

The Kenya Land Laws (Amendment) Act, 2016

The 2016 Land (Amendment) Act 2016 replaces the Land Act 2012. The Land Act 2012 introduced several Land Reforms to earlier enactments and in particular corrected certain conflicts resulting from the ambitious titling legislation enacted prior to Independence.

Kenya introduced a comprehensive program of land registration and titling throughout the country as early as 1949. The titling of land using the Torrens system of land titles over land largely occupied under Customary Tenure resulted in serious dislocation of families and hardships for many, leading to land disputes to be resolved in the courts. In order to ease the harsh effects of the titling scheme the courts devised the concept of an intergenerational trust resulting from occupation and use of land under customary tenure. *Mbui v. Mbui* (See cases section).

The situation created by the earlier Land Acts has now been corrected in the amendment Act 2016 which now recognises the the rights of the customary land owners as overriding rights to be protected under the Act upon registration of the land.

The 2012 Land Reforms included articulation of Principles of Land Policy in Article 60 and Classification of Land in Article 61 into: Public, Community or Private Land.

The Land Laws (Amendment) Act, 2016 received presidential assent on 31st August 2016 and came into force on 21st September 2016.

The Act brings about amendments to the Land Act, 2012, Land Registration Act, 2012 and the National Land Commission Act, 2012. The amendments were necessary to correct errors and inconsistencies in the statutes and to clarify certain definitions, as indicated above.

In addition, the amendments have also introduced some pertinent changes to land law and conveyancing in Kenya.

Some of the more significant amendments are discussed below:

1. Functions and Powers of the Cabinet Secretary for Lands

A clear distinction has now been drawn between the role of the Cabinet Secretary for Lands (falling under the National Government) *vis-à-vis* the National Land Commission.

The NLC remains the body responsible for managing public land on behalf of national and county governments including the maintenance of records and data in respect of public land. However, the decision to allocate any part or parcel of public land is to be made by the national or county government (as the case may be). The role of the NLC is only to implement the decision to allocate.

2. Controlled Land

The Act has introduced the new concept of “controlled land” which is land within a zone of 25 kilometres from the inland national boundary of Kenya, within the first and second row beach plots in the Coast Region and any other law that may be declared controlled land by statute.

The Act requires that “transactions” in controlled land can only proceed with the prior written approval of the Cabinet Secretary and that in considering an application for approval, the Cabinet Secretary must seek approval of the relevant authorities.

This provision also introduces the concept of “ineligible persons” which basically refers to individuals who are not citizens of Kenya, foreign governments or their agencies or subdivisions and corporate bodies whose shareholders are not Kenyan citizens.

It is not immediately clear whether consent is required for all transactions in controlled land or only those transactions where an interest is being acquired by an ineligible person.

The word transaction is also not defined leaving it to be interpreted very widely to cover transmissions and involuntary dispositions.

We hope that this provision will be further clarified in subsidiary legislation or by the courts.

3. Expiry of Government Leases

Kenyan citizens whose leasehold titles are about to expire have a pre-emptive right to re-allocation of that parcel of land.

The Act now provides for NLC to notify the Lessees of the pre-emptive right, only where the land is not required by the national or county government for public purposes. This notification is to be given within five years before expiry and the lessee has to make an application to exercise the right.

If the lessee does not apply within one year of the notification, the NLC is required to publish the notification in one newspaper of nationwide circulation.

NLC may still refuse to allocate the land to the lessee for reasons to be given in writing.

4. Charges

Retrospective application

A lot of confusion was created by the retrospective application of the Land Act to charges that had been created before the Act came into force in 2012. This has now been clarified such that the validity of charges entered into before 2012 cannot be questioned for not complying with any formal requirements stipulated by the Land Act but when it comes to enforcing the charge, the chargee will be obliged to comply with the provisions of this Act except for the provisions relating to service of notice upon the spouse of the chargor and other persons.

- *Remedies of a Chargee*

The period of notice to be given to the chargor to remedy a default of the charge under section 90 has been increased from two months to Ninety days.

The chargor's default must continue for a period of one month before this notice can be given. Only if the chargor does not comply with that notice within 90 days of service can the chargee exercise its remedies under the charge.

Accordingly, a chargor in default has a minimum of four months before any action can be commenced for enforcement of the charge.

- *Chargee's power to grant leases*

The chargee's power to grant leases and accept surrenders over the charged land is only available and applicable if a receiver has been appointed under the Land Act and not under any other instrument. This is a clear reference to appointment of receivers under a debenture pursuant to which the power to appoint a receiver is exercisable immediately and without notice whereas under the Land Act, 2012, a receiver over charged land can only be appointed after the chargee has given 30 days' notice to the chargor.

- *Chargee's power to enter into possession*

When the chargee exercises the power to enter into possession of the charged land, the chargee is entitled to use only reasonable force and in any event, may only exercise this power after obtaining a court order.

- *Chargee's power of sale*

The Act already provided that where a chargee exercises the power of sale by private contract, the sale must be at the market value and where the power is exercised by public auction, it must be at the best price possible which is determined by reference to the market price.

It has now been clarified that for purposes of ascertaining the market value, the chargee is entitled to rely on a valuation carried out by a registered valuer provided the valuation was carried out in the six months immediately preceding the sale.

Where charges rank *pari passu* with each other, the charged land cannot be transferred upon exercise of the power of sale of one of the charges unless the other chargee gives written consent to the transfer.

It has now been expressly provided that a sale by public auction crystallizes upon acceptance of the winning bid. The chargor's equity of redemption is extinguished at that point.

The Act now provides for instances where a chargee cannot be found by allowing the chargor to pay the entire amount due into court upon which the registration of the charge will be cancelled.

- *Application for relief*

The right of a spouse of the chargor to apply for relief is now restricted to those cases where the spouse was required to give consent to the creation of the charge but did not give consent.

5. Compulsory Acquisition

Compensation for compulsory acquisition is to be made by the NLC only after final survey and determination of the acreage, boundaries, ownership and value of the land.

If the Commission takes possession of the land before paying the compensation, interest is payable to the owner from the time of taking possession to actual payment at the base lending rate set by the Central Bank of Kenya.

6. Jurisdiction of the Courts

It is provided that subordinate courts have jurisdiction to deal with claims and disputes within the purview of the Land & Environment Court but subject to their pecuniary limits.

7. Eviction of Unlawful Occupiers

Unlawful occupation of any land, whether public, community or private is prohibited. The Act now provides for elaborate procedures for the giving

of notice to unlawful occupiers and the carrying out of evictions upon expiry of such notice.

8. Spousal Consent

There is no longer a requirement to obtain spousal consent for any dealing with or disposition of interests in land save for:

- consent of a spouse to a charge over the matrimonial home under Section 79(3) of the Land Act, 2012; and
- any requirement for such consent under the Matrimonial Property Act.

9. Suspension Period

An application for a search, properly made, will result in a suspension period of 14 days during which, no other instrument affecting the land will be registered. If the instrument for which the search application was made is then presented during this period, it will have priority to any other instruments that may have been presented during the suspension period.

10. Co-ownership

Unless it is expressly provided, where land is co-owned, it will be presumed that the proprietors are holding as tenants in common in equal shares.

Previously, joint tenancies could only arise where land was co-owned between spouses. That restriction has now been removed and accordingly, any two or more parties may be registered as proprietors as joint tenants regardless of the relationship between them.

11. Rates Clearance Certificates

It is now mandatory to produce a Rates Clearance Certificate for registration of any instrument relating to any rateable property even if the property that is subject of the instrument is a portion of the rateable property and no rates are payable on it e.g. an apartment.

12. Execution

A corporate body is required to execute instruments as provided for in the law governing it e.g. the Companies Act, 2015 in respect of limited companies. If the governing law does not make any provision, then execution by the corporate body has to be in the presence of an advocate, judge, magistrate or notary public.

As a consequence of this amendment, it will no longer be necessary for a company to execute instruments in the presence of an advocate; the affixing of the company seal in the presence of two directors or a director and the secretary will be sufficient.

However, it also means that execution by a foreign corporate body will have to be witnessed by a notary public.

13. Surrender of Freehold Interest

It is now expressly provided that a registered proprietor cannot be obliged to surrender a freehold interest in exchange for a leasehold interest as a condition for granting planning permission e.g. change of user.

The only exception to this is where such surrender is required by the Constitution i.e. in respect of a registered proprietor who is not a Kenyan citizen.