must meet the four mandatory conditions required for valid contract, which are the consent of the contracting parties, capacity

---

<sup>33</sup>Art.2, 12° of Law N°34/2013 of 24/05/2013 On Security in interests in movable property

<sup>34</sup>‘Loan’ is sum of money borrower by a person or business that needs to be paid in future, <http://www.creditloan.com>, accessed on 09/05/2015

of the parties to contract, a determinant object that is contemplated by the contract and a legal cause and purpose.<sup>35</sup>

Consent is certainly the key element for the formation of contracts. It may take numerous forms. It may be written or verbal, and may be either explicit or implicit. The exchange of consent takes place in two phases. Prior to the consent to contract, there must have been an offer that one party passes to the other inviting him to treat; secondly, the other party also must justify the acceptance of the offer. In the case of loan contract, if the debtor client applies to a bank for a loan and the bank accepts to give out the loan, this is enough to reveal that the acceptance has been moved to the applicant client and the contract becomes complete when it is accepted.<sup>36</sup>

An offer may be made to specific persons or to the public. When a bank advertises its interest rates, calling clients to come for loans in a specified time, the offer is made open for acceptance by whoever qualifies and willing to undertake the contract. It is made specific to person, when an individual person or entity goes to bank for loan. The offer is always considered valid until it is accepted or rejected or when its specified time elapsed.<sup>37</sup> Acceptance may either be tacit or explicit.

However, unless otherwise provided by the law, silence of a person, the intending party to the contract, can never be deemed to constitute an acceptance of an offer. An acceptance of an offer must clearly conform to the offer so as to suit the intent of the parties.<sup>38</sup> Meaning that acceptance must specifically address the real meaning of the offer. In the case of an offer to the bank for certain amount of money loaned on a specific project against a pledged mortgage, once accepted must be implemented as is. The bank has to release the very loan requested much as the borrower has to pay that loan as per the mortgage contract terms and on failure to implement, amounts to the breach of the contract.

If the offer is accepted pursuant to certain conditions, the conditions must be clear and precise, and the parties must contract and implement as per the conditions accepted. Like if the bank

---

<sup>35</sup>Supra note 17

<sup>36</sup>William A.Schabas and Imbleau Martin, supra note 14 p. 75

<sup>37</sup>*Ibid*

<sup>38</sup>*ibid*

offers loans to the client on conditions highlighted in the offer, the implementation of the contract should not exclude any of the conditions set and accepted in its totality.<sup>39</sup>

### **1.2.2. Capacity to contract**

The capacity to contract may vary with the nature of the contract or other circumstances. A natural person who manifests assent to the contract shall have legal capacity unless he/she is under guardianship minor or mentally ill.<sup>40</sup> The capacity for banks is determined by its accreditation by the Central Bank, and once a bank is licensed, it acquires recognition to engage into banking activities. Then for the offer, there should be the offer for a loan that is accepted, then the mutual assent of the parties shall have an offer to show by one party followed by an acceptance by the other party.<sup>41</sup> Therefore he who deals with a licensed bank deals with a legal entity that has capacity to contract.

Capacity in accordance with Art.23 of the Rwandan civil code, which states that any person may validly contract, as long as he or she is not declared incompetent by the court based on medical declaration that the person is insane or considered to be minor as per the general rules of Rwandan civil law that, people under the age of twenty one are legally considered minors and thereof lack capacity to contract, unless otherwise provided by the law.

In accordance with the Rwandan civil law, majority age is set at twenty one years. Otherwise, there is a legal presumption that everyone is competent to contract.<sup>42</sup> Therefore if borrower having legal capacity to contract and capacity to pay the loan contract, in case he or she is given a loan by a the bank on mortgage contract , he or she is conditioned to pay the principal together with its generated interest as timely as scheduled in a repayment calendar of the loan contracted and bearing in mind that on failure to effect repayment as per the contract , the bank will resort to realization of his or her pledged assets or property as provided by the instructions of the Registrar General.<sup>43</sup>

---

<sup>39</sup>ibid

<sup>40</sup>Section 2.Art.7 Law n°45/2011 of 25/11/2011 governing contracts, Official Gazette n° 04bis of 23/01/2012

<sup>41</sup>Art.8 Law n°45/2011 of 25/11/2011 governing contracts, Official Gazette n° 04bis of 23/01/2012

<sup>42</sup>Supra note 14. p.78

<sup>43</sup>Article 7of the Instructions of Registrar General N°03/2010 ORG of 16/11/2010 on modalities of lease, Sale, Public Auction and Mortgage Acquisition. Public Auction and Mortgage Acquisition. Published in the official Gazette N° special of 23/11/2010

### **1.3. Bank's general obligation in a loan Agreement**

A bank as an enterprise that customarily receives funds from the public and grants loans for its' accounts<sup>44</sup> and for a loan secured by mortgage, it has to be identified and eye-marked by the lender "Bank'" as the security pledged to get the loan, and continues to make close follow-up on the debtor's repayment plan and the security's status, but prior to accepting the mortgage the bank will first ensure the following:

Following the assessment and evaluation of the applicant's mortgage, the bank has to give to the debtor, the total loan granted in time, to disclose to the client all conditions and requirements needed by the bank for complaints and the effect of conformity to loan repayment reminding the debtor to pay when time is due. And keep monitoring the usage of loan and existence of the condition of mortgage.

### **1.4. Obligations of the debtor to the bank**

The debtor has an obligation to timely pay back the principal amount of the loan and subsequently pays the interest on the loan<sup>45</sup> so as to avoid penalties for late payment imposed as per the bank regulations.<sup>46</sup>

To take due care over the property mortgaged to the bank for guarantying payment as the last option for payment and avoiding misallocation of loan granted, meaning that the money loaned to a client must be used only for the business plan prior taken study of and presented to the bank. The client is also charged with accurate maintenance of his accounting records and lastly gets ready to give-up the mortgage in case of loan default.

### **1.5. The basis of the bank-customer relationship**

The banker-customer relationship is essentially a contractual one. It is traditionally expressed as a 'debtor-creditor' relationship: the bank accepts deposits from its customers and becomes their debtor; the bank lends money customers and becomes their creditor. It is more than that

---

<sup>44</sup>Article 1 of law 007/2008 of 08/04/2008 , concerning organization of Banking, O.G, N°12 of 15/06/2008

<sup>45</sup>Article 5 of regulation No.14/2011 on the publication of TARRIFF of interest Rates and fees applied by banking .Published in the official gazette No.30 bis of 25/07/2011

<sup>46</sup>Article 6 Article 5 of regulation No.14/2011 on the publication of TARRIFF of interest Rates and fees applied by banking .Published in the official gazette No.30 bis of 25/07/2011

however, and contains other contractual incidents implied by the courts<sup>47</sup>. In addition, the contract is overlaid by equity, tort to a lesser extent and statute including consumer protection legislation. Although described in those terms, the banker-customer relationship is not a normal debtor-creditor relationship where the debtor is required to seek out his or her creditor and repay the debt when it is due<sup>48</sup>.

A bank is entitled to and should wait for a demand for repayment – a withdrawal slip or equivalent – and the timing of the demand may be prescribed by the express terms of the contract, such as with term deposits.

When considering the following incidents of the banker-customer contractual relationship, it is important to remember that these can be varied by express terms of the contract, which in turn are subject to limitations imposed by statute and rules of public policy. And as banking practice changes, the way in which they are expressed may also change.

#### **1.5.1. Common incidents in the relationship baker-customer**

The basic incidents of the banker-customer relationship have been identified as<sup>49</sup> the bank undertakes to receive money and to collect bills for its customer's account; The bank borrows the money and proceeds from the customer and undertakes to repay them on demand, at the branch of the bank where the account is kept, during ordinary working hours; The bank promises to repay any part of the amount due against the unambiguous written order of the customer addressed to the branch of the bank where the account is kept; Conversely the bank will not pay away any part of the amount due to the customer without such order or other compulsion recognized by law;<sup>50</sup>

Any written order by the customer which requires the bank to pay a greater amount than the balance standing to the credit of the customer or an agreed overdraft limit may be declined in to: The bank will not cease to do business with the customer except on reasonable notice; The bank undertakes to observe secrecy with respect to the customer's account, information acquired from

---

<sup>47</sup>Elisabeth Wentworth,\* Special Counsel to the Ombudsman banking and Financial Services Ombudsman Ltd, Essential Banking law and Practice, a paper in seminar for an overview of the some of the characteristics of banks and their legal relationship with their customers;

<sup>48</sup>Ibid

<sup>49</sup>Idem, p.11

<sup>50</sup>Ibid

the account<sup>51</sup>, and other information acquired in the character of the customer's banker (subject to certain exceptions); transaction

Therefore, the money transactions is the pivot of their cooperation as a common factor, following the grant of the loan by the bank, bank gets interest in return of loan, which is among its' primary missions subject to banking activities as prior mentioned. On this matter the client to the bank means a lot in as far as flourishing the bank's economic growth is concerned. Meaning that without the client seeking loans from the bank, this source of income to the bank would cease to hold meaning and thereof loss of one of its constituency source of income.

### **1.6. General parties protection under a loan contract**

Following the formation of loan contract between the bank (also hereinafter referred to as lender/creditor) and the client (also hereinafter referred to as debtor), both parties are presumed covered by law since valid contracts are enforceable at law and since banks are legal entities established by the law as prior mentioned<sup>52</sup> and the clients have legal capacity still as mentioned, and the law of mortgage is made reference on approval of security for loan repayment then at the contract theory for protection of parties is guaranteed.

If a contract is properly formed, it is legally binding and all parties are required to accomplish their respective obligations under the contract, failure to meet the obligation laid out, the law provides remedy,<sup>53</sup> for the purpose of loan; it is clear and always set in the contract. that If the mortgagor defaults, the bank through the Registrar General either takes the mortgage, lease it or sales it for re-imbursement of the loan as stipulated by the law<sup>54</sup> and in case it is sold more that the debt only amount equivalent to the loan balance is given to the lender / bank and the balance is given to the mortgagor/debtor.

A loan contract with a condition of mortgaging an asset for security of loan repayment refers to the application of mortgage law<sup>55</sup> and instructions of Registrar General <sup>56</sup>which provides that

---

<sup>51</sup>Ibid

<sup>52</sup>Instruction No. 03/2008 of licensing conditions of banks, supra note 27

<sup>53</sup>Art.2 Para 1 of law N° 45/2011 of 25/11/2011 Governing contracts .Published in the Official Gazette N°04 bis of 23/01/2012

<sup>54</sup>Article 3 of law No.13/20010 Modifying and completing Law no.10/2009 of 14/05/2009 on mortgage, published in the official Gazette No.Special of 14/05//2010

<sup>55</sup>Supranote 13

when the payment is not timely affected the bank may either confiscate the property pledged or auctions it for repayment of the loan. It binds the parties not to worry for non- respect of the contract. Since each party is consciously informed of forfeiting the pledged asset after failure to fulfill the loan repayment obligations.

Following the respect of complete formalities of a valid contract, like consenting upon the terms of contract and meeting the obligations of each party to perform, constitutes a binding factor and Justifies the fulfillment of the essentials of contract hence contributing to the validity of the contract and making it enforceable at law as stipulated by the law.<sup>57</sup>

### **1.6.1. Effects of the contract**

Validly formed contracts bind the contracting parties. In other words it has mandatory legal affect between them, from this principle the results the possibility for creditor to require that the obligation which is due be executed, either in kind or in some equivalent, generally monetary compensation. A contract which has binding force,<sup>58</sup> cannot be changed or revoked unless the parties agree, and for causes that are authorized by the law<sup>59</sup>

### **1.6.2. Relative effect of contracts**

Contracts are formed to produce effect only between the parties.<sup>60</sup> Consequently, there is no way to encroach upon the rights of the third parties, either to their benefit or prejudice, to have no effect *erga omnes*. An individual only contract for him or herself as per the provisions of the law<sup>61</sup>. but even if the contract affect the rights of the third parties, the latter cannot remain totally indifferent to it, because the contract is a legal act which may be set up against third parties. Generally the only persons affected by contract, aside from the contracting parties themselves, are the beneficiaries or successors.

Art.22 of civil code book 111 creates a presumption that the parties to a contract have stipulated not only for themselves, but also their heirs and successors. A party to a contract who doesn't wish this effect, must therefore state the contrary in the contract .heirs of the party to the contract are bound to respect the obligations assumed by the deceased (also known as the *de cujus*).

---

<sup>56</sup>Supra note 54

<sup>57</sup>Art.10 of law N° 45/2011 of 25/11/2011 Governing contracts .Published in the Official Gazette N°04 bis of 23/01/2012

<sup>58</sup> Art.33(2) Civil code book 111

<sup>59</sup>Supra note 36. p71

<sup>60</sup> Art.63 Civil code book 111

<sup>61</sup> Art.19 of civil code 111

This is only normal, because the successors merely continue the legal personality of the de cujus. Because of this principle concerning the effect of contracts, a creditor does not ordinarily intervene in contractual relationships between his or her debtor and third parties. This may be of immense prejudice to a creditor in cases for example where the debtor disposes important assets and hereby imperils recovery, of the debt by the creditor. Civil law allows the creditor to challenge contracts to which they are not a party in a case.<sup>62</sup> Another relative effect of the contracts is that creditors can challenge the sales of the third party made by the creditor's debtor, in case made against the mortgaged property.

In this case, the sales can be null and void and remedies known as Paulina actions or oblique action can apply.<sup>63</sup> With Roman law, "Action Paulina" where it was well developed, such remedies permit the creditor in effect to take place of or stand in for his or her debtor, and exercise legal rights on behalf of the later or simply to have the court declare, that the impugned contract is of illegal effect to the creditor, for example where a debtor had sold a house to the third party at a ridiculously low price in order to dispose of his or her contract.

The original creditor may sue the third party (purchaser) and nullify the transaction at the option of the creditor by the competent court. As a result the property will turn to the estate of the debtor and the creditor will be in a position to recover the debt against the property.

### **1.7. Modalities of loan payment**

Following the compliance on terms and conditions of contract up to the contract signature, the debtor is expected to repay his loan in conformity with the calendar of loan repayments which is normally calculated on annual basis and paid monthly up to when the debt is completed with respect to the contract terms. Which is the creditor's gauge that the debtor is or is not compliant by effecting payments obligation or not that marks an early indicator of defaulting or not, hence alerting the creditor to take recovery measures.

### **1.8 Loan payment plan**

Under normal circumstances loan is paid on time as per the agreed loan contract but when this approach fails, there comes an option of forfeiting the mortgage for the loan repayment. The bank should have no risk of payment, because the bank is duty bound to know their customers

---

<sup>62</sup>William A.Schabas, p. 71

<sup>63</sup>William A.Schabas, p. 75. See also Art. 64-65 CC111

(KYC), and must release the loan that is richly secured since each of the party contracts with informed consent to meet their interests out of that loan in question<sup>64</sup>.At the beginning of the loan contract signing, the parties are at good compliance terms, but unfortunately at times end in court litigation.

From this chapter, the legal provisions for valid contract and conditions for licensing commercial bank in Rwanda and its ‘guideline for operations in the urge to avoid loan default and loan losses by the debtors were cited.

The following chapter deals with lenders and borrower’s obligations under a mortgage agreement

---

<sup>64</sup>Art.9 of law N° 45/2011 of 25/11/2011 Governing contracts .Published in the Official Gazette N°04 bis of 23/01/2012

## CHAPTER TWO: LENDER'S AND BORROWERS'S RIGHTS AND OBLIGATIONS UNDER A MORTGAGE AGREEMENT

This chapter aims at analyzing the rights and obligations of the lender and the borrower under mortgage agreement, which serves to guild the contracting parties to meet their individual interests as per the contract, which is the main central point of the agreement that must be understood and complied with.

Under the mortgage agreement each party to the contract agreed conditions set and failure to meet them, amounts to the breach of the contract and attracts enforcement measures for specific performance and penalties that may result for the agreement.

Therefore to have more clarity on the parties' guilds for an effective performance, this chapter discusses responsibilities, Rights and conditions of the parties to the agreement, Reasons for the mortgage and comparative analysis of the mortgage law in various jurisdictions through the following main sections of which the researcher take note of the analysis for recommendations.

### 2.1. Responsibilities of the bank/lender under a mortgage agreement

Under the law No. 007/2008 of 08/04/2008 concerning organization of banking, banks have the responsibility to maintain at all the times a solvency ratio set forth in central bank regulations. However this law doesn't mirror the general principles on consumer protection; this provision enhances the protection of the clients' mechanisms<sup>65</sup>.

Banks are compelled to gather or obtain sufficient cash or its equivalent at the right time and at a reasonable price in order to be able to meet its daily financial obligations and as well having strong liquidity management policy in place<sup>66</sup>. With this provision certain amount of money is set as minimum of liquidity that banks must have to meet to satisfy the demands of the clients<sup>67</sup>. The importance of this clause is to protect consumers by meeting their demands easily. It compels banks to submit to the Central Bank a Liquid Assets Report.<sup>68</sup>

---

<sup>65</sup>Art.15law No. 007/2008 of 08/04/2008, concerning organization of banking ( *Gazette n°12 OF 15/06/2018*)

<sup>66</sup>Article 2 para.3 of Regulation No 10/2009 on Liquidity Ratio (*Official Gazette n° 02 of 1 OF 0/01/2011*)

<sup>67</sup>Article 1of Regulation No 10/2009 on Liquidity Ratio *Official Gazette n° 02 of 10/01/2011*.

<sup>68</sup>Article 1of Regulation No 10/2009 on Liquidity Ratio *Official Gazette n° 02 of 10/01/20*

Bank has an obligation to minimize repayment difficulties that may result from large exposure<sup>69</sup>. This provision protects consumers in two ways; it serves to protect borrowers from tough recovery that may result from taking loans that are beyond their repayment capacity. And further protects consumers (depositors) against the loss of their funds because borrowers are not able to pay back, for example its article 3 states that “A bank shall not grant or promise to grant to a single person or to related parties, an advance, credit or commitment which is more than 25% of its Net Worth”<sup>70</sup>

It is also the bank’s responsibilities to:

- 1) Maintain data base on bank wide credit portfolio and up-to date accuracy records on the performance of individual credit exposure, provision of detailed guidelines for monitoring and managing information on existing exposure as a basis for informed decision making;
- 2) Liaise with legal department to confirm adequacy of documents submitted and facilitate perfection of securities pledged. Maintain custody of all security documents related to the extension of credit. Conduct independent inquiring inquiries on the borrower e.g. from NBR credit bureau and other sources;
- 3) Evaluate credit quality and performance of existing exposures in line with bank’s guidelines also has responsibility to provide with the client a correct information with regard to the interest rates and tariffs of the banks such that the client will take his/her choice with informed consent. Also the lender has right to forfeit the mortgage in case of loan default to regain the loan.

## **2.2. Responsibilities of the borrower under the mortgage agreement**

The borrower has the right to ask the lender and to be informed by the bank of the details pertaining to his contract and following the details also has the right to accept the loan or refused to take it and thereof has to an obligation to take due diligence respect in case of executing the terms of the contract conditions.

The borrower has duty to disclose collect information regarding his project through which he is seeking loan for and use it for the very project submitted to the lender. The borrower is further

---

<sup>69</sup>Article 1 of Regulation N° 05/2008 on Credit Concentration and Large Exposure (O G n° 02 of 10/01/2011)

<sup>70</sup>Article 3 of Regulation N° 05/2008 on Credit Concentration and Large Exposure. (O G n° 02 of 10/01/2011)

duty bound to perfectly maintain the mortgage in a reasonable manner and execute its terms in case of acceptance as to avoid effects.

### **2.3. Commercial banks' loan conditions to the borrowers**

Conditions exposed to clients vary from bank to bank depending on their individual approaches but the general principles are that the borrower must prove ability for loan repayment and provide his or her mortgage as security for repayment.

#### **2.3.1. Overview of the concepts of mortgage and security**

##### **2.3.1.1. Mortgage**

The word “mortgage” comes from the French “mort-gage”, literally death-pledge; where by the French peasants were working until they died for the privilege of owning a house.<sup>71</sup> Arranging the loan he would gage or “pledge” to repay the debt when his father died (at which time the son expected to receive his inheritance). It is said that the first mortgage ever recorded dates to 1190 in England. Common English Law provided protections to the grantee (lender) of that mortgage loan and these protections granted the lender in the borrower’s property,<sup>72</sup> to be reimbursed. At that time most pledges or loans were known as “Living Pledges” which were just those pledges of possessions while one *was* living until the debt was paid.

Mortgage is a compound word from the Latin words; Mort-Gage. Literally translated Mort means death Gage which means pledge. The word mortgage is a French Law term meaning “death contract”, meaning that the pledge ends (dies) when either the obligation is ‘fulfilled or the property is taken through foreclosure’.<sup>73</sup> A mortgage loan is a loan taken out with a bank or building society to buy a house or other property<sup>74</sup>. The mortgage is usually for a long period, typically up to 25 years, and you pay it back by monthly instalments. When you sign the mortgage agreement, you agree to give the property as security. This means if you don’t keep up with the repayments, the lender has the right to take back and sell the property. But they can't do

---

<sup>71</sup>Ricardocobos, <http://truedemocracyparty.net/2013/01/mortgage>, accessed on 18/08/2015

<sup>72</sup>X, “ MORTGAGE”,<http://truedemocracyparty.net/2013/01/mortgage-death-pledge-latin-words-mort-gage-literally-translated-mort-means-death-gage-means-pledge>, accessed on 18/08/2015

<sup>73</sup>Ibid

<sup>74</sup> Mortgage is a pledge or security the loaned money , such that on failure to meet the payment it is taken for the worthy, <https://www.citizensadvice.org.uk/debt-and-money/borrowing-money/types-of-borrowing/mortgages-and-secured-loans/>, accessed on 15/09/2015

this without first going to court. Under Rwandan law, if a borrower pledges his property as security for a loan, in the event of default. That security will be leased, auctioned or taken by the creditor to regain his loan as per the Registrar general's instructions<sup>75</sup> and in case of collateral inadequacy, following the failure to obtain full payment from the sale of the mortgage, the creditor institutes the case to the court for the remaining unpaid debt.<sup>76</sup> It is also a lender's security against the loan issued to the borrower.

Thus, if the borrower fails to fulfil his or her debt obligation, the lender has the right to dispose the mortgaged property. This implies that it is a forewarning that no one will temper with it not until its purpose is served. Meaning that it will turn to the owner after the loan is fully paid<sup>77</sup> or else it will be forfeited in the event of default to recoup the money lent as noted by Trevar Adams and Alexis Longshaw, noted that the Loan is often secured so that if the borrower defaults, the lender can realize the security to recoup the money lent.<sup>78</sup> In case it so happens that the sale proceeds exceeds the loan balance that balance is given to the mortgagor.

### **2.3.1.2. Security**

The word "security" means an interest which the debtor confers on the creditor in an item of property owned by himself or, by arrangement, in the property of some third party such as a surety. For the bank to ensure that loan repayment it requires from the borrower a security as one of the conditions for the loan and includes it in the loan agreement "security agreement"<sup>79</sup> to create or provide for a security interest and includes a writing that evidences a security agreement. The word "security" is sometimes used to mean shares or debentures furnished by the borrowers to a lender to secure a loan or an advance, or used to describe a negotiable instrument issued to secure instalments due under a credit facility, see Ellinger, E. P. and Lomnicka E., "Modern Banking Law", 2nd ed., 1994, Oxford, Clarendon Press, p. 632

Mortgage loan conditions under access bank Ltd, Bank of Kigali and "Banque populaire du Rwanda Ltd", below paragraphs discuss some of the conditions as applied by each bank

---

<sup>75</sup> Supra note 46

<sup>76</sup> Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure Official Gazette N° 29 of 16/07/2012

<sup>77</sup> Art.9 of law No.10/2009 of 11/05/2009 on mortgage law, (OG.No.17 Bis of 2704/2009)

<sup>78</sup> T.Adams and A. Longshaw, Commercial law and practice, Collage of law publishing, 2005, p.89

<sup>79</sup> Art 2, 16° of law LAW N° 11/2009 OF 14/05/2009 On security interests in Movable Property, (O.G. n° special of 15/05/2009)

### **2.3.2. Access bank's conditions of mortgage loans**

#### **2.3.2.1. Interest rate**

The bank has right to inform the client, with Access bank an interest rate is negotiable within the set rates composed of minimum and maximum rates<sup>80</sup>. The minimum is 16 and the maximum is 18 depending on which facility the client falls. There is women banking, which is 15%, Retail banking which is 16% and corporate, but of all these facilities the bank has standard conditions that a client must concur before the grant of the facility.<sup>81</sup>

#### **2.3.2.2. Use of facility**

In accordance with the bank's operations and credit regulations, the facility will be managed through the account number opened in the bank's books<sup>82</sup>. This clause is mostly in for the bank other than the client because it is mostly helps the bank to generate more funds from the facility through bank charges for the account maintenance and withdraws from opened account. The bank's operations and credit regulations also has another stringent clause "that the interest rate is subject to be reviewed by the bank from time to time in accordance with the market conditions without prior consultation with the borrower and the borrower hereby voluntarily waives such right of consultation"<sup>83</sup>.

Following the existence of this clause in the contract, one can imagine or wonder if the borrower would not be at risk to accept the contract without even asking the lender about the limit of the changes of interest rate at least the borrower would know by how much will it increase or which range of rate that may not be exceeded!. This implies that the consumers are at times less skilled with banking laws in relation to bank operations and thus simply accept and sign the contracts which the bank as a commercial institution prepares for their interest that at the end when deems necessary will be used against them. Surely as well known a bank is a profit seeking institution and thereof must do all it could to protect its own commercial interest in the business, that is why such clauses are in place and is not beyond the scope of the law since the law of contract provides that what parties to the contract have consented on mutual grounds to contract is law binding<sup>84</sup>. The only issue rests on the borrower who simply signs the contract without due

---

<sup>80</sup>Art 3 of Access bank LTD's internal policy on loan management 2015

<sup>81</sup> Article 20 of Access bank LTD's internal policy on loan management 2015

<sup>82</sup>Article 2 of Access bank LTD's internal policy on loan management 2015

<sup>83</sup> Article 2 facility 2 last paragraph of Access bank LTD's internal policy on loan management 2015

<sup>84</sup> Article 64 of law n°45/2011 of 25/11/2011 governing contracts, Official Gazette n° 04bis of 23/01/2012;

consideration of the effect of contract implementation. Legally speaking, following the contract signature the it is presumed that the parties have beyond reasonable doubt analyzed and approved the contract as favorable to them and thereof ready for implementation as is, in its' totality, regardless of ignorance of either party because the law has it that ignorance of law is no defense and assumes that he who does not fall under the classification of insane, minors or under any influence to sign has full right to enter into a valid contract that is enforceable at law, meaning that failure to do it as contracted , amounts to the breach and marks the default. As long as the borrowers are ignorant about bank's operations and legal connotation of contract enforcement, they always stand risks to default and thereto penalties for the default apply!

### **2.3.2.3. Duration of loan payment**

Prior the agreement signature, the borrower must concur with the lender on time when to end the payment and modalities of payment which indicates the calendar of payment <sup>85</sup>. This clause is sounding; it helps both parties to manage their loan payment plan<sup>86</sup>.

### **2.3.2.4 Irrevocable domiciliation of business proceeds**

The borrower further covenants to domicile all proceeds from the business into the current account held at Access Bank (Rwanda) Ltd and to comply with the repayment terms and purpose for which the facilities should be utilized. Any delay or default in repayment shall immediately attract additional interest.<sup>87</sup> It is very amazing that the borrower assumes to timely meet his or her loan obligation, when there is a clause that interest rate is subject to be review from time without his prior consultations, meaning that the amount been paid before the likely changes, will be raised and though during the contract signature doesn't the know the anticipated increment of interest rate and signs to acknowledge the commitment.

As the bank anticipates the variation of interest rate, there also should be a counter clause for flexibility at least mentioning that, " when changes are about increasing the interest rate then the calendar of installment payment will be reviewed," to avoid penalties of none compliance with the loan contract clause for timely payment and immediate penalty following any delay. Meaning that if the increase is higher than the prior rate signed for, which the debtor had at least considered matching with his or her project study , then the debtor is likely to fail to

---

<sup>85</sup> Article 1 of Access bank LTD's internal policy on loan management 2015

<sup>86</sup> Ibid

<sup>87</sup> Article 3 of Access bank LTD's internal policy on loan management 2015

raise payment in time and as long as he or she had accepted to go by any change put in place by the bank without consultation, automatically any delay of payment contravenes the loan contract and thereof attracts penalties as per the contract provisions.

An example of complications of the compelling clause to the debtor for loan contract is the likely rise in interest rate which definitely attracts an increase in payment of none prior budgeted expense, which undoubtedly effect the business plan of the debtor by increasing the volume of expenses that obviously reduces his or her profit margins or that may fail the debtor to meet his projected target. The clause further mentions that if any interest due on the facilities is not paid on date thereof, same shall immediately be added to the principal sum outstanding and shall accordingly attract interest at the rate herein stated in the contract.<sup>88</sup>

#### **2.3.2.5 Commencement date**

This tenor of these facilities shall commence upon the draw down or on the date of disbursement notwithstanding the date on the loan agreement.

#### **2.3.2.6 Availability of facility**

The facilities shall be available for utilization only upon satisfactory compliance with the conditions precedent to draw down<sup>89</sup>. This condition underpins the borrower to accept the conditions in the urge to get money without due considerations of the results at times due to language barrier. Contrarily to the provisions of law in place that official languages to use in public and private bodies should be in three languages<sup>90</sup>; Kinyarwanda, English and French. In the Access bank they strictly use only English as if all their clients know the language!

However it is presumed that though the bank only uses English in its' operations, the borrowers who doesn't know that language are interpreted for before the contract signature to assent to the condition set in the contract, but would be better if the contract in prepared even in Kinyarwanda such that a borrower who doesn't know English but knowing Kinyarwanda can at least try to interpret for him or herself.

---

<sup>88</sup> Article 8, (1x) of Access bank LTD's internal policy on loan management 2015

<sup>89</sup> Article 5 of Access bank LTD's internal policy on loan management 2015

<sup>90</sup> Article 5 of the Constitution of the Republic of Rwanda of 4th June 2003, as amended (O.G N° special of 4 June 2003)

### 2.3.2.7 Securities/ Collaterals

The mortgages are accepted on condition of having 130 % value of the loan depending on the credibility of the client .approved by the recognized valuer and the mortgage must be insured noting that Access Bank as first loss Payee in place<sup>91</sup>. The borrower undertakes to obtain insurance with an insurance company approved by the bank<sup>92</sup>. The bank's interest as the first loss payee must be duly endorsed on the insurance policy. The borrower must ensure that the premiums are paid regularly. The borrower further undertakes to renew the policy one month before its expiry , if not done by the borrower the bank is authorized to do so on behalf of the borrower and debit his or her account to the extent of the insurance premium paid<sup>93</sup>.

Well this clause to the lender is sounding in that it ensures the maximum security of the property from the insured risk, however on the side of the borrower it is not fair in that that amount paid before one month before the expire means a lot to a business person such that it would be injected in the business to generate his extra profit. Instead the borrower would be warned to timely pay the insurance without conditioning him or her to pay one before the expire for all that length of time, but because of no option the borrower accepts. May be this is what the legislator would think about to amend the laws in favor of the weaker contract party “the borrower”.

Regarding the case of insuring the mortgage , it sounds clear as good initiative to cover both the bank and the client in case of accident, but when a kin analysis is made , it should not be mandatory to the client to incur the expenses for insuring all the properties since the contract bears another clause<sup>94</sup> that states that the bank may at any time and without notice to the borrower combine or consolidate all or any of the borrower's accounts with any liabilities to the bank and set off or transfer any sum or sums of standing to credit such account or towards satisfaction of the borrower's liabilities to the bank or any other respect whether such liabilities be actual or contingent, primary or collateral and several or joint. Meaning that the bank has a number of options to get back their loan paid out of the clients assets even beyond the mortgage.

---

<sup>91</sup> Article 6 of Access bank LTD's internal policy on loan management 2015

<sup>92</sup>Ibid

<sup>93</sup> Article 12 of Access bank LTD's internal policy on loan management 2015

<sup>94</sup> Article 10 of Access bank LTD's internal policy on loan management 2015

### **2.3.3. Bank of Kigali's conditions of mortgage loans**

When the Bank of Kigali, enters into a loan agreement with a borrower, currently the interest rate is at 19% per annum on reducing balance throughout the loan period. However the bank reserves the right to vary this rate upon giving a prior written notification of thirty days (30days)<sup>95</sup>. The borrower finds an agreement already formulated and only fills the amount of loan requested<sup>96</sup> and duration of the loan payment<sup>97</sup> which is only the point in the agreement that is subject to discussion with exclusive of terms and conditions of the contract with the lender. It is therefore through this agreement that entails general rules and regulations that the borrower must be in accord in order to materialize the contract.<sup>98</sup>

#### **2.3.3.1. Duration of the loan payment**

The parties must agree on period of completion of reimbursement because payment cannot be elastic; this will be a measure for performance of which penalties for non-performance with regard to the period of payment normally indicated and scheduled in a calendar of installment payment plan. Along payment plan, Additional interest will be charged at the rate of 2% per month flat rate on any amounts exceeding limit and penalty of 5% for early payment.

Bank of Kigali's general conditions on charges includes, facility fees computed at the rate of 1% of the facility plus VAT, that is payable on implementation of the credit facility subject to a minimum ranging from 12,980 Rwf to 59.000Rwf and an annual and management and supervision fee on personal loan of % charged at the anniversary of loan minimum of 11000 Rwf to 50000 Rwf depending on the size of the facility, forced recovery and interest rate are all provided in the bank's current internal credit policy and lending relations<sup>99</sup>.

#### **2.3.3.2. Collaterals and securities**

For the case of collaterals and securities, the borrower authorizes the bank to use his or her salaries, allowances and terminal benefits in reducing the outstanding loan<sup>100</sup> In case of loss of employment for any reason and in case he or she gives a security as mortgage like vehicle,

---

<sup>95</sup> Article 3 of Bank of Kigali's current Internal Credit policy and lending relations.

<sup>96</sup> Article 1 of Bank of Kigali's current Internal Credit policy and lending relations.

<sup>97</sup> Article 2 of Bank of Kigali's current Internal Credit policy and lending relations.

<sup>98</sup> Article 12 of Bank of Kigali's current Internal Credit policy and lending relations.

<sup>99</sup> See Articles 5(a-f) of Bank of Kigali's current internal credit policy and lending relations.

<sup>100</sup> Article 6 of BK's current internal credit policy and lending relations

business assets, he or she will sign a complementary security agreement. For other loans secured under mortgaged security, they must be covered by an asset(s) that must show a value of 130% of the total loan project and the borrower must have on his or her account opened at Bank of Kigali a deposit of 30% of the loan value. The borrower is obliged to insure the mortgage under a recognized insurance company.

### **2.3.3.3. Termination of loan agreement**

The bank reserves the right to terminate the loan immediately and without formal notice to pay and to require immediate repayment upon mere notification by registered letter to the borrower or in the absence thereof, by simple letter directly delivered to the debtor by the bank in the following cases: (a) inaccurate statement made by the borrower or default on any obligation to the bank<sup>101</sup> or (b) if any installment has been two month overdue.<sup>102</sup>

Mortgage law provides that the borrower agrees that when he or she fails to comply with the commitment and after he or she has been given a warning, the bank shall in accordance with the law on mortgage, use any of the following options as it deems appropriate to recover the debt: (a) manage the mortgaged immovable, b) lease the mortgage, c) take over the ownership of the mortgage; or d) enforce the mortgage

Although parties consent to the loan agreement, it is worth noting that the borrower is generally the weakest party in the agreement and often party commits to meet risky conditions like those provided under Article 8 of Bank of Kigali's current internal credit policy and lending relations, where it is stated that any default condition, or delay for payment will automatically be tantamount to rescind the contract; and all outstanding loans shall immediately fall due for payment, Banque Populaire du Rwanda also has such pinning provision, in its article 5 of internal credit policy for individual loan, where it is stated that the bank reserves the right to terminate loan immediately without formal notice to pay and require immediate repayment upon mere notification by registered letter to the borrower or in the absence thereof by simple letter hand-delivered to the debtor by the bank/lender for any default on any obligation to the bank.

---

<sup>101</sup>Article .5 (A) of BK 's current internal credit policy and lending relations .

<sup>102</sup>Article .5 (E) of BK 's current internal credit policy and lending relations .

With views to these provisions, the banks doesn't suppose there to be any reason of excuse which the borrower may present. In addition, Article 3 contains a clause on "varying interest"<sup>103</sup>. This implies that the bank can raise interest rate and impose it to the borrower and thereof the borrower finds him or herself paying unbudgeted money and fails to complete his or her intended business plan or in progress project and this may even result into defaulting.

## **2.4. BPR's conditions of mortgage loans**

When Banque Populaire du Rwanda enters into a loan agreement with a borrower, it formulates and sets the agreement through which conditions and obligations are enshrined and shares it with the client aspiring to borrow money. The borrower must read through the term sheet and he/she agrees with the conditions set out therein, he/she will then assent to loan agreement. Conditions which must be adhered to are set out in the contract. By the statement that the borrower must read through" the bank assumes that the borrower knows the language and has capacity to interpret the contract terms. However may not be the case, if the borrower signs the contract acknowledging that he has read and approved the terms and conditions it is legally binding and must be executed as is.

### **2.4.1. Condition of mortgage loans**

The mortgage must be registered with registrar of lands bearing land title which is submitted in its original copy to the bank. The mortgage value should represent 125% of the loan amount and must be forfeited in case of default. `

### **2.4.2. Changing rates**

BPR grants to the borrower a loan to its client borrowers at its' current base rate, currently calculated at 18% per annum for the time being and is calculated on daily basis and debited monthly to the bank's account. BPR reserves the right to change such rate or rates from time to time as it may in its sole discretion, it decides without consultation to the borrower, but later notifies the borrower through normal means<sup>104</sup>. This clause is too much complicated in as far as the borrower's effective plan may be concerned, because, one would imagine how to make effective budget without clear knowledge of expenses he/she will incur, or how a borrower would start his

---

<sup>103</sup> Art.3 of Banque Populaire du Rwanda 's current internal credit policy.

<sup>104</sup> Article 3 of BPR's current internal credit policy 2015

or her business using loan money, then after reaching a certain point, the bank notifies him that the interest rate is raised.

In such circumstances of abrupt raise of the interest rate a debtor has two options: accepting the changes or to cancel the agreement and pay the loan balance right away which is ambiguous to the debtor in relation to his business plan.

### **2.5. Other common conditions imposed by the banks to borrowers**

The bank reserves the right to withhold further disbursement, recall, or cancel the facility for reasons of default or non-compliance with the agreed upon conditions therein<sup>105</sup> A bank may vary some or all the terms and conditions of the loan agreement to reflect the prevailing conditions in the financial market or monetary authorities' regulations. The conditions also includes the bank's right to appoint a professional valuer to conduct annual re-evaluation of any collateral pledged by the borrower .The cost of such re-evaluation shall be debited to the borrower's account. Where the re-evaluation reveals a diminution of the value of the assets leading to under collateralization of the facilities, the bank may issue the borrower a demand notice to provide collateral and provided in the loan agreement, this incident shall constitute an event of default allowing the bank to call in the remaining unpaid loan.

It is recognized that the final clause of bank's contractual conditions states that the client acknowledges the contents of the contract by preceding his or her handwritten signature. However, as regards that clause, the act of repeatedly re- evaluating the security is over burdening the client and making him spend a lot of money of which he or she would have used to honor his or her loan obligations. For example, if a client is granted a loan payable in twenty years , this means that the re- evaluation will be made twenty times and from there you can imagine how much the borrower will spend within that period, just for an exercise which could be done only once and cover the loan period and at least use that extra money to reduce the loan volume.

All these conditions oppresses the mortgage debtors by imposing to them a number of unnecessary expenses to the borrower, that contributes much to his or her loan default and thereof holds a need to be looked into for revision in order to improve means of protecting the mortgage

---

<sup>105</sup>Ibid.

debtors. With reference to the application of foreign laws in various jurisdictions cited below, the mortgage debtors are relatively protected.

In USA, the law of mortgages is mainly governed by state statutory and common law. Mortgages are regulated by federal or state law or agencies depending on under whose law they were chartered or established. The Office of Thrift Supervision, an office in the Department of the Treasury, regulates federally chartered savings associations. Currency charters and regulates national banks. Federal credit unions are chartered and regulated by the Administration. Federal agencies that purchase loans and mortgages are the Federal National Mortgage Association or Fannie Mae, the Federal Home Loan Mortgage Corporation or Freddie Mac, and the Government National Mortgage Association or Ginnie Mae<sup>106</sup>.

A home buyer or builder can obtain financing (a loan) either purchase or to secure against the property from a financial institution, such as a bank, either directly or indirectly through intermediaries. Features of mortgage loans such as the size of the loan, maturity of the loan, interest rate, method of paying off the loan, and other characteristics can vary considerably<sup>107</sup>.

In Canada, when a debtor defaults, the lender doesn't rush to court; instead he or she genuinely takes due considerations and think deeply and analyse his debtor 'challenges against perfect execution of the loan contract<sup>108</sup> and when it proved that he/she is going through bad business periods, he gives him/her little more time to turn its fortunes around,<sup>109</sup> un like in the mentioned provisions in the Bank of Kigali and Bank populaire where it is stated that any default of its any condition or delayed payment irrespective of the cause is tantamount to termination and immediate enforcement of the loan balance follows.

The mortgage is thus is forfeited irrespective of whatever economic status or the cause of default and losses the client stands so as to regain back the loan and along with its responding interests.

---

<sup>106</sup>purchase loans and mortgages are and the Government National Mortgage Association or Ginnie Mae, <http://www.ginniemae.gov> accessed on 15/08/2015

<sup>107</sup>;ibid

<sup>108</sup>Grant B.Moffat,Mortgage Remedies following choosing between : forbearance and enforcement,p.3, [http://www.tgf.ca/Libraries/Publications/Mortgage\\_Remedies\\_Following\\_Default\\_Choosing\\_Between\\_Enforcement\\_and\\_Forbearance.sflb.ashx](http://www.tgf.ca/Libraries/Publications/Mortgage_Remedies_Following_Default_Choosing_Between_Enforcement_and_Forbearance.sflb.ashx)

<sup>109</sup> Ibid

The treatment of a mortgage debtor's default in Rwanda differs from how it is treated by other jurisdictions, for example, in South Africa. In South Africa, the Constitution<sup>110</sup> provides that the State has a positive duty to take reasonable regulative and other measures within its available resources to achieve progressive realization of having the right to access adequate housing<sup>111</sup> and further states that no one may be evicted from her/his home<sup>112</sup>, or have his/her home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. The lender and the court take due care when taking and mortgaging and realizing for payment in the event of default so as not to conflict with the South Africa's Constitution 1994.

It stipulates in its section 26 (1) that access to housing is a fundamental right every citizen has and this has even to be taken into consideration by the court in South Africa when executing enforcement measures. None can endeavour auctioning a person's home for the repayment of a loan in case of default. In this regard in *Jaftha* cited section, this judgment is now a precedent followed by South African Courts in similar cases. by *C. Van Heerden*<sup>113</sup>, the court developed the nature of the right of access to adequate housing, stating that a limitation on security of tenure will always have to be justified. As specified in the enforcement

It must be noted that in such cases, the protection provided by Article 26 of the Constitution only applies when the immovable property constitutes "adequate housing", that is when the debtor may become homeless if his property is executed. To strengthen consumer protection, the

---

<sup>110</sup>Section 36(2) of Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), [http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution of the republic](http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution%20of%20the%20republic) o.p Accessed on 25/11/2015

<sup>111</sup>Section 26 (2) of Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), [http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution\\_of\\_the\\_republic\\_o.p](http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution_of_the_republic_o.p)

<sup>112</sup>Section 26(2) of Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), [http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution\\_of\\_the\\_republic\\_o.p](http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution_of_the_republic_o.p) Accessed on 25/11/2015

<sup>113</sup>Corlia Van Heerden, The impact of the right of access to adequate housing on the enforcement of mortgage agreements and other credit agreements, [http://repository.up.ac.za/bitstream/handle/2263/31660/VanHeerden\\_Impact\\_2012.pdf?sequence=1](http://repository.up.ac.za/bitstream/handle/2263/31660/VanHeerden_Impact_2012.pdf?sequence=1)

National credit Act was enacted, whereby in its' Article 130(4), the law sets out specific powers of a court when it adjudicates a credit agreement matter, in addition to the extensive procedural protection afforded to a natural person mortgagor by the national credit Act (NCA), the act also provides extensive debt relief remedies to distressed nation person consumers who are over indebted and /or to whom reckless credit has extended.

These remedies also bring another lay of significant procedural compliance to be observed by guarantors access to adequate housing, is a fundamental right of people in the republic of south as enshrine in the constitution of 1996 of South Africa.<sup>114</sup> To avoid future disappointments of the parties emanating from the acquisition of mortgage loans, parties to a mortgage agreement need to be scrutinize it in a transparent manner and come to the compromise after all constraint are taken into consideration before the agreement is signed. With regard to enforcement approach, it is worth noting that many mortgage agreements include a grace period and after it elapses, however, late fees will start to be levied.

After the due date go by, the mortgage is considered to be in default. The bank sends a notice of mortgage default to a credit agency, impacting the credit score immediately. Within time limit, it will usually retain the services of a credit collection agency in an attempt to get the homeowner's past due payments. This adds to the fees associated with mortgage default.

Many banks will also insist on a full payment including late fees and collection fees to bring the homeowner current, and they will not accept partial mortgage payments when the mortgage is in default.<sup>115</sup> From the above considerations, it is clear that mortgage lenders, who often dictate the conditions of mortgage agreements, design them in order to ensure that in case of mortgage debtors' default, they can get full repayment of any outstanding loan balance. When mortgage debtors assent to mortgage agreements, they are supposed to enter into those agreements being fully aware of their contractual obligations. But like for other loan agreements, it is not true totally true that mortgage debtors enter into mortgage agreements with full information on contractual details.

---

<sup>114</sup>Ibid.

<sup>115</sup> Mortgage default is a situation in which someone is not making payments on his or her mortgage, and then the loan is considered to be in default see <http://www.wisegeek.com/what-is-a-mortgage-default.htm#didyouknowout>, accessed on 29/11/2015

Mortgage agreements being generally adhesion contracts formulated in technical terms often unintelligible for a common mortgage debtor, drafted sometimes in a language that mortgage debtors do not understand, the latter generally simply accept the loan conditions without considering the contents of those contracts, for a number of reasons including ignorance of the functioning of financial institutions, fear to have loan proposals retracted by lenders, etc. In such circumstances, how can mortgage debtors be protected against the hardship that they may endure during the enforcement of mortgage agreements? The following chapter analyzes challenges, strategies and mechanisms aimed at ensuring the protection of mortgage debtors.<sup>116</sup>

---

<sup>116</sup>Art 18 of Law no.Art.2 para.27 of law 43/2013 of 16/06/2013 Governing Land in Rwanda, (O.G .No. Special of 16/06/2013)

<sup>116</sup>Art 18 of Law no.Art.2 para.27 of law 43/2013 of 16/06/2013 Governing Land in Rwanda

## CHAPTER THREE: CHALLENGES OF THE DEBTOR'S PROTECTION IN THE ENFORCEMENT OF A MORTGAGE AGREEMENT

This chapter discusses a number of challenges, strategies and mechanisms that have been considered in a comparative perspective as regards the protection of debtors with respect to the enforcement of mortgage agreements in some selected jurisdictions.

### 3.1. Enforcement on defaulted loans

Pursuant to the aforementioned preconditions for contract formation and acquisition of loan, against a pledged asset, there wouldn't be further enforcement of loan following the sale of the pledged security, because the conditions set for the loan contract state that on failure to settle the loan, the mortgage will be forfeited to compensate the money lent as the mortgage law<sup>117</sup>. The challenge of banks' debtors is gauged from the analysis of implementation of loan contract theory as per the provisions of mortgage law and instructions of Registrar General and enforcement measures for the payment.

Moreover, challenges faced by the bank's debtor's range from series of issues seemingly addressed contrarily to the expectations of the debtor with reference to contract norms and performance, mostly as a result of imbalance of power between the parties to the contract, whereby the bank is well positioned to defend its interests at any cost while the borrower less financial literate and limited knowledge of the law is a weaker position.

Also challenging for the debtor is to service a loan contracted at high interest rate and other expenses encountered during the process of acquisition of loan; like payment fee for registration of collateral, cancellation or assignment of debt mortgage which is subject to fee)<sup>118</sup>, notarization fee for authentication of a signature on documents,<sup>119</sup> fee for approval of authenticity, etc. In addition, the borrower continues to pay for the property taxes for the pledged property, fee for valuation by experts and during the application for the loan, payment of receiver's remuneration

---

<sup>117</sup>Law N°17/2010 of 12/05/2010 Establishing and organizing the real property valuation profession in Rwanda, published *Official Gazette n° 20 of 17/05/2010*)

<sup>118</sup>Art. 16 Para.2. Art. Presidential order N°25/01OF09/07/2012 Establishing the list of fees and other charges levied by Decentralized entities and Determining their thresholds.OfficialGazetten°Special of 27/07/2012

<sup>119</sup>Art 17.para.09 of Presidential order N°25/01 of 09/07/2012 Establishing the list of fees and other charges levied by Decentralized entities and Determining their thresholds, *O.G. n° Special of 27/07/2012*

for the sale of the mortgage which is deducted from the auction proceeds at the option of the client. Other charges imposed by banks to borrowers are named as processing fee which is paid upfront for analysing the project before being given the loan.

With Access bank, for example, besides interest rates, the charges are: 1 % of the principle for processing fee, management fee payable annually and 15,000 to 50,000 Rwf for CRB, depending to the amount of loan. In BPR, in addition to interest rate of 18% on loan, other mandatory charges not subject to debate include 1% of the principal for commission of bank operations chargeable on withdrawing of that loan, and 2/1000 with its corresponding VAT for what is called opening file fee payable once. All these charges are deducted from the client's loan which actually waits to be charged the interest!

Bank of Kigali also has charges titled management fee that includes studying client's project.

Being in the three commercial banks considered in our case study or in other lenders in Rwanda, borrowers including mortgage debtors are often struggling to meet their contractual obligations given high interest rates, hefty fees and heavy penalties in case of default. A review of selected case law amply illustrates this.

### **3.2. Selected case law on enforcement of mortgage agreements**

This section will review some key cases relating to enforcement of mortgage agreements following mortgage debtors' default on their loans. As it can be noted, above all steps taken and conditions imposed by the bank to debtors, that results into spending some money for some services almost on each condition imposed to him or in order meet the conditions, so as to get the bank convinced that its money lent will be recovered from the mortgage. On failure to meet the payment as per the calendar of loan repayment, this is considered as default, and then the bank/lender reports to the Registrar General requesting to seize the mortgaged property for selling it, taking it or leasing it.

If the request is for selling the mortgaged property, the Registrar appoints a receiver to auction for the loan recovery, but surprisingly, if the auction proceeds do not meet the expected money to cover the loan as prior evaluated by the experts listed and approved by National Bank of Rwanda, the recovery of the remaining amount will be done on other assets of the borrower. Borrowers often complain against that, the fact that the mortgaged property is undervalued and the matter ends up into court litigations as it can be seen in some cases reviewed below. Where

by borrower claim for more payments to the auction sales to top up the loan balance. An example; In *BPR vs. ENGENCY ltd*, a client had been granted a loan of 11,744, 766 Rwf, at the interest of 19%; by the time of default, the debt had accrued to fourteen million nine hundred and eighty thousand and two hundred and ninety one francs (14,980,291) including principal loan and interest. It was granted on loan contract secured against mortgage, on condition determined by the law that on failure to repay the loan the mortgage will be forfeited for the payment as provided by the law<sup>120</sup>.

Unfortunately, it often happened that payment was not fully paid in accordance with the loan payment plan provided in the contract. Thereafter, the lender through the receiver appointed by the Registrar General<sup>121</sup>, sold the mortgage at a less value contrary to its value determined by the competent valuer selected in compliance with client and the bank “lender”. This was not enough to end the debt, thereafter; the bank sued the debtor before the court for the payment of the loan balance. The court received and examined the claim and found it as having legal basis, then accepted it and then summoned the parties for a hearing.

Thereafter, based on the provisions of the law<sup>122</sup>, which states that all assets of the debtor are securities of the creditor, decided the case in favour of the Bank/lender and ordered the debtor, now the plaintiff, to pay the total amount of loan owed including, accrued interest and Advocate’s fees, principal loan, court fees and all the expenditures incurred during the process, all totalling to 14.980.291Rwf<sup>123</sup> detailed as follows:14,380, 291 Rwf for the sum of principle loan and interest and 600,000 Rwf for the payment of legal proceedings and the payment of advocate’s remuneration.<sup>124</sup>

The Court disregarded the provisions of the mortgage law article 3, which stipulates that once loan is in default its corresponding mortgage can even be taken by the creditor to settle the debt as per compliance of the parties to the contract right from the contract formation and their confirmation of consent by contract signing.

---

<sup>120</sup>See art.3 of Law N°13/2010 of 07/05/2010 Modifying and Complementing Law N°10/2009 OF 14/05/2009 on Mortgages on mortgages, (O.l G. n° special of 14/05/2010)

<sup>121</sup>Instructions of Registrar general N°03/2010/ORG. of 16th of November 2010 on modalities to sell, manage, lease or take over the mortgage.

<sup>122</sup> Supra note 17

<sup>123</sup>Banque Populaire Du Rwanda (BPR)ltd Vs Engency ltd, R.Com 0416/14/TC/NGE, Pronounced on 15/09/2014

<sup>124</sup>Ibid

Another related case is of Bank of Kigali Ltd VS Kyamazima Françoise<sup>125</sup> where the client was given a loan of 633,788,334 Rwf at different dates with different securities that all were meant to cover the mentioned loan in case of default, including the payment of the principal loan and interest, that were calculated to be paid up to 21/10/2011. After she had paid some money, there remained 350, 531, 262 Rwf un paid. When she failed to complete the reimbursement in the specified time frame, the bank thereafter appealed to the Registrar general to sell the mortgage as per the provisions of the law as prior mentioned;<sup>126</sup> the Registrar General then appointed a receiver to auction the mortgage in order to enforce the terms of the contract so that the bank could get back the lent money out of the mortgage.

The mortgaged property was sold at a lesser money in comparison with the value prior confirmed by the bank and valuation experts from the Institute of property valuers in Rwanda. The auction of the mortgaged property yielded 300, 000, 000 Rwf, out of this, the bank paid out 15, 000,000 Rwf for the payment of the receiver's remuneration, and the advocate's payment equivalent to 300.000 Rwf, leaving the balance of sale proceeds 285,000,000Rwf, which was not sufficient for the repayment of the loan balance.

The **bank** thereafter sued the debtor before the commercial High court of Nyarugenge for the loan balance. The court admitting the case as having legal basis for litigation, summoned the parties for court hearing out of which, the court, based on the provisions of the law<sup>127</sup> which states that every plaintiff must prove a claim and failure to obtain proof, the defendant wins the case.

Likewise, a party who alleges that he/she has been discharged from an obligation that has been established must prove that the obligation no longer exists. Failure to do so, the other party wins the case. It is in this regard that the lender institutes the case to the court claiming to be paid the loan and proves that the bank loan was paid and the mortgage debtor had an obligation to discharge the loan that was not honoured. Furthermore the court has it as matter of law that "the movable and immovable assets of a debtor shall constitute a common and general security of

---

<sup>125</sup> R.COM 0057/12/HCC, of Bank of Kigali VS KYAMAZIMA Françoise.

<sup>126</sup>Supra note 116

<sup>127</sup> Article 9 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure official Gazette n° 29 of 29/0f 16 /07/2012

his/her creditors without prejudice to privileges and securities<sup>128</sup>”. Noting that the bank must get its’ loan paid out of the debtor’s assets.

During the court hearing, it was held that the client lost the case as a result, she was ordered to pay the bank,<sup>129</sup> an amount equivalent to 418.604,461 Rwf, and to pay 16.744.178 Rwf for the proportionate fees and 6.200Rwf, for court fee challenging the provisions of the mortgage law, which provides that upon failure to repay the loan in total qualifies to be in default and therefore, the mortgage is subject to be waived to the creditor for loan repayment either leasing it, managing it or selling it to get his lent money back. This being what the client had based and relied on to enter into the contract.

Another registered case of the Bank of Kigali vs SOCOGEDI ltd<sup>130</sup>. In this case the Bank of Kigali’s client “SOCOGEDI ltd”, now the plaintiff was sued for the loan balance of 721,403,432 Rwf, including principle amount of 549,389,253 Rwf and interest of 172,014,170 Rwf, only counted up to 01/07/2012.

This was done following the sale of the pledged mortgage against a loan which he did not complete the payment as it was prior anticipated and complied with. After the court hearing, the Court held that the plaintiff “SOCOGEDI ltd, lost the case, and thereof must pay the bank the total loan balance of 721,403,432Rwf and also pay 5,000,000Rwf, (five million francs Rwanda francs), the fee for legal proceedings including the advocate’s remuneration and the expert 12.362, 500Rwf, including Principal and interest, also ordered to pay 6,181,250Rwf for the expert and court fees of 1800Rwf<sup>131</sup>.

Following the pronouncement of the case, the defendant appealed to the commercial high court and also lost the case. This appellate court upheld the decision rendered by the commercial court of Nyarugenge and ordered the company to pay the Bank of Kigali, the “plaintiff”<sup>132</sup> the pecuniary amount set by that court, plus an additional amount of, 4,800 Rwf as the court fees.

It is also interesting to analyse another case of Uwamahoro Twahiri, vs. ACCESS BANK Ltd.<sup>133</sup>. In this case, the defendant had pledged his plots and houses against a loan of 83,608,000 RWF,

---

<sup>128</sup> Supra note 21

<sup>129</sup>Bank de Kigali ltd VS KYAMAZIMA.Francis , R.COM.0057/12/HCC, Pronounced , 23/07/2012  
130 R.COM.0703/12/TC/Nyge which was delivered on22/03/2013

<sup>131</sup> Bank de Kigali ltd.VS. SOCOGED ltd.R.Com 0703/12/TC/Nyge, pronounce on 22/03/2013

<sup>132</sup>Bank de Kigali ltd. Vs. SOCOGEDI ltd, R.COM A0233/13/HCC, 28/08/2013

<sup>133</sup>ACCESS BANK ltd VS Twahiri , UWAMAHORO , R.COM. 0436/14/TC/NYGE,

payable in a period of 120 months. After a period of time, she had paid some amount, before completing the loan repayment.

Unfortunately, the mortgaged property were expropriated by the ministry of commerce for public interest as provided by the constitution<sup>134</sup>, which states that individual's properties whether individual or jointly owned are invariable but can be expropriated only for public interest on worthy price. The mortgaged property was expropriated on understandable grounds with the consent of the expropriator and the parties to the mortgage, but yielded less to the expectations of the owner which led or accelerated the loan default by failing to complete the loan payment. Thereafter, Uwamahoro Twahiri was sued before the commercial court of Nyarugenge for the payment of the balance, that had accrued to 102,765,023 Rwf, as per the bank's claim.

After the court hearing the case was won by the plaintiff, ACCESSBANK Ltd and the court ruled that Uwamahoro Twahiri had to pay 102,765,023 RWF, including 76,670,813 Rwf, 25,094 Rwf and 1,000, 000 Rwf, accruing from the principle loan of 76,765,023 Rwf, that had remained after paying some amount of principle and interest inclusive after negotiations, the bank amicably agreed with the client to only pay eighty million francs and get waiver for with the balance as the debtor claimed to have had that asset as her only source of income to flourish the loan. Of which was expropriated with consultation and consent of the parties to the mortgage. From this scenario we construed that within the provisions of the law there must be a reasonable clause for flexibility other than spiky as it is , to facilitate the parties in case the sounding cause of default at the option of the client who in most cases is weaker contract party and a lay man in the field of banking and at times with less skills in law related issues pertaining to the contract, such that the client can even commit himself to take the loan that he or she will not manage to cover due to a number of entailed clauses in the contract that favours the bank to

---

<sup>134</sup>Article 29 Constitution of the Republic of Rwanda of 4th June 2003, as amended (Official GazetteN° special of 4 June 2003)

solicit more money from the client and thus make the client to incur a number of un budgeted expenses which in most cases contribute to the debtor's failure to meet the loan obligations. With reference to this situation where the expropriated asset was a mortgage to the bank, eye marked and being controlled by the lender as the only standby asset to secure the loan already issued. Since the bank had consented for its expropriation at a lesser amount to the registered value of the mortgage then it should have been the banks to sacrifice, the mortgage with exclusive of further claim for the balance beyond the expropriation. Therefore following the court rulings against such scenarios unveil that rope holes of weakness of some provisions of law relating to the civil, commercial, labour and administrative procedure<sup>135</sup>

Generally the clients are less knowledgeable in banking skills in comparison with the bank's employees carrying out the banking operations as their specialized business and thereto appears a weaker position to the contract.

In Access bank ltd vs. Mbanzabugabo Francois<sup>136</sup>, the plaintiff, " Access Bank" (lender) and Mbanzabugabo Francois, the Borrower had signed a loan contract of 1.000.000 U\$ equivalent to 550,000,000 Million francs<sup>137</sup> by then , but after, the bank had also availed an amount of 370 , 266, 556 Rwf, payable in one year as a line of credit. When the debtor Mr Mbanzabugabo Francois, had received some money from the loan amount, he was unfortunate that his Hotel got cracked as an effect of the earthquake and subsequently, he got sick and used some of the loan for his treatment and repaired his Hotel, other than using it for purpose it was meant for.

This led him to default and following that situation, the bank cancelled the contract and started the process of auctioning the mortgaged property.

---

<sup>135</sup> Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure official Gazette n° 29 of 29/0f 16 /07/2012

<sup>136</sup> RCOMA 0079/10/CS, Access bank ltd vs. Mbanzabugabo Francois

<sup>137</sup>Page 1 of Access Bank ltd vs. Mbanzabugabo f , RCOMA 0079/10/CS, pronounced on 26/10/2012

On stating his case before the commercial court, Mr.Mbanzabugabo refuted the issue of paying interest when the agreement were cancelled out of the debtor's will and instead asked the plaintiff to pay damages for the losses caused by the breach of the contract, while he was in process of payment. The Court, however, decided that Mr. Mbanzabugabo had lost the case<sup>138</sup>.

As a result, he was ordered to pay the loan with the interest. He appealed to the Supreme Court, whereby the court required an expert in bank loans and payment of interest following the cancellation of the contract.

The expert from the National Bank of Rwanda came and explained to the court that it is true that if the contract is not respected, it can be cancelled and the interest still continues to count until payment is done. Based on the explanations to the court, Mr.Mbanzabugabo lost the case and was ordered to pay the principal loan of 370.2668.556 Rwf plus interest of 114, 480.675 Rwf all totalling 485,175,231 Rwf and 19.407.008 Rwf for the court fees<sup>139</sup>.

The foregoing case shows that the bank as lender did what it could with reference to existing laws that are not friendly to consider or provide some options for flexibility in some special cases in certain circumstances where for example a calamity occurs that makes impossible the reimbursement of the loan, in which a clause ought to be in the loan contract to protect either party. Like in this case, however, the lent money belongs to the depositors and get used by the bank, if there had been a clause to cover, the parties the bank could have waived the interest and give him some days of grace and extend the payment period status to favour and cover him from auctioning his assets in that sense.

Since time immemorial, banks or lenders have been issuing loans on condition of being mortgaged securities to secure loans repayments, but defaulters continued to surface, at times leading to the foreclosures which appear as a none solution giving method to both creditors and debtors, other than life burden to the debtors who at the end, ends up in frustration.

---

<sup>138</sup> Access Bank ltd vs. Mbanzabugabo f, RCOMA 0079/10/CS, pronounced on 26/10/2012

<sup>139</sup>Page 2 of Access Bank ltd vs. Mbanzabugabo f, RCOMA 0079/10/CS, pronounced on 26/10/2012

For sure, it is not just, for a financial institution , carrying out banking activities and staffed with professionals, experienced directors and managers, to condition a client to pledge a property evaluated by professional property evaluators listed and approved by BNR, to establish an appropriate value of the property and to require that those experts be paid by the borrower, which adds to the already high interests and hefty fees imposed to him/her, bearing in mind also that heavy penalties in case of default are provided for in the loan agreement and later following the failure to raise the loan amount in time scheduled and even out of the mortgaged property, the debtor trespasses on other client's none mortgaged properties .

In some circumstances, however, borrowers who take loans without having very well analysed their projects will end defaulting on their loans when they face the reality of servicing them. This situation gets more complicated for the borrower when he/she also has to face a number of expenses at times not prior considered and budgeted for but come in as a result of imposed conditions by the bank, such as the payment of bank's operations fees for processing the loan, management fees for the account of the debtor payable on annual basis, etc. All these charges are deducted from the debtor's loan, ultimately weaken his or her capacity to repay the loan and increase the possibility of defaulting on its contractual obligations.

Following the failure to raise the loan amount, the borrower is further held accountable to payment of the remuneration of the receiver for the exercise of auctioning his or her mortgage to the bank and other charges incurred during the process of the auction!

Under Rwandan Law, there are no specific legal mechanisms that can rescue such a mortgage debtor especially when it comes to the point of default and execution of the mortgage. In the following section, we will review legal and institutional mechanisms set out in order to ensure a fair level playing field in the relationships between the mortgage lender and the mortgage debtor.

### 3.3. Ensuring a level playing field between the mortgage lender and the mortgage debtor

According to an European Commission staff's research, defaults on mortgage payments can have severe consequences for individual homeowners<sup>140</sup>, who could lose their homes in a foreclosure procedure, but also for society as a whole, through the impact on financial and social stability. The Commission announced in its Communication for the 2009 Spring European Council that it would examine ways to ensure that foreclosures are avoided wherever possible and identified national practices in this area. In that regard, the Commission services then collected information on measures already taken or about to be taken at national level as well as information on the evolution of defaults and foreclosures.

The commission's report showed the number of defaulter's rates and the corresponding approaches used to address the situation. The purpose of the results in a report served to provide examples and guidance for national public authorities and credit in parallel, coming forward with a proposal for a Directive that aimed to promote responsible lending and borrowing and ensured on how rising default rates had been addressed across the EU with measures to avoid foreclosure procedures. The report did not cover initiatives aimed at creating or reviewing rules on individual insolvency. The Commission's concern was to that borrowers be offered affordable loans, thus reducing the need for recourse to foreclosure of properties<sup>141</sup>.

Creditors in some European Union's Member States had voluntarily adopted certain internal practices to avoid foreclosures. Certain measures had also been imposed on creditors in some Member States.<sup>142</sup> It was found that reconciliation procedures with the borrower before foreclosure procedures could be started were aimed at promoting individual solutions to overcome payment difficulties.

---

<sup>140</sup>European Commission staff, "National measures and practices to avoid foreclosure procedures for residential mortgage loans: Accompanying document to the Proposal for a Directive of the of the European Parliament and of the council on credit agreements relating to residential property", 2011, Brussels, p.3. <http://cornell.edu/wex/negotiable-instruments>, accessed on 21/08/2015

<sup>141</sup>Ibid

<sup>142</sup>Ibid

In Belgium, for example, the law requires that a conciliation attempt be made before a judge before the foreclosure procedure can be started. In 2009, creditors committed to immediately contacting any borrower who had missed a payment in order to find appropriate solutions.<sup>143</sup>

In the Netherlands, the Code of Conduct on Mortgage Credit (CCMC) states that if a consumer fails to meet his commitments; the lender must enter into consultations with the consumer and examine whether a reasonable, acceptable solution for both can be found.<sup>144</sup> The aforesaid report pointed out that in the UK, according to the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB), creditors are required to have a written policy and procedures for dealing fairly with customers in arrears. The pre-action protocol for residential mortgage possession cases introduced in 2008 states that courts expect the parties to have taken all reasonable steps to discuss proposals for repayments of the arrears prior to the start of a possession claim.<sup>145</sup>

It is also reported that under the Irish Code of Conduct on Mortgage Arrears (CCMA), the borrower enters the Lender's Mortgage Arrears Resolution Process (MARP) when arrears remain outstanding days from date on which the arrears arose: the lender must explore a number of alternative repayment options to determine which are appropriate to the borrower's circumstances.<sup>146</sup> As for Hungary, it was found that the Code of Conduct on the Principles of Fair Conduct by Financial Organisations Engaged in Retail Lending (CCPF) entered into force on 1 January 2010 and states that the signatory institutions would contact the borrower in the event of payment default and try to agree on a reasonable solution.<sup>147</sup>

Other mechanisms aimed at ensuring a level playing field between parties to a mortgage loans tackle the matter of modification of loan terms before foreclosure can be launched. Moreover, setting a minimum length of time before starting foreclosure procedures can also help in stabilizing the relationships between mortgage lenders and mortgage debtors<sup>148</sup>. It is also worth mentioning that in the European Union, some national measures and practices have been adopted by public authorities in order to avoid foreclosure procedures for residential mortgage loans.<sup>149</sup>

---

<sup>143</sup> Idem, p3

<sup>144</sup> Idem, p4

<sup>145</sup> Ibid

<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> Idem, p 6

<sup>149</sup> Idem, p.7

They include public rescue schemes comprising of public loan guarantees<sup>150</sup>, the possibility to sell the home to a publicly sponsored association or to others<sup>151</sup>, a financial relief for unemployed homeowners and a temporary tax relief.<sup>152</sup>

The aforementioned European Commission Staff Paper also addresses the matter pertaining to providing debt and legal advice<sup>153</sup> in order to avoid foreclosure of residential mortgage loans.

The staff paper states in this regard that borrowers in difficulty may turn to free or low-cost independent primary debt or legal advice before foreclosure procedures have started to find out about the available options likely to solve their problems and eventually reach an agreement with the creditor. Different services that can be responsible for providing this advice include the Financial Supervisory Authority (Estonia), the National Free Legal Advice Centre and the Money Advice and Budgeting Service (MABS, Ireland).

In Finland, the Money and Debt Adviser, a free municipal service supervised by the Consumer Agency, helps over-indebted people with debt settlements) and in Sweden the Social Service Act and debt relief act<sup>154</sup>, require every municipality to support dividable in need and advise debtors in matters concerning their debts.

In Luxembourg, borrowers can contact specialised services for mediation and indebtedness handling in order to negotiate reimbursement plan with the creditor. In the Czech Republic, several financially-supported NGOs provide advice. Another measure that can help creditors to detect negative trends in their mortgage loan portfolio at an early stage and analyse the possible reasons is by encouraging internal reporting<sup>155</sup> as it is the case for example in Denmark and Ireland.

Following the overview on various approaches in as far as addressing the issue of defaulters and foreclosure of the mortgagor's assets, the mortgage debtors' hardships, with the shared experience from the mentioned sources, the researcher herewith below gives recommendation in urge to improve protection of mortgage debtors in financial institution.

---

150Ibid

151Ibid

152Ibid

153Ibid

154Ibid

<sup>155</sup>Idem, p.10

## 4. CONCLUSION AND RECOMMENDATIONS:

### 4.1. Conclusion

The present research analysed the Protection of Mortgage Debtors in Commercial Banks with a focus to three commercial banks, namely: Banque Populaire *du Rwanda*, Bank of Kigali and Access Bank. This work starts with general introduction and also covers three chapters where a number of laws, regulations, instructions, policies, issues related to formation of banks, contract, including mortgage agreements, challenges of mortgage debtors during enforcement, series of approaches from different jurisdictions in view to amicably or court proceedings come to solutions of addressing issues related to loan re-payment difficulties were discussed. Following the analysis, it was found that in Rwanda, there are no strong and specific consumer protection regulations within the framework of financial sector legislation. It is likely that due to the lack of protection of consumers in the financial industry, interest rates and conditions are subject to changes in the interest of the lenders alone without prior notice or re-negotiations with the mortgage debtors to discuss about the changes before implementation. In that respect, the Central Bank's Governor asserted that corporate and the general public should engage banks when seeking loans and negotiate for better terms.<sup>156</sup>

It is noted that as long as the overriding laws and regulations, like mortgage law and Article 194 of Law N°21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and Administrative Procedure, are not amended to get harmonized, consumers of financial services will always fall victims of the oppression. Also noteworthy is the practice in other jurisdictions such as UK, The Republic of South Africa, Kenya, where legal and regulatory frameworks were set up in order to ensure the consumer protection of financial services, for instance, there is very strict restrictions regarding the foreclosure on peoples' residential houses such that the mortgagees have to take reasonable steps while enforcing the mortgages for repayments. In addition, consumer associations were established so as to advocate for the clients and to mediate disputes between them and lenders in the event of conflict and enforcement.

---

<sup>156</sup> See, Central bank's governor. John Rwangombwa urges corporate and the general public to engage banks when seeking loans and negotiate for better terms in his interview with the new times by Collin MWAI, published on 23/11/2015, <http://www.newtimes.co.rw/section/article/2015-11-23/194642/>, accessed on 29/11/2015

Rwanda has some form of scattered consumer protection legislation in place, such as the law on completion and consumer protection, the constitution of the Republic of Rwanda where it stipulates that Rwanda is a State that commits itself to conform to the principles and to promote and enforce the respect of law and committed to promoting social welfare and establishing appropriate mechanisms for ensuring social justice.<sup>157</sup> These provisions do serve to protect consumers but generally, they don't regularly address concerns specific to the financial services industry due to the fact that there is no consumer protection law with explicit reference to financial services.

We have also found that enforcement mechanisms are weak and generally side with the banking industry. The existing provisions on consumer protection in Rwanda, once implemented in light of best practices observed in the above mentioned jurisdictions, it could be one of pillars toward setting up a specific legal and regulatory framework for consumer protection of financial services in the country.

One example to emulate is South Africa, where protection for consumers in financial services were paid attention to and some acts like the act that provides mechanisms for its effective consumer protection by giving rise to consumer associations such as the National Consumer Commission<sup>158</sup> that were voted. The latter institution is a body assigned to investigate consumer complaints, as well as the National Consumer Tribunal, which is responsible for the adjudication of violations and transgressions of the Act.

In accordance with the provisions, the Act lays down nine fundamental rights for consumers which include, <sup>159</sup> the fundamental right to fair, just and reasonable terms and conditions to protection against unfair, unreasonable or unjust contract terms, or the right to obtain notice for certain terms and conditions, as well as the enactment of law to protect the consumers. In that respect, a residential mortgage cannot be auctioned, without prior establishing whether he or she

---

<sup>157</sup>Article 9.para.5 of the Rwandan Constitution law O.G N° special of 4 June 2003)

<sup>158</sup>Supra note 111

<sup>159</sup>Fundamental Right No. 7: Right to fair, just and reasonable terms and conditions, South Africa's Consumer Protection Act No.68 of 2008 was signed on 24 April 2009 and is effective 1 April

2011. <http://www.standardbank.co.za/standardbank/Personal/Consumer-protection-act> accessed on 27/09/2015

has another home to stay as it is provided in the constitution, that every person has right to access adequate housing.<sup>160</sup>

In Rwanda, the fate of the mortgagor is set by Article 3 of the Law on mortgage which stipulates that if a debtor fails to pay the loan, the mortgage will either be sold, taken or leased by mortgagee, and with this the debtor accepts to pledge a property of higher or greater amount than the loan as imposed by the lender. However much, the debtor accepts to pledge more than the loan. This situation that seems to be fair as there is a sort of mutual consent, is complicated by the provisions of Law relating to the Civil, Commercial, Labour and Administrative Procedure<sup>161</sup>, where it is stated that all assets of the debtor are the securities of the creditor and hence, meaning that in case of default, all debtors' assets with exclusive of no asset including a residential home can be auctioned to repay the loan.

The criticism or condemnation on this provision is that it contracts with the mortgage law where by the parties agree forfeiting the mortgage as a provided option in case of failure to meet loan obligation and further more when considering that the provision states or allows the creditor to attack all assets of the debtor up to the satisfaction of his or loan disregards that by the term all assets involves residential homes and which supports the debtors' family including the innocent dependants family and children of the debtor who may fall victims of the

The contradiction and overriding of laws ends up suppressing the mortgage debtor, simply because the latter law gives a window to the creditor to encroach or impinge on the debtor's non pledged properties. His/her situation may worsen when the property is undervalued at the time of realizing it, as the buyers basing on the lender's enforcement pressure, may connive to buy it at a lesser value and the debtor remains answerable for the balance.

Following the above mentioned findings of the research, the section below will outline the main recommendations that can be formulated in order to improve the protection of consumers of financial services in particular, mortgage loans debtors".

---

<sup>160</sup> Supra note 113

<sup>161</sup> Article 194 of Law N°21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and Administrative Procedure

## 4.2. Recommendations

In light of above mentioned findings of our research, it is recommended the enactment of laws and adoption of regulations with some clauses to protect the vulnerable and weak party in mortgage contract that is the mortgage debtor. These clauses will especially address the matters pertaining to the Mortgage contract formulation with some clauses that can protect family properties or homes, in order to avoid that a person may pledge his/her home and risk to loss it in case of default and some family dependants fall victims of their guardian or parent's ignorance.

It is also recommended to establish consumer associations purposely to address and advocate for the bank's clients and the amendments of some existing laws, such as Law N°21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and Administrative and to harmonize it with the provisions of the mortgage law as regards the realisation of mortgage debtor's assets in case of default to repay the loan.

There is also a need to improve clients' financial literacy so that clients could know better loan conditions imposed by banks, especially those relating to interest rates and various charges and fees associated with granting and servicing of loans. This will avoid that clients be exploited and that banks capitalize on their ignorance and keep tying them on contract tactics, by raising interests, imposing a number of bank charges to get a higher pay of interest from clients. This in the end might turn a number of borrowers into bad debtors due to deterioration of their financial situation and in the long run, there might be a risk that clients lose confidence in the banking sector.

I reiterate therefore the need for the enactment of a law specifically aimed at protecting consumers in financial institutions, and to amend and strengthen the existing ones which doesn't include consumers of financial services, with a special attention to striking a fair balance between the rights and obligations of parties in a mortgage agreement.

In that the Rwandan legislator can emulate other lawmakers in countries such as the UK, where a strong legal, regulatory and institutional framework has been set up so as to avoid foreclosures for non loan repayment , but inprovisise other means of getting payments other than resorting to foreclosure that causes the clients to lose their homes and remain stuck and wedged without even ending the debt , leaving the children and other family members in a poor social environment as

opposed to the human right declaration which states that children and people at large are entitled to a healthy and dignified life.<sup>162</sup> <sup>163</sup> It is then recommended that lenders and borrowers should be encouraged to discuss about some other measures of payment other than of foreclosure which places people in poorer conditions.

Other best practices to adopt are those in action in France, where, as mentioned above, the courts may suspend a borrower's payment obligations at his request, for a maximum period of two years. In Belgium, the borrower can ask the judge to allow him to pay lower instalments over a longer period of time. In Romania, the Guidelines for Extra-Judicial Restructuring of Mortgage Loans encourage the parties involved to discuss solutions prior to any measures for mortgage enforcement, e.g. modifying the amount of instalments, delaying payment. These examples of best practices can guide the Rwandan legislator in enacting appropriate laws for the protection of consumers of financial services in general, and the protection of mortgage debtors in particular.

---

<sup>162</sup> “Declaration of Human Rights (UDHR)” articulates this right to adequate health in Article 25, <http://www1.umn.edu/humanrts/edumat/studyguides/righttohealth.html>, accessed on 14/08/2015

<sup>163</sup>Article 2 para.2 of United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, which States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child 's parents, legal guardians, or family members, available at <http://www1.UNICEF.php/thesa/urus/glossary-display.php>

## **5. BIBLIOGRAPHY**

### **1.1.Laws**

Constitution of the Republic of Rwanda of 4th June 2003, as amended (Official Gazette N° special of 4 June 2003)

Law no.55//2007 of 30/11/ 2007 governing the Central Bank of Rwanda, (Official Gazette N° special of 20/02/2008)

Law 007/2008 of 08/04/2008, concerning organization of Banking, O.G, N°12 of 15/06/2008

Law N°21/2012 of 14/06/2012 Relating to the Civil, Commercial, Labour and Administrative Procedure, Official Gazette N° 29 of 16/07/2012

Law n°45/2011 of 25/11/2011 governing contracts, Official Gazette n° 04bis of 23/01/2012

Law No.07/2009 of 07/04/2009 relating to companies Official Gazette N° 17bis of 17/04/2009

Law No.10/2009 of 11/05/2009 on mortgage law, (OG.No.17 Bis of 2704/2009

Law N°13/2010 of 07/05/2010 Law modifying and complementing Law n°10/2009 of 14/05/2009 on mortgages, Official Gazette, n° special of 14/05/2010

Law 43/2013 of 16/06/2013 governing land in Rwanda, (Official Gazette No .Special of 16/06/2013)

Law N°36/2012 OF 21/09/2012 relating to competition and consumer protection (*OG n° 46 of 12/11/2012*)

Law N° 11/2009 OF 14/05/2009 on security interests in movable property, (O.G. n° special of 15/05/2009)

Law N°34/2013 of 24/05/2013 on security interests in movable property, O.G.no.21 of 27 may 2013.

Law N°17/2010 of 12/05/2010 establishing and organizing the real property valuation profession in Rwanda, (*O. G. n° 20 of 17/05/2010*)

### **5.2. Orders, Regulations and Instructions**

Presidential order N°25/01of 09/07/2012 establishing the list of fees and other charges levied by Decentralized Entities and determining their thresholds. Official Gazette n° Special of 27/07/2012

Regulations N°02/2011on credit classifications and provisioning, Official Gazette No. special of 30 March 2011

Instructions of Registrar General N°03/2010 ORG of 16/11/2010 on modalities of lease, sale, public auction and mortgage acquisitions

Regulation No 10/2009 on Liquidity Ratio *Official Gazette n° 02 of 1 OF 0/01/2011*.

Regulation N° 05/2008 on Credit Concentration and Large Exposure in (O G n° 02 of 10/01/2011

Regulation No.03/2008 on licensing conditions of banks. (O.G.No.51bis of 20/12/2010

Regulation N° 06/2008 on Corporate Governance of Banks in *Official Gazette n° 02 of 10/01/2*

Access Bank's current internal credit policy and lending relations

Bank of Kigali's current internal credit policy and lending relations

Banque Populaire du Rwanda's current internal credit policy and lending relations

### **5.3. International legislation**

Universal Declaration of Human Rights and in the International Covenants on Human Rights adopted by General Assembly of the United Nations on 10/December 1948.

### **5.4. Foreign Legislation**

Constitution of the Republic of South Africa, 1996

South Africa's Consumer Protection Act No.68 of 2008 was signed on 24 April 2009 and is effective 1 April

Serbian law on the protection of Financial services consumers, Published in the Official Gazette of the republic of Serbia .No.36/2011 and its 'amendments and supplements published in in RS.No.139/2014

### **5.5. Textbooks**

Adams, A. and Longshaw, A., Commercial law and practice, College of law publishing, 2005.

Eyler, R., Money and Banking an international text, Routledge publishing, 2009, London, pages.

Oxford dictionary of Finance and banking, Oxford University Press fourth edition, edited by Johnson law BA (Market house of books ltd), 2008, New York.

Schabas, W. A.and Imbleau, M, Introduction to Rwandan Law, Les editions Yvon Blais Inc, Canadian cataloguing in publication data, 1997,Quebec, Canada.

Uher, T. and Dorenport, Ph., Fundamentals of building contract management, second edition, 2009, University of south wales press,2009, Australia.

### **5.6. Cases**

Access Bank ltd vs. Mbanzabugabo Francis, RCOMA 0079/10/CS, 26/10/2012, unpublished.

ACCESS BANK ltd VSTwahiri , UWAMAHORO , R.COM. 0436/14/TC/NYGE, unpublished  
 Bank de Kigali ltd VS KYAMAZIMA.Francis , R.COM.0057/12/HCC,23/07/2012,unpublished  
 Bank de Kigali ltd.VS. SOCOGED ltd.R.Com 0703/12/TC/Nyge, on 22/03/2013, unpublished  
 Bank de Kigali ltd. Vs . SOCOGEDI ltd, R.COM A0233/13/HCC, 28/08/2013, unpublished  
 Banque Populaire Du Rwanda (BPR)ltd Vs Engency Ltd, R.Com 0416/14/TC/NGE,  
 15/09/2014, unpublished

### **5.7. Internet sources**

European Commission staff, “National measures and practices to avoid foreclosure procedures for residential mortgage loans: Accompanying document to the Proposal for a Directive of the European Parliament and of the council on credit agreements relating to residential property”, 2011, Brussels,

<http://cornell.edu/wex/negotiable-instruments>, accessed on 21/08/2015.

Oya Pinar Ardic,et, al, World Bank, Research working paper, on consumer protection laws and regulations in deposit and loan services, January 2011; [www.cgap.org/.../CGAP-Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf](http://www.cgap.org/.../CGAP-Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf)

Section 26(2) of Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996, [http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution\\_of\\_the\\_republic\\_o.p](http://www.acts.co.za/constitution-of-the-republic-of-south-africa-act-1996/index.html?constitution_of_the_republic_o.p)

Central bank’s governor. John Rwangombwa urges corporate and the general public to engage banks when seeking loans and negotiate for better terms in his interview with the new times by Collin MWAI,published on 23/11/2015,<http://www.newtimes.co.rw/section/article/2015>.

Mortgage default is a situation in which someone is not making payments on his or her mortgage, and then the loan is considered to be in default see <http://www.wisegeek.com/what-is-a-mortgage-default.htm#didyouknowout>, accessed on 29/11/2015

Corlia Van Heerden , The impact of the right of access to adequate housing on the enforcement of mortgage agreements and other credit agreements,

[http://repository.up.ac.za/bitstream/handle/2263/31660/VanHeerden\\_Impact2012.pdf?sequence=1](http://repository.up.ac.za/bitstream/handle/2263/31660/VanHeerden_Impact2012.pdf?sequence=1)

GrantB. Moffat, Mortgage Remedies following choosing between : forbearance and enforcement,p.3,

[http://www.tgf.ca/Libraries/Publications/Mortgage\\_Remedies\\_Following\\_Default\\_Choosing\\_Between\\_Enforcement\\_and\\_Forbearance.sflb.ashx](http://www.tgf.ca/Libraries/Publications/Mortgage_Remedies_Following_Default_Choosing_Between_Enforcement_and_Forbearance.sflb.ashx)

Serbian law on the protection of Financial services consumers; [www.nbs.rs/.../laws/low financial services consumer protection. PDF](http://www.nbs.rs/.../laws/low_financial_services_consumer_protection.PDF)

purchase loans and mortgages are and the Government National Mortgage Association or Ginnie Mae, <http://www.ginniemae.gov> accessed on 15/08/2015

Grant B.Moffat, Mortgage Remedies following choosing between : forbearance and enforcement, p.3, [http://www.tgf.ca/Libraries/Publications/Mortgage Remedies Following Default Choosing Between Enforcement and Forbearance.sflb.ashx](http://www.tgf.ca/Libraries/Publications/Mortgage_Remedies_Following_Default_Choosing_Between_Enforcement_and_Forbearance.sflb.ashx)

[www.moneywalks.com/category/banks/](http://www.moneywalks.com/category/banks/) Accessed on 17/04/2016 also see [http://books.google.rw/books?isbn= 0735510032](http://books.google.rw/books?isbn=0735510032)