

1.0. INTRODUCTION

The Security Interest in Movable Property Bill, 2018 was introduced in Parliament by the Minister of Justice on the 27th March, 2018 and was, in accordance with rule 128 of the Rules of procedure of Parliament, referred to the Committee on Legal and Parliamentary Affairs for scrutiny.

The object of the Bill is to provide for the use of movable property as collateral for credit, to provide for the creation and perfection of security interest; to provide for rules for determining priority of claims among competing claimants; to provide for registration of security interest in movable property by notices; to provide for a register of interests in movable property; to provide for the enforcement of security interests, search of the register and for related matters.

2.0. BACKGROUND

The law relating to chattels securities in Uganda is the Chattels Transfer Act, Cap 70, common law and the doctrines of equity by virtue of the Judicature Act, Cap. 13. The Chattels Transfer Act has been on the Statute Book since 1978, and is largely based on the old English law and has rarely been put to use due to its archaic and complicated provisions.

In 2009, Government introduced in Parliament, the Chattels Securities Bill, 2009, with the intention of modernising the law relating to the use of movable property as security. The Bill was intended to overhaul the legal situation and to provide adequately, chattels securities law commensurate with Uganda's state of development and social circumstances and to promote private investment. Parliament passed the Chattel securities Bill into an Act in 2014. The Minister was obligated in section 1 of the Chattels Securities Act, 2014, to commence the Act by way of a statutory instrument, on a date the Minister appoints. To date, the Minister has not commenced the Chattels Security Act, 2014, meaning, the chattels Transfer Act, Cap 70 is still in force.

In 2018, Government introduced in Parliament, the Security Interest in Movable Property Bill, 2018, to mainly repeal the Chattels Security Act, 2014

and to provide for the use of movable property as collateral for credit, to provide for the creation and perfection of security interest; to provide for rules for determining priority of claims among competing claimants; to provide for registration of security interest in movable property by notices; to provide for a register of interests in movable property.

The repeal of the Chattels Securities Act, 2014 was necessitated by the inadequacies in the 2014 Act, including-

- (a) the narrow scope of the types of movable assets that can be used as collateral;
- (b) the exclusion of judgement liens, negotiable instruments, debentures and intangible assets such as intellectual property rights, shares and securities;
- (c) the prescription of a manual register which according to international best practices may not be effective for putting third parties on notice on the actual or possible existence of a security interest; and
- (d) unnecessary formalities in creating and registering a security interest.

In 2016, Parliament enacted The Tier 4 Microfinance Institutions and Money Lenders Act, 2016, an Act that among others, repealed the money lender's Act, Cap 273 and regulated money lender's transactions and the creation of security interests in money lender's transactions.

2.1. METHODOLOGY

In considering the Bill, the Committee was guided by Rule 128 (2) of the Rules of Procedure of Parliament and therefore met and received memoranda from the following stakeholders;

1. The Ministry of Justice and Constitutional Affairs
2. Uganda Registration Services Bureau
3. Uganda Law Reform Commission
4. Uganda Microfinance Regulatory Authority
5. Uganda Association of Money Lender.

3.0. GENERAL ANALYSIS OF THE SECURITY INTEREST IN MOVABLE PROPERTY BILL , 2018

The Committee analysed the proposals made in the Bill clause by clause and made its recommendations as below-

LONG TITLE

Whereas the Security Interest in Movable Property Bill contains a long title which describes some of the leading provisions of the Bill, its deficient in some matters of relevant importance to the Bill. The long title of the Bill doesn't include one of the most important aspects of this Bill, being, the repeal and replacement of the Chattels Security Act, 2014. This leaves the reader or the eventual user of the law to decipher from the provisions of the Bill , in clause 53, that the intention of the Bill is to repeal and replace the Chattels Security Act, 2014, thereby, affecting the appreciation of the provisions of the Bill .

Recommendation

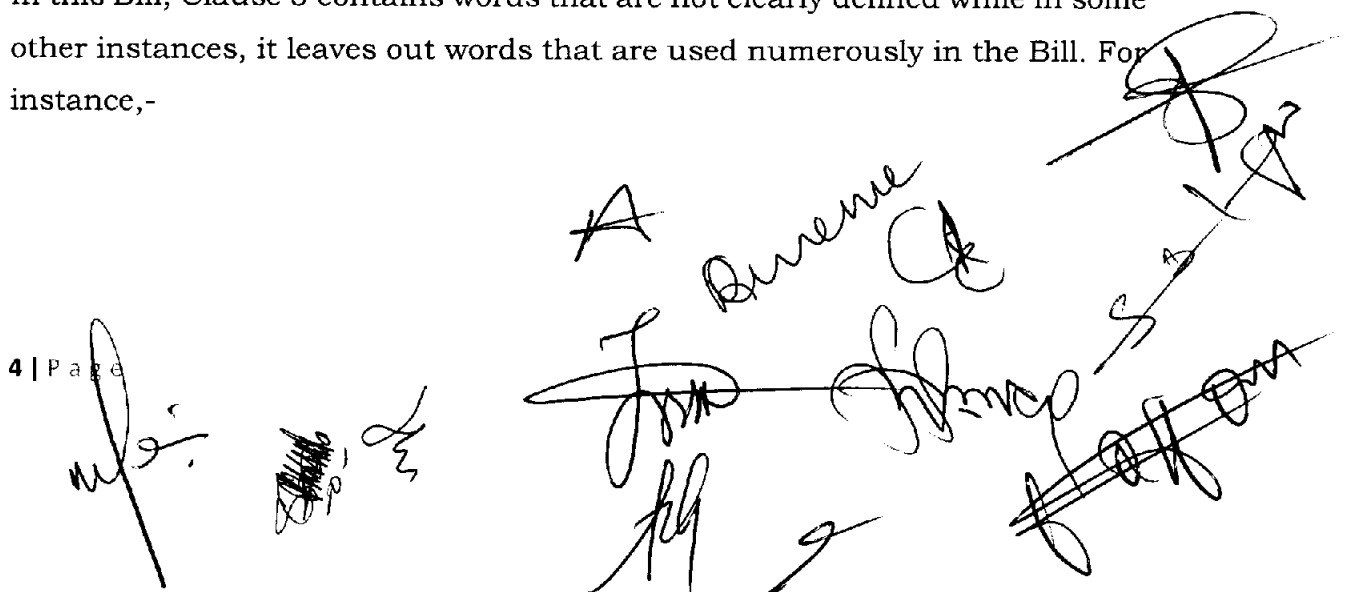
The Committee recommends that the long title should, in accordance with section 3 of the Acts of Parliament Act, include in the long title, the repeal of the Chattels Security Act since it one of the leading provisions of the Bill.

CLAUSE 3

Clause 2 of the Bill is the interpretation part of the Bill and defines the major words used in the Bill. The significance of the definition provision of the Bill cannot be over emphasised since it enhances the interpretation and understanding of the Bill.

Since the interpretation part of the Bill is central to the understanding of the Bill, it should be comprehensive enough to cater for all the major words used in the Bill and ensure that the words are defined clearly and precisely.

In this Bill, Clause 3 contains words that are not clearly defined while in some other instances, it leaves out words that are used numerously in the Bill. For instance,-

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1. "Collateral"

The definition is ambiguous since it extends the collateral to movable property that may be subject to the security interest at a future date. This definition is reproduced below-

"Collateral" means movable property that is subject to a security interest and includes movable property that may be subject to the security interest at a future date"

It appears that by the definition, a security interest can attach to movable property in future without it having attached to such property in the first place. This begs the question when such a situation may arise since the Bill doesn't prescribe when such arises.

Furthermore, the words **"and includes movable property that may be subject to the security interest at a future date"** are redundant and serve no purpose since the first part of the definition also covers the instances the second part intends to cover.

2. "Commingled Goods"

The definition of the word "commingled goods", is limited in nature since it relates to goods alone and not to funds or assets. It should be noted that the word "goods" is not defined in the Bill. More so, the words used numerously used are chattel or tangible asset. The manner in which the word commingled goods is used connotes that it is used in reference to goods alone yet the Bill broadly considers money and other intangible assets.

This begs the question as to whether funds held in an account on which proceeds are deposited, which proceeds arise from the disposal of a security interest can be referred to as commingled. In such a situation, since the security interest extends to the proceeds arising from the disposal of a security interest, such funds are commingled with funds which don't relate to the security interest. In such a situation, the definition of the word "commingled goods" wouldn't extend to funds deposited as described above because such funds are not, in the ordinary use of the word, goods.

In such a situation therefore, there is need to cater for such funds by defining the word commingled assets or funds. For instance, such a definition exists in the Movable Property Security Rights Act of Kenya, in section 2 and it is defined as follows-

"Commingled assets" means funds credited to a deposit account or money mixed with other money so that they ceased to be identifiable."

3. Document of title",

In the definition of the word "document of title", certain words used in the definition are redundant and with or without them the definition is discernable. The words "document of title are defined below-

"Document of title" means a document that authorises the delivery of tangible asset and satisfies the requirements of negotiability such as a Bill of lading and a ware house receipt"

The underlined words in the above definition are redundant since they add no value to the definition.

Furthermore, the above definition doesn't comprehensively define the word document of title. For instance, the Chattels Security Act defines the words "document of titles" in the following manner-

"document of title" means a document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the goods it covers; and includes a Bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods; and is issued by or addressed to a bailee and relates to goods in the possession of the bailee that are identified or are tangible portions of an identified mass;

The above definition was specific to the document it referred to since unlike the proposed definition, the definition is limited to-

- (a) document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the goods it covers;
- (b) is issued by or addressed to a bailee; and

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- (c) relates to goods in the possession of the bailee that are identified or are tangible portions of an identified mass;

The above definition clearly defines the document that is envisaged in the definition unlike the definition proposed in the Bill which appears to allow all documents as long as they are negotiable, without providing for the definition of what amounts to a negotiable document.

4. "Intellectual property"

The definition of the word "intellectual property" is limited in scope and needs to be rethought. In the definition of the word intellectual property, the Bill outlines a non-exhaustive list of intellectual property rights some of which are not protected or recognised in Uganda. Even in that list, there are intellectual property rights that are ambiguous and not capable of exact definition. For instance, the list includes intellectual property rights such as "inventions in all fields of human endeavour and protection against unfair competition".

It is important to note that Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.

In Uganda, the protected intellectual property rights are those listed in the Copyright and Neighbouring Rights Act, 2006, Trademarks Act, 2010 and The Industrial Property Act, 2014. These laws variously prescribe the intellectual property rights that are protectable and how these are protectable. The definition of the word intellectual property should be limited to only those rights that known to the laws of Uganda as listed in the Copyright and Neighbouring Rights Act, 2006, Trademarks Act, 2010 and The Industrial Property Act, 2014. For instance, such a definition exists in the Movable Property Security Rights Act of Kenya, in section 2 and it is defined as follows-

"intellectual property" means -

- (a) **copyright as defined in section 2(1) of the Copyright Act, 2001; No. 12 of 2001;**

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- (b) **industrial property rights as defined in section 2(1) of the Industrial Property Act, 2001; No.3 of 2001,**
- (c) **trade mark as defined in section 2(1) of the Trade Marks Act; and**
- (d) **any other related right;"**

By that definition, the Kenyan law only applies to intellectual property rights that are known to the laws of Kenya and should be adopted as the preferred definition in Uganda as well since it ensures certainty in the rights that can be used to create security interest.

Recommendations

1. The Committee recommends the following;

- 1. *for clarity, to substitute for the definition of words chattel, collateral, debtor, intellectual property and warehouse receipts.*
- 2. *for completeness, to insert a new definition on commingled assets and money lender.*

CLAUSE 4

Clause 4 of the Bill deals with the creation of security interest and it allows for the creation of a security interest by a grantor over any property, by written agreement entered into between a secured creditor and a grantor. It also prescribes when an agreement becomes enforceable.

The provision has a number of limitations as detailed below-

- 1. The provision goes beyond the traditional principles for the creation of security interest in as far as it doesn't limit the chattel to being used as security only as well as restricting the rights the secured creditor may exercise over the security interest.

For instance, section 9 (2) of the Chattel Security Act limited the transaction creating a security interest to only where the transaction is intended only as security, be a right that is enforceable against any person, be created by grant or declaration of trust and not by reservation and expressly specify a restriction on the control by the debtor over the assets.

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The above limitation is important because it restricts the transactions from which security interest may arise to only those ones where the parties intended it, thereby protecting the borrower from being exploited by the lender by using every transaction, whether intended or not, to create or give rise to a transaction envisaged under the Bill. Furthermore, it also keeps with the principles of security, one of which is a keen to the principle of mortgages which prescribes "once a mortgage, always a mortgage". In this principle, a security interest remains a security and should not be converted into something else.

In the Bill, the above principles are missing, thereby allowing the creation of security interests which go beyond the intention of the grantor thereby exposing such persons to abuse and exploitation. In the Chattels Security Act, section 9 (4) read as follows-

"A security interest shall be taken as given by a debtor to a creditor for the sole purpose of creating a security interest and shall not operate as a transfer of an interest in property from the debtor to the creditor."

The above provision meant that a secured party may not convert the security granted to him or her to operate as a transfer of the interest in the property. Indeed, it is common that a secured party may require the debtor to sign a transfer of title to him or her as a condition for the loan. In such a situation, the Bill doesn't offer any protection to the grantor yet such a transaction goes beyond the principle for which security interest is created. In the chattel security Act, section 9 (5) does offer some protection as follows-

"Where a debtor signs a transfer as a condition for a grant of a security interest under this Act, the transfer shall be void."

2. The Bill does not take into account the provisions of the Land Act Cap 227 as far as family land rights are concerned. The land Act, section 39, requires the consent of a spouse or children in certain transactions such as those envisaged under this Bill. Section 39 is reproduced below-

"39. Restrictions on transfer of land by family members"

(1) No person shall—

- a). sell, exchange, transfer, pledge, mortgage or lease any land;
- b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land; or
- (c) give away any land inter vivos, or enter into any other transaction in respect of land—

(i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;

(ii) in the case of land on which a person ordinarily resides with his or her dependent children of majority age, except with the prior written consent of the dependent children of majority age;

(iii) in the case of land on which a person ordinarily resides with his or her children below the age of the majority, except with the prior written consent of the committee;

(iv) in the case of land on which ordinarily reside orphans below majority age with interest in inheritance of the land, except with the prior written consent of the committee”

The requirement in section 39 is absolute and where it is not followed, court has voided such transactions. The failure to subject this Bill to the provisions of the land Act may affect the enforceability of transactions arising from the provisions of this Bill. It should be noted that the Chattels Security Act, section 9 (6) used to subject transactions under that Act to section 39 of the Land Act, thereby, requiring the strict compliance with the land Act in transactions subject to the Act.

Recommendations

Clause 4 of the Bill should stand part of the Bill albeit with the following amendments-

(a) *Require, for a transaction to create a security interest, it should-*

- (i) *be intended only as security;*
- (ii) *be a right that is enforceable against any person;*

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- (iii) *be created by grant or declaration of trust and not by reservation; and*
- (iv) *expressly specify a restriction on the control by the debtor over the assets.*
- (b) *Subject the provisions of the Bill to the Land Act, mortgage Act and the Tier 4 Microfinance Institutions and Money Lender's Act, 2016.*
- (c) *Require security interest to be for the sole purpose of creating a security interest and not to operate as a transfer of an interest in property from the debtor to the creditor.*
- (d) *To enhance the protection of grantors, avoid any traction that has the effect of acting as a transfer of property from the grantor to the secured party.*
- (e) *For completeness, include the following provisions from the Chattels Security Act. These are sections 10, 11, 12,13,14,15 and 16.*

CLAUSE 6

Clause 6 of the Bill which prescribes that the security interest in tangible assets continues in commingled goods. As already pointed out, the provision only applies to commingled goods and doesn't extend to money deposited in an account yet such accounts can be used as security.

This will create a problem of tracing of proceeds of the disposal of a security interest when the proceeds are deposited in an account.

Therefore, there is need to expand clause 6 to include bank accounts as well. Such a provision exists in the Movable Property Security Rights Act of Kenya, in section 9 and it extends the principles applicable to commingled goods to apply to commingled assets.

Recommendation

The Committee recommends that Clause 6 stands part of the Bill albeit with the following amendments-

- (a) *The headnote should include commingled assets*

(b) *Insert new sub clause on commingled assets to deal with proceeds that are deposited on accounts.*

CLAUSE 8

Clause 8 of the Bill deals perfection of security interests in a collateral and prescribes three methods of the perfecting a security interest. These are -

- (a) perfection by registration,
- (b) perfection by possession; and
- (c) perfection by control.

The provision however has the same enforcement challenges. For instance, the provision needs to be redrafted since it doesn't elaborate on each of the methods of perfection. Apart from perfection by registration, the other methods are not clear on how they are effected or the steps that need to be taken to perfect a security interest under those methods. This leaves the provision incomplete and may pose enforcement challenges since the user may not know when he or she has been effective in perfecting a security interest especially by possession or control. It should be noted that the Chattels Security Act used to provide stand-alone provisions on each of the perfection mechanisms.

Recommendation

Clause 8 should stand part of the Bill but the provision should clearly prescribe the steps and mechanisms for the perfection of a security interest using the different mechanisms and these should be stand-alone provisions.

CLAUSE 9 OF THE BILL

Clause 9 of the Bill deals with methods of perfecting proceeds of security interest and it automatically perfects the proceeds arising from the sale of collateral.

However, the provision may face some challenges as detailed below-

- (1) the provision is limited in scope since it is limited to only proceeds arising from sale and in the form of money, accounts receivables,

negotiable instruments or right to payment of funds to a bank account. To explain this, if a person X is granted collateral of a vehicle and the grantor exchanges that vehicle for another vehicle, he or she may not recover the proceeds of that exchange, being the vehicle the grantor received if the provisions of clause 9 are complied with.

- (2) the provision might allow for unjust enrichment since it perfects the proceeds of sale as well as extending the right of the secured creditor to the collateral without limiting the amount the secured creditor may recover. This means that the secured creditor may not only recover both collateral and proceeds but there is no limit to the value he or she can recover.
- (3) The provision further imposes an additional obligation on the secured creditor to perfect the proceeds of sale where they are not in form of money, accounts receivables, negotiable instruments. This means that in case of proceeds arising from the disposal of a collateral not being in the form of money and say is in kind, the secured party must perfect such proceeds in one of the mechanisms prescribed in the Bill, including registration, control or attachment. If the provisions of this Bill are to be complied with, such a secured creditor may find it difficult to perfect such proceeds because clause 8 of the Bill requires for one to perfect a collateral, there must be an agreement between the grantor and the secured creditor. Therefore, since the Bill is silent on how the perfection of such proceeds is to be done especially in light of clause 8, sub clause 3 of clause 9 of the Bill might be impossible to enforce.

Recommendation

Clause 9 should stand part of the Bill albeit with the following amendments-

1. *Expand the provision to allow*
 - (a) *the proceeds to arise from any form and not limit it to arise from a sale only;*
 - (b) *the proceeds to be in any form, including in-kind;*

2. *In sub clause (3), automatically allow for the perfection of proceeds without imposing additional requirements on the secured creditor.*
3. *Limit the amount the secured creditor is entitled to, to the market value of the collateral at the date of the dealing rather than being open.*
4. *Include provisions on continuity of perfection, protection of purchasers of goods and Protection of purchasers of chattel paper, negotiable instruments, documents of title and securities.*

CLAUSE 13

Clause 13 of the Bill deals with the registration of security interest and allows for the registration of a security interest by a secured or judgement creditor before the creation of a security interest. The provision also allows for the grantor to authorise the registration of an initial notice prior to the registration of the initial notice but the secured creditor, lien holder or judgement creditor may register an initial notice without authorisation.

Whereas the provision is well intentioned, it may face some enforcement challenges as explained below-

Sub clause 2 which allows for the registration of a security interest before it is created conflicts with the clause 8 (1) of the Bill since it clause 8 (1) only allows for the registration of a security interest after it has been created. It is important to note that a security interest may arise through the agreement of the parties or through a court process or lien. In case of agreement of parties, the provision assumes that a person can have a right to register a security interest over a person's property where there is no agreement creating such a security interest. In case of judgement creditor, the provision assumes one can register a security interest before a judgement debt arises. Therefore, the registration of a security interest before it is created appears to give a person interest in someone's property before or without such interest being created. This is likely to be abused.

Sub clause 3 of the provision of the provision is ambiguous since its not clear on its intentions and may be interpreted in a number of ways. It appears to

suggest that a grantor may authorise the registration of an initial notice prior to its registration. This then appears to mean that the registration of an initial notice must be authorised by the grantor yet sub clause 1 gives the secured creditor or lien holder or judgement creditor the right to register an initial notice once a security interest is created. This means that the authorisation envisaged in sub clause 3 do not arise except if they relate to the proposed sub clause 2 which allowed for the registration of a security interest before it arises. This provision needs to be rethought.

Sub clause 4, just like sub clause 3 appears to suggest that a grantor or judgement debtor may authorise the registration of an initial notice yet such a right cannot be limited by the grantor in light of sub clause 1 of clause 13.

Recommendations

In light of the above, The Committee recommends that sub clauses 2, 3 and 4 are redrafted to prescribe condition precedence for registration of notices under this Act and to require authorisation of the grantor every time a notice is to be registered.

CLAUSE 16

This provision prescribes the information required for registration of an initial notice. The provision requires the initial notice to contain a unique identification number and address of the grantor, the unique identification number and address of the secured creditor or representative of the secured creditor, a description of the collateral and the date and period of perfection of the registration. The provision also requires for the separate registration of a grantor or secured creditor where there are more than one of the earlier mentioned persons.

The provision has a number of enforcement challenges as explained below-

- (a) The provision appears to suggest that the notice is not capable of being rejected. Once a notice is filled, it is immediately registered, meaning that a person objecting to the registration does so after the fact of

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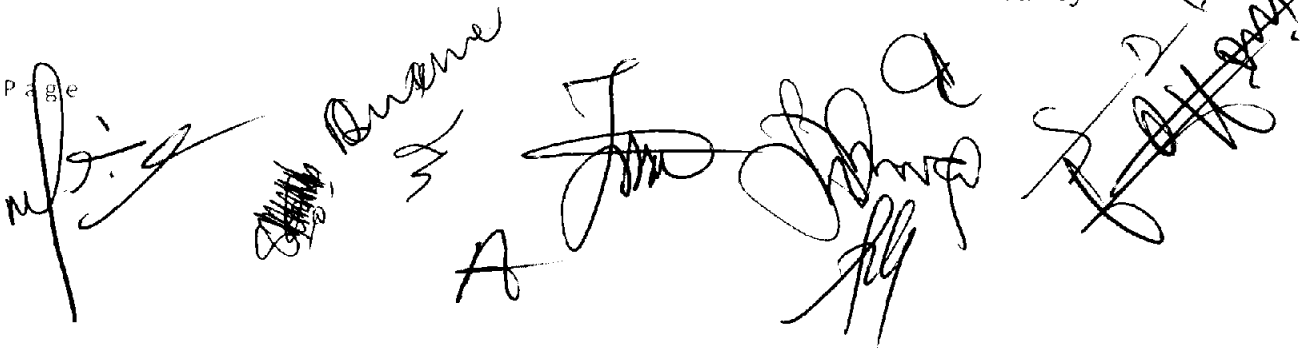
- registration. This provision is lopsided to favour the person registering the notice rather than the person who might be objecting to the interest.
- (b) The provision appears to apply only to the registration of security interests granted by way of agreement and not to others, such as the registration of a lien or judgement debt. This assertion is based on the fact that the provision uses the words "grantor" in paragraphs (a) and (b), and "secured creditor" in paragraph (b), which words are defined in clause 2 to exclude judgement debtors and creators of liens and to specifically refer to a person in whose favour a security is created under a security agreement. This means that the provision doesn't prescribe the information that a judgement creditor or a lien holder has to include in the notice for the same to be registered. This will affect the registration of judgment debts and liens since the provisions are not drafted to cater for such security interests.
- (c) The information required to be included in the notice needs to be rethought since some of it cannot be obtained by the person seeking to register the notice. It is important to note that the notice will be initiated by the person seeking registration and in such a situation, he or she cannot possibly include in the notice a unique identification number of the grantor, secured creditor or representative of the secured creditor. For continuity and consistency, these unique numbers should ordinarily be provided by the registrar at the time of registration rather than allow a person originating the notice to prescribe the same. Whereas it appears to suggest that a secured creditor and intending grantors are to be assigned a unique identification number which they will use every time they are registering a notice or being a grantor, granting a security interest, the provision do need prescribe how they unique numbers will be generated and assigned prior to applying for registration. Whereas it appears that there might be some form of registration from which a unique identification number is to be assigned which is then used during the process of registering a notice, this is not clearly spelt out in the provisions of this Bill.

- (d) The Bill doesn't prescribe the form the notice is to take. This means that there will be no uniformity in the notices since there is no prescribed format for the notice.
- (e) Whereas the Bill requires the description of the collateral as well as allowing the creation and registration of multiple interests in a collateral, the provisions of the Bill appear to be silent on value of the collateral, the amount of loan advanced to the grantor as well as the maximum amount of money the secured creditor may claim from the grantor in case of default. These matters are important since they put third parties on notice in cases where the grantor intends to create more than one security interests over the same collateral, help in protecting the grantor from exploitation and guide the determination of value at the time of disposal of the collateral in case of sale.
- (f) The provision somehow waters down the provisions of Part V of the Tier 4 Microfinance Institutions and Money Lender's Act. It should be noted that whereas the transactions envisaged in this Bill are broader, the majority of these are basically money lending transactions.

Apart from those transactions involving financial institutions, the other transactions involving the advancement of loans by a company in money leading business might be considered a money lender's transactions under the Part V of the Tier 4 Microfinance Institutions and Money Lender's Act. This then means that persons involved in such a transaction needs to comply with the provisions of Part V of the Tier 4 Microfinance Institutions and Money Lender's Act including-

- (a) Section 78, which requires such persons to be companies; and
- (b) Section 79 be in possession of a license issued by the Authority;

Even where a person, who not being a money leader with the provisions of the Tier 4 Microfinance Institutions and Money Lender's Act, advances a loan to a person, he or she may be considered a money leader under the provisions of the section 98 (1) (a) if the security for repayment of the loan and the interest on the loan is effected by

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execution of a chattel's transfer in which the interest chargeable is more than 9% per annum.

The above therefore means that clause 16 needs to be alive to the provisions of Tier 4 Microfinance Institutions and Money Lender's Act and make specific provisions for the various transactions that are envisaged and the documents that must accompany the notice envisaged in clause 16 of the Bill.

Recommendation

Clause 16 should stand part of the Bill but insert a new provision empowering the Minister to prescribe other matters that have to be registered in the initial notice.

CLAUSE 17

Clause 17 of the Bill deals with the period of perfection of initial notice and requires the perfection to be for a period not exceeding 5 years.

Whereas there is need to put in place a duration for perfecting an initial notice, the prescription of a 5 year term is limited and may have an adverse effect on the loan repayment period. It should be noted that the shorter the period of perfection in clause 17 of the Bill, the shorter the period of loan repayment and the higher the repayment amounts. Therefore, the period of perfection should be left to the parties to determine.

The provision doesn't prescribe any document that signifies the release of the collateral from perfection, akin to the documents provided for a lease of a mortgage.

The provision assumes upon the expiration of the duration prescribed in sub clause (1) that the perfection ends and when it ends, the obligations attaching to the collateral also ends. This assumption is not always true since the duration may end while the obligations may not change.

The provision doesn't take into account the right of the person to redeem the loan before the duration prescribed in sub clause (1). It appears that the

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(3) The provision also needs to be separated into two stand-alone provisions, one on amendment and the other on cancellation of notices.

The Committee recommends that that the provision stands part of the Bill albeit with the following amendments-

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- (ii) Allow the grantor and the secured creditor the right to apply for the cancellation of a notice to the registrar
- (iii) Prescribe the procedure for cancellation of the notice.

Clause 19 of the Bill deals with objection to registration of notices and allows a person to object to the registration of a notice where a person believes that a notice is inaccurate or was registered wrongfully. The provision also provides that a notice of objection doesn't affect the perfection of a notice. The provision further requires that were a secured creditor doesn't respond when an objection is raised, the person objecting then has to apply to the registrar for cancellation of the notice.

(a) It is limited in scope since it allows the objection only where the notice is inaccurate or is wrongfully registered. To make matters worse, the provision doesn't define what amounts to wrongful registration or an inaccurate notice. This is likely to affect the enforcement of the provision.

21 | Page

Page 2

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then begs the question as to the relevancy and value of the provision in light of the fact that the objection doesn't prevent the registration of a notice. This provision therefore serves no purpose and is redundant in light of the sub clause (2) and clause 18 and gives a lot of powers to the secured creditor over the registration process.

Recommendation

In light of the above, The Committee recommends as follows:-

1. *the provision should be redrafted to ensure that-*
 - (a) *an objection acts as a bar to the perfection or registration of a notice;*
 - (b) *The grounds for objection should be expanded and should be clearly spelt out for clarity;*
 - (c) *There is adequate notification to third parties on the intended registration of a notice in order for them to object to the registration;*
 - (d) *To allow for a specific duration before registration becomes effect and to ensure that during that period, a person is able to object to the registration.*

CLAUSE 21 OF THE BILL

Clause 21 of the Bill deals with integrity and security of the register and obligates the registrar to remove the notice from the register after its expiration and it prohibits the registrar from amending or removing any information from the register except upon the expiration of the notice. The provision further obligates the register to archive the notices removed from the register for ten years.

The above provision has a number of issues that might affect the other provisions in the Bill. For instance, sub clause (2) only empowers the registrar to amend or remove information from the register only were the notice has expired. This means that a registrar cannot remove a notice under clauses 19 when there is an objection and clause 18 upon amendment or cancellation of such a notice. This provision therefore renders clauses 18 and 19 redundant

since the powers envisaged in those provisions cannot be exercised by the registrar as prohibited in sub clause (2) of clause 21 of the Bill.

Recommendations

In light of the above, The Committee recommends that-

- (i) *Sub clause (1) should be redrafted in broader terms to generally allow the registrar to periodically remove notices that have expired, amended or discharged in accordance with the Bill ;*
- (ii) *Sub clause (2) should be deleted since it conflicts with other provisions of the Bill.*

CLAUSE 23 AND 24 OF THE BILL

Clause 23 of the Bill deals with general rules of the priority of perfected security interest and prescribes the priorities. On the other hand, clause 24 deals with priority of security interest of unperfected security interest. In these provisions, the following issues need to be addressed-

- (a) Paragraph (a) of clause 23 is redundant since whatever it wants to achieve has been dealt with in paragraphs (a) and (c) and this should be deleted
- (b) For clarity and completeness, clauses 23 and 24 should be merged together since they relate to the same subject matter.

Recommendation

In light of the above, The Committee recommends that clause 23 and 24 are merged since they deal with the same subject matter and redrafted for clarity and better drafting.

CLAUSE 27 OF THE BILL

Clause 27 deals with priority of security interest in proceeds and requires that the priority in the proceeds of a security interest is determined using the date used to determine the priority of the security interest.

This provision will face some enforcement challenges since it is not clear as to who has priority over the proceeds of collateral. Ordinarily, the interest of a secured creditor whose interest ranks in priority over all the other secured

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creditors will take precedent and have priority over competing interest over the proceeds arising from the disposal of the collateral. For instance, this has been the position of the law in the Chattels Security Act, section 25 (2) (b) which used to provide as follows-

“the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of the security interest in its proceeds;”

The above is the position of the law in all the countries with such legislation including Kenya and Zambia. In such a situation, clause 27 of the Bill should be redrafted for clarity.

Recommendation

The Committee recommends that clause 27 is redrafted for clarity.

CLAUSE 30 OF THE BILL

Clause 30 of the Bill deals with priority of security interest in fixtures and provides that the security interest in a security interest continues in a tangible asset even when it is attached to a fixture.

Whereas this provision is important and a mainstay in similar legislation, the manner in which the provision is drafted is ambiguous and may lead to enforcement challenges. Sub clause (1) reads as follows-

“(2) A security interest taken in a tangible asset that becomes a fixture may continue in the tangible asset after the tangible asset is affixed to the immovable property”

The first part of the provision being ***“A security interest taken in a tangible asset that becomes a fixture”*** is not in tandem with the second part of the provision reading ***“continue in the tangible asset after the tangible asset is affixed to the immovable property.”*** The first part is dealing with the tangible asset that has become a fixture and the second part deals with a security interest in a tangible asset that is not a fixture itself but is merely affixed to immovable property.

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This provision is not clear since the two parts conflict. Indeed, when one reads the provision, the interpretation one gets is that the security interest in a tangible asset that becomes a fixture continues in tangible asset if the fixture is affixed to immovable property.

Furthermore, the provision may contravene with principles of fixtures and chattels under land law. A **fixture**, as a legal concept, means any physical property that is permanently attached (*fixed*) to real property (usually land). Property not affixed to real property is considered *chattel* property.

It is a principle of land law that any chattel attached to land become part of the land and is transforms from a chattel to a fixture. This principle is expressed in the Latin maxim ***quicquid plantatur solo, solo credit***, which means "whatever is attached to the soil becomes part of it."

By that principle, once a personal property is attached or affixed on immovable property, the personal property transforms from a chattel to a fixture and is treated as part and parcel of that property. In regard to this provision, once a chattel is attached to immovable property, it becomes part and parcel of that property and loses its identity as a chattel. Therefore by allowing the security interest to continue in such a personal property that has since transformed into a fixture, this provision is attempting to contradict known principles of land law and may result in enforcement challenges.

Sub clause (2) proposes to make the security interest created under the Bill superior over those created under the Land Act and Mortgage Act. This provision needs to be rethought since it may be seen as extending beyond the scope of the Bill. The scope of the Bill is limited to movable property yet it attempts to impose obligations beyond movable property to include even immovable property. Furthermore, this provision might have far reaching consequences on the enforcement of rights in the land and mortgage Act since. This needs to be rethought.

The provision also doesn't prescribe how a secured creditor may enforce his or her rights especially where such security interest has become a fixture.

Burru

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For

Adviser

Adviser

Whereas the provision allows the removal of a fixture or a chattel attached on immovable property, it does not clearly state how this may be done and if any damage is caused, who makes good such damage.

Recommendations

In that regard, The Committee recommends as follows-

That Clause 30 is redrafted to ensure that the security interest arises only before the tangible asset becomes a fixture.

CLAUSE 37

Clause 37 of the Bill deals with rights of the secured creditor. The provision allows the secured creditor the right to, upon default, take possession or control of the collateral even if the security agreement is silent about the possession or control as well as the right to sell or dispose of the collateral using any means to satisfy the obligation.

The provision, especially sub clause (2), is likely to be abused since it gives the secured creditor absolute right to do whatever he or she wants upon default without a court order or the consent of the grantors. Sub clause (2) is reproduced below-

“(2) Upon default, the secured creditor shall have-

- a. The right to possession or control of the collateral even if the security agreement is silent about the possession or control;***
- b. The right to sell or dispose of the collateral using any means to satisfy the obligation.”***

The above provision has a number of challenges including-

- (a) The process of taking control, possession, sale or disposal of the collateral without a court order is contrary to section 88 of the Tier 4 Microfinance Institutions and Money Lenders Act which requires such process, as far as money lenders are concerned, to be authorised through a court process.

- (b) The provision appears to suggest that the grantor agrees the moment he or she creates a security interest, to the automatic sale, disposal, taking over or taking of possession of such collateral. This presumption of consent is contrary to the principles of creating a security interest which is, to secure payment. By that provision, a person who creates a security interest is taken to have agreed to transfer, sale or dispose of his or her collateral yet that is not the case,
- (c) The provision is silent on what happens when a person takes possession or control of collateral. It appears to suggest that once a person takes possession or control, the collateral becomes his or her property and he or she becomes the owner. This is likely to be abused in situations where the collateral has more value than the loan advanced. In such a situation, the secured party will have been allowed to unjustly enrich himself or herself to the detriment of the grantor.

The above provision will not only water down the provisions of the Tier 4 Microfinance Institutions and Money Lenders Act, but it will also disadvantage the grantor.

Recommendations

In light of the above, The Committee recommends that clause 37 is redrafted to specifically provide for-

- (a) a requirement in taking possession of or control of a collateral to be done through a court process;*
- (b) a requirement for the sale or disposal of collateral to be through auctioning;*
- (c) the provision should prescribe the processes following the taking possession or control of collateral;*

CLAUSE 40 OF THE BILL: Expedited Possession by Secured Party

Clause 40 of the Bill deals with expedited possession by secured party and it empowers a secured creditor to take possession of the collateral upon default, without a court order. The provision further prescribes the circumstances under which a person may take possession without a court order, including

where the grantor agrees in writing, where the secured creditor gives notice to the grantor or any person in possession of the collateral and where possession can be taken without breach of peace.

Clause 40 of the Bill is likely to face a number of challenges including-

- (a) sub clause (1) of clause 40 is redundant in light of clause 37 since whatever it intends to achieve can be achieved through clause 37 (2) of the Bill . Clause 37 (2) of the Bill empowers a secured creditor to take possession, control or sale collateral upon default. Clause 40 (2) therefore doesn't introduce anything new save for such a power being used without a court order. In any case, the right to exercise the power envisaged in sub clause (1) of clause 40 without a court order can be taken care of in clause 39 which deals with actions permissible without judicial process.
- (b) Whereas paragraph (b) of sub clause (2) of clause 40 empowers a secured party who has given a notice to a grantor, upon default, to take possession of collateral without a court order, this provision is likely to be abused since it doesn't prescribe the nature of the notice envisaged, its content and what is required of the grantor upon receipt of the notice. This means that once a person has defaulted and notice of possession served on him, that notice serves as consent on the part of the grantor since the provision is silent on what is expected of the grantor upon receipt of the notice.

Recommendations

The Committee recommends for the deletion of clause 40 to avoid abuse.

CLAUSE 41 OF THE BILL

Clause 41 of the Bill deals with notice of disposal of collateral and it empowers the grantor to dispose of the collateral after giving the grantor, debtor and any other person, notice of ten working days.

Whereas this provision is intended to ensure the quick process in realising the collateral upon default, it has a number of challenges as indicated below-

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- (a) The provision grants the creditor the right to dispose of the collateral in any manner he or she chooses. This is likely to lead to the exploitation of the grantor since the secured creditor is left to choose how he or she disposes of the collateral.
- (b) In sub clause (1), the provision is limited in scope since it applies to persons who have been notified of the sale. It is important to note that paragraphs (a) and (b) of the sub clause (1) assume that the person giving notification has been informed of the intended disposal of the collateral beforehand. These paragraphs are reproduced below-

(a) the grantor and the debtor;

(b) Any other person who files a notice in respect of the collateral within at least five days before the notice disposing is given;

(c) Any other person who gives the secured creditor notice of an interest in the collateral where the notice is received before the secured creditor gives notice of the proposed disposition"

The above provision assume that the person who has to file a claim has knowledge of the intended disposal yet this is not the case since the secured creditor is not obligated to notify the public before he or she gives the notice envisaged in those paragraphs. Secondly, the notices referred to in the above paragraphs are required to be filled before the notice of disposition is given. This unreasonable considering that such a person will not, until the notice of disposition is given, have knowledge that the secured creditor intends to dispose of the collateral or even that the grantor has defaulted.

- (c) The provision doesn't require the valuation of the collateral before disposal. This is also likely to lead to untold losses on the part of the grantor since the creditor, who determines how to dispose of the collateral, is also left to determine the value attached to such a collateral;
- (d) Whereas the provision refers to a notice prior to disposing of the collateral, this is not sufficient since it doesn't require the secured

creditor to advertise or gazette the notice for purposes of ensuring that 3rd parties are notified of the impending sale. It is therefore likely that the secured creditor will not put in place adequate mechanisms for the notification of third parties before the disposal of collateral;

- (e) The provision doesn't prescribe the manner in which perishables are to be sold since the provision doesn't apply to the disposal of such goods;
- (f) The provision also doesn't provide for the redemption of the collateral by the grantor. This hinders the right of the grantor or any other person to rescue collateral from sale or attachment;
- (g) The provision also is silent on the duties of the secured creditor during the disposal nor does it provide for the payment of any access money to the grantor if any.
- (h) The provision also waters down the provisions of Tier 4 Microfinance Institutions and Money Lenders Act, especially section 88, which requires the enforcement of money lender's transactions through court. Whereas this Bill deals with private lenders and registered money lenders, the provision is likely to be used by registered money lenders who would otherwise have complied with the strict provisions of Tier 4 Microfinance Institutions and Money Lenders Act, to dispose of collateral without going through a court process as required in section 88 of the Tier 4 Microfinance Institutions and Money Lenders Act.

Recommendations

In the circumstances, The Committee recommends that clause 41 is amended and specific provision is made for the-

- (a) Requirement of the secured creditor to advertise in a newspaper of wide circulation its intention to dispose of the collateral;*
- (b) Empowering of any person with interest in the collateral to file a claim with the secured creditor who intends to dispose of the collateral;*
- (c) Prescribe what happens upon receipt of a third party claim arising from the notification*
- (d) Prescription of the nature of the notice;*

Amended

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- (e) Requirement of the valuation of collateral before sale;
- (f) Prescription of the circumstances and procedure for the disposal of collateral that is perishable

CLAUSE 42 OF THE BILL

Clause 42 of the Bill deals with notice and claim for distribution and requires, among others, the secured creditor to give notice to the grantor, debtor and third parties with interest in the collateral, the intended distribution of proceeds arising from the disposal of collateral. The provision further empowers the person to whom a notice is sent to file a claim of interest with the secured creditor.

Whereas this provision is important and affords other interest holders the right to be informed before distribution of the proceeds of a sale, it has a number of challenges that might hinder its enforcement. For instance-

- (a) The provision is limited in scope since it only allows persons listed in clause 41 to be notified of the intended distribution.
- (b) Paragraph (a) of sub clause (3) requires the submission of an authenticated claim of interest without specifying who has the duty to authenticate it
- (c) The requirement for an authenticated claim appears to limit the notification to those people who have registered security interest and not, unregistered interest.
- (d) Sub clause (4) of the Bill appears to be redundant. It is important to note that clause 42 (4) of the Bill dispenses with the need to give notice envisaged in sub clause (1) if the collateral is a perishable good or its likely to decline in value. This provision is redundant since at the time of giving the notice referred to in sub clause (1), the collateral has already been disposed of meaning that the perishability of the collateral doesn't arise in the circumstances, thereby making the provision redundant.

Recommendation

Delete sub clause (4) because it is misplaced.

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Clause 47 of the Bill deals with redeeming of collateral and it allows a person, being the grantor or any other person with interest in the collateral to redeem the collateral before sale or disposal, by tendering performance of the obligations secured by the collateral as well as paying the reasonable expenses incurred by secured creditor.

- (a) it proposes to introduce another right arising after the grantor's default beyond those prescribed in clause 37 (2) (a) and (b), being disposal, taking possession and taking over the control of the collateral.
- (b) It conflicts with clause 46 by allowing a secured creditor the right to take over the collateral unilaterally, contrary to the clear provisions of clause 46.
- (c) The provision doesn't recognise the interests of third parties who might also have protectable interests in the collateral which if unilaterally take over by the secured creditor, will be terminated.

32 | Page

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Recommendations

In light of the above, The Committee recommends the deletion of sub clauses (2) (a) and (c) and sub clause (4) since those provision conflicts with the principles for the creation of chattels.

CLAUSE 48 OF THE BILL

Clause 48 of the Bill deals with rights acquired after sale and provides that where the secured creditor sells or otherwise disposes of the collateral, the buyer acquires the rights of the grantor in the collateral free of the rights enforcing secured creditor and any competing claimant except the rights that have priority over the security interest of the enforcing secured creditor. Furthermore, the provision further requires that where a secured creditor leases the collateral the lessee or licensee is entitled to the benefit of the lease or license except against a creditor with priority over the enforcing secured creditor.

The above provisions might create confusion and affect the efficaciousness of the Bill since they seem to suggest that a secured creditor may dispose of the collateral but the rights of the competing secured creditors who have priority over such collateral will still attach to the collateral. This implies that the person to whom the collateral is sold to might not enjoy any proprietary interest in the collateral because of the substance of the competing and ranking security interest.

This provision would in such a situation be promoting an absurdity and would indicate clearly that the provisions of the Bill on disposal and priority would not have been complied with. For instance, if the secured creditor had really given notice of its intention to dispose of the collateral third parties as required in clause 41, then the competing creditors will be known and the ranking secured creditor would take over the disposal and the funds arising from the disposal will be shared in accordance with clause 42 and 43, meaning all the competing secured creditors will be paid, leaving no outstanding claim at all. Therefore, clause 48 is redundant and serves no purpose.

Recommendation

The committee recommends for the deletion of clause 48 since it's redundant

3.0. GENERAL RECOMMENDATIONS

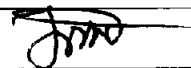
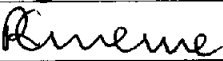
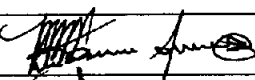

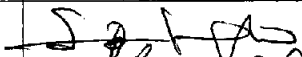
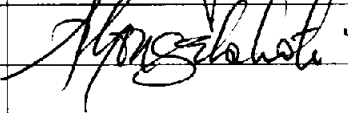
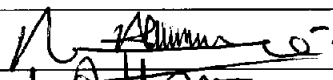

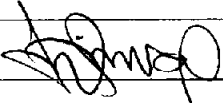
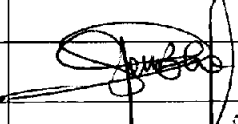
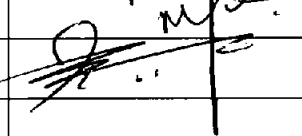
In light of the observations made as detailed above, The Committee recommends that the Minister should immediately commence the Chattels Security Act, 2014 since it is not legally permissible to repeal legislation that has not yet commenced;

The Committee proposes that the bill is passed with the following amendments.

I beg to Move

34 | Page

SIGNATURE OF MEMEBERS OF THE COMMITTEE ENDORSING THE REPORT

SN	NAME	CONSTITUENCY	SIGNATURE
1.	Oboth Jacob Marksons (Chair)	West Budama South	
2.	Hon. Rwakoojo R Gureme	Gomba West	
3.	Hon. Kasozi M. Jackson	Bukoto County M-West	
4.	Hon. Isala Eragu Veronica	Kabera maido County	
5.	Hon. Kafuuzi Jackson K	Kyaka South	
6.	Hon. Kajara Aston	Mwenge south	
7.	Hon. Mwiru Paul	Jinja East County	
8.	Hon.Obua Denis Hamson	Ajuri County	
9.	Hon. Basalirwa Asuman	Bugiri Municipality	
10	Hon. Bitangaro Sam Kwezira	Bufumbira South	
11	Hon. Ongalo Kenneth Obote	Kalaki County	
12	Hon. Agaba Abbas Mugisha	Kitagwenda County	
13	Hon. Azairwe Dorothy	DWR Kamwenge	
14	Hon. Mugoya Kyawa Gaster	Bukooli North	
15	Hon. Akamba Paul	Busiki County	
16	Hon. Otto Edward Makmot	Agago County	
17	Hon. Adeke Anna Ebaju	NFY MP	
18	Hon. Nsereko Muhammed	Kampala Central Division	
19	Hon. Wilfred Niwagaba	Ndorwa East	
20	Hon. Abdu Katuntu	Bugweri County	
21	Hon. Ssemujju Ibrahim	Kira Municipality	
22	Hon. Medard Ssegona Lubega	Busiro East	
23	Hon. Mathias Mpuuga	Masaka Municipality	
24	Hon. Byarugaba Alex	Isingiro County South	
25	Hon. Akello Rose Lilly	DWR, Kabong	
26	Hon. Akampulira Prosy	DWR Rubanda	
27	Hon. Suubi Brenda Asinde	DWR Iganga	