MISSING LINKS IN THE MIDAS' TOUCH: REGULATING CAPITAL AND SECURITIES MARKET IN TANZANIA[1]

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ABSTRACT

One of the important elements in achieving an efficient free market economy is the development of efficient capital and securities markets that facilitate access to capital, innovation and competition. Capital markets are vital for promoting meaningful participation of the private sector and the public in corporate ownership and development. While in Tanzania there is not that much to regulate since the capital markets across East Africa, and especially in Uganda, Tanzania, Rwanda and Burundi are largely underdeveloped and in their infancy or formative stages; Kenya's capital market has a had history which is traced to the 1920s in the East African region. This article reviews the challenges of regulating capital and securities market in the light of the context of the law and policy in the United Republic of Tanzania. The main thesis of this article posits that the emerging capital markets in Sub Saharan Africa (SSA) in general and the United Republic of Tanzania in particular are faced with the challenges of ownership, shifting posts in the still evolving regulatory policy architect, inward looking and perpetual lack of the capacity of facilitating vibrant capital markets despite the vital role that they could play to promote competition, efficiency and local and international ownership in corporate enterprises and allocation of resources. The underlying concern throughout this work is the issue: is how will such emerging capital markets in Sub Saharan Africa to develop sustainable capital markets that can contribute to the country's economic growth in the region's quest to eradicate poverty through entrepreneurship and wealth creation.

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> "*... The only way forward for Tanzania is the "market way. We can no longer choose to disassociate ourselves from the global financial system. What we can choose is the terms of our membership in it, something that depends directly on the level of development of our internal financial markets and systems...*"[3]

1.0 INTRODUCTION

1.1 Background

One of the important elements in achieving efficient a free market economy is the development of efficient capital markets that facilitate access to capital, innovation and competition.[4] Capital markets are vital for promoting meaningful participation of the private sector and the public in corporate ownership and development.[5] While in Tanzania there is not that much to regulate since the capital markets across East Africa, and especially in Uganda, Rwanda and Burundi are largely underdeveloped and in their infancy or formative stages; Kenya has had a history which is traced to the 1920s in the East African region.[6] Elsewhere in the Sub Saharan Africa (SSA) region, South Africa boasts one of the Africa's oldest, largest and most vibrant capital market in Africa.[7] In most developing countries or the countries whose economies are in transition from Socialism where the state owned and dominated the economic planning and owned the major means of production including economic enterprises to a capitalist free market economy, the capital and securities market has increasingly been seen as the avenue through which the a percentage state owned enterprises shares could be gradually transferred to the majority population through initial public offering and a subsequent secondary securities market where shares and other securities could be sold, bought and transferred. In the United Republic of Tanzania, the capital and securities market provides the best avenue for providing the 'Midas touch' for promoting entrepreneurship and allocation of resources for enterprises development, however, it is intimated that for

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3 Dr. Festus Limbu (2002), Deputy Minister for Finance, the United Republic of Tanzania Opening address on the occasion of (Institute of Finance Management) IFM's 30th anniversary conference held at Royal Palm Hotel on 21st November 2002, Dar es Salaam, Tanzania at www.mof.go.tz/mofdocs/news/speeches/depmin/open.doc last accessed on February 20, 2009.

4 John Coffee, Jr et al, *Securities Regulation Cases and Materials*, 10th Edition,, New York: Foundation Press, 2007 at 2-8. The authors outline the role and the need for mandatory disclosures in capital market regulation particularly in the United States. They assert that capital markets protect consumers, provIbide access to information, improve governance by mitigating the agency costs and maintains a competitive market.

5 Ndulu, B.J. and Charles Mutalemwa, *Tanzania at the turn of a century: Background Papers and Statistics,* Washington D.C.: World Bank, 2002 at p.120-1

6 See Rose. W. Ngugi, "Development of the Nairobi Stock Exchange: a historical perspective", Kenya Institute for Public Policy Research and Analysis (KIPPRA) Discussion Paper No. 27, March 2003 available at http://www.kippra.org/Download/DPNo.27.pdf accessed on February 19, 2009.

7 See K.R. Jefferis et al, International Capital Markets Linkages in Southern Africa at 2 'International Stock Market Linkages in Sub Saharan Africa (undated) available at www.aercafrica.org/documents/EXSUM105.pdf last visited November 11, 2008.

capital markets to act as the economic panacea for poverty eradication, there are missing links or challenges to be addressed by in the SSA region.

This article reviews the evolution of capital markets, the forms of securities traded and missing links challenges of regulating capital and securities market in the light of the context of the law and policy in the United Republic of Tanzania. Where appropriate in analyzing the regulatory framework and practice, the author draws some leaves from other jurisdictions. The main thesis of this paper posits that the emerging capital markets in Sub Saharan Africa (SSA) are faced with the challenges of ownership, shifting posts in the still evolving regulatory policy, inward looking and perpetual lack of the capacity of facilitating vibrant capital markets despite the vital role that they could play to promote competition, efficiency and local and international ownership in corporate enterprises and allocation of resources. The underlying concern throughout this work is the issue: how will such emerging capital markets in SSA develop sustainable capital markets that can contribute to the country's economic growth. This is in recognition of the fact that most developing countries since mid 1980s have embarked on reforms and programmes aimed either at eradicating or alleviating poverty.[8]

This article has five parts. Part 1 introduces the subject matter by providing its background by describing the conceptual framework and introducing the evolution of the United Republic of Tanzania's financial system. It also provides the background to evolution of capital and securities markets in Europe and America and the need for building a regulatory framework and current trends in the global capital and securities markets. This part also analyses the legal and policy architect of the Tanzania's legislation that govern capital and securities markets and describes the reforms which are essential in addressing the missing links towards making the capital and securities market work for the majority of the people. The historical perspectives are vital for understanding the reasons which made the United Republic of Tanzania a late entrant in establishing a capital market. This fact also makes it imperative to draw leaves from other jurisdictions in order to develop a general understanding of capital and securities markets *in extenso*. Only in this context will the subsequent discussion on the issues relating to the regulation of capital and securities market will be understood in the light of the development of capital and securities market in SSA region as a whole and in Tanzania in particular. In the light of the foregoing historical context, part 2 discusses various forms through which corporate bodies and other enterprises can raise funds for their operations. The main forms in discussion in this article are shares, debentures, charges, mortgages and other forms of securities. It is intimated that in Tanzania like in other SSA region countries, there is lack of understanding securities which has been well documented by case law. On the other hand, there is high dependence on government treasury bonds which shows lack of innovation in establishment of new and secondary securities markets in the SSA region among the key actors and stakeholders in the market. Part 3, discusses the regulation of the key actors in the capital market and securities in Tanzania. These include the Dar es Salaam bourse, brokers, dealers, advisors, investors, commercial banks and the commercial court. Part 4 discusses the various issues or missing links in the

[8] For example, Tanzania began with Structural Adjustments Programmes (SAPS) and Economic Recovery Programmes , the Poverty Reduction Strategy Paper (PRSP) to the National Poverty Reduction Strategy (NPRS) which is most popular in Kiswahili as the '*Mpango wa Taifa wa Kupunguza Umaskini* '(MKUKUTA).

regulation and administration of capital and securities markets. These include compliance, monitoring and enforcement, capacity building, regional integration and globalization and participation of the key stakeholders particularly institutions and the members of the general public. Part 5, concludes and make recommendations on how to address the missing links in the administration and regulation of capital and securities markets n order to achieve the 'Midas touch' which will make the capital and securities market work towards enhancing economic well being and contribute towards poverty eradication in Tanzania in particular and the SSA in general.

The financial sector is at the heart of a vibrant modern economy which is vital for social, economic and political development of Sub Saharan Africa at the time when SSA countries have embarked on poverty reduction and political and economic liberalization after decades of socialism or racial discrimination or managerial inefficiencies. It is settled that a financial system's primary goals are two-fold: on one side it functions to channel resources to their most productive uses while on the other side it functions towards ensuring an adequate portion of the return flows to the financier.[9] Where there is no guarantee of an adequate return for the investors, capital will not be made available for investment.[10] Capital markets play a vital role in ensuring the flow of capital to investments and entrepreneurship initiatives, no wonder developing countries' financial sector reforms have strived to go beyond banking sector. However, some critics warn that the wholesome introduction of western institutions such as stock exchanges facilitates the exploitation of resources from the developing countries particularly the SSA region. It opines:

> *…the use of western law in the creation and maintenance of SSA stock exchanges, as a consequence of structural adjustments…facilitates the neo-colonial recapture of SSA resources and forces the significant redeployment of regional resources from general domestic to specialized foreign uses… cannot be an effective component in structuring institutions to promote economic development in the region because they do not impact those economies at the level of production…*[11]

In Tanzania, the volume of primary and secondary bond or equity securities trading is limited, and foreign participation in the capital markets is restricted.[12] Only a few initial public offers (IPOs) have been listed and one can count the companies and only three banks so far have raised capital through the stock market; two banks through

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[9] See Eugene E. Fama, 'Efficient Capital markets: a review of theory and empirical work' in *Journal of Finance*, Vol 25 No 2, Papers and proceedings of the Twenty Eighth Annual Meeting of the American Financial Association, New York, N.Y. December 28-30, 1969 (May 1970) pp. 383-417 available at http://www.macroeconomics.tu-berlin.de/wgs-finanzkrisen/fama.pdf last accessed on February 21, 2009.

[10] Raghuram G. Rajan and Luigi Zingales, 'Which Capitalism? Lessons From the East Asian Crisis' in *Journal of Applied Corporate Finance* Vo.11.3 Fall 1998 pp.40-48 at 41 available online at http://www3.interscience.wiley.com/cgi-bin/fulltext/119133259/PDFSTART.

[11] See Charles R.P. Pouncy, 'Stock Markets in Sub Saharan Africa: Western Legal Institutions as a Component of the Neo-Colonial Project' in Volume 23 No 85 *University of Pennsylvania Journal of International Economic Law* 2002 at p.86.

[12] For a detailed discussion of the listed companies at the Dar es Salaam Stock Exchange see Lemayon L.Melyoki, *Determinants of effective corporate governance in Tanzania,* Ph.D Thesis University of Twente, Enschede, 2005 available at http://doc.utwente.nl/50856/1/thesis_Melyoki.pdf last accessed on February 20, 2009.

IPOs and one bank through a bond, and a handful of companies have been listed through IPO's.[13] On the other hand, there is an immense appetite for securities investment, evidenced by the over subscription of the few IPOs and corporate bonds that have been listed in Tanzania.[14]

1.2 Conceptual framework of capital and securities markets

Capital and securities markets have various functions in a free market economy but the single most important function is "that markets …. allocate capital moving it from savers to those who have productive uses for capital and are willing to pay a competitive return".[15] Some scholars while acknowledging the above named primary function of capital markets go further and posit that that the function of the market is "to create and promote a competitive market information traders."[16] Consequently, efficient capital markets or financial markets are determined by 'share price accuracy and financial liquidity'[17] which incorporate all the vital information in the prices of shares.[18] One of the benefits of a capital market which is competitive and efficient is the reduction of the management's agent costs.[19] The capital and securities markets, which refers to one for long-term capital, both equity and bonds, are central in corporate control competition.[20] There is the primary capital markets and secondary capital markets; while the former deal in issues market, that is, selling and buying new securities or shares, the latter deals with existing securities sales.[21] The role of the capital market in relation to money has been aptly illustrated to be akin to that of a credit market.[22] Accordingly, three elements have been identified in measuring the structural dimensions which are "width, length and depth." Driving the nail home in his illustration, Kimei states:-

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[13] Samuel M.S.Waigama, *Privatization Process and Asset Valuation*, Stockholm:KHT, Ph.D thesis 2008 at 83 provIbides a synopsis of the citizens of Tanzania participation in IPOs of four companies: Tanzania Oxygen Limited (TOL) whose share IPO in 1998, Tanga Cement Company Limited in 2002, Tanzania Cigarette Company Limited in 1998 and Tanzania Breweries in 1998. He concludes that although the share IPOs was quoted from Tanzanian Shillings 600.00 for Tanzania Breweries Limited and Tanzanian Shillings 3, 000.00 for Tanga Cement Company, all issues were oversubscribed. In the case of Tanga Cement Company Limited he concludes that 14, 228 applications were received from the public which required actual share allotment of 80, 628, 778 shares but only 20, 700, 000 shares were floated making the oversubscription demand percentage of 290 % which amounted to unmet demand for 60, 000, 000 shares.

[14] *Ibid*.

[15] John Coffee, Jr et al, *Ibid*.at 1.

[16] See Zohar Goshen and GIbideon Parchomovsky, the Essential Role of Securities Regulation *in* 55 Duke L. J. 711 at 714 available online at http://www.law.duke.edu/shell/cite.pl?55+Duke+L.+J.+711 last accessed on November 16th, 2008.

[17] *Ibid*.

[18] *Ibid*.

[19] *Ibid*. at 716.

[20] Lemayon L.Melyoki, *Ibid.* at 121.

[21] *Ibid*.

[22] See Charles Stephen Kimei, *Tanzania's Financial Experience in the Post War Period*, Uppsala: Textgrupen i Uppsala AB, 1987, at 27-9. Dr Kimei's work is a published edition of a doctoral dissertation presented to the Faculty of Social Sciences, Uppsala University in 1986.

> *"... The width of the market may be measured by the number of actors in it... An increase in the number of these actors may be termed as financial widening. The length of the market may be defined in terms of the number of different instruments or financial assets traded in it. Among these instruments are currency and demand deposits, savings and time deposits, insurance and pension claims, loans by financial intermediaries, mortgage, government debt, corporate bonds and corporate stock, trade credit and other claims ..."* [23]

In this context, the capital and securities market involves the buying and selling of financial instruments with differing marketability and market risk. These include money and capital assets in order to achieve liquidity. Marketability is achieved where there are is an efficient secondary assets market while market risk connotes the absence of a market risk which is achieved through a "fiduciary authority" such as a central bank that guarantee the market value of assets.[24]The capital market play an integral role as a middleman between individual savers and the investors who requires a shot in the arm capital injection from members of the general public for enterprise development and investments.[25]

1.3 Historical perspectives to Tanzania and Its Financial System

The United Republic of Tanzania, commonly referred to as Tanzania, is a union of two sovereign states the then Republic of Tanganyika and the then People's Republic of Zanzibar which was formed on April 26th, 1964.[26] Although both Tanganyika and Zanzibar gained their independence after multiparty elections, between 1965 and 1977 they were *de facto* a one party state[27] and between 1977 and 1992 Tanzania was a *de jure* one party state.[28] In 1992, Tanzania re-adopted multiparty democracy and the Parliament of the United Republic of Tanzania enacted the Political Parties Act 1992[29]. Tanzania had a population of 34.5 million in 2002 but currently it is estimated that the population is 39.5 million while the annual increase rate is 2.9 per cent.[30] Tanzania's economy depends on agriculture as its backbone and 45 per cent of Gross Domestic Product emanates from

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[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*.
[26] See A.M. Mapunda, 'Tanzania' in Christian Campbell (Ed.), *Legal Aspects of Doing Business in Africa* pp. I 573-584 2006 at I/573. Both Tanganyika and Zanzibar were British colonies. Tanganyika attained her Independence on December 9th, 1961 and Zanzibar attained her Independence on December 10th, 1963 under the Sultan rule whose government was overthrown by a popular revolution on January 12th, 1964. See also Lemayon L.Melyoki, *Ibid*., 2005 at p. 27.
[27] In Tanzania Mainland the Tanganyika African National Union (TANU) from 1965 became the single political party while in Zanzibar after the January 12th, 1964 the Afro Shiraz Party (ASP) was the only political party in Zanzibar.
[28] TANU and ASP were united in 1977 to form one political party; *Chama cha Mapinduzi* (CCM), the Revolutionary Party, which is the ruling party to date and has won general elections for the PresIbident, Members of Parliament and Councilors with a landslIbides in 1995, 200 and 2005.
[29] Act No 5 of 1992 [Cap.258 R.E 2002].
[30] See Juma Thomas, 'Population of Tanzania Now 39 million' in the *Guardian*, November 14th, 2007 available online at http://www.ippmedia.com/ipp/guardian/2007/11/14/102444.html.

agriculture.[31] Extractive mining industry is increasingly growing fast and makes Tanzania the third largest producer of gold in Africa after South Africa and Ghana.[32] Tanzania is also endowed with natural resources such as wildlife sanctuaries[33] which make it a perfect destination for tourism ideal for the development of tourism and hospitality industry.[34] While the financial sector contributes 10 per cent to the economy of Tanzania, it ranks the third largest, behind agriculture and tourism and the manufacturing sector which contributes 8 per cent ranks fourth, between 1992 and 2002.[35]

The financial sector development in Tanzania has been aptly but partly documented by a number of authors.[36] However, the focus has been especially on the post Second World War period. The development of the modern financial system is attributed to this period. The key feature of the Tanzania financial system until 1966 was the lack of a central bank and a *laissez faire* policy in the operation of the financial sector which was *ipso facto* immune from government interference. Lwiza and Nwanko traces the history of the banking industry in Tanzania from the colonial times to the post liberalization era.[37] Market economy which was introduced by the colonial government necessitated the establishment of a commercial bank in 1905 when Tanzania mainland then known as German East Africa[38] was under German colonial rule.[39] Kimei provide more details on the development of commercial banking in Germany East Africa and subsequently Tanganyika Territory. He states:-

> *"... The Deutsche Ostafrikanische Bank was the first bank to open its doors for business in Tanzania in 1905. With the issuing privilege conferred to it by the German government it performed, inter alia, the central bank functions of currency issue and banker to the government. In 1911, the Handelsbank fur Ostafrika opened a branch at Tanga, but it acted exclusively as a commercial bank without any rights of issuing currency ..."* [40]

In 1919, the League of Nations entrusted the former German colony as a trust territory to the United Kingdom. British banks opened shop and operated in Tanganyika

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[31] A.M. Mapunda, *Ibid.* at I/573.

[32] See Ernest C. Ambali, "Mining: Boosting Tanzania's economic achievements" in the Guardian, December 31st, 2005 available at http://www.ippmedia.com/ipp/guardian/2005/12/31/56886.html.

[33] Tanzania has a number of national parks, game reserves and natural beaches. These includes the world famous Serengeti National Park, Tarangire National Park, Mikumi National Park, Gombe National Park, Lake Manyara National Park, the Kilimanjaro Mountain National Park, Arusha National Park, Saadani National Park, the Ngorongoro Crater Conservation Area and Selous Game Reserve, to mention but a few.

[34] Lemayon L.Melyoki, *Ibid.* at 27-28.

[35] *Ibid*. Lemayon L.Melyoki, *Ibid.*at 29.

[36] See Charles Stephen Kimei, *Tanzania's Financial Experience in the Post War Period*, Uppsala: Textgrupen i Uppsala AB, 1987, at 18. Dr Kimei's work is a published edition of a doctoral dissertation presented to the Faculty of Social Sciences, Uppsala University in 1986. Dr Kimei posit that little efforts have been made to document Tanzania's financial system in the past.

[37] *Ibid*.

[38] German East Africa consisted of the present day countries of Tanzania Mainland, Burundi and Rwanda.

[39] According to Lwiza and Nwanko, the first bank to operate in Tanzania was the Deutsche Ostafrika Bank which operated from 1905 to 1918during German colonial rule which ended with the defeat of the Germany during the 1st World War 1907-1918.

[40] Kimei, *Ibid*. at 71.

Territory[41], which was the new name of the colony, from 1919. Capturing the impact of this development on the colony's financial system, Kimei states succinctly:-

> *"... Immediately after the defeat of the Germans in the World War I, three bank cartels of British Origin were established to replace the German banks. These came to be known popularly as the "Big Three" and included:*
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> *a) The National and Grindlays Bank, an amalgam of the Grindlays Bank, the National Bank of India, and the South-Asian Eastern Branches of Lloyds Bank;*
>
> *b) The Standard Bank; and*
>
> *c) The Barclays Bank D.C.O.-a merger of the British Colonial Bank (founded in 1836), the Anglo-Egyptian Bank (formed in 1864) and the National Bank of South Africa (founded in 1890) ..."* [42]

Accordingly, 'the Big Three' dominated the banking and the financial system of the colony, although other smaller players from the Netherlands and India also opened shops. For instance, the *Nederlansche Handel-Maatschappij* , a Dutch bank, entered the Tanganyika Territory banking market in 1951.[43] Two years later, Indian banks joined the colony's financial market.[44] These were the Bank of India and the Bank of Baroda. In 1958, the Ottoman Bank, which was a joint English and French owned bank started to operate in the colony.[45] Soon after independence of Tanganyika in 1961, a new entrant to the banking sector was the National Bank of Pakistani.[46] Although commercial banks had operated in Tanzania for over half a century, it was only in 1960 when the Banking and Financial Institutions Ordinance 1960 was enacted.[47] The effect of the *laissez fare* policy in the regulation of the financial system had an adverse effect on the economy. As the financial sector was dominated by international banks, there was an inimical capital flight in the operation of the financial system. The impact was two-fold. First, as the interests' rates were based from those prevailing at the London financial market, there was a capital

[41]Faustine Karrani Bee interestingly notes that commercial banks in Tanganyika territory operated without a legal framework until 1960 when the Banking Ordinance 1960 was enacted by the Legislative Council. The Ordinance was amended in 1962 by the Banking Act 1960 Amendment Act 1962 which intended to accommodate other financial institutions such as cooperative societies which could operate as licensed financial institutions. See Faustine Karani Bee, 'Rural Financial Markets in Tanzania: An Analysis of Access to Financial Services in Babati District, Manyara Region' , a thesis submitted in accordance with the requirements for the degree of Doctor of Literature and Philosophy of the University of South Africa available online at http://etd.unisa.ac.za/ETD-db/ETD-desc/describe?urn=etd-06272007-150955. The same view is expressed by Kimei, *Ibid*.

[42] Kimei, *Ibid*. at 71.

[43] *Ibid*. at 72.

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.*

[47] See Kanywanyi, *supra* at 6 and endnote 23. The Ordinance was repealed and replaced by the Banking and Financial Institutions Act 1991 (Act No 12 of 1991).

flight to equalize the interests rates in the centre-peripheral relationship caused by the use of the English Pound Sterling as the yardstick of convertibility of the East African shilling. Second, the international commercial banks operating in Tanganyika had no incentive to promote investment opportunities in the country's economy because they could profitably invest in the "first class low risk securities offered by the international financial markets."[48]

The salient feature of the Tanzania's financial system was its linkage and dependency on the international financial systems, particularly the London financial market which determined interests rates for credit facilities among the banks. This feature is attributed to the fact that the modern financial institutions in the country were introduced as subsidiaries of foreign, particularly English financial institutions.[49]The impact of this colonial heritage puts the stakes against traditional sectors of the economy in favour of the 'foreign (export) enclave of the economy.' Commenting on this imbalance Kimei states:-

> *"… This tendency was reinforced by enactment of legal provisions by the colonial government to restrict credit extension by the foreign banks to the indigenous entrepreneurs… Accessibility to bank credit by the indigenous sectors was also blocked by the requirement for collaterals and reputation (with regard to borrowers) that were known to the overseas bankers. As a result bank credit was almost entirely directed to licenced foreign trade activities, highly protecting industries, international corporations and various government agencies. The traditional sectors acted only as depositors …"* [50]

When Tanganyika attained her independence in 1961, the Tanganyika African National Union (TANU) government embarked on major economic and financial policy reforms. period In 1966, a central bank was established and a year later the Arusha Declaration paved the way for state ownership of the major means of production including financial institutions. As a result of the resolve to build a centralized state controlled economy, there was a subsequent nationalization of the banks in 1967 and the state assumed an ever increasing role in the operation of the economy and the financial system.[51] In 1967, the Arusha declaration paved the way for nationalization of the private banks and introduction of the public sector as the main actor in the economy under Socialism and Self Reliance policy.[52] The National Bank of Commerce was established to take the place of the "Big Three" British Banks when the National Bank of Commerce

[48] Kimei, *IOp. Cit.* at 39-40.
[49] *Ibid.*at 34.
[50] *Ibid*.
[51] *Ibid* at 18.
[52] *Ibid*. According to Lwiza and Nwanko, during British colonial rule and after Tanganyika attained her Independence from the united Kingdom in 1961, three major British banks namely National and Grindlays Bank, Barclays Bank D.C.O and the Standard Bank dominated the financial and banking sector in Tanzania and other minor players were commercial banks from India. For detailed discussion of the British and other commercial banks in East Africa and the role they played in financing trading and commercial enterprises see Holger L. Engberg, 'Commercial Banking in East Africa, 1950-1963' in *The Journal of Modern African Studies*, Vol. 3, No. 2 (Aug., 1965), pp. 175-200.

(Establishment and Vesting of Assets and Liabilities) Act 1967[53] was enacted. [54] Other state banks were the Cooperative and Rural development Bank (CRDB), the Tanzania Postal Savings Bank (TPSB),[55] the Tanzania Investment Bank (TIB), which was mandated to provide loans to enterprises, the Tanzania Housing Bank (THB) and the Peoples Bank of Zanzibar (PBZ).[56] The National Bank of Commerce was privatized and reorganized into two private Banks; the NBC 1997 Limited and the National Microfinance Bank under the National Bank of Commerce (Reorganization and Vesting of Interests) Act 1997.[57]

The two decades of reforms in the economy and the financial system further placed the local entrepreneur to the periphery. It killed competition in the financial market and failure to appreciate the market as the best alternative for allocating resources. Kimei aptly captures the inimical flaws in the well intentioned rapid national development paradigm:-

> *"... Regulation of financial markets is only a part of a wider development policy package ... The 'strong' government apparatus is trusted to have the capacity of regulating the growth of the economy, while the costs of development in the context of the 'weak' markets are considered unacceptably high. One must bear in mind the influence of a strong civil service eager to strengthen its class position and benefits from corruption that arises from the allocation of import licences, credit and investment permits, allocation of cheap supplies from government enterprises ..."*

Tanzania liberalized her economy and re-adopted market economy under the structural adjustment programs in 1980s and 1990s.[58] The economy in Tanzania was plagued with incompetent and inefficient management, over employment, lack of technology, shortage of capital and short term financing especially in foreign currencies and poor domestic policies that thwarted market competition.[59] Other bottlenecks in state ownership of enterprises include corruption, embezzlement, nepotism, political interference and government subsidization of failing enterprises.[60] To address the inimical challenges in the economic plane, the government of Tanzania adopted the privatization policy and financial sector reforms, which included the enactment of the Banking and Financial Institutions Act 1991, and the Securities and Capital Markets Act 1994 which in 2002 paved the way for the establishment of the Capital Markets and Securities Authority (CMSA).[61]

The capital market is a recent phenomenon in Tanzania which emanated from the liberalization of the economy from state planned socialist economy to free market economy reform which was undertaken under the Structural Adjustments Programs

[53] Act No 12 of 1967.
[54] For a detailed discussion on NBC performance between 1967 and 1980, see Kimei, *Ibid*. at 124-142.
[55] For a detailed discussion on TPSB performance, see Kimei, Ibid. at 170-2.
[56] *Ibid.* at pp. I 574-5. .
[57] Act No. 23 of 1997.
[58] See Anne Mette Kjaer, 'Old Brooms can Sweep too!: an overview of rulers and public sector reforms in Uganda, Tanzania and Kenya in *Journal of Modern African Studies*, 42, 3 (2004), pp. 389–413 at 399.
[59] A.M. Mapunda, *Ibid.* at I/573.
[60] Lemayon L.Melyoki, *Ibid.* at p.vii citing Kihiyo and Bagachwa.
[61] *Ibid*.

(SAPs) in 1980s.[62] As a result of liberalization, the state role in planning and commanding the economy was phased out and the nascent private sector increasingly was recognized as the engine for economic growth and institutions were aligned towards the new role in a wide range of sectors such as banks, state owned corporations commonly known as parastatal, taxation and the civil service.[63] Many countries in Africa during SAPs undertook financial sector reforms as one of the aid and foreign loans conditionalities.[64] The government of Tanzania shifted its focus from direct provision of goods and services, to providing an efficient and effective governance structure to promote a market economy.[65] The development and evolution of capital markets is attributed to capitalist quest for capital particularly from the eighteenth century to the contemporary times. The development of the institution of a capital, financial and securities markets is traced to Western Europe particularly in England, France the Netherlands, where such institutions emerged gradually as far back as the middle ages[66] and later to the United States of America where rapid development were made in the nineteenth and twentieth centuries. Capital markets constitute 'financial sector innovations' which is a better way of providing the fundamental services of the financial sector and spreading investment risk and opportunities.[67] Pouncy recognizes, however, that stock exchanges are not a natural phenomenon but a result of deliberate political, economic and social directions towards distribution of assets, resources and opportunities' through the competitive market.[68]In Tanzania, generally, the financial sector

[62] Andrew E. Temu and Jean M. Due, 'The Business Environment in Tanzania after Socialism: Challenges of Reforming Banks, Parastatals, Taxation and the Civil Service' in The Journal of Modern African Studies, Vol. 38, No. 4 (Dec., 2000), pp. 683-712 at 683. For a detailed discussion on Tanzania's economic liberalizations until 1986 see Werner Biermann and Jumanne Wagao, 'The Quest for Adjustment: Tanzania and the IMF, 1980-1986' in African Studies Review, Vol. 29, No. 4 (Dec., 1986), pp. 89-103.

[63] *Ibid*.

[64] See Nii K. Sowa, *Ibid*. at 1. The author provIbides detailed historical perspectives of the financial sector in Africa drawing mostly from Ghanaian experience. He asserts that the financial sector reforms in Africa entailed policy and regulatory reforms particularly in the banking and other financial services, devaluation and liberalization of the interest rates.

[65] Dr. Festus Limbu, *Ibid*. See note 1 on page 1.

[66] Charles R.P. Pouncy, *Ibid*. at p.86 and Note 17 and 18 at 90. Tracing the origin of capital and securities markets in the Western world, Frank J. Bonello in his article Stock Exchange in the Microsoft Encarta Online Encyclopedia , 2007 states:

> *"… Exchanges started in Western Europe and then spread to other parts of the world. Some of the older exchanges, dating back as far as the 1100s, are the Paris Bourse in France; the Amsterdam Bourse in The Netherlands; the Deutsche Stock Exchange (formerly the Börse) in Frankfurt, Germany; the London Stock Exchange (LSE) in England; and the Borsa in Milan, Italy. Other European exchanges opened in the 1600s and 1700s, including those in Belgium, Spain, Portugal, and Sweden. Because stocks were uncommon before the 1800s, all of these early exchanges traded in commodities and currencies. In 1785 Amsterdam's Bourse was the first to formally begin trading in securities. By the mid-1800s, many countries outside of Europe traded in securities, including Canada and Australia. During the 19th and 20th centuries, major exchanges opened in Asia, Eastern Europe, and parts of Africa and Latin America…"*

[67] Pouncy, *Ibid.* at p. 91 Note 22.

[68]Pouncy, *Ibid*. at p. 92.

reforms' central focus has been the banking industry because of the link between financial sector and economic development.[69]

1.4 Background to capital markets regulatory policies, structures and institutions in Tanzania and elsewhere

The regulation of capital and securities markets for the purpose of this paper is traced to the United States of America. In the USA, the buying and selling of corporation's stock and securities had very humble beginning from 1700s. Initially, "brokers and dealers met in parks and coffee houses to buy and sell shares."[70] Bonello captures the evolution of the US Stock Exchanges succinctly:-

> *"... In open auctions, traders called out names of companies and numbers of shares available. Shares went to the highest bidders. After the American Revolution (1775-1783) the number of securities traded increased dramatically. Brokers decided to organize in order to handle the growing volume. In 1800 the Philadelphia Board of Brokers drew up regulations and a constitution and set up central offices where trading could take place. The organization they created, the Philadelphia Stock Exchange, is the oldest exchange in the United States. In 1817 brokers in New York formed the New York Stock and Exchange Board (renamed the New York Stock Exchange [NYSE] in 1863). As the United States grew and prospered during the 19th century, many more companies began to issue stocks and bonds. More people began to invest, and dozens of exchanges were formed across the country. ... During the second half of the 19th century, New York City emerged as the primary financial center of the United States. The NYSE became the most successful exchange. Its members concentrated on trading the securities of the largest corporations. At that time, stocks of smaller companies were traded by brokers on the streets of downtown New York...."*[71]

Regulation of capital markets emerged as part of the New Deal in the US that aimed to overcome the economic downturn emanating from the Great Depression of 1929 and early 1930s where the majority of the members of the public owning corporate bodies securities were devastated by bankruptcy as shares and allied securities became worthless. [72] The impact of the Great Depression resulted in reluctance and loss of faith

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[69] Daud R B Lwiza and Sonny Nwanko, 'Market Based Transformation of the Banking sector in Tanzania' in *International Journal of Bank Marketing* Vol 20 No 1 2002 pp.38-49 at 39.
[70] Frank J. Bonello, *Op.Cit.*
[71] *Ibid.*
[72] O. Lee Reed, et al, *The Legal and Regulatory Environment of Business*, 12th edition, New York: McGraw-Hill, 2002 at 363. Commenting on the Great Depression, Bonello, *supra*, states:-

> *"... During the 1920s millions of Americans began to purchase stocks for the first time. Many new investors entered the stock market with borrowed money. Stock*

on the part of investors and members of the general public to invest in securities because of malpractices and non enforcement of the applicable laws. [73]As securities focus on public investments, the US Congress enacted the Securities Act 1933[74] and the Securities Exchange Act 1934. These legislation were designed to provide prospective investors with adequate information relating to a company through a prospectus so that they could make informed decisions on their investments based on factual information of a company.[75] As such securities regulation legislation focused on disclosure of the vital information to the members of the general public. The Securities Act 1933 governed the initial public offering of securities to the general public while the Securities Exchange Act 1934 regulated transfer of securities after the initial public offering.[76]

The US legislation provided a very broad definition of a security. Both the Securities Act 1933 and the Securities Exchange Act 1934 provided a *pari materia* definition of the term 'security. The Acts provided:-

> *"Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral- trust certificate, preorganization certificate or subscription, transferrable share, investment contract, voting trust certificate, certificate of deposit for a security, fractitional undivided interest in oil, gas, or other mineral rights, or in general, any interest or instrument commonly known as "security," or any certificate of interest or participation in, temporary or interim certificate for receipt for, guarantee of , warrant or right to subscribe to or purchase, any of the foregoing."*[77]

Generally, in historical perspective, it is settled through the United States Supreme Court case law that a security in legal and business context constitute any arrangement where a person invests monies and entrusts another person to manage the monies in anticipation of the investor to get a share of the profits arising from that investment.[78]

For effective regulation of the capital and securities markets in the United States, the US Congress, through the Securities Exchange Act 1934, established the Securities and Exchange Commission (SEC). This statutory body is mandated to regulate securities

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> *prices rose steadily as inflated market demand outpaced increases in the value of the real assets of these businesses as well as their profits. Investors eventually realized that a large imbalance existed between stock prices and the real assets available to back them up, including profits, and decided to sell. On October 29, 1929, great numbers of people tried to sell their stocks all at once. Prices tumbled so drastically on the NYSE and other exchanges that the event became known as the crash of 1929. Millions of investors lost their savings in the crash, and many found themselves deeply in debt because they could not repay the money they had borrowed to buy stocks…"*

[73] See Bonello, *supra*.
[74] 15 U.S.C.A.
[75] O. Lee Reed, et al, *supra*.
[76] *IbIbid* at 365.
[77] U.S.C.A Section 77 (b) (1) which is quoted and reproduced in *Ibid*. at 363-4.
[78] O. Lee Reed, et al, *supra*, at 364.

exchange, brokers, dealers and advisors in the securities industry in the United States[79]. Accordingly, SEC is a federal administrative agency responsible for the regulation and administration of the US securities laws. The securities regulation laws are disclosure laws governing the initial public offering (IPO) and the subsequent transfers and exchange of securities after the IPO. The information which has to be disclosed by corporate bodies offering securities to the members of the general public must be accurate, correct and must not mislead the public. Where the provisions of the Acts are breached, liabilities are imposed on the issuers, underwriters and the controlling shareholders or the seller of such securities.[80] Three types of sanctions are imposed by the US securities legislation. These include criminal punishment, civil liability and equitable remedies of injunction.[81]

To facilitate the disclosure of information relating to the issuance of a body corporate security, the US securities legislation various forms have to be filed and a prospectus prepared.[82]The prospectus has to be made available to any and every potential investor in the securities of the body corporate before the actual sale of the security is effected.[83] Like the registration statement of a security, a prospectus contains vital fiscal details relating to the body corporate. It provides the prospective investor with adequate factual details in order to enable the investor to make informed decision whether or not to invest in the securities of that particular issuer security. [84] When a body corporate make the decision to raise funds from the members of the public, the requirements of the US securities legislation have to be adhered strictly. The directors, advisors, brokers and dealers in the securities industry must at all times avoid prohibited conduct such as fraud, insider trading transactions and non disclosure of vital details to the members of the public.[85]

Fraud has been the most litigated violation of the US securities legislation.[86] The Securities and Exchange Act 1934 prohibit the use of mail or "any instrumentality of interstate commerce or any national securities exchange to defraud any person in connection with the purchase or sale of any security."[87] The persons who are at the centre for allegation of engaging in fraudulent conduct during the preparation and issuance of public offering of securities are insiders, broker dealers, corporate bodies whose securities have been purchased by the plaintiff and advisor such as accountants who aid, abets or conspire with any of the above.[88] However, the plaintiff alleging fraud has the onus to prove damage from the alleged acts of fraud. Damage includes losses or excess amount paid over the actual value received from the transaction.[89] Where the plaintiff is successful, he or she is entitled to payment of damages from the defendants which include consequential damages such as lost dividends, brokerage fees and taxes or

[79] O. Lee Reed, et al, *supra*, at 365.
[80] *Ibid*. at 364.
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.* at 366-7.
[86] *Ibid.*
[87] *Ibid.* quoting section 10 (b) of the Act and SEC Rule 10b-.
[88] *Ibid.*
[89] *Ibid.*

interests. Other common law remedies such as punitive damages may also be awarded by the US federal courts.[90]

Inside trading constitutes one of the major violations of the US securities legislation. Section 16 of the Securities Exchange Act 1934 covers insider trading transactions. An insider is a person owning more than ten per cent of any security or a director or officer of the issuer of a security. According to SEC, an officer of an issuer of securities who may engage in insider trading includes the body corporate's executive officers, accounting officers, financial officers and majority shareholders. Insider trading transactions are prohibited in order to avoid the use of any information which is available to an insider because of his or position or privity to decision making processes of the issuer, which is not available to the members of the general public. One of the famous cases relating to insider trading transactions in the US is the case of Un*ited States v. O'Hogan* [91]Insider trading violation is a strict liability offence when any insider makes a profit on issuer's securities during any six months period before the disclosure of the information to the public.[92]

Avoidance of non disclosure of information to the members of the general public is central to the prohibition on insider trading transactions. This prohibition goes beyond the scope of the provisions of Section 16 of the Securities Exchange Act 1934.[93] The prohibition is extended to cover a person who prima facie is not an insider but who trades securities without disclosing his or her access to non public information.[94] The position f SEC has been to the effect that a trader's silence concerning his or her access to information which has not been made public is a market manipulation and deception.[95] As a result, the profits obtained from such an undertaking are illegal. Accordingly, traders who access non public information for their securities trading are treated akin to insiders and they are classified as tippees.[96] Such a person access non public information from insiders and are attributed the same statutory liability.[97]

In Tanzania, on the other hand, there is paucity of literature relating to capital and securities markets in Tanzania. This phenomenon can be attributed to the nascence of the capital market and the attempt made by the United Republic of Tanzania to build Socialism

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[90] *Ibid.*

[91] 117 S.Ct 2199 (1997). This case is reproduced in *Ibid.* at 368-370. According to the judgment of Ginsburg, J, James O'Hogan was a partner in a law firm which was retained a company based in London England for negotiations towards an offer for common stock of a US corporation. Although, the respondent did not represent the client in the negotiations, before the information of the deal was made public, he began to purchase common stock of the US Corporation. When the deal was made public, the price of the shares rose to 60 US$ from the initial price of 39 US$. As a result, O'Hogan who by then owned a number of shares in the US corporation made a profit of 4.3 million US$. When it became aware of this development, SEC initiated investigation on insider trading over the transaction. Consequently, O'Hogan was arrested and arraigned on a 57 count indictment. He was convicted by the trial court but a divided US Court of Appeal reversed the conviction. On a further appeal to the US Supreme Court, it was held that the US Court of Appeal erred in law in holding that the misappropriation theory did not apply. Accordingly, the decision of the Court of Appeal was reversed and remanded.

[92] O. Lee Reed, *Op.cit.* at 371.

[93] *Ibid.* at 367.

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

and Self Reliance soon after independence.[98] Luckily, a thorough attempt at reviewing the policy and legal issues for the existence of a local capital markets has been made by Professor Joel Kanywanyi of the Faculty of Law, University of Dar es Salaam.[99] Drawing from the Tanzania experience on building Socialism and Self Reliance in the economic plane during the heydays of *Ujamaa*[100], Kanywanyi highlights several attempts which were made by the government of Tanzania to pool resources for economic development without resort to an establishment of a capital market.[101] On the other hand, he attempts to eulogise the legal framework for the future which could create an enabling environment for the creation of a local capital market in Tanzania. All these attempts show that in liberalising the economy, the need and urgency of creating a capital market was central to the thinking and strategies of the government, the nascent private sector and the academia.

Like Kanywanyi, Kimei outlines various initiatives made by the colonial and the post colonial government in extending financial and credit service through 'specialised financial institutions prior to 1967'[102] more graphically. These include the establishment of cooperative societies and marketing boards[103]; the Local Development Loan Fund,[104] the African Productivity Loan Fund[105] and the Land Bank[106] during colonial period. In the post independence there was reorganisation of the specialised financial institutions. The

[98] On February 5th, 1967, Tanzania declared the Arusha Declaration which was a blueprint for building Socialism and Self Reliance. The major means of production including enterprises were to be owned and managed by the State. Accordingly, a number of enterprises including banks were nationalized and transformed into parastatals. Between 1967 and 1990, Tanzania established over 400 parastatals in various sectors of the economy.

[99] Joel L. Kanywanyi, "Enabling Legal Framework for the Operation of a Local Capital Market in Tanzania: Past Experience and Future Requirements " in Volume 19 No 1 *Eastern Africa Law Review*, June 1992 at 40-69.

[100] This is a Kiswahili word which may be literally translated in English to mean Socialism.

[101] According to Kanywanyi some of the attempts to promote pooling together of capital for productive economic initiatives since colonial times include the enactment of legislation for incorporation and regulation of companies and other forms of business association such as cooperatives, societies and so forth. For example, the Companies Ordinance was enacted in 1932 and it was modeled on the English Company Act. Partnerships were formed and regulated under the Law of Contract Ordinance. He also cites the enactment of the Foreign Investment (Protection) Act 1963, as one of the most notable attempts to attract foreign capital into post independence Tanganyika.

[102] Kimei, *Ibid.* at 81-96.

[103] *Ibid.* at 81-2. According to Dr Kimei, the cooperative which were formed from 1930s onwards were central in the promotion of production, provision of credit and marketing of cash crops grown by peasants. On the other hand the marketing boards which were established vide the African Agricultural Products (Control and Marketing) Ordinance 1949, were an offshoot of the cooperative movement.

[104] *Ibid.* at 83. According to Dr Kimei, the LDLF which was set up in 1947 provided credit to small scale African farmers through the native authorities because Africans owning land under the deemed right of occupancy had only usufruct rights and could not sell or offer as security their land owned under customary tenure.

[105] *Ibid.* at 84. According to Dr Kimei, the APLF which was set up in 1955 under a generous grant from the United States International Development Agency (USAID) provided credit for the purchase of farming and milling equipments.

[106] *Ibid.* at 85. According to Dr Kimei, the Land Bank was set up in 1947 by the British Colonial government to provide long term loan ranging from 15-30 years for purchasing and clearing land and related construction and the procurement of agricultural equipment on short and medium term. It benefited only the expatriate settlers estates which could provide the required securities.

independent government formed the Agricultural Credit Agency,[107] the National Development Credit Agency,[108] the National Cooperative and Development Bank[109] and the National Cooperative Bank to promote agriculture and rural development. In the industrial plane, the post independence government established the Tanganyika Development Finance Company Limited and the Tanganyika Finance Company. TANU, the ruling political party, the private sector and the trade unions also were not to be left behind; they established the Mwananchi Development Corporation, the Diamond Jubilee Investment Trust and Industrial Promotion Services and the Workers' Development Corporation, respectively. [110]

The Tanzania's long waited and envisioned capital market materialised when the Capital Markets and Securities Act 1994. The Capital Markets and Securities Act 1994[111], as amended by Act No. 4 of 1997, regulate the affairs of capital markets and securities in the United Republic of Tanzania.[112]The Act defines securities to include debentures, stock, shares, bonds or notes, bonds, other loan investments of the Government of Tanzania or any other country, rights and interests under collective investment schemes and other rights or interests or instruments which the minister responsible may by notice in the gazette prescribe.[113] The Act establishes the institutional framework and policy on the regulation of capital markets and securities in Tanzania. Notably the legislation is intended to establish the Capital Markets and Securities Authority (CMSA) which is intended to promote and facilitate the development of a fair, efficient capital market and securities industry in Tanzania[114]. The Authority is composed of ten members the majority of whom are public officials. The Chairperson is appointed by the President of the United Republic of Tanzania on the recommendation of the Minister responsible for finance.[115] The members of the Authority serve for a renewable term of three years.[116] The functions of the Capital Markets and Securities Authority are to advise the minister on all matters relating to the securities industry; to ensure fair and equitable dealings in the industry; to register, license, authorize or regulate stock exchanges, investment advisors, securities dealers and their agents and to control and supervise their activities with a view of maintaining proper standards of conduct and professionalism.[117]

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[107] *Ibid.* at 87. According to Dr Kimei, the ACA was set up in 1961"to serve as the major specialized financial institution in the development of agricultural sector" through short, medium and long term credit.

[108] *Ibid.* at 88.

[109] According to Kanywanyi, *Ibid*. at 10 the main objective of establishing the Bank were, *inter alia*, to:
"For further credit facility provision to peasant primary commodity production and local marketing, a special bank, the National Cooperative and Development Bank was established. Among its purpose was to 'take over seasonal crop financing with personal and loan capital support from local branches of foreign monopolist banks chanelled through the cooperative shareholders proprietors bank…"

[110] *Ibid*.

[111] Cap. 79 (R.E. 2002).

[112] Section 1 (2) of the Act provides that the legislation applies to 'Tanzania Zanzibar as well as Tanzania Mainland'. The Act empowers the Minister to promulgate rules and regulations and several regulations have been enacted to supplement various aspects of the securities and capital markets industry.

[115] Section 6(3)(a) read together with Section 2.

[116] Section 6(4).

[117] Section 10 (a)-(c).

The powers of the Authority are massive under the Act; it may give directions to a stock exchange and other actors in the capital market and securities industry.[118] Such directions may include production of books by a stock exchange or other actors in the regulated industry relating to business or affairs of the stock exchange, dealings in securities advice concerning securities, financial position, audit or auditors reports.[119] The Act requires actors in the securities market to make disclosures whenever the Authority deems it necessary for them to do so for the protection of investors.[120] The legislative framework for capital markets in Tanzania is under review to comply with the International Organization of Securities Commission (IOSCO).[121]

1.5 Cross listing and initiatives towards integration of East African Capital Markets

The East Africa region countries have had a common history and there have been various forms of economic cooperation or integration since early colonial times.[122] The East African countries of Kenya, Uganda, Tanzania, Burundi and Rwanda are members of the East African Community[123] whose goal is to develop a common market with a custom union, a single currency and ultimately a political federation with free movement of people, goods and capital. The capital markets in East Africa have established a working relationship among them in the spirit of integrating and developing capital markets in the East African Community (EAC).[124] The exchanges operate under the umbrella of East African Stock Exchanges Association (EASEA). At the moment, there are only two companies listed in all three markets, which are the East African Breweries

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[118] Section 11.
[119] Section 11 (3).
[120] Section 19 (1).
[121] See http://www.thecommonwealth.org/Internal/153522/141772/146206/review_of_regulatory_framework_for_capital_markets/ last accessed November 13, 2008.
[122] Between 1890s and 1918 German East Africa consisted of the present day states of Tanzania Mainland, Rwanda and Burundi; it was the end of the World War I which paved the way for the new colonies of Rwanda and Burundi under Belgian colonial rule. Both Kenya and Uganda were British colonies and one of the major projects in 1890s was the construction of the Kenya-Uganda Railway. After the war, present day Tanzania Mainland which was then christened Tanganyika Territory became a British colonial under trusteeship mandate of the League of Nations.
[123] See www.eac.int/index.php/downloads/doc_download/2-present-and-future-trends-of-the-east-african-community.html . The East African Community was re-launched on January 15th, 2001 at Arusha, Tanzania after the Treaty of East African Cooperation came into force on July 7, 2000.
[124] See Report on EASEA Committee on Mass Cross Listing, November 17th 2005 which is available online at http://www.nse.co.ke/newsite/inner.asp?cat=regionalisation. The DSE, NSE and the Uganda Stock Exchanges (USE) operate under the umbrella of East African Stock Exchanges Association (EASEA). EASEA is a member of Capital Markets Development Committee (CMDC) of the EAC. Other members of the CMDC include East African Securities Regulatory Association (EASRA) and East African Stock Exchange Brokers Association (EASBA). The three associations have the common objective of integrating the three markets in order to achieve growth of the market with the ultimate aim of economic union in the EAC. The three markets are aiming at achieving this objective in a systematic, coordinated manner that will facilitate the availability of listed securities in the three markets simultaneously. To this end EASEA has
determined mass cross listing as the key activity that will achieve this objective. Rwanda nad Burundi joined the East African Community on July 1st, 2006.

Ltd. (EABL) and Kenya Airways Ltd.[125] The cross listing of securities across the East African region is intended to benefit the listed companies in a variety of ways. The listed companies benefit from other advantages of cross listing such as facilitation by the exchanges of promotion and awareness, access to a wider capital base across the region and cheaper additional sources of capital; regional presence, acceptance and recognition of the company brand across the region and the prestige of regional listing.[126] Plans are underway to harmonize the capital markets regulatory policies with the East African Region.[127]

Hardly a decade when the bourse began operation, clarion calls were made for a reform. In early 2000s, the United Republic of Tanzania embarked on a financial sector reforms. For instance, at the support of the Joint International Monetary Fund (IMF) and the World Bank, the United Republic of Tanzania undertook a Financial Sector Assessment Programme (FSAP).[128] The FSAP report which was issued in May 2003 pointed out the limited role played by the financial sector because of inefficiencies in contributing to economic growth of the country.[129] The programme was a precursor to a subsequently decision made by the third phase government Minister of Finance, Hon. Basil Pesambili Mramba to appoint an Inter Institutional Committee on financial sector which was mandated to examine the recommendations made in the assessment with a view to develop a plan of action for their implementation.

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[125] *Ibid.*

[126] *Ibid.*

[127] See CMSA Annual Report 1999/200 at 22 available online at http://www.cmsa-tz.org/downloads/public.php.

[128] For detailed information on the assessment and the work and recommendations of the inter-institutional committee on the financial sector, see The United Republic of Tanzania, *The Second Generation Financial Sector Reforms, Volume II: Background Paper to the Implementation Plan*, Dar Es Salaam: Bank of Tanzania, June 2007. The report provIbides the constitution of the members of the Committee and its terms of reference. According to the Inter-Institutional Committee report at p.4-5:

> *"On 31 March 2004, the Minister for Finance appointed an Inter-Institutional Committee on FSAP comprising of the Governor of the Bank of Tanzania as Chairman, the Permanent Secretary Treasury of the United Republic, the Principal Secretary Ministry of Finance of the Revolutionary Government of Zanzibar, the Permanent Secretary Planning and Privatisation, the Permanent Secretary Ministry of LABOUR, Youth and Sports Development, and the Permanent Secretary Ministry of Cooperatives and Marketing. Other members of the Committee were the Commissioner of Insurance, the Chief Executive Officers of all existing pension funds, and the Executive Director of the Tanzania Bankers Association (TBA) representing commercial banks. Subsequent appointments to the Committee by the Minister of Finance included the Attorney General and the Permanent Secretary to the Ministry of Justice and Constitutional Affairs, Commissioner for Lands and the Registrar of Titles. The above Committee was charged with the responsibility of reviewing the recommendations of the Joint IMF – World Bank FSAP Mission report, and propose actions for implementation of the recommendations."*

[129] *Ibid.*at 1.

On financial sector reforms, the Inter-Institutional Committee noted with concern eight recommendations made by the FSAP.[130] These were the fact that foreign exchange trade between banks was limited and dominated by the central bank, the Bank of Tanzania; the absence of secondary trading for government securities at the Dar es Salaam bourse, excess liquidity in pension funds whose major investments were the government bonds, the non diversification of the bourse products, weaknesses in the payment systems relating to securities and the absence of sterilisation plans. Accordingly, the Committee made four key recommendations which included a review of the legal and the regulatory framework for capital and securities markets, deepening of the financial markets to enhance the financial asset base of the majority Tanzanians, the improvement of the capital and securities market infrastructure and the enhancement of corporate governance. [131]

The first limb of recommendations of the Inter-Institutional Committee related to a review of the legal and regulatory framework for the sound development of the capital and securities market in Tanzania.[132] Central in this recommendation was an assessment of the Capital Markets and Securities Act 1994 and its subsidiary legislation in order to examine their efficacy in addressing the challenges of developing a sound bourse in the Tanzanian context which would adhere to international best practices. A call was made in this recommendation to streamline and strengthen the institutional arrangement, roles and responsibilities so that the Capital and Securities Market (CSMA) could enhance its primary duty of developing and regulating capital markets in Tanzania according to international standards. The Committee also recommended the establishment of a legal framework for setting up and regulating collective investment schemes, trading rules and regulations as well as operating procedures for an automated trading system at the Dar es Salaam bourse.[133]

The deepening of the financial and securities in order to enhance the share of the fiscal assets in the investments of the majority Tanzanians, was the second limb of the recommendations of the Committee on capital and securities markets.[134] The Committee was concerned with the fact that the nascent bourse in Tanzania was characterised by limited demand and supply of the bourse products. It called on the Capital and Securities Markets Authority to find innovative avenues of increasing equity and other long term investment opportunities of the majority Tanzanians. The improvement of the capital and securities market infrastructure was the third limb of the Committee recommendations. The last, but not the least limb of the recommendations was the enhancement of corporate governance in the administration and regulation of the bourse and its key actors. The report identified three key areas where the financial and securities markets could be enhanced in order to promote the share of the fiscal assets in the investments of the majority Tanzanians. The first avenue was the development of the debt securities markets.[135] Actions in this avenue were envisioned to include development of municipal bonds because local governments are closer to the people, such products could attract more Tanzanians to utilise the services of the bourse in buying and selling such securities. The development of

[130] *Ibid*, at 30.
[131] *Ibid.*at 31.
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*at 32.

corporate bonds could also be developed and institutionalised to include offering of unsecured bonds issued by the commercial banks. The development of the central government Treasury bonds was also envisioned as one of the measures through which a secondary market could be restructured. The other avenues recommended were the creation of a conducive environment for the underwriters and debt issuers' guarantees and evaluation of primary market dealers so that to enable them to play a key role in the development of a secondary securities market at the bourse.[136]

The second avenue in deepening of the financial and securities in order to enhance the share of the fiscal assets in the investments of the majority Tanzanians was premised in the development of an equity market.[137] The Committee underscored the need to re-examine the capital and securities market structure in order to align it with vision of moving the economy forward. In addition, the Committee report called for other measures to be undertaken by Tanzania which includes (i) promotion of the listing of privatised parastatals; (ii) promotion of the listing of any other qualifying entities in the private sector and (iii) enhancing public awareness in order to promote more active participation of investors and issuers in the nascent Dar es Salaam bourse. [138]The modernisation of the capital and securities market infrastructure was the third key recommendation of the Committee.[139] The modernisation of the market infrastructure was envisioned to encompass three main areas. These were automation of the Dar es Salaam bourse, development of custodial services and centralised depository systems and the modernisation of clearing and payment systems..The last recommendation of the Committee relating to capital markets and securities was enhancement of corporate governance in Tanzania. [140]The recommendation encompassed improvement of the industry standards, assessment of disclosure practices in order to enhance transparency in the market operations; the privatisation of state owned financial institutions, creation of public awareness of the financial sector developments and investment opportunities and capacity building of the key players in the capital and securities markets.

1.6 Current trends in global and regional capital markets

In 1998, drawing a leaf from the experience of the Asian financial and capital markets crashes, Maurice Obstfeld, of the Department of Economics, University of California Berkeley in his working paper titled "The Global Capital Market: A Menace or Benefactor" in which he warns:

> *"... the international capital market has the potential to yield great benefits, but that it also constrains national choices over monetary and fiscal policies, and may facilitate excessive borrowing. To what extent is the positive potential of the international capital market outweighed by a potentially disruptive role? Are there policy reforms*

[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*

> *or institutional changes that might improve the balance of benefits and costs? ...*"[141]

The recent financial meltdown in the US emanating from the subprime mortgage market[142] has had an impact which is felt worldwide. In this subsection, we take stock of the current global and regional capital markets and the lessons for Tanzania and South Africa capital markets. Charles W. Calomiris, a Henry Kaufman Professor of Financial Institutions, Columbia University Business School, traces the origins of the subprime crisis, the financial system responses and concludes that "there are both old and new components in both the origins and the propagation of the subprime shock…"[143] He compares the financial meltdown with the Great Depression of 1929 and asserts that financial shocks are recurrent and draws the fact that utilities companies in 1920s just like banks in 2008 turned from booming enterprises to entities seeking bailout from the government.[144]

2.0 FORMS OF SECURITIES THAT MAY BE USED TO RAISE CAPITAL FOR COMPANY'S ENTERPRISE IN TANZANIA

As it goes without saying that capital and securities markets are the most competitive form of raising capital for enterprise development in a modern economy, it is pertinent to revisit various forms through which capital is raised and channelled towards companies productive and service provision. Both private and public companies need capital not only for their establishment but also for their operations. There are various forms through which capital can be raised by both private and public companies. The Capital Markets and Securities Act 1994[145] defines the word securities in the following words:-

> *"Securities" include-*
>
> *(a) debentures, stock, shares, bonds, or notes issued or proposed to be issued by a body corporate and any right, warrant or option in respect thereof;*
>
> *(b) bonds or other loan instruments of the Government of Tanzania or any other country;*
>
> *(c) rights of interests, whether described as units or otherwise under any collective investment scheme;*

[141] Maurice Obstfeld, 'The Global Capital Market: A Menace or Benefactor', NBER Working Paper 6559 (1998) available at http://www.nber.org/papers/w6559.
[142] Charles W. Calomiris, 'The Subprime Turmoil: What's Old, What's New and What's Next' available online at www.kc.frb.org/publicat/sympos/2008/Calomiris.08.20.08.pdf also at http://www.aei.org/publications/pubIBID.28720/pub_detail.asp.
[143] *Ibid*. at p. 1.
[144] *Ibid*. at p. 6. The author lists a number of booms and busts in the US economic cycle from 1920s to the contemporary times.
[145] [Cap. 79 R.E. 2002].

> *(d) such other rights, interests or instruments as the Minister may, by notice in the Gazette prescribe."*[146]

Accordingly, the most common securities which may or may not be traded in a capital and securities market include:-

2.1 Shares

The term share has been aptly defined by N. D. Kapoor defines share in the following words:-

> *"A share is the interest of a shareholder in a company. The capital of a company is divided into certain indivisible units of a fixed amount. These units are called shares. 'Share' means share in the share capital of a company... A share has also been defined as an interest having a money value and made up of diverse rights specified under the s of Association (Commr. of Income Tax v Standard Vacuum Oil Co. Ltd.,* A.I.R. (1966) S.C. 1393). *It carries with it certain rights and liabilities while the company is a going concern or while the company is being wound up..."*[147]

In Tanzania, the term 'share' is defined by the Companies Act 2002 to mean:-

> *"Share" means share in the share capital of a company, and includes stock except where a distinction between stock and share is expressed or implied;"*[148]

Accordingly, every person interested to become a member of a company has to purchase shares. In this context, a capital market becomes an open forum through which shares of publically traded companies can be sold and bought by the members of the public on a daily basis. The private companies, however, are statutorily restricted from trading their shares at a capital market. However, a company can change form from a private company to a public company and vice versa at any time, subject to laid down rules.

A public company may raise its share capital by issuing shares and debentures from the members of the general public.[149] The initial public offering of shares is done through issuance of a prospectus which invites the members of the public to purchase shares at a set price. The main function of a prospectus is to highlight the prospects of a public company and the goal of raising capital from the members of the public. It acts as the basis through

[146] Section 2 of the Capital Markets and Securities Act 1994..
[147] N.D. Kapoor, Elements of Company Law, 28th edition, New Delhi: Sultan Chand & Sons Educational Publishers, 2007 at 189.
[148] Section 2 of the Companies Act 2002. On the other hand, Section 2 of the Capital and Securities Market Act 1994 [Cap.79 R.E. 2002] defines the term share as follows:-
"share" means the interest of a members of a body corporate who are entitled to share in the capital or income of such body corporate."
[149] *Ibid.*at 113.

which potential investors from the members of the public may decide on the value and goodwill of a company in order to purchase or not to purchase the offered shares.[150]

2.2 Debentures

A company may raise funds for its operations in a variety of ways including secured and unsecured borrowing from banks and other financial institutions.[151] In legal parlance, such securities, are called 'debentures' however, in modern times the word 'bond' has become more commonplace.[152]There has been a difficulty in defining the term 'debenture' and also on the issue of what should be the criteria for distinguishing debentures from shares of a company.[153]Accordingly, analysing the trend in England, Davies points out that:

> *"In practice, the absence of a precise definition has given rise to surprisingly few problems and to even fewer reported cases... In recent years, the development in banking and commercial circles have led to the invention of a remarkable array of new and highly sophisticated types of 'securitised' loan investments as a result of which finance, which would formerly have been raised by a straightforward bank loan.... may be obtained through the issue of instruments, some of which for most purposes unquestionably are debentures and others of which may be or may not be. "*[154]

The relationship between a debenture holder and a company simply arise out of a contract. It is a relationship of a debtor and creditor. Accordingly, unlike a share holder, a debenture holder is not a member of the company. However, there are no hard and fast rules that may distinguish the rights of a share holder as compared with a debenture holder. This is because a debenture holder out of the terms of the terms for the extension of the credit may be entitled "to appoint a director; to a share of profits (whether or not available on dividend); to a payment at premium; to attend and vote at general meetings and even to convert his debentures into equity share."[155]

On the other hand, a distinction between a shareholder and a debenture holder is also made n terms of the protection of their interests in the company. Davies aptly points out the difference:-

> *"The protection of the rights of the debenture- holder is obviously much greater than that of a member's rights under the s since a debenture confers contractual rights independent of the company's s. It is nonetheless, possible that those contractual rights might be affected as a result of the exercise by the company or the general meeting of its*

[150] *Ibid*.
[151] Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, 7th edition, London: Sweet & Maxwell, 2003 at 806.
[152] *Ibid.*
[153] *Ibid.*at 807.
[154] *Ibid.*at 807-8.
[155] *Ibid.*at 806-7.

> *statutory powers. If, for example, the debenture provided that the holder should be entitled to appoint a director of the company... The breach would normally entitle the debenture holder to require his debt security to be repaid and, if it was secured by a charge on the company's property, to enforce his security. This he would do rather than sue for damages for the breach. While the value of his right may depend on the continued prosperity of the company... he is normally not subject, as is a shareholder, to any serious possibility that his rights will be varied by the company by corporate action without his consent."*[156]

In Tanzania, just like in England, the term 'debenture' is used in a number of legislation including the Companies Act 2002.[157]The Act defines debentures in the same terms as the English Companies Act:-

> *"debentures" includes debenture stock, bonds and any other securities of a company whether constituting a charge the assets of the company or not;"*[158]

This definition has remained the same since the English Companies Act 1929.[159]The Tanzanian Companies Act 2002 treats shares and debentures *pari passu*. Part III of the Act

[156] *Ibid.*at 813. The protection of the debenture holder result in the power of the debenture holder to either exercise power of direct sale of the borrowing company's assets or parts thereof or to appointment of a receiver. The exercise of the direct power of sale over the encumbered assets will be discussed in the discussion of the case of Shinyanga Regional Trading Co. Ltd v National Bank of Commerce case, below. On the other hand, the protection of the interests and the priority of the debenture holder over other creditors has been discussed in detail in a number of East African cases particularly in Kenya. The Milimani Commercial Court of Kenya at Nairobi has a number of decisions relating to debentures. In *Morris and Co Ltd v Kenya Commercial Bank Ltd and Others* [2003] E.A. 605-616, the defendant bank in exercise of its rights under certain debentures given by the plaintiff company appointed receivers and managers over the assets of the plaintiff company in order to recover a debt owed by the plaintiff to the defendant. The plaintiff contended that the appointment of receivers and managers was unreasonable because the power to appoint receivers under the debenture was exercised oppressively and would spell winding up of the plaintiff company. The defendant counter argued that the validity of the debentures was not disputed and the lender had the right to appoint receivers and managers in default of the payment of the debt. It was held for the defendant. The court acknowledged the fact that "*prima facie* the lender had an unfettered discretion… ". Similar, the appointment of a receiver under the authority of a debenture was considered in another Kenyan commercial case in *Diversey Lever East Africa Ltd v Mohanson Food Distributors Ltd and Another* [2004] E.A. 43-4. In this case the plaintiff obtained judgment in its favour against the 1st defendant and attached six motor vehicles belonging to the 1st defendant. The motor vehicles were subject of a floating debenture in favour of Kenya Commercial Bank Ltd. When the bank became aware of the attachment it filed objection in court seeking the lifting of the execution against the plaintiff's motor vehicles on the strength of the debenture. However, the bank had not appointed any receiver to that date. It was held that where there was a floating charge over movable property of an execution debtor created by a debenture, the floating charge crystalised on the date of the appointment of a receiver.

[157] Cap.212 (R.E. 2002).

[158] Section 2 of the Companies Act 2002 which is in *pari materia* with section 744 of the English Companies Act. According to note 8 on page 807 of Paul L.Davies, (supra), "the definition has remained substantially unchanged since the 1929 Act."

[159] See Paul L. Davies, (supra) note 8 on page 807.

governs share capital and debentures.[160] This situation seems to be similar to the law and practice in England and India.[161] The law relating to shares applies equally to debentures. However, there is a slight difference because when relating to debentures, the term is applied in a restricted sense to debenture stock and not to its wider meaning of a single mortgage, charge or bond.[162]

Debentures have been discussed in a number of East African and English cases. In *Shinyanga Regional Trading Co Ltd v. The National Bank of Commerce*,[163] the Court of Appeal of Tanzania discussed *in extenso*, the nature of debentures and the effect of the requirement for compulsory its registration under both the Companies Ordinance[164] and the Registration of Documents Ordinance.[165]Mfalila, J.A. (as he then was) on behalf of the other Justices of Appeal, responding to the misconceptions that there was a debenture agreement put the factual and legal position relating to debentures in perspective when he stated:-

> *"...* Although the words of Chitty, J. in *Long v Abercorris Slate & Slab Co* (1887) 37 Ch.D. 260 to the effect that:
>
> > *I cannot find any precise legal definition of the term "debenture", it is not either in law or commerce a strictly technical term of what is called a term of art"*

[160] According to section 45 (1) of the Act, the provisions of Sections 46-54 and 58 are limited to public companies only. Similarly, section 45 (2) of the Act prohibits private companies, save for a company limited by guarantee and not having share capital, to:-

(a) offer to the public (whether for cash or otherwise) any shares or debentures.
(b) allot shares or debentures for a public sale to the members of the general public.

[161] See N.D. Kapoor, (supra) at 261 where he quotes Section 2 (12) of the Indian Companies Act.

[162] See Paul L. Davies, (supra) at 811.

[163] [1997] T.L.R. 78. This was an appeal against a decree of the High Court of the United Republic of Tanzania at Tabora in which judgment was made in favour of the respondent. The material facts of the case were that Shinyanga Regional Trading Co. Ltd and Nyanza Bottling Company Ltd sued the National Bank of Commerce seeking a declaration that the sale of a godown on Plot No 308 Block 'B' in Shinyanga Township was illegal. The said godown consisted of , *inter alia*, one of the properties listed in a debenture which was issued by Shinyanga RTC, the appellant, to secure an overdraft of Tanzanian Shillings 50, 000, 000.00 from NBC. The appellant failed to repay the loan within the stipulated time. The lender purporting to have been vested with the power of sale of the assets, sold by auction the said godown. Following the auction, the appellant filed a suit in the High Court but before the determination of the suit, the appellant sold and transferred the godown to Nyanza Bottling Company Ltd. The trial court frame three issues to be considered in the suit which were:-

(i) Whether the sale and transfer of the suit premises by the 1st defendant to the second defendant was illegal.
(ii) If the sale was illegal, whether the second defendant was a *bona fide* purchaser for value.
(iii) Whether in the circumstances, the plaintiff was entitled to sell the suit premises and whether he had title to pass to the purchaser.

The trial held in favour of the National Bank of Commerce. The judgment of the High Court aggrieved Shinyanga RTC which appealed to the Court of Appeal of Tanzania whose bench was constituted of Mnzavas, Mfalila and Lubuva, JJA allowed the appeal. Consequently, the judgment of the trial court was set aside. sued

[164] Then Cap.212 of the laws of Tanzania. The Ordinance was repealed and replaced by the Companies Act 2002.

[165] Then Cap 117 of laws of Tanzania.

> sounds severely pessimistic on the meaning and nature of debentures, it does not mean that the term is incapable of having a precise meaning or that its meaning is so elastic as also to be a species of contract. Of course the rights of the debenture holder are contractual rights against the borrowing company, but these contractual rights relate to the agreement to lend by the lender and to borrow by the creditor. Debentures then are species of documents issued by companies evidencing their indebtedness which [the indebtedness], is normally but not necessarily secured by a charge over the company's property. Debentures which do not provide a charge are called naked debentures. In sum then debentures are a class of securities issued by companies."[166]

It is obvious that their Lordships had greater pains than necessary to define the factual and conceptual framework relating to debentures because they noted with concern the fact that there is lack of awareness and understanding on the law and practice relating to securities in Tanzania. Their Lordships did not mince words when the decided to call a spade a spade when they retorted:-

> *"..., we would like to point out that the respondent [The National Bank of Commerce Ltd] found itself in this predicament largely through the ineptitude of its legal department. For instance, how could the respondent's legal department sit idly by without monitoring the security of the loan the respondent had advanced to the appellant? The respondent's legal department was either negligent or incompetent, for we cannot see how they could have failed to ensure that the appellant complied with section 80 of the Companies Ordinance, or taken steps themselves and registered the debenture as they are empowered under sub section (1) of that section, because the respondent was surely 'a person interested therein'. After such registration, the respondent could then have compelled the appellant to comply with section 83 of the Ordinance that is endorsing the certificate of registration on the debenture."*[167]

The members of the legal fraternity, businessmen and the general public need to be very cognisant of the salient features f debentures in order to have clear understanding of the term. An attempt was made by an Indian author to enumerate the key characteristics of debentures. The starting point is the definition of the term. The Indian author notes with approval the definition of debentures enunciated in an English case of *Lemon v Austin Friars Investment Trust Ltd*[168] that:-

> *"A debenture is document containing an acknowledgement of indebtedness which need not be, although it is usually, under seal, which need not give, although it usually does give, a charge on the*

[166] [1997] T.L.R. 78 at 84.
[167] *Ibid.*at 92-3.
[168] (1926) Ch. 1 (C.A.).

> *assets of the company, by way of security, and which may or may not be one of series*."[169]

Six salient features have been advanced in describing and distinguishing debentures from other securities.[170] These include (i) issuance by a body corporate body in the form a certification acknowledging its indebtedness; (ii) although not mandatory, the practice has been for companies to issue debentures under seal; (iii) a debenture may be issued in series to a lender or as a single debenture such as a mortgage as a security for a loan (iv) debentures are issued for a definite period of time; (v) a debenture may or may not create a charge over the body corporate's assets or part thereof; and (iv) a debenture holder may have no right to vote in the company's general meetings.[171]

2.3 Charges or Mortgages

Although a company raises its initial capital through shares, for successful undertaking its business it needs to borrow monies from banks and other financial institutions.[172] It has been aptly summed up that "borrowing is incidental to the object of a borrowing company."[173] Accordingly, a company may secure its debts by creating a charge or a mortgage over all or any of its property.[174]

2.4 Other forms of securities

Other forms of securities which are constantly being traded in capital and securities markets are government bonds. These have been the most common forms of securities in the Tanzanian market. Generally, the capital and securities market in Tanzania seems to rely on traditional forms of securities such as shares, bonds, charges and mortgages and government bonds. In contrast, other jurisdictions such as the USA the actors in capital and securities markets have been innovative and ventured into other derivative forms of securities. For instance, in the USA, securities include futures and options.[175] Options are offers to sell or buy shares at certain fixed prices within a certain fixed duration. [176]Options are traded in two phases; first, there is the call option, which is the right to buy shares and second and a put option which invites people who want to sell shares to do so at a fixed price and duration. On the other hand, futures are contracts on buying and selling commodities such as 'food or textiles' at a fixed price at fixed dates in the future.[177] Bonnelo writing about futures states:-

> *"... Futures contracts ... deal in commodities such as foods or textiles. Futures trading works somewhat like options trading, but buyers and sellers instead agree to sales or purchases at fixed prices on fixed*

[169] Quoted in N.D. Kapoor, *supra* at 261.
[170] Supra at 261-2.
[171] *Ibid.*
[172] N.D. K.apoor, *supra* at 249.
[173] *Ibid.*
[174] *Ibid.*
[175] Frank J. Bonello, "Stock Exchange" Microsoft® Student 2007 [DVD]. Redmond, WA: Microsoft Corporation, 2006.
[176] *Ibid*.
[177] *Ibid*.

> *dates. After a futures contract is made, the choice to buy or sell is not optional. Instead, there is an obligation to buy or sell. Futures contracts are then traded on the exchanges."*[178]

These transactions stimulate secondary marketability of shares and other securities in the capital markets and enable the actors involved to earn a commission. However, the transactions may result in profit or loss according to the dictates of the market. There is a need for capital and securities markets in SSA to be more innovative in the types of securities which are traded in the market according to local social economic context.

3.0 REGULATION OF THE KEY ACTORS IN CAPITAL AND SECURITIES MARKET

It is trite that a capital and securities market is a vital instrument and avenue for allocating resources competitively to various enterprises because of its ability to promote efficiency. On the other hand, for most developing countries, especially SSA, the capital and securities market provides the best opportunity for promoting and financing entrepreneurship and economic growth in the quest to eradicate poverty. The realization of a workable, effective and efficient capital and securities market rely on sound administration and functioning of a capital and securities market requires strong, viable and efficient institutional arrangement of various actors in the economy. However, the developing economies are at a disadvantage compared to developing economies because:-

> *"In developing economies, oversight institutions are often missing, inadequately equipped to perform their function effectively, or may sometimes be unrealistic in their demands of the market. This may lead to the market falling short of expectations. Experience from successful developmental states shows that where the market does not perform according to expectations, the best course of action is to support the institutions of the market…*[179]

Accordingly, there is a need to overcome such pitfalls and the key actors for regulation of a capital and securities market which include the Capital Markets and Securities Authority, the Dar es Salaam Stock Exchange, brokers, dealers, commercial banks, the courts; particularly the High Court of the United Republic of Tanzania Commercial Division, public and private companies and the members of the general public, must all play role in ensuring sound administration and regulation of the capital and securities market in Tanzania.

Public companies are the key beneficiaries of capital markets operations. In Tanzania, a public company is a company limited by shares or by guarantee having share capital whose memorandum and s of association expressly state that it is a public

[178] *Ibid*.

[179] Research and Analysis Working Group, The United Republic of Tanzania, "Poverty and Human Development Report 2009", Dar es Salaam: Mkuki na Nyota Publishers, 2009 at 207.

company.[180] Such companies have no restriction on the maximum limit on the number of shareholders but are required to have a minimum of seven shareholders to be allowed to operate as public limited company.[181] These companies can be listed on the stock exchange, as their shares are freely transferable.[182] In this respect, they are required to issue a prospectus, which is an invitation to the public to subscribe to shares on issue to be listed on the Dar es Salaam Stock Exchange.[183] Generally, the ownership of public companies in Tanzania is controlled by a single shareholder owning over fifty percent of the equity.[184] The controlling shareholder is either the Government or a foreign entity as a result of privatization and bank ownership is restricted.[185] As a result, the role of the capital market and financial markets to promote efficiency and competition is dismal.[186] The Dar es Salaam Stock Exchange (DSE) is insular as no cross listing of a Tanzanian public company has been effected even within the East Africa region and although foreigners participation in the bourse has been allowed since 2003 some restrictions still are in place such as ownership of sixty per of a public company equity and there has never been any case of a hostile takeover. [187]

The Dar es Salaam Stock Exchange (DSE) in Tanzania and other emerging Sub Saharan Africa capital markets have predominantly been utilized to float shares for the refinancing of privatized state owned companies instead of fulfilling the primary capital market goal of raising capital.[188] Consequently, Pouncy warns that:

> *"...Stock markets in SSA are not playing the type of a role that they have played in the West and in Asia. They are not providing financing for the development of innovative independent domestic industry. Instead, they appear to be serving two primary functions. First, they provide a means for multinational corporations to acquire controlling stakes in firms whose assets are SSA's exploitable natural resources and exportable agricultural commodities. ... much of the equity of recently privatized firms has been acquired by non-Ghanaians..."*

Insider trading and speculative trading has also been attributed as a major factor hindering the efficient operation in Sub Saharan Africa region.[189] The problem arises from the fact that share ownership is dominated by a few large companies which restricts open trading.[190] Ironically, despite the common knowledge of the malpractice, no one has been prosecuted because of ineffective law enforcement[191].

[180] Section 3 (3) of the Companies Act 2002 which became operation in 2006.
[181] Lemayon L.Melyoki, *Ibid*. at 61.
[182] *Ibid*.
[183] *Ibid*.
[184] *Ibid*. at 90.
[185] *Ibid* .
[186] *Ibid* at 91.
[187] *Ibid* .
[188] Charles R.P. Pouncy, *Ibid*. at p. 104 and K.R. Jefferis et al, *Ibid*.
[189] Pouncy, *Ibid*.
[190] See K.R. Jefferis et al, *Ibid*.
[191] See http://www.mbendi.co.za/exch/1/p0005.htm last accessed on November 15, 2008.

3.1 The Dar es Salaam Stock Exchange

The Dar es Salaam Stock Exchange (DSE) was incorporated in September 1996 as a private company limited by guarantee and not having a share capital under the Companies Ordinance 1932.[192] The formation of the DSE did not follow the stages of growth[193] of a stock exchange for it was made possible and facilitated by the enactment of the Capital Markets and Securities Act, 1994 and the establishment of the Capital Markets and Securities Authority (CMSA), the securities industry regulatory body mandated to promote the enabling environment for the development of capital markets in Tanzania and regulating the securities industry.[194] Trading activities at the DSE commenced on 15th April 1998 after two years of background preparatory work under the stewardship of the Government through the Capital Markets and Securities Authority. The opening of the trading floor coincided with the listing of TOL Limited (formerly Tanzania Oxygen Limited), as the first company on the new exchange to issue an Initial Public Offering (IPO).[195]

The DSE governance structure is made up of three vertical tiers.[196] The General Meeting of the members of the company provides policy and operational direction and is the supreme decision making body. The Governing Council provides oversight and strategic direction and implementation of the decisions of the General Meeting. All the governing functions of the DSE are vested into the Council which is accountable to the General Meeting. The Management of the DSE under the leadership of the Chief Executive Officer is vested with powers to run the day-to-day activities of the DSE. It is composed of the CEO and Managers, is vested with powers to run the day-to-day activities of the DSE. The Management reports to and is accountable to the Governing Council.

3.2 Broker, Dealers and Advisors

The Capital Markets and Securities Authority (CSMA) is mandated to regulate brokers, dealers and advisors operating in the Dar es Salaam Stock Exchange.[197] Such operators are required to observe code of conduct and honest; although there is lack of

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[192] (Cap. 212). See http://www.darstockexchange.com/history.asp last visited on November 12, 2008. DSE a non-profit sharing body created to facilitate the Government of the United Republic of Tanzania implementation of the economic reforms and in future to encourage the wIbider share ownership of privatized and all the companies in Tanzania and facilitate raising of medium and log-term capital.

[193] See Rose. W. Ngugi, *Ibid*.

[194] *Ibid*.

[195] *Ibid*. Trading takes place throughout the week from Mondays to FrIbidays (except public holIbidays) starting from 10.00 a.m. to 12.00 noon. However due to the low level of activity, trading session's ends before 12.00 noon.

[196] The DSE is a body corporate whose organogram is stipulated under the company's Articles of Association of the DSE. The governing organ of the DSE is the Council of the Exchange, which consists of 10 members representing various interest groups in the society.

[197] See CSMA Annual report 1999/2000 at p. 16 available at http://www.cmsa-tz.org/downloads/public.php.

malpractice cases, the CMSA has taken disciplinary actions against malpractices.[198] In 1999, Exim Securities and Investment Company licence to operate as broker dealer was withdrawn after being found guilty of malpractices.[199] The Brokers and dealers need to be more vibrant in facilitating the accessibility of allocating resources to small and medium scale enterprises. Drawing a lesson from the United States of America, it is a evident small and medium sized business entities or large companies which are not listed at the Dar es Salaam bourse can access capital and related securities funding through an over the counter transactions which may be assisted by a computerized network. Capturing the experience of the dealers experience in the USA and Europe Bonnello states:-

> *"Thousands of companies do not list their stock on any exchange. These stocks make up the over-the-counter (OTC) market. The largest of these companies are traded on the Nasdaq Stock Market. Nasdaq stands for National Association of Securities Dealers Automated Quotation system. The member countries of the European Union (EU) have an equivalent market, called EASDAQ. Nasdaq is a shareholder in and provides operational advice to EASDAQ. NASDAQ and EASDAQ operate like exchanges, but instead of having central locations, their specialists are located at computer terminals all over the United States and Europe. Trades are carried out primarily online through computer networks. Companies that list their stock on Nasdaq and EASDAQ are generally smaller than those listed on centralized exchanges."* [200]

3.3 Investors participation: Institutional and private investors

Active participation of stakeholders in stock exchanges is vital for sustainable liquidity which has results in a positive relationship with economic growth which is central to the establishment of capital markets in emerging economies.[201] Institutional investors have been very active in participating in the activities of capital markets in Tanzania.[202] These include pension funds such as the National Social Security Fund (NSSF), the Parastatal Pension Fund (PPF), the Local Authorities Pension Fund (LAPF) and Government Employees Pension Fund (GEPF); private local and foreign companies and collective investment entities such as the Unit Trust of Tanzania (UTT) and National Investment Company Limited (NICO).[203] In order to pave the way for public ownership of privatized public companies and corporations trading at the Dar es Salaam Stock

[198] *Ibid*.
[199] *Ibid*.
[200] Frank J. Bonello, "Stock Exchange" Microsoft® Student 2007 [DVD]. Redmond, WA: Microsoft Corporation, 2006.
[201] See , Capital Markets and Securities Authority, A study on feasibility and implementation of the appropiate market segments for the Capital Markets in Tanzania (Synthesis), 16th June 2001 at p.1 available online at http://www.cmsa-tz.org/downloads/public.php last accessed on February 21, 2009.
[202] *Ibid.* at 3.
[203] See Capital Markets and Securities Authority, A Study on Feasibility and Implementation of the Appropriate Market Segments for the Capital Markets in Tanzania, Final Report Vol. 1 at p. 82 available online at http://www.cmsa-tz.org/downloads/public.php.

exchange, the Government established the Unit Trust of Tanzania (UTT) a collective scheme of pooling savings for productive investments.[204]

One the pitfalls in the active participation of institutional and private investors in the capital and securities market has been the fact that most large companies in Tanzania which are household names all over Tanzania remain private companies whose shares and securities are not traded at the Dar es Salaam bourse. It is vital that competition for resources in the operation of the capital and securities market should also be beefed up by a vibrant mergers and acquisition business. It is heartening to see that the government of the United Republic of Tanzania has been taking initiatives to make sure that some household name companies are required to enlist at the Dar es Salaam bourse so that the members of the public can share in their successes. For example, the telecommunication companies, which since 1990s remained foreign and privately owned were required to enlist at the bourse but fiercely opposed such legislative initiatives. On the other hand, the mining companies have also not been key players in offering shareholding opportunity to the general public. It is vital that such big players in the economic plane to utilize the opportunity offered by the capital and securities market to share the risks and gains with the local communities. Underscoring the need for symbiotic relationship between mining companies and the local communities in Canada, one author states:-

> *"... Mining continues to be controversial because it has generated costs of an environmental, social and financial nature, especially at the level of local communities. The benefits, which could accrue to the local communities, have the potential to be more substantial than they have been in the past. Indeed, the principal objective of the new generation of mine enterprise and community relationship is to improve the net benefits of mining activity for the benefit of the local communities which were often overlooked in the past..."*[205]

3.4 Commercial Banks

Commercial banks have also been very active in the promotion of capital markets in Tanzania. Some select banks participated in the IPOs and although many did not lend to individual customers to buy securities during the IPO some lent to institutional customers for that purpose.[206] Banks are the preferred strategy of raising capital for many companies in Tanzania.[207]There is a need for the banks to utilize the opportunities of

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[204] See Collective schemes empower communities, the Express editorial undated available at http://www.theexpress.com/express%20364/business/business_opinion.htm.

[205] See Archibald R.M. Ritter, "Canada: From Fly-In, Fly –Out to Mining Metropolis' in Gary McMahon and Felix Remy (eds.), *Large Mines and the Community: Social Economic and Environmental Effects in Latin America, Canada, and Spain* Washington D.C.: The World Bank/IDRC, 2001 at 223-261.

[206] See , Capital Markets and Securities Authority, A study on feasibility and implementation of the appropiate market segments for the Capital Markets in Tanzania (Synthesis), 16th June 2001 available online at http://www.cmsa-tz.org/downloads/public.php.

[207] See Capital Markets and Securities Authority, A Study on Feasibility and Implementation of the Appropriate Market Segments for the Capital Markets in Tanzania, Final Report Vol. 1 at p. 97 available online at http://www.cmsa-tz.org/downloads/public.php. In the study, 42.9 respondents stated that bank loan is the main strategy and mechanism of raising capital for companies operations.

making funding available to business entities through securities which are easily transferrable at the capital and securities markets. This is especially important for emerging entrepreneurs who cannot meet the stringent commercial loan facilities offered by banks because they do not own property which can secure the loans as collateral. The banks operations should focus not only on profit but also to promote enterprises development among the majority of the members of the general public in order to contribute towards eradication of poverty. The banks should avoid the weaknesses of the Big Three which although they dominated the banking industry in Tanzania but they promoted foreign investors at the expense of the local communities investments. The community banks such as the Dar es Salaam Community Bank (DCB) should play a central role in using securities at the bourse a reliable source of capital for the small and medium scale business people.

3.5 Commercial Court

In 1999, Tanzania established the Commercial Court, as a division of the High Court of Tanzania under amendments of the Civil Procedure Code Act of 1966[208] and the Law Reform Commission of Tanzania Act of 1980.[209] It was established as one of the measures to enhance efficiency and beefing up the legal and institutional structure reforms.[210] The courts in Tanzania for many years, instead of resolving expeditiously commercial and financial disputes, became notorious for dilly-dallying and frequently frustrated transactions in favour of the wrong doers.[211] The Courts in Tanzania in the post Arusha Declaration era and the liberalization era had very few commercial or corporate law disputes to adjudicate as the role of private sector declined and the public parastatal became the norm.[212] There are calls for an active role in dispute settlement so as to enable growth of the economy, as Dr. Bwana puts it:

> *"...the courts should become principal tools for the promotion of business growth....the law and the courts in particular must move faster and be more responsive to social or business change. The courts, which interpret the law, should not only frustrate the positive changes in society but they should also not remain static while*

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[208] Act No. 49 of 1966.

[209] See http://www.state.gov/e/eeb/ifd/2008/101015.htm accessed on November 10, 2008.

[210] Ndulu, B.J. and Charles Mutalemwa, *Ibid*, p.121

[211] Dr. Steven Bwana, 'The role of courts in supporting financial sector reforms in Tanzania', a paper presented at the Tanzania Bankers Association Public Lecture, April 20th, 2006 available online at http://www.tanzaniabankers.org/TBA_%20Public_%20Lecture_%20Paper.pdf at p. 3. Dr Bwana is a Justice of the High Court of Tanzania Commercial Division.

[212] See N.N.N. Nditi, 'The Court of Appeal of Tanzania and the Development of Commercial Law' in *Eastern Africa Law Review*, Special Issue on the 10th Anniversary of the Court of Appeal, Vol 16 Dec. 1989 No. 2, Dar es Salaam: Faculty of Law, University of Dar es Salaam 1989 at pp.62-88 at 62. The author is of the view that not only were the courts unwilling to entertain such cases but also that most litigation involving ownership of shares in private companies were mostly centred on application of contract law. The same view is shared by A. Bahati in 'The Court of Appeal and the Development of the Laws Relating to Commercial Transactions' in *Ibid*. at 89-99. In both works various decisions of the Court of Appeal of Tanzania between 1979 and 1989 are discussed *in extenso*.

> *everything else moves on. Courts must develop and adopt themselves to the signs of time in society……."*[213]

4.0 ISSUES IN CAPITAL AND SECURITIES MARKET REGULATION IN TANZANIA

In order to find and address the missing links that impinges the effectiveness of the capital and securities market, a number of issues have to be addressed. These include:-

4.1 Compliance, monitoring and enforcement

The legal and regulatory instruments relating to the administration of the capital and security markets need sound enforcement. Laws and regulations which are not enforced are as good as a toothless lion. In the United States of America weak laws which were not enforced were among one of the main reasons for the Great Depression and the need to enact stronger disclosure legislation during the New Deal era. Tanzania has resolved not to repeat such a mistake. The Capital Markets and Securities Market is vigilant in ensuring that laws and regulations are enforced. For instance, on the eve of the Initial Public Offering of the National Microfinance Bank (NMB), The Capital Markets and Securities Authority issued a public warning against unlicensed brokers and dealers on the issue.[214] The CMSA warned: "the public should be cautious of advertisements inviting them to buy NMB shares through a company called C.V. Securities and an individual known as C.V.Okhal. C.V. Securities is not licensed by CMSA to deal in securities market operations."[215] The measures were taken to protect the public against an agent of a registered broker who had issued advertisement on the internet.[216]

4.2 Capacity Building

The nascence of the emerging capital markets in Tanzania, South Africa and other African, Asian and Latin America countries make capacity building one of the most profound challenges. The need for capacity building in developing countries is aptly capture by the Tanzania Human and Development Report 2009 which points out that:-

> *To effectively and efficiently undertake the responsibilities …, it is vital [for the state] to create and maintain a highly-skilled and committed bureaucracy. To achieve this, government staffing must be characterised by recruitment and promotion based on demonstrated ability, salaries must be competitive with the private sector, and high performance standards must be upheld.*

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[213] *Ibid.* at 3.

[214] See Joseph Mwamunyange, 'Tanzania: Market Regulator Issues Alert Over Unlicensed Brokers', the East African, August 31, 200 available online at http://allafrica.com/stories/200809010511.html.

[215] *Ibid*.

[216] *Ibid*.

> *Efficient government systems are also essential. Experiences from other developing countries show that it takes time to build and transform a bureaucracy to achieve high performance. Given limited resources, it may be appropriate to adopt a deliberate approach which focuses efforts on progressively strengthening the bureaucracy, with priority on staff and systems in those institutions which are most strategic to realising the national vision of socio-economic transformation. Without a competent bureaucracy the danger exists that government itself can become an impediment to transformation, a source of government and system failure.*[217]

Recognising the human resources shortfalls, the reform processes have increasingly focused on capacity building of the key actors in the economy including regulators of capital and securities markets. Accordingly, the international financial institutions particularly the International Finance Corporation (IFC) and some bilateral development partners have been undertaking capacity building and financial sector deepening initiatives over the years in Tanzania and other Sub Saharan Africa countries.[218] The IFC is currently implementing a programme called the Efficient Securities Market Development (ESMID) to try to develop capital markets across East Africa by increasing the volumes and types of capital markets trading.[219]Tanzania has also made sure that experiences and best practices are studied from various jurisdictions before making major regulatory framework and operational plans.[220]The membership to regional and international bodies is also one of the strategies of making sure that emerging markets build their capacities.[221]

4.3 Regional integration and globalization

Capital markets all over the world are increasingly becoming interlinked[222], a situation which increase opportunities and vulnerabilities. Both East Africa and Southern Africa have witnessed initiatives towards either integration or inter-linkages to reflect the reality of globalization. In East Africa restrictions on foreign national and corporations participation has been lifted to reflect the global nature of the modern capital markets. In Southern Africa, similar trends to the East African have been noted. There have been

[217] Research and Analysis Working Group, The United Republic of Tanzania, "Poverty and Human Development Report 2009", Dar es Salaam: Mkuki na Nyota Publishers, 2009 at 205.
[218] See http://www.ifc.org/Africa last accessed November 18, 2008
[219]See http://www.ifc.org/ifcext/esmIbid.nsf.
[220] CMSA commissioned a study on implementation of the appropriate market segments for the Capital Markets in Tanzania in which it studied the experience of the United States of America, the United Kingdom, Malaysia, Pakistan, Mauritius, South Africa, Kenya, Uganda, Singapore, Zambia, Taiwan, Hong Kong and Thailand. See Capital Markets and Securities Authority, A Study on Feasibility and Implementation of the Appropriate Market Segments for the Capital Markets in Tanzania, Final Report Vol. 1 at p. 82 available online at http://www.cmsa-tz.org/downloads/public.php.
[221] See section on the Capital and Securities Markets and the Dar es Salaam Stock Exchange membership to regional and international bodies.
[222] K.R. Jefferis et al, Ibid. at 1. See also Ethiopis Tafara and Robert J. Peterson, A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework in Harvard Int'l L. J. Vol.48 No.1, Winter 2007, pp.32-68.

strong interlinkages between the Johannesburg Stock Exchange (JSE) and the nascent Botswana Stock Exchange (BSE) which was established in 1989.[223] The linkage is attributed to common membership between South Africa and Botswana in the Southern Africa Customs Union (SACU).[224] On the global scale, it has been noted that Sub Saharan Africa emerging capital markets are not linked directly to the Western capital markets in North America and Europe.[225]

4.4 Participation of institutions and the public

4.4.1 Institutions

The establishment of the Dar es Salaam Stock Exchange (DSE) necessitated the establishment of other institutions which participate in the operations of capital markets. There are currently six brokers/dealers and eleven advisers[226] but two institutions deserve more analysis.[227] These are the Unit Trust of Tanzania (UTT) and the National Investment Company Limited (NICO). The UTT is a trust incorporated under the Trustees Incorporation Act[228] on June 19th, 2003. It succeeds the Privatization Trust (PT) which was established by the Privatization Trust Act 1997[229]whose life span was only five years.[230] The establishment of the Privatization Trust reflects the challenge of promoting local participation in ownership of the privatized public corporations. As in many other developing countries which had to divest State ownership from commercial and business functions, a mechanism such as a Privatization Trust was a temporary measure in the process of transferring ownership through a public floatation through a stock exchange.[231] The UTT as a successor to the PT is vested with three-fold objectives which are to acquire and keep in trust public shares of privatized enterprises, to ensure shares held in trust are divested to the Tanzanian public in a manner that stimulate public participation in the capital markets and to establish, launch and manage collective investment schemes.[232]

4.4.2 Public awareness

The Capital and Securities Markets Authority (CSMA), the Dar es Salaam Stock Exchange (DSE) and the Privatization Trust (PT) and its successor the Unit Trust of

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[223] *Ibid* at p.3.
[224] *Ibid*.
[225] *Ibid*.
[226] The investment advisors includes all the broker/dealers and the African Banking Corporation, Aureos Tanzania Managers Ltd, Barclays Bank Tanzania Ltd, Consultants for Resources Evaluation Ltd, Deloitte Consulting Ltd, Standard Chartered Bank (T) Ltd and the Unit Trust of Tanzania.
[227] See http://www.darstockexchange.com/inv_adv.asp.
[228] Cap.318.
[229] Act No. 7 of 1997 available at www.parliament.go.tz/Polis/PAMS/Docs/7-1997.pdf.
[230] Section 3 (d) and Section 8 of the Privatization Trust Act 1997. Section 8 provided that:

> *8.-(1) If at the expiry of the Trust period the Trust holds shares the Board shall subject to sub-section (2) and (3) of this section, convert the Trust into a unit trust, the trustee or trustees of which shall be appointed by the Minister.*

[231] See United Nations Economic Commission for Africa (UNECA, Broadening Local Participation in Privatization of Public Assets in Africa, Addis Ababa: Working Paper Series ESPD/WPS/99/1.
[232] See http://www.utt-tz.org/module1.php?Ibid=1#mission.

Tanzania have embarked on public awareness activities for many years.[233] The DSE has been in the forefront in organizing visits, seminars, publications and brochures to create awareness on the basic fundamentals of investing and trading at the bourse.[234]

5.0 CONCLUSION AND RECOMMENDATION

5.1 Conclusion

In this paper an attempt has been made to review the challenges of regulating capital and securities market in the light of the context of the law and policy in the United Republic of Tanzania. Where appropriate in analyzing the regulatory framework and practice, some leaves have been drawn from other jurisdictions. The main thesis of this paper posits that the emerging capital markets in Sub Saharan Africa (SSA) are faced with the challenges of ownership, shifting posts in the still evolving regulatory policy structure, inward looking and perpetual lack of the capacity of facilitating vibrant capital markets despite the vital role that they could play to promote competition, efficiency and local and international ownership in corporate enterprises and allocation of resources. The underlying concern throughout this paper is the issue: how will such emerging capital markets in Sub Saharan Africa to develop sustainable capital markets that can contribute to the country's economic growth. There are multiple missing links that hinders the realization of sustainable capital and securities markets in Tanzania in particular and in SSA region in general.

The history of the evolution of the financial system in Tanzania shows that the access to financial services since colonial times has been at the disposal of the foreign investors and international investments at the expense of stifling the local investors. *Ab initio*, the establishment of a capital market was seen as the avenue through which parastatals which were divested and the government retain a percentage of the shareholding in the anticipation of off loading them gradually to the members of the general public, led to the phenomenon of the Dar es Salaam bourse to come to life only during initial public offering. To address this abnormality, it is vital that the operation of the capital and securities market should offer an efficient and competitive pool of funding for promoting access to capital for enhancing enterprises including private companies. On the other hand, innovative products should be designed to enable small and medium scale enterprises to access capital through securities transferrable at the capital markets or through the over the counter trading even when such lesser players in the economy are not listed. In the alternative, a secondary capital market should be established to cater for the needs of the small and medium scale enterprises. While Tanzania is focusing on poverty eradication, access to capital seems to be a major hindrance to the entrepreneurial minded members of the general public to break into business. It is also envisioned that mergers and acquisitions could also play a vital role in promoting access to capital to enterprises, which in the long run, will encourage private companies to go public and share the quest for wealth creation with the members of the general public.

Limited knowledge on the members of the public and the professionals involved in the operations of the capital and financial capital is also a missing link that needs to be addressed. The courts have commented on the ineptitude and unawareness which has

[233] *Ibid*.
[234] See http://www.darstockexchange.com/inv_adv.asp.

been witnessed in administering securities over the years. There is an urgent need to build the capacity of various professionals and support staff responsible for handling securities in private sector corporate bodies, central government, local governments, civil society and the general public.

5.2 Recommendations

In all, there is a need for capacity building, ownership and increased regional integration. It is recommended that more research is needed to determine the extent of the challenges and bottlenecks facing capital markets in Tanzania in particular and in Sub Saharan Africa in general. Equally important is the need to make sure that capital markets operate efficiently and sustainably to promote competition among the entities participating in the market. It is also recommended that the government of the United Republic of Tanzania should work on the recommendations made by the the Joint International Monetary Fund (IMF) and the World Bank and Financial Sector Assessment Programme (FSAP). It is evident that legal and regulatory framework need to be reviewed comprehensively and make the relevant amendments or repeals. The focus of the reform should also focus on understanding of the recent trends in the regulation of capital and securities market during the financial meltdown as well meeting the best practices in the industry worldwide. It is also for the government stakeholders and the general public to enhance and promote understanding of securities and nurture a culture of making securities a treasured part of the day to day ownership and transactions among the private sector, the civil society and the general public.

The role of the capital market in Tanzania is currently quite dismal and most of the firms that have been privatized entities have become non-performing[235]. Accordingly, as outlined in this paper above, effective measures that can make the dream of a market driven economy a reality must be implemented in Tanzania in particular and Sub Saharan Africa region in general. Innovation should also be central in the operations of the various actors and stakeholders in the capital market. The silent wealth such as local government bonds, for example, should be central in beefing up fund raising opportunities for local authorities in financing public works and major investments that need the pooling of resources from the members of the general public. On the other hand, local entrepreneurs should also have access to financial opportunities to fund their operations through the capital and securities markets. Banks and other financial institutions can play a vital role in enhancing a pool of resources to be channeled towards the most viable and feasible venture. On the same vein, the private sector and regulators they should work rigorously towards competitive mergers and acquisitions among the various economic entities so that the number of the public owned companies and trade in corporate and other securities is enhanced. Only when Tanzania addresses the missing links in the capital and securities market's Midas touch in the economy will the market work as a panacea in promoting competitive funding for enterprises operations and economic well being of the majority Tanzanians through a vibrant secondary market in various types of securities.

[235] See Mbonea Israel, "Tanzania Government to Repossess Loss Making Privatized Companies" in *East African Business Week*, 10 August 2008 Kampala available at www.busiweek.com/index.php?option=com_content&task=view&Ibid=274&ItemIbid=2.