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IKM CONVEYANCING ALERT

NEW LAND LAWS IN KENYA, 2012 – WHAT YOU NEED TO KNOW

28th May 2012

INTRODUCTION

The Constitution of Kenya promulgated on the 27th of August, 2010 has been one of the most significant pieces of legislation since independence.

One of its primary aims is to ensure that land in Kenya is held, used and managed in an equitable, efficient, productive and sustainable manner. The new land laws give effect to the provisions of Chapter 5 of the Constitution which aimed to revise, consolidate and rationalize existing land laws.

These new statutes consolidate the existing legislation on land in Kenya and apply to all categories of land, whether declared by the Constitution as public, private or community land.

The new laws (the “Acts”) with the commencement date of 2nd May 2012 are:

1. The National Land Commission Act, 2012: An Act of Parliament to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes.

2. The Land Registration Act, 2012 (LRA): An Act of Parliament to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.

This Act has repealed:-

a) The Indian Transfer of Property Act, 1882
b) The Government Lands Act (Cap. 280) (“GLA”)
c) The Registration of Titles Act (Cap. 281) (“RTA”)
d) The Land Titles Act (Cap. 282) (“LTA”)
e) The Registered Land Act (Cap. 300) (“RLA”)

3. The Land Act, 2012 (LA): An Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes.

This Act has repealed:-

a) The Wayleaves Act (Cap. 292)
b) The Land Acquisition Act, (Cap. 295)

Some of the land statutes that have not been repealed are as follows:-

a) Land Control Act
b) The Sectional Properties Act
c) The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act
d) The Rent Restriction Act
e) The Distress for Rent Act
f) The Physical Planning Act
g) The Land Disputes Tribunals Act.

NATIONAL LAND COMMISSION ACT

This Act establishes a Land Commission pursuant to Article 67 of the Constitution. It contains details of the functions, powers, composition and administration of the Commission.

Some of the key areas over which the Commission can exercise powers include:

a) management of public land;
b) recommendations on national land policy;
c) monitoring land use planning and natural resources;
d) alienation of public land with the consent of the national and county governments; and
e) developing and encouraging alternative land dispute resolution mechanisms.

LAND REGISTRATION ACT AND LAND ACT, 2012 - HIGHLIGHTS

1. The Registers and Registries

The National Land Commission is empowered, in consultation with national and county governments, to constitute an area or areas of land to be a land registration unit under section 6 of the LRA. Every registration unit is to be divided into registration sections identified by distinctive names, and may be further divided into blocks with distinctive numbers or letters or combinations of numbers and letters.

Pursuant to section 6(6) of the LRA, the land registration units shall be established at county level and at such other levels to ensure reasonable access to land administration and registration services.

Section 104 of the LRA provides that registers maintained under the repealed Acts are deemed to be the land registers for the corresponding registration unit established under the Act.

Comment 1

Under the saving and transitional provisions of the LRA (section 105) the titles issued under the repealed RLA and RTA shall be deemed to be titles issued under the new Acts. Over time the registrar will issue new titles in the prescribed form. This appears not to be the case for GLA and LTA titles which “as soon as conveniently possible” will be examined and registered. No timelines are indicated for this exercise. The implication appears to be that the GLA and LTA titles will remain valid but will only operate under the new Acts once examined and registered. No guidance is given as to whether holders of GLA and LTA can transact with the title documents they hold pending examination and registration. Given the lack of express and clear guidelines, we anticipate delays on GLA and LTA transactions pending clarification and we advise that caution be exercised when dealing with these titles.

2. Registrars

The LRA provides for the requisite qualifications and the manner of
appointment to the office of the registrar. Registrars under the new regime are:

a) Chief Land Registrar  
b) County Land Registrars  
c) Land Registrars appointed under sections 12 and 13 of the LRA

**General Powers of Registrars**

The respective Registrars may:

a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question;

b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;

c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under the LRA is not performed;

d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and

e) order that the costs, charges and expenses as prescribed under the Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of the Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit (section 14, LRA).

3. **Effect of Registration**

Indefeasibility of title is emphasized under section 24 of the LRA which is couched in similar terms as section 27 of the RLA and section 23 of the RTA and provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Equally, the registration of a person as the proprietor of a lease vests in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges and subject to all implied or expressed agreements, liabilities or incidents of the lease.

The rights of a proprietor can only be subject to any registered leases, charges, encumbrances, conditions and restrictions, if any, shown in the register; and to overriding interests envisaged in section 28 of the LRA.

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

The title of that proprietor shall not be subject to challenge, except:

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Certified copies of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar shall be received in evidence in the same manner as the original.
4. **Overriding Interests**

All registered land shall be subject to the following overriding interests which may subsist without their being noted on the register:

a) spousal rights over matrimonial property;
b) trusts including customary trusts;
c) rights of way, rights of water and profits subsisting at the time of first registration under the LRA;
d) natural rights of light, air, water and support;
e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
g) charges for unpaid rates and other funds which, are expressly declared by any written law to be a charge upon land;
h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
j) any other rights provided under any written law.

**Comment 2**

*Matrimonial Property*: introduction of statutory rights for spouses deserves special mention. The LRA does not define the term “Matrimonial Property”. Attention should be drawn to the Matrimonial Property Bill, 2012 which shall make provision for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. The Bill provides for the definitions of “Matrimonial Property” and “Spouse”. Once enacted, it will make the provisions under the LRA and LA clearer. For the moment, the LA sheds some light and defines “marriage” as a civil, customary or religious marriage and defines “matrimonial home” as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.

Section 79(3) of the LA and section 93(3) of the LRA will impact on bank securities. Section 93 (3) of the LRA provides that where a spouse who holds land or dwelling house in his or her name individually undertakes a disposition of that land or dwelling house, the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, consented to the charge.

Section 79 (3) of the LA provides that a charge over a matrimonial home shall only be valid if the form of charge is executed by the chargor and any spouse of the chargor living in the matrimonial home or there is evidence to indicate that it has been assented to by the spouse(s). The term “spouse” has not been defined and there may be practical difficulties in ascertaining whether spousal consent has been obtained or not. There is also the added burden of identifying if a property is a “matrimonial home/property”.

Section 93 (4) of the LRA provides that if the spouse undertaking the disposition deliberately misleads the lender, or the assignee or transferee, the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition. (The transaction is thus voidable but not void ab initio).
A due diligence will need to be done in this regard. It shall also be prudent to incorporate a consent clause, warranties and indemnities in every charge given the uncertainty and practical difficulty in identifying spousal rights over properties.

5. Title Documents (Certificate of Title and Certificate of Lease)

Section 30 (1) of the LRA empowers the Registrar to issue a certificate of title or a certificate of lease if requested by a proprietor of land or a lease where no certificate of title or certificate of lease has been issued.

It is important to note that no certificate of title or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-five (25) years.

Section 31 (1) of the LRA provides that if a certificate of title or a certificate of lease has been issued, it must be produced on the registration of any dealing with the land or lease to which it relates (unless the Registrar dispenses with its production).

Where the disposition is a transfer, the certificate of title shall be cancelled and a new certificate issued to the new proprietor.

Under section 31(3) of the LRA, where the disposition is a charge, the certificate shall be delivered to the lender.

6. Dispositions of leases and charges

Section 32 of the LRA provides that upon the registration of any disposition of a lease or charge, the original and the duplicate of the lease or charge must be produced to the Registrar.

Particulars of the disposition are to be noted on the lease or charge and on the duplicate.

7. Where Title documents are lost or destroyed

Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease.

Evidence of the loss or destruction of the previous certificate of title or certificate of lease is required to satisfy the Registrar.

Under section 33 (2) of the LRA a statutory declaration that the certificate of title or a certificate of lease has been lost or destroyed is to be made by all the registered proprietors, and in the case of a company, the director, and where the property has been charged, the lender.

Upon the Registrar being satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.

If a lost certificate of title or certificate of lease is found, it should be delivered to the Registrar for cancellation.

Comment 3

It should be noted that the gazettement period has been reduced from 90 days as was provided by the RTA to 60 days.

8. Searches and copies of records
Section 34 of the LRA states that any person, who requires an official search in respect of any parcel of land, is entitled to receive particulars of the subsisting entries in the register, certified copies of any documents and the cadastral map, or plan filed in the registry upon payment of the prescribed fee.

9. **Dispositions and dealings affecting land**

Instruments of disposition of an interest in land must be registered.

The LRA defines disposition as

a) *sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer* and includes the creation of an easement, usufructuary right or any other servitude or any other interest in land or a lease and any other act by an owner or land or under a lease whereby the person's rights over that land or lease are affected; or

b) *an agreement to undertake any such disposition.*

Pursuant to section 36(2) of the LRA, any unregistered instrument can only operate as a contract between the parties.

The Cabinet Secretary/Minister are empowered under section 36 (3) of the LRA to prescribe terms and conditions of sale which:

(a) shall apply to contracts by correspondence, subject to any modification or any stipulation or any intention to the contrary expressed in the correspondence; and

(b) may be made to apply to any other cases for which the terms and conditions are made available, where express reference is made to those terms and conditions.

Subject to the establishment of the National Land Commission, the Cabinet Secretary/Minister shall make regulations prescribing the time within which instruments presented for registration must be registered and providing for the supervision of the registration process to achieve the objectives of efficiency, transparency and good governance.

**Comment 4**

*Once effected, the regulations setting out the time limits within which instruments presented for registration must be registered shall be a welcome addition for efficiency and planning purposes.*

10. **Transfers (Sections 37 – 39 of the LRA)**

A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.

Transfers are to be completed by:-

a) Filing the instrument and registration of the transferee as proprietor of the land, lease or charge.

b) Obtaining the requisite consents from the relevant County Land Management Board.

c) Paying any rates and other charges due and payable.

d) Obtaining a Rent Clearance Certificate, certifying that no rent is owing to the national or county governments in respect of the land.

Transfers once registered must take effect immediately and shall not be conditional or subject to the fulfillment of any condition or at any future time.
No part of the land comprised in a register shall be transferred unless the proprietor has first subdivided the land and duly registered each new subdivision.

Comment 5
(1) Sections 37 and 42 of the LRA provide for transfer of land, lease or a charge ‘in a prescribed form or in such other form as the Registrar may in a particular case approve”. No prescribed statutory forms are currently available although under section 110, the Cabinet Secretary has the power to prescribe the forms to be used in connection with the Act. As has been noted in the past, such prescribed statutory forms only contain the basic minimum information and hence under the repealed RLA the Chief Land registrar was granted powers to approve other forms. This power appears to have been removed. What happens in the interim? It may be arguable that section 108 provides a possible solution as it states that until the Cabinet Secretary makes the regulations contemplated under section 110, any regulations/forms issued or undertaken before the commencement of the Act under the repealed Acts shall continue with the necessary alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the LRA. As an alternative, where necessary, this provision can be invoked in requesting the Registrar to approve new forms with variations to adapt them to the provisions of the new Acts.

(2) Section 39(2) of the LRA provides for consent from the relevant “County Land Management Board”. These Boards appear not to have been set up as yet and until established are likely to delay registration of Transfers.

(3) Section 42 of the LRA restricts transfers of portions of land unless the land has been sub-divided and new registers opened. Exceptions to this is registration of long-term leases and certificates of lease over apartments, flats, maisonettes, townhouses or offices which are exempt pursuant to section 54(5) of the LRA provided that these are properly geo-referenced and approved by the statutory body responsible for survey of land. The Survey department has had major constraints in the past in processing deed plans. The added burden to approve geo-referenced plans, in the absence of increased manpower and resources, will certainly result in delays in processing the deed plans or geo-referenced plans.

11. Execution of instruments of disposition of interest

a) Every instrument effecting any disposition under the Acts must be executed by each of the parties consenting to it.

b) Execution is to consist of appending the person’s signature on the instrument or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.

c) Execution by a corporate body, association, cooperative society or any other organization shall be effected in the presence of either an advocate of the High Court of Kenya, a magistrate, a Judge or a notary public.

d) Instruments executed out of Kenya (but within the Commonwealth) require endorsement or attaching of a certificate in a prescribed form
completed by a judge, magistrate, notary public or commissioner for oaths.

e) Instruments executed in a foreign country outside the Commonwealth require a certificate by any other person or class of persons as the Cabinet Secretary may prescribe.

Section 44(5) of the LRA requires a transferee, in addition to executing the instrument of transfer, to attach the following:

i. a copy of an identity card or passport;
ii. a copy of a Personal Identification Number (PIN) certificate;
iii. passport-size photographs;
iv. where applicable, a marriage certificate; and
v. such other identification documents as the Cabinet Secretary may prescribe.

12. Verification of execution

For the purpose of authentication, a person executing an instrument is required to:

(a) appear before the Registrar, public officer or other person as is prescribed; and

(b) be accompanied by a credible witness for the purpose of establishing identity, unless the person is known to the Registrar, public officer or other person.

The Registrar, public officer or other person verifying is required to identify the person and ascertain whether the person freely and voluntarily executed the instrument, and thereafter complete a certificate to that effect.

Under section 45 (3) of the LRA, the Registrar may dispense with verification in exceptional circumstances such as where the registrar ascertains that the verification cannot be obtained or can only be obtained with difficulty and is otherwise satisfied that the document has been properly executed.

13. Stamping

An instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the Stamp Duty Act.

14. Minors

Section 47 of the LRA allows the name of a person under the age of eighteen years to be entered in the register to enable the minor’s interest to be held in trust. However, such registration does not permit a person under the age of eighteen years to deal with land or any interest in land. It is however important to note that where a disposition by a minor whose minority has not been disclosed to the Register has been registered, the disposition cannot be set aside only on the grounds of minority.

15. Agents, Attorneys and persons under disability

No instrument executed by any person as agent for any other person shall be accepted by the Registrar unless the person executing it was authorized in that behalf by a power of attorney executed and verified in accordance with section 45 of the LRA.

Section 48(2) of the LRA requires the original of a power of attorney (or, with the consent of the Registrar, a copy certified by the Registrar) to be filed.

The guardian of a person under a legal incapacity may make an application, do any act and be party to any proceeding on behalf
of that person, and may generally represent that person as approved.

16. Leases

The new Acts provide extensive and in some cases, mandatory provisions governing lease transactions. Part VI of the LA contains the general provisions for leases.

The LA provides that parties to a lease made before the commencement of the LA may agree, in writing, to adopt or incorporate any of the provisions in this part of the LA. In short, the LA provides for retrospective application of the LA. This is unusual.

The LA also prescribes certain mandatory provisions that shall be implied in every lease. See section 65 of the LA.

Section 75 of the LA provides for specific provisions on forfeiture which are significant. There can be no exercise of the right of forfeiture unless the lessee is served with not less than thirty days notice. In addition, once served with a notice, the lessee has a statutory right to seek court relief from forfeiture. In making its decision, the court is empowered to look at the conduct of the parties and the circumstances of each case. The forfeiture provisions shall have effect notwithstanding any stipulations to the contrary in the lease and irrespective of whether the lease is registered or not.

The new provisions also provide that where a lessor’s consent is a requisite to do or not to do certain acts, there is deemed to be an obligation on the part of the lessor not to withhold consent unreasonably. Unreasonable actions include, but are not limited to, payment of fees (other than for consent) or imposing unreasonable conditions for giving of the consent.

Comment 6

Drafting of leases will need to be looked at afresh given the new changes to ensure that the mandatory provisions are incorporated and so are the specific forfeiture and other provisions.

17. Charges

Part V of the LRA and part VII of the LA are devoted to provisions relating to Charges.

17.1 Form and effect of Charges

Section 56(1) of the LRA provides that a proprietor may charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money’s worth, or the fulfillment of a condition. The charge should be in a form prescribed by the Cabinet Secretary under section 110 of the LRA. Section 79(1) of the LA also makes reference to a charge by an instrument in the prescribed form.

Section 79 (3) of the LA provides that a charge of a matrimonial home shall be valid only if executed by the chargor and any spouse of the chargor living in the matrimonial home or there is evidence that the document has been assented to.

Unless the lender’s remedies have been expressly excluded by instrument, the charge instrument must contain a special acknowledgement that the chargor understands the effect of that section.

The acknowledgement should be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal.

A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by
the charge on the date specified, the money shall be deemed to be repayable three months after the service of a written demand by the lender.

The charge is to be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.

Where applicable, land rent clearance certificate and the consent to charge, must be provided before a charge can be registered.

Sections 56(5) of the LRA and section 80(1) of the LA state that charge shall have effect as a security only and shall not operate as a transfer.

A proprietor whose land or lease is subject to a charge may create a second or subsequent charge in the same manner as the first charge and the same provisions shall apply, but any sale under the power expressed or implied in any such charge shall be expressed to be subject to all prior charges unless all those charges have been discharged.

Where a second or subsequent charge is to be created, the consent of the first chargee (lender) must be obtained before the second or subsequent charge is created.

Consent of the lender must be obtained where a charge contains a condition, express or implied, by the borrower, that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease. In such a case, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.

17.2 Execution of security documents
Section 44 of the LRA requires the documents to be executed by the chargor and lender.

Execution by companies should be in the presence of an Advocate, a magistrate, judge or a notary public.

17.3 Registration
Section 79 (5) of the LA provides that a formal charge shall take effect only when it is registered in the prescribed register and that a lender cannot be entitled to exercise any of the remedies under the charge unless it is so registered.

Sections 43 (2) and 56 (3) of the LRA also require charge instruments to be registered.

17.4 Informal Charges/Lien by Deposit of Documents
Section 79 (6) of the LA recognises that an informal charge may be created where a lender accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor’s land or interest in land, with the repayment of money or money’s worth, obtained from the lender (referred to as an “informal charge”); or the chargor deposits any document of title to the land (referred to as a “lien by deposit of documents”).

It is important to note that a lender holding an informal charge or a lien by deposit of document can only take possession of or sell the land which is subject of the informal charge or whose title document has been deposited with the lender by obtaining an order of the court to that effect.

Section 81(2) of the LA provides that informal charges shall rank according to the order in which they are made provided that a
registered informal charge shall take priority over any unregistered informal charge.

17.5 Consents required before registration of charge under the LRA
a) Spousal Consent - Matrimonial Property - Section 93(3) (a).
b) Consent by County Land Management Board (if required) - Section 39.
c) Consent by the Commission if not freehold - Sections 55 & 56(4).
d) For leaseholds, consent by the lessor – Sections 55 & 56.
e) Land Control Consent under Land Control Act (where required).

17.6 Clearance required before registration of charge under the LRA
National or County Rent Clearance if not freehold – Sections 39, Sections 55 & 56(4) of the LRA.

17.7 Tacking
Section 82(1) of the LA provides that a chargee may make provision in the charge instrument to give further advances or credit to the chargor on a current or continuing account.

Such a further advance shall not ordinarily rank in priority to any subsequent charge unless—
(a) the provision for further advances is noted in the register in which the charge is registered; or
(b) the subsequent chargor has consented in writing to the priority of the further advance.

Except as provided in section 82 of the LA, there is no right to tack.

17.8 Implied covenants by the Chargor
Section 88(1) of the LA provides for covenants, conditions and powers implied in charges, summarized as below:

a) to repay on appointed day;
b) to pay outgoings e.g. rent, rates etc;
c) to repair buildings and improvements;
d) to insure in joint name of chargor and lender;
e) to practice sustainable use of agricultural land;
f) not to lease or sublet for more than 1 year without the consent of the lender;
g) not to transfer without the lender’s consent;
h) to observe covenants in lease; and
i) to pay interest and principal on prior charges.

On failure by the chargor to pay outstandings and comply with the above covenants, the lender may remedy the breach and pay the outstandings and add the amounts thereof to the secured amount.

17.9 Variation of Interest Rate, Amount Secured by the Charge and the Term
Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the lender:-

(a) giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and
(b) stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge.

The amount secured by a charge may be reduced or increased by a memorandum which must comply with section 84 (5) of the LA and be signed:-
(i) in the case of a memorandum of reduction by the lender; or
(ii) by the chargor; and
(iii) state that the principal funds intended to be secured by the charge are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.

The term of a charge may be reduced, extended or renewed by a memorandum which—
a) complies with section 84(5) of the LA;
b) is signed by the chargor and the lender; and
c) states that the term of the charge has been reduced, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.

Section 84 (5) provides that for a memorandum for the purposes of s. 84(2), (3) and (4) to vary the charge in accordance with the terms of the memorandum, it must be endorsed on or annexed to the charge instrument.

17.10 Transfer of Charge
Section 86(1) of the LA provides that a chargor or any person referred to in subsection (2) (i.e. interested purchaser, any surety, or any creditor of the chargor who has obtained a decree for sale of the land, lease or charge, that is subject of the charge), may, at any time, upon payment (provided that the lender is not in possession of the charged land), in writing, request the lender to transfer the charge to a person named in the request.

17.11 Equity of Redemption/Right of Redemption
The Equity of redemption is entrenched in section 89 of the LA.

Section 89 (1) of the LA provides that any rule of law, written or unwritten, entitling a lender to foreclose the equity of redemption in charged land is prohibited.

A lender is not entitled to enter into possession of the charged land or a charged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge, other than in accordance with the provisions of the LA.

Section 102 of the LA codifies the right of a chargor or any other entitled person to discharge a charge on payment of any sum due any time before sale of the charged land.

Upon such payment, the lender is required to deliver to the chargor a discharge of the charge in the prescribed form over the whole or that part of the charged land to which the payment relates; and all instruments and documents of title held by the lender in connection with the charged land.

17.12 Remedies of the Chargee
Section 90 of the LA sets out the remedies available to the lender as chargee.

If the Chargor is in default for one month, the lender is required to give the chargor one month’s notice in writing to pay the money owing or remedy the default as the case may be.

The notice must specify the following:-
a) the nature and extent of the default by the chargor;
b) if the default consists of the non-payment of any money due under the charge, the amount to be paid to rectify the default and the time by the end of
which the amount must be paid. The amount must be paid. The time for repayment must not be less than Three (3) months;
c) if default consists of failure to perform or observe a covenant (express or implied) in the charge, the thing that the chargor must do or desist from doing so as to rectify the default and the time by the end of which the default must have been rectified. The time must not be less than Three (3) months;
d) the consequence for failing to rectify the default within the time specified in the notice, which is that the lender will proceed to exercise any of the remedies conferred under the Act; and
e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

If the chargor does not comply within Two (2) months after the date of service of the notice, the lender may:
   i. sue for any money due and owing under the charge;
   ii. appoint a receiver of the income of the charged land;
   iii. lease or sublease (as the case may be) the charged land;
   iv. take possession of the charged land; or
   v. sell the charged land.

Section 90 (4) of the LA provides that a charge over customary or community land shall only be valid if the land is charged with the concurrence of members of the family or community. In case of default under a charge over customary or community land, the lender may:
   a) appoint a receiver of the income of the charged land; or
   b) get a court order to lease or sublease (as the case may be) the land or enter into possession of the charged land; or
c) get a court order to sell the land to any person or group of person referred to in the law relating to community land.

17.13 Redemption Date
Section 56 (2) of the LRA provides the redemption date to be that specified in the charge or three (3) months after service of a written demand.

17.14 Consolidation
This is envisaged in Section 83 of the LA.

In case of more than one charge with a single lender, the chargor may discharge one charge without redeeming the other charges, unless there exist express provisions to the contrary.

The lender should record the right of consolidation in the registers of all the charges.

Comment 7

(1) For purposes of section 56(1) of the LRA the prescribed forms under section 110 are not yet available and presumably one may need to rely on section 108 by using the forms under the repealed acts with appropriate alterations, adaptations and qualifications to conform with the Acts. Given the lack of prescribed statutory forms however, delays are likely in preparation of security documents until clear guidelines are given and the position clarified.

(2) As regards spousal consent for “matrimonial property” see Comment 2 above.

(3) Memorandums: The introduction under section 84 of the LA of signed
memorandums to vary interest rates and term of the charge are worth noting. The amount secured by a charge may also be increased or decreased by a signed Memorandum endorsed or annexed to the charge instrument. Such Memorandums may also vary the terms and conditions of a charge. This may be an alternative to preparation of further charges.

(4) Informal Charges. Section 79 of the LA introduces the creation of informal charges over private land by an instrument in a prescribed form. The definition of informal charges is wide and vague and may capture letters of offer, letters of intent, debentures, among others. The banks will need to exercise extra caution when negotiating these documents to ensure that they do not constitute informal charges when that was not the intention. In addition, appropriate representations and warranties should be incorporated in relevant documents to ensure that the borrower has not created prior informal charges. When receiving and accepting title documents from a borrower, extra caution will need to be exercised to ensure that this does not constitute an informal charge.

(5) It is important to emphasize that under the new Acts, where the parties have agreed to a variable interest rate, it is a requirement that the lender notifies the borrower of a change in such interest rate in writing thirty (30) days prior to the change.

(6) The process of exercising the lender’s statutory power of sale is longer and more procedural. Under section 97(2) of the LA, a valuation will need to be undertaken by a registered and licensed valuer prior to a forced sale.

(7) In case of default arising from non-payment of monies owing under the charge, the lender may not be able to exercise its remedies after two months of service of the notice as provided under section 90(3) of the LA since section 90(2)(b) provides that the time by the end of which the payment in default must have been completed is “…not less than three months.” We hope that further clarification regarding these provisions will be made through future legislation and decided case law.

(8) Section 98(1) of the LA provides more ways in which a lender may exercise its statutory power of sale. This can now be by way of a private contract at market value or by public auction with a reserve price. The charged land may be sold as a whole or may be subdivided before it is sold. Furthermore, the purchase price can be paid in one sum or by installments or on such terms as the lender may think fit provided there is exercise of a duty of care to obtain the best reasonable price at the time of the sale.

(9) Section 105 of the LA now confers upon the court powers to re-open certain charges over matrimonial homes in the interest of justice between the parties. Such powers may be exercised by the courts on application made by the chargor, lender or in some instances, by the Registrar. When considering grounds for re-opening the charge, the court shall have regard to:-

a) age, gender, health, experience and understanding of the chargor of the commercial transaction;
b) financial standing and resources of the chargor relative to the lender;
c) degree of financial standing and resources of the chargor relative to the lender;
d) prevailing interest rates; and
e) degree of risk accepted by the lender given the value of the land and financial resources of the chargor and any other factors the court considers relevant.

It appears that the law is now trying to enforce a more equitable bargaining environment for the borrower. The bank has to ensure that the borrower fully understands the purport of the charge and the rights and obligations contained therein and acknowledges and signs that this is the case.

18. Restraints on Disposition

Part VII of the LRA contains provisions relating to restraints on dispositions, including inhibitions, cautions and restrictions. The repealed laws had provisions relating to statutory caveats, registrar’s caveats and prohibitions under the GLA, LTA and RTA and cautions and inhibitions under the RLA. Under the LRA, the terminology under the GLA, RTA and LTA has been largely excluded and restraints on land are either by way of inhibitions, cautions or restrictions.

Inhibition by Court
Pursuant to section 68 (1) of the LRA, the registration of any dealing with any land, lease or charge may be inhibited by a Court Order for a particular time, or until the occurrence of a particular event, or generally until a further order.

So long as an inhibition remains registered, any instrument that is inconsistent with the inhibition shall not be registered.

An inhibition shall not bind or affect the land, lease or charge until it has been registered.

Cautions by persons claiming right
Cautions can be lodged by a person who claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under the LRA.

Section 71 (1) of the LRA provides that a caution may either forbid the registration of dispositions and the making of entries; or forbid the registration of dispositions and the making of entries to the extent expressed in the caution.

The Registrar is required to give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution.

A disposition that is inconsistent with the caution shall not be registered while the caution is still in place except with the consent of the cautioner or by the order of the court.

Section 71(4) of the LRA provides that the Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under the LRA.

Restrictions by the Registrar
For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may make an order prohibiting or restricting dealings with any particular land, lease or charge.
Section 76 of the LRA empowers the Registrar to enter such a restriction upon or without the application of any person interested in the land, lease or charge.

19. Rectification

Section 79 of the LRA empowers the Registrar to rectify the register or any instrument presented for registration in the following cases—
(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
(b) in any case and at any time with the consent of all affected parties; or
(c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.

Rectification may also be ordered by the Court by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

20. Review of the decision of the Registrar

Pursuant to section 86 (1) of the LRA, if any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by the LRA, the Registrar or any aggrieved person is entitled to state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties.

21. Co-Tenancy and Partition

Section 91 of the LRA envisages the ownership of land by two or more persons in undivided shares, including instances of joint tenancy and tenancy in common.

Section 91 (8) of the LRA contains a limitation to the effect that except with leave of a court, the only joint tenancy capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common.

Each co-tenant of land is entitled to receive a copy of the certificate of title of that land.

On application by a co-tenant in the prescribed form, the Registrar shall issue a copy of the certificate of ownership to a co-tenant, with an endorsement signed by the Registrar that the copy has been issued to the co-tenant named in the endorsement.

Co-ownership and other relationships between spouses

Section 93(1) of the LRA provides that if a spouse obtains land for the co-ownership and use of both spouses or all the spouses, there shall be a presumption that the spouses hold the land as joint tenants unless:
(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in his or her own name only, or that the spouses are taking the land as joint tenants; or
(ii) the presumption is rebutted in the manner stated in (i) above.

Where land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement
of the land, that spouse or those spouses are deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.

Lenders have a duty to inquire of the borrower on whether the spouse has or spouses have consented to that charge in instances where the spouse who holds land or a dwelling house in his or her name individually undertakes a disposition by way of a charge of that land or dwelling house.

Any assignee or transferee where disposition is an assignment or a transfer of land, is under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made, the disposition can be voided at the option of the spouse or spouses who have not consented to the disposition.

Comment 8

(1) Section 91 (8) of the LRA is important as, except with the leave of a court, the only joint tenancy that shall be capable of creation shall be between spouses and any joint tenancy, other than between spouses, created without the leave of the court, shall be treated as a tenancy in common.

(2) The lender shall need to exercise caution when handling land held in the name of one spouse, and where the other has contributed to its productivity, upkeep or improvement as in such a situation the spouse will have been deemed to have acquired an ownership interest in the land. One can foresee difficulties with interpretation of this section, particularly on the issue of what constitutes a spousal contribution.

(3) The LRA does not clearly address a situation where a borrower may not be married as at the time of charging the land but does so at a future date. Does this mean that a future spouse who contributes towards the land by improving it in a manner anticipated in section 93(2) acquires an overriding interest? It also raises questions on whether borrowers are under an obligation to disclose a change in their marital status that may impact on the charge. Banks are best advised to have the appropriate disclosure provisions within the body of the charge.

22. Jurisdiction of Court

The Environment and Land Court established by the Environment and Land Court Act, 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land. See section 101 of the LRA.

23. Fees

The Cabinet Secretary/Minister is empowered under section 102(1) of the LRA to prescribe the rates of fees payable for any matters in respect of which prescribed fees are required to be paid by any person and to keep such fees under continuous review.

24. Offences relating to dealings in land

A raft of offences under the Acts is set out in section 103 of the LRA and section 157 of the LA. The offences range from the making
of false statements, giving of false information, fraudulently procuring registration, distortion of entries and unlawful occupation of public land.

25. Savings and Transition

Section 104 (1) of the LRA provides that Registers maintained under any of the repealed Acts are deemed to be the land registers for the corresponding registration unit established under the LRA.

Transiting Title Documents - Section 105(1) of the RLA

The following provisions apply in respect of every parcel of land where title is already registered under the repealed Acts:

a) if the title to a parcel of land is comprised in a grant or certificate of title registered under the repealed RLA:
   i. the grant or certificate of title shall be deemed to be a certificate of title or certificate of lease, as the case may be, issued under the LRA; and
   ii. the folio of the register of titles kept under the repealed Act shall be deemed to be the register under the LRA.

b) if the title to the parcel is comprised in a grant or certificate of title registered under the repealed RTA:
   i. the grant or certificate of title shall be deemed to be a certificate of title or certificate of lease, as the case may be, issued under the LRA; and
   ii. the folio of the register of titles kept under section 7 of the repealed RTA shall be deemed to be the register under the LRA.

c) if the title to the parcel is comprised in a register kept under the repealed GLA or the repealed LTA, the Registrar shall:
   i. as soon as conveniently possible, cause the title to be examined;
   ii. prepare a register, in the prescribed form, showing all subsisting particulars affecting the parcel which are capable of registration under the LRA;
   iii. serve on the proprietor and on the proprietor of any lease or charge, a notice of intention to register; and
   iv. issue to the proprietor, upon request, a certificate of title or certificate of lease in the prescribed form.

Comment 9

(1) See Comment 1 above on the repeal of the old Acts and the transiting title documents.

(2) Offences: Both the LRA and LA introduce new offences relating to public land. Any person who unlawfully occupies public land commits an offence and so does one who unlawfully obstructs or encroaches on to a public right of way.

Transitional provisions on rights, liabilities and remedies of parties

Under the provisions of section 106 of the LRA, the repealed Acts ceased to apply to parcels of land to which the LRA applies as from 2nd May, 2012.

The rights, liabilities and remedies of the parties under any instrument registered under any of the repealed Acts are not affected by the repeal provided that such registration was done immediately before the registration under the LRA of the land affected.

Section 106 (3) of the LRA clarifies that, for the avoidance of doubt:

(a) any rights, liabilities and remedies shall be exercisable and enforceable in
accordance with the law that was applicable to the parcel immediately before the registration of the land under the LRA; and

(b) the memorandum of equitable mortgage or memorandum of charge by deposit of title may be discharged by the execution of a discharge in the form prescribed under the Act under which the memorandum was first registered.

Section 106(4) of the LRA provides that, notwithstanding this section, any notice in writing required to be served under the repealed Acts upon any of the parties under any mortgage, charge, memorandum of equitable mortgage or memorandum of charge by deposit of title may be served in accordance with the LRA, and such service shall be deemed to be effective for all purposes.

Section 162(4) of the LA provides that if a lessor or a lender had initiated any steps to forfeit a lease or to foreclose a charge, as the case may be, before the commencement of the LA, a court may on the application of the lessee or the chargor issue an injunction to the lessor or, to the lender to stop the continuation of any such step.

Comment 10

1. The provision under section 106(4) of the LRA is unusual as for all purposes and intents it constitutes retrospective application.

2. Given the retrospective application of section 106(4) of the LRA and given the right of the lessee or the borrower pursuant to section 162(4) of the LA (to make an application in court to issue an injunction where steps to forfeit a lease or to realise a charge have been initiated by the lessor or the lender) it may be prudent to issue fresh statutory notices (with regard to the charges) or notices of forfeiture pursuant to a lease.


Section 110 of the LRA and section 160 of the LA contain the general power to make Regulations. The National Land Commission and the Cabinet Secretary are required to make regulations for the better carrying into effect the purposes and provisions of the respective Acts.

Some of the areas where Regulations are expected include regulations prescribing:

a) the forms to be used in connection with the respective Acts;

b) the manner and form of the registries of land, the procedures to be followed by the registries and hours they are to be open for business;

c) procedures for the transfer of land from one category to another; and

d) particulars and format to be contained in a register or other document required to be kept under the Acts.

Comment 11

1. The transitional clause in the Acts is unclear and subject to different interpretation. Section 106(1) of the LRA on the one hand provides that from the commencement date, the repealed Acts shall cease to apply while section 107 of the LRA appears to allow the continued application of the repealed Acts. In practice, the Land Registry continues to register documents based on the repealed legislation but there is an issue of validity of these documents given the unclear and contradictory provisions of the Acts.

2. Section 107(3) of the LRA is also significant. It provides that for the
avoidance of doubt, any lease granted to a non-citizen shall not exceed ninety-nine years. With the promulgation of the Constitution, non-citizens who held freehold titles or leasehold titles that were for a term exceeding ninety-nine years had their titles reduced to ninety-nine years. There is some uncertainty as to when the ninety-nine year term commences: is it on the date of promulgation of the Constitution (27th August, 2010); or the date on which the title was granted or the commencement date indicated in the title? This uncertainty remains.

CONCLUSION

As matters currently stand, and despite the saving and transition provisions under the LRA, in the absence of the regulations by the Cabinet Secretary under section 110 of the LRA, prescribed forms together with clear guidelines as to the implementation of the provisions under the LRA and LA, it will be a challenge to proceed with and complete land transactions under the new Acts in the short term. Efforts are under way to address some of these challenges and the hope is that clear directions and guidelines will be forthcoming in the short term.

We expect lots of debate from all stakeholders including law firms, bankers, financial institutions, the land registries, the Law Society of Kenya and land owners. We shall keep you posted of further developments.
This alert is intended to give an overview of the new land Laws in Kenya and should not be used as a basis for ascertaining a course of action without appropriate professional advice.

If you need any further information and/or clarification please contact Anne Kinyanjui, Amrit Soar or Norah Mutuku of the Conveyancing and Bank Securities Department.

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