

Finance & Banking

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KENYA

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**FINANCE & BANKING
ALERT**

Worrying trend in exercise of statutory power of sale: A preserve of entities conducting banking or financial business and licensed by CBK?

At the heart of every secured lending transaction is a lender's comfort in the knowledge that in the event of default by the borrower, it will be able to enforce its security, including the ability to exercise of statutory power of sale on charged land.

This comfort is guaranteed by the provisions of the Land Act, 2012 and the Land Registration Act, 2012 (Land Acts), which describe a charge in broad terms as "an interest in land securing the payment of money or money's worth" without any limitation on who can create or take a charge. The Land Acts also stipulate remedies available to a lender, including the exercise of statutory power of sale over charged land provided that the steps for security perfection as provided in the Land Acts have been complied with.

It is worth noting that there is presently no law that requires a person to have a licence from the Central Bank of Kenya (CBK) in order to secure the repayment obligations of a borrower through the creation of a mortgage or charge over land and to subsequently be able to sell that land in the event of non-payment.

Recently, the Kenyan Court of Appeal and the High Court have taken the view, which we respectfully note to be incorrect, that only a person licensed by the CBK as a

mortgage finance company or as a financial institution can lend against security over land and thereby exercise statutory power of sale if there is default by the borrower.

In *Joseph Njogu Njuguna and One Other v Tetra Pak Limited and One Other* [2024] KEHC 4188 (KLR), the plaintiffs, being the registered owners of a parcel of land that had been charged to the defendants, filed a suit against the defendants seeking a declaration that the sale of the charged property was fraudulent and illegal. The High Court agreed with the plaintiffs and held that Tetra Pak could not exercise statutory power of sale over the land that was charged to it since it was not a bank. According to the court, Tetra Pak could not purport to advance any money, take security therefor or exercise a statutory power of sale.

The High Court in the Tetra Pak case followed the decision of the Court of Appeal in *George Lalla Oduor v Cannon Assurance Limited* [2019] (eKLR) in which it was held that Cannon, an insurance company, could not conduct mortgage business without having obtained a licence from the CBK to do so. In reaching the conclusion that Cannon could not enforce its charge, the Court of Appeal reasoned that section 4(1) of the Banking Act, Chapter 488 Laws of Kenya, which is couched in mandatory terms, requires all persons carrying out banking, financial or mortgage finance business to obtain a licence from the

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CBK. However, what the Court of Appeal failed to do in relying on section 4(1) was to check that that business of a “*mortgage finance company*” is defined and expressly limited to companies that take deposits from the public and employ those deposits in their business.

The plaintiffs in these two cases did not allege that either Tetra Pak or Cannon were taking deposits from the public and employing those deposits in their business and neither did these two companies present that as a defence.

These two cases point to a worrying misapplication of the provisions of the Banking Act to deny a lender that has taken a charge over the borrower’s land the ability to sell that land to recover the debt where the borrower is unable to repay it. One would expect that in determining what a mortgage finance business is that the courts would be minded to apply the definition contained in the Banking Act rather than the assumed ordinary meaning of the phrase. Meanwhile, lenders that are not licensed by the CBK will need to be consider if taking a land charge is viable and to be better prepared to fight for their right to sell their land against this worrying and incorrect trend.

Stella Situma

Chambers Global 2024 Results

Finance & Banking

Chambers Global 2021–2024 ranked our Finance & Banking practice in:
Band 2: Capital Markets: Debt and Capital Markets: Equity.

Ludwig Smith recognised as a “**Senior Statesperson**” in Banking & Finance.

Jacqueline King ranked by Chambers Global 2017–2024 in **Band 2:** Capital Markets: Debt.

Deon Wilken ranked by Chambers Global 2021–2024 in **Band 3:** Banking & Finance.

Sammy Ndolo ranked by Chambers Global 2023–2024 in **Band 4:** Banking & Finance.

Peter Hesseling ranked by Chambers Global 2023–2024 in **Band 3:** Capital Markets: Equity.



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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