

March 19, 2025

## Can Lenders not licensed by CBK take security over land?

Kenyan courts have handed down two decisions that threaten to upend lending practices in the country. A 2019 Court of Appeal decision<sup>1</sup> and a 2024 High Court decision,<sup>2</sup> have the unintended consequence of limiting who can take security over immovable property.

In April 2024, the High Court followed a 2019 Court of Appeal decision finding that institutions without banking licences cannot legally create charges (mortgages). This decision raises one fundamental question—can institutions not licensed by CBK take immovable property securities when lending?

### What does the Banking Act provide?

The starting point for this conversation is the Banking Act. Section 4 of the Act bars anyone from engaging in banking, financial, or mortgage finance business without being licensed by the Central Bank of Kenya (CBK).

The Act defines mortgage finance business as the taking of deposits to be deployed in lending for the purchase or improvement of land secured by, among others, a mortgage or charge over land.

Therefore, as per the Act, to be a mortgage finance company, a company must accept public deposits, use those deposits to lend for land purchases and developments, and secure repayment by taking security over land. All three elements must exist for an institution to fall under the regulatory purview of the Banking Act.

### What is a Mortgage?

Before we delve further, it is necessary to consider what a mortgage is. The term has an ordinary meaning and a legal one. Ordinarily, mortgage refers to lending provided to finance the purchase or construction of a home for personal use. Legally however, a mortgage is an instrument which transferred ownership of immovable property to a lender to secure a debt.

After the Land Act 2012 came into force, all mortgages were converted into charges. A charge is a security interest in land securing payment of money or fulfilment of a condition. Unlike mortgages pre-2012, charges do not transfer ownership of land.

### Misapplication of Banking Act Provisions

The Court of Appeal unfortunately viewed the elements of mortgage finance business individually rather than as an inter-dependent whole. The entire premise of regulation of banking institutions is they receive and hold funds on for the general public. To protect this public interest, the government regulates such business. However, not all lending secured by land is mortgage finance.

Nothing in Kenyan law prohibits persons not licensed by CBK from giving loans whose repayment is secured by security over land provided they do not accept deposits from the public. Respectfully to the Learned Judges of the Court of Appeal, the Banking Act only regulates mortgage finance business not the giving or taking of security over immovable property.

<sup>1</sup> George Lalla Oduour v Cannon Insurance (K) Ltd (2019) eKLR

<sup>2</sup> Joseph Njogu Njuguna & Jane Nyambura Njogu v Tetra Pak Limited (2024) eKLR

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## Why does this matter?

The immediate impact of these decisions is persons not licensed by CBK holding mortgages issued until the 2012 Land Act was fully in force may be unable to enforce those securities. The application of the new Land Act did not take off until sometime in 2017, potentially leaving instruments issued between 2012 and 2017 exposed. Non-bank persons holding mortgages need to review their security documents for enforceability and may need to consider replacing their securities.

Consequently, lenders not licensed by the CBK could face the same challenge while enforcing security over immovable property. Ultimately, we think this issue needs to be brought back before the Court of Appeal for reconsideration.

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