



THE LAND LAWS OF KENYA

A SUMMARY OF THE CHANGES

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October 2012



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THE NEW LAND ACTS

Pursuant to the Constitution of Kenya, three Acts of Parliament have been enacted and came into force on 2nd May, 2012:

- Land Act, 2012
- Land Registration Act, 2012
- National Land Commission Act, 2012

THE REPEALED ACTS

The following Acts have been repealed:

- The Indian Transfer of Property Act, 1882
- The Government Lands Act
- The Registration of Titles Act
- The Land Titles Act
- The Registered Land Act
- The Wayleaves Act; and
- The Land Acquisition Act

HIGHLIGHTS

Highlights of the changes brought by the new Land Acts:

- To have one registration system and one Land Registry - **Note: this has not yet been implemented.**
- Titles to be called certificates of lease or certificates of title - **Note: this has not yet been implemented.**
- 3 categories of land have been created – public land, community land and private land
- New laws have been introduced dealing with ownership of land by non-Kenyan citizens.
- Consent of spouse to certain transactions is a key change.
- Land and Environment Court
- Several changes have been brought to laws on leases and the laws on charges.
- Format of documents have changed – **Note: no forms have been prescribed as yet.**
- National Land Commission – **Note: the Commission is not yet constituted.**

Changes have been put in place but a lot remains to be done in terms of implementation thereby causing uncertainty.

CLASSIFICATION OF LAND

Under the new laws, land has been classified into (a) Public Land; (b) Private Land; and (c) Community Land.

- Public land is defined pursuant to Article 62 of the Constitution and includes unalienated land, land occupied by a State organ, land transferred to the State, land to which no heir can be identified, minerals, forests, reserves, national parks, water catchment areas, sea, lakes, rivers, land between high water mark and low water mark, any land not classified as private

land or community land. The National Land Commission is responsible for administration of public land.

- Community land is defined pursuant to Article 63 of the Constitution and includes land lawfully registered in the name of group representatives, land lawfully transferred to a specific community and any land declared to be community land by an Act of Parliament. Community land shall be managed in accordance with the law enacted pursuant to the Constitution. However, the law has not yet been enacted and the Constitution provides for a 5 year period within which legislation has to be enacted.
- Private land includes registered land held by any person under freehold tenure, land held by any person under leasehold tenure and any other land declared private land under any Act of Parliament.

Land can be converted from one category to another.

OWNERSHIP OF LAND BY NON-KENYAN CITIZENS

A significant change under the new laws is that:

- freehold land cannot be owned by a non-Kenyan citizen; and
- a leasehold interest of over 99 years cannot be held by a non-Kenyan citizen.

Therefore any freehold land owned by a non-Kenyan citizen is deemed to have been converted into a 99 year leasehold interest commencing from 27/8/2010 and any leasehold interest with an unexpired term of over 99 years is deemed to be converted into a 99 year leasehold interest commencing from 27/8/2010.

As yet there is no procedure in place for conversion of freehold title to leasehold so, for example, if prior to the coming into effect of the new Constitution a non-Kenyan citizen owned freehold land and you conduct a land registry search today the result will still show the non-Kenyan citizen as owning the land on freehold tenure.

The Constitution states that a body corporate/company is deemed to be a Kenyan citizen only if it is 100% owned by Kenyan citizens. Therefore a company with even one shareholder who is a non-Kenyan citizen would only be entitled to own a leasehold interest of 99 years or less.

It is unclear whether a freehold title or title with an unexpired term of over 99 years that is owned jointly by a Kenyan citizen and a non-Kenyan citizen would be converted to a lease of 99 years or whether the tenure would remain intact.

REVERSION OF TITLE – EXPIRY OF LEASEHOLD TERM

Section 13(1) of the Land Act provides: “Where any land reverts to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenyan citizen and that the land is not required by the national or the county government for public purposes.” (emphasis ours).

No such right is available for a non-Kenyan citizen; non-Kenyan citizens need to check their titles and be aware of the above change. On expiry or termination of a leasehold term held by a non-Kenyan citizen, the land will vest in the national or county government pursuant to section 12(6) of the Land Act. The land then can be allocated in accordance with criteria prescribed by the National Land Commission. The Commission has not yet been constituted and therefore there are no criteria in place.

CONTRACTS OVER LAND

A contract for disposition of an interest in land has to be in writing, signed by all parties and witnessed. Otherwise, neither party can bring a suit in relation to the contract. However, this does not apply to a contract made in course of public auction.

It is not recommended to give early possession on a sale of property as, if the purchaser is in breach, then an elaborate procedure needs to be followed to regain possession which involves service of a notice detailing the breach, applying to court to seek an order for possession and defending any claim brought by the purchaser for relief against rescission of the contract.

PREJUDICIAL DISPOSITIONS

Laws relating to prejudicial dispositions have been introduced under the Land Registration Act. If land is disposed by a person who is unable to pay his creditors in an attempt to delay or defeat the exercise by his creditors of any right to recourse to the land or any interest therein, the creditor may apply to court to set aside the prejudicial disposition. For example, John owns a plot of land and is in debt and is worried his creditor may obtain a court order to attach his land to recover the debt, John may decide to transfer his land to a good friend or grant a long lease of his land to a relative so as to prevent the creditor from attaching his land. If the creditor can prove that John's intention was to defeat his claim to John's property (for example, by proving that John sold his plot at an undervalue price) then the transfer may be set aside. A transfer would not be set aside against a bona fide purchaser for valuable consideration who has no knowledge of the creditor's claim.

There is no time frame within which a prejudicial disposition may be set aside. Banks would need to be careful and include as part of their due diligence procedure a check that the registered owner proposing to charge his land to the bank did not acquire the land under a circumstance which could fall under a prejudicial disposition.

RIGHTS OF SPOUSE TO LAND

Under the Land Registration Act, a spouse will acquire an interest in his/her spouse's land if the spouse contributes by labour or other means to the productivity, upkeep and improvement of the land. The spouse's interest shall be recognized as if it is registered against the title to the land. Under the Land Registration Act, marriage includes a civil, customary or religious marriage.

CONSENT OF SPOUSE REQUIRED FOR DISPOSITION OF LAND

Where a spouse who holds land or a dwelling house in his/her name individually and undertakes a sale of that land or dwelling house, the purchaser shall be under duty to inquire whether the spouse has consented to the sale. If consent has not been obtained and the non-consenting spouse challenges the sale, then the transfer to the purchaser is void. This could create very serious repercussions for the purchaser.

No timeframe has been specified within which a non-consenting spouse can bring an action to challenge the sale on the basis that his/her consent was not sought. If the vendor's spouse refuses to consent, then this would stop the vendor from being able to sell the vendor's property.

This would also be applicable when a person wishes to lease his/her land.

The requirement for spouse's consent extends to all land and is not limited to matrimonial property.

KEY CHANGES IN THE LAWS OF LEASES

- **Long-term leases**

Section 54(5) of Land Registration Act provides that the Registrar shall register long-term leases and issue certificates of lease over apartments, flats, maisonettes, townhouses or offices having the effect of conferring ownership, if the property is properly geo-referenced and approved by the statutory body responsible for the survey of land.

Geo-referencing is defined as “the reference of an object using a specific location either on, above or below the earth’s surface”. In lay terms this means a survey of a property and the preparation of a survey plan. The Commissioner of Lands has issued a Practice Instruction to all Land Registrars to the effect that until such a time that the Director of Surveys shall have put in place the process of geo-referencing and approvals by the relevant statutory body the registration of long term leases shall continue without the requirement of geo-referencing and in line with the previous procedures.

- **Unlawful eviction**

A new provision dealing with unlawful eviction is part of the new land laws. A tenant who is evicted contrary to the terms of his lease is immediately relieved of the obligation to pay rent or other monies due under the lease or from performance of any covenants of the lease. A tenant is considered as having been evicted if on the commencement of the lease the tenant is unable to obtain possession of the land or buildings or part thereof as a result of any action or non action of the landlord contrary to the express or implied terms of the lease.

This would arise, for example, when a landlord has entered into a lease with a tenant in respect of premises to be comprised within a new development but at the time of the commencement date expressed in the lease the development is not ready such that the tenant cannot obtain possession of the premises at the commencement date expressed in the lease.

A tenant who is aggrieved as a result of unlawful eviction may commence an action against the landlord for remedies.

Landlords of new developments need to be careful of this provision.

KEY CHANGES IN THE LAWS RELATING TO CHARGES

The Land Act applies to all charges including those created before the commencement of the Land Act.

- **Types of Charges**

There are currently only two types of charges that are now capable of being created under the new land regime. These are:

- **Informal charges**

The New Laws now recognize a form of charge known as an informal charge that can be created quite simply. The charge can take 2 forms:

- a written and witnessed undertaking, the clear intention of which is to charge the chargor’s land, for example, a letter of offer requiring a charge to be created which is consented to by the borrower may now be construed to be an informal charge; and
- a chargor depositing documents of title to the land, for example, a certificate of title or a certificate of lease.

It is possible to register an informal charge so banks are likely, in the interest of time, to take this type of charge as they await the formalities of preparation of a formal charge. However it is not likely to be a popular security as a chargee holding an informal charge may only take possession of or sell the land on obtaining a court order to that effect.

- **Formal charges**

Formal charges only take effect on registration and a chargee cannot exercise any of its remedies under the charge unless it is so registered.

- **Titles issued under Government Lands Act and Land Titles Act**

Titles to GLA and LTA property are not deemed to be titles under the new Act and will need to be examined and re-issued. In addition, unlike the registers for RTA and RLA land that will continue to be maintained, the register of GLA and LTA land will need to be prepared afresh. Accordingly, until this process is done, it will not be possible for a bank to take security over GLA and LTA land. This means that if the land you are holding has a GLA or LTA title, it will not be possible to offer this land as security until new titles are issued.

- **Transfer of charges**

The Act recognises transfers of charges at the request of the chargor in writing at any time other than when a chargee has taken possession.

A similar request may be made by the following persons, subject to the consent of the chargor:

- any person who has an interest in the land that has been charged;
- any surety for payment of the amount secured by the charge; and
- any creditor of the chargor who has obtained a decree for sale of the charged land (it is not clear though why a creditor would need the chargor's consent if he has a decree).

The chargee on receiving written request and on payment of the amount secured by the person(s) making the request and the performance of all obligations secured by the charge shall transfer the charge to the person named in the written request.

There is a section under the Finance Act amending the Stamp Duty Act to the effect that stamp duty will not be charged when a person transfers a charge from one bank to another. This section came into effect on 2nd May, 2012.

- **Fetter to Right to Discharge**

A chargor is entitled to discharge a charge at any time prior to the sale of charged land. Any provision that seeks to deprive the chargor of the right to discharge or fetter the exercise of this right or stipulates a collateral advantage that is unfair or unconscionable or inconsistent with the right to discharge is void.

A chargee may provide in a charge that a chargor may exercise its right to terminate a charge before expiry of its term and such chargor, (i) shall give one month's notice; or (ii) shall pay one month's interest at the prevailing interest rate or a lesser rate as may be agreed and all other monies secured by the charge.

- **Reopening of charges**

The Land Act has now vested on the court the power to re-open a charge. This essentially means that even though all the formalities and approvals were in place at the time of entering into a charge and a valid security is created, the court may "re-open" the charge or a chargor, chargee or the Land Registrar may apply to court to reopen a charge.

• Remedies available to a chargee

Remedy	Duration (approx)	Points to Note
Sue for Debt	4/5 Months	Applies if Chargor is personally liable Subject to exhaustion of other remedies
Appoint Receiver	4/5 Months	Implied in all charges
Lease the Land	4/5 Months	Lease to reserve best rent reasonably obtainable Term of lease to be 15 years or less
Take Possession	4/5 Months	Chargee can only renew a lease but cannot grant one Chargee liable for deterioration of land and buildings and rents / profits
Sell the Land	4.5/5.5 Months	Notice to various persons has to be given Best Price – Chargee may be in breach if price is less than 25% below market value No indemnity or compensation to Chargee for breach of obligations Attempt to exclude these provisions is void Purchase by Chargee – require leave of Court

This information was provided by Anjarwalla & Khanna.

The contents of this article are intended to be of general use only and should not be relied upon without seeking specific advice on any matter. For more information on land law in Kenya please contact **Mona Doshi** (mkd@africalegalnetwork.com) or your usual contact at Anjarwalla & Khanna.

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