PRINCIPLES OF CONVEYANCING IN KENYA
A PRACTICAL APPROACH

Tom O. Ojienda

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PROGOLOMENA

Land in Kenya is an emotive issue. It was at the core of resistance to British rule at the turn of the last century and subsequent agitation for land thereafter up to the time of the struggle for independence. Today, land remains the principal source of livelihood and material wealth and invariably carries cultural significance for many Kenyans. It provides the physical substratum for social and economic life. All of us— even the truly homeless—live somewhere, and each therefore stands in some relation to land as owner, occupier, tenant, licensee or squatter. Yet it cannot be gainsaid that the question of land, especially as it relates to its distribution, division, transfer and generally to its administration and management still remains highly contentious even in the post-independence era.

It is in this view that the study of the principles that underpins land law and conveyancing in Kenya becomes imperative not only to the student of law and legal practitioner but also to the ordinary Kenyan who is constantly vexed by the question of land. Yet again anyone desirous of grasping the principles of land law and conveyancing in Kenya is faced with myriad challenges, three of which I expound here, first, land law and conveyancing in Kenya is a function of historical evolution premised on medieval English law of property which in itself dates back to the Norman invasion in 1066. To therefore understand land law and conveyancing, one must seek to demystify its historical foundations.

Secondly, principles of land law and conveyancing in Kenya are enshrined in a complex web of legal framework. There are more than fifty statutes that in one way or another control access, use and transfer of land. These statutes are an embodiment of many principles that, are foreign, and have their origin in the history and traditions of England. The Acts lack uniformity due to the fact that they were enacted in the absence of a coherent land policy and were essentially aimed at addressing specific interests and issues at different times in history. In addition, these statutes constantly face challenge when they are juxtaposed against the competing claims of customary land laws of the more than forty tribal groups in Kenya. To therefore have a complete understanding of this field of law, one must prod into these statutes whilst remaining alive to the customary land
laws of our tribal groups. Finally, the study of land law and conveyancing has long and traditionally carried the notion that it is a difficult branch of law. As Sukhinder Panesar puts it, ‘there is no doubt that the majority of students find property law an immensely difficult and technical area of the law. For those who teach the subject, it can often be an uphill struggle to make this area of the law interesting.’ However, anyone desirous of learning the subject must purge himself of this notion.

Thus, *Principles of Conveyancing in Kenya- A Practical Approach* seeks, amongst others, to address these issues. It aims at giving the reader a succinct understanding of the historical and philosophical background of land law and conveyancing in Kenya, a thorough grasp of the legal framework and a simplified concise exposition of the processes and formalities that precedes the legal transfer of land from one person to another. It combines a technical understanding of complex legal phenomenon with some critical awareness of the broader values and preferences which inform the law. The book is alive to the fact that land law and conveyancing is much more than the formalities, but rather it impinges upon a vast area of social ordering and expectations, and exerts a fundamental influence upon the lifestyles of ordinary people. Therefore, it addresses philosophical issues that emanate from the institution of property and presents the subject as a social engineering. Thus, the reader is expected to view the principles of land law and conveyancing in two perspectives: from a strict and rigid dogmatic perspective and from a social perspective.

No doubt, principles of land law and conveyancing in Kenya has greatly been shaped by case law. In this regard, so as give the reader a jurisprudential analysis of the subject, the book is rich in case law. Noteworthy, reference has been made to judicial landmark decisions, delivered as recent as February 2007. The dicta of these judgments, some of which have been quoted *in extenso*, cogently point out our courts’ efforts to build and enrich the jurisprudence of land law and conveyancing in Kenya. In addition, for comparative jurisprudential analysis, reference has been made to decisions of other jurisdictions including India, South Africa and, most obviously, England. At a time when the legal systems are quickly embracing conventional principles and the world is
shrinking to a global village, it would be utterly wrong to ignore comparative case law which may contribute towards a richer understanding of land law and conveyancing.

The book is a package of nine chapters, all of which are interrelated and interdependent. Chapter one, lays the foundation of the book. It defines the institution of the property and seeks to demystify the terminologies and concepts peculiar to it e.g. ownership, possession and title. It draws the historical evolution of land law and conveyancing in Kenya by looking at the two major factors that have historically defined the subject: customary land law and the colonial factor. Chapter two gives an insight into the legal framework that regulates conveyancing in Kenya. It is premised on the fact that he who must understand and practice conveyancing in Kenya must be well versed with the provisions of the entire legal framework that regulates the subject in the country.

Chapter three is an overview of dispositions in land. It not only provides the basic formalities of conveyancing but also the philosophical justification for these formalities. In essence, the formalities are discussed in the context of public policy. Most, importantly, the chapter gives an elaborate description of the process of the creation and disposition of interests under the statutes highlighted in Chapter Two. Included herein also, are discussions on dispositions by way of gifts, transmissions, adverse possession and compulsory acquisition. Notably too, is the discussion on the emotive topic on disposition of land upon dissolution of marriage. Here reference is made to the now contentious decision of the five-bench Court of Appeal on 2nd February 2007 in the case of Echaria v Echaria. Following the decision in this case, it is no longer tenable to consider the non-monetary contribution of a wife and putting a value on it when determining the inter-spousal property rights upon dissolution of marriage.

Chapter four is on the process of registration and investigation of titles and documents. It is based on the fact that the law of conveyancing only serves the interests of the society when it is capable of not only facilitating the transfer of land but also when it can provide security of title upon such a transfer. It sheds light on how our law of conveyancing has sought to reconcile security of title with ease of transfer. On its part, chapter five deals
with leasehold transactions. Notable in this chapter is the topic on sectional property rights which is slowly but gradually gaining more use and awareness. With the increasing need to acquire flats in high-rise buildings as a consequence of the diminishing stock of land in the country and the corresponding increase in the price of available land, it is hoped that this topic will prove invaluable to conveyancers and real estate investors.

Transactions in mortgages, charges and other forms of securities for advances are considered under chapter six. This is followed with controlled transactions and land use planning at chapter seven. Chapter eight is on a rare subject that is often forgotten in conveyancing cycles; the construction or interpretation of conveyances and documents. And then finally, the book closes with a look into modern developments in land law and conveyancing in Kenya. The chapter sheds light into recent efforts to reform the law of real property. The topical issues discussed here include the place of land law and conveyancing in the on-going constitutional review; the place of commissions on inquiry in reforming land law and conveyancing; Land Law (Amendment) Bill 2005; Gazette Notices 300 and 301 of 19th January 2007; and the Draft National Land Policy 2007. Noteworthy too, is the discussion on e-conveyancing and cross-border legal practice. The era of electronic and digital information technology has brought with it the need to consider the computerization of the conveyancing practice. As such, it is proposed that Kenya as a legal system and lawyers as individuals must embrace electronic conveyancing (e-conveyancing). On another front, the advent of the East African Community (EAC) has come with bounty opportunities for lawyers and conveyancers in the region. This means that lawyers and conveyancers must brace themselves to take conveyancing from national to regional level.

In summary, there is no doubt that *Principles of Conveyancing in Kenya- A Practical Approach* is an invaluable text to students of conveyancing, conveyancers, legal practitioners, real estate investors, estate agents, commercial and banking institutions, auctioneers, Governments departments and generally the citizenry.
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Lewis V Franklove
Lloyd V Butler
London & North Western Rail Co Buckmaster
London County & Westminster Bank Ltd V Tompkins
Louis George V Babu Ram Sharma
Lowrey V Steadman
Macedo V Beatrice Stround
Machenge V Kibarabara
Makokha Wamukota V Sylvester Nyongesa
Manaver N. Alibhai T/A Diani Boutique V South Coast Fitness & Sports Center Ltd
Margaret Nduati V Housing Finance Co. (K) Ltd
Marguard & Co V Bicard
Martha Khayanga Simiyu V Housing Finance Co Of Kenya Ltd & 2 Others
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Mcmahon V North Kent Iron Works
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Mwangi Muguthu V Maina Muguthu
Narshidas & Co Ltd V Nyali Air Conditioning & Refrigeration Services Ltd
Nathakal Rai V Standard Chartered Bank (K) Ltd
Nderitu V Nderitu
New Stanley Hotel Ltd V Tobacconists Ltd
Newhart Developments V Cooperative Commercial Bank
Nicoll V Cults
NJ Blakeman Ltd V Associated Hotel Management Services Ltd
Njuguna V Njuguna
Noakes V Rice
Nthenge V Wambua
Nyaga Kabute V Housing Finance Co (K) Ltd
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Oza V Jani
Parker Towers & Co Ltd V Gray
Parker V Boggon
Pereira V Vandivan
Peris Gichuki & Jacob Gichuki Minjire V The Official Receivers & Interim Liquidator
Peter Mmini Shaka V James Shaka
Peter Nganga Muiruri V Credit Bank & Charles Ayako Nyachae T/A Nyachae & Co
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Re Automatic Bottle Melter Ltd
Re Estate Of Mangece
Re Farnol Eades Irvine & Co Ltd
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Re Hillard
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Re Rose: Midland Bank Executor & Trustee Co. Ltd V Rose
Re Victoria Steamboats Ltd
Re Wells
Re Yorkshire Woolcombers Association Ltd
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Reliance Permanent Building Society V Harwood Stamper
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Republic V Chairman Kapsabet Division Land Dispute Tribunal & Other
Republic V Funyula Land Dispute Tribunal & 3 Others
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Samuel V Jarrah Timber & Wood Paving Corporation Ltd
Santley V Wilde
Savings & Loan Kenya Ltd V Odongo
Sedac Investments Ltd. V Tanner
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Shah V Devji
Shah V Orodho & 2 Others
Shaw V Shah Devshi & Co
Smith V Marrable
Souza Figuerido & Co Ltd V Moorings Hotel Ltd
Standard Chartered Bank V Walker
Stephen Mugera V Kenya Commercial Bank & Another
Stephen Obadiah V Euro Bank Ltd & 3 Others
Street V Mountford
Susan V Bank Of Scotland
Swiss Bank Corporation V Lloyds Bank Ltd.
Thakkar & Another V Joram & Others
Tiwi Beach Hotel Ltd V Juliane Ulrike Stamm
Trust Bank Ltd V Eros Chemist Ltd & Whitestone Auctioneers
Trust Bank Ltd V Kiram Ramji Kotedia
United Mining & Finance Corporation Ltd V Beecher
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Wainaina V Murito
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Wallace V Universal Automatic Machines Co
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CHAPTER ONE
INTRODUCTION TO CONVEYANCING

1.0. What is Conveyancing?

Conveyancing is generally understood as the transfer of estates and interests in land by legal process. Hence Abbey Robert and Richards Mark rightly consider conveyancing as ‘the process by which legal title to property is transferred.’\(^1\) According to the Black’s Law Dictionary conveyancing is the act of or business of drafting and preparing legal instruments, especially those (such as deeds or leases) that transfer an interest in real property.\(^2\) In almost a similar vein Peter Butt defines conveyancing in the following terms:

“Conveyancing is the art or science of preparing documents and investigating title in connection with the creation and assurance on interests of interests in land. Despite its connection with the word ‘conveyance’, the term in practice is not limited to use in connection with old system title but is used without discrimination in the context of all types of title.”\(^3\)

An even more elaborate conceptualization of what entails conveyancing is perhaps to be well found in the words of Professor Philip Kenny and Russell Hewitson in their book, ‘Conveyancing in Practice’\(^4\). They write that conveyancing is concerned with the legal mechanisms whereby the ownership of land or of an interest in land is transferred from one person to another.\(^5\) In this regard, they note that conveyancing is about how to transfer ownership in land, about the rights of the parties at different stages in real

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\(^3\) ibid.
\(^4\) Kenny Philip & Russell Hewitson, Conveyancing in Practice, (2nd ed), Northumbria Law Press (University of Northumbria at Newcastle), Newcastle, 2001, p. 1
\(^5\) Ibid.
property transactions and about their respective positions if things should go wrong in the course of the transaction.

Essentially, therefore, conveyancing convey a connotation of movement from a point A to a point B i.e. the transfer of rights in property from a person A to a person B.\(^6\) It is important, however, to note that conveyancing relates only to land or an interest(s) in land. Further, it is vital to appreciate that the key to understanding the nature of conveyancing is to appreciate how it calls upon various disparate areas of law. In this light, the relationship between conveyancing and other laws must necessarily be considered.

1.1. The Relationship between Conveyancing and Other Laws

Conveyancing is a second level subject that rests upon three particular stanchions; that of land law, contract law, and equity and trusts. Its characteristic as a multi-disciplinary subject has been captured well in the following analogy:

‘In many ways conveyancing is like Shakespeare’s character, Autolycus in The Winter’s Tale, a ‘snapper-up of unconsidered trifles’. Like this amiable rogue, conveyancing takes from here, there and everywhere from within the full gamut of the law. Conveyancing rests and has been built upon the three foundations of land law, contract law, and equity and trusts\(^7\).

But how then, does conveyancing relate to these other facets of law? As regards land law, it (land law) details the estates and interests that will form the subject matter of all conveyancing transactions and, therefore, without an understanding of land law, it is difficult to grasp conveyancing both in theory and practice. Indeed according to B. Walker, ‘you can study land law without conveyancing, but not conveyancing without

\(^6\) See Graveland v Porter 10 ch. 8 where Cairns L.J. stated “there is no magic in the word conveyance. It means an instrument conveying an interest in land from one person to another”.

\(^7\) Ibid. at p. 2
land law. Consequently, one intending to study and practice conveyancing must carry knowledge of land law to the point when it will be possible for him to embark with profit on a study of conveyancing.

Indeed stemming from the understanding that land law is that part of the general law that regulates the allocation of rights and obligations in relation to ‘real’ (or immovable) property, conveyancing has been regarded as ‘the application of the law of real property in practice’ and their distinction may be obscure at some point for the two inevitably overlap and often, the exact place at which to draw the line is mainly a matter of taste. In general terms, it can be said that real property is static while conveyancing is dynamic. In other words real property deals with the rights and liabilities of landowners while conveyancing with the art of creating and transferring rights in land.

As concerns contract law, the link between the two (conveyancing and contract law) is reflected in the fact that conveyancing is about the transfer of title and these transfers are in the first instance made by contract. In essence, any transfer of land must first be preceded by a sale agreement which must be reducing in writing in the form of a contract between the vendor and the purchaser. Thus according to Megarry and Wade, ‘contracts and the sale of land are so much part and parcel of the whole system of conveyancing that they have many peculiarities drawn from the land law. In default of any express terms there will be many implied terms as to proof of title and of title and other matters. Between the contract and the conveyance, which are respectively the first and last formal steps in a sale of land, many questions arise which have to be decided according to the settled practice of conveyancers.’ As such, a confident understanding of the law of contract, which obtains under the Contract Act (Cap 23 Laws of Kenya), is a necessity for the student and practitioner of conveyancing.

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10 Megarry and Wade, The Law of Real Property
On a third front, the link between conveyancing and equity and trusts is anchored on the fundamental distinction of interests in land as either being legal or equitable.\textsuperscript{11} This distinction largely defines the transfer of title or interests in land and the rights and obligations that flow therefrom.\textsuperscript{12}

Conveyancing is also related with other branches of law such as sale of goods, company law and the law of torts. The import of this exposition on the relation between conveyancing and other laws is that a fuller understanding of the former must be informed by the initial or concurrent appreciation of the latter. Therefore, conveyancing demands that one blends his knowledge of law and abandons a discrete approach to the subject.

1.2. Conveyancing and the Law of Property

As earlier noted, conveyancing is intricately intertwined with the law of property and as such, more light needs to be shed on its genesis and evolution so as to appreciate how it has and influences conveyancing. The Law of property in land no doubt, emerged hot on the heels of the emergence of civil society. On its part, the emergence of civil society was according to one author precipitated by the birth of the concept of property ownership. He has written thus:

\begin{quote}

\textsuperscript{12} Like in many legal systems, proprietary rights exist in equity as well as in the common law. One of the reasons for the complexity of property law is the fact that similar rights may exist in the same thing, and at the same time, but in two different systems of law- that is, law and equity. This duality of rights in law and equity, whilst imposing some difficulties in the understanding of the spectrum of proprietary rights, does, however, bring into the law of property remarkable flexibility. It allows a number of social and economic needs of the legal system to be met by the recognition of two sets of jurisdictions and the ability of proprietary rights run side by side therein. Unlike the common law, equity looks to substance as opposed to form; this allows equity to recognize proprietary rights which correspond to legal proprietary rights in their nature- for example, ownership. Thus whilst there can be legal ownership in a chattel or a piece of land, this does not inhibit the finding of equitable ownership in the same thing. However, equity is much more creative than common law; there are proprietary rights which do not exist in the common law but only in equity. In other words, there are rights in equity which have no equivalent in the common law.
\end{quote}
‘The first person having enclosed a piece of ground, bethought himself saying, “this is mine” and found a people simple enough to believe him, was the real founder of civil society.’

A substantive examination of the genesis and evolution of the law of property in land cannot be successfully attempted without first pinpointing the essence of the law of property in land. In a nutshell both the theory of the Law of Property in land and the rules defining the nature and manner of transacting in property rights attempt to respond to the following questions:

i) What are the foundations of the law of property in land?
ii) What are the jurisprudential questions and concepts underlying the law of property in land?
iii) What are the rights and obligations arising therefrom?
iv) What is the manner of transferring or otherwise dealing with the said rights?
v) What is the relationship between the state and the individual in relation to the said rights and in relation to the rights arising from property generally?

It is clear from the above questions that understanding the concept of property is central to grasping the intricacies of the law of property. Professor F.H. Lawson neatly explained the importance of grasping the concepts underlying property law while speaking of the English law of property. He said:

‘It is logical and orderly, its concepts are perfectly defined, and they stand in well recognised relations to one another. It is no longer easy to make any remarkable inventions, though new combinations of concepts are constantly being worked out. Above all, this part of the law is intensely abstract and has become a calculus remarkably similar to mathematics.

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13 See Jean Jacques Rousseau, Discourse on Inequality, quoted in H.W.O. Okoth Ogendo, Teaching Manuals on Property Law, vol 1, available at the School of Law Library University of Nairobi, Parklands Campus.
14 Ibid.
The various concepts had, and still have, when properly understood, a very necessary relation to the economic facts of life, but once created and defined they seem to move among themselves according to the rules of the game which exists for its own purposes. So extreme are these various characteristics that they make of this part of the law something more logical and more abstract than anything that to my knowledge can be found in any other law in the world. More than anywhere else we seem to be moving in a world of pure ideas from which everything physical or material is entirely excluded.

1.2.1. The Concept of Property

The concept of property is not one that easily renders itself to conceptualization especially in the legal realm. To non-lawyers, property is the thing which is owned.\textsuperscript{15} This usage, according to K.J. Gray and P.D. Symes, whilst being harmless enough in day-to-day speech, it does obscure certain salient features of property as a legal phenomenon, for, semantically, property is the condition of being ‘proper’ to (or belonging to) a particular person.\textsuperscript{16} Thus, originally, property was the relationship between the thing (or ‘object’) and the person (or ‘subject’) which provided the key to the definition of ‘property’.\textsuperscript{17}

\textsuperscript{15} In laymen’s view, property is something tangible, such as a home, land, or car. The central characteristic of the layperson’s definition of property is the emphasis on objects or things as representing property. According to Sukhminder Panesar, the layperson’s response to the question, “what is property?” is inaccurate for two reasons. In the first place, the lay definition of property confuses the concept of property with the objects of property and the property relationship. Secondly, the definition attempts to focus on objects of property that are predominantly tangible in nature whilst the truth of the matter is that in contemporary property law, objects of property are increasingly becoming intangible. See Sukhminder Panesar, General Principles of Property Law, Pearson Education Ltd., Harlow, England, 2001, p. 7


\textsuperscript{17} It is important to note that the understanding of property as a thing (as opposed to a right) began during the industrial revolution and the development of the full capitalist market economy. Prior to this, in England during the earlier part of the 17th Century, property meant nothing more than a right to revenue rather than the thing itself. Given that land was an important commodity, a person could have only certain rights in land, which at all times vested in the Crown. Furthermore, by law and the Manorial custom, these rights were not fully disposable by sale or will. It was as a result of the industrial revolution that land became predominantly more and more ‘parcelled’ and absolute and consequently transferable. It was natural to speak of the land itself as one’s property rather than the right in or over the land itself. The blurring distinction between things and rights was further encouraged by the state’s recognition of the individual’s right to transfer and sell his property.
To the contrary, in legal perspective, property is the network of legal relationships prevailing between individuals in respect of things.\textsuperscript{18} In the lawyer’s eyes, ‘property’ is the bundle of mutual rights and obligations between ‘subjects’ in respect of certain ‘objects’.\textsuperscript{19} In a nutshell property is not a thing; it is a relationship. It is a relationship that arises when subjects acquire proprietary rights in or over an object, the nature of which varies from right to right.\textsuperscript{20} In this light, C.R. Noyes provides an apt definition of property thus:

‘The term property may be defined to be the interest which can be acquired in external objects or things. The things themselves are not in a true sense, property but they constitute its foundation and material, and the idea of property springs out of the connection or control, or interest which according to law; may be acquired in them, or over them’.\textsuperscript{21}

In the same vein, Bentham explains that property is a legally protected ‘expectation…of being able to draw such or such an advantage from the thing in question according to the nature of the case.’\textsuperscript{22} As such, the law of property is not so much concerned with ‘things’;

\textsuperscript{18} The relationship between individuals stem from the fact that a single object may sustain more than one proprietary right- in other words, more than one person may have rights to the same object in question. In the context of land, a person may have absolute ownership but at the same time he may have mortgaged the land to a building society or bank. The bank will have proprietary interest in the land in the form of a mortgage. The owner of the land may have leased his land for a period of time to another, called a tenant. The tenant does not acquire absolute ownership of the land but has a lease granting him certain rights in the land. Finally, the owner may have granted an easement to another person enabling him to walk over the owner’s land in order to effectively utilize his own land. The holder of an easement has rights over another person’s land but again different ion nature from absolute ownership, mortgage or a lease.

\textsuperscript{19} In this context, ‘subject’ means those individuals having legal entity, such as a person or a corporation, and ‘object’ means all those things of value which the legal system has accepted as capable of control.

\textsuperscript{20} A right is an affirmative claim asserted by one against another in respect to a given situation, object or thing in which the one vested with the right has an interest. The idea of a right boils down to a statement about the quantum or range of activities which a given society will permit its members, either individually or collectively, serially or concurrently to execute. Therefore, the precise nature and content of particular species of rights, whether legal, moral, political or economical and the identity of those in whom they vest, will naturally vary from one political economy to another. In capitalistic state, for example, rights of whatever species will characteristically vest in individuals or nucleated groups since these are the focus of production relations. To the contrary, in community based societies the nature of and the extent of rights vests essentially in what is the collective or corporate whole.

\textsuperscript{21} Noyes C.R., The Institution of Property (1936) at p. 357.

\textsuperscript{22} J. Bentham, Principles of the Civil Code (1830).
it is more concerned with the relationships between individuals in respect of ‘things’. The quotation hereunder mirrors well this proposition.

‘…Instead of defining the relationship between a person and ‘his’ things, property law discussed the relationships that arise between people with respect of things. More precisely, the law of property considers the way rights to use things may be parceled out amongst a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-à-vis other potential users…the way in which user rights may be legally packaged and distributed are wondrously diverse. Hence, it risks serious confusion to identify any single individual as the owner o any particular thing. At best, this locution may sometimes serve as identifying the holder of that bundle of rights which contains a range of entitlements more numerous or more valuable that the bundle held by any other person with respect to the thing in question…. For the fact (or is it the law?) of the matter is that property is not a thing but a set of legal relations between persons governing the use of things.’

Additionally, the study of the law of property is an inquiry into a variety of socially defined relationships and morally conditioned obligations. It is concerned with values, obligations and ideologies cast in sharp relief against the universe of things. This study is continuous owing to the ever changing of property. Of particular importance, is that the concept of property is closely linked with the concepts of ownership, possession and title such as to warrant a brief look into these concepts herein.

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23 Professor Bruce Ackerman as quoted in Real Property and Real People, n. 10 above, p. 9
24 See Becker, ‘Too Much Property’ (1992) XXI Philosophy & Public Affairs, pp. 196-206 arguing that ‘the philosophical analysis of property is an ever-continuing process both with respect to the broader question of property and the more specific institution of private property. This is attributable to the fact that the meaning, function and existence of the institution of property are not constant. The concept of property changes with time and is influenced by a number of factors, not least the way in which the dominant classes in society expect the institution of property to serve. In the same way as the dominant classes of society change, so does the institution of property.’
1.2.2. Ownership, Possession and Title

In everyday practical property law, we take it for granted that that somebody is the owner of a thing. Whether one has ownership or not depends on the rules that prescribe how ownership can be lost or acquired. These rules are taken for granted and most legal disputes relating to ownership are resolved accordingly. But whilst this may be true, an understanding of the jural nature of concepts such as ownership, possession and title are important in order to understand where the law is coming from and what it is striving to protect. We are reminded by a leading jurist that ‘the idea of jural relation is as important for legal phenomena as is the idea of gravitation for physical phenomenon.’

   a. Ownership

Although the underlying idea of property revolves around the idea of rights in things and that such rights can be multi-functional, the most predominant right a person can have in a thing is the right of ownership. In its simplest conceptualization, ownership is right in a thing. But as to what actually consist the right of ownership has been an issue that has received varied opinions from jurists. At the bottom line are the different approaches taken by the Roman law representing the civil law system on one side, and the English law representing the common law system, on the other side.

The Roman law treats the idea of ownership as the right to enjoy and dispose of something in an absolute manner and equated it to *dominium*. It analyses ownership (and possession) as an absolute jural relationship between a person and a thing. Interference with ownership gave the owner a remedy in damages known as *vindicatio*, or simply damages in trespass.

To the contrary, the English law does not treat ownership as an absolute concept but as a form of possession or seizin. Consequently, under English land law the right to remain

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25 A. Kocourek, Jural Relations (2nd edn, 1927) at p. iii.
26 In English land law, ownership is not absolute; rather it is fragmented amongst a number of competing users. The concept of trust has been the primary vehicle that has allowed the things to be utilized in a manner that more closely meets the economic and social needs of a private property system. The second
in control of land depended on a better possession or seisin, rather than on any notion of trespass. It never based its remedies for trespass on the abstract notion of ownership, instead possession being the basis of such remedies. The question of whether a remedy as forthcoming depended on the better entitlement to retain or obtain possession rather than ownership per se.

As already noted the idea of ownership in law is more relative than absolute. Ownership is not a fixed and guaranteed entitlement in respect of a thing; where ownership has been ascribed to a person, it does not mean that the ownership is guaranteed indefinitely. Of course, ownership may be lost to the state by way of a compulsory acquisition or to a creditor in the satisfaction of a judgment debt or in the exercise of his statutory power of sale. In addition, there are some circumstances where ownership may be lost through some form of discontinuance or dispossession. Where the owner fails to exercise his right of ownership—either by failure to retain possession or failure to regain possession in the event of a wrongful dispossession—that ownership can be lost to another by the effluxion of time.

a) Possession

The understanding and definition of possession largely remains contentious. It however said to be is a de facto relationship between a person and a thing. It is a question of fact; it does not necessarily mean that a person in possession is the owner of the thing in

explanation for the reason that ownership is not absolute and cannot be restricted to a single idea relates to the manner in which the law resolves ownership disputes. Courts look to the relative claims of one person in respect of another. The basis of this is that remedies in some cases seek to protect possession rather than abstract ownership. This in turn requires the court to establish who has a better possession rather than who is the absolute owner of the thing in question.

27 According to Madan JA in Blakeman v Associated Hotel Management Services Ltd, Civil Appeal No. 45 of 1984, ‘possession’ is a teasing topic whenever it arises. It does not hold one straightforward meaning; it has various meanings different in different situations so that the ownership of property cannot be affixed with encumbered ease. According to Stable J. in Bank View Mill Ltd & Others v. Nelson Corporation & Feyer & Co (Nelson) Ltd (1942) 2 All ER 476 at 486 (E &F), ‘the term possession is always giving rise to trouble. In the same vein Viscount Jowitt in United States of America and Republic of France v. Dulffus Mieg et Compagnie, SA & Bank of England (1952) 1 ALL ER 572, “the person having the right to immediate possession is, however, frequently referred in English law has never worked out a completely logical and exhaustive definition of “possession”. Parker CJ in Towers & Co Ltd v. Gray (1961) 2 All ER 68 at 71, the learned judge stated, ‘For my part I approach this case on the basis that the meaning of possession depends on the context in which it is used”.

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question. To mankind possession of things is an important aspect of life. Without possession of things in the world it is questionable whether a person has any liberty or security. Indeed, early laws of property had one objective in mind—that is, the protection of lawful possession. Without such protection, not only would life be impracticable but also it would lead to a state of chaos and constant. To the lay mind possession implies some control or detention of a thing. The idea of possession as involving detention is taken by lawyers to suggest that, unlike ownership, which is essentially a de jure relationship between a person and a thing, possession is a de facto relationship between a person and a thing.

b) Title

Title is the set of facts upon which a claim to a legal right or interest is founded, title can exist even when there is no pre-existing legal interest or right vested in a person who claims he has title. In other words, the facts themselves may lead to a legal right or interest enforceable against others. According to Lawson and Rudden, ‘title is a

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28 Although it is quite normal for ownership and possession to go hand in hand, it need not be the case. A person may have possession without having ownership in the thing in question. For example, it is quite possible for a thief to have possession without ownership. Possession without ownership can also occur lawfully, for example, in the case of a bailment of goods.

29 According to Salmond, ‘possession is the most basic relationship between men and things’. See Salmond, Jurisprudence (12th edn, 1966) at p. 65. Speaking of the English system Pollock and Maitland stated that, ‘in the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that the whole system of our land law was law about seisin and its consequences’. See Pollock and Maitland, History of English Law (2nd edn, 1968) at p. 29.

30 In the early law possession was explained through the concept of ‘seisin’, a concept described as lying ‘at the root of the historical development of English land law’. The idea behind seisin lay in the actual or de facto possession of land, which was determinate of whether a proprietary right in land was granted. There were no abstract ideas of title and right; instead possession decided whether a person had a right to land. As such seisin was not a question of right, but rather a question of fact although fact may then lead to a right through the passage of time. Long sustained possession meant quiet and peaceful enjoyment of land.

31 Professor Ray Goode distinguishes title and interest in the following words, ‘interest is to be distinguished from title. A person’s interest in an asset denotes the quantum of rights over which he enjoys against other persons, though not necessarily against all other persons. His title measures the strength of the interest he enjoys in relation to others’. See Ray Goode, Commercial Law (1982) at p 52.

32 It is important to appreciate that the use of the word ‘fact’ here is not used to denote mere physical facts. Rather the inquiry is into the legal facts pertaining to a person standing in relation to some object or asset. In other words, the question can be put, what is the legal significance of an individual claiming an interest in a thing? In this respect A. Pottage writes: ‘…title is an abstract quality, which depends upon an
shorthand term used to denote facts which, if proved, will enable a plaintiff to recover possession or a defendant to retain possession of a thing’. Similarly, Salmond writes, ‘…title is the *de facto* antecedent, of which the right is the *de jure* consequent. If the law confers a right upon a man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other, and these facts are the title of the right’. 

Title to a proprietary interest can be either absolute or relative. In the common law tradition titles are more relative than absolute. An absolute title in property law is one which is indefeasible. A person alleging an absolute title is basically putting forward a set of facts which demonstrate that there is in fact only one title- that is, his title- and that all other titles in respect of the same object are non-existent or simply bad. An absolute title is one which is indefeasible in the sense that there is no one else who can point to a better title in respect of the same object in which a proprietary interest is held. Since the essence of an absolute title is that there is simply nobody else with a better title to the same thing, an absolute title will only arise only if there are sufficient facts which lead to this conclusion.

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34 See Salmond, *Jurisprudence* (12th edn, 1966) at p 331. It follows from the definition(s) of title that two or more persons may have independent legal interests in the same thing. For example, both a true owner of an asset and a person with mere possession with the intention to control can have absolute legal interests in the asset. This legal interest is enforceable against third parties by both the true owner and a possessor. Whilst they both have identical legal interests, they have titles that are different in nature. The true owner has a much stronger title than a mere possessor of the chattel. A true owner has an indefeasible title whereas the possessor has a mere relative title. The strength of the true owner’s title is greater because it cannot be defeated by anyone so long as the true owner has an intention to control the asset. The title of the possessor is liable to be defeated by the true owner, and thus, whilst he has a legal interest, his title is a relative one.
35 There are three classical instances in which a person may prove an absolute title. The simplest way to acquire an absolute title is to create something out of nothing. In this case there can be no other title to the thing other than the one that belongs to the creator. The creation of a book is a good example: here the creator would protect his absolute title by a copyright, which would give him exclusive rights in the book. Another way of acquiring an absolute title is by manufacture. In the absence of further evidence, a person who manufactures something is the first owner and the only owner. Another example of an absolute title is a registered title. A registered title amounts to a guarantee from a certain body, such as the state, that the person registered as owner is the owner and that his title is better than any other title.
A relative title, unlike an absolute title, is one that can be defeated by a person showing that he or she has a better title to the thing in question. The idea of relativity of title originates from the nature of possession in law. Possession in law has the effect of making ownership a relative concept as opposed to an absolute one. Possession raises a presumption of ownership and in the absence of further inquiry a person with possession is deemed to be the owner.

1.3. The Foundations of the Law of Property in Kenya

Having introduced, albeit briefly, the concept of the law of property in land, it is important that we again briefly examine its foundations in Kenya. This is necessitated by the fact that any student of the law on proprietary transactions should not only be well versed in the law which creates the subjects of such transactions, but also with its foundations. Accordingly, the purport of this sub-topic shall be to introduce the reader to the peculiar circumstances and happenings, which have defined our law of property in land and by extension, the subjects of the Kenyan Law on proprietary transactions. This is done with a view to laying a concrete basis for the oncoming extensive and intensive study of the latter branch of Kenyan Law.

To begin with, the foundations of the law of property in Kenya is to be traced first, to the customary land law tenure and secondly, to the colonial administration in Kenya. These two factors have largely defined the historical underpinnings of property law in Kenya which have consequently greatly informed and impacted the present regimes on property and proprietary transactions. Indeed, it would be well nigh impossible for anyone to attempt to grasp contemporary law of property in land, leave alone the law on proprietary transactions, if one did not possess a marked appreciation of the historical place of customary land tenure and the origin, nature, and concerns of colonialism in Kenya.
1.3.1. Customary Land Tenure System

Customary land law tenure system largely obtained prior to the advent of colonialism in Kenya. But, as it would be seen hereunder, the system has been significantly replaced by the agrarian policy introduced by the colonial government in Kenya though some communities and areas in Kenya still remain under the authority of customary land law and over which application of formalization processes have had no significant consequences. It is nevertheless important to study this system of law for, as already elucidated above, it forms the foundation of the regime of law regulating the ownership and possession of property and the province of proprietary transactions in Kenya.

Customary land law tenure owes its legitimacy to the traditional societies (communities) where land was owned on a communal basis by different tribes (groups of people) who lived in the region presently Kenya before the advent of the colonial rule. Though Kenya is composed of diverse groups of people with different values and perception and despite the fact of there being varying forms of ownership of land, it is possible to discern certain common characteristics in the land tenure systems of communities. However, it is vital to note that the social transformations of the people and their philosophy as determined by the dictates of the historical stage of development (hunting, gathering, herding and settled farming etc.) were important influences on the land tenure system of each traditional community.

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36 Much of the available literature on property relations in the pre-colonial period have generally characterized land tenure in Kenya as having been communal in the sense that the entire community exercised ownership over its entire land through some traditional institutions. See for example, Kenyatta Jomo, Facing Mount Kenya: The Traditional Life of the Gikuyu, Nairobi, Kenway Publications, 1938, p. 25; see also James R.W. and Fimbo G.M., Customary Land Law of Tanzania: A source Book., East Africa Literature Bureau, Dar es Salaam, 1973, p. 3

37 Kenya has more than forty-two (42) ethnic communities, each having a variety of land tenure systems. This limits the extent to which one can broadly generalize and categorise customary systems of land tenure.


Customary land law tenure was (and is) anchored on the premise that land is much more than the physical soil. As such in many African societies, traditional philosophy ascribed a sacred significance to land. In particular land did not belong to a particular person but to God.\textsuperscript{40} The Njonjo Commission of Inquiry into the Land Law System of Kenya captured well this phenomenon. It stated thus in its 2002 report:

‘…For indigenous Kenyans, land also has an important spiritual value. For land is not merely a factor of production; it is; first and foremost, the medium which defines and binds together social and spiritual relations within and across generations. As one Nigerian Chief put it, “land belongs to a vast family of which many are dead, few are living, and countless members are still unborn”. Issues about its ownership and control are therefore as much as about the structure of social and cultural relations as they are about access to material livelihoods. This is one reason why debate about land tenure in Africa always revolves around the structure and dynamics of lineages and cultural communities rather than on strict juridical principles and precepts.’\textsuperscript{41}

Since it was so, it meant that members of the particular community could exercise certain rights over the land in varying degrees of equality with others of the same community. In turn, that right was secured by virtue of membership in that community or more specifically by membership into some socially distinct unit of that community. Membership into a community or its unit of course required the performance of certain obligations, which in turn defined rights of access and use of land. The degree of access and use exercised by any particular member would also depend on the status of that member. In essence customary land tenure was inclusive in nature.\textsuperscript{42}

\textsuperscript{40} Among the Ogiek for instance, all land belonged to God. To the Gikuyu, the earth was considered a most sacred thing with the soil being especially honoured. See also Odour, M., “Community Based Property Rights: A Case Study of the Endorois Community, Baringo District”, Draft Paper presented at in-house Workshop on Community Based Property Rights and Sustainable Natural Resource Management in Kenya, RECONCILE, Nakuru, 9\textsuperscript{th} August, 2000


\textsuperscript{42} By inclusive land tenure is meant tenure which guarantees that the available land caters for any expansion in the community population on a continuing and re-adjusting basis through re-arrangement and
In the Pastoral communities, communal ownership was predominant and land use was basically intertwined around the community. The main reason for this being that the economic lifestyle and the climatic conditions were such as not to favour settled forms of production thus discouraging individualized property ownership. Moreover, as the pastoral economy laid a lot of emphasis on livestock rather than land, more priority was given to livestock. To the pastoralists, the important resources were pasture and water whose availability fluctuated from time to time.  

Tenure relations under this customary system were controlled by some socially distinct authority usually comprising of a functionary e.g. a chief, an elder, council of elders, spiritual leader etc. Such an authority solved the problem of allocation by overseeing the access, management and use of land. Control was for the purpose only of guaranteeing access to land and the resources found on it. Decisions about whom to exclude and who not to exclude also rested with this controlling authority.

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44 These functionaries served the allocator’s role in the tenure relations. According to Jeremy Waldron in his 1988 book, The Right to Private Property, the concept of property is the concept of a system of rules governing access to and control over material resources which include land. These material resources are usually scarce with the result that conflicts abound as to who is to get what at what time. Herein arises the problem of allocation, that is, the problem of determining peacefully and reasonably predictably who is to have access to what resources for what purposes and when. In a traditional community the power of resolving this problem i.e. the allocating power vests in some local leader. See Waldron J., The Right of Private Property, Oxford Clarendon Press, London, 1988, p. 32

45 Generally, the composition of the allocating authority was dependent on the use for which the land was employed and the social organization of the community. Thus for example, among the sedentary agricultural groups leading a more settled life, control of use and access generally began at the lower level of the family and progressed concentrically to the highest unit of control in the community. Among the Gikuyu, for example, a man would acquire an estate by cleaning a vast tract of land often extending to a complete ridge. The man would start a nuclear family which would expand later on to become an extended family at which point the locus of control would then shift progressively to the leaders of the greater lineage members, eventually to the clan elders. Among the Luo a common grandfather regulated use and access within a lineage set-up. He was recognized as the land controlling authority and allocated cultivation rights and controlled types and scopes of use with regard to land that required more expansive access rights e.g. grazing. A council of common grandfathers exercised the allocating role. See Odour M., “Community-Based Property Rights and the Management of Natural Resources in Kenya”, Unpublished LLB Dissertation presented to Faculty of Law, Moi University, 2001, p. 26. See also Ogolla and Mugabe Supra n. 11, p. 98
In summary, Adam Leach observes that there are at least five dominant concepts to most customary tenure systems, as follows:

a. Tenure is family based and the head of the family holds rights on behalf of other family members.

b. Individual and group membership of the social unit of production or political community have guaranteed rights of access to land or other natural resources.

c. Rights of control are vested in the political authority of the unit or community.

d. Private property rights accrue to individuals because of the investment of their labour in exploiting resources.

e. Resources which do not require extensive investment are shared as common pasturage and managed by the relevant political authority or people with appropriate jurisdiction.46

However, with the introduction of colonialism, these customary conceptions about use and ownership of land began to be eroded. The colonial masters brought with them new institutions of ruler-ship which systematically undermined the traditional socially accepted institutions of leadership.47 Moreover, other social and cultural changes occurring within communities have generally changed the outlook of their members with the result that traditional forms of production may no longer be fashionable. Other variables like population increase have generally forced communities to change their


47 The colonial masters were guided (or is it misguided?) By the notion that the African community had no concept of land ownership. They thus sought to replace the African system of communal land ownership with individual ownership of land which was in direct contrast with the understanding of Africa’s idea on land ownership. It was for example; argued that since natives had no any form of political organization could, not accordingly; claim to have any rights in land. It was stated, “sovereignty if it can be said to exist at all…is made of chiefs, elders, who are practically, savages and who exercise a precarious rule which have not yet developed either an administrative or legislative system—even the idea of tribal ownership is unknown, except in so far as certain tribes usually live in a particular region and resist the intrusion of weaker tribes…. The occupation
means of economic production. Nevertheless, as earlier noted, there are certain areas and communities that still practice and hold fast to the customary land tenure system.

1.3.2. The Colonial Factor in the Evolution of Kenyan Law of Property and Conveyancing

The incidence of colonialism in Kenya dates back, generally, to the scramble for Africa via the Berlin Conference of 1885, and, particularly, to the declaration of a protectorate over much of what is now Kenya on 15 June 1895.\(^{48}\) From then, the British rule endured until 12 December 1963 when Kenya attained its independence. Throughout this period, the major concern of the colonial masters was capital accumulation which concern was initially hindered with Kenya being under the protectorate status.\(^{49}\) Pursuant to an opinion given by the Law Officers of the British Crown in 1833 in respect of Ionian Island, the protectorate status did not confer radical title to the land in the territory.

As a consequence thereof, rights in land could only be acquired by way of conquest, agreement, treaty and to an extent by sale. Some of these methods were only possible within the ten-mile strip at the coast, which was, then under the jurisdiction of Zanzibar Sultan.\(^{50}\) This difficulty called for drastic revision of imperial jurisprudence which was

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\(^{48}\) At the time of the scramble for Africa which saw East Africa divided into British East Africa (under Britain) and German East Africa (under Germany), the British policy in East Africa was based on the strategic rather than economic significance. According to Mungeam, the reason for Britain’s assumption of territorial jurisdiction over East Africa was not in the new acquisition of political and economic significance but in the wider field of international diplomacy. Mungeam’s emphasis is founded on the strategic significance of the opening of the Suez Canal in 1869 and the importance of controlling the head waters of river Nile viz Uganda. To him, there was little in East Africa to move the British Empire to assume jurisdiction (apart from the aforecited reason). However, this position is found wanting considering that following the construction of the Kenya-Uganda Railway coupled with the discovery of a climate conducive for European settlement and agriculture, the British recognized Kenya as of economic importance to their needs. See Okoth Ogendo, Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya, ACTS Press, Nairobi, 1991

\(^{49}\) The process of capital accumulation was to be effected through a plantation/estate system of agricultural production that invariably had to be under the control of Europeans. This necessitated the need to have and wrest control over land from the natives. The land so acquired could then be used as an incentive to attract settlers.

\(^{50}\) Land tenure issues in the 10-mile coastal strip of East Africa are intertwined with the early Swahili settlement in the region and the Indian Ocean trade. In Kenya, this area covers a strip of land of 1900Km stretching from Vanga in the south coast to the Lamu archipelago in the North. The ownership of land in this area has changed hands severally between the Sultan of Zanzibar, imperial British East Africa.
undertaken gradually over years culminating in the explanation by the Law Officers in 1899 that their 1833 opinion only applied to protectorates “with a settled form of Government”.\footnote{Prior to the 1899 Law Officer’s opinion the British Government had already taken legislatives initiatives to remedy the problem albeit for immediate purposes. In 1896 for example, the Indian Land Acquisition Act 1894 was extended to the protectorate and this allowed the administration to acquire land compulsorily for the railway, for government buildings, and for other public purposes. Further in 1897 the Land Regulations was promulgated to draw a distinction between land within the Sultan’s dominions and land elsewhere in the protectorate. These regulations modeled after the Imperial British Africa Company’s (IBEAC) 1894 Land regulations were promulgated vide the Zanzibar Order-In –council for the ‘peace, order and good governance in Kenya’. These regulations empowered the colonial government to sell land freeholds within the Sultan’s dominions only. Elsewhere, only certificates occupancy were available. Initially these were for 21 years and later for 99 years. The settlers were not satisfied with this state of affairs. Some took to unorthodox means of acquiring land, for instance, by purchasing it from the locals. This was in spite of the fact that the Natives had no title to the lands they occupied save for the right of occupation. See the judgment in Mulwa Gwanobi v. Alidina Visram (1913) KLR 14 S.R.O. 661.} In the case of the East African protectorate, the law officers opined that the Foreign Jurisdiction Act of 1890 gave the Crown the power of disposition over “waste and unoccupied land”.

The opinion of the Law Officers of the Crown having been revised, the colonialist found the basis of subsequent legislative instruments touching on land. In 1901, the East Africa (Lands) Order in Council\footnote{S.R.O. 661.} was passed to give effect the Law Officer’s opinion. It vested crown lands in the whole of the protectorate in the Commissioner and Consul-General for the time being and such other trustees as might be appointed, to be held in trust for her Majesty. The Commissioner was empowered to make grants or leases of Crown lands on such terms and conditions as he might think fit, subject to the directions of the Secretary

Company (IBEACO), and later the British and Kenya Government. The Omani Arabs conquered the East Coast of Africa in 1660 AD and declared their sovereignty over the entire coastal region from Mozambique to Somalia.

In 1885, Sir William Mackinon of the IBEACO signed an agreement with Sultan Sayid Baghash of Zanzibar for leasehold on the 10-mile strip. In 1888 all the land in the area was ceded to the British Government by virtue of a concessinary agreement signed between the British and the Sultan of Zanzibar. Under the agreement, all rights to land in this territory, except for the private property, were vested in the Crown. In 1902, the RDA was enacted to facilitate registration of documents relating to private land in the area. In 1908 it became necessary to adjudicate land in the 10-mile strip in order to separate private property from Government land and the LTA of 1908 was passed for this purpose. Those individuals who successfully claimed their land rights were issued with a freehold certificate of ownership or certificate of mortgage. Title deeds issued for the RDA lands did not create new rights to land but confirmed the existing and did not pertain to new grants. Today, most of these titles have been converted to either the RLA or into the RTA.
of State. In 1902 the Commissioner promulgated the Crown Lands Ordinance which provided for outright sales of land and leases of ninety-nine years duration.

In 1915 the Crown Lands Ordinance re-defined Crown lands so as to include land occupied by native tribes, and land reserved by the Governor for the use and support of members of the native tribes. It also made it clear that the Africans had no right to alienate any of the land, whether they occupied it, or it was reserved for their use. The import of this Ordinance was, according to Ghai and McAuslan, the complete disinheritance of Africans from their land. It must be further noted that the 1915 Crown Lands Ordinance marked the onset of private individual land ownership in Kenya.

As such, by the time Kenya was declared a colony in 1920, the British had already acquired full control of the Kenyan soil. In effect the colonial government had become the allocator of land rights. Thus, throughout the colonial period, the British government controlled the regime of property and conveyancing in Kenya. It is the system created by the colonial regime that was inherited by the African Kenya government upon attaining independence in 1963 and still obtains today albeit with slight amendments. The maintenance of the colonial regime on land law and other factors is attributed to the decolonization process itself. The process represented an adaptive, co-optive and pre-

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53 Crown land was defined as, ‘all public lands within the East Africa Protectorate which for the time being are subject to the control of Her Majesty by virtue of any treaty, convention, Agreement, or of Her Majesty’s Protectorate, and all lands which have been or may have hereafter be acquired by Her Majesty under the Land Acquisition Act 1894 or otherwise howsoever’.

54 Pursuant to section 25 thereof, the commissioner could grant settlers twenty-five hectares for purposes of agriculture. He could go up to 7500 hectares with the approval of secretary of the state. In addition, he could grant leases of agricultural land for a period of 999 years and for a period of 99 years in regard of town plots. Further, the commissioner could subdivide any town plot for purposes of construction. Under section 4 thereof, the commissioner could reserve from sale, lease or other disposal any piece of Crown land that was required for use by natives. Notably, the natives who occupied these reserves were not vested with any rights therein and could thus not purport to alienate them.

55 The view that Africans or natives could not hold any title to land was judicially endorsed by Justice Barth in his notorious judgment as pronounced in the case of Wainaina V Murito (1922) 23 KLR Vol. IX, 102, where his lordship categorically stated that natives were tenants at the will of the Crown in respect of the land they occupied.

56 Ghai and McAuslan

57 The Njonjo Report in this regard, rightly observes that, ‘it was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy created by the colonial masters. This however did not fully materialize. Instead what happened was a general, re-restructuring, hence, continuity of colonial land policies, laws, and administrative infrastructure.
emptive process which gave the new power elites access to the European economy. Therefore:

(a) It had to be moulded in a way that allowed the settlers to adapt to the changed economic and political situation by identifying new centres of influence that were not overtly political;
(b) It had to achieve the aim of socialising the new elite into the colonial political economic and social patterns to ensure that the elite was able to rule functionally on an inherited political structure and co-operate with outgoing rulers; and
(c) The process was geared towards preventing the mobilisation of a nationalist base that would be opposed to continuation of colonial policies after independence.

For these reasons, it will be realized in the succeeding chapters that the theory and practice of conveyancing in Kenya resembles the one that obtains in England in a myriad of ways. However, while the system in England has over the years been refined to capture societal developments, the one in Kenya have undergone very minimal developments, if any.

1.4. LAND TENURE SYSTEMS IN KENYA

Land tenure refers to the terms and conditions under which access to land rights are acquired, retained, used, disposed of, or transmitted. Tenure systems represent relations of people in society with respect to the essential and often scarce land. They are culture specific and dynamic, changing as the social, economic and political situations of groups change. Land tenure ordinarily has at least three dimensions namely, people, time and space.


58 See Lawry S. & Bruce J., 1987, Resource Tenure & Management of Natural Resources in Africa
59 Ibid.
In so far as people are concerned, it is the interaction between different persons that determines the exact limits of the rights any one person has to a given parcel of land. These rights are ordinarily not absolute since there are rules that govern the manner in which the person with tenure is to utilise their rights. While the time aspect of tenure determines the duration of one’s rights to land, spatial dimensions limit the physical area over which the rights are to be exercised. The spatial dimension of tenure may be difficult to delineate in exclusive terms since different persons may exercise different rights over the same space at different times.\(^6^0\)

It is imperative that one understands the land tenure systems obtaining in Kenya so as to appreciate the different legal formalities available for the transfer of interests in land under the different land tenure systems. The historical events and patterns that have impacted land law and conveyancing in Kenya, as discussed above, has yielded at least three main systems of land tenure, viz., so called “modern” (individual) tenure, public holding and customary (Group) tenure.\(^6^1\) In view of the fact that customary land tenure has already been expounded above, it would only be logical that the same is not repeated here.

1.4.1 Public Tenure

The system of public tenure stems from the idea or notion of the state as the owner of radical title i.e. all land belong to the state.\(^6^2\) Public tenure, therefore, designates the Government as private landowner and follows the provisions of the Crown Lands

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\(^{62}\) The source of the medieval theory of land law was the Norman invasion of England in 1066. From this point onwards the King considered himself to be the owner of all land in England. Since the Normans had no written laws to bring with them to their newly conquered territory, what they created was effectively a system of landholding in return for the performance of services. Thus came into being the classic feudal structure. According to the feudal theory, all land was owned by the crown and was subject to the Crown only upon the fulfillment of certain conditions. Land was never granted by way of an actual transfer of ownership. Thus as Pollock and Maitland were later to say, ‘all land in England must be held of the king of England, otherwise he would not be the King of all England. To wish for an ownership of land that shall not be subject to royal rights is to wish for the state of nature.’ See The History of English Law (2nd edn., London 1968), vol 2, 3.
Ordinance of 1902 as subsequently amended and currently reflected and embodied in the GLA.

Public tenure, therefore, is a province of Government land or public land. Government land in Kenya is the land that was vested in the Government of Kenya by sections 204 and 205 of the Constitution that was contained in Schedule 2 to the Kenya Independence Order in Council 1963 and section 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act 1964. Government land in turn comprises of two sub-categories i.e. un-alienated and alienated Government land.

Unalienated Government land refers to Government land which is not for the time being leased to any other person or in respect of which the Commissioner of Lands has not issued any letter of allotment. In other words, these are lands vested in the Government and over which no private title has been created. The defining element of such lands is that they have not been alienated, meaning given away or ceded by the Government to another person or entity.

Alienated Government Land on the other hand, is land which the Government has leased to a private individual or body corporate, or which has been reserved for the use of a Government Ministry, Department, State Corporation or other public institution, or land which has been set aside by way of planning, for a public purpose (this latter category is usually referred to as public utility land). The defining element of alienated Government Land is that it has been reserved for the use of a Government institution or it has been set aside for the use of the public or it has been leased to an individual.

In summary, public land is all that land which is vested in the public or held under public tenure.\textsuperscript{63} It means all the land in which every Kenyan has an interest by virtue of being a member of the public.

\textsuperscript{63} It has been argued that the concept of ‘public land’ was not alien to African customary tenure. In this regard, public land, in customary law, fell under what are usually referred to as “commons”, thus there was territory which served the interests of the community in its corporate status. In this category were found lands such as common pathways, watering points, grazing fields, recreational areas/grounds, meeting
1.4.2 Modern (Individual) Tenure

Today, ‘modern tenure’ forms the basis of official policy towards land in Kenya. Individual tenure system owes its roots to colonial instruments that sought to propagate ideals of agricultural production based on individual tenure system. The most significant of these instruments was published in 1954 as A Plan to Intensify African Agriculture, widely known as the Swynnerton Plan. This plan saw the problem of land in terms of tenure and the technology of production. The problem was to be addressed firstly by the creation of an indefeasible title, and secondly by intensification of agricultural production in the native areas. The general expectation was that natives would be able to get maximum returns from their farms and hence abandon the clamour for return of the land taken from them by the Europeans.

The Swynnerton Plan was introduced as land tenure reform policy with the aim of perpetuating land ownership centered on the individual. Customary tenure based on ownership by the community was thought to tie up land in many hands hence serving as an obstacle towards attainment of a free market. If high levels of investment were to be achieved, then land ownership had to be “rescued” from the yokes of customary ownership, so the argument went. Further, it was said that customary ownership created insecurity and hence provided poor incentives for investment. Agricultural growth on the contrary required the conversion of kinship-based systems of customary tenure, incapable of being sold, to formal individual titles that could be exchanged freely in the market. The report summarized the advantages of individual tenure system in the following words:

‘individual tenure has great advantages in giving to the individual a sense of security in possession and in enabling, by purchase and sale of land, an

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venues, ancestral and cultural grounds, and many others. No individual or group could be allocated rights of access to such public lands other than for purposes for which they had been set aside and recognized. The community’s needs could not yield to private interests.

adjustment to be made by the community from the present unsatisfactory fragmented usage to units of an economic size. The ability of individuals to buy and sell land by a process of custom opens the door to that mobility and private initiative on which a greater sector of economic progress tends to depend. The urban wage earner can sell his homeland plot which so often the uneconomic one confident in the knowledge that he can buy another when occasion demands. The specialist farmer is relieved of the liability of providing a place for the subsistence of his clan relations. Moreover, individual tenure should lead to the release and encouragement of new genius and to new experiment in finding the most productive use of land.”

Predicated on these arguments, the Native Land Tenure Rules were promulgated in 1956 establishing a system of adjudication, consolidation and registration. Subsequently, the Native Land Registration Ordinance was enacted to provide for individual ownership of land upon registration. It was posited that the registration of private rights in land resulted in more efficient use and conservation of the available land. Private title was supposed to enable land to acquire a collateral feature so that it could be offered as security to obtain credit, which could be channelled towards further improvement.

These laws are in no doubt the forerunner of the present system obtaining under the Land Adjudication Act, the Land Consolidation Act and the RLA. The RLA, as will be seen, currently embodies the individual tenure system with the effect that the registration of an individual as the proprietor of land vests in that person an absolute title. As will be seen later, the introduction of absolute proprietorships as a separate land tenure category by the enactment of the RLA was intended to extinguish customary tenure and replace it with rights that would be individually and exclusively held.

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CHAPTER TWO

THE LEGAL FRAMEWORK REGULATING CONVEYANCING IN KENYA

2.0. INTRODUCTION

This chapter aims to examine the various pieces of legislation, which as already noted are what constitute Kenya’s primary source of Property Law. This will serve to tie up the prior discussion on the philosophical origins of colonialism, particularly when we examine the actual reasons which led to the enactment of some of these statutes by the colonial legislature, thus leading to what may be said to be the onset of administration of property rights in Kenya.

As such the starting point ought to be a discussion on the Crown Land ordinances of 1902 and 1915 which served to facilitate the alienation of crown land by the colonial government. However, these two pieces of law have already been looked into in Chapter one and, therefore, the same will not be repeated herein. The discussion here, then, will begin with the Registration of Documents Ordinance of 1915 running through to the Registered Land Act of 1963.

2.1. The Registration of Documents Ordinance 1915 (Cap 285 Laws of Kenya)

This piece of legislation was enacted alongside the 1915 Crown Lands Ordinance. The Registration of Documents Ordinance, (hereinafter the R.D.O.), set up Registries in Nairobi, Mombasa and Malindi. This was done with a view to facilitate the registration of documents relating to transactions involving alienated crown land. Subsequently, the registries in Malindi and Naivasha were closed down and their registers transferred to Nairobi and Mombasa.
It is noteworthy that the RDO was the very first registration statute in Kenya. It introduced a simple system of registration which had been applied in Zanzibar before. All documents registered pursuant to its provisions pertained to land which was the subject of either 999 agricultural land leases which had been converted into freeholds by the commissioner pursuant to his powers under the 1915 Crown Land Ordinance.

All surveys and consequent registrations under the RDO were based on the claims of ownership of land submitted by the residents of the coast to the Recorder of Titles. Since independence the RDO, or RDA (A for Act) as it is currently referred to, is applicable only to unadjudicated claims at the Coast. However, it is noteworthy that major parts of the Register kept pursuant to its provisions have been converted to the Registered Land Act, (Cap 300) and the Registration of Titles Act (Cap 281) regimes of registration of interests in land.

2.2. The Lands Title Act (Cap 283 Laws of Kenya)

This Act, initially an ordinance\(^67\), was enacted in 1908 for purposes of facilitating alienation of Crown Land at the Coast. The precise background to the enactment of the Land Titles Act (hereinafter L.T.A.) lies in the fact that the colonial Government needed to distinguish between private land and crown land situate within the ten (10) mile coastal strip.\(^68\) It must be reiterated that this strip had been leased from the Sultan of Zanzibar subject to the rights of the inhabitants, who were mostly Arab settlers.\(^69\)

\(^67\) The Land Titles Ordinance 1908
\(^68\) Prior to the enactment of the 1908 Ordinance, the British authorities had assumed jurisdiction over the ten-mile coastal strip, which was before then under the suzerainty of the Sultanate of Zanzibar, by virtue of an Administrative Agreement entered into in 1895 with the Imperial British East African Company (IBEAC) transferring control over lands ceded to the latter by virtue of the concession Agreement signed in 1888 with the Sultan. Under that Agreement, all rights to land in the Sultan’s territory, except private lands, were ceded to the company. See Sorrenson, M.P.K., The Origins of European Settlement in Kenya, Oxford University Press, London, 1968
\(^69\) The land problems that have incessantly visited the coastal region have been linked to the 1908 Ordinance. According to the report of a Parliament Select Committee released in 1978, ‘adjudication of claims under the 1908 Ordinance (was), the primary cause o landlessness by indigenous people in the ten-mile strip as we know it today. For it ruled out the possibility that these people and sections non-Mazrui Arab communities could ever acquire title or guaranteed access to land during the colonial period. The reasons why most indigenous coastals made no claim as required by the Ordinance are not difficult to understand. First of all, the indigenous people of the strip had no knowledge of the existence of the Ordinance. Even if they did, they never understood its provisions. Secondly, the Ordinance had no relevance to indigenous conceptions o land tenure. That they should be asked to lay claims upon the soil was a startling proposition. Thirdly, the Ordinance was clearly biased against these people. For the colonial government and courts believed that no African, whether as an individual or a community had any title to land. Hence for purposes of the 1908 and other colonial land ordinances land occupied by Africans was always treated as ownerless. Fourthly, the actual investigation o claims was done mainly by Mudirs-usually Mazrui Arabs absorbed into colonial administration- who were generally unsympathetic to the indigenous people. Fifthly, the time limit within which claims could be made was extremely short. And indeed after 1922 claims would no longer be received at all. …sixthly, because the Ordinance had introduced a basically British conception of land, i.e. that whatever is attached to the land becomes part o that land, these people also lost whatever rights to the product of the soil, e.g. coconuts etc. that
Those individuals who successfully claimed private land were issued with Certificates of Ownership giving freehold title or Certificates of Mortgage or Interest covering lease holds depending on the nature of title adjudicated. The titles issued under the LTA did not create new rights, they only confirmed existing rights thus they did not in any way pertain to Government grants. Further, under the LTA, the Registrar was known as the “Recorder of Titles” and the procedure of adjudicating private claims to land was borrowed from an Act of Ceylon. 70 Lastly, it must be pointed out that any plot, which was not successfully claimed by private individuals, was vested in the colonial government and upon independence, in the Kenya Government.

2.3. The Registration of Titles Act (Cap 281 Laws of Kenya)

This statute was enacted in 1920 whereupon all successfully claimed plots were registered under it. Thus to date any titles adjudicated in 1920 and thereafter are registered under the Registration of Titles Act (hereinafter the RTA) unless they have been converted to Registered Land Act (Cap 300) titles.

It is worth noting that when the LTA had been enacted in 1908, it had been expected that the process of adjudication of claims would be completed within a short time. Unfortunately, this was not to be so, and the office of the Recorder of Titles was eventually closed down due to lack of funds in 1922. Therefore, the RTA was enacted principally for the purpose of improving the issuance of titles to land as well as regulating transactions in the same. It was modelled upon the Registration of Title enactment of the Federal Republic of Malaya and the Transfer of Land Act, 1890 of Victoria.

Apart from introducing a form of title registration based on the Australian Torrens system of title registration, the RTA also introduced conveyancing by statutory form. Lastly it ought to be noted, this Act relates to all land granted by the Government or subject to the Certificates of Ownership, Mortgage or Interest issued by the Recorder of Titles under the LTA. In addition, it also applies to all leaseholds which have been converted from the terms of 99 years since 1920 (or even 999 years) to freeholds and to any titles converted on a voluntary basis from the Government Land Act, (Cap 280) or LTA registration to RTA Titles.

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70 Act No.30 of Ceylon

2.4. The Indian Transfer of Property Act 1882

Basically, the LTA, RDO and the RTA were registration statutes. They only provided for the registration of ascertained interests in land but not the manner of dealing or transacting in the said interests. In a nutshell, as at the time of the enactment of the said statutes, there was no general substantive law governing the conduct of proprietary transactions or conveyancing, as they are commonly known.

Naturally it follows that the concept of title was alien to the Kenyan legal system as it obtained then. This state of affairs was addressed vide recourse to Article 11(b) of the 1897 East Africa Order-in-council. This article allowed the application of the 1882 Indian Transfer of Property Act to Kenya. This Act, (hereinafter referred to as the ITPA) was applied in Kenya as a substantive law, principally for the purpose of catering for the interests of European Settlers.71

To date, the ITPA (1882) is still the main substantive law governing transactions in land concluded under the LTA and the Government Lands Act (Cap 300) hereinafter referred to as the GLA. However, it must be pointed out that the ITPA (1882) had inherent shortcomings, the greatest being that it was neither a conveyancing nor a registration statute. This deficiency in the ITPA (1882) made it necessary for documents relating to transactions to be drawn in accordance with the provisions of the English (1845) Real Property Act and the 1881 Conveyancing Act of Victoria.

Clearly, there was a burning need for a substantive enactment. Hence the Registered Land Act (Cap 280) was eventually to function as a substantive conveyancing and registration statute. Before dealing with this legislation, however, it is deemed important to deal first with the Government Lands Act (Cap 280 Laws of Kenya).

2.5. The Government Lands Act (Cap 280 Laws of Kenya)

This enactment is no doubt a replacement of the 1915 Crown Lands Ordinance. It was enacted to make further and better provisions for regulating the leasing and other dispositions of Government Land and related issues. Under this Act, only the President can sign documents granting title. The President can and has delegated his powers to the

71 The ITPA should be read in conjunction with the Indian Act (Amendments) Ordinance (Cap. 2 (1948))
Commissioner of Lands. The GLA lays down the procedures the Commissioner of Lands must follow in allocating land.

In addition, it abolished the compulsory registration required under the RDA in respect of transactions relating to unalienated Government Land. Basically, this Act governs all freeholds and leasehold interests granted by the Government prior to 1920, with the exception of leaseholds converted to 999 years or to freeholds under the RTA.

2.6. The Registered Land Act (Cap 300 Laws of Kenya)

The Registered Lands Act was enacted in 1963 with the aim of achieving two policy objectives. First, it sought to enable land by Africans to be registered under the law. In this regard it provided that "all land that was consolidated or adjudicated in the African reserves and then offered to the Africans for settlement in the settlement schemes would be registered under it." Secondly, it aimed at simplifying and unifying the registration process which, at the time, was spread between the above-mentioned statutes. It provided for the conversion of a registration under any of the other statutes into a registration under its provisions.

The policy objectives behind the enactment of the RLA were ignited by the problems that attended the GLA, RTA and the ITPA. The GLA and RTA were limited only to the registration of title to land. They did not provide for the procedure through which interests in land registered under them would be conveyed. The ITPA which was meant to serve this purpose was subsequently found not to be meritorious.

In this light, it repealed the Land Registration (Special Areas) Act save for its adjudication and consolidation provisions. The Land Registration (Special Areas) Act had been enacted in 1959 shortly after the enactment of the Native Lands Registration Ordinance, both of which were focused on recognizing and registering the claims of Natives to land under customary law.

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72 The phenomenon of African reserves (and indeed the RLA) owes its roots to the Native Lands Trust Ordinance. It was enacted after Africans had demanded the return of their land and expressed their insecurity with regard to the land they occupied. As can be expected, this statute was interpreted by colonial courts as giving the Natives rights of perpetual possession with respect to the reserves they occupied, subject to the power of the Governor to expropriate the same for public purposes (see Kalabri v. A.G. 1938 18 KLR)
2.7. The Land Control Act (Cap 302 Laws of Kenya)

The land Control Act was enacted in 1967 with an aim of regulating, by means of public control, the manner in which the landowner or the interest in land is supposed to deal with his land. It owes its origin to the Land Control Ordinance of 1944. This Ordinance put an end to the exclusive Europeans dealing in land as was earlier envisaged by the Crown Lands Ordinance of 1902 and 1915. It ensured that only those who were capable of developing land could own it. This was perhaps necessitated by the fact that the Second World War, had caused a dwindle in farm production as farms were neglected. It was therefore necessary to take steps to ensure that land would be used for the benefit of the country.

The land tenure committee appointed in 1941 recommended that ‘any system of land tenure would be unsatisfactory which permitted unrestricted transfer and unrestricted use and misuse of land.” The 1944 Ordinance, therefore, established a Land Control Board whose consent had to be obtained before any transaction in land was seen as valid. The Board was given power to impose conditions as to the development of land and failure to comply with these conditions would lead to one’s forfeiture of his land. The membership of the board comprised of the Commissioner who was the chairman, a finance secretary, a director of agriculture and six other persons. Appeals were to the land Control Appeals Tribunal whose decision was final. The 1944 Ordinance was only for the control of land in the ‘white highlands.’

After Second World War, the administrators saw the African Reserves as productive units and wanted to encourage the growing of cash crops. They therefore needed a change from communal land ownership to individual land tenure. In advocating for this, Swynnerton stated that Africans “must be provided with security of tenure through an indefeasible title as will encourage him to invest his labour and profits towards development of his farm as will enable him to offer it as security against such financial credit as may be open to him.” The idea was further developed by the East African Royal Commission which suggested that for the Africans to develop their land, they needed to own it individually.

There was therefore needed a system to control productivity of the land. The recommendations of the two groups formed the basis of land registration and land control. The aim was to prevent the Africans after registration from sub-dividing, selling and living on the land without adequately developing it. These were the reasons for the enactment of the 1959 Land Control (Native Lands) Ordinance. It provided for establishment of Divisional and Provincial Land Control Boards without whose consent dealings in land would be void.
Under this Ordinance, all transactions in land were to be controlled except three types of transactions: transmissions of land unless it involved sub-division; foreclosures; and transactions made in favour of the Government of Trust Board. Consent would not be granted to any transaction which would cause the creation of smaller pieces of land and reduce productivity.

At independence, the provisions of the 1944 and 1959 Ordinances were incorporated in the Kenya (Land Control) Transitional Provisions Regulations 1963. These regulations were to serve until provisions could be made by law. These rules served from 1963 to 1967 when the Land Control Act (Cap 302) was enacted. This Act however did not depart from the system that had earlier existed except with regard to the composition of the Board and the application of the Act to most areas of the country. It is under this Act that the regime of land control in Kenya is today embodied. Its salient provisions and judicial application will be discussed in depth under Chapter Eight of this book.

It is important to note that the above-discussed Acts of Parliament are the main statutes that largely impact on the theory and practice of conveyancing in Kenya. However, there are other numerous pieces of legislation that in one way or another are significant to a fuller and complete understanding and practice of conveyancing in the country. They in particular deal with a specific aspect of conveyancing. These statutes include, amongst others, the following:

- Physical Planning Act 1996 and Regulations, (Cap 286).
- Local Government Act, (Cap 265).
- Stamp Duty Act, (Cap 480).
- Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, (Cap 301).
- Companies Act, (Cap 486)
- Rent Restrictions Act, (Cap 286).
- Auctioneers Act No. 5 of 1996.
- The Land Disputes Tribunals Act, 1990.
- The Distress for Rent Act, (Cap 293)
- Land Trusts Act (Cap 290)

The relevance of these statutes to conveyancing in Kenya has been discussed herein under the various chapters that embody this book. In conclusion, it must be noted that the multiple
Statutes (more than fifty) that regulate conveyancing in Kenya are an embodiment of many principles that, are foreign, and have their origin in the history and traditions of England. The Acts lack uniformity due to the fact that they were enacted in the absence of a coherent land policy and were essentially aimed at addressing specific interests and issues at different times in history. Nevertheless, he who must understand and practice conveyancing in Kenya must be well versed with the provisions of the entire legal framework that regulates conveyancing in the country. Only then will one find that there is no magic in the word conveyance. The relevance of studying the legal framework behind conveyancing has been well elaborated by Kenny and Hewitson as quoted in the paragraph below:

‘Land law, Trusts, Succession and Conveyancing- these are names to strike terror into the hearts of students…the subjects become clearer and more interesting not by mastering a superficial guide but by coming to grips with the intricate and enthralling detail of each subject of property law. Very much of this law detail is contained in statute law. The good property lawyer is framework. This familiarity and confidence can come only from frequent reading and use of the statutes. It would be hard to claim that anyone of these statutes is, taken as a whole, well or coherently drafted and their study presents difficulty, but not studying them leaves property law opaque. When statutory framework is monitored the case law becomes more accessible. The complex picture of…property law begins to move into focus. Soon its study and practice will be enjoyed.’

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73 See *supra* n. 6.
CHAPTER THREE

DISPOSITIONS IN LAND

3.0. INTRODUCTION

Having looked into the nature and scope of conveyancing and the legal framework that clothes the same in Kenya, it now suffices to look into the details of land disposition. As it has already been noted, conveyancing is essentially the law relating to the creation and transfer of estates and interests in land. The unique character of conveyancing (as contrasted from disposition of other chattels) flows from the nature of land.\(^75\) The starting point of a discussion on disposition in land, therefore, should be a clear exposition of the legal understanding of land.

3.1. LAND: THE SUBJECT OF CONVEYANCE

For the property student and lawyer, the word ‘land’ has an extended and complex meaning. This meaning is usually expressed by reference to two Latin maxims. The first is *Cuius est solum eius est usque ad coelum et ad inferos* meaning he who owns the land owns everything extending to the very heavens and to the depths of the earth.\(^76\) This medieval brocard contains a measure of truth as far as Kenyan law is concerned save for the fact that there are numerous exceptions to it such that it cannot be said to a statement of law on the face of it. The second is *quidquid plantatour solo, solo cedit* meaning whatever is attached to the ground becomes a part of it. The rule also implies that objects attached to the building in question become annexed to the realty with the result that they are regarded as “fixtures.”\(^77\) Once annexed to the land, there are often legal restrictions on their removal or severance from the realty. There are however limitations, statutory or otherwise, to these broad doctrines and indeed it is

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\(^75\) There are three differences between buying land and any other chattel e.g. a book. The first difference between the two transactions lies in the nature of what is being sold. A vendor cannot ‘own’ land in the same way that he can ‘own’ a book, that is to say that he cannot own land absolutely, but only have an estate in it. A second difference lies in the method of transfer of estates in land. A book is normally bought by taking possession and paying the purchase price. This is not a suitable method of transfer of land. Because the transfer or creation of a legal estate or interest must be by a deed or contract. A third difference between buying a book and buying land is in the proof of ownership provided. A purchaser buying a book normally neither demands nor receives any proof from the shop that they do own the book; he assumes that they do from their possession of it. Such an assumption would be extremely foolish in the case of land. One cannot really be in possession of land in quite the same way that one can be in possession of a book. One can be in possession of it but that does not necessarily suggest that the occupant is the owner of a freehold or leasehold estate. He could be a mortgagee, a tenant under a weekly tenancy, a licensee, or even a squatter. See Storey I.R., Conveyancing, (2nd edn), Butterworths, London, 1987, p 3-4.

\(^76\) See Wandsworth v United Tel. Co. Ltd (1884) 13 B.D. 904

\(^77\) Whether a chattel (such as a bathroom cabinet or an overhead heater or an extractor fan) merges into ‘land’ by reason of attachment to a wall depends upon both the degree and the purpose of the annexation. See Holland v Hodgson (1872) LR 7 CP 328 where Blackburn J adverted to a useful but not a conclusive guideline: ‘when the article in question is not further attached to the land than by its own weight it is generally considered a mere chattel.’
doubtful whether the latter doctrine is applicable in Kenya given the statutory provisions dealing with the question of fixtures.\textsuperscript{78}

Stemming from this understanding, section 2 of the RTA defines land as including ‘land and benefits to arise out of land or things embedded or rooted in the earth, or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is so attached, or permanently fastened to anything so embedded, rooted or attached, or any estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, privileges, easements, plantations and gardens thereon or thereunder lying or being, unless specifically excepted’.

Section 3 of the RLA defines land to include land covered with water, all things growing on land and buildings and other things permanently affixed to land. In general, various Acts of Parliament define land for their own peculiar purposes and although the definitions of land in Kenyan statutes are varied and often inconsistent with each other, it can be observed that taken together and with the common law, land may be defined to include the soil, any buildings thereon and anything affixed to the soil or the building together with anything growing on the land with statutory exceptions as regards the ownership of geospace and aerospace.\textsuperscript{79}

\section*{3.2. PROPRIETARY RIGHTS IN LAND}

But what then are the interests that one can own and transfer in land? In this regard, it is important to remember that estate or interest in land is divided into two classes: freehold and leasehold.

\subsection*{3.2.1 Freehold Estate/Interest}

A common feature of all estates of freehold is that the duration of the estate, though limited, is uncertain. The freehold estates are the fee simple, fee tail, life estate and estate pur autre vie. In the case of the fee simple and the fee tail, the word “fee” denotes that the estate is an estate of inheritance, i.e. an estate which, on the death of the tenant is capable of descending to his heir. It also means that the estate is one which might continue forever. The words “simple” and “tail” distinguished the classes of heirs who could inherit. A fee simple

\textsuperscript{78} See Shaw v Shah Devshi & Co (1954) KLR (P&I) 24.

descended to the heirs general, including collaterals. A fee tail descended to heirs special, i.e. to lineal descendants only.

A life estate on the other hand, is not a fee. It is not an estate of inheritance and it cannot continue for ever. On the death of the tenant an ordinary life estate determines, and an estate \textit{pur autre vie} does not descend to the tenant’s heir, but passes under the special rules of occupancy. Life estates are sometimes called “mere freeholds” or simply “freeholds”, as opposed to “freeholds of inheritance”. Under the RLA, sections 27 and 28 and under the RTA section 23, a freehold interest is known as an absolute title. The GLA is also capable of conferring a freehold interest.

\textbf{3.2.2 Leasehold Estate/Interest}

A leasehold estate is an estate for a fixed term of years. Leaseholds have long been denominated “estates less than freehold”, and in theory they are inferior. There are various forms of leasehold estates, their distinguishing characteristic, in contrast with freehold estates, being that their maximum duration is fixed in time. The principal categories are: fixed term of certain duration, fixed term with duration capable of being rendered certain, and tenancies at will and at sufferance.

In Kenya, leasehold interest may be conferred under the GLA, RTA, RLA and the Sectional Properties Act, 1987. The details on leasehold transactions are enshrined hereunder in chapter five.

\textit{80} A fee simple was originally an estate which endured for so long as the original tenant or any of his heirs (blood relations, and their heirs, and so on) survived. Thus at first a fee simple would terminate if the original tenant died without leaving any descendants or collateral blood relations (e.g. brothers or cousins), even if before his death the land had been conveyed to another tenant who was still alive.

\textit{81} A fee tail estate (or entailed interest) is an estate which lasts for as long the original grantee or his lineal descendants survive. It could be limited to male or female descendants. It was designed to keep the land within the family. Thus if the original tenant died leaving no relatives except a brother, a fee simple would continue, but a fee tail would come to an end.

\textit{82} The tenant may hold the land of a fixed term of certain duration, as under a lease of 99 years. The possibility of the term being curtailed (e.g. by forfeiture for non-payment of rent) under some provision to this effect in the lease does not affect the basic conception, which is one of certainty of duration in the absence of steps being taken for extension or curtailment.

\textit{83} A lease for a fixed term of duration capable of being rendered certain occurs, for example, where there is a lease of land “to A from year to year”. Such a lease, if it has no other provision as to its duration, will continue indefinitely unless either landlord or tenant takes some step to determine it.

\textit{84} A tenancy at will is a tenancy which may continue indefinitely or may be determined by either party at any time. This involves tenure (i.e. a relationship of landlord and tenant) but no definite estate, for there is no defined duration of the interest. The tenant has nothing which he can alienate. A tenancy at sufferance arises where a tenancy has terminated but the tenant “holds over” (i.e. remains in possession) without the landlord’s assent or dissent. Such a tenant differs from a trespasser only in that his original entry was not wrongful and the landlord must re-enter before he can sue for trespass. His estate in the land is not true estate, and there is no real tenure; the tenancy seems to have originated as a pretext for preventing the occupation being regarded as “adverse possession”, which in time could bar the landlord’s title altogether.
In addition to the above classes of estates or interests in land, other interests in land which may form the subject of a conveyance are: mortgage or charge, license, easements and profits a prendre.

### 3.3. FREEDOM OF DISPOSITION AND PUBLIC POLICY

Statutory rigors inherent in conveyancing legislations are often the function of the need to strike a balance between the freedom of disposition and public policy. Like the law of contract, property law rests upon the doctrines of sanctity and freedom of contract. As such, it works on the premise that there is private autonomy in property transactions. In a nutshell, this means that individuals are viewed as having the power to effect changes in their legal relations, which power is a fundamental incident of having property.

Accordingly, one of the consequences of having a property right is that the holder of that right has a power to effect changes in the legal relationship constituted between himself and the thing in which he has the proprietary right. It is this aspect of private autonomy that necessarily imports a sense of freedom of disposition. This autonomy is crucial to an efficient system of property distribution. In this respect one author writes:

‘…if in a pure liberal market society the market is to carry out its function of allocation of resources amongst various uses, property must be freely alienable. This seems to require a system of property law designed to sustain freedom of disposition.’

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85 See chapter 7 below.
86 A license is a personal permission granted by a land owner to another person to occupy, personally, for a consideration, the other’s land, and may be for a limited time or unlimited. However, a licence cannot amount to a lease. The difference between a lease and a licence is that a lease can be assigned while a licence cannot. See Runda Coffee Estates v Ujagar Singh (1966) EA 564.
87 Easements include rights of way, rights to light and other similar rights. Section 3 of the RLA defines an easement as ‘a right attached to a parcel of land, which allows the proprietor of the parcel either to use the land of another in a particular manner or to restrict its use to a particular extent, but does not include a profit’. Under section 30 of the Act are expressly stated to amount to overriding interests. They are basically rights in alieno solo, for instance, where a person purchases land subject to easements, the person in the dominant tenement will still have a right to pass over the servient tenement.
88 Profits a prendre is the right to go to the land of another person to pick up a product of the soil. It confers a right to take part of the soil or produce of the servient tenement. In this respect profits are to be distinguished from easements, which are essentially privileges without profit. A profit is further distinguishable from an easement in that a profit may exist ‘in gross’. This means that the owner of the profit need not be the owner of any adjoining or neighbouring land or indeed any land at all. There need not be a ‘dominant tenement’.
However, the freedom of disposition must be exercised in consideration of public policy. The state, therefore, plays a role in regulating transfer of property rights. This role stems from the notion that there is a strong public interest in the private acts of individuals who attempt to dispose of their property to others. One may question why there is such a public interest in private acts dealing with acquisition and transfer of property rights. Sukhinder Panesar aptly provides the answer:

‘On a theoretical level analysis, the state interest in private property transactions may be justified by the desire to achieve wider social and economic goals. Property is an important means of liberty and survival; without any property there is no liberty or security. Property is also a fundamental vehicle through which commerce and economic wellbeing is generated. The state therefore has a strong interest in seeing that property is distributed in a manner that maintains liberty and security but at the same time generating economic well-being.

In the light of the above, it will be realized in this and in the subsequent chapters, that transactions in proprietary rights are subjects of rigorous and complex statutory and procedural requirements. Under the chapter on controlled transactions, for example, it is elaborated that certain transactions can only be undertaken with the consent of statutory bodies designated to control those transactions. Similarly, as will be seen in chapter seven, mortgages and charges are strictly regulated especially when the mortgagee/chargee intends to exercise his statutory power of sale.

In essence, disposition of land must be preceded by compliance with statutory requirements in order to give legal validity to a particular property right, which is either being transferred or is being created out of a larger proprietary right. The formalities are dependant upon the nature of conveyancing. It is thus prudent that the categories of conveyancing is elaborated before the formalities of land disposition are looked into.
3.4. CATEGORIES OF CONVEYANCING

Conveyancing falls under two broad categories: unregistered and registered conveyancing. Unregistered conveyancing arises where land in question or interest(s) in land is not registered. Title to the land in unregistered conveyancing is usually proved by tracing through the title deeds disposing of the property/interest. Accordingly, it is imperative that one establishes the good root of the title. Further, one should be careful not to take the preferred titled documents as conclusive proof of good title.

Registered conveyancing, on the other hand, arises where the land/interest in question has been registered. Basically, the title to land or interest in land is proved by an entry in the official register. Usually, the entry in the official register is taken to be conclusive prove of title. Thus one need not establish the good root of title.

3.5. GENERAL FORMALITIES OF DISPOSITION IN LAND

As was seen above, dispositions in land are constrained by a number of formalities that must be satisfied. Traditional justifications for formality rules in the context of real property are said to protect original parties making a disposition of ownership or an interest in land. Unlike personal property, real property has the characteristic of durability, land is said to be permanent and thus rights created therein have a degree of permanence and stability. In this respect a property transaction involving land is treated as more important than any other type of property transaction. The second reason for formality rules in real property law is that they protect third parties. An efficient system of conveyancing is dependent on the ability of third parties to establish exactly what they are purchasing, what interests already exist in the land and how that land is restricted in its use in the future.

Dispositions in land are normally conducted in two stages. The First stage entails contract for the sale of land and the second stage involves completion of the contract. The latter stage is commonly referred to as the “conveyance stage” for it is at this stage that the transfer of the interest in land is effected. In a nutshell, when the preliminary negotiations between the prospective vendor and the purchaser have taken place, the parties enter into a formal contract to execute in favour of the purchaser a conveyance of the legal estate in the land to be sold. These two stages should be looked into in turn.
3.5.1. Contract for the sale of Land

To a large extent, a contract for the sale of an estate in land is just like any other contract. It must comply with the basic requirements for a contract not under a seal: there must be an offer and an acceptance, there must be consideration, and the parties must have intended to create a legal relationship. The parties must also be of contractual capacity.\textsuperscript{90}

The question of contractual capacity requires further consideration here. Under the ITPA, any person competent to contract and entitled to transferable property, or authorized to transfer such property not his own, has the capacity to deal in land. Under the RLA the name of a person under the age of twenty-one years may be entered in the register either on first registration or as a transferee or on transmission. On the face it, the RLA considers twenty-one years as the majority age for purposes of conveyancing. Consequently, though a minor may hold an interest in land, he is not permitted to deal in that land and where he does so, the Land Registrar is empowered to enter a restriction.\textsuperscript{91}

Further, where a disposition by a minor whose minority has not been disclosed to the Registrar has been registered that disposition may not be set aside only on the grounds of minority. Under section 109 of the Children Act 2001, a guardian appointed by the court shall have the same powers over the estate and the person, or over the estate, as the case may be, of a child, as a guardian appointed by deed or will or otherwise under the Law of Succession Act.

A transfer of interest in land may also be effected by a person authorized by a power of attorney. Details concerning this capacity will be dealt with in detail later in this chapter. A guardian or a person appointed under some written law may deal in land on behalf of a person under a disability provided that the Registrar is satisfied of his authority to do so.\textsuperscript{92} In addition, a person under a disability who has been registered as proprietor of land by way of gift may, within six months after he ceases to be under a disability, repudiate the gift if he has not disposed of the subject matter thereof.\textsuperscript{93} However, no such repudiation will have legal effect unless the person has transferred the land to the donor, who is bound to accept it and the transfer has been registered.\textsuperscript{94}

\textsuperscript{90} Section 113(1) RLA.
\textsuperscript{91} Section 113(2) RLA.
\textsuperscript{92} Section 114(3) & (4) RLA.
\textsuperscript{93} Section 115 RLA.
\textsuperscript{94} \textit{Ibid.}
In addition to the above requirements, contract for the sale of land is subject to more stringent conditions owing to the value and peculiarity of land. In particular, unlike contracts for the sale of other chattels which may either be oral or written, contract for the sale of land must strictly be in writing. The insistence on written documents such as contracts (and a deed of conveyance) protects the original parties from ill-thought transactions that they may regret later on. Third parties are also protected.

In view of the above, section 3(3) of the Contract Act (Cap 23 Laws of Kenya) explicitly states that a memorandum of a disposition in land must in writing. For reasons to be shown under, a distinction must be drawn between this requirement prior to 2003 and after. Prior to 2003, section 3(3) of the Law of Contract Act rested on the view:

‘no suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and signed by the party to be charged or some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of contract-

i) has in part performance of the contract taken possession of the property or any part thereof; or

ii) being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.’

The provision as stated was introduced in the statute via an amendment to the Act in 1968. The amendment adopted the position of the English Statute of Frauds of 1677 (no applicable in Kenya) which made the requirement for writing imperative to guarantee the enforceability of an agreement for the disposition of interest in land in an action. This requirement was however often defeated by the application of the equitable doctrine of part performance which nevertheless permitted the party who had performed the act of part performance to bring an action under an unwritten agreement. It is interesting that the 1968 amendment while imposing the requirement for writing also codified the doctrine of part performance in its proviso but restricted this only two possible acts of part performance. The net effect of this was that agreements not necessarily wholly written or formal were deemed to be enforceable through action in court.
This position prevailed until 1st June 2003 when the second amendment to subsection 3 vide Act No. 2 of 2002 came into effect. This amendment repealed and replaced the subsection with the following provisions:

‘No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-
   i) is in writing;
   ii) is signed by all parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this subsection shall not apply to a contract made in the course of a public auction within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting implied or constructive trust.’

The requirement for writing under this amendment is absolute. There is no room for the courts to consider unwritten agreements for the sale of land. It follows that this recent position of the law envisages a contract for sale or charging of land that contains all its particulars within four corners. These particulars would preferably comprise the identity of the parties to the transaction, identity to the property, the price, other terms and conditions of the transaction and finally it must be witnessed by all parties to the transaction whose signatures must be attested to by a person present at the execution of the agreement.

Consideration must, however, be given to the fact that a significant number of land owners in rural Kenya are hardly literate and the mode of contracting for the sale of land is invariably oral with written evidence of transactions maintained in several simple memoranda by the vendor (usually a record of money received from the purchaser on different dates). This is an entrenched practice when it comes to contracts for the sale of land in the rural areas and was previously accommodated by the proviso of the now repealed section 3(3).

The second concern on the recent amendment focuses on the requirements of execution of agreements. Whereas it was hitherto sufficient for the beneficiary to a disposition of an interest in land to execute an agreement, the present requirement is for all parties to execute the agreement and to have the same witnessed. There are significant implications of this particularly on the part of incorporated companies where it is now mandatory that the company seal must be witnessed by at least two directors or one director and the secretary in
order to comply with the requirements of the statute. This requirement also applies to security documents where a bank must now also execute an instrument of charge (through persons with registered power of attorney) together with the chargee. However, the Act fails to define who may attest execution and raises questions as to the possible ramifications if an agreement was attested to by a person who, say, lacks contractual capacity. It has been opined that the Act should provide a closed list of the persons that should be allowed to attest such agreements.

Judicial endorsement of the requirement that a memorandum of disposition of an interest in land flows from the leading case of *Morgan v Stubenitski*. In this case though the memorandum was signed, it was devoid of the envisaged essential terms and was also ambiguous as to who was the tenant, the agreement to take up the lease in question having been made to the landlord by a husband and the memorandum having been signed by the wife. The agreement emphatically stated that there was no agreement in writing capable of satisfying the requirements of section 3(3) of the Law of Contract Act.

In light of the changes in law highlighted above, it is obvious that cases determined before the 2003 amendment are only relevant to the extent that they reflect that contracts for the sale of land must be in writing. Having established that contracts for the sale of land must be in writing, it would be prudent to appreciate here that sometimes the contract might be broken. In such a circumstance, the remedy of rescission of a contract comes into play.

Rescission is a remedy which either party may elect to use should the other party break a term of the contract which is a condition precedent. An example of this would be if the vendor were unable to prove that he had good title to the land; the purchaser would then normally choose to rescind the contract. Rescission is an optional remedy and the wrong party can choose to affirm the contract instead and to seek damages for breach. It is only available in cases in which restitution in integrum is possible; that is, it must be possible to return the parties to their original position.

When rescinding a disposition contract or an agreement for the sale of land, a party must do so in accordance with the provisions of English common law. This basically stems from the fact that the law of contract in Kenya is basically based on the English common law subject to modifications. However, in the presence of specific provisions pertaining to rescission of

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95 (1977) KLR 188.
a contract for the sale of land, the rescission must be strictly in accordance with those provisions. The Court of Appeal emphasized this position in the case of Johnson Joshua Kinyanjui & another v Rachael Wahito Thande & another. The court stated that where a party rescinds such a contract in a manner not provided for i.e. by failing to give a proper notice, the other party is entitled to seek an order of specific performance. Even further, the court was emphatic that the repudiation of such a contract does not amount to or it does not necessarily lead to a rescission.

This view of the law is in accord with an earlier decision of the same court sitting at Kisumu in the case of Nyatwange Israel v Alloys Otachi, where the court granted an order of specific performance on the basis of an undated and unsigned memorandum.

3.5.2 Completion of the Contract/Conveyancing Stage

Having prepared a valid contract for the sale of land, the next step in land disposition is the process of transferring the interest or estate in that land to the purchaser. This is the completion of the contract or the conveyancing stage. The conveyancing process entails but is not limited to the following:

- Investigation of title to land.
- Searches to establish the legal ownership of land and the presence or absence of encumbrances.
- Preparation of conveyancing documents, approving and engrossing them. Engrossing refers to the making of final fair copies of a conveyance/document. Usually after engrossing, the document is known as an engrossment.
- Execution, attestation and verification of the said documents.
- Registration of the said documents to transfer either ownership or security or even discharge an interest.

The above procedures are not necessarily chronological and one may always undertake a number of steps simultaneously as the circumstances of the conveyancing may allow. Edward Moeran provides a noteworthy advice in this regard.

97 Civil Appeal No. 284 of 1997 (Court of Appeal at Nairobi).
98 Civil Appeal No. 73 of 1996 (Court of Appeal at Kisumu).
'Like driving a car, a good conveyancing is largely a matter of making habitual to the point of reflex action the routine and technique, leaving all one’s faculties free to deal with the finer points and the real problems. If you work meticulously through half-a-dozen matters in the way suggested you will begin to establish the habits and you will find that with this habit-formation there comes an immediate lightening of your work…. The most important habit of all is the “one bite at the cherry” approach, by which I mean that you should take as many steps at the same time as the position of a matter will allow.'

3.5.3 Identification of Conveyancing Documents

Different terminologies are employed with respect to conveyancing under the various applicable statutes. In this regard it is imperative that one knows how to identify these documents.

To begin with, under the GLA the process of transfer of the interest(s) will entail a document known as a “conveyance”. It can also entail a Re-conveyance or an assent. A reconveyance is prepared upon redemption of a mortgaged property at under the Act. The mortgagee gets his title documents back before he executes a reconveyance. An assent, on the other hand, is prepared upon the death of a proprietor where the property is to be transferred to someone else. On the same note, it may also be possible to prepare assignments and re-assignments, but only in case of lease. Documents of title under the GLA are referred to as Title Deeds where the interest is freehold and an Assignment where the interest is leasehold.

Therefore, a document with the phrase “THIS CONVEYANCE” or “THIS RECONVEYANCE” or “THIS ASSIGNMENT” or “THIS IDENTURE OF CONVEYANCE or LEASE” is definitely a GLA document.

Under the GLA there are no prescribed forms of the documents. The practice has been to use documents prescribed under the 1845 English Real Property Act and the 1881 Conveyancing Act. These Acts were statutes of general application before 1897 and accordingly they may have the force of law in Kenya.

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The interest conferred by the LTA is either a charge or a second charge or an equitable charge. The transfer document is simply known as a “Transfer” and the document of title are either a Grant or a Certificate of Title. Under the RTA the interests are similar as those under the LTA. The instrument is also known as a Transfer or where necessary, a Discharge or an Assent. Documents of title are known as Grant or a Certificate of Title. Under section 33 of the RTA, all documents used in conveyancing under the Act must be in prescribed form. However, one may amend the documents without substantive departure from the prescribed forms. The basic idea is the proper description of the property in question.

In view of the above, a document marked “I.R.” or “C.R.” or “I.R.N.” is either an RTA or an LTA document. “I.R.” means Inwards Registry, “C.R.” means Coast Registry and “I.R.N.” is derived from what were initially native lands.

The instrument prepared under the RLA may either be a Transfer of Lease/Land or a Discharge or a Transmission. Documents of title are Land Certificate, a Certificate of Lease or a Title Deed. Pursuant to section 108 RLA, the documents must be in prescribed form. Where one does not want to use the prescribed forms, he must get the Chief Land Registrar to approve his documents.

An RLA title number usually refers to the location, sub-location and then the District where the parcel of land is situated. Therefore, if the land is situated in Nairobi, for instance, the title number may be NAIROBI/BLOCK 73/2000.

3.6. ADVOCATES’ FUNDAMENTAL RESPONSIBILITIES IN LAND DISPOSITIONS

In order for conveyancing to be done properly, it is essential that it be done by an advocate(s). Apparently, the conveyancing practice has normally been conducted to date by advocates acting for the vendor and purchaser respectively. Indeed, Advocates enjoy a monopolistic control of conveyancing. As such, there is a need for high standards of competence and ethical conduct. Accordingly, any advocate who is involved in conveyancing is charge with, but not limited, to the following duties/obligations:

Correspondence- The concerned advocate must initiate correspondence upon taking instructions from a client. Such correspondence will ensure that eventually the advocate is

100 See English Final Report of the Royal Commission on Legal Services (Cmnd 7648, October 1979), vol 1, para 21.60(e).
possessed of adequate information to carry out the transaction and to advise the client accordingly.

**When acting for a Seller/Vendor** - An advocate who is acting for the seller/vendor must either by way of correspondence or when taking instructions obtain the following information:

  a. Full names and addresses of the parties, the buyer’s/purchaser’s advocate and those of any estate agents involved.
  b. Full particulars of property concerned, including the address where possible and whether it is freehold or leasehold.
  c. The price
  d. Whether any preliminary deposit is required or has been paid and if so, to whom
  e. Details of any mortgage or charge on the property (if any), the lenders name and the outstanding balance.
  f. Whether the property is vacant, whether there are any chattels thereon and such like issues.
  g. The expected date of completion and the fact as to whether the purchase monies are available.

In addition the vendor’s advocate should carry out the following fundamental duties:

- Prepares agreement
- Prepares title documents
- Approves transfer/conveyance
- Procures execution of transfer of conveyance
- Attests the execution of a transfer or conveyance
- Receives and accounts for the proceeds of sale to his client

**When acting for a Purchaser** - An advocate acting for a purchaser will obviously require similar information. Further, the advocate must advise the client on the following issues:

  a. Finances.
  b. Possible future liability for taxes.
  c. Legal costs and expenses of the conveyance.
In addition to giving the said advice, the purchasers advocate is responsible for the following:

- Carrying out the search
- Scrutinizing title documents
- Approving sale agreement and sends out requisition for the same
- Preparing transfer or conveyance and engrosses the same
- Attending to the execution of conveyance or transfer where necessary
- Stamping and lodging documents for registration
- Obtaining and paying the purchase monies to the vendor’s advocate.

**When Acting for Both Parties**- When acting for both purchaser and vendor or for both lender and borrower, in conveyancing, ethical and professional responsibility issues arise. The general principle is that an advocate is obliged to refrain from acting for both parties where there is a conflict of interest or where such a conflict is likely to arise. A case in point is *King Woolen Mills Ltd v M/s Kaplan & Stratton Advocates*.101

**Other Instructions which must be taken**

(a) Name and address of client(s) - if he is an alias, this must be indicated. Where a person/client had different names, a statutory declaration must be sworn pursuant to the provisions of Oaths and Statutory Declarations Act (Cap 15 Laws of Kenya). Where possible, one should know his/her clients telephone number.

(b) Details of property being sold/bought should also be acquired i.e. Land Reference Number etc.

(c) It is imperative that where one is acting for a purchaser, he obtains a deposit. Though it is not a legal requirement, a deposit is a clear indication that the purchaser is committed to the transaction. The rules pertaining to adequacy and sufficiency of consideration should not be disregarded. Pursuant to condition 3 of the L.S.K. conditions of sale, 10% of the purchase price ought to be paid on or before executing the agreement for sale of land.

(d) Information pertaining to the completion date ought to be acquired when one is taking instructions. The contractual date of completion must be concretely identified. This is

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101 Civil Appeal No.55 of 1993 (unreported)
because it forms a turning point in the transaction i.e. it is the yardstick for establishing whether or not a breach of the contract has occurred, whether there is a default by either of the parties. It is open to the parties to provide for a completion notice.

If one of the parties defaults on or before the date of completion, the other party acquires a right to rescind the contract as was highlighted above. No legal action may be taken on the contract before expiry of the contractual date of completion.

Usually, the contractual date of completion follows the actual date of completion. A completion notice may be served by a party who is ready and willing to complete the transaction. It will usually require the other party, to complete payment within 21 days from receipt of such notice. It is important that the party serving the notice be ready, willing and able to complete on his part. After the contractual date of completion, a completion notice must be served. Twenty one (21) days thereafter, the other party, (party not in breach) may rescind the contract.

(e) Information must also be obtained on the source of purchase monies. This is especially important where one is required to give a professional undertaking.

(f) Care must be taken to ascertain whether there is a need for any special terms. An advocate must ensure that he is cognisant of any terms agreed upon by the parties. The agreement should cover all such terms.

(g) Nature of property ownership- Care must be taken to establish just who owns the property in question. Is the property the subject of joint ownership/common proprietorship? Is the vendor a natural person or a juristic person?

(h) Once the agreement for sale has been approved, it must be executed. Upon execution, it must be stamped though failure to stamp is not fatal to the document. Upon execution, the deposit must be obtained from the purchaser and held by a stakeholder, who may be an advocate for the vendor or any recognized agent.

A stakeholder holds the deposit pending the completion of the sale, but has no interest in the money. Where there is a dispute between the vendor and the purchaser and the stakeholder cannot determine who is entitled to the sum deposited, he ought to initiate interpleader proceedings.
3.7. FURTHER OBLIGATIONS OF AN ADVOCATE

Upon getting the title documents, an advocate must discharge the following further responsibilities.

**Obtaining a Rates Clearance Certificate**- Rates Clearance Certificate is required with respect to properties within municipalities and falling within the jurisdiction of either the GLA or RTA or RLA. This rate is imposed pursuant to the Valuation for Rating Act, Cap 266, which allows/authorizes all local authorities established under the Local Governments Act, Cap 265 to raise revenue from land located within their municipalities/jurisdictions.

Rates are usually levied after the local authority concerned has undertaken valuation and opened up a Valuation for Rating Roll. A proprietor may object to the valuation. However, if no objections are raised, the rates are confirmed after sometime. Upon payment of the requisite rates, one is issued with a Rates Clearance Certificate. Once obtained, the land may be charged or disposed off to another party. Without a Rates Clearance Certificate, the land registrar will not register any transfer or conveyance or any dealing in land. Rates must be paid whether property is freehold or leasehold.

**Obtaining a Land Rent Certificate**- A Land Rent Certificate is required where the land in question holds leasehold interest. Thus it is required under the RTA and the RLA to the extent that the land in question is leasehold. The Land Rent Certificate is not required where the land in question falls under the GLA. Pursuant to Section 86 of the RLA and section 33 of the RTA, a Registrar is empowered to decline to register any instrument unless a rates clearance certificate is produced.

**Obtaining Consent of the Commissioner for Lands**- The Consent of the Commissioner for Lands is required under RTA and the RLA where the land is leasehold but not freehold. Like the Land Rent Certificate, the consent of the Commissioner for Lands is not required under the GLA.

**Obtaining the Land Control Board Consent**- This is required where land in question is agricultural land. As a requirement, it is imposed by the Land Control Act, Cap. 302.102

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102 See Chapter Seven below.
Obtaining Town Clerk’s Consent- This consent is only required where the lessor is a local government, for example, a city council.

Obtaining Consent of Trustees- The requirement for consent of trustees arises in cases of settled land, i.e. where land in question is vested in the National Parks of Kenya.

Obtaining Consent of Public Corporation/Authority- Where one is dealing with a public corporation or authority e.g. the Kenya Railway Corporation or Kenya Ports Authority, one must obtain the consent of that corporation or authority.

Obtaining a Discharge/Reconveyance- Where the land in question is the subject of a charge, it must be discharged and a discharge obtained. Where it is mortgaged, a reconveyance must be procured. Under the G.L.A., one needs not produce the Title Deed, but under the R.T.A. one must produce the Grant or Certificate of Title. Under the R.L.A. it’s not a legal requirement for one to produce a certificate of lease or of land or even the lease itself, though this is the usual/general practice. Principally, this is due to the fact that under the R.L.A. it is the register which is the conclusive evidence of title and not the title documents. Accordingly the register held by the District Land Registrar is the primary evidence.

Payment of Stamp Duty- This is charged at 4% of the price declared in the transfer by the parties, usually the ad valorem value of the property in question if it is situate in municipalities/urban councils. For property situate in other sites i.e. rural areas, the rate is 2% of the ad valorem value. As a charge, it is imposed pursuant to the provisions of cap 480, Stamp Duty Act. A document which is required to be stamped shall not be registered until the requisite stamp duty has been paid.

3.8. INSIGHTS INTO SPECIFIC ASPECTS OF CONVEYANCING

3.8.1 EXECUTION AND ATTESTATION

Execution is the making of an imprint by the person entitled to an interest in land on a conveyance. The signing of the agreement is one of the usual means of executing a conveyance. In imprinting, men use their left thumb print while women use their right thumb print. Where there is no thumb, the print of the big toe may be used.
Where a juristic person e.g. a company is involved, the company seal may be affixed and attested by either two directors of the company or single director and the secretary of the company. Under the RTA it is stated that an instrument executed by a company within the meaning of the Companies Act shall be executed by means of the company’s seal affixed in accordance with the memorandum and articles of association. For any other juristic person e.g. societies and trust bodies/organizations, one should ascertain from their constitution who is the proper person mandated to execute documents on its behalf.

For Government bodies i.e. parastatals, one must look at the establishing Act to ascertain who is empowered to execute documents on behalf of the parastatal. Pursuant to the Co-operative Societies Act, the limited co-operative societies will execute documents by affixing their seal thereto. Unlimited societies are entitled to execute documents pursuant to their internal rules.

In specific terms the RLA provides that every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument. The Registrar may, however, dispense with execution by any particular party save for the transferor or transferee where he considers that the execution is necessary. An instrument is deemed to have been executed under the Act only by a natural person, if signed by him or by a corporation in the following instances:

First, if sealed with the common seal of the corporation, affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer and by a member of the board of directors, council or other governing body of the corporation. Where such a company is being wound up, execution of its instruments is deemed to have been executed if sealed with the common seal of the company and attested by the liquidator.

Secondly, in the case of a corporation not required by law to have a common seal, if signed by such persons as are authorized in that behalf by any law or by the statute or charter of the corporation or, in the absence of any express provision, by the persons duly appointed in writing for that purpose by the corporation, evidence of which appointment has been produced to the satisfaction of the Registrar. Where such a company is being wound up,
execution is deemed to have been effected if the liquidator signs the instrument and the same is verified in accordance with section 110 of the RLA.\textsuperscript{110}

Finally, In the case of group representatives incorporated under the Land (Group Representatives) Act (Cap 287 Laws of Kenya), if signed by all the group representatives, or if signed by a majority of the Group representatives who produce a certificate of the Registrar of Group Representatives that the execution of the instrument has been authorized by resolution of the group.\textsuperscript{111}

Under the ITPA, a mortgage for securing one hundred rupees or upwards must be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.\textsuperscript{112} Consequently, a mortgagee can only exercise his/its statutory power of sale if, amongst other conditions, the mortgage instrument had been signed by the mortgagor and witnessed by an advocate. The ITPA also provides that a gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.\textsuperscript{113}

The RTA has under section 58 elaborate provisions for attestation of instruments. It begins by stating that every signature to an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required to be deposited with the Registrar shall be attested by one of the following persons if it is within Kenya-

i) A judge or magistrate;

ii) A registrar of titles;

iii) A notary public;

iv) An advocate;

v) A justice of the peace;

vi) The Registrar or Deputy Registrar of the High Court;

vii) An administrative officer\textsuperscript{114}

If it is within the United Kingdom or the Commonwealth, the following persons may attest the execution of the instrument:

\textsuperscript{110} Section 124(2) RLA.

\textsuperscript{111} Section 109(2) (b) (iii) RLA.

\textsuperscript{112} Section 59 ITPA.

\textsuperscript{113} Section 133 ITPA.

\textsuperscript{114} Section 58(1) (a) RLA.
i) A judge or magistrate;

ii) A notary public;

iii) A commissioner of the Supreme Court of Judicature, empowered to take affidavit in that court;

iv) The mayor or recorder or other chief officer of any city or municipal corporation.\(^{115}\)

The above persons including an administrative officer may also attest the execution of an instrument if it is within Uganda or Tanzania.\(^{116}\) In any other place not mentioned above, any Kenyan consular officer, consular agent or proconsul, or acting consular officer, or person specially appointed by the president may attest the execution of instruments.\(^{117}\)

It is also stipulated that where an official holding a seal of office attests any instrument he is required to authenticate his signature by his official seal.\(^{118}\) The provisions of the Act on attestation of instruments, however, do not apply to instruments executed by the president or to any instrument executed by a company under its common seal or to any instrument duly executed by a company to which Part IX of the Company Act (Cap 486) applies.\(^{119}\)

To ensure compliance with section 58 of the RTA, the Law Society of Kenya Digest of Professional Conduct and Etiquette enjoins an advocate who is requested to attest a signature in pursuance of the RTA, to insist on the signature being appended in his presence and not to accept an acknowledgment of signature by the person requesting attestation.\(^{120}\) As such, it not considered that that the advocate should accept further responsibility for the identification of the signatory than that suggested in the Digest.

\(^{115}\) Section 58(1) (b) RTA.

\(^{116}\) Section 58(1) (c) RTA.

\(^{117}\) Section 58(1) (d) RTA.

\(^{118}\) Section 58(2) RTA.

\(^{119}\) Section 58(3) RTA.

3.8.2 VERIFICATION

Verification is a requirement of the Registered Land Act only. The pertinent provisions are to be found in section 110 of the Act. At subsection 1 of this section it is provided that a person executing an instrument should appear before the Registrar or such public officer or other person as is prescribed. Unless the person is known to the Registrar or to the public officer, he should be accompanied by a credible witness for the purpose of establishing his identity.

It therefore becomes incumbent upon the Registrar or the public officer to satisfy himself as to the identity of the person appearing before him and to ascertain whether he freely and voluntarily executed the instrument. Having so verified, the Registrar or the public officer is required to prepare a certificate to that effect.

The Registrar is empowered to dispense with verification in certain instances i.e. where it cannot be obtained or it can be obtained only with great difficulties and that he is otherwise satisfied that the document has been properly executed. He may also dispense with verification in cases in which to his knowledge the document has been properly executed. In any event, the registrar is enjoined to record the reasons for his dispensing with verification. These provisions apply only to documents executed in Kenya.

If execution has occurred in the Commonwealth, verification should be undertaken by a judge, magistrate, notary public, commissioner for oaths, or any administrative officer who is under an obligation to endorse thereon or attach thereto a certificate in the prescribed form. If execution has occurred in any other country, verification ought to be by a British consular officer, pro consul or such other person as determined by the minister.

3.8.3 POWER OF ATTORNEY

A power of attorney is an instrument by which a person appoints another to act for him in any matter, including the dispositions of interests in land. It may be general or specific. The person appointing is known as the principal or donor. The person appointed is referred to as

121 Section 110(1) RLA.
122 Ibid.
123 Section 110(2) RLA.
124 Ibid.
125 Section 110(3) (a) RLA.
126 Section 110(3) (b) RLA.
127 Section 110(4) (a) RLA.
128 Section 110(4) (b) RLA.
the donee. A power of attorney presupposes that the person donating it has capacity. As such, a person of unsound mind, for example, has no capacity to donate a power of attorney. Consequently where a person purports that he has a power of attorney donated to him by a person of unsound mind, as was the case in *Grace Wanjiuru Munyinyi & another v Gedion Waweru & 5 others*, the power is null in law.

Section 114 of the RLA makes provisions for powers of attorney. Pursuant to this section, an instrument dealing with an interest in land shall not be accepted for registration where it is signed by an agent (other than the registered proprietor) without a power of attorney. The original of such power of attorney must be filed. In the event that one wish to file a copy of the power of attorney then it must be with the consent of the Registrar and the copy must duly be certified by him.

However, an instrument may still be registered when signed by an agent without a power of attorney in certain circumstances. These are:

a. Under section 114(3) of the RLA, a guardian or a person appointed in law to represent a minor or person of unsound mind or a disabled person, is entitled to generally represent that person for purposes of the Act without necessarily obtaining a power of attorney.

b. Under Cap 248 (Mental Treatment Act) one may apply to manage the property of an insane person. Such a person need not have a power of attorney.

Pursuant to section 116(1) of the RLA, the Registrar is required to keep a register of the power of attorney and file the original in the file of powers of attorney. A copy of the power of attorney may be filed subject to the consent of the Registrar and his certification. A Power of attorney is under the Act required to be in the prescribed form and it must be executed and verified in accordance with the provisions of the Act. These requirements are couched in mandatory terms such that failure to satisfy them renders the power unenforceable. This point was emphatically stated by the Court of Appeal in the case of *Mayfair Holdings Ltd v Ahmed*. Here, a power of attorney prepared under the United Kingdom Power of Attorney Act 1971, was held to be unenforceable for lack of verification and certificate prescribed under section 110(4) as read with section 116 of the Kenyan RLA.

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129 Civil Case No. 116 of 2002 (High Court at Nakuru, Kimaru J).
130 Section 116(2) RLA.
131 (1990) KLR 667
A power of attorney may be revoked by the donor at any time.\textsuperscript{132} This is done by the donor issuing a notice in the prescribed form to the Registrar indicating his revocation of the power of attorney.\textsuperscript{133} Such a revocation must be entered in the register of powers of attorney and noted upon the power, and the notice should be filed in the file of powers of attorney.\textsuperscript{134}

It is possible for an interested party to give notice in writing to the Registrar that a power of attorney which has been registered has been revoked by the death, bankruptcy or disability of the donor or the death or disability of the donee.\textsuperscript{135} Such a notice must be accompanied by such evidence as the Registrar may require.\textsuperscript{136} Here too, the revocation must be entered in the register of powers of attorney and noted upon the power, and the notice must be filed in the file of powers of attorney.\textsuperscript{137}

A power of attorney given for valuable consideration is, however, irrevocable during any time during which the terms thereof states that it is irrevocable.\textsuperscript{138} Further, where owing to the length of time since the execution of a power of attorney or for any other reason the Registrar considers it desirable, he may require evidence that the power has not been revoked, and may refuse to register any disposition by the donee of the power of attorney until satisfactory evidence is produced.\textsuperscript{139}

A duly registered power of attorney and which no notice of revocation has been registered is deemed to be subsisting as regards any person acquiring any interest in land affected by the exercise of the power, for valuable consideration and without notice of revocation and in good faith, or any person deriving title under such a person.\textsuperscript{140} This section embodies the principle behind the protection of a \textit{bona fide} purchaser without notice.

A donee who in pursuance of a power of attorney and in good faith makes any payment or does an act, is not liable in respect of that payment if at the time of making the payment or doing the act he was not aware that the donor was dead, had become bankrupt, or had revoked the power.\textsuperscript{141}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{132} Section 116(3) RLA.
\item \textsuperscript{133} \textit{Ibid.}
\item \textsuperscript{134} \textit{Ibid.}
\item \textsuperscript{135} Section 116(4) RLA.
\item \textsuperscript{136} \textit{Ibid.}
\item \textsuperscript{137} \textit{Ibid.}
\item \textsuperscript{138} Section 116(5) RLA.
\item \textsuperscript{139} Section 116(6) RLA.
\item \textsuperscript{140} Section 117(1) RLA.
\item \textsuperscript{141} Section 117(2) RLA.
\end{itemize}
\end{footnotesize}
Provisions relating to power of attorney are also to be found under the Part IX of the RTA. Section 50 thereof allows any proprietor of land provided he is not a lunatic, a minor or a person of unsound mind, to donate a power of attorney for purposes of dealing with his land. The appointment must be done in the prescribed form which document must be executed. A duplicate or an attested copy of the power must be deposited with the Registrar who is under a duty to enter in the register a memorandum of the particulars therein contained and of the date and hour of its deposit with him.

However, a power of attorney executed in due and customary form and giving sufficient powers in the opinion of the registrar may be registered as though executed in the prescribed form. Where a power of attorney was registered before the coming into force of the RTA, and in accordance with the RDA or the GLA, it shall be deemed to be duly registered for the purposes of the RTA too.

Like under the RLA, A power of attorney conferred under the RTA, may be revoked by an instrument of revocation in the prescribed form. After the registration of revocation of the power, the Registrar is not permitted to give effect to any transfer or other instrument signed pursuant to that power. However, a revocation executed in due and customary form may, at the discretion of the Registrar, be registered as though executed in the prescribed form. Further, a power executed before the coming into force of the RTA should be revoked in accordance with the provisions of the Act under which the power was registered.

3.8.4 PROFESSIONAL UNDERTAKING

Advocates are sometimes called upon to make professional undertakings in the course of practice where a promise to perform a certain Act on behalf of their client is expressed to the client or his advocate. These are more prevalent in the practice on conveyancing. An undertaking is defined as an equivocal declaration of intention addressed to someone who reasonably places reliance on it and made by an advocate or a member of an advocate’s staff in the course of practice; or an advocate as “advocate” but not in the course of practice.

Basically, it is a promise by an advocate to do or not to do something. It ought to be in writing though there is nothing in principle to prevent it from being oral. It should only be given to professionals and not to laymen. Templeman LJ expressed the importance of professional undertaking in conveyancing as follows:
Conveyancing is a complicated business. A chain of transactions is frequently involved where no vendor will sell until he can purchase and no purchaser will buy until he can sell. Each client as vendor and purchaser needs time to make up his mind and change his mind after studying surveys and legal reports and other related matters and each client expects everyone else to be ready when he is ready. Skillful conveyancers are required to forge the chain, to see that no bargain is lost and that no one is left without a home. Binding and enforceable undertakings between professional men play an essential part at different stages. Mistakes are bound to occur occasionally and each client must be protected by the insurance of his solicitor against financial loss, even though damages will never fully compensate a client for the loss of a bargain or the loss of a home.142

An undertaking is personally binding on an advocate whether it was given orally or in written form and it does not have to include the word “undertake” to have the effect of an undertaking. Also noteworthy is the fact that professional obligations may accrue even though the advocate has not made an undertaking say where a person deposits documents to an advocate under escrow to be held subject to a professional obligation to return the same in the event that the condition under which such documents are held is not fulfilled, or where a cheque or draft is sent to the advocate who bears the professional obligation to return the documents on demand or present the same for payment only with the consent of the client or in third instant, where an advocate requests another advocate to supply copies of documents, there is professional obligation to pay a proper charge for them.

There is no duty on the advocate to give or accept an undertaking. Whereas the advocate has a duty to act in his client’s best interest, this does not imply a duty to underwrite a client’s financial or other obligation. However, the giver of an undertaking cannot unilaterally withdraw from it one reliance has been placed on it by the recipient.

Therefore, one must be very cautious and prudent when giving a professional undertaking for once given, it can not be revoked and must be performed. Notably, our courts will readily enforce them unless in the clearest of cases. Principally this is due to the fact that once a professional undertaking is given, it transcends the mere transaction and assumes the character of an acid test on the honesty of the advocate.

142 Domb v Isoz (1980) 1 KB 76 at 81
This view is lent judicial support by the pronouncements of the court in the case of Peter Ng’ang’a Muiruri v Credit Bank and Charles Ayako Nyachae t/a Nyachae & Co. Advocates. In this case, the appellant sought to enforce an alleged undertaking given by Messrs. Nyachae & Company Advocates to another firm, Messrs F.N. Wamalwa & Co. Advocates, for the payment of the suit sum plus interest thereon. The suit sum was to be held in a joint interest earning account. Subsequently, the firm of Nyachae and Company breached its professional undertaking by failing to deposit the said money in a joint interest earning account, principally on the ground of a collateral dispute as to the meaning and purport of the undertaking and the amount. The Court in issuing an order against the firm to deposit the amount to the bank within 30 days stated that, ‘An undertaking is a solemn thing. In enforcing undertaking the court is not guided by considerations of contract, but the court aims at securing the honesty of its officers.’

Similarly, the Kings Bench Division of the English High Court in the case of United Mining and Finance Corporation Ltd v Beecher, while referring to the decision of Coleridge J in the case of Re Hillard, stated:

‘…the court does not interfere merely with a view of enforcing contracts on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed when employed as such, or because they are such officers.’

The court of Appeal in granting an order to enforce a professional undertaking in Kenya Reinsurance Corporation v Muguku Muriu t/a Muguku Muriu & Co. Advocates, emphasized that such an order will be granted where the undertaking in question is clear, unambiguous, certain and without any conditions precedent. Further the court also clarified the fact that an undertaking once given, can not be watered down by way of reference to collateral issues.

This view of the law was subsequently restated by the same court in the case of Walker Kontos Advocates v Mwirigi M’inoti & Company Advocates, and also in Karsan Lalji Patel

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143 Civil Appeal No. 263 of 1998 (Court of Appeal at Nairobi).
144 (1910) 2KB 296(Hamilton J).
145 2 D & L 919
146 Civil Appeal No. 48 of 1994 (Court of Appeal at Nairobi).
147 Civil Appeal No. 20 of 1997 (Court of Appeal at Nairobi).
Vs Peter Kimani Kairu practising as Kimani Kairu & Company Advocates,\textsuperscript{148} where notably the court, probably as manifestation of the gravity with which it regards professional undertakings, allowed a client to enforce an undertaking given to his advocate.

It important to note that an undertaking usually attaches only to the giver of the undertaking and only the recipient may complain of its breach. The purport of this is that when an advocate takes over conduct of a matter from another the acquiring advocate does not inherit the undertaking unless otherwise adopted by him. However, the former advocate is not relieved of his obligation until he obtains a release from the recipient. It follows, therefore, that an advocate cannot assign the burden of an undertaking without the consent of the recipient. The advocate remains personally liable in an undertaking unless such liability is disclaimed in the undertaking itself.

3.8.5 CONVEYANCING AND TAXATION

Land has always been a source of revenue for the state. The purpose of land taxation is to provide a stable fund for land banking, land servicing, and facilitating efficient utilization of land. The interface between conveyancing and taxation is captured in a number of statutes enacted for purposes of levying taxes on transactions involving land. These statutes include the following:

- The stamp Duty Act, (Cap 480 Laws of Kenya)
- The Local Government Act (Cap 265 Laws of Kenya)
- The Valuation for Rating Act (Cap 266 Laws of Kenya)
- The Rating Act (Cap 267 Laws of Kenya)

\textbf{(a) The Stamp Duty Act (Cap 480)}

The Stamp duty is one of the oldest taxes on documents. The core of the Act is that every instrument specified in the Schedule to the Act, wheresoever executed which relates to property situated or to any matter or thing done in Kenya shall be chargeable with stamp duty specified in the Schedule.\textsuperscript{149} The only exceptions are those instruments that are exempt under the Act or any other written law. The Act sets out clear provisions on the procedure and provisions applicable to instruments that require stamping.

\textsuperscript{148} Civil Appeal No. 135 of 1999 (Court of Appeal at Nairobi).
\textsuperscript{149} Section 5, Stamp Duty Act (Cap 480)
The Act defines “stamp” as a stamp embossed or impressed by means of a die or an adhesive stamp. The requirement that stamp duty with which instruments are chargeable be denoted by an embossed stamp on their instrument is contained in Regulation 2 of the Act. Prior to amendment of the Regulations vide Legal Notice No. 18 of 1993, save for the instruments specified in the First Schedule to the Act, there was a mandatory requirement to have revenue stamps impressed on the instruments by an embossed stamp. The 1993 amendment extended the provision of franking to the instruments in the Fourth Schedule to cover ‘instruments upon which stamp duty may be paid and denoted by instrument requiring or capable of registration, being an instrument relating to the registration of transactions or devolution affecting land registered under any law relating to the registration of land.

The Act imposes a requirement that parties should declare truly the amount of stamp duty which ought to be paid. A false declaration amounts to an offence. Following an amendment vide Legal Notice No. 97 of 1991, the registrar is empowered to lodge a caveat on property purchased in a bid to secure the payment of stamp duty, which upon valuation may be found to be due and owing to the government. Naturally, this burden is imposed upon the purchaser, because the caveat is lodged once the property has passed. Gifts inter vivos also attract stamp duty on their ad valorem value. This valuation is done by an independent government valuer and the duty must be paid within 30 days from the date of the first execution (though the time for collection may be extended for just cause). Section 20 of cap 480 (Stamp Duty Act) does impose a penalty for late payment of duty. Any excess duty paid may be refunded on application.

(b) The Local Government Act (Cap 265)

The Local Government Act empowers the local authorities to charge rents, stand premiums or fees to any land it has let to any person or any land in which it has granted licence to any person to occupy. It may also charge fees for any licence or permit issued in respect of any premises which the local authority is empowered to control.

(c) The Valuation for Rating Act (Cap 266)

The Valuation for Rating Act empowers the local government local authorities to value land for the purpose of rates. The Act applies to any area of a local authority in respect of which

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150 Section 144(5) Local Government Act (Cap 265)
151 Section 148(1) Local Government Act (Cap 265)
any rate on the valuation of land, other than a rate on the annual value of agricultural land, in
the area has been imposed by or under any law.\footnote{Section 1(2) The Valuation for Rating Act (Cap 266)} Local authorities are required to prepare valuation rolls and supplementary rolls at least every five years of every rateable property
within its jurisdiction.\footnote{Section 3 Valuation for Rating Act (Cap 266)} It shall, on its own initiative or at the request of any person, cause a valuation to be made at the time of valuation of-

\begin{enumerate}
\item any rateable property omitted from the valuation roll;
\item any new rateable property;
\item any rateable property which is subdivided or consolidated with other rateable property; or
\item any rateable property which, from any cause particular to such rateable property arising since the time of valuation, has materially increased or decreased in value.\footnote{Section 4(1) Valuation for Rating Act (Cap 266)}
\end{enumerate}

Having made such a valuation, the local authority shall include it in the supplementary valuation roll. The Valuation Rolls ad the Supplementary Evaluation Rolls are required to contain the following information:

\begin{enumerate}
\item the description, situation and area of the land valued;
\item the name and address of the rateable owner;
\item the value of the land;
\item the value of the unimproved land;
\item the assessment for improvement rate.
\end{enumerate}

The Act empowers a local authority to appoint a Valuation Court to determine matters arising out of valuation within its jurisdiction.\footnote{Section 12 Valuation for Rating Act (Cap 266)} The Valuation Court consists of a magistrate having power to hold a subordinate court, or an advocate of not less than five years’ standing, who shall be the chairman of the court, and not less than two additional members appointed with
the approval of the Minister, who may or may not be members of the local authority.\footnote{Ibid.} The Minister may authorize a local authority to appoint a Valuation Court.\footnote{Section 13 Valuation for Rating Act (Cap 266)}
Where a local authority appoints a Valuation Court *sua moto*, appeals from such a court lie to the High Court while where the court’s appointment was authorized by the Minister, appeals lie to a subordinate court held by a Chief Magistrate, Senior Resident or a Resident Magistrate.\(^{158}\)

**(d) The Rating Act (Cap 267)**

The Rating Act is designed to provide for the imposition of rates on land and buildings in Kenya and to amend the law relating to valuation and rating. Rating is generally levied under the Act to meet all liabilities falling to be discharged out of the general rate fund, the county fund or the ownership rate fund as the case may be, for which provision is not otherwise made. Among the rates that are chargeable under the Act include area rate, agricultural rental value rate, site value rate,\(^{159}\) supplementary rate\(^{160}\) and special rate.\(^{161}\)

In conclusion it is important to note that there has been a general concern that land taxation in Kenya is currently confined only to urban areas.\(^{162}\) It has therefore been suggested that it is necessary to bring commercial farms in rural areas within the taxation regime.\(^{163}\) It has also been felt that land taxation assessment and collection procedures under existing laws are not effective in raising revenue and discouraging hoarding of land. The problem of absentee land owners has particularly brought the regime of land taxation into sharp focus. In this regard it has been proposed that the Government should:

- apply the unimproved Site Value and Improvement Value in urban areas;
- introduce a development levy on undeveloped land;
- introduce land taxes for commercial farms in rural areas based on productivity levels set for different zones;
- apply the Development and Capital Gains Tax in order to capture some of the value created through public infrastructure improvements for society;
- apply the Estate/Probate Tax subject to the remissions already enjoyed by certain types of properties and ownership to safeguard interests of the poor and the rural folk;
- continue to apply Stamp Duty but review the stamp duty tariff from time to time to facilitate home ownership; and

\(^{158}\) Section 19 Valuation for Rating Act (Cap 266)
\(^{159}\) Section 4(1) Rating Act (Cap 267)
\(^{160}\) Section 8 Rating Act (Cap 267)
\(^{161}\) Section 9 Rating Act (Cap 267)
\(^{162}\) Draft National Land Policy 2007, para. 162
\(^{163}\) Ibid.
improve the capacity of institutions including local authorities to assess and collect taxes.\textsuperscript{164}

These suggestions are not only aimed at improving the regime of land taxation and increase revenue thereof, but they are also meant to facilitate the efficient utilization of land and land-based resources.

3.9. THE DISPOSITION OF LAND UNDER TOPICAL HEADINGS

Different interests in land form the subject of conveyancing under different statutes. Under the GLA the interest is freehold. Under the RTA the interest can either be freehold or leasehold. Under the RLA, the interest is dependent on whether the land in question is situated in urban area or in the rural area. In the urban area, the interest is leasehold while in the rural area the interest is absolute. These lands/interests are disposed of differently depending on the regime under which they fall. It is therefore prudent to look at the disposition of land/interests under these statutes in depth.

3.9.1 Disposition of Government Lands under the GLA

Disposition of land under the GLA is essentially the disposition of government land because, as earlier noted in chapter two, the GLA is an Act of Parliament to make further and better provision for regulating the leasing and other disposal of Government lands, and for other purposes. The Act is both a substantive and procedural statute with respect to Government lands and provides the administration and conveyance of Government lands.\textsuperscript{165}

For purposes of disposal of Government lands under Cap 280 (which is a condition precedent to the issuance of title to Government lands), Government lands may be divided into two

\textsuperscript{164} Draft National Land Policy 2007, para. 163

\textsuperscript{165} Section 2 of the GLA defines “Government Land” as land for the for the time being being vested in the Government by virtue of section 204 and 205 of the Constitution (as contained in Schedule 2 of the Kenya Independence Order-in-Council of 1963), and sections 21,22,25 and 26 of the Constitution of Kenya (Amendment) Act of 1964. Note that the Kenya Independence Order-in-Council of 1963 (which came into effect on 11\textsuperscript{th} June 1963) provides that land vested in the Government of Kenya are all estates, interests or rights over land situated in the Nairobi area that were vested in the Queen or Governor; lands registered in the name of the disbanded Trust Lands Board and lands situated in the regions (provinces) that are designated by the Governor as Government land. It is also important to appreciate that Government land within the meaning of the GLA does not necessarily mean land owned by the Government. Land owned by the Government is land owned by the Government for Government use, for example, because it is a Chief’s office, or Provincial Commissioner’s office or residence, or land owned by the Government by virtue of its reservation by the Government for specific purposes, such as the protection of flora and fauna therein. The tenure regime of the GLA typically applies to such lands, but this need not be the case.
categories, namely town plots\footnote{Part III of GLA deals with disposal of land within townships. In particular, section 9 thereof states that the Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.} and agricultural land.\footnote{See Part IV of GLA} For both of these categories of lands, the Act provides for alienation and disposal primarily through three methods: by grants to various recipients for a variety of purposes; by leases of town plots and agricultural lands for specified periods of time; and by sale of agricultural land, thereby conferring freehold (absolute) titles thereto.

The only statutory criteria to be met prior to disposal of Government lands is that the lands must be available, meaning that they must not, at the time of proposed sale, be needed or required for Government purposes. In the case of an application by a municipality for a grant of land, the criterion to be met is that the land is required for purposes of the municipality. Clearly, these two criteria provide only limited guidance as to the circumstances in which the alienation of Government lands would be justified. The absence of proper criteria for disposal of Government lands therefore opens up room for the abuse of discretion by the authorities charged with the responsibility of deciding on the alienation of Government lands.

**a) Disposition of Government Lands by Way of Grants**

The GLA authorizes the President to make grants of any estate, interest, or right over unalienated Government land.\footnote{Section 3 GLA} The Act does not prescribe the circumstances under which grants may be made, but authorizes the President’s powers to be delegated to the Commissioner of Lands, such that either the President, in person, or the Commissioner may make grants of land. By these powers, grants of land may be made for religious, charitable or sports purposes; for town planning exchanges on recommendation of the town planning authority of Nairobi and Mombasa municipality; and for the use of local authorities for municipal or district purposes (for office accommodation, town halls, public parks, fire stations etc).

Any grants of land are to be made in accordance with the provisions of the GLA. The Act does not prescribe that land grants are to be made upon application by an interested party, and only if the President or the Commissioner is satisfied that the purposes for which the land is required are valid. In practice, applications for land grants are nevertheless made and it is usual for applicants to state the purposes for which the land grants are needed. However, there are no requirements for or practice of verifying the claims made in justification of the
application, and the Act does not contain any guidelines or rules to guide the Commissioner in making a determination on such applications. There is also no clear Government policy on Government land grants. In the absence of a policy, even the Commissioner of lands would have difficulty in ascertaining the public interest in making grants.

These omissions notwithstanding, where the Commissioner decides to grant land located within an urban area (a town), the Act authorizes the President or the Commissioner to specify conditions for the grant. However, the provision with regard to conditions have, so far, not been effective in controlling the use to which lands granted are put. In addition to any conditions that may be created by the President, or Commissioner, the Act contains implied covenants against sub-division, assignment, and subletting, unless the prior written consent of the Commissioner has been obtained. There are, however, no guidelines for consideration of applications for sub-letting etc. moreover, in practice, implied restrictive covenants are usually ignored. This undermines existing or future functions of public authorities that would be secured by the restrictive covenants.

In practice, where a grant of land is made, the steps are as follows:

**Valuation of land for purposes of determining rent**- the GLA authorizes the Commissioner to charge rent on grants of land and for this purpose, land may be valued for purposes of determining rent. The Act requires the amount of rent to be stated in the letter of allotment.

**Issuance of a letter of allotment**- a letter of allotment is prepared by the Commissioner in favour of the allottee who may, for example, be the City Council.

**Registration of conveyance**- finally, the Act requires that all transactions with respect to Government lands be registered in the Government Lands Registration offices in Nairobi or in the registration districts within which the land is located, in case of land located outside of Nairobi and Mombasa.  

Prior to registration, the Act requires that conveyance documents be properly executed by both parties- the Commissioner on behalf of the Government, and the grantee, but the Act does not specify what kind of document is to be executed. Typically, a grant, or a letter of

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169 See Part X GLA.
170 Section 7 GLA authorizes the Commissioner to execute documents on behalf of the Government thus ‘the Commissioner may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act,
allotment in one form or another is prepared by the Commissioner, stating that land has been granted to a person or body, and then delivered to that person or body for execution. In practice, leases and transfers have been prepared, depending on the statute under which the Government land in question was registered.

Upon execution, the original conveyance document, together with two copies, are delivered by the Commissioner to the Principal Registrar of Government Lands for registration.\(^{171}\) The statute provides that registration shall be effected by the Registrar by binding (filing) a copy of the conveyance document delivered to him in the Register of Government Lands and entering an abstract or note of the document in a part of the volume of the register that relates to the land affected by the document.\(^{172}\) He is also required to indicate the number of the volume and folio of the document on the filed Photostat copy and to make and sign an endorsement on the original of the document registered and the filed copy. Finally, the original document, which is the document of title, is delivered to the grantee.\(^ {173}\)

The Act does not describe or name the document of title to be issued to a grantee at the end of the registration process but the standard Application for Registration form appearing in the subsidiary legislation under the Act (Form I) suggests that it would be a certificate of Title. Further, the Registration of Titles Act, Cap 281, which may apply to certain Government lands, states that title to land comprised in a grant shall be evidenced by the issuance of a certificate of title thereof.

In practice, Certificates of Titles have been issued conferring leasehold as well as freehold titles to Government lands, including lands within townships, pursuant to applications for land grants. In many cases, land grants are further sold, subleased, or subdivided with prior consent of the Commissioner. Whereas the requirement of the Commissioner’s consent should be a mechanism for regulating dealings in alienated Government lands, the consent is typically granted as a formality on payment of a fee. Consequently, the consent mechanism has ceased, in reality, to be a control mechanism and now functions simply as a revenue generating mechanism.

b) Disposition of Government Lands by Way of Leases

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\(^{171}\) See sections 94 and 95 GLA.
\(^{172}\) See sections 95, 97 and 118 GLA.
\(^{173}\) Ibid.
In addition to issuing grants of land for various purposes as shown above, the GLA authorizes disposal of government lands-unaliennated plots within township and agricultural lands, through leases. The only requirement is that the lands are available, that is, that the lands are not, at the time of proposed sales, required for Government purposes. The procedure for disposal of the lands through leases culminates in the issuance of titles to the land bearing a leasehold interest for a term of years. The procedures for issuing leasehold titles to Government lands within townships and those within agricultural areas entail procedures for alienation and disposal, and must be in conformity with the Act. It provides the following steps:

- **Availability of unaliennated Government lands** - the first procedural requirement is the determination of availability of Government land within township (i.e. availability of a town plot belonging to the Government, for example, because it remained unsold in previous auctions) or within an agricultural area that is not required for public purposes.\(^\text{174}\)

- **The Commissioner’s exercise of the power to sell the land** - the next requirement is for the Commissioner to cause such lands to be disposed of in the manner prescribed by the Act, i.e. by public auction.\(^\text{175}\) There is no requirement for the Commissioner to consult with town planning authorities or any other interested parties to determine whether such lands may be required for future government developments, or future public purposes. The statute does not also provide guidelines on matters to be taken into consideration before putting up such lands for sale.

- **Establishment of an up-set price** - once surveys and divisions of urban plots and agricultural lands are completed, the Act requires the Commissioner to establish an “up-set” price at which leases are to be sold. He may also establish building conditions and special covenants to be inserted in leases, but this is not mandatory.

- **Establishment of lease periods** - in addition, the Commissioner is required to establish the periods into which the lease terms are to be divided (for not more than 100 years in case of town plots and not more than 999 years for farm plots)\(^\text{176}\) and also to establish the annual rent to be paid in respect of each period.

- **Advertisement of availability of Government lands and proposed sale by public auction** - the next step is for the Commissioner to advertise availability of town and agricultural plots for sale by public auction in the Gazette, indicating the up-set price

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\(^{174}\) Sections 9 and 19 GLA.

\(^{175}\) Section 9 GLA.

\(^{176}\) Sections 10 & 27(2) GLA.
and other terms of sale. In addition, the notice of sale is required to indicate the number of plots available, the area of each plot and their location, the amount of survey fees required, the cost of deeds for each plot, and the time and place where the plan of each farm may be inspected.\textsuperscript{177} The Act authorizes the Commissioner to carry out all these tasks alone, without any requirement for consultation with other concerned parties or an advisory body.

- **Informing bidders of the terms and conditions of sale** - further the Act requires that before the commencement of sales at public auctions, bidders be informed of the terms and conditions of sale.\textsuperscript{178} Every sale of leases carry implied covenants and restrictions against subdivision of plots, assignment, subletting, or use not specified in the lease, except with the written consent of the Commissioner.\textsuperscript{179} Bidders are required to be made aware of these conditions.

- **Sale by public auction** - the Commissioner is required to dispose of Government lands through sale by public auction. Before a public auction is held (or before some other mode of sale is adopted, which may be done if the President so directs under the powers given to him by section 12 of the Act), lands available within urban areas are to be divided into plots suitable for the construction of buildings for business or residential purposes.\textsuperscript{180}

There is no statutory limit as to sizes into which the plots are to be sub-divided. There is also no requirement that pressing public needs as the need for provision of low-income housing for urban residents be given priority. Similarly, “available” agricultural lands may be surveyed and then subdivided into farms for sale,\textsuperscript{181} in this case, sale by leaseholds, for a term of years. The Act does not specify the size, or sizes of land into which farm plots may be divided. It also does not stipulate public purposes or the needs that should be given priority over lease sales, such as the needs for settlement of landless people.

A public auction is aimed at ensuring that the government gets the best price; transparency in the process of disposal of Government lands; and equity between members of the public. Presently public auctions are rarely held for sale of Government lands. In many cases land is sold or give away without following the stipulated procedures.

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\textsuperscript{177} Sections 13, 20 & 21 GLA.
\textsuperscript{178} Sections 14, 15, 22 & 23 GLA.
\textsuperscript{179} Sections 18 & 19 GLA.
\textsuperscript{180} Section 9 GLA.
\textsuperscript{181} Section 19 GLA.
• **Sale to the highest bidder**- the Commissioner is also required to ensure that sales of Government lands are made to the highest bidder,\(^{182}\) and that the highest bidder pays the deposit and the balance of the purchase money, rent, stamp duty and fees for preparation and registration of lease within seven days of the date of the auction.\(^{183}\) The Commissioner is also the recipient of payments which payments must be made within one month of the date of auction otherwise the purchaser loses the right to lease and the deposit is forfeited.\(^{184}\)

• **Preparation of conveyance documents**- subsequent to the foregoing procedures, the Commissioner prepares a lease of town plot or agricultural land, which he executes on behalf of the Government, then presents to the lessee for execution.

• **Registration of title**- the registration requirements under Part X of the Act form the last stage of the procedures for issuance of titles in respect of leases of Government lands. Once a lease is prepared and executed by both the Commissioner and lessee, the Commissioner is required to deliver the lease to the Principal Registrar, together with a copy thereof.\(^{185}\) The lease must clearly describe the property affected and its boundaries and situation. It must also indicate a reference volume and folio of the Register in which the property has been previously registered, or a reference to the lease from the Government relating to the land affected by the transaction.\(^{186}\)

Registration is effected, just as in the case of grants, by filing a Photostat copy of the document accepted for registration, and be entering an abstract or note of the document in a part of the volume of the Register of Government lands relating to the leased land. The filed photocopy must bear the number of the volume and folio in which the sale is registered and the date of registration. Immediately thereafter, the Registrar signs an endorsement on the registered document and on the photocopy and delivers the original to the lessee.\(^{187}\) In practice, a certificate of lease is issued to signify ownership of a leasehold interest in government lands.\(^{188}\)

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182 Sections 14, 15, 22 & 23 GLA.
183 Sections 10 & 16 GLA.
184 This condition is unconscionable. It fails to take into account various genuine factors that may hinder a purchaser from completing payments within one month of the date of auction. Moreover, Equity would require that the purchase price should be refunded if a purchaser loses the lease.
185 Section 95 GLA.
186 Section 97 GLA.
187 Sections 118 & 119 GLA.
188 In addition to leases issued through this procedure, the GLA authorizes leases of Government lands to be granted for “special purposes” by the Commissioner, with the President’s approval. It does not, however, define what special purposes are, or any special procedures for granting such leases. See Part V GLA.
Government leaseholds often impose on a lessee requiring that the lessee develops the land within a set of time frame and in accordance with the permitted user on the land. Failure to meet these conditions may subject the lessee to legal sanctions such as fines and imprisonment. Invariably, the terms of the lease shall dictate that failure to observe the development clause contained in the lease shall operate to prohibit the grant of consent of the Commissioner of Lands for any further dealing with the land by the lessee. The particular lease conditions in respect of this aspect vary; some lease conditions may allow the Commissioner to grant consent to deal with undeveloped land but in so far as such transactions are limited to effecting development to the property, say through charging to a bank. Some are silent on the conditions precedent to grant of consent.

In 1994, the then Minister for Lands and Settlement amended the Governments Lands (Consent) (Fees) Rules vide Legal Notice No. 305. this subsidiary legislation introduced a fee that was payable in order to obtain the grant of consent to transfer undeveloped land by the Commissioner. This fee was to be calculated at 2% of the capital value of the land or of the consideration of the envisaged transaction. This prohibitive fee was payable by the vendor (lessee) who had not developed on his land as per the requirement of development clause contained in the leasehold title held. Prior to this amendment, there did not exist any legislation that contemplated the grant of consent over undeveloped land. The import of this amendment therefore was to create the general impression that consent could generally be granted over undeveloped land.

This position was however recently reversed by the Minister for Lands and Housing who has since revoked the amendment introduced by Legal Notice No. 305 of 1994 effectively making it absolute that consent to deal with land shall be withheld with no exception unless the lease terms have been satisfied by the leaseholder.

c) Disposition of Government Land through Sale of Freehold Interest in Land

The GLA allows disposal of freehold interest Government lands- town plots and agricultural lands- in two basic ways: through its failure to stipulate expressly that only leases of Government plots in urban areas shall be sold, and, secondly, by expressly authorizing the sale of freehold interests in the Government lands designated as agricultural lands.

Section 12 of the Act which provides for sale of Government urban plots merely states that “leases of town plots shall, unless the President otherwise orders in any particular case or cases be sold by public auction.” Similarly, with regard to agricultural lands, the statute
provides that “leases of farms shall, unless the President otherwise orders in any particular case or cases be sold by public auction.” There is nothing in the Act to stop sales of town plots and agricultural lands otherwise than by the sale of leases thereof. The Act does not expressly state, for example, that only leases for a term of years shall be issued on Government town plots and agricultural lands. It is thought that, in practice, freehold titles may have been conferred upon disposal of urban plots and agricultural lands in addition to leaseholds.

Regarding agricultural lands the Act makes express provisions for the issuance of freehold titles upon sale. Section 20(1) provides that “when agricultural land is available for leasing, it may be sold by auction after giving notice of sale in the Gazette.” Section 21(2)(d) goes further to provide that in the notices of auction,

“…The Commissioner shall state the annual rent to be paid for each farm under the lease and the capital sum to be paid for a grant of freehold of the land, on due compliance with conditions thereof, under section 27…”

This is an indication that freehold titles may be issued with respect to alienated Government lands, in addition to sale of leases of the lands. Lack of clear policy on disposal of Government land makes it hard to reconcile any contradicting views regarding the issuance of freehold and leasehold titles to Government lands, especially in the current absence of any requirements for the lands to be put to any specific purposes, or for the sales to achieve certain public objectives.

3.9.2 Management and Disposition of Trust Lands

It is important first to trace the origin of trust lands before giving a description of the nature of their management and disposal. It was noted under Chapter Two that the phenomenon of the Government as an owner of land in the region presently in Kenya was introduced by the colonial Crown Lands Ordinance of 1902. The Ordinance declared “all waste and unoccupied land” in the Kenya protectorate to be crown land. In 1915, the Crown Lands Ordinance re-defined the concept of “crown land” to include land that was in actual occupation by African tribes. Later in 1938, the Crown Lands (Amendment) Ordinance of the same year excised native reserves areas occupied by African tribes from crown lands, thereby designating them

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189 Section 20 GLA.
190 See Section 21(2)(d).
trust lands. These were subsequently vested in the Native Lands Trust Board (NLTB) by the Native Lands Ordinance of 1938. At independence, the NLTB was abolished and what was left of trust lands vested in the county councils within whose jurisdictions the lands were located to hold the lands for the benefits of the ordinary residents therein.

The legal regime governing trust lands fall into two categories: one dealing with the management of trust lands and the other, with disposal/alienation of trust lands at which the land ceases to be trust land and becomes either Government land or land privately owned. The substantive and procedural law governing trust lands are primarily the Constitution, the Trust Lands Act (Cap 290), the Land Consolidation Act (Cap 283) and the Land Adjudication Act (Cap 284).

These laws define trust land and provide for their administration, management, alienation (disposal) and registration. In addition, the RLA and the Land (Group Representatives) Act (Cap 287) apply in certain cases of registration of Trust lands. Upon adjudication and registration, trust lands cease to be trust lands. Besides the statutes, trust lands are, in all respects subject to “the general law that may, from time to time be in force.” Unless express provisions are made in the statutes to the contrary. \(^{191}\) This implies that trust lands are subject to common law.

### 3.9.2.1 Administration and Management of Trust Lands

The framework for the management of Trust lands is laid out under section 115 of the constitution. It stipulates that Trust lands shall vest in the county councils within whose area of jurisdiction the land is situated. This section of the constitution sets out a legal framework for the public trust in respect of land - in particular case trust lands. In this respect, the constitution goes on to state the county councils in whom trust lands are vested shall hold the land for the benefit of persons ordinarily resident thereon, and to give effect to such of their rights, interests, or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto be vested in any tribe, group, family, or individual. Only customary rights that are repugnant to written laws are to be disregarded.

The Trust land Act also gives the Commissioner of Lands to administer trust lands “as agent for the council.” \(^{192}\) The Commissioner is thus authorized to perform certain functions that

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\(^{191}\) Section 59 Trust Lands Act.

\(^{192}\) See section 53 Trust Land Act. Having firmly placed the authority to manage and regulate trust lands in county councils, the Constitutional provisions are confused by the provisions of the Trust Land Act which gives
relate to the issuance of titles to trust lands. Among other things, he is authorized to exercise on behalf of the Council (either in person or through an agent) powers of the council to set aside land for public and private purposes; and to execute on behalf of the council grants, leases and other documents relating to Trust lands.\textsuperscript{193}

\textbf{3.9.2.2 Disposition of Trust lands}

Having placed the management, control and administration of Trust lands in the hands of the Government (i.e. County Councils and the Commissioner), the Constitution provides for alienation of Trust lands. The provisions with regard to alienation are buttressed by similar provisions in the Trust Lands Act. In addition, the Land Adjudication Act and the Land Consolidation Act specify procedures for alienation and disposal of trust lands to both public and private bodies. In general the legal regime governing trust lands authorizes disposal of the lands to the Government for public purposes, to private individuals, as well as to private bodies. In the process, freehold as well as leasehold titles can be issued.

\textbf{(a) Disposition of Trust Lands to Individuals}

Disposal of trust lands to individuals and the issuance of individual titles to trust lands are authorized by section 116 of the Constitution. The relevant section provides that:

“A county council may, in such manner, and subject to such condition as may be prescribed by under an Act of Parliament, request that any law to which this section applies shall apply to an area of Trust land vested in that County Council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the County Council, it shall cease to be Trust land.”

This authorization does not indicate exactly which law the section applies to, or the considerations a county council should make before proceeding to deal with Trust land in a manner that eventually causes it to cease to be a Trust land. Therefore, it is necessary to look at the other statutes governing trust lands for clarification on the procedures for disposing of Trust lands to private individuals.

\textsuperscript{193} Section 53(a) & (b) Trust Land Act. Note that there is no mandatory requirement that powers of the Commissioner be exercised in accordance with standards, guidelines or rules that would ensure that the powers are exercised in a way that would allow county councils to manage the lands so as to give effect to the interests of people ordinarily resident therein.
The statute with relevant provisions in regard to disposal of Trust lands is the Land Adjudication Act. At section 3 the Act states that:

“The minister may, by order apply this Act to any area of Trust land if-

3.10 The county Council in whom the land is vested requests; and

3.11 The minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered…”

The alienation or disposal of trust lands involves a number of steps as follows:

**Application of the land Adjudication Act to an area-** in light of section 116 of the Constitution, the application of the Land Adjudication Act to an area constitutes the first requirement in the process of alienating Trust lands to private individual resident therein. It requires a County Council in whom the land has been vested to request the Minister for the time being responsible for matters concerning land to apply the land Adjudication Act to the area intended to be alienated.

If upon receiving such a request, the Minister considers that it is expedient for the rights and interests of persons living on the land to be ascertained and registered, he may issue a legal notice in the Kenya Gazette of the application of the Land adjudication Act to the area of Trust land in question. The remainder of the process leading to the issuance, of private individuals with titles to portions of Trust land (which thereupon ceases to Trust land) is governed by the Land Adjudication Act. However, if a recording of existing rights have not been completed and certified, the Land Consolidation Act will be applied to accomplish this before the process of adjudication can proceed.  

**Appointment of adjudication officers-** the Land Adjudication Act provides that before the process of adjudication of Trust land commences, the Minister appoints a public officer to be the Adjudication Officer for the adjudication area to which he has authorized the Act to apply. The Act does not provide any criteria, such as qualifications, experience or personal integrity to guide the Minister in his appointment of the officer.

The Act authorizes an appointed Adjudication Officer to appoint (subordinate) Demarcation, Survey and Recording officers to demarcate, survey and record interests of residents within
the Adjudication area. The minister may appoint additional adjudication officers, if the situation so requires.

Establishment of an adjudication section- the next step is for the Adjudication Officer to establish the whole Adjudication area as an adjudication section for purposes of ascertainment and recording of interests, or establish several Adjudication Sections within the adjudication area.195

Publication of notice- once an Adjudication Section is established, the Act requires that another notice be published by the Adjudication Officer in respect of each Adjudication Section and that, in the notice, the area of Adjudication Section be defined as clearly as possible. It also requires the issue of a declaration to residents that interests in land within the Adjudication Section will be ascertained and recorded in accordance with the LAA.

Fixing of a period for making claims to land- after publication of notice, the Act requires Adjudication Officers to fix a period within which a person claiming an interest in land within the Adjudication Section must make his claim to the Recording Officer either in writing or in person or by agent. There is no statutory guidance as to what period of time may be appropriate for residents to make their claim of interest. The officer may require any person making claim to point out or to demarcate, or to assist in the demarcation of the boundaries of the land in which he claims to have interest. Such person may also clear any boundaries demarcated by a Demarcation Officer.

Conducting a survey and demarcation- upon completion of the above step, Survey Officers are required to carry out a survey of the Adjudication Area or Areas and to demarcate parcels of land for persons therein. The Act does not indicate whether parcels of land are to demarcated for each adult resident member of the adjudication area, or for each family, or for a head of a family and this raises serious ownership (including trust and gender) issues in relation to registration of interests in Trust lands disposed of to individuals. It, however, does provide for demarcation of interests of a group of residents.196

Preparation of a demarcation map- upon demarcation, Survey Officers are required to prepare a Demarcation Map of the Adjudication Section, showing every parcel of land

195 Section 5(1) LAA.
196 Section 18(1)(d) LAA.
identified by a distinguishing number. In carrying out demarcation of parcels of land, Adjudication Officers are empowered actually to enter upon any land and to summon any person to give information regarding boundaries of a parcel or to point out boundaries. They may lay out fresh boundaries.

If in the process of conducting these activities, an act is done, an omission made, or a decision given by a Survey Officer, Demarcation Officer or a Recording Officer that is objectionable to any resident of the Adjudication Section, if there are two or more conflicting claims or if there is an objection to the Adjudication Register, the aggrieved party is authorized to bring the matter before an Adjudication Officer, an Adjudication Committee or Arbitration Board established under the Act. These bodies must be comprised of residents of the Adjudication Area, and not by persons with pecuniary or personal interest in the land in question, or in the adjudication process.

**Preparation of forms for every parcel of land**— in the process of recording of interests and demarcating parcels of land thereof, forms are to be prepared for every parcel of land shown on the demarcation map (in duplicate)(which may be land belonging to an individual, or to a group). These forms, together, comprise an Adjudication Record. Each form is required to contain the number of a parcel as shown on the demarcation map and its approximate area, the name and description of the owner, year and number of gazette notice setting apart, in cases of land set apart; the fact that land is in the ownership of a county council and remains Trust land, in cases of land entirely free from private rights or all rights have been relinquished in favour of a County Council; and an indication that any person or group is entitled to any interest in land not amounting to ownership (including any lease, right of occupation, charge or other encumbrance including those recognized under customary law); and an indication of joint or ownership in common, where two or more persons are recorded as owners of land.

**Correction of errors in the adjudication record**— adjudication officers are authorized to correct any errors in adjudication records. When completed, the forms are to be signed by the Chairman and Executive Officer of the Adjudication Committee and by the owner of each interest in the parcels of land demarcated. No alterations are to be made after the forms are so

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197 Section 16 LAA.
198 Sections 6, 7, 8, 21 & 22 LAA.
199 Section 8 LAA.
200 Section 19 LAA.
201 Section 23 LAA.
202 Section 23 LAA.
signed, unless an adjudication officer does so upon objection and arbitration, or appeal to the Minister. 203

**Display of the original Adjudication Register for inspection**- upon completion of the Adjudication Register, the Adjudication Officer is required to so certify on the Adjudication Record and map and then deliver the duplicate Adjudication Record (bearing a copy of the certificate) to the Director of Land Adjudication; display the original Adjudication Register for inspection at a convenient place within the Adjudication Section and give notice to residents that the Adjudication Register has been completed and may be inspected at a particular place during a period of sixty days from the date of the notice. 204

Any objections may be raised during this period and the Adjudication Officer is authorized to determine them, and to alter the Register, as he deems necessary. The Act allows the Adjudication Officer to recommend compensation to the Minister rather than rectification of Adjudication Records in cases where he “considers that altering an Adjudication Register would incur unreasonable expense, delay or inconvenience.” 205 The Act does not give any guidance as to circumstances under which rectification of the register may be deemed as unnecessarily expensive or inconvenient. It also authorizes divesting an individual of interests in land without due consideration of the statutory requirements for compulsory acquisition.

**Presentation of the Adjudication register to the Director of Land Adjudication**- after the determination of all objections and appeals, the Adjudication Officer is required to send the Adjudication Register, along with particulars of all determinations and objections to the Director of Land Adjudication. At that point, only the Director is authorized to make any alterations and then certify on the Adjudication Register and its duplicate that it has become final (subject to outstanding appeals) and then forward the register to the chief Land Register, together with a list of the appeals. 206

**Certification of the Adjudication Register**- the Act authorizes the Director of Land Adjudication to certify that an Adjudication Register has become final so that the Register can proceed to register and issue titles to land when there are outstanding appeals that might even require overhauling of the whole adjudication exercise.

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203 Section 23(7) LAA. The Demarcation Map and the Adjudication Record are collectively known as the Adjudication Register. See section 24 LAA.
204 Section 25 LAA.
205 Section 27(2) LAA.
206 Section 27 LAA.
Registration of titles- upon receiving the Adjudication Register, the Chief Land Register is authorized to cause registrations to be effected in accordance with the Register. The Act authorizes registrations of lands on which there are outstanding appeals as well, except that restrictions are to be placed on them until the appeals are determined. Moreover, it prohibits any person from instituting suits and any courts from hearing suits concerning an interest in land in an Adjudication Section, unless that person has first obtained consent of the Adjudication Officer.\textsuperscript{207} This provision would hamper suits that might arise from the conduct of an adjudication official with respect to Trust lands. Moreover, suits can only be filed after the Adjudication Register has become final, by which time interests in land are authorized to be registered, including land on which there are outstanding disputes.\textsuperscript{208}

Issuance of Titles- the land Adjudication Act is a procedural statute providing for ascertainment and recording of individual or group interests in Trust lands. It does not clearly specify the manner of registration, or the nature of titles to be issued with respect to recorded interests in parcels of Trust lands. Therefore, it is necessary to look to the RLA which is specifically referred to in Rule 5 of the Land Adjudication Regulations.

The RLA applies to Trust lands by virtue of section 2 thereof, which provides \textit{inter alia}, that the Act shall apply to any area to which, immediately before its commencement, the Land Registration (Special Areas) Act (Ordinance) applied,\textsuperscript{209} any area to which the LAA has been applied for purposes of ascertainment, recording and registration of interest in land;\textsuperscript{210} and to all land which from time to time, is set apart under sections 117 and 118 of the Constitution.

Under section 4, the RLA prevails over any written law that conflicts with its provisions (here, with respect to Trust lands). This leads one to the section of the Act that provides for registration of titles, specifically section 32. Section 32 of the RLA authorizes the Registrar of Titles to issue a proprietor of land or lease (if requested by that proprietor) with a title deed or a certificate of lease where no certificate of lease or title deed has been issued in the prescribed form. The effect of this section is that a proprietor of land, whose proprietorship has been evidenced (in the case of rights ascertained in Trust lands) by the recording of the interests of that person in an Adjudication Register, and by the registration of that interest in the prescribed from, shall be issued with a title deed, and in cases of the leasehold interests, a

\textsuperscript{207} Section 30 LAA.
\textsuperscript{208} Sections 28 & 30 LAA.
\textsuperscript{209} These areas were later included in the designation of trust lands.
\textsuperscript{210} Section 2 RLA.
certificate of lease. Such a title deed or certificate of lease shall be the only *prima facie* evidence of ownership of land. The meaning conveyed is that issuance of first registration titles to trust lands are to be effected under the RLA.

The provision goes further to state that only a title deed or a certificate of lease shall be issued in respect of each parcel of land.\(^{211}\) Further, the Act provides that when there is more than one proprietor, the proprietors shall agree among themselves as to who shall receive the title deed or the certificate of lease.\(^{212}\) The Act also provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land, together with all rights and privileges belonging or appurtenant thereto.\(^{213}\)

**(b) Disposition of Trust Lands to the Government/Setting Apart**

The procedures for alienation of Trust lands at the instance of the Government are established under section 118 of the Constitution, and sections 7, 8, 9 and 10 of the Trust Lands Act. These procedures lead to the vesting of title to the Government. They require the following:

**Use for public purposes**- the first statutory requirement in the process is that the President must be satisfied that the use and occupation of an area of Trust land is required for specified purposes, namely the purposes of the Government of Kenya; the purposes of a body corporate established by an Act of Parliament; the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the government; and for purposes of prospecting or extraction of minerals and mineral oils.\(^{214}\) The laws do not state exactly what factors the president must into account in order to make the determination that there is a need for land for these purposes. Further, there is no requirement for verification of the needs stated in justification and of the suitability of the lands in question for these purposes.

**Consultation with respective County Councils**- upon determination of the public purpose, the President is empowered to consult with respective County Council and give them notice that land is required for one or more of the specified purposes. There is no requirement that the affected County Council, in its turn, must consult the residents of the area in question.

\(^{211}\) Certificates of lease are issued only if leases are for a period exceeding 25 years.

\(^{212}\) Section 32(3) RLA. Failing agreement, the title deed or certificate of lease is to be filed in the Land’s Registry.

\(^{213}\) Section 27 RLA.

\(^{214}\) Section 118(2) (a-d) Constitution of Kenya.
Setting apart of land—after consultation and notice, land is set apart in the same manner as specified in section 117 of the Constitution. The setting apart extinguishes any rights, interests and benefits of local residents of the land provided that compensation is paid as in cases of compulsory acquisition under section 75 of the Constitution. Payment must be made promptly and in full.

Since setting apart, or alienation of land, is to be conducted in a manner similar to that specified in section 117 of the Constitution, a county council may subject the land in question to “any law” for purposes of issuing a grant, or making disposition of some kind of any estate, interest or right in the land (including leaseholds, freeholds and licences) to the Government of Kenya, a body corporate, or any other body or person for purposes of prospecting minerals or mineral oils.

Section 117 of the Constitution permits the issuance of a grant, a title deed or a certificate of lease or a licence to the Government or any one or more of ten other bodies and persons upon demarcation of land and execution of conveyance documents in respect thereof by the Commissioner of Lands on behalf of the Government or one or more of the listed persons and bodies. Where lands so conveyed are no longer required for the purposes for which they were alienated, the Trust land Act requires that they revert to the respective County Council—that is, they revert to the status of Trust lands.215

Parties aggrieved by the setting apart or any other dealings with trust lands are authorized to seek redress in the high Court, but the provisions regarding lawsuits are contradictory and difficult to reconcile. Section 54 of the Trust Land Act prohibits actions against the Government or its officers for acts done for purposes of carrying out the provisions of the Act into effect. Section 58 thereof, prohibits appeals from any decision given, orders made and matters and things done under the Act. But section 63 of the same Act states that nothing contained in the Trust Lands Act shall prevent a prosecution under any other law, so long as a person is not punished twice for the same offence. Consequently the meaning to be given to the earlier protective provisions is that they relate to civil actions as opposed to criminal proceedings.

215 Section 119 Trust Land Act. Though there is no authorization for lands no longer required for the purposes for which was acquired to be disposed to private individuals and bodies, this has been the case in some parts of Kenya. Consequently, any titles issued in respect of land that should have reverted to Trust land as provided by law is irregularly issued and unlawful. Similarly, any titles issued without following any respect of the stipulated procedure for alienation of Trust land at the instance of the Government is irregular.
3.9.3 Disposition of Land Owned By Local Authorities

With respect to lands owned by local authorities, the Local Government Act, (Cap 265) applies. Lands owned by the local authorities can be Government lands falling under the GLA. The relevant section of the Local Government Act with respect to alienation/disposal of local authority lands is section 144, which authorizes local authorities to acquire and to hold land for their purposes and functions. The same provision authorize local authorities to sell, grant or lease any land which it may possess and which is not required for the purpose for which it was acquired or being used, subject to approval by the Minister of Local Government.216

In addition to these provisions, the City Council of Nairobi has created by-laws that require that any sale, lease or grant of lands that they do not need must be approved by a resolution of the Council. These constitute procedures of issuing titles to lands owned by local authorities that must be adhered to in any alienation. Breach of or failure to adhere to these provisions in issuing titles gives rise to irregularly issued titles, something that is not uncommon with many local authorities.

3.9.4 Disposition of Land by Transmission

Transmission principally means the passing of land, lease or charge from one person to another by operation of law. Transmission is a unique type of conveyancing because the proprietor is usually unable to do the transfer by himself. This is often upon the proprietor’s death, insolvency or bankruptcy.

a. Transmission upon Death of Proprietor

Under the LTA, GLA and RTA, upon the death of the proprietor, his personal representatives are registered as proprietor(s) by registering against the title the probate or letters of administration of the estate. As will be seen hereunder, this is not true of transmissions under the RLA. The procedures involved under of each of the above statutes are discussed below.

Under the section 52 RTA, whenever the proprietor of any land dies, the representative of the deceased proprietor are required, before making any dealings with the land, to make an

216 Section 144(6) Local Government Act.
application in writing to the registrar of the registration district within which the land is situated to be registered as proprietor. In making this application such an applicant is required to produce to the registrar the probate or letters of administration issued in his/her name. On the part of the registrar, he is required, upon receipt of the application and the probate or letters of administration, to enter in the register a memorial of the date of the probate or letters of administration, the date of the death of the proprietor (when it can be ascertained, and to add the words “as representative” after the name of the applicant. It is after this process that such a personal representative is deemed to be the proprietor of the land or part thereof which has remained undisposed.

Where any charge or lease affecting land is transmitted in consequence of the death of the proprietor, then the person claiming to be registered as proprietor in respect of the charge or lease, shall produce to the registrar the probate or letters of administration together with his application in writing for purposes of being registered as the proprietor of the charge or lease. Further, Section 54 of the Act requires persons registered as the representative of a deceased person, to hold such land according to equity and good conscience and subject to any trusts upon which the deceased proprietor held it. However, for the purposes of any dealings in the said land, he shall be deemed to be the absolute proprietor.

It is worth noting that in certain instances, the court may make an order preferring as proprietor of lands any person other than the registered proprietor thereof. Noteworthy too is that such a court order has no effect until an entry of the particulars of the preferred proprietor and other details is made on the register by the registrar.

The relevant section dealing with transmission under the GLA is section 105 which states that a person who acquires a right, title or interest in, to or over any land registered under the Act on the death of the proprietor must present for registration the document evidencing the right, title or interest.

Under the RLA, as was earlier noted, transmission does not take effect by registering against the title the probate or letters of administration produced by the deceased’s personal representative. Instead, any executor/administrator who wishes to have his name entered in the register must complete the prescribed RL 19 form and present it for registration like any

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217 Section 53 RTA.
218 Section 56 RTA.
219 Note that under section 118 of RLA, if one or two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.
other registrable document.\textsuperscript{220} Obviously, and as envisaged by the Act, the RL 19 form must be accompanied by the grant to serve as evidence of him being the personal representative. In registering a personal representative, the fact that he is a personal representative is usually noted in the register by simply adding, after his name, the words “as executor of the will of the deceased…” or “as the administrator of the estate of the deceased,” as the case may be.

The effect of transmission of land upon the death of a proprietor under the RLA is to vest on the personal representative, for purposes of dealings in the land, all the rights of a proprietor as if he had obtained the same by valuable consideration.\textsuperscript{221} He is however required to hold the land, lease or charge subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same.

If the personal representative intends to transfer the land to the beneficiaries, he must execute an instrument drawn on form RL 17 and present it for registration. Where the land concerned is agricultural land, the Land Control Board consent is not required unless it will lead to subdivision of the land in question. A personal representative who is also beneficiary must, where he intends to transfer the property to himself, execute a transfer on his favour in the form prescribed RL1.

\textbf{b) Transmission upon Insolvency or Bankruptcy of the Proprietor}

Land may also be disposed by way of transmission upon the insolvency of a company or the bankruptcy of an individual.

As regards a company, the doctrine of relation back applies. A company may appear to be solvent, but due to certain circumstances i.e. financial mismanagements, may still be unable to meet its financial obligations. Under the Bankruptcy Act (Cap 53), provided it cab be shown that a company has committed an act of bankruptcy in the last one year, then any transfer, mortgage, or dealing in property by the company is null and void. Such is regarded as fraudulent.

Otherwise where a company is in liquidation or under receivership, the liquidator or official receiver as the case may be is entitled to deal with is its immovable property. In this regard,

\begin{footnotesize}
\textsuperscript{220} Section 119 RLA.
\textsuperscript{221} Section 122 RLA. Note that the registration of a person as proprietor of a deceased person’s land, lease or charge, relates back to and takes effect from the date of the death of the proprietor.
\end{footnotesize}
where a company is been wound up, the liquidator is required to produce to the Registrar any resolution or order appointing him liquidator and he must also satisfy the Registrar that he has complied with section 237 of the Companies Act (Cap 486).\textsuperscript{222} Having done this, the Registrar is obligated to enter the appointment in respect of any land, lease or charge of which the company is registered as proprietor in addition to filing the copy of the resolution or order.

Pursuant to section 124(3) where any person has become entitled to any land, lease or charge under any law or by virtue of any order or certificate of sale made or issued under any law, the Registrar shall, on the application of any interested person supported by such evidence as he may require, register the person entitled as the proprietor. The GLA also embodies a similar provision.\textsuperscript{223}

As concerns an individual, the RLA provides that once a person is adjudged bankrupt, only the trustee in bankruptcy can deal in his property. The relevant section stipulates that a trustee in bankruptcy shall, upon production to the Registrar of a certified copy of the order of court adjudging a proprietor bankrupt, or directing that the estate of a deceased proprietor shall be administered according to the law of bankruptcy, be registered as proprietor of any land, lease or charge of which the bankrupt or deceased proprietor is proprietor, in his place, and a copy of the order shall be filed. The registrar will register the name of the trustee as “X”, the trustee of the property of “Y” bankrupt.\textsuperscript{224}

Such a trustee in bankruptcy is required to hold the land, lease or charge of which he is registered as the proprietor subject to any restrictions contained in the Bankruptcy Act or in any order of court.\textsuperscript{225} He is also subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the bankrupt or the deceased proprietor held the same. However, for purposes any dealings with such land, lease or charge the trustee in bankruptcy shall have all the rights and be subject to limitations conferred or imposed by the RLA or any other written law on a proprietor who has acquired land, lease or charge for valuable consideration.

In conclusion on this part on disposition by way of transmissions, it is important to note that the RLA also provides for transmissions in other circumstances not mentioned above. Under

\textsuperscript{222} Section 124(1) RLA.
\textsuperscript{223} See section 105 GLA.
\textsuperscript{224} Section 123(2) RLA.
\textsuperscript{225} Section 123 (3) RLA.
section 125 thereof, the Act states that where any person has become entitled to any land, lease or charge under any law or virtue of any order or certificate of sale made or issued under any law, the Registrar shall, on the application of any interested person supported by such evidence as he may require, register the person entitled, as the proprietor.

### 3.9.5 Disposition of Land through Gifts

A gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.\(^{226}\) It is a general principle of law that an acceptance of a gift must be made during the lifetime of the donor and while he is still capable of giving.\(^{227}\) Consequently if the donee dies before acceptance, the gift is void.\(^{228}\)

A gift of land must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.\(^{229}\) If it is registered land then the statutory requirements and procedures under which the land is registered must be adhered to for the gift to be effective. In the case of *Registered Trustees Anglican Church of Kenya Mbeere Diocese v The Rev. David Waweru Njoroge*,\(^{230}\) for instance, the Court of Appeal stated that:

“For a gift of agricultural land as in this case to be completely constituted the donor must comply with both the substantive law and statutory procedure relating to the transfer of agricultural land. For instance, the consent of the Land Control Board must be applied for and obtained as required by the Land Control Act. Thereafter the disposition must be effected by a transfer in the prescribed from (section 108(1) of the RLA) and executed, stamped and lodged for registration as prescribed in the RLA. As section 85(2) of the RLA, provides, ‘the transfer shall be completed by registration of the transferee as proprietor of the land, lease, or charge and by filing the instrument.’”

Section 124 of the ITPA states that a gift comprising both existing and future property is void as to the latter. A similar fate meets a gift of a thing to two or more donees, of whom one does not accept it.\(^{231}\) A gift may be suspended or revoked if the donor and donee agree that on the happening of any specified event which does not depend on the will of the donor the

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\(^{226}\) Section 122 ITPA.

\(^{227}\) *Ibid.*

\(^{228}\) *Ibid.*

\(^{229}\) Section 123 ITPA.

\(^{230}\) (2007) eKLR; Civil Appeal 108 of 2002 (Court of Appeal at Nyeri, judgment delivered on 9th February 2007)

\(^{231}\) Section 125 ITPA.
gift shall suspended or revoked. However, a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part, as the case may be. In addition, a gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked.

The question of revocation of a gift came up for determination in aforementioned case of Registered Trustees Anglican Church of Kenya Mbeere Diocese v The Rev. David Waweru Njoroge. In this case, the respondent an ordained as clergyman in Anglican Church of Kenya (CPK) Mbeere Diocese applied to the Land Control Board for consent to transfer a parcel of land registered in his name to the Church Commissioners for Kenya as a gift. The consent was given and the respondent executed a transfer of the land in favour of the Church Commissioners for Kenya but the same was not registered because a case had been lodged in respect with the same land. The respondent later resigned from the service of the church and sought to withdraw or revoke the gift. The appellants declined leading to a suit in which the High Court ruled in favour of the respondent. The appellants lodged an appeal.

The Court of Appeal in holding in favour of the appellants said that where the donor has done all in his power to divest himself of and transfer all his legal and equitable interests to the land to the donee, then the gift is completely constituted and cannot be revoked in law. The Court stated thus:

“The application for registration of the transfer was executed and the transfer and accompanying documents lodged at the District Lands Registry for registration. In this case, therefore, the respondent has done all in his power to divest himself of and transfer to the church trustees all his legal and equitable interest in the land. There is nothing that remains to be done by the appellant to complete the transaction. The registration of the land is not within the power of the appellant and the transferee does not need any assistance from the court…. Although the land is still in the name of the respondent, he is in the circumstances of this case, a bare trustee for the transferee having transferred the whole of his beneficial interest in the land.”

In reaching this conclusion, the Court of Appeal was guided by the principle that the moment in time when a gift takes effect is dependent on the nature of the gift; the statutory provisions

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232 Section 126 ITPA.
233 Ibid.
governing the type of the gift and the steps taken by the donor to effectuate the gift. It made a number of references to English cases worth noting here.

In *Macedon v Beatrice Stroud*, a father, three months before his death executed, among other documents, a memorandum of transfer purporting to transfer certain properties to his daughter on consideration of his affection for her. The properties dealt with by the memorandum were registered under the Real Property Ordinance No. 6 of Trinidad which provided in section 46, “no instrument until registered in a manner herein before prescribed shall be effectual to pass any estate or interest in any land under the provisions of this Ordinance.”

The donor after executing the memorandum of transfer delivered it to his solicitor telling him to keep and not to register it. The memorandum remained with the solicitor until the donor died. The donee continued to receive rent from the properties. There were concurrent findings that the instrument was intended to operate as an immediate and unconditional gift to the daughter. The Privy Council held that memorandum of transfer was an imperfect gift of the properties saying at page 337 last paragraph and page 338:

“The memorandum of transfer, however, stands on a different footing. It was never made the subject of registration, nor did Iberia (donor) present it or hand it to the transferee for that purpose. It therefore, having regard to the terms of the Ordinance, transferred no estate or interest either at law or in equity. At most it amounted to an incomplete instrument which was not binding for want of consideration”

In *Mescal v Mescal*, a father gave a gift of land to his son. He handed over the transfer and the land certificate to him. The son was left to have the transfer stamped and title in the land register altered. The question then before the court was whether a gift of land was completely constituted by delivery of the land certificate and a form of transfer. Brown LJ held as follows:

“The basic principle underlying all the cases is that equity will not come to the aid of a volunteer. Therefore, if a donee needs to get an order from a court of equity in order

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234 See Re Fry Deceased (1946) Ch 312; Re Rose: Midland Bank Executor and Trustee Co. Ltd v Rose (1949) Ch 78; Re Rose: Rose v Inland Revenue Commissioners (1925) Ch 499; and Pennington v Waine (2002) 1 WLR 2075.
235 (1922) AC 330.
to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle which is laid down in (Rose vs. Inland Revenue Comrs (1952) Ch 499) that in equity it is held that a gift is complete as soon as the settler or donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, the donee to complete his title:

The Court of Appeal also quoted at length the following words from Snell’s Equity 29th Edition at page 122 paragraph (3):

“…Where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Thus, in Re Rose Midland Bank Executor & Trustee Co.Ltd v Rose (1949) Ch. 78 the donor executed a transfer of shares in a private company and handed it with share certificate to the donee who died before it had been registered. Although the donee’s legal title would not be perfected until the company had passed the transfer for registration or at least until the donee had an unconditional right to be registered, it was held that the gift was good because the donor had done all that was necessary on his part.”

It is therefore settled law in Kenya, following the decision of the Court of Appeal in the case of Registered Trustees Anglican Church of Kenya Mbeere Diocese v The Rev. David Waweru Njoroge,237 that a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor.

3.9.6 Disposition of Land Upon Dissolution Of Marriage

One of the most controversial issues that have visited our present time is to do with the disposition or division of matrimonial property upon dissolution of marriage. In normal circumstances, spouses are generally not concerned with precise questions of ownership during the subsistence of a happy marriage. Indeed, when parties get into marriage, they do not do so in contemplation that the same will someday collapse. They therefore do not

237 See n. 132 above
involve themselves with questions as to what belongs to whom. In any event, even where spouses make agreements, these are rarely considered enforceable because it is unlikely that it was the intention of the parties that the agreement would have legal consequences.

Further, in the vast majority of cases, marriage terminates in the death of one of the parties. However, in the now greatly increased tendency for marriage to terminate not in death but in divorce, no doubt the ascertainment of the proprietary rights of husband and wife during marriage must be raised. This is especially so because the unprecedented resort to divorce has coincided with a hitherto unknown family affluence. Where spouses divorce, it cannot be expected that they will themselves be able to make dispositions of the matrimonial property on the basis of what in the circumstances as they have developed, would be thought by an independent person to be fair and just. The law must therefore descend on the arena to determine the disposition thereof. Thus Gray and Symes observe that ‘the economic problems caused by marital breakdown can no longer be resoled purely in terms of maintenance at subsistence level. It has now become a task for the law to arrange for a fair distribution of not only the revenue resources but also the capital resources built up during the marriage.’

i. Historical Background

The province of property in the context of family law is categorised into two; *communion bonorum* and *separation bonorum*. The former involves community property, and is prevalent in the continental system. The latter is founded on a system of separate property between spouses and is prevalence in common law jurisdictions. Some jurisdictions have developed a regime which applies elements of both separate and community property. For this reason, it has been contended that within both regimes there is a move towards enabling devices that allow straightforward management of property during good spousal relations but that allow for equitable sharing of the property in cases of estrangement.

In community property jurisdictions, certain properties acquired during the pendency of the marriage are automatically deemed community property. Community property in this sense means property owned in common by husband and wife during marriage. Thus in these systems, considerations such as who acquired the property and mutual intention to share the

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238 But with increasing phenomenon of contractual, de facto and same sex marriages especially in the western countries, this view is gradually changing and parties thus enter into marriage with well laid down written agreements including terms on the ownership and disposition of property upon dissolution of the marriage.
239 See Balfour v Balfour (1919) 2 KB 571
beneficial interest are irrelevant considerations. The property is presumed be owned jointly, generally in equal shares, between the spouses.

If the property is movable, it would probably be transferable by one partner without the need for express confirmation by the other, although the other spouse would potentially set aside such a transfer on the ground of fraud, lack of authority, etc. for immovable property there would generally be a requirement that both spouses consent expressly to any disposition of the property, failing which the same would be prima facie void. Different community property regimes would by legislation establish varying nets, some quite narrow and others rather extensive, of what property would fall into definition of community property.

In separate property jurisdictions, the fact that two persons are married to each other has no automatic effect on their respective property entitlements. Spouses are, in this context, treated as strangers one to another, and their rights in respect of property are determined according to bleak and inflexible rules of the general law of property. In a nutshell, there is no special body of principles applicable to married persons, and each spouse remains separate owner of those assets or interests to which he or she has acquired title pursuant to the general law.

Being a common law jurisdiction, it is the separate ownership principle that obtains in Kenya. Accordingly, our view of inter-spousal property rights have not only been a function of the African customary law but it has also been shaped by common law as defined by the English system. In both of these systems (i.e. African customary law and common law) the right of the woman to own property have historically been greatly curtailed. As already noted above, in African cultures, the head of the family, more often than not the man, held land on behalf of other family members. Even upon divorce, it is the wife that left the matrimonial home leaving only with her self-acquired personal property. Any property which belonged to the matrimonial home and landed property remained with the husband.241

In general too, women were not allowed to inherit land save for those who remained unmarried.242 The introduction of the individual tenure system did not cure the discrimination

242 See Mumo v Makau (2004) 1 KLR 13 where the appellant, a married woman, registered the suit land belonging to her late father in her name. She claimed, inter alia, that she had inherited the land from the father. In rejecting this argument the Court of Appeal observed that ‘under Kamba customary law, the appellant would
inherent in customary law. When land rights under customary law were translated into individualized land rights within the context of patriarchy, male household heads, actual or nominal, were registered as the sole or absolute proprietors of such land. Women’s access rights to land under customary law were not reflected in the register even as overriding interests. Hence according to Adam Leach, ‘the rights of women have generally been better served under customary than modern tenure. Reform has adversely affected their access to land and other natural resources, notwithstanding their dominant involvement in agricultural production and raising of livestock.’

Under common law, the view on inter-spousal property rights was a function of the doctrine of conjugal unity. The doctrine of conjugal unity was based on the belief that husband and wife are ‘one in flesh.’ Thus, by marriage husband and wife becomes one person in the eyes of the law. The doctrine of conjugal unity became the basis upon which man’s oppression and domination of the woman and her property was justified. It was believed, that if husband and wife were one, then that one was obviously the husband. In this regard, it has been commented that:

‘…the property that a woman possessed or was entitled to at the time of the marriage and any property she acquired or became entitled to after her marriage became the husband’s to control. Moreover, if a woman who accepted a proposal of marriage sought, before the marriage took place, to dispose of any property without the knowledge and consent of her intended husband, the disposition could be set aside as a legal fraud.’

However, the rigour of the medieval common law began to be mitigated by the intervention of equity towards the end of the sixteenth century. It came to be established that the common
law disabilities suffered by the wife in respect of property could be circumvented by a disposition of property (real or personal) to trustees ‘to the separate use’ of the wife. By means of the device of the separate estate, the married woman was enabled, in equity to hold and dispose of the separate so settled as if she were a feme sole. However, it was not until the enactment of the Married Women Property Act 1882 that the norm of separate ownership of property was crystallized.

Under the terms of the Married Women Property Act (MWPA), married women had the same rights over their property as unmarried women. The Act therefore allowed a married woman to retain ownership of ante-nuptial property and to keep separate ownership of property acquired during the marriage. In establishing the principle of separate of property under the MWPA it was generally felt that the principle would inevitably generate between spouses difficult questions of title and possession to property. To deal with such questions section 17 of the Act stated as follows:

‘in any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body or society as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice…and the judge…may make such order with respect to the property in dispute, and to the costs of and consequent in the application as he thinks fit’

Today, the MWPA is applicable in Kenya by virtue of being a statute of general application in England on 12 August 1897. Thus in Kenya the law in respect of inter-spousal property rights is that which has been developed in England since the advent of separate ownership. It is this law as reflected in the MWPA and the principles of equity that determine the disposition or division of property (both real and personal) upon the dissolution of marriage.

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248 See section 3 Judicature Act (Cap 8 Laws of Kenya). See also I v I (1971) EA 276.
ii. Judicial Interpretation and Application of MWPA

The case of Pettitt v Pettitt\(^{249}\) is lauded as been the first of the English decisions on family law to attempt a clarification of the law relating to property interests between spouses.\(^{250}\) In this case, the wife purchased property and had it conveyed into her name. The husband undertook internal decoration work. The court had to determine whether this would entitle him to a beneficial interest in the property. It was held that a husband was not entitled to an interest in his wife’s property merely because he had done in his free time jobs which husbands normally do. Since the improvements carried out were generally of an ephemeral character and there was neither fraud nor a mutual intention or agreement for the husband to gain beneficial interest, the husband’s claim would fail. In reaching this decision, the House of Lords made several landmark pronouncements that has since then laid the law on the application of section 17 MWPA. First, while recognizing that the MWPA gave married women full proprietary rights to the properties that they may acquire nevertheless emphatically held that section 17 of the Act was purely procedural provision which did not entitle the court to vary the existing proprietary rights of the parties. Secondly, it was stated that the procedure in section 17 of the Act is not all embracing for the disputes over property between husband and wife could be resolved by ordinary action. Thirdly, the House of Lords also emphasized that the status of the marriage did not result in any common ownership or co-ownership of the property, and the term ‘family property’ was devoid of any legal meaning unless it refers to assets separately owned by one spouse.

In Gissing v Gissing\(^{251}\) the House of Lords attempted to answer some of the questions that were hanging in the Case of Pettitt. These questions were: first, what was the position in law when no common intention of the parties could be inferred; and secondly, was there a difference between direct and indirect contribution to the purchase price of the property; and thirdly, would the conduct subsequent to the acquisition of property be relevant in the determining the common intention.

\(^{249}\) (1969) 2 All ER 385
\(^{250}\) But it can be argued that long before Pettit v Petit, clarification of section 17 MWPA had been attempted. See H v H (1947) 63 TLR 645 where Denning J (as he then was) sought to applied section 17 MPWA and stated that the section authorized a judge of the High Court to ‘make such order with respect to the property in dispute as he thinks fit.’ It gave the judge the discretion. However, this decision was overturned by the House of Lords. See also Hine v Hine (1962) 1 WLR 1124 where the same judge stated that, ‘it seems to me that the jurisdiction of the Court over family assets is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the Court to make such order as it thinks fit. This means, as I understand it, that the Court is entitled to make such order as may be fair and just in all the circumstances of the case.’
\(^{251}\) (1970) 2 All ER 780.
Here, the husband, during the currency of the marriage, purchased the matrimonial home and had it conveyed into his sole name. There was no express agreement as to how the beneficial interest in the house should be shared. The wife provided some money for furniture and improvements, but it was not suggested that her efforts or earnings made it possible for the husband to raise the purchase money for the house. The court considered whether the wife was entitled to a beneficial interest in the house.

It was held, *inter alia*, that if there is no agreement between the spouses regarding the matrimonial house to which both contributed to the purchase, and the registered owner has evinced no intention that the other spouse should have a beneficial interest in the house, the question of whether that spouse has a beneficial interest will be dependent on the law of trust. Lord Diplock expressed the legal position thus:

> ‘any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom, the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as a trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts the law relating to the creation and operation of resulting implied or constructive trusts…’

It was also held that there is distinction to be drawn in law between the position where a contribution spouse makes direct contributions to the purchase of the property and where he/she makes indirect contributions. In this regard, the share of the contributing spouse would be proportionate to the contributions, either of direct payments for the property or a fair estimate of indirect contribution.252

The Kenyan courts have followed the principles established in English jurisprudence in ascertaining inter-spousal property rights. The first reported case came for determination before the High in 1970 in I v I.253 However, this case is largely only relevant in as far as it

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252 English property law between spouses was subsequently reformed by the Matrimonial Causes Act of 1973. However, the principles of Gissing continue to be applied where statutory changes are incapable, such as between unmarried cohabitants. Gissing is still a leading authority in England today.

253 (1971) EA 278. In this case, the husband had acquired a property in England from earnings and had it registered in the joint names of the spouses. The house was subsequently sold and most of the proceeds used to purchase a house in Kenya which was transferred into the husband’s name. The wife had expected that the subsequent property would go into their joint names. The question before the court was whether the MWPA would apply to Kenya. Further, whether the presumption of advancement to the wife as a result of the initial
established that MPWA is applicable to Kenya. Accordingly, it is the case of *Karanja v Karanja*,\(^{254}\) that began the arduous path of applying the principles enunciated in *Pettitt* and *Gissing* to local cases.

In the *Karanja Case*, the parties acquired several properties in the currency of their marriage which were registered in the name of the husband. One property was acquired from money supplied by the wife while the other properties were acquired with her direct or indirect contribution. The court considered whether customary law would operate to disqualify any imputation of trust in favour of a married woman, especially one in salaried employment.

In declaring that the husband held the properties in dispute in trust for himself and his wife in proportions of two to one respectively, Simpson J quoting *Chapman v Chapman*,\(^ {255}\) stated that in cases where the property was acquired as a joint venture, it will be regarded as belonging to the spouses jointly no matter in whose name the property stands. He also observed that where a husband and wife are in salaried employment, the imputation of a trust cannot be rejected outright. This implication would arise where the wife is contributing indirectly through payments for household and other expenses which the husband would otherwise have had to pay.

In *Njuguna v Njuguna*,\(^ {256}\) the husband acquired the suit premises. There was conflicting evidence of how the parties had ordered their marriage and arranged their financial affairs. However, there was some evidence that the husband had been unemployed for over one year and that the wife had made financial contributions to the property. On an application for determination of her share in the property, it was held that the wife had satisfied the court of her direct and indirect financial contributions to the property. The court therefore declared joint ownership of the property assessed in equal shares.

For the first time in 1991, the Court of Appeal considered whether the non-monetary contribution of a typical Kenyan housewife would be at par with indirect financial contribution of a wife in salaried employment. This was in the landmark of *Kivuitu v Kivuitu*.\(^ {257}\) In this case, the husband commenced the process of purchasing some property and paid the deposit. However, dissatisfied with the location and security of the house, he agreed

\(^{254}\) (1976) KLR 307.
\(^ {255}\) (1969) 3 All ER 476.
\(^ {256}\) (1986) LLR 823 (HCK)
\(^ {257}\) (1991) KLR 248.
with the wife to purchase another house at a different location. He went abroad and left his wife in charge of obtaining alternative property who subsequently found an ideal matrimonial home. The deposit for the purchase of this property was paid by the wife out moneys obtained from a business owned by the husband and a third party. The husband paid the balance from his salary. The property was registered in their joint names.

Upon the dissolution of the marriage, the wife applied for the matrimonial home to be sold and the proceeds shared in equal shares between them. The Court of Appeal held that the fact that the property was registered in the joint names of husband and wife means that each party owns undivided equal shares therein. It was also stated that section 17 MWPA does not give the right of sale but a determination and declaration of the wife’s share in the property.

Of particular importance (or controversy), Omollo JA in this case insinuated that where a wife makes non-monetary contribution to the purchase of matrimonial property, then the court can assess and put value on that contribution. He said in obiter:

‘In the case of the urban wife, if there were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even a bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make a contribution to the family welfare and assets. So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property, being family asset, is owned in equal shares. Where, however, such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to the court under s 17 of the Married Women’s Property Act 1882, so that the court can determine her interest in the property and in that case, the court would have to access the value to be put on the wife’s non-monetary contribution.’

The decision in the Kivuitu Case was subsequently followed in the case of Essa v Essa258 where the Court Appeal again stated that where property is acquired during the subsistence of

258 (1995) LLR 384 (CAK)
the marriage and registered in the joint names of the spouses, the law assumes that the property is held in equal shares. Omollo JA observed:

‘Since the decision of this court in Kivuitu v Kivuitu...the law with regard to the disposal of matrimonial property upon the dissolution of a marriage is fairly well settled. Where property acquired during the subsistence of the marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares. There is of course no presumption and there could not have been any, that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties.’

However, it also confirmed that there is no presumption that any or all property acquired during the subsistence of the marriage must be treated as being owned jointly by the parties. Further, it stated that the mere fact of marriage does not give one spouse an interest in the property of the other spouse. Having quoted the dictum of Lord Morris Borth-Y-Gest, Omollo JA said:

‘...when a woman gets married to a man who already has property registered in his sole name, the fact of marriage alone cannot by itself confer any rights over such property, to the woman. Nor would the act of marriage alone confer on, the man any property rights over that of which the woman id the registered owner at the time of the marriage.’

In Nderitu v Nderitu, the obiter of Omollo JA on non-monetary contribution of a wife, quoted above, was adopted and approved. Kwach JA stated that, ‘a wife’s contribution and more particularly a Kenya African wife, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial judge hearing an application under section 17 of the Act to take into account this form of contribution in determining the wife’s interest in the assets under consideration.

In essence, an African wife by doing well her housewife duties, bearing and taking care of the children contributes non-monetary to the acquisition of property. Thus, such a wife acquires a proprietary interest in property acquired during coverture. If in addition she

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259 (1997) LLR 606 (CAK)
contributes financially, either to improving the family welfare or directly to the purchase price, this should be taken into account in assessing her aggregate contribution. Reasoning from this argument, the wife share in the property was increased to 50% from 30% initially declared by the trial decision.

In *Mathembwa v Mathembwa* the Court Appeal established that its jurisdiction was not limited to merely making declaratory orders and that it had jurisdiction to make orders as it considers appropriate on the facts and circumstances of the case before it. The court stated:

> ‘so if a court’s powers were limited to only making declaratory orders, we doubt whether the dispute between parties would ever come to an end soon enough as envisaged by the provisions of section 17….so unless the court is able to order a sale or make such orders as it considers appropriate on the facts and circumstances of the case before it, then the mischief, the legislature intended to remedy will persist and the object of the enactment will be defeated.

The law in Kenya therefore until recently remained as shaped by the above cases. In summary, concepts such as family welfare, fair sharing of matrimonial property, wifery duties as a mother and family income all had a place in the Kenyan regime. A wife need not give a detailed evidence of her contribution, because once the court is satisfied that there was substantial contribution, equality of division would necessarily follow. There is a presumption that by carrying out the duties of wife and mother, she has made substantial contribution to the acquisition of property.

But then entered the judgment of a five-bench Court of Appeal in *Peter Mburu Echaria v Priscilla Njeri Echaria* on 2nd February 2007. In this case, the appellant was employed as a civil servant in 1961 and later joined the Diplomatic service and posted to Moscow where he married the respondent in a civil ceremony. He then worked as a diplomat in various countries before he retired in 1984. He was living with the respondent during his service years.

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260 (2001) 1 KLR 91. The husband and wife ceased cohabitation and sought divorce. The wife concurrently filed an application seeking her determination in the share of the property acquired during coverture, which was also registered in the husband’s name or in the name of certain companies jointly owned by the parties. The trial court after considering the evidence and ascertaining substantial contribution by the wife, determined that the spouses jointly held all the properties. The husband appealed. He contended that that property acquired by himself as a gift prior to marriage should not have been divided, nor property whose title vested in a jointly owned company. It was held that the property inherited by or gifted to one spouse either before or during coverture can be the subject of a section 17 application, especially where such property is pooled with other property the couple may have and developed by their joint effort resulting in improvements to it. Such property should be taken as the contribution of the donee spouse to the family welfare.

261 Civil Appeal 75 of 2001 (Court of Appeal at Nairobi) (unreported).
abroad but in view of the appellant’s diplomatic status, the respondent was not allowed to work. During the subsistence of the marriage, the suit property was bought by the appellant by cash deposit and a loan from Agricultural Finance Corporation (AFC). Upon dissolution of the marriage, the respondent claimed 50% of the suit property through section 17 MWPA application. The trial court held that the suit property be divided into equal shares between the parties prompting the appeal preferred by the husband.

Several questions came up for determination on appeal. First, whether the obiter dicta of the majority in Kivuitu v Kivuitu had become the ratio decidendi in Kenya. Secondly, whether equal division of the matrimonial assets is the rule in all cases irrespective of the spouses varying financial contributions direct and direct. In its judgment the court addressed these issues, amongst others, as follows.

First, the Court of Appeal confirmed that the Kivuitu Case did not lay any general principle of equality applicable to all property disputes between husband and wife as later confirmed in Essa v Essa. It stated that where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one of the spouses, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “equality is equity” while heeding the caution by Lord Pearson in Gissing v Gissing. The judges expressed their point as follows:

‘In all cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this court, the court has invariably given the wife an equal share…. However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife’s contribution as equal to that of the husband.’

262 The caution by Lord Pearson in Gissing v Gissing reads, ‘No doubt it is reasonable to apply the maxim in case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of the property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing.’
Secondly, the Court considered the question on non-monetary contribution of a wife. It observed that the suggestion by Omolo Ag JA that non-monetary contribution should be taken into account was obiter dictum. Other members of the court in the Kivuitu case did not express any view on the issue of the wife’s non-monetary contribution. Similarly, what Kwach JA said in the Nderitu Case on the status of the wife’s non-monetary contribution was not a unanimous decision of the court and likewise it was an obiter dictum. The judges proceeded to state that ‘both Omolo Ag JA and Kwach JA, though guided by a noble notion of justice to the wife were ahead of parliament when they said that the wife’s non-monetary contribution have to be taken into account and a value put on them.’

In a nutshell, if non-monetary contribution is to be considered then Parliament should enact a law to that effect. The Court of Appeal in Kamore v Kamore\(^\text{263}\) observed that despite the fact English law has undergone changes following the decisions in Pettitt and Gissing, the Kenyan law has not undergone any change in regard to inter-spousal property rights.\(^\text{264}\) As such, the law applicable in Kenya remains as stated by the House of Lords in the cases of Pettit and Gissing. The Court of Appeal in the Echaria Case lamented thus:

‘It is now seven years since this Court expressed itself in Kamore v Kamore, but there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform agenda to keep the country shackled to a 125 year-old foreign legislation which the mother country found wanting more than 30 years ago! In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the product of a lesser god and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value. Those precedents, as shown above, are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times.’

Consequently, the Court confirmed that the status of marriage does not solely entitle a spouse to a beneficial interest in the property registered in the other, nor is the performance of domestic duties. Even the fact that the wife was economical in spending on house keeping

\(^{263}\) (1998) LLR 714 (CAK).

\(^{264}\) The law on inter-spousal property rights in England have undergone numerous changes ever since the decisions in Gissing and Pettit were pronounced. In particular the English Matrimonial Proceedings and Property Act 1970 which came into force on 1\(^\text{st}\) January 1971 empowered the court to make property adjustment ordered. The power was re-enacted in section 24 of the Matrimonial Causes Act 1973. in particular, section 5(1) (f) of the 1970 Act gave court power in considering whether to make a transfer of property to have regard, among other things, to ‘the contributions made by each the parties to the welfare of the family including any contributions made by looking after the home or caring for the family.’
will not do. It therefore found that the trial judge had erred in taking into account the status of being an ambassador’s wife as indirect contribution towards the acquisition of the property.

Thirdly, the court clarified the issue as to whether it has jurisdiction to order transfer of proprietary interest from one spouse to another. Counsel for the appellant relying on the Kamore Case submitted that the court had no jurisdiction under section 17 MWPA to order transfer of proprietary interest from one spouse to another and asked the court to order the appellant to pay the respondent the value of her share. The court rejected this argument and said that the position is as stated in the Muthembwa’s Case.

In particular the court observed that the decision of the House of Lords in Pettit v Pettitt that section 17 MWPA is a procedural section and did not entitle the court to vary the existing proprietary rights of the parties has often been misunderstood. All that the House said, noted the Court of Appeal, was that if a spouse indisputably owns property alone before the dispute reaches the court, section 17 MWPA did not give the courts the discretion to take that property right away and allocate it to the other spouse. In other words, the House of Lords did not say that after the ascertainment of a property dispute between husband and wife, the court did not have any power to make appropriate orders as would give effect to its decision. It summarized the issue as follows:

‘Section 17 of the 1882 Act gives the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property. The same remedies as are available in law in property disputes in ordinary actions are also available in disputes between husband and wife under section 17. The court has jurisdiction after the adjudication of the dispute, to allocate shares of the disputed property as it may deem just and order the transfer of the share to the rightful beneficial owner to give effect to its decision.’

In the final analysis, it is important to note that, the Court having looked into the circumstances of the case assessed the wife’s beneficial interest in the suit property at 25% and that of the husband at 75%. This decision has raised immediate concerns. It is argued that it serves to reduce a wife’s beneficial interest in the matrimonial property from 50% to 25%;

265 In coming to this conclusion the Court of Appeal drew inspiration from lord Morrison’s dictum in Pettitt v Pettitt that ‘there would be room for the exercise of discretion in deciding a question as to whether a sale should be ordered at one time or another but there would be no discretion enabling a court to withdraw an ascertained property right from one spouse and grant it to the other.’ See also Cobb v Cobb (1955) 1 All ER 781.
in essence it has curtailed the equality principle. This argument doesn’t seem to appreciate that the decision does not make any general principle that a wife would only be entitled to a quarter of the matrimonial property. The decision is specific to the circumstance of the case.

Concerns have also been raised that in refusing to take into account the non-monetary contribution of a wife, the decision again serves to reduce a wife’s beneficial interest in the matrimonial property. As the Court of Appeal has now twice observed, the cure to this problem lies in the enactment of a new to govern matrimonial property dispositions.

3.9.7 Compulsory Acquisition/Eminent Domain

One of the residual powers that the state derives from the Constitution as the owner of radical title is eminent domain which gives the state or its assigns (e.g. county councils) the right to compulsorily acquire land for public purposes. Kenya’s Constitution at section 75 provides three conditions under which compulsory acquisition is subject to.266 These are:

a. **Demonstrable public interest**- the purpose for which the state wishes to compulsorily acquire an individual’s private land should be in the interests of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization property so as to promote the public benefit.

b. **Benefit must outweigh hardship to the owner**- the necessity to compulsorily acquire private land must such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property.

c. **Prompt payment of full compensation**- provision must be made by a law applicable to that taking possession or acquisition for the prompt payment of full compensation.

A person having an interest or right in or over property which is compulsorily taken possession of or whose interest in right over any property is compulsory acquired shall have a

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266 Section 72(6) however contains exceptions to the conditions set for compulsory acquisition.
right of direct access to the High Court for the determination of his interest or right.\textsuperscript{267} Questions for determination may include the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled. One may also institute suit for the purpose of obtaining prompt payment of compensation.

Compulsory acquisition is implemented through the Land Acquisition Act (Cap 295 Laws of Kenya). The Act categorically empowers the Commissioner of lands upon due notice in the Kenya Gazette and upon the payment of full compensation to all persons having an interest in the property, to acquire any piece of land which the minister is satisfied that it is required for public use. It is also important to note that the Trust Land Act empowers the Government or a local authority in whose jurisdiction trust land falls within to compulsorily acquire such land in a process called setting apart.

### 3.9.8 Acquisition of Land by Limitation of Actions/Adverse Possession

Acquisition of land by limitation of actions or adverse possession is quite different from acquisition by contract and conveyance or transfer. The basic idea behind adverse possession of land is that a person who takes possession of land, albeit wrongful to begin with, acquires a possessory title to the land which after the expiration of a certain period is good against the whole world. In other words, if the owner of property fails within a certain period to secure the eviction of a squatter or trespasser from his land, that owner is statutorily barred from recovering possession thereafter. Title to land being ultimately relative, the intruder or trespasser thus acquires as an indirect effect of the limitation of actions, a title which enables him to remain in possession.

The law adverse possession gives effect to the pragmatic expectation, born no doubt in the more physical climate of earlier times that a property owner will rise with rugged fortitude to assert his title against unlawful intruders. It reflects the policy that ‘those who go to sleep upon their claims should not be assisted by the courts in recovering their property.’\textsuperscript{268} In social terms adverse possession is justified on the assertion that ‘certainty of title to land is a social need and occupation of land which has long been unchallenged should not be

\textsuperscript{267} Section 75(2) The Constitution of Kenya. See also section 7(2) Land Acquisition Act (Cap 295 Laws of Kenya).

\textsuperscript{268} Lloyd v Butler (1950) 1 KB 76 at 81
disturbed.’ Therefore, limitation of actions in property law is directed towards extinguishing the title which an owner has failed to protect within the period specified by statute and instead indirectly permit third parties to set up new titles good against the world.

The doctrine of adverse possession in Kenya is embodied in the Limitations of Actions Act (Cap 22 Laws of Kenya) and in case law. Section 7 states that ‘an action may not be brought by an person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’ Section 13 of the Act states that a right of action is in the possession of some person in whose favour the period of limitation can run. Much of the case law on adverse possession has centered on the concepts of discontinuance, dispossession and possession by the squatter or wrongful intruder. The principle here is that:

‘The true owner must have discontinued possession or have been disposed and another must have taken it adversely. There must be something in the nature of an ouster of the true owner by the wrongful possessor.’

In order that a right of action should accrue, and therefore cause the period of limitation to begin to run, the land concerned must be ‘in the possession of some person in whose favour the period of limitation can run. Not all persons in possession can have time run in their favour. For example, time can run in favour of a tenant at will by virtue of section 12 of the Limitation of Actions Act but time cannot run in favour of a licensee. A licensee therefore has no adverse possession.

Possession which causes time to run must be ‘open, not secret; peaceful, not by force; and adverse, not by consent of the true owner.’ In essence it must be nec vi, nec clam, nec precario. Fundamental principles related to adverse possession were cogently set out by the Court of Appeal in the case of Wambugu v Njuguna as follows:

First, in order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts

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270 Wallis’s Cayton Bay Holiday Camp Ltd v Shell Mex and BP Ltd (1975) QB 94 at 103 as per Lord Denning MR
271 See Hughes v Griffith (1969) 1 WLR 23
272 Mulcahy v Curramore Pty Ltd (1974) 2 NSWLR 464 at 475D per Bowen CJ
273 (1983) KLR 172
which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it.

The Limitation of Actions Act (Cap 22), on adverse possession, contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been disposed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

Where the claimant is in possession of the land with leave and licence of the true owner in pursuance to a valid agreement, the possession become adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist. In a nutshell, a person must have effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract or other valid permission or licence, which has not been determined.\textsuperscript{274}

\textsuperscript{274} See Jandu v Kirpal (1975) EA 225 where Chana Singh J stated that ‘the rule on ‘permissive possession’ is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.’
CHAPTER FOUR
REGISTRATION AND INVESTIGATION OF DOCUMENTS AND TITLES

4.0. INTRODUCTION

The law of conveyancing serves the interests of the society when it is capable of not only facilitating the transfer of land but also when it can provide security of title upon such a transfer. As such, the reconciliation of security of title with ease of transfer is a central theme in conveyancing. In a nutshell, conveyancing law must facilitate the transfer of land by easing the burden on purchasers without defeating the interests of others unfairly. This is in practice carried out through the registration and investigation of titles and documents. This chapter looks into the process of registering and investigating titles in the Kenyan context.

4.1. REGISTRATION OF TITLES AND DOCUMENTS

Registration is a process of recording interests in land so as to facilitate ascertainment of these interests through searches for effective conveyancing. Once carried out, registration has the effect of passing an interest in land from one party to another. This process has become increasingly important owing to the contemporary highly mobile and industrialized society. Further, by virtue of the fact that the law permits multiple individuals to hold varied degrees of interests in the same land, it is vital that the transfer of interests of these persons in or over the land in question be protected upon the transfer of that land. In addition to these blanket importance of registration, there are other finer goals of registration that need specific mention here.

275 The term security of land or tenure means different things to different users of land, but is often used indiscriminately and given one mainstream meaning. To the investor whose use of land is for profit, with land as one of the factors of production (a capital asset) security means two things; first, that his title to land is certain and non-contestable; and second, that he is free to pass on the title to a purchaser without constant challenges. This is the dominant meaning of secure title and the perception and rationale which lie behind the titling system. Here the investor may be direct, i.e. someone who directly invests in land, or indirect i.e. the financier who advances credit to the landowner on the security of the land. In this perception, the security of title or tenure is concerned with the negotiability of land. Titling facilitates negotiability by separating 'possession' and use from 'ownership.' Thus this conception of security is predicated on the possibility of the alienation of land from the user/owner.

The perception of peasant communities regarding security of title or tenure is of a different order altogether. For them land is the means of producing for survival, and possibly some surplus for the market so as to get the wherewithal to buy other necessities. For them, therefore, security means being secure from the fear of their land being alienated- a totally different conception of security from that of an investor.
4.2. THE GOALS OF REGISTRATION

According to William Iris, there are two main aims of registration: to remove the necessity for title deeds and to remove the necessity for searches, making conveyancing easier since all information is on the land certificate.\(^{276}\) However, as already noted, there are other aims of registration that go beyond the aforementioned goals. These are as discussed below:

i. Security of Tenure

Security of tenure gives one a right to indemnity from the government. It is the security of the transferee, chargee and the mortgagee.\(^{277}\) It flows from the fact that a purchaser of a piece of land from a proprietor on the register should have the commercial confidence in the transaction unbothered by the deficiency of title not revealed in the register. Likewise, a moneylender against the title on the register should have similar confidence.\(^{278}\)

In this light, the Government guarantees security of tenure by providing indemnity. Under the RTA, the guarantee is provided under Section 24(1) while under the GLA the same obtains under Sections 23, 28 and 29. Registration of land under these two statutes confers absolute proprietorship and is indefeasible except in certain defined circumstances.

Security of tenure is also guaranteed by the conclusiveness of the register. No claim, which is inconsistent with a registered title, can be enforced against the owner of the interest. A person who has acquired title from registered proprietor has acquired an indefeasible title against the whole world.\(^{279}\)

ii. Reduction in Litigation

During the process of registration, the size and owner of a land parcel are conclusively established or determined. Usually, this goal is achieved during survey. Survey is an indefeasible pre-requisite to a good registration system, which explains why, under the Land Adjudication Act No. 35 of 1968, titles, estates and any other interests are exhaustively

\(^{277}\) See A.G. vs. Odell (1906) 2 Ch 47 at p.70
\(^{278}\) See Halsbury’s Laws of England supra, at p. 984
arbitrated. Once registration has taken place any one may transact or settle on the land without any fear of being sued.

iii. Preventing Fragmentation of Land

Registration of land prevents the unreasonable and unnecessary subdivision or fragmentation of land especially of agricultural land. Such fragmentation of land may easily lead to low productions and thus hinder the benefits that come with large economies of scale in the agricultural sector. For this reason, an individual requires the permission of the Land Control Board for any sale or subdivision or any dealing with regard to agricultural land. This is so pursuant to the provisions of the Land Control Act No. 34 of 1967, which empowers the Board to refuse consent where a land transaction is likely to cause unnecessary land fragmentation.

Similarly, the Land Planning Act No. 37 of 1968 obligates one to acquire the permission for planning, development and user of urban land. Registration will be refused without the necessary consents. On its part, the RLA allows only the registration of five persons though the minister may vary. Section 105(1) RLA prohibits partitioning of land which is incapable of partitioning or where such would adversely affect the proper use of the land.

iv. Facilitation of Tax Administration

Registration enables the Government to identify a person against whom to levy a tax or a rate regarding a land parcel. This flows from the fact that because land transactions must be registered, the Government is able to follow up a sale of land and tax it. However, due to the fact that registration of land in trust areas is incomplete, the local authorities have not been able to avail themselves of incomes from rates that they can levy against land under the Local Government Act, (Cap 265) and the valuation of Rating Act, (Cap 266).

v. Administration of Loan System

Security of title makes borrowing of money an easy task, as the moneylender i.e. a bank, is quite happy to advance money on a secure title. This facility helps proprietors to secure capital for the development of land.
4.3. REGISTRATION SYSTEMS

There are two operative systems of land registration in Kenya that stems from the two types of conveyancing earlier discussed in the previous chapter. These registration systems are the registration of deeds or documents and registration of titles.

a) Registration of Deeds/Documents

Under the registration of deeds, a public register is kept in which documents affecting interests in land are copied or abstracted. Consequently, it is the document or the deed that is registered and not the title. The document that is referred to here is the document/deed evidencing the disposition of an interest in land. Accordingly, in registration of documents, it is the document that proves title and not the register, as is the case under registration of the title system discussed hereunder.

A person wishing to rely on this type of register has to go behind the public register and dig into the history of all the transactions affecting the particular parcel of land. In other words, before a transaction can be safely effected, an ostensible proprietor must first establish the good root of the title. Basically, this will entail the tracing of (the proprietors) proprietorship backwards to the original grant. The import of this is that a search must be effectively done to ensure that a purchaser gets good and authentic title to property proposed to be purchased.

It is important to note that the government does not guarantee the accuracy of the register with the consequence that any person suffering loss as a result of the inaccuracy therein is not

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280 The use of “abstracted” in this context derives from the term “abstract” which means an epitome of the documents, events and facts, which constitute the vendor’s title. An abstract must be perfect, i.e. it must consist of connected summaries of the deeds, wills or other instruments, births, marriages and deaths, and other material events, which show that the vendor is able to convey, or able to compel to be conveyed, the estate or interest in the property agreed to be sold. The traditional form of an abstract is usually printed, typed or handwritten on brief-sized paper, and the matter contained in it set out in a special form.

281 According to E.G Bowman and E.L.G. Taylor, a good root of title may be defined as ‘a document which affects a dealing with the whole legal estate and equitable interest in the property sold, and wherein the property is described, and nothing appears to cast any doubt upon the title. If the document is deficient in any of these particulars, the purchaser may require, in the absence of anything to the contrary in the contrast, a good root of title.’ They further note that the best roots of title are a conveyance on sale and a legal mortgage. This is because in both of these cases, the property will have been fully described and the earlier title examined at the time of the transaction. Similarly, a voluntary conveyance is a good root of title, if it complies with the above definition, and cannot be objected to if the conveyance was made at least fifteen years ago. It is not, however, desirable as a conveyance on sale, because the title will not have been investigated at the time, and, therefore, if a voluntary conveyance less than fifteen years old is specified in the contract as the root of title, the nature of the conveyance must be clearly stated in the contract, otherwise the purchaser will be at liberty to rescind on the ground that he was misled. On the other hand, an equitable mortgage is not a good root of title. See E.G. Bowman and E.L.G. Taylor, The Elements of Conveyancing, Sweet and Maxwell, London, 1972, p. 121-122
entitled to state indemnity. Dealings in land registered under this system are very expensive in terms of the resources required to be expended by a conveyancer. One has to put in a lot of time, money and personnel in spite of the fact that often the searches may lead to inaccuracies.

The registration of documents is largely a province of the following Acts: Registration of Documents (Cap 285), Land Titles Act (Cap 282), and Government Lands Act (Cap 280).

b) Registration of Titles

The system that is rapidly superseding the registration of documents/deeds highlighted above is the system of title registration. Under this system, a register of titles serves as an authoritative record of the rights to clearly defined units of land as vested for the time being in some particular person or body, and of the limitations if any, to which these rights are subject. When the property is recorded on the register, the land registrar checks the details of the property. If the registrar is satisfied that the title is in order then the current legal owners will be entered on the register as the registered proprietors. The registrable transactions are thus registered against each title document kept in the registry and a memorandum thereof is endorsed on the register and on the grant/certificate issued to the proprietor.

Save for overriding interests, all the material particulars affecting the title of the land are fully revealed merely by a perusal of the register which is maintained and guaranteed by the State. The register is at all times the final authority and the State accepts responsibility for validity of transactions, which are affected by making an entry in the register. Instead of title deeds as evidence of a disposition of an interest in land as is the case in registration of deeds; it is certificates that are issued under the title registration system. Thus land certificates are issued for absolute proprietorships and certificates of leases for leaseholds. As a signal of distinction, certificates of title issued under the RTA, for example, are conclusive proof of title/ownership, while certificates issued under the RLA are not conclusive proof of title, they are merely prima evidence of the same.

282 The credit for being the first person to advocate registration of title belongs to a London solicitor, Mr. T.G. Fonnerneau. One sentence from his evidence before the 1830 English Real Property Commissioners is sufficient to show his line of thought: “Although…my opinion is against a registry of instruments relating to landed property I entertain little doubt that a registry of the property- a registry which should in itself be evidence, not of a deed, but of a title- would be highly beneficial by accomplishing facility and cheapness of transfer as well as securing security of title.”
Registration under this system is essentially effected pursuant to the three fundamental principles of the Australian Torrens System. These principles are described hereunder:

1. **The Mirror Principle** - the register is intended to operate as a ‘mirror’, reflecting accurately and incontrovertibly the totality of estates and interests affecting the registered land.

2. **The Curtain Principle** - the register is/should be source of all information pertaining to the title. This principle is essentially reflective of the principle of the finality of the register. As such, for example, trusts affecting the registered land are kept off the title, with the result that the purchaser of that land may safely transact in the assurance that the interests behind any trust will be overreached on sale.

3. **The Insurance Principle** - this principle stipulates that any case of any error/flaw in the register, anyone who has suffered loss as a consequence thereof ought to be put in the same position by way of indemnity as if the register were correct. This is reflective of the principle of indemnity. In essence the state itself guarantees the accuracy of the registered title, in the sense that an indemnity is payable from public funds if a registered proprietor is deprived of his title or is otherwise prejudiced by the operation of the registration scheme.

Theodore Ruoff and Robert Roper in their book ‘Ruoff and Roper on The Law of Registered Conveyancing’ identify advantages and/or features of registered titles as follows:

- Registration of title gives finality and certainty by providing an up-to-date official record of land ownership. The need to examine the past history of the title on each successive transaction is thus eliminated.

- A registered title is guaranteed because there is express provision for indemnity should any person suffer loss through any error in or omission from the register.

- Registration can cure defects in title which, may, up to the time of first registration, have been the subject of recurrent conditions of sale and enquiries. In addition, many unregistered titles have been successfully re-established by registration after the title deeds have been lost or destroyed.

- For each title there is provided an official plan which clearly identifies the extent of the registered land.

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283 The Torrens system of land titles was introduced into South Australia by Sir Robert Torrens and has since spread into many communities in the British Commonwealth and some countries outside it.
The proprietor of registered land (when it is not in mortgage) is issued with a land certificate which contains a copy of the entries in the register and of the official plan identifying the land. This certificate, unlike the often numerous and bulky title deeds of an unregistered property, is a comparatively simple and compact document from which a proprietor can readily see and understand exactly what he owns. If the certificate is lost it can be replaced so that the proprietor will still be able to deal with his land.

When unregistered land is mortgaged to secure a loan, the mortgagee holds the title deeds as part of his security. In the case of a mortgage of registered land, the mortgagee holds a charge certificate which is a document similar on form to a land certificate and to which is annexed the mortgage deed. This can be particularly helpful to mortgagees because it reduces the costs of handling and storing bulky documents. So far as the mortgagor is concerned, he is always able to obtain an up-to-date record of his title without having to go to his mortgagee because he can obtain from the land registry an official copy of the register of his title.

A proprietor registered with an absolute title has a title to the land, together with all its appurtenant rights, which is good against the world and which is subject only to such mortgages and other burdens as are set out on the register or are declared by statute to be overriding interests. Overriding interests are matters which do not normally appear in the abstract of an unregistered title. They may, for example, be local land charges which can be discovered by means of enquiries of the local authority, or short-term occupation leases, which will be revealed by an inspection of the property or by enquiry of the occupier.

Registration of title eliminates the need for the deduction by the vendor and the examination by the purchaser of proof of ownership originating from a satisfactory root of title, as is necessary on each successive transaction with unregistered land. Should the proprietor of registered land wish to sell his property, he can speedily offer proof of his title by obtaining an official copy of the register and the title plan without normally facing any problems arising from defects in the title or in the identity or extent of the land.

In his turn, the purchaser can quickly and safely accept the evidence of title offered by the vendor without the need to investigate the past history of the title. He can then protect himself by making an official search of the register immediately before the completion of the purchase. This will ensure that no other entries have been made on the register since the date of the official copy which the vendor has supplied to him.
and the search will have the effect of reserving priority for the subsequent registration of his transfer.

- Simple forms are prescribed for transfers and mortgages of registered land. Furthermore, because each registered title is identified by its registration number, the description of the property in any document dealing with it can be reduced to a few words.
- Registration of title results in reduced costs because of the simplification of the conveyancing work. It also excludes the possibility of fraud resulting the duplication or suppression of title deeds.\(^\text{284}\)

Registration of titles is generally a preserve of the following Acts of Parliament: Registration of Title Act, Cap 281 and Registered Land Act, Cap 300.

### 4.4. INGREDIENTS OF A GOOD REGISTRATION SYSTEM

From the above discussion on the aims and systems of registration, it is possible to deduce the factors that make a registration system desirable. These factors may be summarized in a four-fold scheme as follows:

a. **Accuracy**- a good registration system must be accurate and reliable. In most circumstances, this is achieved through effective survey. As such, in an effective registration system, there is as a pre-requisite survey followed by boundary placement, which may be either general or fixed boundaries. State indemnity, guaranteed Sections 24 RTA and 39 RLA amounts to a recognition of the accuracy the registration ought to achieve. This ingredient dispenses with unnecessary title investigation.

b. **Simplicity**- a good registration system must be simple to understand and grasp. This explains why the RLA and RTA insist on conveyancing being done in simple printed forms.

c. **Cheapness**- the fees of registration and preparation of documents should not be prohibitive and should be well within the reach of the average landowner.

d. **Ubiquity**- in order to carry out full-scale registration and to enlist the cooperation of the landowners, ubiquity of land registries is a must. The more the registries are the speedier and convenient, the more the landowners will endeavour to register their

\(^{284}\) Theodore Ruoff & Robert Roper, Ruoff and Roper on The Law and Practice of Registered Conveyancing, (4\(^{th}\) edn), Stevens and Sons, London, 1979, p 8-10
lands. Accordingly, the need for numerous land registries scattered all over the country cannot be gainsaid.

In the light of the above, it is vital to note that though attempts have been made to ensure that the Kenyan registration system reflects the above-mentioned principles and ingredients, much is yet to be achieved. Numerous problems are evident in the registration system including illiteracy of a majority of landowners; high costs in the mechanics of registration; and lack of skilled and efficient manpower.

4.5. THE LAW ON THE REGISTRATION OF DOCUMENTS AND TITLES

By virtue of the fact that there are two parallel systems of registration in Kenya, it ordinarily follows that there are different laws that regulate the registration of documents on one side, and the registration of titles on the other. A look into each of these laws is undertaken below.

4.5.1 The Law on Registration of Documents

As earlier noted the law on registration of documents obtains under three principal statutes: registration of documents Act, Land Titles Act, and Government Lands Act. In general, the registration of a document is preceded by the process below:

- Document is delivered to the Registrar for assessment of fees
- An official receipt is paid for and issued for the document by the is issued or in case of Registration Revenue stamps,
- Document is presented in Registry where it is allocated a Day Book number in order of first come, first in priority
- Document is investigated to determine its suitability for registration. If unsuitable, it is rejected. If suitable, entries are made but in case of transfer, it is first referred to valuation
- Registrar checks the entries and signs either the rejection or the registration entries.
- The rejected document or copies of registered Document is dispatched to the presenter of the documents

An analysis of the provisions of each of the statutes mentioned above now ensues below.
i) **Registration under the RDA (Cap 285)**

As a system of registration of deeds or documents, the system obtaining under the RDA has so far remained the simplest and uncomplicated. Basically, it remains to be a record of isolated transactions. The record is evidence that a transaction has occurred but is not in itself proof of the transaction’s validity or legality. Documents are received and their abstracts (short particulars) are recorded in an uncoordinated manner. A separate folio is not denoted to each piece of land. They are not examined and/or scrutinized for their correctness.

Section of the Act outlines the documents which must be registered compulsorily under the Act. Principally, any document conferring or purporting to confer, declare, limit or extinguish any title, right or interest in or over immovable property must be registered. However, certain documents upon transfer of debentures, leases and licenses to land for terms not exceeding one year and documents which are otherwise registrable under or pursuant to the provisions of GLA/RTA/RLA.

Pursuant to Section 5, any other document may be registered at the option of the person so holding it. Examples of such documents are deed polls, wills, and plans. Pursuant to Section 6 thereof, documents not written in English, i.e. Kiswahili, Gujarati, or Arabic shall not be registered, unless accompanied by an English translation. Under Section 7, the Registrar is empowered to decline to register certain documents for instance, documents which have interlineations, erasures, or alterations. Pursuant to Section 9, every registrable document must be presented for registration within two months of execution. In default, one may have to pay a penalty imposed under Section 10, which is a fine not exceeding 30 times the prescribed regulations fee for the document in question.

The Registrar may also decline to register a document where the person alleged to have executed the document in question denies to have so executed it or where the said person appears to be an idiot under Section 15. Further under Section 16, the Registrar is empowered to cancel registration which has been obtained by way of fraud, mistake or misrepresentation. Section 18 of the Act, states that a document which is the subject of compulsory registration and is not duly registered can not be used as evidence in court without leave of court.
ii) **Registration under the GLA (Cap 280)**

The relevant sections to the registration of documents under the GLA are Sections 99, 100 and 102. Section 99 requires the compulsory registration of all transactions affecting, conferring, and purporting to confer, limit or extinguish any right, title or interest in land governed by the Act. Leases for a term not exceeding one year need not be registered under the Act.

Section 100 stipulates that unless evidenced by a registered instrument, no evidence of certain transactions may be tendered in court. Such transactions include sales, leases and other *inter vivos* transfer of land registered under the Act, liens, mortgages and charges. However, an equitable mortgage by deposit of documents need not be registered.\(^{285}\)

Section 101 is to the effect that any document executed (including wills) creating, assigning, limiting or extinguishing any right, title or interest to, in or over land registered under the Act is void unless registered. Such documents are only void as against parties claiming an adverse interest thereto on a valuable consideration by virtue of any subsequent duly registered document. There are certain exceptions to this rule, listed in Sections (i) to (V) of Section 101.

iii) **Registration under the LTA (Cap 285)**

Pursuant to Section 57, all documents affecting the holding or any interest in the holding as defined in Section 55(b) thereof must be registered. Registration shall be done by making the necessary entries in the register kept pursuant to the provisions of the Act. Pursuant to Section 58, every document unless registered shall be deemed to be void as against all parties claiming adverse interest thereto by virtue of any subsequent but duly registered document. The exceptions to this rule are set out in Section 58 (i) to (iv). Under Section 58(v), the following documents need not be registered under the Act.

- Composition deeds.
- Documents relating to shares in a joint stock company.
- Debentures given by such companies capable of creating only a floating charge over the companies’ immovable assets.
- Endorsements upon transfer of such debentures.

\(^{285}\) Section 100(2) GLA.
• Leases for one year or lesser periods.

Under Section 59, no charge may be created or a mortgage except by way of a registered document.

A distinction must be made between registration of documents under both the GLA and LTA on one hand and the RDA on the other. Under the latter two statutes, upon the subdivision of any plot, a separate folio is opened for the subdivision. Further, the registrar does not in practice accept a Deed for registration unless he considers it to be authentic/good. In contradistinction, the registration under the RDA is essentially a record of isolated transactions. Documents are received and only their abstracts (short particulars) are noted and recorded in an uncoordinated manner. The documents are not scrutinized/examined for their correctness and no separate folio is denoted for each piece of land. Accordingly, it may be safely concluded that registration under the GLA and LTA may actually confer most of the benefits inherent in deed registration.

4.5.2 The Law On Registration Of Titles

The law on registration of title in Kenya, as noted above, is embodied under the Registration of Titles Act, Cap 281 and the Registered Land Act, Cap 300. However, in some instances the ITPA also provide for title registration.

i. Registration under the RTA (Cap 281)

The RTA is an Act of Parliament to provide for the transfer of land by registration of titles. The title under this Act consists of a Grant or a Certificate of Title issued to the proprietor, a duplicate of which is kept at the registry. Coast titles are prefixed CR No…(the number of the title) and up country titles are prefixed I.R. No…(the number of the title). If the Grant or Certificate of Title is lost, a provisional certificate is issued after advertisement of the loss for 90 days in the Kenya Gazette.

Section 20 of the Act provides that a transfer, a charge or a lease and any instrument purporting to confer an interest in land must be dealt with in accordance with the Act. Any attempt to deal in land otherwise than in the manner set out in the Act is null and void. Section 32 thereof spells out in no uncertain terms that no instrument unless registered, shall
be effective to pass an interest in land or land in itself. Under sections 34 and 35, any transfers of land must be effected by vide a registered instrument.

The RTA at section 23 embodies the doctrine of sanctity of title and indefeasibility of title. Section 23 expressly provide that the Certificate of Title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof. Such an owner is only subject to the encumbrances, easements, restrictions and conditions contained in the title. The title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

Sections 40 and 41 provide that all leases for periods exceeding 12 months or for less than 12 months but containing a right to purchase the reversion must be effected by vide a registered instrument. Further, it is obligatory that any legal charge must be created by a registered instrument.

### ii. Registration under the RLA (Cap 300)

Registration under the RLA must first be preceded by adjudication or sometimes both adjudication and consolidation in case of trust land. Therefore, whenever adjudication has been carried out for a particular piece of land pursuant to the Land Adjudication Act, the Adjudication officer is supposed to deliver to the Land Registrar, an adjudication register. Upon receipt of the adjudication register, the Land Register is required to register for each person shown in the adjudication record as the owner of the land.

For purposes of effecting registration under the Act, the Minister may, by order, constitute an area or areas of land as a land registration district or land registration districts. He has the discretion to vary the limits of such districts at any time. Pursuant to the RLA (Districts) Order, 28 districts have been constituted by the Minister.

In each of these registration districts, it is required that a number of documents be kept. These are:

- A register, to be known as the Land Register;

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286 Section 11(2) RLA.
287 Section 11(2A) RLA.
The Registry Map;
Parcel files containing the instruments which support subsisting entries in the land register and any filed plans and documents;
A book, to be known as the presentation book. In this book, is kept a record of all applications numbered consecutively in the order in which they are presented to the registry;
An index, in alphabetical order, of the names of the proprietors (other than public bodies, banks, building societies and other corporations which lend money on the security of land) of land, leases and charges showing the numbers of the parcels in which they are interested. However, the keeping of this index is not mandatory and lies upon the discretion of the Chief Land Registrar to keep it or not.
A register and a file of powers of attorney.

A brief exposition of two of the above documents i.e. the Land Register and the Registry Map, is conducted below.

The Land Register—Basically, the Land Register comprises of register in respect of each parcel of land in each registration section and a separate register in respect for each lease under the Act.\textsuperscript{288} The register is kept in form of a ledger and therefore the sheets can be easily taken out and returned. It is divided into three sections: the Property section, the Proprietorship section and the encumbrances section. A description of each of the said sections follows hereunder:

**Property section**—under this section, a brief description of the land or lease, together with particulars of its appurtenances and a reference to the registry map and filed plan.

**Proprietorship section**—this section contains the name and address of the proprietor. It also contains details of any inhibition, caution or restriction adversely affecting the proprietor’s right of disposition.

**Encumbrance section**—this section outlines a note of every encumbrance and every right adversely affecting the land/lease e.g. it may contain details of a charge over the land in question. Notably, easements are entered both in the property section of the

\textsuperscript{288} Section 10(1) RLA
title to the dominant tenement and in the encumbrances section of the servient tenement title.

**Registry Map** - A registry Map is created by section 18(1) RLA and its production is vested in the Director of surveys. For every registration district, it is required of the Director of Surveys to prepare and thereafter maintain a map or a series of maps to be called the registry map. Where no such map has been prepared for a particular registration district, the Registrar may himself cause a map or series of maps to be prepared for that district. Until a registry map is prepared by the Director of surveys such a map so prepared by the Registrar shall be deemed to the registry map for the district in question.

On the registry map, every registration district is supposed to be divided into registration sections. These sections should be identified by distinctive names. The registration sections may further be divided into blocks, which shall be given distinctive numbers or letters or combinations of numbers and letters. The parcels in each registration section should be numbered consecutively. The reference of any parcel is therefore derived from the name of the registration section and the number and letter of the block, if any, and the number of the parcel. Such a reference is sufficient under the Act.

**Instruments/Documents Registered under the RLA**

Section 38(1) is explicit that no land, lease or charge shall be capable of being disposed of except in accordance with the Act. Further any attempt to dispose of any Land/Lease/Charge or otherwise than in accordance with the Act shall be ineffectual to create, extinguish, vary or affect any lease, estate, right or interest in the Land, Lease or Charge. Section 38 RLA and section 20 RTA are basically similar. However, there is a distinction, in that section 38 of the RLA has a proviso. Section 38 (2) reads that nothing in section 38 shall be construed as preventing any unregistered instruments from operating as a contract. The thrust of this proviso is essentially that an instrument, though unregistered, may still operate as an effective contract inter-parties.
Section 47 thereof requires leases for periods exceeding two years to be registered. Further, leases coupled with an option for renewal for a term which if added to the original term of the lease exceeds two years must be registered. Similarly, a lease for the life of lessor/lessee must be registered. However, Periodic tenancies are not registrable under the R.L.A.

Under section 65, a charge must be completed by registration as encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument. Pursuant to section 95 and 96, easements, restrictive covenants and profits a prendre must be registered.

Unlike under the RTA, GLA and LTA, the RLA specifies the time limit for presentation of documents for registration. Documents must be presented to the Registrar for registration within 3 months of their execution. Failure to do so does not render the instrument fatal but invites a penalty.

The Chief Land Registrar is empowered to compel the registration of any instrument which is registrable under the Act. Further, it is an offence punishable by a fine not exceeding Kshs. 500, if person declines to present a document for registration if so requested by the Chief Land Registrar.

**Effect of Registration under the RLA**

Pursuant to section 27(a), the registration of a person as the proprietor of land under the RLA has the effect of vesting in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Similarly, subsection (b) of section 27 states that the registration of a person as the proprietor of a lease has the effect of vesting in that person the leasehold interest described in the lease, together will all implied and expressed agreements, liabilities and incidents of the lease.

Further, the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, cannot be defeated except as provided under the Act. Such rights shall be held by the proprietor, together will all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. Such a proprietor is only bound by the lease, charges and other encumbrances over the land as shown in the register and by overriding interests stipulated under section 30 of the Act.
Under this section the following are considered overriding interests which are deemed to affect the proprietor’s land without being noted in the register:

(a) Rights of way, rights of water and profits subsisting at the time of first registration under the Act;
(b) Natural rights of light, air, water and support;
(c) Rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
(d) Leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46 of the Act;
(e) Charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
(f) Rights acquired or in process of being acquired by virtue of any written law relating to the limitations of actions or by prescription;
(g) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
(h) 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.

The essence of overriding interests under the RLA is that certain kinds of interests in land are made to bind a third party purchaser automatically, even though they relate to matters which would not normally be shown on title deeds or disclosed in abstracts of title. Since such matters would therefore not become apparent upon an inspection of the documentary title (whether carried out by an intending purchaser or by the Land Registrar), they are matters to which it is not possible to compile a trustworthy record on the register of the relevant title. As to such matters, persons dealing with registered land must seek information outside the register in the same manner and from the same sources as would persons dealing with unregistered land. In other words, a purchaser of registered land must obtain information about the possible presence of overriding interests by means of physical inspection of the land itself and of enquiries made of persons living there.

Overriding interests are, in the main, supposed to be rights which would become obvious to any purchaser who bothered to go and look at the property which he proposed to buy. Cumulatively, therefore, they represent a group of interests in registered land which have
been singled out either as having such distinct social importance or as involving such
technical conveyancing difficulty as to merit a protection which derives not from the force of
register but from the force of statute.  

Rectification and Indemnity

It is imperative that the provisions on the effect of registration under the RLA be read in
tandem with the Act’s provisions on rectification and indemnity. Section 142 of the Act
empowers the Registrar to rectify the register or any instrument presented for registration
only in three clear circumstances.

First, the Registrar may do rectification in formal matters and in the case of errors or
omissions not materially affecting the interests of any proprietor. Secondly, he may do so in
any case and at any time with the consent of all persons interested. Finally, rectification by
the Registrar is possible where upon resurvey, a dimension or area or shown in the register is
found to be incorrect. In this final circumstance, the Registrar is under a duty to give notice to
all persons appearing by the register to be interested or affected of his intention so to rectify.
The Registrar may also make an entry in the register to reflect change of name or address of
any proprietor upon proof and application by such a proprietor.  

Where registration has been obtained, made or omitted by fraud or mistake, the court is
empowered to make an order for rectification of the register by directing that such
registration be cancelled or amended. This provision, however, is not applicable to a first
registration. Further, a register cannot be rectified so as to affect the title of a proprietor
who is in possession and acquired the land, lease or charge for valuable consideration, unless
such proprietor had knowledge of the omission, fraud or mistake in consequence of which the
rectification is sought, or caused such omission, fraud or mistake or substantially contributed
to it by his act, neglect or default.  

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296 It has been argued that the existence of overriding interests in registered land fundamentally distorts the
mirror image of the register, since the register can no longer be relied upon as a comprehensive record of the
totality on interests in and affecting registered land. It has also been commented that in spite of the original (and
vaguely comforting) theory that overriding interests will always be apparent upon physical inspection of the
land, it is now becoming clear that several categories of overriding interests may well remain undiscovered even
by a purchaser who carefully inspects both title and land. See K.J. Gray & P.D. Symes, Real Property and Real

297 Section 142(2) RLA.

298 Section 143(1) RLA.

299 Ibid. see Keduwo Marisin & 7others v Samuel Kipsige Soi; Civil Appeal no. 140 of 1996 (Court Appeal at
Nakuru); Joseph Marisin v Jospeh Kibilat Civil Appeal No. 306 of 1997

300 Section 143(2) RLA.
Where any person has suffered damage by reason of rectification, he is entitled to indemnity by the Government.\textsuperscript{301} The person claiming indemnity must do so within the limitation period as stipulated under the Limitation of Actions Act (Cap 22) and he must not have contributed to the mistake or fraud that led to the rectification of the register.\textsuperscript{302} These provisions are supposedly the basis of the claim that the scheme of registered title operates on the premise of a state-guaranteed title which is reinforced by automatic compensation in the event that the guarantee fails.

\textbf{Absolute Title versus Customary Land Rights}

Perhaps it may perfectly be said that no other provisions of the RLA has raised so much controversy and emotions as provisions of section 27 and 28. The RLA in general was enacted as part of the process intended to transform the legal status of registered land from one susceptible to customary claim to individual absolute ownership that would secure credit for purposes of development. The aim was the eventual replacement of customary land law with a regime having its basis on statute law. However, the guaranteed rights of a registered proprietor of land have caused considerable confusion and insecurity of tenure in many parts of rural Kenya with respect to customary rights of family members who entrusted one person to be registered as a proprietor in trust for the rest, only for it to turn out that the registered individual had secured absolute title. In some instances, a single family member went ahead, with neither the knowledge nor the consent of other family members, to register family land in his/her own name.

Thus the introduction of individual title to land meant that those people who could only be accommodated in the customary tenure arrangements lost their rights altogether since their rights could not amount to ownership. At the same time most people did not yet conceive the new property arrangements under the RLA as conferring exclusive power on an individual to the detriment of others.

It is, therefore, not a surprise that a lot of wrangles thereafter sprung up leading up to disputes in the courts. When it dawned on families that the confidence they had placed on a certain member of their family to allow him hold land on their behalf had effectively transferred ownership of the land to that person, there was a flurry of suits to seek to regain and protect their use and access rights. Where a family member had secretly registered the family land in

\textsuperscript{301} Section 144(1) RLA.
\textsuperscript{302} Section 144(2) RLA.
his name, the situation was even worse for in more often than not, the discovery of the registration thereof led to violence and family break ups.

Consequently, the main question for determination before the courts in reference to sections 27 and 28 of the RLA has revolved around the concept of absolute title vis-à-vis customary law rights. In other words, the concept of customary land law has been brought into sharp focus when disputes arise pitting competing claims under both statute and custom. The result has been that the concept of absolute proprietorship as conferred by the RLA has been subject to a number of interpretations in the Kenyan courts. There is a divergence of opinion in so far as the existence or otherwise of customary land law is concerned and the extent to which it impacts or is impacted upon by statutory law.

On the one hand, there are those courts which have taken the view that absolute proprietorship means exactly what it say it is i.e. the rights of an absolute proprietor are absolute and the rights of the proprietor are not subject to any certain or uncertain future event or other rights contrary to the title of the proprietor. Consequently, this school of thought has adopted a positivist approach that applies the law as it is and brooks no exception, whether necessitated but customary law rights or other claims not part of the registered interest.

On the other hand, there are those courts that have felt that the application of the black letter law has occasioned a great deal of injustice especially with regard to those people who have

303 The basis for the application of customary land law in Kenyan legal system is discernible from both constitutional and statutory provisions. In so far as the Constitution is concerned, section 82(4) is relevant to the extent that it does not outlaw the application of customary law in respect of members of a particular tribe or race. It therefore seems to lay a basis for the application of customary land law. so far as statute is concerned, the Judicature Act (Cap 8) allows for the application of customary law. section 3(2) is to the following effect:

've the High Court, Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicality of procedure and without undue delay.'

304 See Opiyo Linet, The Strengths and Limitations of the Land Disputes Tribunal Act No. 18 of 1990 as the Legislatures Ultimate Response in Addressing the Land Law Problems Regarding Status of Customary Land Rights upon Registration under the Registered Land Act (RLA), unpublished LLB Dissertation presented to Faculty of Law, Moi University, 2002, commenting that, ‘it was thought that the promulgation of those provisions would bring an end to disputes over land ownership. But nothing could have been farther from the truth. Both S. 27 and 28 of the RLA have caused considerable difficulties of interpretation particularly in relation to the effect or impact of registration on rights arising out of customary law. the attempt by the colonial and post colonial state to impose a legal regime specific to a capitalist made of production on a free capitalist social formation was bound to create massive dislocation and many maladjustments. Indeed the problem that has been created can be accounted far in this premise: the primary objective of the tenure reform was to confer absolute title to registered proprietors. This however has not been to the understanding of the peasantry. The situation has been complicated by the fact that ownership of registered land in rural areas is primarily obtained through inheritance.’
genuine claims premised upon customary land law. Hence, it is probably true to say that two broad approaches have emerged in the interpretation of the absolute proprietorship provisions of the law: the positivist approach and the trust view approach. These approaches are indicators of how courts have tended to treat customary claims in land over the years.\(^{305}\)

**Positivist Approach**

The positivist approach takes the view that the law is as it is and that no extraneous considerations need to be imported into legal provisions irrespective of the consequences. It rests on the premise that the work of the court is to look for the intention of the legislature and when it finds it enforce it irrespective of the absurdity of the result. Thus, under this approach, the owner of an absolute proprietor has the totality of claims, privileges, powers and immunities that the law permits him to enjoy over his property. Such ownership is not fettered by other claims that are not provided for in the law.

The upshot of this is that the registration of a person as an absolute proprietor of any land is meant to extinguish all interests other than the ones noted in the register or the ones stated not require registration or the ones stated to have an overriding interest. Consequently, customary rights, not being overriding interests under section 30, are extinguished upon registration of land by an absolute proprietor, so says the positivist.

Perhaps, the earliest glimmerings of this approach can be traced in the case of *District Commissioner for Kiambu v Republic and others ex parte Ethan Njau*.\(^{306}\) An issue that came up for determination at the Court of Appeal was the effect of the Native Lands Registration Ordinance 1959, which had come into force during the pendency of the proceedings. The question was whether an order of mandamus would have contravened its provisions.\(^{307}\) It was

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\(^{305}\) In addition to positivist and trust view approaches, it can be added the natural law approach and the customary trust approach. However, these two approaches seem to fall under trust view approach for they are all based on the concept of the trust.

\(^{306}\) (1960) EA 169.

\(^{307}\) Ethan Njau had made an application to the Supreme Court for an order of mandamus directed to the District Commissioner (DC) Kiambu (the appellant in the Court of Appeal) to register the said Ethan Njau (the respondent) as title holder. The applicant was the son of one Leban Kiarie who owned a large piece of land in Kiambaa area of Kiambu. Shortly, before consolidation under the Native Land Tenure Rules was to take place, Leban Kiarie sold two contiguous parcels of land to persons who later disposed their interests in those parcels of land to one John Munge. Leban then gave a portion of his remaining land to his son, the said Ethan Njau. Leban then gave a portion of his remaining land to his son, the said Ethan Njau. The contiguous parcel of land obtained by John Munge was numbered as Plot No. 352. In the course of consolidation and the ultimate piece of land belonging to Kiarie was demarcated and confirmed to him as plot No. 51. Plot No. 352 was by agreement allocated to Ethan so as to create a situation in which his land would be contiguous with that of his father, Leban Kiarie. The Committee (appointed under the Native Tenure Rules 1956) in turn allocated another plot of land situated about half a mile away to John Munge in lieu of Plot No. 352, after a certificate had been given to Ethan Njau, John Munge complained that the allocation of Plot No. 352 to Ethan was unfair and submitted that it should have been allocated to him. This complaint was referred to the
held that an order of mandamus would be contrary to the provisions of section 38 of the Ordinance so far as it provided that the rights of a proprietor shall be rights “not liable to be defeated except as provided by any written.” The written law in this regard was section 80 of the Ordinance which expressly excluded relief in the case of a first registration. Though, the dispute in this case did not revolve around customary versus statutory tenure, it is nevertheless relevant in so far as it sought to define the concept of absolute proprietorship. The fact of indefeasibility of the title of an absolute proprietor has been used to oust any customary claims, as will be demonstrated in the subsequent cases discussed.

It was, however, in the celebrated case of *Obiero v Opiyo*, that disputes pitting customary versus statutory tenure was first determined substantially. This case affirmed the absolutism of the rights of a registered proprietor and denied the capability of customary claims of tenure to affect such rights. The facts were that the plaintiff, Seal Obiero got registered as the proprietor of a piece of land clearly used by the family. The plaintiff was a widow of one Opiyo who died between the year 1938 and 1939, while the defendants were the sons of her co-wives. In 1968, the plaintiff got registered under the RLA as proprietor of the suit premises and no encumbrances were noted in the register. The defendants were in possession of the land in question and were cultivating it in accordance with customary norms. The plaintiff sought to evict them from the land but they raised their customary entitlement to it in their defence and attributed fraud to the plaintiff’s registration as proprietor.

According to Bennet J, the issue for determination was whether despite the fact that the plaintiff was the registered proprietor, the defendants had any right to occupy or to cultivate the land under customary law. In an opinion that ousted the jurisdiction of customary land law, the learned judge held thus:

‘I am not satisfied on the evidence that the defendants ever had any rights to the land under customary law, but even if they had, I am of the opinion that those rights would have been extinguished when the plaintiff became the registered proprietor. S. 28 of the Registered Land Act confers upon a registered proprietor a title “free from all

Committee which purported to reconsider its previous allocation and to allocate Plot No. 352 to John Munge instead of Ethan and the other distant plot be re-allocated to the latter. Before confirmation of the new register, Ethan lodged a complaint with the respondent (DC Kiambu) arguing that by virtue of the Committee’s original allocation and the issue of its original certificate to him, he was in law entitled to Plot No. 352 and hence John Munge was a trespasser, so far as that plot was concerned. Ethan moved the Supreme Court for an order of mandamus directed to the DC Kiambu to register him as titleholder. The Supreme Court granted the order compelling the DC to so register Ethan as title holder of Plot No. 352 in accordance with the certificate issued to him under the Native Land Tenure Rules. The DC appealed. The Court Appeal confirmed Munge’s title arguing that it was a first registration and could not thus be defeated save as provided by any written law.

*308* (1972) EA 227.
other interests and claims whatsoever” subject to the leases, charges and encumbrances shown in the register and such overriding interests as are not required to be noted in the register. There are no encumbrances noted on the land certificate...the plaintiff’s title is free of encumbrances. Rights arising under customary law are not among the interests listed in S. 30 of the Act as overriding interests.’ (Emphasis added).

In an apparent attempt to show that at no time were customary land rights contemplated in the regime of absolute proprietorship, the learned judge concluded by saying that the legislature having not expressly provided for their recognition then it was intended not to extend any protection to them. The judge exhibited the classical approach to positivist interpretation where in applying a statute, the intention of parliament is searched for and when found it is enforced without due regard to the consequences thereof.

The decision of Judge Bennet in Obiero v Opiyo was followed and adopted a year later in the case of Esiroyo v Esiroyo,\textsuperscript{309} where Kneller J despite acknowledging the existence of customary land rights refused to enforce them on the ground that they had been extinguished by the incidence of registration.\textsuperscript{310} On his part, Harris J observed that once land has been registered in the name of the proprietor, the matter is taken out of the purview of customary law by the provisions of the RLA. The Court went further to note that where a right of occupation under customary law is recorded on the adjudication register by virtue of section 11(3), such right is converted to a periodic tenancy subsisting from year to year terminable by a year’s notice.

\textsuperscript{309} (1973) EA 388.
\textsuperscript{310} The plaintiff in this case, owned two plots of land, viz 226 and 309. he had married twice and had three sons viz, the 1\textsuperscript{st} and 2\textsuperscript{nd} defendants and another named Jones Williams. The first wife had died and was buried on Plot 226 of which had been registered the name of Jones Williams and measured approximately 0.4. Ha. The defendants were in possession of Plot 309 (which measures approximately 22 acres), although the plaintiff was its registered proprietor. On the basis of that registration, the plaintiff sought the eviction of the defendants from Plot 309, claimed damages for the defendants trespass on the parcel for two years and an injunction to restrain them, their wives and children or servants from confirming or repeating any act of trespass. The defendants in their defence claimed that being the natural sons of the plaintiff they were entitled to the plaintiff’s land and to occupy such land and cultivate them, together with their wives and children because it was the land which came to their father from his father and grandfather and so forth. They claimed that they were so entitled in terms of Luhya customary law on which they were relying. Hence the defendant claimed to be entitled to registration jointly with the plaintiff by virtue of Luhya customary law.

The learned judge recognised that indeed the defendants held rights under customary law with regard to Plot No. 309. However, these rights were deemed to have been extinguished by the registration of the plaintiff as the sole proprietor of the land under the RLA, section 28 of which conferred upon a registered proprietor “a title free from all interests and claims whatsoever” subject to the leases, charges and encumbrances shown in the register.” To the extent that there were no encumbrances noted in the land certificate, the plaintiff’s title was free of encumbrances. If there were any rights arising under customary law, the same were inconsequential as they are not among the interests listed in section 30 of the RLA as overriding interests.
This line of reasoning was followed in the case of Belinda Murai & others v Amos Wainaina.\textsuperscript{311} Wainaina had sought a declaration of entitlement by virtue of possession under customary law of land registered in the name of Ignatius Murai (deceased) as the sole proprietor from whom the defendants claimed as successors and legal representatives. In the first instance, the High Court granted the plaintiff’s prayers and held that the plaintiff was entitled to the land in question by virtue of adverse possession. The decision was predicated upon the Kikuyu customary law concept of a “Muhoi” (or tenant at will) on the basis of which the learned judge held that the plaintiff had acquired a title to the land despite the fact that under ordinary circumstances such a muhoi could not under customary law acquire a title over land irrespective of his period of occupation.

On appeal, it was argued that, whatever rights the plaintiff had under customary law had been extinguished upon registration of Ignatius Murai as the proprietor of the land in question. It was added for the appellant that on reading section 4 of the RLA together with section 3(2) of the Judicature Act, the customary claim of the plaintiff as a muhoi was extinguished by the express provisions of the law. The view of the majority of the bench as expressed by Porter J was that:

‘No rights in land under customary law can survive or arise after the registration of such land under the Registered Land Act. Such rights as existed before registration are extinguished and none can arise thereafter.’

Consequently, the plaintiff’s occupational rights had ceased to exist upon the registration of the land in question. However, not all judges agreed thus and Justice Miller in dissenting opinion that seems to have sown the seeds of subsequent pro-customary law interpretation stated in defence of customary land claims that, ‘I refuse to be moved by the suggestion to this court that customary law and practice affecting land have ceased to exist in Kenya.’\textsuperscript{312}

In the course of determining these disputes, it is apparent that the courts have resorted to the overriding interests theory to deny customary claims to land. However, that is not the only basis that has been used and time and again the courts have resorted to theory of first registration with a similar effect. Under this approach the rights of a registered proprietor remain sanctified in the case of a first registration despite the fact that such registration may have been obtained by fraud or mistake perpetrated by the proprietor himself. This was the

\textsuperscript{311} Civil Appeal No. 40 of 1997  
\textsuperscript{312} Supra n. 237.
view apparent in the case of *Obiero v Opiyo* where the learned judge expressed scepticism as to the chance of success of the defendants’ claim of succeeding on the basis of fraud since the registration in question was a first registration.

The argument on a first registration, as premised on section 143(1) of the Act, already highlighted above, which precludes rectification of the register in cases of a first registration regardless of proof of fraud on the part of a registered proprietor.

Disputes surrounding customary and statutory law claims have not just pitted individuals inter se but have also touched on rights claimed by groups by virtue of customary law. The courts have applied the concepts of overriding interests and first registration to defeat group rights over land. One case in point is the case of *Kenduiwo Marisin & others v Samuel Kipsige Arap Soi (Suing on behalf of Kilanda Village Group)*.\(^{313}\) the respondent in this matter was suing on his behalf and on behalf of a village group comprising a number of families. He sought *inter alia* declarations that he and the families he represented by virtue of their long occupation of certain parcels of land had acquired proprietary interests over them by virtue of their custom and that the appellants held the same in trust for them. He also sought adjudication of these parcels of land in favour of the said families and their registration as the proprietors thereof. It was argued that the said parcels of land had been in the occupation of the respondents as one large parcel until 1974 when it was adjudicated in favour of one Leshan Ole Kipketer who then subdivided it into present eight parcels that were then registered in the names of the appellants.

At the trial stage, the court ordered a cancellation of the register in favour of the plaintiff and the persons he represented on the ground that the defendant had wrongfully got himself registered as a proprietor thereof contrary to the interests and rights of the people resident thereon. It is apparent that the judge was inclined to recognise the rights of the greater majority than those of the individuals. He consequently found that a trust had been established in favour of the plaintiff.

On appeal, however, that decision was over-ruled when the Court of Appeal held that the cancellation of the register was not available for the plaintiffs as the registration in question was a first registration. This would remain so even if a trust could have been established in favour of the plaintiffs. Further, it was stated that the claims of the plaintiff and the village

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\(^{313}\) Civil Appeal No. 140 of 1996.
group did not amount to overriding interests capable of protection by dint of section 30 of the RLA.

In the case of *Elizabeth Wangari Wanjohi & others v Official Receiver and Interim Liquidator (Continental Credit Finance Ltd.)*, the letter of the law as laid down in the Obiero and the Esiroyo cases was affirmed and endorsed with regard to rights under customary law under the provisions of the RLA. Therefore, in summary, the positivist approach

**Trust View Approach**

There is no doubt that the strict and rigid application of the RLA by the positivist approach has wrought its own problems particularly with regard to land that is subject of claims that transcend the individual. There has, therefore, efforts to circumvent the rigours of the RLA by applying certain customary law concepts in the face of the provisions of the RLA. The subtle roots of this approach can be found in the dissenting opinion of Miller J quoted above, in which he refused to admit that customary land law and practice had ceased to exist in Kenya.

Generally, the reasoning has been that even though under the proper circumstances, the rights of a registered proprietor accrue to him absolutely without exception, situations exist where one must go behind the registered title and impute certain obligations on the proprietor. Courts have hence resorted to the concept of the trust, replete in the customary law institutions in an attempt to do justice. Courts have also had to resort to the English concept of trust with the same aim. Ultimately, the aim has been to reverse the adverse effects of registration of land and avoid the unjust enrichment of those persons who would wish to take advantage of the law.

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314 Civil Application No. 140 of 1988- in this case, the applicants were the widows of the two brothers who were the registered proprietors of two parcels of land in Nyeri, which they had charged to the respondent and obtained a loan therefrom. The chargors remained in occupation of the parcels with their families including the applicants. There was default in the loan repayment and the company then in liquidation sought through its receivers to realise the security by exercising its statutory power of sale. The applicants sought an injunction against the respondent and a declaration that they were in actual occupation of the parcels within the meaning of section 30(g) of the RLA, hence, the charge in favour of the respondents was subject to their overriding interests. Their application for a temporary injunction was dismissed and they sought an appeal against the said dismissal. Pending such an appeal they sought temporary restraining orders from the Court of Appeal in the course of which the court sought to examine the legal concept of overriding interest upon which the applicant sought to rely and held that customary rights of occupancy were not overriding interests and that rights under customary law are extinguished upon registration of land under the RLA.

315 Ibid.
The essence of trust as far as the Kenyan land law jurisprudence is concerned presupposes that where a person is registered as the sole proprietor of land under circumstances which indicate clearly that other persons legitimately entitled to that land run the risk of being dispossessed in case of registration, then the court would necessarily impute a trust provided it is pleaded and proved to accrue. One of the most ardent exponent of the trust view has been said to be Muli, J in reference to the views expressed by him in the case of Samwel Thaka Misheck & Others v Priscillah Wambui & Another. He held that so long as it could be shown that land was family land or that trust was envisaged, the rigours of a first registration could be avoided. He ordained the continued existence of customary law claims despite the registration of land in the following statement:

‘Registration of title are creation of the law and one must look into the circumstances surrounding each case as well as customary law and practice in force surrounding the registration of title to determine whether a trust was envisaged.’

This view was again replicated in the case of Gatimu Kinguru v Muya Gathangi, in which the plaintiff being the registered proprietor of the suit parcel instituted proceedings against the defendant alleging trespass by the latter and claiming an order for rectification of the register to include his name as owner of half the parcel of land and an order for rectification of the register to include his name as owner of half the parcel of the land. The basis of the registration of title are creation of the law and one must look into the circumstances surrounding each case as well as customary law and practice in force surrounding the registration of title to determine whether a trust was envisaged.’

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316 High Court Civil Case No. 144 of 1973. In this case, the plaintiffs were the sons and daughters of one Mishek Nganga (deceased at the time). The first defendant was the widow of the plaintiff’s elder brother (also deceased) while the second was the plaintiff’s mother and widow of Mishek Nganga. Mishek had 40 acres of land in Kiambu where his three wives and the second defendant lived prior to and after the death of both the head of the family tree (Mishek Nganga) and his elder son Muthee Mishek. During consolidation, the land was divided into three equal portions amongst the three wives of the late Mishek Nganga with the result that the share due to the second defendant was registered in the name of the elder son Muthee. The other portion allotted to the other wives of Mishek Nganga were not in dispute. It was argued on behalf of the plaintiffs that the former portion was to be held by Muthee in trust for himself and his brothers who were minors at the time and also for the third and fourth plaintiffs who were unmarried daughters of Mishek Nganga and sisters to Muthee Mishek entitled to a life interest according to the Kikuyu customary law.

Following the demise of Muthee, his widow (the first defendant) together with Muthee’s mother (the second defendant) got the land transferred in their joint names without the knowledge or consent of the plaintiffs and in breach of the aforesaid trust. According to the plaintiffs they were all entitled to equal shares in the land with the first defendant who would hold her share in trust for her children with Muthee, with the second defendant being only entitled to remain on the land for her life. The two defendants were consequently holding the title in trust for the plaintiffs and the first defendant in equal shares.

The first defendant denied that Muthee held the land in trust for the plaintiffs or for anyone else and contended that Muthee was lawfully registered as the owner of the disputed land and therefore the first defendant being his wife and the second defendant his mother were entitled to the said piece of land to the exclusion of the plaintiffs and anyone else. The issue for determination was whether Muthee held the land in trust for the plaintiffs and the defendants and if so to what extent.

The court held that indeed Muthee held the land in trust for himself and for his minor brothers. On his demise, this land descended to the first and second defendant jointly but this did not confer them any better title over the disputed land than what Muthee had. The first defendant consequently stepped in the shoes of Muthee as trustee for Muthee’s minor brothers and herself and her wife to the extent of his only share or interest. As such the defendants could not hide behind this second registration to defeat the first and second plaintiff’s interest in the land.

317 (1976) KLR 253
The defendant’s averments was that the suit parcel was inherited by him and the plaintiff who was his brother, from their father to be held by them as tenants in common in equal shares and consequently the plaintiff became the registered owner of the land half in trust for the defendant whilst the defendant was away in detention during the emergency period. The defendant denied trespass and claimed that he has been in lawful possession of a half of the land since 1959 and that his half was marked by a boundary separating it from the plaintiff’s portion and on which he had built his home, developed a coffee plantation and effected other development.

Madan J delivering his judgment held inter alia that the defendant was entitled to succeed on his counter claim and found that the plaintiff held the half portion of the land in trust for defendant. It had been argued for the plaintiff that in terms of section 126(1) of the RLA, a trust would accrue if the plaintiff had been described as “trustee” in the instrument of acquisition. The learned judge rejected this assertion and referred to his own judgment in *Mwangi Muguthu v Maina Muguthu*\(^{318}\), where he said:

> ‘As regards Section 126, there was no need to register the defendant ‘as trustee’. He was registered owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of a trust inherent in it. Ordinarily in pursuance of Kikuyu Custom he could have transferred a half share “marango” [land] to the plaintiff. In any event, this section does not make registration ‘as trustee’ obligatory. It states a person may be described by that capacity.’

Therefore, in order to circumvent injustices clearly posed by section 143(1) of the RLA, the learned Judge sought to distinguish between a registration obtained by fraud or mistake and one done pursuant to a custom. He thus stated:

> ‘The registration was done in pursuance of a custom which may be described as a custom primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the court to so hold.’

The case of *Mani Gichuru & Kamau Mani v Gitau Mani* was also decided along similar lines. The dispute arose over land which at the time of the suit was registered in the name of the

\(^{318}\) High Court Civil Case No. 337 of 1968.
defendant. The land belonged to the first plaintiff Mani Gichuru who left it to be cultivated by his wife (mother of the second plaintiff and the defendant. The first plaintiff had gone away so that during demarcation, the land was registered in the name of the defendant in the absence of the first plaintiff and the second plaintiff who was in detention. The father had wished that the land be divided equally between the sons and it was hence held that the defendant held the disputed land on trust for himself and second plaintiff in equal shares.

To support this line of reasoning, the case of Edward Samuel Limuli v Marko Sabayi\(^3\) may be cited as well. In this case, the dictum of Cotran J is instructive. He stated:

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\text{‘it is now generally accepted by the courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration, and there is nothing to prevent the giving effect of such a trust be requiring the trustee to do his duty by executing transfer documents.’}
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In the case of Alan Kiama v Ndia Mathunya & others,\(^3\) the Court of Appeal sought to extend protection to customary law rights by elevating them to the status of overriding interests in term of section 30(g). In this case, one Karura Kiragu had transferred the land in question to the appellant, Allan Kiama, who subsequently filed suit for the ejectment of the respondents on the ground that they were trespassers. The respondents claimed that the land belonged to their clan and hence sought a declaration to the effect that the appellant held the land in trust for them and alternatively a declaration that the appellant held the land subject to

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\(^3\) High Court Civil Case No. 222 of 1978. The respondent in this case was the applicant’s uncle and registered as the proprietor of the suit land. There was no doubt that the registration was a first registration which therefore could not be cancelled or rectified as being prescribed by section 143 RLA. The applicant sought a declaration that the respondent held part of the suit parcel on trust for him and an order that the respondent transfers to him half the plot.
The applicant’s father Samuel was the elder half brother of Marko the respondent. When Samuel died in 1947 he left two young sons, the applicant Edward and an older brother Isaak. Their mother died shortly after their father and according to them buried in the suit plot. The respondent also lived in the plot. So far as Edward and Isaak were concerned the plot was family land which their father Samuel and their uncle Marko had inherited from their father. It was said that Samuel had also had a smaller plot nearby which he had bought personally. At the time of land adjudication and registration both these plots were registered in the name of respondent as Edward and Isaak were minors then.
When Edward and Isaak reached majority, they claimed their due entitlement. Marko agreed to give Isaak the smaller plot but when it came to the bigger plot he offered only 10 acres of it to Edward, which was then subdivided to two portions. However, the respondent thereafter refused to execute the necessary transfer documents hence the suit. Marko argued that the plot was not family land but his own as he was entitled to it since his mother had cultivated it. He denied ever having agreed to transfer a portion of it to the applicant.
The learned judge found as a matter of fact that both plots were owned by the father of Samuel and Marko who left them for his sons when he died. The main issue was whether Marko held part of the suit plot in trust for Edward and if so to what extent. It was held that Marko was indeed a trustee under customary law for the shares of Samuel’s sons in their father’s land during their minority, when he got the plots registered in his own he was still a trustee.

\(^3\) Civil Appeal No. 42 of 1978.
rights of possession, occupation and cultivation of the respondents under section 30(g) of the RLA.

The High Court had proceeded to grant the declaration of trust on the basis that Karura Kiragu had held the land in trust for the clan since it had been a decision of the clan members that Karura Kiragu be registered as the proprietor so that later he could transfer the pieces of land to the rightful owners.

However, the Court of Appeal overruled the finding of a trust as, in their view, no expert evidence was led on the existence of a resulting trust under Kikuyu customary law. Nevertheless, the court agreed with the High Court judge in ordering rectification of the register albeit on the basis of overriding interests under section 30(g) of the RLA. It appears that the Court of Appeal was of the view that the existence of a trust under customary law was the subject of proof and that the concept did not exist separately as it does under English common law.

The approach adopted by the Kenyan courts so far have revolved around the imputation of a trust where circumstances so demand. In this process, questions have been raised about the juridical status of a customary trust although some courts have imputed its existence without posing to ask whether indeed the concept is recognised in the particular custom in question. Perhaps this is the proper approach in the present circumstances where the concept has been the subject of judicial pronouncements and academic expositions for so long.

It is indeed now settled that the concept of a trust is inherent in African customary law. Its legal implications are entirely different from those found in the English trust. For instance, in the latter, the trustee is usually able to deal with property in a manner that binds the beneficiary while in the former, the trust ends at merely holding property for the benefit of the beneficiary until such time that the holding passes on to the beneficiary.

Perhaps, a clearer exposition of the concept of a trust and the way it arises with respect to registered land is given by Khamoni J in the case of Joseph Githinji Gathiba v Charles Kingori Gathiba. Here, the court determined the question of the existence and proof of

321 (2001) 2 EA 342- the plaintiff was an older brother of the defendant. He filed suit seeking to restrain the defendant from trespassing with respect to the suit land which he claimed belong to him as its registered proprietor. The defendant contended that the suit land together with another adjacent piece of land were all family land as their father had initially owned them. During land adjudication and consolidation, it was decided to register that adjacent land in the name of the parties’ eldest brother, to hold on his own behalf and on behalf
customary trust, its nature and consequences on an absolute proprietorship under the RLA. Khamoni J held that Kikuyu customary law contains the concept of a trust or resulting trust within its jurisprudence as proven by legal texts and continuous judicial exposition. Consequently, there is no need to adduce expert evidence every time customary trust is pleaded as it is a concept that has been the subject of litigation and it is shown to be inherent in the customary law of the various Kenyan communities.\(^{322}\)

According to the learned judge, since the concept of trust was inherent in customary law, it followed that in the course of consolidation, adjudication and registration, the trust was passed from customary law and vested on the registered proprietor for on behalf of the subsequent beneficiaries. Consequently, the relevant regime of law to be considered in situations where a customary trust is claimed is the Land Adjudication Act and the Land Consolidation Act. Therefore, in the course of consolidation and adjudication the relevant officers are obliged to record all the claims pertaining to the land as premised on customary law. Hence it becomes pertinent for the officers to record situations under which customary trust arises.

When the adjudication and consolidation records are passed over to the relevant officers as ordained in the RLA, it is their duty to make first registrations under the Act in accordance with the records compiled by the adjudication and consolidation officials. Since the latter officers hardly record the existence of trusts, it follows that land registration officers do not reflect the same in their records with the consequence that such holdings are noted in the register under the RLA. The intended beneficiaries would then lose out if a strict interpretation of the law was to be resorted to.

As such, Khamoni J found justification in declaring a trust in favour of the defendant and ordering that the plaintiff transfer to the defendant that portion of the land to which the defendant was entitled. The current position can thus be summarised as follows as stated by the learned judge:

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of another younger brother, whereas the suit land was registered in the name of the plaintiff to hold on his own behalf and on behalf of the defendant. The plaintiff on his part denied those assertions and said that having had purchased the suit premises there could no family land. It was the defendant’s case that though their eldest brother had agreed to share the adjacent land with their brother, as it was indeed the intention, the plaintiff had refused to share the suit premises with the defendant. It was shown that, the dispute had in fact been deliberated upon by various panels of elders, all of which had been in favour of the defendant’s entitlement to the land. The familiar defence was raised on behalf of the plaintiff that no trust was existent, as there was neither a document nor instrument declaring it or had it been entered in the relevant land register.

\(^{322}\) But see Wambugi v Kimani (1992) 2 KAR 58 stating that it is trite law that trust is a question of fact and has to be proved by evidence.
‘The position as I see it is therefore as follows: correctly and properly, the registration of land under the RLA extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the RLA. But since the same registration recognises trusts in general terms as is done in the proviso to section 28 and section 126 of the RLA without specifically excluding trusts originating from customary law and since African customary laws in Kenya, generally, have the concept or notion of trust inherent in them while a person holding a piece of land in a fiduciary capacity, that registration signifies recognition, by the RLA of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the RLA because, according to the proviso to section 28 of the RLA such registration does not relieve a proprietor from any duty or obligation to which he is subject as a trustee.’

The decision of Khamoni J in this case has subsequently been followed including by the Court of Appeal. Thus in *Mumo v Makau* the Court of Appeal in consonance with the Gathiba case held that there is nothing in the RLA which precludes the declaration of a trust in respect of a registered land, even if is a first registration.

A review of the cases reveals that indeed customary land law has tended to remain vibrant in the face of onslaught by not only legislative enactments but also judicial and executive interpretation. Consequently, the vigour and relevance of customary law in the lives of Kenyans continues to be discerned despite challenges. However, this conclusion must be taken with a rider that so far, majority of the disputes tend to involve individual family members in set-ups where a sedentary form of living is the norm. Hence the findings made by courts necessarily have an impact in situations of disputes pitting individuals for whom a settled form of existence is the norm. The situation of group rights premised on customary communal ownership has so far not received sufficient interpretation to enable any general conclusions to be made.

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323 (2004) 1 KLR 13- the appellant had registered the suit land belonging to her late fathering her name. The deceased had two wives and his entire family lived on the suit property. The respondent contended that the land was held in trust for the rest of the deceased’s family and further, that as a married daughter of the deceased, it was against Kamba customary law for her to inherit the family land. The appellant’s main submission was that she held absolute title to the land and not in any form of trust. She argued that she had a good and indefeasible title.

324 The resilience of customary practices relating to land in the face of official policy that denies and stifles them raises the question as to whether indeed their replacement rather than their recognition is a more appropriate approach. See Akech-Migai J.M., (2001), “Rescuing Indigenous Tenure from the Ghetto of Neglect-Inalienability and the Protection of Customary Land Rights in Kenya” in Ecopolicy II, Nairobi ACTS Press

325 Group rights arise in situations where land use and ownership still revolve around the entire community with little or no notion of individual ownership, as for among pastoralists, hunters-gatherers, agro-pastoralists, forest-dwellers etc. generally. These groups have had relatively restricted contact with outside influences with the
iii. Registration under the ITPA

Section 54 of the ITPA stipulates that any transfer of immovable property for more than 100 rupees must be completed by a registered instrument. The transfer of immovable property of a value less than 100 rupees may either be effected by a registered instrument or by delivery of the property. Under mortgages, the Act provides that where the principal money secured is 100 rupees or upwards then the mortgage must be effected by a registered instrument. However, where the principal money is less than 100 rupees, the mortgage may be effected either by a registered instrument signed and attested or (except in the case of a simple mortgage) by delivery of the property.

Under section 107, a lease of immovable property from year to year, or for a term exceeding one year must be completed by registration too. All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. However, the Local Government is empowered to direct that leases of immovable property not compulsorily registrable under the Act, to be made by unregistered instrument or by oral agreement without delivery of possession.

Priority of Registration

Pursuant to section 27 of the RDA, the day on which a document is presented for registration shall be deemed to be the date of registration. Under the GLA it is stated that every document to be registered must be registered in the order of time in which it is presented at the registry for registration. In addition to stating that instruments presented for registration shall be registered in the order of time in which it is presented, the RTA clarifies that priority is given according to the date of registration and not the date of each instrument itself i.e. the date of execution. Similar provisions are provided under section 60 and section 48 of the LTA and ITPA respectively.

result that in the main, they have been able to retain their traditional forms of ownership and access over land and its resources.

326 Section 59 ITPA.
327 Ibid.
4.6. JUDICIAL RESPONSE TO NON-REGISTRATION

Courts have had to consider the effect of non-registration of compulsorily registrable instruments, documents and transactions. As a consequence thereof, they have evolved various categories of judge made law with reference to the aspect of non registration. One of the earliest decisions in this regard was rendered in the famous case of *Walsh v Lonsdale*.\(^{328}\) In this case, the defendant granted the plaintiff a seven year lease in writing, one of the terms of the tenancy being that the plaintiff should pay each year’s rent in advance. No lease under seal was executed but the plaintiff entered into possession and proceeded for some time to pay rent in arrear thereby seeming to become a yearly periodic tenant at law. The defendant then demanded a year’s rent in advance and, on plaintiff’s refusal to pay in advance, distrained for it. The plaintiff brought an action seeking both damages for trespass and a decree for specific performance of the informal lease.

It was held that where a tenant has taken possession under an unregistered agreement capable of specific performance, he holds under the said agreement in equity as if a lease had been granted. For instance, where the agreement provided for a term of 3 years, then, that would be the period for which he is entitled to enjoy the land despite the fact that the instrument i.e. the lease is unregistered.\(^{329}\) In laying this rule, the court applied equitable principle that equity treats as done that which ought to have been done. Accordingly, an executory lease will be deemed to be an executed lease. This remains to be the position in England.

In Kenya and East Africa generally, though the position is admittedly a bit different, our courts have in their reasoning, shown a bias towards the rule in Walsh v Lonsdale. The general principle is that no interest or estate in land can be passed or created by way of an unregistered instrument. Further, land can not be made liable to burdens/covenants in an unregistered instrument.

However, as already noted, our courts have, in a bid to dispense justice, applied the rule in Walsh v Lonsdale, albeit in a sneaky manner, and not wholly. Thus for instance, our courts have ruled that in case of an unregistered lease, the term of the lease would be the maximum period for which registration is not required. That is, for leases under RTA and GLA the

\(^{328}\) (1882) 21 ch D 9

\(^{329}\) The doctrine of Walsh v Lonsdale has come to apply to a wide range of purportedly legal transactions which are vitiated by non-compliance with some legal formality. The doctrine establishes a principle of general application to such transactions as the granting of easements, profits and mortgages, and brings about the effect that informal grants in any of these cases are construed as contracts which, if capable of specific performance, are regarded as grants of equitable interests of the relevant kind.
maximum period for which registration is not required is 1 year while for leases under RTA
the period is 2 years

The distinction between the positions in Kenya and in the U.K. ought to be quite clear. In
Kenya, one is allowed to hold under the lease as though the lease was registered but one can
only enjoy the land in question for the maximum period for which registration is not required.
In England, one is allowed to hold under the lease as if it was registered, and to enjoy the
land in question for a period of time so prescribed under the lease.

Several judicial decisions are illustrative of the Kenyan position. In Bains v Chogley, the
landlord purported to lease certain premises for manufacturing purposes for a period of five
years. This was done vide an unregistered instrument at a monthly rent. It was held that the
lease, though unregistered was a lease from year to year requiring 6 months notice for
termination pursuant to section 106 ITPA (1882).

In Meralli V Parker, the issue for determination was the effect of an unregistered sub-lease
of which the law categorically demanded registration. Rudd J. Observed, with respect to
section 100 and 102 of the GLA. ‘The effect is that while evidence cannot be given (in court)
to prove a lease for more than one year, evidence can be given to prove an agreement for a
lease and the effect of that agreement coupled with possession is to create a tenancy.’
However, though such an agreement is valid inter partes, it is gives no protection against the
rights of third parties.

In Clarke V Sondhi, The lessor purported to lease certain premises to the lessee for a period
of 3 years at an annual rent payable by monthly instalments in advance on the 1th day of each
month. The lessee took possession of the premises and subsequently fell into arrears. The
lessor brought an action in the High Court for recovery of the arrears and the lessee defended
the action by contending that the lessor had no cause of action due to the fact that the lease
was not registered as was required by the provisions of the RTA. He further contended that
due to the same fact, the lease was either void or unenforceable and could not pass any legal
estate in land.

330 (1949) EACA 27
331 Note under the ITPA, the duration of periodic tenancies depends on their purposes. Where the tenancy is for
agricultural or manufacturing purposes, the tenancy is from year to year. This requires 6 months notice for
termination. Tenancies for any other purpose are run on a monthly basis i.e. from month to month. Period of
notice is usually 15 days.
333 See Grosvenor v Rogan-Kamper (1957) EA 4 & East Africa Power and Lighting Co. Ltd. v The Attorney-
The Trial Judge held that the unregistered lease could operate as a contract *inter partes* and therefore, the lessee was liable to pay the arrears. But just in case he was wrong in so holding, the lessee was nevertheless liable to pay the arrears for use and occupation of the leased premises. On appeal, The Court of Appeal held inter alia, that an unregistered lease could operate as a contract *inter partes* and could confer on the lessee a right to enforce the contract by way of specific performance and to accordingly obtain a registrable lease. The court also observed that the proviso to section 40 RTA could not and did not exclude the use of an unregistered lease to show the terms of the contract between the parties.

Similar issues as in the above case came up for determination in the case of *Souza Figueirido & Co. Ltd V Moorings Hotel Ltd*, 335 A Landlord sought to recover arrears of rent from a tenant under an unregistered but registrable sub-lease. The tenant raised the defence of invalidity of the lease on account of its being unregistered. The tenant further contended that the lease was ineffectual to create any interest in land or any estate and therefore, the covenant under it to pay rent could not be enforced. The court of Appeal actually agreed with the first limb of the tenant’s arguments that no interest could be created or transferred by way of an unregistered instrument and that land ought not to be made liable to covenants in an unregistered instrument.

However, the court proceeded to hold that, though the lease was unregistered, it could nevertheless operate to create an enforceable *inter partes* contract, thereby conferring upon the lessee a right to seek specific performance and accordingly, compel the lessor to grant him a registrable lease. 336 The court’s views appear to be that a lease which is registrable compulsorily and which is not registered is incapable of creating any rights in *rem* but can, however, create rights in *personam*.

335 (1960) EA 926.
336 See also Bachelor’s Bakery Ltd v Westlands Securities Ltd, Civil Appeal No. 2 of 1978 (Court of Appeal at Nairobi) where the appellant occupied a shop premises owned by the respondent under an unregistered lease agreement for a period of six years and upon expiry of the six-year term, the respondent sought possession of the premises. The appellant refused to deliver up possession and the respondent instituted a suit seeking vacant possession. The appellant submitted that the lease was unregistered, hence invalid in law and that it created a monthly tenancy terminable only by requisite notice. The respondent applied for summary judgment arguing that even if unregistered, the lease was enforceable. The application for summary judgment was allowed and the appellant appealed. The Court of Appeal held, inter alia, that the agreement was valid between the parties even if in the absence of registration.
4.7. INVESTIGATION OF TITLES

Investigation of title is the means by which the buyer ensures that the seller does own the land and can convey it. It is distinguished from deducing title which is the process by which the seller demonstrates to the buyer that the seller owns the land or property and can convey it. Investigation of title, therefore, entails, inter alia, checking whether the title is freehold or leasehold, whether it is a current reference number or not. This ensures that one does not deal in the wrong land.

In a nutshell, investigation of title must uncover the good root of title. A well done search is expected to establish at least the following:

- Land reference number
- The owner/proprietor
- Registration particulars
- Presence of any encumbrances
- Presence of any burdens i.e. covenants imposed on the Land.

An investigation of title or search may be carried out either personally or officially.

4.7.1. Personal Search

A personal search is usually undertaken by the purchaser of the land in question by simply visiting the registry and personally examining the register. Sometimes it may be undertaken by the purchaser’s advocate or his clerk. The advocate doing the search takes personal responsibility for what he purports to find. At the registry, a person intending to do a personal search pays the prescribed fees, requests for the parcel documents then inspects the same and takes notes. A personal search is frowned upon and as Russel LJ commented, ‘anyone who nowadays is foolish enough to search personally deserves what he gets.’

4.7.2. Official Search

An official search is undertaken by the officials at the registry, and is advantageous than a personal search because it enjoys a state guarantee. For an official search to be undertaken, the purchaser or intending purchaser or his advocate must pay the prescribed fees and apply

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337 Oak Cooperative Building Society v Blackburn (1968) Ch 730.
in writing for an official search to the Land Registrar. The Land Registrar then conducts the search and issues a certificate of official search. The certificate in favour of a purchaser or an intending purchaser is, according to its tenor, conclusive. Thus, even if the Registry mistakenly issues a clear or ‘nil’ certificate of official search, the certificate is conclusive according to its tenor. Since the search is conducted by Government officers, the government can be held responsible for whatever they purport to find. Under the R.L.A., it is always prudent to insist on an official search. This is principally because official searches reflect a true copy of the register.

It is also possible for one to undertake a Postal Search whereby the results of the search are mailed/posted to the applicant. This type of search is not prudent because the status of the register may be altered by the time the results reach the applicant through the post.
CHAPTER FIVE
THE LEASEHOLD GRANT AND TRANSACTIONS

5.0. DEFINITION OF A LEASE

A lease, as generally understood today, is a document creating an interest in land for a fixed period of certain duration, usually in consideration of the payment of rent. It is essentially a contract between two parties for the grant of a time in land. In *Prudential assurance Co. Ltd. v London Residuary Body*, Lord Templeman explained that a lease is ‘a contract for the exclusive possession and profit of land for some determinate time.’ By its nature, therefore, a lease is executory contract where rights and obligations remain outstanding between the parties during the course of the lease.

In other words, a lease creates, for a term of years, a leasehold relationship between a landlord or lessor and a tenant or lessee. According to Woodfall’s Law of Landlord and Tenant, a lease is ‘the grant of a right to the exclusive possession of land for a determinate term less than that which the grantor has himself in the land’. Under section 3 of the RLA, a lease is a ‘grant with or without consideration by the proprietor of land, of the right to exclusive possession of his land and includes the right so granted, and the instrument granting it, and also includes a sub-lease but does not include an agreement for a lease’.

Under the ITPA at section 105, a lease of immovable property is ‘a transfer of a right to enjoy such property, made for a certain period, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically, or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms’.

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338 (1992) 2 AC 286 at 390.
340 In feudal English, the leasehold relationship formed no part of the feudal structure; the interest conferred by a lease or tenancy was originally regarded as lying outside the law of real property. The right to occupy another’s land for a defined period of time was initially considered to be a mere right *in personam* which subsisted- at most- only in contract. Such an interest was not recognised as right *in rem*. It was only with the development of the action of ejectment in the 15th century that occupation rights of this kind- albeit conferred by contract- were acknowledged as constituting a new category of property right. Thus, although the lease is today recognised as a potential legal estate in land, it has always had a somewhat hybrid character, partaking of the nature of both realty and personality. See Simpson A.W.B., A History of the Land Law, 2nd Ed, Oxford, 1986; Pollock F. and Maitland F.W., The History of English Law, Vol II, London, 1968.
341 See Woodfall’s Law of Landlord and Tenant, Sweet and Maxwell, Release 48, April 2001, para. 1.003
5.1. ESSENTIALS OF A LEASE

The above definitions of a lease identifies three essentials of a lease without which no lease or tenancy can be created. The three essentials are: exclusive possession, determinate term, and defined premises. Each of these essentials will be considered in turn.

5.1.1 Exclusive Possession

A tenant must acquire the right of possession to the exclusion of the landlord and all persons claiming through the landlord. In the leading case of *Street v. Mountford* it was stated that in determining whether a tenancy has been granted, the essential question is whether there has been the grant of a right to the exclusive possession of the premises. If there is exclusive possession, then, provided the other requirements for a tenancy are satisfied, a tenancy will have been created. This element was also considered in the case of *London & North Western Rail Co. v. Buckmaster*.

However, exclusive possession does not necessarily imply that where one is let into exclusive possession he becomes a tenant. It is quite possible that one may be in exclusive possession yet failing to be deemed a tenant. This was, for example, the case in *Runda Coffee Estates v. Ujjagar Singh* where the defendant had occupied the suit property for ten years on the basis of what eventually turned out to be a contractual licence.

5.1.2 Determinate Term

The period of a lease must be defined or capable of being defined i.e. the term must have a beginning and a certain ending. In *Harvey v. Pratt*, it was held that it is enough that these requirements are satisfied before the lease takes effect even if they are not agreed upon when the lease is executed. Where the date of commencement or the date of expiry of the lease is

342 Windeyer J declared that the legal right to exclusive possession is ‘the proper touchstone’ of the lease tenancy. He further observed that it is usually this element alone which confers the degree of territorial control necessary to enable the tenant effectively to carry out (he purpose (whether commercial or residential) for which he took the letting. See Radaich v Smith (1959) 101 CLR 209 at 223
343 (1985) A.C. 809
344 The common law (and now statutory) requirement of ‘exclusive possession’ is a constant reminder of the fact that privacy is seen as an intrinsic component of ownership of an ‘estate’ within the capitalist concept of property. In this view the English House of Lords in *Street v Mountford* pointed out that the hallmark of exclusive possession is entirely consistent with the ‘elevation of a tenancy into an estate in land’. Lord Templeman acknowledged that the tenant with exclusive possession ‘is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions’.
345 (1874) 10 LR Q.B 70
346 (1966) EA 564
347 (1965) 1 WLR 1025
uncertain, the transaction is void. In *Lace v. Chantler*[^348], an agreement to let premises for the “duration of the war” was held to be void due to uncertainty of the period of the intended lease. Likewise a letting of premises ‘for so long as the lessee shall use them’ cannot create a valid leasehold term.[^349]

### 5.1.3 Defined Premises

No lease can be created unless the property is concretely defined or capable of being defined. The rule is that no lease can be created where the frontiers of the property cannot be identified. In *Heptulla Brothers Ltd. v. Jambha Jeshangbhai Thakore*[^350], the court explicitly stated that no tenancy could be created where the premises intended to be let out could not be ascertained with sufficient precision. As such, a contract by the owner of a building to store goods in them, though with liberty to change the rooms in which they are stored, at his convenience, can create no tenancy since no rights are given over any particular area.[^351] But where the premises are clearly defined, the mere imposition of severe restrictions on the use that can be made of them will not negative a tenancy.[^352]

### 5.2. LEASES UNDER THE RLA

The relevant sections to the province of leases under the RLA are sections 45 to 64. Section 45 provides that the proprietor of land may lease the land or part of it to any person for a definite term or for the life of the lessor or of the lessee or for a period which though indefinite may be determined by the lessor or the lessee, and subject to such conditions as he may think fit. This section in addition to stating that a lease may be for the life of the lessee or lessor it also lends credence to the fact that a lease must be for a definite term or for a term which is ascertainable.

#### 5.2.1 Periodic Tenancies

Where in any lease the term is not specified and no provision is made for the giving of notice to determine the tenancy, the lease shall be deemed to have created a periodic tenancy.[^353]

Similarly, where the proprietor of land permits the exclusive occupation of the land or any

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[^348]: (1944) KB 368 at 370f
[^350]: (1957) EA 358
[^353]: Section 46 (1)(a) RLA
part thereof by any other person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.\textsuperscript{354}

In simple terms, the essence of a periodic term is that its term is not specified. Further there is no provision for its termination by way of notice. Usually the period is determined by reference to payment of rent. The period of the tenancy will be the period for which rent is payable. A periodic tenancy is rather abstract, and is only capable of conferring a right which can only be protected by way of a caution under section 131 RLA.\textsuperscript{355}

Judicial enforcement of section 46 is myriad in our court’s jurisprudence. In \textit{Aroko v Ngotho and Another}\textsuperscript{356}, Githinji J stated that in the absence of a lease in writing then a lease automatically becomes a periodic tenancy in terms of section 46(1) (b) of the RLA.

\textbf{5.2.2 Registration of Leases}

Pursuant to Section 47 a lease for a specified period exceeding two years, or for the life of the lessor or of the lessee, or a lease which contains an option whereby the lessee may require the lessor to grant him a further term or terms which, together with the original term, exceed two years, must be registered. This must be in the prescribed form and shall be completed by-

\begin{itemize}
  \item[a)] Opening a register in respect of the lease in the name of the lessee; and
  \item[b)] Filing the lease; and
  \item[c)] Noting the lease in the encumbrances section of the register of the lessor’s land or lease.
\end{itemize}

Under the RTA, any lease or agreement for a lease granted for a term exceeding one year must be registered.\textsuperscript{357} The obvious upshot of this is that a lease or agreement for a lease for a period not exceeding twelve months shall be valid without registration. Indeed this reflected by section 46(2) RLA which stipulates that no periodic tenancy of any kind shall be capable

\footnotesize
\textsuperscript{354} Section 46 (b) RLA
\textsuperscript{355} Section 131 RLA provides that any person who claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, that is to say, some defined interest capable of creation by an instrument registrable under the Act; or is entitled to a licence; or has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same. It also states that a caution may either forbid the registration of dispositions and the making of entries altogether; or forbid the registration of dispositions and the making of entries to the extent therein expressed.
\textsuperscript{356} (1991) KLR 178-183
\textsuperscript{357} Sections 40 and 41 RTA
of registration. However, a periodic tenancy can be deemed to be a right to obtain an interest for the purposes of section 131 of the Act which provides for the lodging of cautions.

An unregistered instrument under the RTA is consequently incapable of passing any land or interest therein to another person. In *New Stanley Hotel Ltd v Arcade Tobacconists Ltd (No. 2)*, it was held that a sublease that is not registered is ineffectual to pass any interest in land on transfer to another person. In this case, the defendant occupied certain premises under a sub-lease for six years made between it and Kulia Investments Ltd (the vendor). Before the expiry of the sub-lease, the plaintiff became the owner of the property by way of transfer under the RTA and the defendant continued to pay the rent provided in the lease to the plaintiff. As the defendant remained on the premises after the expiry of the six years tenancy, the plaintiff sued it for possession and *mesne profits* hence the above decision by the court.

### 5.2.3 Computing the Term of a Lease

In computing the term of a lease, the date of commencement is excluded from the period of the lease. Where there is no date of commencement, time will run as from the date of execution of the lease which day is excluded in computing that period. Where a lease is stated to be for a year or a number of years with no express agreement to the contrary, the actual last date of the year is the date of its expiry.

### 5.2.4 Future Leases

Under the RLA, it is possible to create a lease for a period to commence on a future date. Such a lease is known as a ‘Future or Reversionary’ lease. Pursuant to section 51(2) thereof, such a lease must commence within the twenty-one years from the date of its execution otherwise it is void. Such a lease must also be registered failure to which it will be rendered void.

In accordance with section 52(1) ‘where a person, having lawfully entered into occupation of any land as a lessee, continues to occupy that land with consent of the lessor after the determination of the lease, he shall, subject to any written law governing agricultural

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358 (1986) KLR 760
359 Section 50(1) RLA. See also section 110 ITPA which has similar provisions. The ITPA, however, further provides that where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is terminable, the lessee, and not the lessor, shall have such option.
360 Section 50(2) RLA
361 Section 50(3) RLA
362 Section 51(1) RLA
tenancies and in the absence of any evidence to the contrary, be deemed to be a tenant holding the land on a periodic tenancy on the same conditions as those of the lease, so far as those conditions are appropriate to a periodic tenancy’.

5.2.5 Leases and the Interese Termini Doctrine

At common law, the rule was that a lessee had to enter into possession before he was considered to have acquired an estate. Thus a lease was perfect upon entry. This requirement was abolished by the English 1925 Law of Property Act. Consequently, a lease is effective as from the date fixed for its commencement. In Kenya, section 51(1) RLA abolished the doctrine of interese termini by providing that a future lease is effective upon registration.

5.3. LEASES UNDER THE ITPA

Section 106 ITPA provides for the duration of leases in the absence of written contract or local usage. In this regard it is stated that in the absence of a contract or local usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months’ notice expiring with the end of a year of the tenancy. It further provides that a lease of land for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days’ notice expiring with the end of a month of tenancy’.

In the case of WJ Blakeman Ltd v Associated Hotel Management Services Ltd, the Court of Appeal considered the circumstances in which monthly tenancy may be imputed under the ITPA. In this regard, it was held that in order to impute a monthly tenancy, the law requires such an action on the part of the intending lessee that illustrates that the parties must be taken to have intended that the lessee wishes to take the property and the intending lessor to give him the property on payment of rent. The outstanding features therefore are possession and payment of rent. In African Universal Merchandise Ltd v Kulia Investments Ltd, the Court of Appeal observed that a lease reduced into a writing (over a year later) could not be said to be a lease from month to month under sections 106 and 116 of the ITPA because those

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363 Note that every notice under this section must be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.
364 (1986) KLR 157-166
365 (1986) KLR 529-537
sections applied to situations in which there was no contract or agreements to the contrary, which was not the situation in this case.

The ITPA further stipulates that a lease of land from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. All other leases may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Under the Act, however, the Local Government, was empowered to direct that leases, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery possession.

5.4. LEASES UNDER THE GLA

The GLA is an Act of Parliament to make further and better provision for regulating the leasing and other disposal of Governments lands, and for other purposes. All conveyances, leases and licenses of or for the occupation of Government lands, and all proceedings, notices and documents under the Act, made, taken, issued or drawn are deemed to be made, taken, issued or drawn under and subject to the provisions of the Act. The Act has numerous provisions as regards leases under it.

Section 10 provides that ‘leases of town plots may be granted for any term not exceeding ninety-nine years. Such leases shall, unless the President otherwise orders in any particular case or cases, be sold by auction. Section 18 of the Act states that in every lease of a town plot under the Act, there shall be implied by virtue of the Act a covenant by the lessee not to divide the plot and not to assign or sublet any portion thereof, except with the previous

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366 Section 107 ITPA
367 Ibid.
368 Ibid.
369 Government land is defined under the Act as ‘land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in schedule 2 of the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964.
370 Section 4 GLA.
371 Section 12 GLA. Note that under section 13 of the Act, the place and time of sale shall be notified in the Gazette not less than four weeks nor more than three months before the day of sale, and the notice shall state:
1. the number of plots and the situation and area of each plot;
2. the upset price at which the lease of each plot will be sold;
3. the amount of survey fees and the cost of the deeds for each plot;
4. the term of the lease and the rent payable in respect of each plot; and
5. the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot.
In addition it is provided, however, that any plot may be withdrawn from sale by the Commissioner at any time before it is offered for sale. See also sections 14-17.
consent of the Commissioner in writing and in such manner and upon such conditions as he may prescribe or require.\textsuperscript{372}

The Act also provides for leases of agricultural land. In this regard, section 20 requires that leases of farms, unless the President otherwise orders in any particular case or cases, be sold by auction.\textsuperscript{373} Leases of agricultural land have the following covenants implied into them by the Act:

a. The lessee must within the first three years of the lease effect or place on the land leased improvements of the nature and to the value specified in the First schedule of the Act as the improvements to be effected within such time upon a farm of the like area.

b. The lessee must at all times after the expiration of the third year of the lease have and maintain on the land leased improvements of the nature and to the value required under the last preceding covenant.

c. The lessee must within the first five years of the lease effect or place on the land leased additional improvements of the nature and the value specified in the First Schedule of the Act as additional improvements to be effected within such time upon a farm of the like area.

d. The lessee must at all times after the expiration of the fifth year of the lease have and maintain on the land leased additional improvements of the nature and to the value required under the last preceding covenant.

In addition to leases of town plots and agricultural lands, the GLA provides for leases for special purposes. In this regard, section 35 of the Act stipulates that every application for a lease or license of or relating to unalienated land for any special purpose shall be made in writing in the form prescribed, and shall give such particulars as may be required by rules made under the Act. Unlike leases of town plots and agricultural lands, lease for special purposes need not be sold by public auction.\textsuperscript{374} However, the Commissioner may, with the approval of the President, cause a lease or license for special purposes be sold by auction.\textsuperscript{375}

\textsuperscript{372} An application for consent of the Commissioner under section18 shall only be entertained if the building conditions (if any) have been complied with. In addition, in no case shall the annual rent reserved on any such portion be less than ten shillings nor the aggregate annual rent be less than that reserved in the original lease. This condition applies to every building lease granted under the Crown Lands Ordinance, 1902, in the event of the property held under such lease being subdivided and the portions assigned.

\textsuperscript{373} See sections 21-31 RLA for general regulations of leases under the Act.

\textsuperscript{374} Section 38(1) RLA.

\textsuperscript{375} Ibid. Where a lease for special purpose is sold by public auction then the provisions of sections 13 to 17 (both inclusive) shall, so far as applicable, apply. The lessee in a lease for special purposes is under a covenant not to
The GLA also contains general provisions relating to leases (and licences and agreements) under the Act. Section 69 thereof provides that in every grant or lease under the Act there shall be implied by virtue of the Act, by the grantor or lessor, the following covenants:

a. That he has full power to grant the grant or lease;
b. That the grantee or lessee, paying the rent and fulfilling the conditions the condition therein contained, shall quietly hold and enjoy the premises without lawful interruption by the grantor or lessor or any person claiming under him, except so far as the laws for the time being in force may permit.

On the part of the lessee or grantee, the Act implies covenants and conditions. First, he is expected to pay rent and royalties thereby reserved at the time and in the manner therein provided. Secondly, he is bound to pay such taxes, rates, charges, duties, assessments or outgoings of whatever description as may be imposed, charged, or assessed upon the land or the buildings thereon or upon the lessor or grantor or lessee or licensee in respect thereof.

5.4. THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO A LEASE

The general rule is that the rights and obligations of the parties to a lease are often set out in the lease agreement. However, where the parties to a lease fail to provide for them, the statutory obligations are read into the agreement. The effect of the obligations of the parties to a lease is crucial to the operation of a lease and gives rise to two main issues:

a. The nature of the obligations placed upon the original contracting parties (the original landlord and tenant); and
b. The effect of those original obligations on those who later acquire the lease or the reversion

Obligations in a lease may be imposed in one of two ways: by covenants or by conditions. A ‘covenant’ is a promise made by one party (the ‘covenantor’) for the benefit of another party (the ‘covenantee’) which is contained in a deed. Covenants must be distinguished from ‘conditions’, which may also impose obligations on a tenant. If a tenant breaks a condition in
the lease the landlord will have an automatic be right to bring the term to an end, whilst the landlord does not automatically have such a right for breach of covenant and must express provision for it in the lease. The question whether a particular term in a lease is a covenant or a condition is a matter which is decided by reference to the intention of parties. Generally the courts presume that the terms of the lease are covenants, unless clear words are used to show that the obligation is intended to be a condition.

5.4.1 Implied Obligations of the Landlord (Rights of the Tenant)

i) Quiet Enjoyment

The landlord is required to ensure that his tenant has peaceful or ‘quiet enjoyment’ of the leased premises. The covenant has nothing to do with noise-free enjoyment of the demised premises, but impliedly guarantees that the tenant shall be immune from the exercise of adverse rights over the land. The essence of quite enjoyment is that there should be no interruption from the landlord or persons claiming through him i.e. assignees or legal representatives. Similarly, there should be no disturbance of whatever nature. However, this obligation is subject to the condition that the tenant pays rent and performs other obligations imposed upon him by the lease agreement.

For instance, the landlord will have breached this covenant where in an effort to get rid of the tenant, he removes from the leased premises the doors, windows and cuts off electricity, as was the case in Pereira v. Vandivan. Similarly, where the landlord persistently knocks on the tenant’s door and uses threats in an attempt to induce him to leave, he would have broken this covenant. However, where a superior landlord breaches this covenant, the lessor shall not incur liability for the breach as was held in the case of Jones v. Lavington.

Section 53 (a) RLA implies this obligation in every lease agreements as follows:

378 In the case of Celsteel Ltd v. Alton House Holdings Ltd (No. 2) (1987) 1 WLR 291 at 294B-D, however, the English Court of Appeal found no breach of the landlord’s covenant for quiet enjoyment where a tenant complained that his occupation had been disturbed by the lawful exercise of rights by persons who had earlier been granted tenancies of adjacent property by a former owner of the present landlord’s reversion. Such persons did not claim their adverse rights, ‘under’ the present landlord but rather ‘under’ his predecessor in title. Their rights had been created by virtue of a title which was prior to that of the current landlord and which was therefore superior to it, and the exercise of those rights could not cause the present reversioner to be in breach of his covenant to afford quiet enjoyment.
379 (1953) 1 WLR 672
380 Kenny v Preen (1963) 1 Q.B. 499
381 (1903) 38 CH.D 295. See also Aldin v. Latimer Clarke, Muirhead & Co. (1894) 2 Ch 437 at 447 where premises had been let to a tenant subject to a covenant that the tenant would use the property to run the business of a timber merchant. The demised premises included a wood-drying shed which depended on a natural flow of air passing on to
‘So long as by the lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease and on his part to be observed and performed, the lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the lessor or any person rightfully claiming through him.’

The Court of Appeal in *Agip (K) Ltd and Another v Gilani*[^382^] judicially enforced this section by holding that the appellants who were tenants of the respondents were entitled to the right of quiet possession and the attempt by the respondent to terminate them was unlawful because there was no allegation that they were in breach of any covenant or had failed to pay the agreed rent.

In a similar note, section 108 (c) ITPA provides that the lessor (landlord) shall be deemed to contract with the lessee (tenant) that, if the latter pays rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption. Section 69 of the GLA is also of the same effect with regard to leases transacted under the Act.

### ii) Non-Derogation from Grant

This obligation requires that the landlord does not use or permit the adjoining or neighbouring premises/land of which he is the proprietor to be used in a way adverse to the tenant’s use. This obligation has been described as ‘a principle which merely embodies in a legal maxim a rule of common honesty’. It requires that the landlord in granting land to the tenant not to do so in terms that substantially negative the utility of the grant. Bowen LJ in *Birmingham, Dudley and District Banking Co. v. Ross*[^383^] summed up this obligation succinctly when he stated:

‘…A grantor having given a thing with one hand is not to take away the means of enjoying it with the other’.

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[^382^]: (2003) KLR 176. The appellants were tenants of the respondents of the respondent by a lease for a term of 30 years. The lease was for a fixed term and contained a clause for earlier determination. The respondent decided to terminate the lease but the appellants declined to honour the termination maintaining that the action was unlawful. The appellants, defendants at trial, raised a counterclaim for a declaration that the purported termination was null and void.

[^383^]: (1888) 38 Ch D 295 at 313
This obligation is embodied under section 53 at paragraph (b) by enjoining the lessor ‘not to use or permit to be used any adjoining or neighbouring land of which he is the proprietor or lessee in any way which would render the leased premises unfit or materially less fit for the purpose for which they were leased’.

### iii) Fitness for Habitation

Traditionally at common law, there was generally no implied guarantee by the landlord as to the fitness of the subject matter of any letting. The broad rule was caveat emptor i.e. buyer beware. However, this degree of legal abstention is now qualified by a number of exceptions (arising both at common law and by statute) of which impose on the landlord various kinds of duty in relation to the physical condition of the premises leased.  

Accordingly, section 53 paragraph (d) RLA imposes upon the landlord the duty to ensure that ‘where any dwelling house, flat or room is leased furnished, that the house, flat or room is fit for habitation at the commencement of the tenancy’.

Under the ITPA there is no implied covenant upon the landlord to ensure that the property is fit for habitation.

### iv) Duty to Disclose Material Facts

Under the ITPA, the landlord is under an obligation to disclose any material defect in the leased property which is within his knowledge and which the tenant is not aware. Section 108 thereof states that ‘the lessor is bound to disclose to the lessee any material defect in the property, with the reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover’. In light of this section, it is clear that in discharging this obligation, regard must be given to the tenant’s proposed use of the premises.

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384 A significant exception to the common law principle of caveat emptor in landlord-tenant relations was established in 1843 in Smith v Marrable (1843) 11 M & W 5 at 8f, 152 ER 693 at 694. In this case the tenant, on taking possession, had discovered the premises to be infested with bugs. The Court of Exchequer held it to be an implied condition in the letting of any furnished house that the premises should be reasonably fit for habitation. The tenant was therefore entitled to quit the letting without notice. According to Parke B, ‘if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up’. The American parallel is Ingalls v Hobbs, 31 NE 286 at 287 (1892), citing Smith v Marrable in support.
v) **Duty to Repair**

Akin to the duty to provide premises fit for habitation, the landlord ordinarily gives no implied undertaking that the premises shall be repaired. But exceptions have been developed to this general rule. Section 53 paragraph (c) RLA provides that the landlord is obligated, where part only of a building is leased, to keep the roof, main walls and main drains, and the common passages and common installations, in repair. Breach of this condition entitles a tenant to repudiate the lease and bring an action to recover damages. Under the ITPA, there is no such implied obligation on the part of the landlord. However, if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor. This obligation must thus be created by the lease agreement to be enforceable.

In *Abdulali Jiwaji and Co. v Shamvi Holdings Ltd.*, the High Court held that in an action for breach of covenant to repair in a lease, a tenant is not liable for acts done before the time of execution of the lease.

**5.4.2 Implied Duties of the Tenant (Rights of the Landlord)**

i) **Obligation to Pay Rent**

Under the RLA, it is implied in every lease agreements by the lessee with the lessor binding the lessee to pay rent reserved by the lease at the times and in the manner therein specified. In fact, the duty to pay rent subsists even where an event or a catastrophe has occurred which has had the effect of rendering the property unfit for the purpose for which it was let/leased. Principally this is due to the fact that a lease creates an estate in land. It supersedes a simple contract and anything which affects the contractual aspects of the contract does not affect the estate. Accordingly, the estate remains vested in the tenant and therefore the obligation to pay rent subsists. Rent is often payable in arrears or in advance.

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385 Section 108 (f) ITPA
386 (1989) KLR 319-324
387 Section 54 Para (a) RLA
ii) **Obligation to Pay Rates and Taxes**

The tenant is under an obligation to pay all rates and taxes except those for which the landlord is liable. Section 54 at paragraph (b) requires the tenant to pay all rates, taxes and other outgoings which are at any time payable in respect of the leased premises during the continuance of the lease unless the same are payable exclusively by the landlord by virtue of any written law.

iii) **Obligation to Repair Leased Premises**

Where a whole building or a dwelling house is leased unfurnished, the tenant is obliged to keep the whole premises in repair (both internal and external repairs). Where part only of a building or where a dwelling house is let furnished, the tenant is liable only for internal repairs. Repair in this context is defined as such repair as a prudent owner would reasonably do, depending on the age, character and locality of the building.

iv) **Obligation to Repair or Replace Furniture**

Under section 54 (e) RLA, the tenant is required, where the premises are let furnished, to keep the furniture in good condition i.e. as it was at the commencement of the lease. Fair wear and tear is allowed. Where articles are lost, damaged or destroyed, as to be beyond repair, they ought to be replaced with items of equal value.

v) **Obligation Not to Sublease, Charge or Transfer**

A tenant must not transfer, charge, sublet or otherwise part with possession of the leased premises or any part thereof, unless the landlord agrees in writing.\(^{388}\) The landlord’s consent should not be unreasonably withheld. In the case of *Chanly v Ware\(^ {389}\)*, the court stated that the landlord must show a solid and substantial cause for withholding his consent. The court also stated that the onus to of proving that the consent has been unreasonably withheld is on the tenant and that it is not necessary for the landlord to prove that the conclusions which led to the refusal of consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances.

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\(^{388}\) Section 54 (h) RLA

\(^{389}\) (1913) 29 TLQ
In *Premier Confectionary Co. v London Commercial Sale Rooms*\(^{390}\), consent was held to have been reasonably withheld where the transferred property would have been used for detrimental competitive purposes with reference to the landlord’s other properties. In *Pimms Ltd v Tallow Chandlers Co.*\(^{391}\), the court held that a transfer consent was reasonably withheld where the sole object of the tenant was that the transferee should acquire a protected statutory tenancy.

\[\text{vi) Obligation to allow Landlord to View Premises}\]

Section 54 (f) RLA obliges the tenant to allow the landlord or his agent to enter the premises and examine their condition. In this regard, the landlord or agent(s) is required to give notice of his intention to view the premises. Further the viewing must be done during reasonable times. Similarly, section 108 (m) ITPA requires the lessee (tenant) to ‘allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition’.

**5.5. ENFORCEMENT OF OBLIGATIONS UNDER A LEASE**

Having identified the rights and obligations of parties to a lease, it is now prudent to consider the effect of these rights and obligations upon non-compliance or breach on the part of either party.

**5.5.1 Enforcement by a Landlord**

A landlord may enforce a breach by a tenant in any of the following ways: distress for rent, by forfeiture of the lease, action to recover arrears and injunction.

**i. Distress for Rent**

Distress is the right to remove certain goods or chattels from the possession of the tenant in order to compel him to pay the rent due. Kevin Gray captures well this remedy thus, ‘distress is an ancient common law remedy, which entitles the landlord, in appropriate circumstances,
summarily to seize goods found on the demised premises, sell them up and recoup from the proceeds of sale any arrears of rent owed by the tenant’. Distress for rent, in Kenya, is undertaken pursuant to the provisions of the Distress for Rent Act (Cap 293). The right of a landlord to the remedy of distress of rent is provided for under section 3(1) of the Distress for Rent Act thus:

‘Subject to the provisions of this Act, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent service as is given by the common law of England in a similar case’. 392

Pursuant to section 4 of the Act, the goods are simply seized after which, if the tenant fails to pay the rent within ten days, the seized goods are sold by way of a public auction. In the case of *Gusii Mwalimu Investment Co. Ltd and 2 others v Mwalimu Hotel Kisii Ltd.* 393 the Court of Appeal clarified that section 4(1) of the Act, “…clearly envisages having goods at the premises in question for at least ten (10) days to enable the tenant either to pay the rent or replevy them. It does also envisage impounding of goods within a limited area of the premises. But this sub-section does not empower a bailiff to remove the goods or chattels for storage elsewhere without the consent of the owner. The tenor of the whole section 4 of this Act is that the goods or chattels seized should remain *in situ* for 10 days.”

Distress for rent can only be made within six months after the end or determination of the lease. A distress conducted after the expiry of six months after the determination of the lease is consequently illegal. In the case of *Gusii Mwalimu Investment Co. Ltd.*, it was stated that section 5 of the Act, “clearly stipulates that no distress can be levied six months after the end of the demise, lease or contract. Yet the landlord proceeded to levy distress some one month and twenty-two days after the expiry of the aforesaid period of six months…. What is the effect of levying such distress? Levying of illegal distress does not place a landlord in good standing in court of equity.”

Any personal goods and chattels found on the leased premises may be seized. However, certain goods may not be seized. In this regard, section 16 of the Distress for Rent Act stipulates that the following goods and chattels shall be exempt from distress for rent:

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392 Under section 3(2) thereof, distress cannot be levied between sunset and sunrise or on any Sunday.
393 *Civil Appeal No. 160 of 1995, Court of Appeal at Nairobi.*
a) The property of the Government;
b) Goods or chattels in the possession of the law;
c) Things delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade;
d) Things in actual use or occupation of the person distrained upon at the time of the distress;
e) Things of a perishable nature, or such as cannot be restored again in the same state and condition that they were before being taken or must necessarily be damaged by removal or severance;
f) Animals *ferae naturae*
g) Wearing apparel and bedding of the persons whose goods and chattels are being distrained upon and the tools and implements of his trade to the total value of one hundred shillings;
h) Things exempted from distress under the Electric Power Act; and
i) Any meter (together with fittings thereto) supplied and let on hire by a corporation or company supplying water to the premises on which the distress is levied for the purpose of ascertaining the quantity of water consumed on or supplied to those premises.

Other types of property may only be seized if there are not sufficient distrainable goods on the premises. These are sheep, beasts of plough and instruments used in a man’s trade or profession.

Section 7 of the Act stipulates the penalty for unlawful removal of goods, chattels, stock or crops distrained upon for rent from any place where they or any of them are lawfully stored or detained. Such an offender is liable to pay to the person(s) aggrieved by the removal treble the value of distrained property which had been removed. It is important to note that section 7 of the Act creates a criminal offence and only a criminal suit will lie against the offender for the recovery of the amount. As such, in *Fatemi Investments Ltd v Bayusuf*[^394] a civil suit for the recovery of treble the value of distrained property which had been unlawfully removed was dismissed.[^395] The Court stated that section 7 of the Distress for Rent Act creates a

[^394]: (1990) KLR 390
[^395]: The plaintiff averred that it was the landlord in certain premises in which a tenant named Sheikha Ventures operated a video library business. The tenant had fallen to arrears in rent and on the plaintiff’s instructions, a bailiff levied distress on the premises and seized the tenant’s goods. Part of these goods included 1000 video cassettes which had been in the possession of the defendant. The plaintiff further stated that after the levy of the distress, the defendant had wrongly removed the cassettes from the premises. The plaintiff therefore claimed from the defendant threefold the value of those cassettes as it was entitled to do under section 7 of the Distress for Rent Act cap 293.
criminal offence and imposes a penalty and if a person is charged with it, he must be presented in accordance with the safeguards contained in section 77(1-9) of the Constitution and the Criminal Procedure Code (Cap 21).

In levying distress, a certified bailiff must be employed.\textsuperscript{396} In \textit{Nthenge v Wambua}\textsuperscript{397}, Simpson J stated clearly stated that where a person is not empowered to act as a bailiff in accordance with section 18 of the Distress for Rent Act, then he couldn’t purport to discharge the functions of a bailiff under the Act. He further stated that a bailiff under the Act is appointed by the High Court and not the Business Premises Rent Tribunal created under Landlord and Tenant (Shop, Hotels and Catering Establishments) Act.

Further, not more than six years arrears of rent can be recovered by way of distress pursuant to the Limitation of Actions Act (Cap 22). Noteworthy, section 26 provides for reference to a subordinate court of a dispute arising in respect of any distress levied on an agricultural holding or ownership of any livestock distrained or any other matter or thing relating to a distress on an agricultural holding. Appeals from the subordinate court lies to the High Court.

The judicial system in Kenya has had myriad opportunities to deal with issues arising from the remedy of distress for rent. In \textit{Aroko v Ngotho and Another}\textsuperscript{398}, the High Court determined the question of applicability of double rent where the tenant fails to give vacant possession after termination of the lease. Githinji J. stated that though the English Distress for Rent Act 1737 specifically provides for double rent where the tenant fails to give vacant possession at the determination of the term for the lease, our Distress for Rent Act (Cap 293) has no such provisions.

In \textit{Wildlife Lodges Ltd T/a Landmark Hotel v Jacaranda Hotel Ltd}\textsuperscript{399} the High Court dealt with the issue of whether an order to levy distress extends to a right of re-entry and subsequent termination of the lease. In this case, the respondents leased the suit premises to the applicant for a period of ten years expiring in July 31 2006. In March 1999, the respondents instructed a firm of auctioneers to levy distress against their tenant to recover arrears of Kshs. 9.7 million. The auctioneers sought and received authority from the principal deputy registrar of the High Court to levy distress. However, purportedly acting on this

\textsuperscript{396} Section 18 Distress for Rent Act
\textsuperscript{397} (1984) KLR 799. In this case the plaintiff sued the defendants for damages arising out of illegal distress for rent on grounds that the second defendant did not hold a certificate as required and that the 1st defendant was liable for damages arising thereof as he had instructed the bailiff.
\textsuperscript{398} (1991) KLR 178
\textsuperscript{399} Civil Case No. 521 of 1999.
authority and as agents of the respondents, the auctioneers re-entered the suit premises and purported to terminate the lease. The Court held that a landlord cannot distrain and exercise a right of re-entry or forfeiture for non-payment of rents but he may and usually does join an action for arrears in an action for forfeiture. Further, in condemning the action of the auctioneers the Court said, “a court broker or auctioneer who behaves in this manner by going against the express authority granted to him by the court is not fit to remain in business as an officer of the court.”

In the case of Gusii Mwalimu Investment Co. Ltd, A.B. Shah J.A. summarized the position as follows:

“To obtain possession by levying illegal distress is per se wrong.... The bailiff has to be careful and follow the strict letter of the law between seizure and sale. Alas! In Kenya today bailiffs (who are court brokers) seem to flout the law with impunity. Distresses are used to obtain possession when the same can never be used for such purposes.... If what the landlord did in this case is allowed happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order of possession.”

ii. Forfeiture

The remedy of forfeiture allows the landlord to re-enter the premises, making the lease voidable at the landlord’s option if the tenant breaks a covenant. Almost all well drafted leases contain a stringent forfeiture clause which provides that in the event of any breach by the tenant ‘it shall be lawful for the landlord to re-enter upon the demised premises and peaceably to hold and enjoy the demised premises henceforth as if this lease had not been made and the term hereby granted shall absolutely determine.’

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400 The clear purpose of the landlord’s right of re-entry is to provide the landlord with a realistic form of security in the event of the tenant’s failure to discharge his obligations under the lease. In other words, the landlord is not relegated to a mere monetary claim in respect of the tenant’s breach, but may use the threat of recovery of possession as a lever to enforce compliance with the covenants. Sometimes, however, the landlord’s only substantial concern when faced with a defaulting tenant is to ensure the termination of the tenancy and the eviction of the tenant from the premises.
Pursuant to section 57 RLA, the forfeiture of a lease has the effect of determining every sublease and every other interest appearing in the register relating to that lease.\textsuperscript{401} In the English case of \textit{Butcher v Poole Corporation}\textsuperscript{402} it was stated by Lord Greene M.R. that a right of re-entry under the lease for breach of covenant is one the exercise of which determines the existing interest of the tenant. However, forfeiture procured in fraud of the subleasee shall be set aside by the court and deemed no to have determined the lease. Similarly the court may grant relief against forfeiture under section 59 of the Act.\textsuperscript{403}

In a tone akin to section 57 of the RLA, forfeiture has the effect of determining a lease under section 111(g) of the ITPA. However, forfeiture under this section can be waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting.\textsuperscript{404} This waiver is subject to two conditions: the lessor must be aware that the forfeiture has been incurred and that where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Moreover, under section 114 of the ITPA, the Court may grant relief to a lessee against forfeiture for non-payment of rent if at the hearing of the suit for his ejection, he pays or tenders to the lessor the rent in arrear, together with interest thereon and lessor’s full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days. This section came determination in the case of \textit{Shah v shah}.\textsuperscript{405} In this case, the dispute arose from a six-year lease between a tenant and a landlord over shop premises. The tenant had failed to pay a proportion of site value tax within seven days of receiving a notice from the landlord. Accordingly, the lease became liable to forfeiture and when the landlord sought to regain possession so as to carry demolition the tenant obtained an \textit{ex parte} injunction to stop the demolition. In their defence and counterclaim the tenant sought relief from forfeiture under section 114 of the ITPA and for his option to renew the lease as provided for to be affirmed. The landlord sought to set aside the \textit{ex parte} injunction and further prayed for a permanent injunction restraining the tenant from trespassing in the shop premises occupied by him.

\textsuperscript{401} See also section 111 (g) ITPA
\textsuperscript{402} (1943) 1 KB 48 at p. 54
\textsuperscript{403} The High Court has a general discretion, rooted in its ancient equitable jurisdiction, to grant relief against forfeiture. In the leasehold context this discretion is exercisable in cases where less than six months’ rent is in arrear and the tenant tenders full payment before the trial date. It is similarly exercisable where the tenant tenders payment of all arrears and costs subsequent to the granting of possession order, provided in general that application for relief is made within six months of the execution of the judgment for possession.
\textsuperscript{404} Section 112 ITPA.
\textsuperscript{405} Civil Case No. 1981 of 1979, High Court at Nairobi (Simpson J)
In declining to grant the tenant’s prayer for relief against forfeiture, Simpson J stated that:

“In this case the defendant issued a cheque which was dishonoured, wrongly prevented the levying of distress, tendered the amount due without interest or costs, denies any breach of the covenant in question despite clear evidence of such breach and asks for the suit to be dismissed with costs. In the circumstances it seems to be unlikely that any court would grant relief against forfeiture.”

He further noted that where a tenant is in breach of a covenant conditional to a renewal of the lease, the option to exercise such renewal is extinguished and the landlord is entitled to forfeiture of the lease.

For forfeiture to be legal, the landlord must issue the tenant with a notice specifying the particular breach complained of, a requirement that the lessee remedy the breach if it is capable of remedy within a reasonable time, and a requirement that, in any case other than non-payment of rent, the tenant make compensation in money for the breach. It is only upon the failure of the tenant to discharge these requirements contained in the notice, that the landlord is entitled to exercise his right of forfeiture.

iii. Action for Recovery of Rent Arrears

An action for recovery of arrears may only be instituted subject the six years limitation period stipulated by the Limitation of Actions Act (Cap 22). This action may not be brought where the landlord has already distrained, unless the seized goods or chattels have already been sold and found to be of inadequate value.

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406 Where a breach is ‘capable of remedy’, the real object of the notice procedure is to afford the tenant two opportunities before the landlord proceeds to enforce his right of re-entry. First, the notice gives the tenant the opportunity to remedy his breach ‘within a reasonable time’ after the service of the notice. Second, the notice procedure further allows the tenant to apply to the court for relief from forfeiture.

407 Section 58 RLA and section 114A (1) ITPA

408 The purpose of this notice was explained by Slade LJ in Expert Clothing Service & Sales Ltd v Hillgate House Ltd (1986) Ch 340 at 358A. He noted that the notice procedure is important so as ‘to give even tenants who have hitherto lacked the will or the means to comply with their obligations one last chance to summon up that will or find the necessary means before the landlord re-enters’.
iv. Action for Damages

Damages may be awarded by the court where a landlord proves breach by the tenant of any covenant other than a covenant respecting payment of rent. Except where the breach is of repairing covenant, damages are assessed on the usual contractual basis. Their purpose is to place the landlord in the position- in so far as this can be done by means of a monetary award- in which he would have been if there had been no breach by the tenant. Damages for breach of a tenant’s covenant to keep or put premises in repair cannot exceed the amount by which the value of the reversion has been diminished through the breach.409

v. Injunction

It is possible in appropriate circumstances for the landlord to seek the discretionary remedy of the injunction for the purpose of restraining breaches of certain covenants in the lease. A landlord seeking an injunction for purposes of restraining a breach on the part of a tenant must be aware of the principles for granting an injunction as established in the case of Giella v Cassman Brown Co. Ltd.410 the conditions as set out in this case were restated by the Court of Appeal in Kenya Commercial Finance Co. Ltd v Afraha Education Society411 in the following terms:

“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt, it will decide the application on a balance of convenience…. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

409 The measure of damages recoverable by a landlord for the breach of a repairing covenant formerly varied according to the time of the breach. If the breach occurred during the term, damages were calculated on the decrease in the value of the reversion caused by the breach, i.e. on the difference in the value of the landlord’s interest with the repairs done and its value without. Thus the longer the lease had to run, the less would be the damages. But if the breach occurred at the end of the term, the cost of repairing the premises was recoverable by the landlord even if he did not propose to spend the money in making the repairs but intended to demolish the premises instead. Now, however, damages for breach of a repairing covenant are not to exceed the diminution in the value of the reversion, though if the repairs are going to be done, that diminution will usually be measured by the cost of the repairs. Further, no damages are recoverable if the premises are to be demolished, or structurally altered in such a way as to make the repairs valueless, at or soon after the end of the term.
410 (1973) EA 358.
411 (2001) 1 EA 86
However, no mandatory injunction is available to enable the landlord to compel the tenant’s performance of a covenant to repair the demised premises.  

5.5.2 Enforcement by a Tenant

It is open to the tenant to institute proceedings against the landlord for an injunction and/or damages. In certain cases, it is also open to the tenant to repudiate the agreement altogether i.e. where landlord fails to carry out repairs.

5.6. TERMINATION OF LEASES AND CONSEQUENTIAL EFFECTS

There are several possible ways in which a lease or tenancy may come to an end in Kenyan law. These ways include the following:

5.6.1 Termination by Notice

Essentially, a notice to vacate the premises is required where the lease is for a fixed term, if such was prescribed in the lease agreement. Pursuant to section 64(1)(d) RLA, a lease is determined where a notice duly given to determine the lease has expired. A Periodic tenancy does also require notice of termination. Section 46(1) RLA states that a periodic tenancy may be determined by either party giving to the other notice, the length of which shall, subject to any other written law be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

Under the ITPA, a lease for agricultural or manufacturing tenancies is determinable on the part of either party by six months notice expiring with the end of a year of the tenancy. A lease for any other purpose are terminable, on the part of either party, by fifteen days’ notice expiring with the end of a month of tenancy. In *Rajwani v Roden*, Law JA held that a tenant cannot put an end to a tenancy from month to month without giving a valid notice, and the tenancy persists until a valid notice is given or the landlord re-enters.

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412 Hill v Barclay (1810) 16 Ves 402 at 405f, 33 ER 1037 at 1038. Compare, however, S.E.D.A.C. Investments Ltd v Tanner (1982) 1 WLR 1342 at 1349, where it was suggested that the remedy of mandatory injunction might be open to the landlord.
413 Section 106 ITPA.
414 Ibid.
415 (1990) KLR 4-12.
Further, section 111(h) ITPA stipulates that a lease may determine on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. However, a notice given under this section is waived, with the express or implied consent of the person to whom it is given, by an act on the part of the person giving it showing an intention to treat the lease as subsisting.\(^{416}\)

Where a notice is required, it must be given in the proper form otherwise it will be invalid. Notices under section 106 ITPA, for example, must be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property. Where an improper notice is given or not given at all, a suit for eviction cannot stand. A valid notice is one which clearly and unconditionally requires the tenant to vacate or quit the premises on a specified day.

**5.6.2 Termination by Effluxion of Time**

A lease or tenancy for a fixed term automatically terminates on the expiry of the stipulated period without any requirement that the tenant should be given any form of notice to quit. Similarly, when an event upon which the lease is expressed to come to an end has occurred then the lease terminates automatically. For example, a lease for the life of the lessee terminates automatically upon the death of the lessee. Under the RLA and ITPA termination by effluxion of time is provided for by section 64(1)(a) and section 111(a) respectively. It is worth noting that the determination of a lease must be entered in the register pursuant to section 43 RLA.

**5.6.3 Termination by Surrender of the Lease**

A lease or tenancy may be determined by a surrender of the tenant’s interest to his immediate landlord. If the landlord accepts surrender, the tenant’s term of years merges forthwith in the landlord’s reversion and is extinguished. A surrender of the tenant’s term may be made either expressly or impliedly by operation of the law. Halsburys Laws of England vol 27 at paragraphs 444–450 captures termination of a lease by surrender in the following phrase:

\(^{416}\) Section 113 ITPA
“A surrender is the yielding up of the term of the lease to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion. The surrender may be either express, that is by an act of the parties having the expressed intention of effecting a surrender, or by operation of law, that is as an inference from the acts of the parties. An express surrender will not be difficult to define—as it is either by deed or in writing. Surrender by operation of law will present some problems.”

A detailed examination of both express and implied surrender (surrender by operation of the law) is undertaken hereunder.

**Express Surrender**

Since the surrender of a tenant’s term is effectively a disposition of an estate in the land, an express surrender must be contained in a deed in order to be effective at law. As such, section 63 RLA provides that where the lessor and the lessee have agreed that the lease shall be surrendered, then the procedure of surrender shall be as follows:

a) An instrument shall be prepared in the prescribed form, or else the word “surrendered” shall be endorsed on the lease or on the duplicate or triplicate thereof;
b) The instrument or endorsement shall then be executed by the lessee;
c) The Registrar shall then cancel the registration of the lease; and
d) The instrument or endorsed lease shall then be filed.

In addition to this procedure it is stated that no lease which is subject to a charge or a sublease shall be surrendered without the consent in writing of the proprietor of the charge or sublease.

The RTA provides for a similar procedure under section 44 (1). Further, section 45 states that an entry must be made in the register of the surrender of the lease upon the abandonment of the occupation of the land by the lessee and the re-entry of the lessor. However, in *Mwinyi Hamisi Ali v Attorney General and Another*, where the lessees only made factual surrender of the suit premises and failed to register the same, the Court of Appeal held that section 44 does not envisage a situation whereby lack of such registration would make null and void *de facto* surrenders.

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417 Civil Appeal No. 125 of 1997 (Court of Appeal at Mombasa).
The ITPA too, at section 111(e), provides for the determination of a lease by express surrender i.e. in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them. In addition, the Act provides that a surrender, express or implied, does not prejudice an under-lease of the property or any part thereof previously granted by the lessee.\textsuperscript{418} Under the GLA express surrender is effected by way of a registered instrument of surrender.

**Implied Surrender**

Surrender occurs impliedly where, with the landlord’s concurrence the tenant consciously does some act which is inconsistent with the continuance of the tenancy. Section 111(f) recognizes the determination of a lease by implied surrender. The foundation of implied surrender is that the parties have done some act showing an intention to terminate the lease, and the circumstances are such that it would be inequitable for them to rely on the fact that there has been no surrender by a deed.\textsuperscript{419} Halsbury's Laws of England gives a detailed description of implied operation as follows:

“There will be a surrender by operation of law where the tenant delivers possession of the demised premises to the landlord and the landlord accepts the possession. The next question relates to what matters will amount to a delivery of possession sufficient to effect a surrender. One of the acts that will amount to a delivery of possession is where the tenant returns the keys to the premises and the landlord accepts them with an intention of changing possession. The fact that the landlord attempts re-let the premises is not sufficient of itself to constitute him as having taken possession nor is the fact of his entry to do repairs nor by making occasional use of a part of the premises. There will also be a surrender by operation of law in the following cases:-

(a) Where the tenant takes a new lease from the landlord to commence during the term of the old lease;
(b) Certain agreed alterations of a leave involve the surrender of the previous tenancy and its replacement by a new one;
(c) A surrender is implied when the tenant remains in occupation of the premises in a capacity inconsistent with his being a tenant, where, for instance,

\textsuperscript{418} Section 115 (1) ITPA.
\textsuperscript{419} See Glynn v Coghlan (1918) 1 L.R. 842 at 485; Hogget v Hogget (1980) 39 P & CR 121 at 126; Oaster v Henderson (1877) 2 QBD 575 at 578.
becomes the landlord’s employee, or where the parties agree that the tenant is in future to occupy the premises rent free for life as in licencee; and

(d) The grant by the landlord of a new lease to a third person, with the tenant’s consent, provided the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease. The same effect is produced where the landlord, with the tenant’s consent, accepts another person as tenant and that other person takes possession, unless the landlord reserves his rights against the original tenant or is induced to accept the new tenant by the fraud of the original tenant.”

In the case of *Moses Wachira Kamunyu v Fredrick Kagio Kinyua & 4 Others*,\(^{420}\) the question as to when a lease is said to be terminated by implied surrender came up determination. The Plaintiff was the Defendants’ controlled tenant under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301, of L.R. No. 209/2496 GIKOND BUILDING (Shop No. 1). The Defendants served the Plaintiff with a notice of termination of tenancy under Section 4(2) of the Act. The Plaintiff, not intending to comply with the notice, referred the matter to the Tribunal established under section 11 of the Act. From the correspondence passing between the Plaintiff’s Advocates and the Defendants’ Advocates, it became apparent that the parties were negotiating the termination of the tenancy but the result of that negotiation remain unclear as none was recorded in the Reference before the Tribunal. The tenant was nevertheless removed from the demised premises and a new tenant put therein. At the hearing hereof before the plaintiff argued that he had been evicted unlawfully and thus prayed that he be reistated to the suit premises. On their part, the defendants argued that the Plaintiff had not been evicted illegally but had himself surrendered the tenancy. Alnashir Visram J held as follows:

“No, can it be said in the circumstances of this case that the Plaintiff surrendered the tenancy with the Defendants? The negotiations between the parties were no doubt an effort directed at the surrender of the tenancy: The Plaintiff was not introduced a third party to become the Defendant’s new tenant. It has already been seen that these negotiations were never completed – at least nothing formal came of them. In that case, there can be no surrender. This, therefore, means that the Plaintiff was never lawfully put out of possession of the demised premises. There is no further evidence of surrender, for example, that the Plaintiff delivered possession of the demised

\(^{420}\) HCCC No. 254 of 2001 (Nairobi)
premises. The Defendants tried to lead evidence that the Plaintiff had removed his goods from the demises premises but there is also that some of his goods are still there. It is not at all clear that the Plaintiff delivered possession of the demised premises voluntarily. Did he return the keys to the premises? Did the landlord accept them with intention of changing possession? This matters were never explained satisfactorily. I am left to believe, on a balance of probability, that the Plaintiff never delivered possession of the demised premises. There was never a surrender of the demised premises.”

5.6.4 Termination by Forfeiture

As was noted above, a forfeiture of a lease has the effect of determining a lease. Under section 56(1) RLA the lessor’s right of forfeiture arises where the lessee;

a) Commits any breach or omits to perform any obligations under the lease.

b) Is adjudged bankrupt.

c) Being a company, goes into liquidation.

The right of forfeiture upon arising may be enforced by a court action by either the lessor or his agent. Under section 56(3), this right to forfeit may be waived by accepting rent arrears or otherwise by other conduct (on the part of the lessor) which shows that the lessor is still treating the lease as subsisting. Forfeiture is undertaken either by peaceable re-entry of the premises by the lessor where the lessee is in occupation or by a court action i.e. an action for eviction.

5.6.5 Termination by Frustration

Traditionally, because leases are more than mere contracts in that they create estates in land, the individual covenants contained in a lease were suspended or discharged in so far as supervening impossibility of performance affected the continuing or future obligations. However, it is today accepted that that the contractual doctrine of frustration may sometimes apply to the existence of the lease as a whole. Under section 108(e) ITPA, a lease is frustrated if any material part of the property is wholly destroyed or rendered substantially and

421 To constitute a waiver, express or implied, two elements must be present. First, the landlord must be aware of the acts or omissions of the tenant giving rise to the right of forfeiture. Secondly, the landlord must do some unequivocal act recognising the continued existence of the lease.
permanently unfair for the purposes for which it was let. In such a circumstance the lease is voidable at the option of the lessee.

Under the RLA where such destruction has occurred, the rent payable is wholly or partially suspended until the property has been rendered fit for occupation and use.\textsuperscript{422} However, if the property is not rendered fit for occupation and use within six months of the damage, the lessee may determine the lease by giving one month’s notice to the lessor.\textsuperscript{423}

5.7. LEASEHOLD CONVEYANCING UNDER THE SECTIONAL PROPERTIES ACT

An emerging area of conveyancing that is gradually taking hold in Kenya and worth detailing here falls under the Sectional Properties Act No. 21 of 1987.\textsuperscript{424} This Act was formulated to enable the acquisition of flats in high-rise buildings as a consequence of the diminishing stock of land in the country and the corresponding increase in the price of available land. The act aims at providing for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common.\textsuperscript{425} It also provides for the use and management of the units and common property and for connected purposes.\textsuperscript{426} The process availing individuals with titles to a part of a building allows for the financing of such acquisitions because such titles can be used as collateral.

The Act draws its uniqueness from the fact that it allows for the individual ownership of a unit.\textsuperscript{427} Since, as it has already been noted, estates in land are either freehold or leasehold, it follows that flats can be sold on a freehold or leasehold basis. Leasehold conveyancing seems to be the preferred method of disposing of flats and the reason for this stems from the principle that at common law a positive covenant cannot run with freehold land.\textsuperscript{428} This common law position was because a successor in title was not a party to the contract containing the covenant.\textsuperscript{429} A lease, however, allows for the running of positive covenants in

\textsuperscript{422} Section 53(e) RLA
\textsuperscript{423} Ibid.
\textsuperscript{424} The Sectional Properties Act was passed into law on 23\textsuperscript{rd} December 1987 but the actual date of commencement is April 1990. It is based on the Condominium Property Act of the province of Alberta, Canada, which in turn is molded on the Strata Titles Act of New South Wales, Australia.
\textsuperscript{425} Preamble, Sectional Properties Act No. 21 of 1987.
\textsuperscript{426} Ibid.
\textsuperscript{427} Ibid.
\textsuperscript{428} A unit is a space that is situated within a building and described in a sectional plan by reference to floors, walls and ceilings within the building. See Section 3(1) Sectional Properties Act.
\textsuperscript{429} A positive covenant is one that can be complied with by taking some action e.g. repairing a door, a wall, paying insurance etc. this is unlike a restrictive covenant, which is complied with by not taking action.
\textsuperscript{429} See Austeberry v Oldham (1185) 29 Ch D 750
land. This is because the covenants in a lease are entered into on behalf of the covenantor as well as his successor in title. Therefore, upon the application of the doctrine of privity of estate, the current lessor and lessee can enforce the lease covenants as against each other.

The Sectional Properties Act applies to land registered under any act of parliament but any land registered under the Governments Lands Act or the Registration of Titles Act is deemed to be registered under the Land Act as soon as a sectional plan is registered under the Act. Pursuant to Section 4 of the Act “an existing or planned structure may be designated a building containing a unit or part of a unit or divided into two or more units by the registration of a sectional plan.” A sectional plan then, is the instrument that brings any land/building(s) under the provisions of the Act.

### 5.7.1 Transfer of Sectional Property

The transfer of sectional property begins with preparation and registration of a sectional plan. A sectional plan must:

- Describe two or more units in it;
- Be described in the heading of the plan as a sectional plan;
- Delineate the external surface boundaries of the parcel and the location of the building in relation to them;
- Bear a statement containing those particulars as may be necessary to identify the title to the parcel;
- Include a drawing illustrating the units and distinguishing the units by numbers or other symbols;
- Define the boundaries of each unit;
- Show the approximate floor area of each unit;
- Have enclosed on it a schedule specifying in whole numbers the unit factor for each unit in the parcel;
- Be signed by the proprietor;
- Have endorsed on it the address at which documents may be served on the corporation concerned;
- Contain any other particulars prescribed by the regulations.

Having prepared the sectional plan, it is presented for registration in quadruplicate. The sectional plan presented for registration must endorsed by the following as set out in section 11 of the Act.
A certificate of survey as defined under the Survey Act stating that the structure that is shown in the plan is within the external surface boundaries of the parcel which is the subject of the plan and if gutterings project beyond those external boundaries, that an appropriate easement has been granted as an appurtenance of the parcel;

A certificate of local authority stating that the proposed division of the structure as illustrated in the plan has been approved by the local authority;

The plan must also be accompanied by a certificate of a surveyor as defined under the Survey Act or such other person as shall be approved by the Director of Survey stating that the units shown on the plan correlate with the existing structure.

As soon as a sectional plan is registered, the title to a unit comprised in the plan shall, with effect from the date of the registration of the sectional plan, be deemed to be issued under the RLA. Further, Sectional 9(3) of the Act provides that 21 days from the date of the registration of the sectional plan, a copy of the registered plan shall be delivered to the local authority of the area in which the parcel is located.

After registration, the register of the parcel described in it is closed and the Registrar opens a separate register for each unit that has been described in the plan. The register in respect of each unit shall include the share in the common property apportioned to the owner of that unit. Common property includes all rights of support, shelter and protection, and for passage or provision of water, sewerage, drainage, gas, electricity, garbage, air and all other services of whatever nature (including telephone, radio and television services) over the parcel and every structure thereon as may from time to time be necessary for the reasonable use or enjoyment of the property or unit.

The Act provides that common property shall be held by the owners of all the units as tenants in common (as opposed to joint tenants) in shares proportional to the unit factors for their respective units. Consequently, a share in the common property shall not be disposed of or become subject to a charge except as appurtenant to the unit of an owner and a disposition of a charge on a unit shall operate to dispose of or charge that share in the common property without express reference to it.

On payment of the prescribed fee, a certificate of sectional property in respect of each unit is issued whereupon each unit may be transferred, leased, charged or dealt with in the same manner as land held under the RLA. In departure from conveyancing transactions under the GLA, the RTA and the RLA, the Act provides comprehensive details regarding how a developer is to sell a unit or a proposed unit to a purchaser. Under section 46(i) of the Act, a
developer shall not sell or agree to sell a unit or proposed unit unless he has delivered to a purchaser a copy:

a) The purchase agreement;
b) The by-laws or proposed by-laws of the corporation;
c) Any management agreement or proposed management agreement;
d) Any recreational agreement or proposed recreational agreement;
e) The lease of the parcel; if the parcel on which the unit is located is held under a lease and certificate of sectional property in respect of the unit or proposed unit which has been or will be issued under the Act;
f) Any charge that affects or proposed charge that will affect the title to the unit or proposed unit or, in respect of that charge or proposed charge a notice prescribed under section 46(2);\(^{430}\)
g) The sectional plan or proposed plan.

Under the provisions of section 46(3), a purchaser of a unit under the section may, without incurring any liability for doing so, rescind the purchase agreement within 10 days from the date the purchase agreement was executed by the parties to it. A purchaser may, however, rescind the purchase agreement under section 46(3) if all the documents required to be delivered to the purchaser under section 46(2) have been delivered to the purchaser not less than 10 days prior to the execution of the purchase agreement by the parties to it. Where a purchase agreement is rescinded under section 46(3), the developer shall, within 10 days from his receipt of a written notice by the purchaser of the rescission, return to the purchaser all of the money paid in respect of the purchase of the unit.

Section 47 of the Act prescribes the format of the purchase agreement to be entered into between a purchaser and developer. It states that the purchase agreement should include the following:

a) A notification that is at least as prominent as the rest of the contents of the purchase agreement and that is printed in red ink on the outside front cover or on the first page of the purchase agreement stating as follows:

“The purchaser may, without incurring any liability for doing so, rescind this agreement within ten days of its execution by the parties to it unless all of the

\(^{430}\) The notice referred to in section 46(1)(f) should state:
1. The maximum principal amount available under the charge;
2. The maximum monthly payment that may be paid under the charge;
3. The amortization period;
4. The term;
5. The interest rate or the formula, if any, for determining the interest, and
6. The prepayment privileges, if any.
documents required to be delivered to the purchaser under section 46 of the Sectional Properties Act, 1987 have been delivered to the purchaser not less than ten days prior to the execution of this agreement by the parties to it.”

b) A description, drawing or photograph showing:
   i. The interior finishing of all major improvements to the common property located within a building;
   ii. The recreational facilities, equipment and other amenities to be used by the person residing in the residential units;
   iii. The location of roadways, walkway, fences, parking areas and recreational facilities;
   iv. The landscaping; and
   v. The exterior finishing amount of the building as it will exist when the developer has fulfilled his obligations under the purchase agreements.

c) The amount or estimated amount of monthly unit contributions in respect of a residential unit; and

d) The unit factor of the unit and the basis factor apportionment for all units comprised in sectional plan.

Under the provisions of section 48, a developer or a person acting on his behalf is obliged by statute to hold in trust all the money paid by a purchaser under a purchase agreement other than rents, security deposit or mortgage advances. If the improvements to the unit and the common property are substantially completed, the money may be paid to the developer on delivery of the title documents to the purchaser. If the improvements to the unit are substantially completed not more than 50% of that money less the interest earned on it may be paid to the developer on delivery of the title documents to the purchaser. On the improvements to the common property being substantially completed, the balance of that money and all the interest earned on the total amount held in trust in respect of that purchase agreement may be paid to the developer. Improvements are deemed to be substantially completed when improvements are ready for use or are being used for the purpose intended.

The developer or whoever receives the purchase money in an interest earning trust, should the keep the same in an account maintained in a bank or financial institution licensed under the Banking Act. Where money is held in the trust as aforesaid, and the purchaser of the unit takes possession of or occupies the unit prior to the receiving the title document, the interest earned on that money from the day the purchaser takes possession or occupies the document unit to the day he receives the title document shall be applied against the purchase price of
the unit. Subject to this provision, the developer is entitled to the interest earned on money held in trust.

The protection or benefits afforded to the purchaser regarding deposited funds are however rendered void if the purchaser fails to perform his obligations under the purchase agreement. Further, if a purchaser of a unit prior to receiving title to the unit, rents that unit from the developer, the amount that the developer may charge the purchaser as a security deposit in respect of the unit shall not exceed one month’s rent charged for the unit.\textsuperscript{431}

The Act empowers the Minister to make regulations for, \textit{inter alia}, regulating the forms to be used under the Act including the form of certificates of title and the manner of registering sectional plans. The said regulations have not been gazetted since commencement of the Act though their preparation is underway. As at now, transactions under the Act are being carried out under the auspices of Practice Notes formulated by the Department of Lands.

\textbf{5.7.2 Management of Sectional Properties}

The Sectional Properties Act, 1987 provides for a unique method in managing property under the Act warranting a brief exposition herein. Upon registering and declaration of a particular parcel as sectional property, a body known as the corporation comes into being. The corporation is constituted under the name ‘The Owners, Sectional Plan No…(the number to be specified being the number given to the plan on registration). The corporation consists of all those persons who are owners of the units in the parcel or who are entitled to the parcel when the sectional arrangement is terminated under the Act. The corporation shall have perpetual succession and a common seal but the provisions of the Companies Act (Cap 486) shall not apply to the corporation.

The core function of the corporation is to control, manage and administer the common property including payment of any insurance premiums, land rent etc. to perform these functions the corporation is required to set up a fund and raise money for the fund by levying contributions on the proprietors in proportion to the unit entitlement of their respective units.

It is compulsory under section 26 of the Act that a corporation has a board of management (hereunder “the board”). It is the board that exercises the powers and duties of the corporation. When a developer registers a sectional plan, he shall within 90 days from the day that 50% of the residential units are sold, or 180 days from the day that first residential unit is sold, whichever is sooner, convene a meeting of the corporation at which the board shall be

\textsuperscript{431} Section 49 Sectional Properties Act, 1987.
elected. Having been elected, the board shall within 28 days appoint an institutional manager to manage the units, the common property and the immovable property of the corporation.

The institutional manager must be either an accountant who has held a practicing certificate for a period of not less than 5 years,\textsuperscript{432} or a registered estate agent,\textsuperscript{433} or an advocate. He may be replaced upon an application to the tribunal established under the Act, which application can only be made by a local authority or a judgment creditor of the corporation for an amount not less than five thousand shillings or any person having a registered interest in or over the units comprised in a sectional plan. If the institutional manager relinquishes office, the board must appoint a new one within 20 days.

If an owner, tenant or other person residing in a residential unit contravenes a by-law, the corporation may take proceedings in the tribunal, established under section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act to recover from the owner or tenant or both a penalty of not more than Ksh. 25,000 in respect of that contravention. The corporation can however only commence such proceedings if it is allowed to do so by its by-laws. In addition to the other powers conferred by the Act, the corporation has power to recover from an owner by an action in debt any sum of money spent by the corporation pursuant to a by-law or as required to make statutory payments.

\textbf{5.7.3 Termination of Sectional Property status}

The Sectional status of a building may be terminated by unanimous resolution of the corporation. An application to terminate the sectional status of a building may also be made to the court by the corporation, an owner, a registered chargee of a unit or a purchaser under an agreement for sale of a unit. If, having regard to the rights and interests of the owners as a whole or the registered chargee or purchaser, the court considers it just and equitable to do so then the court may declare that the sectional status be terminated. Upon termination, the unit and sectional plan registers are closed and the land register closed under section 5(1) of the Act is reopened.

\textsuperscript{432} See the Accountants Act (Cap 531Laws of Kenya)
\textsuperscript{433} See the Estate Agents Act Cap (Cap 533 Laws of Kenya)
CHAPTER SIX
TRANSACTIONS IN MORTGAGES AND CHARGES

6.0. UNDERSTANDING MORTGAGES AND CHARGES

Mortgages and charges are basically borrowing transactions. Though encumbrances, they have gained great significance in capitalist economies. The device of the mortgage (and the closely related device of the ‘charge’), as Kevin Gray observes, are designed to provide creditors with a valuable form of security for loan money advanced by them.\(^{434}\) According to Lord Upjohn, ‘it has been the policy of the law for over a hundred years to simply and facilitate transactions in real property. It is of great importance that persons should be able freely and easily to raise money on the security of their property.’\(^{435}\)

When analysed in social and human terms, mortgage finance can be said to play a vital part in the realization of the life chances and aspirations of a large section of the population.\(^{436}\) A firm grip of transactions in mortgages and charges must be informed by a succinct understanding of what entails mortgages on the one hand and charges on the other and the distinction thereof.

The definition offered by Lindley LJ in the case of Santley v. Wilde\(^ {437}\) remains so far the most elaborate and widely accepted definition of a mortgage. He defined a mortgage as ‘a disposition of some interest in land or other property as a security for the payment of a debt or the discharge of some other obligation for which it is given’. In simpler terms a mortgage is a conveyance of land as a security for the payment of a debt or the discharge of some other obligation. The institution of the mortgage thereby permits the lender (the ‘mortgagee’) to be in a privileged position of being a secured creditor of the borrower (the ‘mortgagor’) with the consequence that he enjoys priority over the latter’s unsecured creditors if the latter becomes insolvent. As such, the mortgagee, for the purpose of recovering the amount of his loan, enjoys not merely a personal right based on his contract of loan with the borrower, but also a proprietary right, potentially enforceable against third parties, to realize the value of the mortgaged property.

On the other hand, a charge is commonly regarded as a species of the mortgage for most practical purposes. However, whereas a mortgage actually invests the mortgagee with an

\(^{435}\) See Provincial Bank Ltd v Hastings Car Mart Ltd (1965) AC 1175 at 1233f.
\(^{436}\) Supra n. 372.
\(^{437}\) (1899) 2 Ch 474. See also Swiss Bank Corp n. v. Lloyds Bank Ltd (1982) AC 584 at 595c-D per Buckley LJ.
interest in the secured property, a charge confers no such interest but merely gives the ‘chargee’ certain rights (e.g. in respect of possession and sale) over the property charged as security for the loan. An equitable charge, for example, does not pass either an absolute or special property to the creditor or any right of possession, but only a right of realization by judicial process in case of non-payment of the debt. Principally, therefore, the title to the property in a mortgage is the security whereas with respect to charges, there is only mere appropriation of the property as security for a debt. Nevertheless the practical distinction between mortgages and charges is relatively unimportant. For this reason, the RLA has fully assimilated the distinction between mortgages and charges and as a result it created a “mongrel” fashioned after Section 85 of the 1925 Law of Property of England.

Thus, the definitions of mortgages and charges in Kenyan statutes are moulded around the foregoing understanding. Section 58 (a) of the ITPA defines a mortgage as ‘the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability’. A charge is defined by the RLA at section 3 as ‘an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes subcharge and the instrument creating a charge.’ The distinction between mortgages and charges is further well captured by section 65 (4) of the RLA which stipulates that ‘a charge shall not operate as a transfer but shall have effect as security only’.

6.1. MORTGAGES AND CHARGES IN A HISTORICAL CONTEXT

The idea of a mortgage is founded on very ancient Roman law, Mohammedan law, English common law and Hindu law. Under the Roman law, the first aspect of the mortgage institution to develop was the *fiducia*. Essentially, it was a fiduciary relationship between a lender and a borrower. Property was given to the person lending in return for a loan. Upon default, the same was forfeited to the lender regardless of its value. The second limb was the *pigmus*. This one entailed a transfer of possession but without the element of forfeiture as in the fiducia. Upon default, the property was merely sold and not forfeited. The third one was the *hypotheca*. This one merely entailed a pledge without delivery of possession but the creditor had the power of sale which he could exercise upon default. However, he was required to account for the proceeds from the sale.

438 See London County and Westminster Bank Ltd. v. Tompkins (1918) 1 K.B. 515
439 Ibid. See also Weg Motors Ltd. v. Hales (1962) Ch 49 at 77
440 See Megarry’s Manual of Property Law (7th ed) at pp. 447-448
Under the Mohammedan law, the idea of interest is alien/offensive to this religion. Accordingly, they developed the Bye-Bil-Wafa which is equivalent to the English usufructuary mortgage where the borrower would pledge his property to the lender and promise to pay the debt but the lender had the right to take rent from the property without accounting for it until such a time when he fully recovered the principal.

In common law, the mortgage institution was originally characterized by a pledge of property to a lender coupled with transfer of possession only and not title. Eventually this developed into what is currently known as the English mortgage which is basically a conveyance of the property with a proviso known that the mortgagee will re-convey the property in question to the mortgagor upon the payment of the debt/principal. It is noteworthy that the historical pattern of the English law of mortgage, security interests in land have been created by means of the manipulation of existing estates and interests in the land of the borrower of money. This practice has brought about the consequence that the law of mortgage is heavily marked by fiction. As Maitland said, the mortgage transaction is ‘one long suppressio veri and suggestio falsi.’ Lord Macnaghten declared in Samuel v. Jarrah Timber and Wood Paving Corp Ltd that ‘no one...by the light of nature ever understood an English mortgage of real estate.’

It is also important to note that under the English common law, by virtue of the fact that land could be pledged as security for loan, two types of pledges evolved by the 12th century: the living pledge (vivum vadium) and the dead pledge (mortum vadium). Under the living pledge, the lender took possession of the land, recovered profits and rents as discharge of both the principal sum and the interest on the loan. On the contrary, the lender received rents and profits as discharge of the interest only under the dead pledge. It is these two types of pledged that developed eventually into the English mortgage already discussed.

Initially, the practice was that a borrower, upon defaulting in repaying the loan, had to forfeit the land which he had conveyed as security for the loan to the lender. Consequently, he would lose the land regardless of its value, which was quite harsh. Equity intervened to remedy these harsh provisions of common law, guided by the principle that 'once a mortgage, always a mortgage.' The principle was interpreted by the chancery courts to mean that the

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442 (1904) AC 323 at 326
443 See Grangeside Properties Ltd v. Collingwoods Securities Ltd (1964) 1 WLR 139 at 142f. In this case Harman LJ referred to ‘the ancient law, which had always been that Chancery would treat as a mortgage that
basic right of the lender was his money (the principal) and that his interest and right in the land was only a security for the loan. By further construction, the courts developed the rule that failure to repay the loan on the agreed date did not extinguish the borrower’s interest in his land. Accordingly, a default in repaying the loan did not necessarily have to cause the borrower to forfeit the land to the lender.

Eventually, by applying this principle, the courts of equity developed the equity of redemption and the equitable right to redeem. The first limb gave the mortgagor a general right to redeem his property on or before the date of redemption. The equitable right to redeem gave the borrower a right to redeem the property long after the expiration of the agreed date of redemption. It is in view of these equities that the court in Santley v. Wilde\textsuperscript{444} observed that, ‘the essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property, with a provision for redemption, i.e. that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed.’\textsuperscript{445}

6.2. THE LAW OF MORTGAGES AND CHARGES

Due to statutory intervention in Kenya, the mortgage institution has acquired a somewhat different colouring. For instance, there must be a lending or an existing or a future debt for a mortgage to exist. The Banking Act (Cap 488 Laws of Kenya) at section 2 thereof, initially appeared to provide that lending was to be done at the banker’s risk. It did not make acquisition of security by banks compulsory.

The fallacy of this state of affairs was rudely exposed in the mid 1980s when numerous lending institutions went under to the devastation of many Kenyans. This collapse was principally caused by the fact that most of these institutions had lent without acquiring security first. Fortunately, Act No. 9 of 1989 altered this sorry state of the law by making the acquisition of security by lending institutions a matter of law. Further even the Central Bank of Kenya Act (Cap 491 Laws of Kenya) requires lending institutions to take security before lending.
6.2.1 Classification and Creation of Mortgages

There are two broad categories of mortgages that have evolved as a result of the historical pattern discussed above. These are legal mortgages and equitable mortgages.

i. Legal Mortgages

Section 58 of the ITPA creates four types of legal mortgages recognizable under Kenyan law: simple mortgage, mortgage by conditional sale, usufructuary mortgage and English mortgage. It is important to note that where the principal money to be secured is one hundred rupees or upwards, it is required that the mortgage be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property. I now examine these classes of legal mortgages in turn.

- Simple Mortgage

In a simple mortgage, there is no delivery of possession but the mortgagor binds himself to personally pay the mortgage money and agrees that the mortgaged property will be sold upon his default and the proceeds thereof applied towards discharging the mortgage debt. Section 58 (b) illustrates well what constitutes a simple mortgage as follows;

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgage shall have a right to cause the mortgaged property to be sold and the proceeds of sale to applied, so far as may be necessary, in payment of the mortgaged-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

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446 Section 59 ITPA
• **Mortgage by Conditional Sale**

A mortgage by conditional sale is described under Section 58 (c) of the ITPA as a mortgage where the mortgagor ostensibly sells the mortgaged property to the mortgagee on condition that the sale will become absolute at a given date upon the mortgagor’s default, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the mortgagee (buyer) shall transfer the property to the mortgagor (seller).

• **Usufructuary Mortgage**

Under a usufructuary mortgage, possession is delivered to the mortgagee who is given authority by the mortgagor to retain the property in question until the mortgagee debt is fully paid. In the meantime, the mortgagee has a right to receive rents and profits and apply the same towards the repayment of the mortgagee debt. This class of mortgage is created under Section 58(d) of the ITPA.

• **English Mortgage**

Section 58(e) of the ITPA creates the English mortgage thus, ‘where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage’.

The English mortgage is regarded as the best security amongst all the mortgages. This is because under the English mortgage, the mortgagee has all the basic remedies provided under section 67-69 of the ITPA which remedies have been discussed hereunder. In practice this is the kind of mortgage concluded between borrowers and lenders. It is vital noting that English mortgages can also be created under the GLA and LTA.
ii. Equitable Mortgages

Equitable mortgages under the English system are creatures of equity and as such, statutes do not create them. In Kenya, however, equitable mortgages are created by statute particularly the Equitable Mortgages Act (Cap 291 Laws of Kenya). Section 2 thereof recognizes the creation of an equitable mortgage or charge by delivery to a person or his agent of a document or documents of title to immovable property, with intent to create a security thereon. Further, section 100(2) (g) of the GLA provides for creation of equitable mortgage by deposit of title deeds with the mortgagee and the registration of a memorandum of such deposit in the lands office.

In addition, section 98 of the ITPA provides also for the creation of anomalous mortgages. These are mortgages other than those described in section 58 and section 100A (2) of the Act. For these type of mortgages, section 98 states that the rights and obligations of the parties are to be determined by their contract, as evidenced in the mortgage instrument. The nature and scope of anomalous mortgages is, however, at best described as abstract.

It is prudent to mention herein the provisions of section 100A ITPA mentioned above. Subsection 1 thereof provides that a charge under a charge executed in accordance with the provisions of section 46 of the RTA and duly registered under the said Act shall have the same rights, powers and remedies as an English mortgage to which section 69 of the ITPA applies. Subsection 2 extends the rights, powers or remedies, or the duties, liabilities or obligations, of mortgagors, or mortgagees under the forms of mortgage specified in section 58 to mortgagors and mortgagees under the following mortgages or charges:

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447 Equitable mortgages under the English system arise in three situations. First, the owner of an equitable interest in land, or subsisting in reference to land may effect a mortgage of his interest by assigning that interest to a mortgagee subject to a proviso for re-assignment or redemption. Secondly, an equitable mortgage may also arise where the owner of a legal estate in land effects an informal mortgage of his estate y failing to use either of the modes of the legal mortgage indicated as appropriate in the English Law of Property Act 1925. The consequence of such a transaction is that ‘equity looks on that as done which ought to be done.’ The informal mortgage (i.e. the mortgage created by an imperfect means) regarded under the doctrine in Walsh v Lonsdale, as having the same effect as a mere agreement to create a legal mortgage of realty. Thus both the imperfect mortgage and the agreement to create a legal mortgage are treated as giving rise to an equitable mortgage. Finally, an equitable mortgage of land may be effected by a deposit of the title deeds relating to that land coupled wit an intention on the part of the owner that the depositee should hold the title deeds as his security for a loan of money.

448 See Nyaga Kabute vs. Housing Finance Co. (K) Ltd Civil App. No.158 of 1996 (unreported)

449 It has been accepted ever since Russel v Russel (1783) 1 Bro CC 269, that an equitable mortgage of land may be effected by a deposit of the title deeds relating to that land coupled with an intention on the part of the owner that the depositee should hold the title deeds as his security for a loan of money. Such a deposit is effectively construed as a sufficient act of part performance to amount to evidence of a contract to create a mortgage. No further formalities are required although it is usual for the deposit of the title deeds to be accompanied by some written memorandum of the terms of the agreement.
(a) Charges executed in accordance with the provisions of section 46 of the RTA, attested and certified in accordance with the provisions of subsection (4) of section 69 of ITPA and duly registered under the said Act; and

(b) Equitable mortgages by deposit of documents of title, duly protected by registration of a memorandum thereof under the GLA or the LTA.

(c) Charges by deposit of documents of title, duly protected by registration of a memorandum thereof under the RTA.

Section 46 of the RTA states that whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title as provided for by section 66 of the same Act, the proprietor or lessee or, if the proprietor or lessee is of unsound mind, the guardian or other person appointed by the court to act on his behalf in the matter shall execute a charge in form J(1) and J(2) contained in the First Schedule of the Act. Forms J(1) and J(2) require the following requirements:

- There must be a chargor
- There must be disclosure of the nature of property being charged i.e is it freehold or leasehold?
- There must be a statement of the land reference number and a somewhat limited description.
- Amount advanced must be specified.
- Name and description of lender
- There must be an acknowledgement of the receipt of the loan
- There must be a covenant for repayment of the principal and of interest, with rate of interest being specified.
- Any special conditions must be stated.
- There must be a charging clause (most charges have been rejected under this ground).

A charging clause ought to read as follows, “...for the better securing of the said...the repayment of the principal sum I hereby charge my...” In the absence of the charging clause, the charge is incurably defective and cannot stand.

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450 Section 66 (1) RTA provides that a charge may be created by the deposit of documents of title to land under the Act, and shall be evidenced by an instrument in writing in Form U in the First Schedule of the Act, which shall be registered, and that no charge by deposit of documents of title may be created in any way other than as specifies in this section.
6.3. REMEDIES OF MORTGAGEES AND CHARGEES

The whole purpose of a mortgage is to provide security which the mortgage can realize if the mortgagor fails to repay the loan. Obviously the mortgagee, like any other lender, can always sue in contract for the repayment of the loan, but this may be a long process in which enforcing payment, even once judgment is obtained can be difficult. The mortgage institution, therefore, has developed several remedies for the mortgagee including the right to use the mortgaged/charged land to repay the loan, often without the need for any court proceedings at all. However, the remedies available to a mortgagee/chargee are dependent upon whether he is a legal or equitable mortgagee/chargee.

6.3.1 Remedies of a Legal Mortgagee/Chargee

A legal mortgagee/chargee has, in addition to an action for the money, four primary remedies available to him for enforcing payment. Two of the remedies are basically directed to recovering the capital due and putting an end to the security: these are foreclosure, and sale. The other two remedies are taking possession and appointing a receiver. These primary remedies seek to merely to recover the interest due, though possession is now usually sought so as to facilitate sale with vacant possession. Sale and appointing a receiver are rights which used to be conferred by the mortgage deed but are now given by statute; the other remedies are inherent in the nature of the transaction. However, under the ITPA all four of the above-mentioned remedies are stipulated therein.

(a) Foreclosure

Foreclosure is the process whereby the mortgagor’s equitable right to redeem is extinguished and the mortgagee is left as owner of the property, both at law and in equity. It debars the

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451 Any time after the date fixed for payment the mortgagee may sue for the money lent. This remedy is, of course, in no way peculiar to mortgages. See Bolton v. Buckenham (1891) 1 Q.B. 278. However, under section 68 ITPA the mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:

1. where the mortgagor binds himself to repay the same;
2. where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;
3. where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person;
4. in the case of every mortgage, not being a mortgage by conditional sale or an usufructuary mortgage, although the mortgagor does not expressly bind himself in the mortgage instrument to repay the same. This section also provides that where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section 66, the mortgage may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, he may sue him for the mortgage-money.
mortgagor or chargor from his right to redeem the property and it consequently operates to extinguish all subsequent mortgages. In essence, foreclosure acts as a limit to the equity of redemption and as such it is the means whereby, ‘the court simply removes the stop it has itself put on’ thus allowing the mortgagee to realize his security. Therefore, it logically follows that a foreclosure cannot be sought before the contractual obligation to repay has been broken. Section 67 ITPA provides for the remedy of foreclosure (and of sale) in the following terms:

‘In the absence of a contract to the contrary, the mortgage has at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold’.

For a mortgagee to exercise the remedy of foreclosure he must apply for a court order. This is undertaken in two stages. First he must apply for a foreclosure order nisi. This gives the chargor/mortgagor time within which to repay the debt and accordingly redeem his property. The second stage ensues where the mortgagee is unable to comply with the terms of the foreclosure order nisi. In this stage, the foreclosure order nisi is made a foreclosure absolute, which has the effect of transferring the mortgagor’s estate to the mortgagee i.e. the mortgage is foreclosed. The right to foreclosure accrues to the mortgagee (chargee) in the following instances:

(i) Upon the mortgage debt becoming due and payable; and
(ii) A decree for the redemption of the mortgaged property has not been made; and
(iii) The right of foreclosure is not excluded from the mortgage instrument i.e. there is no agreement to the contrary.

The remedy of foreclosure is considered unfair and unpopular due to its harshness against the mortgagor. In particular, should the property be worth more than the debt, the mortgagee is not liable to pay the balance in value to the mortgagor. For this reason foreclosure has been referred to as ‘the most draconian remedy open to the mortgagee in the event of default by his

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452 Williams v. Morgan (1906) 1 Ch 804
453 It is important to appreciate that even after the court has made an order for foreclosure absolute; it is possible for the mortgagor to request the court to re-open the order.
Consequently its use has drastically reduced especially after the 1959 amendment to the ITPA which introduced the mortgagee’s statutory power of sale.

(b) **Judicial Sale**

In view of the discussion above on the unfairness of foreclosure, it cannot be over-emphasized that the remedy of judicial sale emerged as an alternative to foreclosure. It is much preferable to foreclosure especially where property mortgaged is worth more than the mortgage money. It is provided for under section 67 ITPA. Upon being effected, each and every encumbrancer is paid what is due to him depending on priorities. Section 69 ITPA discourages judicial sale by providing for a complex procedure to secure the remedy. Under this section, if a lender institutes proceedings for the sale of property without special reasons, he shall be condemned to pay the costs of the suit.

(c) **Statutory Power of Sale**

The most usual remedy invoked by the mortgagee in the event of serious default by his mortgagor is the exercise of the mortgagee’s power of sale. This remedy accrues in the following instances:

a. Where and when mortgage money is due, which is after the contractual date of redemption has passed or after another specified event has occurred which has the effect of rendering the money due and payable immediately;

b. Where the mortgage instrument was executed after the commencement of the ITPA (Amendment Act) 1959 or the power has been extended to a pre-1959 mortgage under section 69(4)(c) ITPA; and

c. The power of sale is not expressly excluded by the instrument

d. The borrower has signed the mortgage instrument, his signature has been attested and there is a certificate by an advocate certifying that he has explained to the borrower

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454 But see the judgment of court in Louis George Maxim Vidot vs. Babu Ram Sharma; where the defendant had mortgaged his property to the plaintiff to secure repayment of a principle debt amounting to Shs.40, 000/= plus interest. The Deed of mortgage incorporated the power of sale without the intervention of the court under section 69(1) of the ITPA 1882. Upon default by the Defendant in his repayment of the debt, the plaintiff brought an action for the recovery of the principal plus arrears of interest an order for the sale of the mortgaged property and a personal decree against the defendant for any deficiency after the sale plus the costs of the action. It was held inter alia, that there is nothing in the ITPA 1882 to suggest that a mortgagee desirous of realising the property is estopped from bringing an action for a personal decree against the mortgagor for any deficiency arising out of the sale at his own expense with respect to the costs.

455 Since vacant possession is almost inevitably an essential condition of a good sale price, the exercise of this power of sale is normally preceded by the mortgagee’s recovery of possession of the mortgaged property.

456 See Jolly v Lall Singh (1962) EA 203
the effect of section 49 and that the borrower understood the same pursuant to section 69(4)(a).458

However, before a mortgagor exercises his power of sale once it has accrued, the following three conditions must be satisfied ab initio:

a. There must be a default in repayment of the debt or any part thereof for 3 months, after receipt of a notice by the borrower to repay; or
b. There must be arrears of interest unpaid for two months; or
c. There must be a breach of some other covenant in the mortgage instrument or in the act459

If any of these conditions is satisfied, the mortgagee has statutory authority to proceed with a sale of part or all of the mortgaged property. This is unlike the period before 1959 when the mortgagee had to first go to the court to prove his debt and then secure orders to realize the security. In addition, unlike the remedy of foreclosure, the exercise of the mortgagee’s power of sale does not require the sanction or leave of any court.460 Even though he is not personally invested with the mortgagor’s estate, the mortgagee is statutorily clothed with full power to give a conveyance of this estate freed from all property rights over which the mortgage had priority, but subject of course to those rights which themselves rank prior to the mortgage.461

The lender may sell the property either by public auction or private contract. Generally, he has a wide discretion on how the sale may be carried out. He must, however, act in good faith and exercise reasonable care. The borrower is entitled to any surplus from the sale and his interests must be given due regard.

It is vital to note that in exercising the statutory power of sale, the lender is neither the borrower’s agent nor a trustee. Nevertheless, a borrower still retains an interest in the sale as was held in Kenya Commercial Bank v James Osebe.462 The effect of the sale is to vest the whole estate of the borrower in the purchaser subject to any prior encumbrances but free from the mortgage of the lender/vendor. It also vests the said estate free from the borrower’s right

458 Section 69(4) ITPA.
459 Section 69A ITPA
460 Section 69(1) ITPA states that, ‘a mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof….’
461 See sections 69(2) and 69B ITPA
462 Civil App. No. 62 of 1982 (unreported)
of redemption which is extinguished pursuant to section 69(b). The purchaser gets good title, even if the power was improperly conducted, provided he was not a party or aware of the same.

(d) Appointment of a Receiver

This remedy accrues in circumstances similar to the accrual of the remedy of statutory power of sale, and is exercised in a similar manner. The receiver is appointed by the lender in writing but is deemed to be the agent of the borrower. Accordingly, the borrower is responsible for the acts and defaults of the receiver unless the mortgage instrument provides otherwise. A receiver once appointed is charged with the role of collecting the rents, profits and income relating to the property. The proceeds therefrom are applied towards discharging the mortgage debt, the receiver’s fees, any prior encumbrances and any accrued interest due to the principal.

(e) Right to Consolidate

This right accrues to a lender in whom two or more mortgages are vested. It allows him to decline to allow one mortgage to be redeemed unless the other mortgage(s) is also redeemed. The pre-conditions for this remedy to accrue are the following:

1. The right itself must be reserved;
2. The date of redemption for both/all mortgages must have expired;
3. Both/all mortgages must have been made by the borrower; and
4. The mortgages must be vested in the same person.

The leading case in this regard is *Pledge v White*⁴⁶³ in which the court stated that there would be a simultaneous union of mortgages and equities where both the mortgages are vested in one person.

Other remedies that accrue to a mortgagee are the right to take possession and the right to institute a suit on personal covenant. The decision in *Four-maides Ltd v Dudley Marshall Properties Ltd*⁴⁶⁴ gives an apt exposition of these remedies.⁴⁶⁵ By an amendment to section

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⁴⁶³ (1896) A.C. 187
⁴⁶⁴ (1957) Ch. 317.
⁴⁶⁵ In this case the court observed that since a legal mortgage gives the mortgagee a term of years, he is entitled, subject to any contrary indication/covenant in the instrument to take possession of the mortgaged property as soon as the mortgage is made, even if the mortgagor is guilty of no default. See also Jerrings v Jordan (1880) 6 App. Cas 698.
69 ITPA and section 77 RLA, where a sale has to be exercised with respect to agricultural land, the consent of the District Commissioner must be first obtained. This amendment has had the effect of rendering agricultural properties quite unpopular as securities.

6.4. JUDICIAL INTERPRETATION OF STATUTORY POWER OF SALE UNDER THE ITPA

6.4.1 On Notice under Section 69A of the ITPA (1882)

Section 69A of the ITPA states that a mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until the following three conditions are fulfilled

a. Notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service;

b. Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

c. There has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than besides a covenant for payment of the mortgage-money or interest thereon.

Failure to fulfill the above conditions renders a purported statutory power of sale null and void. Consequently A statutory notice issued under section 69A of the ITPA is invalid and of no consequence if it fails to expressly state that the mortgagee shall exercise his power of sale after three (3) months from the date of notice.

This was entrenched by a five-bench Court of Appeal in the landmark case of Trust Bank Ltd v Eros Chemists Ltd and Whitestone Auctioneers.\(^ {466}\) In this case, the High Court sitting at Nairobi (Otieno J) granted an application for interlocutory injunction restraining Trust Bank Ltd from exercising its statutory power of sale in respect of the suit property pending the hearing and disposal of the substantive suit.

\(^ {466}\) Civil App. No.80 of 1991 at Nairobi (unreported).
The facts grounding the grant of the injunction were that the 1st Respondent was the proprietor of the suit property while the Appellant was the holder of legal charge over the suit property. The appellant caused a notice to be published in the daily newspaper advertising the sale by Public Auction of the suit property. It is then that the chargor’s rushed to court to abate the impending doom, principally on the ground that the chargee had breached mandatory provisions of section 69(A) (1) pertaining to service of statutory notice.

In granting the injunction which was to precipitate the appeal, his lordship Otieno J held, inter alia, that none of the various notices given by the Bank’s advocates constituted a notice under section 69(A) (1) of the ITPA (1882). The 1st Respondent was aggrieved by that decision and appealed to the Court of Appeal. The heart of the appeal lied in the central question as to what constitutes a valid notice under section 69(A) 1 of the Transfer of Property Act. In upholding the decision of the superior court the Court of Appeal stated that:

‘The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the 3 months’ period is to consider what the object of the notice is. In our judgement, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor’s equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and to warn of an intended right of sale. For that right to accrue, the statute provided for a three months period to lapse after the service of notice. In our judgement, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months period. To omit to say so or to state a period of less than three months for sale (as in the Russel case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid.’

The Court proceeded to make the position even clearer in the following terms:

‘In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months’ notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice.’
In so doing, the Court of Appeal settled the conflicting positions that had earlier been set by it. In *Russell Company Ltd v Commercial Bank of Africa Ltd and Another*\(^4\) it had been held by a decision delivered on 15\(^{th}\) October 1993 that section 69(A)1 did not require the 3 months period to be stated in the notice nor did its absence vitiate the notice or render it illegal. Yet in *Trust Bank Ltd v Okoth*\(^4\) the same Court by a decision delivered on 14\(^{th}\) January 2000 held that the notice is required expressly to specify the period of 3 months upon the expiry of which the mortgage shall sell the suit property failing which the notice would be invalid and the mortgagee’s power of sale would not have accrued rendering the sale invalid. In settling the conflicting positions, the court expressly stated that the decision in the Russel case was erroneous and bad law. It said of the Russel case:

‘We have carefully studied the decision and it appears to us that the only reason why it was held that the three months period stipulated in section 69(A) (1) of the transfer of Property Act need not be specifically referred to in the notice to sale is because this is not so stated in the statute…. We have found this matter of the greatest difficulty. The earlier decision, with respect, is erroneous and surely this Court is not bound to perpetuate an error. It is a recent one and has not acquired the respect and following attributable to age. Moreover, it is unlikely that property rights have been acquired on the basis of the earlier decision and indeed it is the duty of this Court to rectify an erroneous decision. With considerable hesitancy we have come to the conclusion that this Court should declare, as we hereby do, that the decision of this Court in the Russell case is wrong.’

Accordingly at present, the law is that a statutory notice purporting to be issued under section 69(A) (1) of the ITPA must expressly state that the mortgagee shall exercise his power of sale upon the expiry of a period of 3 months from the date of service of notice.

### 6.4.2 When a Statutory Notice Need not issue

So much has been said about the requirement of a notice that one may overlook an instance when notice should not issue to the mortgagor before the mortgagee exercises his right of sale. This particular legal point was clarified by the court in *James Ombere Ockotch v East African Building Society & 3 others*.\(^4\)

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\(^4\) Civil App. No.80 of 1991 at Nairobi (unreported)  
\(^4\) Civil Case Appeal No. 177 of 1998 (unreported).  
\(^4\) Civil Appeal No.202 of 1996 at Nairobi (Akiwumi, Tunoi and Shah JJA on 4 July 1997).
By a charge dated 5th October 1978, the appellant charged the suit property to EABS to secure a loan of Kshs.500,000. Subsequently the chargor defaulted whereafter the chargee exercised its statutory power of sale by causing the property to be sold to the 3rd Respondent vide the agency of a firm of auctioneers joined in the suit as the 2nd Respondents (also the 2nd Respondents in the appeal).

In a desperate attempt to alleviate the harsh consequences of the exercise of the chargee’s power of sale, the chargor rushed to court seeking, inter alia, an order restraining the purchaser from proceeding with the purported sale and/or from effecting any transfer of the land. The High Court sitting at Nairobi, (Osiemo J), dismissed the application for interlocutory injunction thus precipitating the appeal.

The Court of Appeal, in dismissing the appeal as unmerited, and having quoted the provisions of section 69A (1) stated the law on the question as to whether a statutory notice ought to be given by a chargee to the chargor even where interest is in arrears and unpaid for two months after becoming due, as follows:

‘It can be seen straight away that under section 69 A (1) there is no need for the giving of the three month statutory notice when interest for more than two months is due and unpaid.’

Flowing from this precedence, there is a wealth of jurisprudence on this issue. In Trust Bank Ltd v Kiran Ramji Kodetia, the Court of Appeal followed its decision in the James Ombere Case and stated that under section 69(A)(1)(b) of the ITPA where interest for more than two months is in due and unpaid no notice is required.

6.4.3 When does property pass to the purchaser?

An important question related to the chargee’s or mortgagee’s power of sale is as to when property pass to the purchaser. This question is intricately intertwined with the question as to when does the mortgagor/chargor lose his equity of redemption. In this regard, the courts have laid down that the property in the charged/mortgaged land passes on to the purchaser and thus the mortgagor loses his equity of redemption upon execution of a valid contract of sale.

470 Civil Appeal No. 61 of 2000 (Omolo, Bosire and O’Kubasu on 8 December 2000)
This follows the English notions that the equity is lost on the completion of a valid agreement for a valid sale. It is not allowed to continue until conveyance nor until registration. The fact some time usually elapses before the conveyancing formalities are completed and the vesting of legal title in the purchaser, in no way affects the position. In *Fisher and Lightwood Law of Mortgages*,\(^{471}\) the following statement illuminating the position is to be found at page 314:

‘A sale destroys the equity of redemption in the mortgaged property, and constitutes the mortgagee exercising the power of sale a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities.’

Crossman J in *Waring v London and Manchester Assurance Company*\(^{472}\) gave an elaborate exposition on this question. In the case, counsel for the plaintiff had submitted that notwithstanding that the company exercised its power of sale by entering into the contract, the plaintiff’s equity of redemption had not been extinguished, as there had not been completion by conveyance and that, pending completion, the plaintiff was entitled to redeem, that is, to have the property reconveyed to him on payment of principal interest and costs. In rejecting this argument, Crossman J held that:

‘In my judgment, section 101 of the Law of Property Act which gives a mortgagee power to sell the mortgaged property is perfectly clear and means that the mortgagee has power to sell out and out by private contract or auction and subsequently to complete by conveyance; and the power to sell, is, I think, the power by selling to bind the mortgagor.’

The Judge continued as follows:

‘if that were not so, the extraordinary result would follow that every purchaser, from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor coming and paying the principal, interests and costs. Such a result would make it impossible for a mortgagee in the ordinary course, to sell unless he was in a position to promise the completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor…. It seems to me impossible


\(^{472}\) (1935) Ch 310 at 317.
seriously to suggest that the mortgagor’s equity of redemption remains in force pending completion of sale by conveyance. 473

In comparison with the old law associated with the ITPA, the equity of redemption was not lost until registration. 474 This balance between mortgagee and mortgagor had served in Kenya from before the First World War and had continued until after Second World War when it was challenged in 1963. Subsequently, the ITPA ceased to apply to any land upon first registration of such land under the RLA. 475 In lieu thereof the principles of equity were applied. Then in 1985, the ITPA was amended so that in section 60 the equity of redemption was extinguished by act of the parties or by order of the court so that it would cease at the time of a valid contract of sale. 476 Similarly a mortgagor under the RLA can redeem the charged property at any time before it has been sold under section 77 and the property shall be deemed to have been sold when a bid has been accepted at the auction. 477

Thus in the case of James Ombere Ocketch, the Court of Appeal established that the mortgagor’s right to redeem stand extinguished upon a contract of sale coming into existence after an auction sale or private contract. It stated that:

‘the purchaser acquired title to the suit property upon the fall of the hammer subject of course, to the payment of the price…when the Transfer of property Act of 1882 of Indian as applied Kenya was amended by Act No. 19 of 1985, the mortgagor’s right to redeem stood extinguished upon a contract of sale coming into existence after an auction sale or private contract.’

Further, the court reiterated the position in law of a bona fide purchaser without notice thus, ‘provided property in the land offered as security has passed, the bona fide purchaser’s title therein cannot be impeached. The only remedy available to the chargor lies in a suit for damages against the chargee.’

473 The decision of Crossman J made in 1934 was followed by Ungoed Thomas in the case of Property & Bloodstock Ltd. v Empton (1967) 3 All ER 311. its correctness was impugned in the Court of Appeal. That Court unanimously held that decision was correct. Dawnkwerts LJ who read the first judgment of the court inter alia said, ‘in my opinion, Crossman J’s decision in Lord Warring’s case was plainly correct and cannot be successfully assailed.’

474 See Industrial and Commercial Development Corporation v Kariuki & Gatheca Resources Ltd (1977) KLR 52. Here the court had stated that, ‘the mere contract of sale between a mortgagee exercising his power of sale under section 69(1) of the Transfer of Property Act and a purchaser does not extinguish the mortgagor’s equity of redemption.’

475 See section 164 RLA.

476 See Statute Law (Miscellaneous Amendments) Act 1985 (No. 19 of 1985) and section 60 ITPA.

477 Section 72(1) RLA.
In the case of Captain Patrick Kanyagia the same court cogently pointed that equity of redemption is extinguished upon execution of a valid contract of sale. Here, the chargor had attempted to challenge the title of the highest bidder for his property during an auction of the same by the chargee. In this case, the court cited the rule enunciated in the celebrated case of Mbuthia v Jimba Credit Finance Corporation and Another\(^{178}\) as stated by Apaloo JA (though dissenting), wherein his lordship had observed:

‘Since preparing this judgement, my attention has been drawn to the Statute Law, (Miscellaneous Amendments) Act (No 19 of 1985) which limits section 60 of the Indian Transfer of Property Act 1882…. This means that the mortgagor’s right of redemption is lost as soon as the mortgages either sells the mortgaged property by public auction or enters into a binding contract in respect of it. The effect of this amendment is to overrule the decision of Kariuki’s case in respect of land registered under the Indian Act and to equate the law with English law as expounded in Waring and the Bloodstock cases.’

Since then, the law is settled that the equity of redemption is lost on the completion of a valid agreement for a valid sale and it is not allowed to continue until conveyance nor until registration.\(^{478}\) Even though the mortgagee and purchaser may adjust the conditions of the contract as they agree, the mortgagor has no ground to intervene.

### 6.4.4 When will the Court Injunct the Mortgagor/Chargor?

Normally, in mortgage and charge transactions, a stay will usually be sought by the chargor/mortgagor in order to alleviate the extinction of his equity of redemption. However, where for instance, a mortgagor or a chargor has relieved the chargee/mortgagee of its security, without repaying the mortgage debt, the chargee/mortgagee can successfully injunct the chargor/mortgagor from dealing in the property the subject of the mortgage/charge in any manner as happened in Isaac Kama Ndirangu v Commercial Bank of Africa Ltd\(^{479}\)

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\(^{178}\) Civil App. 111 of 1986 at Nairobi (unreported)
\(^{479}\) Civil App. No.125 of 1993 at Nairobi (unreported)
6.4.5 Mortgagee’s/Chargee’s Duty to Act in Good Faith

In exercising his power of sale, the mortgagee/chargee is enjoined to act in good faith. The RLA expressly provides at section 77(1) that a chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor. However, a similar provision is not available under the ITPA. To fill the gap in the ITPA, courts have resorted to equity. But views on the chargee’s duty to act in good faith or to have regard to the interests of the chargor have not been unanimous. Nevertheless, the starting point on discussion of this duty has always seemed to flow from Halsbury’s Laws of England, 4th ed., vol 4, at paragraph 276 where it is stated that:

‘If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the grounds of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale.’

Under the English system, there are number of cases that have sought to refine the relationship between the mortgagor and the mortgagee. Earlier on, very little degree of duty was imposed on the mortgagee. This view is expressed by the dictum of Vaisy J in Reliance Permanent Building Society v Harwood stampet480 where, quoting from Halsbury’s Laws of England,481 he stated as follows:

‘A mortgagee is not a trustee of the mortgagor as regards the exercise of the power of sale. He has his own interest consider as well as that of the mortgagor, and provided that he keeps within the terms of the power bona fide for the purposes of realizing the security and takes reasonable precautions to secure not the best price but proper price, the court will not interfere nor will it inquire whether he was actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, provided the amount is fixed with regard to the value of the property.’

The learned judge proceeded to quote from Coote on Mortgages482 to lend credence to his argument.

480 (1944) 3 Ch 362.
‘The only obligation incumbent on a mortgagee selling under a power of sale in his mortgage is that he should act in good faith. Whether selling under an express statutory power, he may generally conduct the sale in such a manner as he may think most conducive to his own benefit, unless the deed contains any restrictions as to mode of exercising the power, provided he acts bona fide and observes reasonable precautions to obtain, not the best price, but a proper price.’

On this backdrop, Vaisy J held that the mortgagee sells primarily for his own benefit and though he must not ignore the mortgagor, the whole purpose of the sale is to get his money back. This argument is also backed by the proposition that the fact that a sale has been effected at a proper conducted auction is a strong prima facie evidence that no unfair advantage has been taken either by the vendor or purchaser. Indeed, it has been argued that there is no better or more reliable method of determining the true and fair market value of property than by sale at a public auction.

However, the current law is as set out in the leading case of *Cuckmere Brick Co Ltd v Mutual Finance Ltd*, where it was stated:

‘A mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale; in exercising the power of sale, however, the mortgagee was not merely under a duty to act in good faith i.e. honestly and without reckless disregard for the mortgagor’s interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it.’

This passage was further explained by Lord Denning in the case of *Standard Chartered Bank v Walker*. He said:

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483 See Herbert Hart on the Law of Auctions, 3rd edn, p. 1
484 See Adborough v Tyre (1840) 7 Cl & Fin at 460, where Lord Cottenham stated that ‘a sale by auction is a means of ascertaining what a thing is worth; or in other words, the fair market value.’ See also Frewen v Hayes (1912) 106 LT 516 where Lord Macnaghten said that ‘the prices which the public are asked to pay (i.e. at an auction) are the highest prices which those who bid can be tempted to offer by the skill and tact of the auctioneer and under the excitement of open competition.’
485 (1972) 2 All ER 633.
486 (1982) 3 All ER 938.
‘If a mortgagee enters into possession and realizes a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible…. There are dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing to the time, he must exercise a reasonable care.’

This means that there is now a higher duty that has been placed upon the mortgagee by English court decisions than had earlier been the case.487 This does not seem to be different from what the Kenyan courts have held. Thus in Kenya Commercial Bank Ltd c James Osebe,488 the Court of Appeal in appreciating the judgment of the trial court observed that the mortgagee’s conduct had been shown in an unmeritorious light. The trial judge had stated:

‘Although there was no evidence of fraud or bad faith, or that the conduct of the auction was irregular or improper, that none the less the interests of the respondent as chargor were not taken into consideration and that the bank was careless, negligent and reckless.’

The question on the duty of the mortgagee came up for determination in the case of Mbuthia v Jimba credit Finance Corporation & another. Here the plaintiff averred that the respondent in exercising its power of sale had sold the suit property at the price of Kshs. 200,000 yet the property was valued at Kshs. 400,000. The court (Apaloo dissenting) was guided by the English decisions enumerated above and held that the test for what is to have “regard to the interests of the mortgagor” is essentially as stated by Lord Denning in Standard Chartered Bank v Walker.489 The court also stated that when the mortgagor alleges fraud on the part of the mortgagee it becomes a matter to be proved by evidence.

Most recently, Khamoni J profoundly dealt with this question in the case of Housing Finance Company of Kenya Ltd v Palm Homes Ltd & 2 others. In this case, the mortgagee having exercised his power of sale over the charged property but the sale price was not sufficient to offset the outstanding loan. It thus filed suit claiming from the sureties the shortfall of the loan balance after the sale of the security. Judgment in default of a defence was entered

487 See Reliance Permanent Building Society v Harwood Stamper (1944) 3 Ch 362.
489 (1982) 3 All ER 938.
against the first and third defendants prompting an appeal to the High Court. The second
defendant argued, *inter alia*, that the property valued at Kshs. 20,000,000 was sold by the
mortgagee at a price of Kshs. 9,000,000 only.

In his judgment, Khamoni j sought to clarify the issue on the duty cast on a mortgagee or
chargee in the exercise of his power of sale in so far as it relates to the value of the property.
He particularly refused to agree with earlier decisions that the entire mortgagee is required to
do is virtually to its own outstanding debt. Of these decisions he said:

‘But their explanations as quoted above is to the extreme as they stand on the
proposition that a mortgagee is not a trustee of the mortgagor so that the
mortgagor remains almost nothing thereby vindicating the position that in the area
of a bank’s rights against a debtor, capitalism knows no neighbour. Capitalism
which used to fight communism flourishing on and cherishing the platform of
religion and human rights seems to be saying to-day when communism is a
toothless bulldog, that as between a chargor and a chargee or between a debtor
and creditor at the time the chargor or debtor is in arrears, you don’t have to do to
your neighbour as you would like him to do to you. A capitalist creditor bank,
therefore, says a debtor is only a neighbour, physically or business wise, when he
is there solely in the interests of me the creditor. Otherwise the neighbour ceases
to be a neighbour as he becomes crushable to annihilation by the creditor, a
foreigner to reasonable care or devoid of good faith and unmindful of the interests
of the debtor, in order to recover arrears.’

The learned judge also sought to clarify that fraud need not be proved for the duty cast on the
mortgagee is to exercise reasonable care. He therefore submitted that the law is as set out in
the James Osebe Case. This is because, had it not been for the question of lack of jurisdiction,
the judgment of Aganyanya Ag J (as then he was) in James Osebe case was sound judgment
as admitted by Haconx Ag JA (as he then was) at the Court of Appeal. Accordingly,
concludes the learned judge, there need not be evidence of fraud. He stated:

The position is that the decision of the learned judge, Aganyanya Ag J, as he then
was, as approved by the Court of Appeal, expressed the law in Kenya. It be noted
that there need not be evidence of fraud, and the learned trial judge in the Kenya
Commercial Bank Case included evidence of bad faith. That evidence need not be
there and Lord Denning did not include the word “fraud” or the words “bad faith”
in the passage quoted here from him. Instead he said that the mortgagee has a “duty to use reasonable care” the mortgagee “owes that duty not only to himself but also to the mortgagor so as to reduce the balance owing as much as possible.’

Proceeding on this premise, the learned judge commented thus of the mortgagee in that case:

‘as a result of lack of diligence, lack of reasonable care or lack of good faith and of being mindful of the interests of the defendants, the plaintiff handled the subsequent public auction sale in a messy way allowing the Auctioneer to do what he wanted to do as to the sale price. The security then having a mortgage value of Ksh 20,000,000/= was sold at Ksh 9,000,000/=, no doubt being a gross under value of the security. Had the plaintiff had good faith and been mindful of the interests of the defendants or had the plaintiff exercised a reasonable care in the sale of the security, even though he had allowed the debt to grow to where it was, the plaintiff would have recovered the debt in full and without any shortfall.’

6.5. CHARGES UNDER THE RLA: RIGHTS AND REMEDIES THEREOF

Under the RLA, there is only the legal charge envisaged under section 65 (1) thereof. There is no equitable charge. Section 65(1) provides that a proprietor may, by an instrument in the prescribed form, charge his land lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfillment of a condition.

A charge under the RLA is 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. It is also expressly stipulated that a charge under the Act shall not operate as a transfer but have shall effect as a security only. The document evidencing title being the register itself, it is prudent that anyone engaging in a charge transaction under the RLA should apply for an official search certificate and not rely on the proffered title deed or land certificate as evidence of title. The fact that the register is the conclusive proof of title explains why there is no need to deposit title documents with the lending institution. The following conditions must be fulfilled to obtain a charge under the RLA.

- It must be in the prescribed form, principally form R.L. 9.
- The title number of the land/security must be specified.

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490 Section 65 RLA.
491 Section 65(4) RLA.
• The name of the chargor and his address must be specified.
• There must be a charging clause
• The name of the chargee and his address, plus the principal sum, interest rate thereon, date of payment i.e. redemption date must all be specified.
• There must be an acknowledgment by the chargor that he fully understands the effects of section 74 RLA pursuant to the provisions of section 65

The RLA under section 66 allows for the creation of a second or subsequent charge to an already existing charge. It is also intended that the provisions of the RLA as regards charges do not affect the registration of a notification or note in respect of any sum of money owing to a public body. In essence the provisions of RLA do not affect the registration of statutory charges. These charges need not be executed by the chargor before they are registered for they are imposed upon a property vide statutory provisions e.g. income tax charge pursuant to the Income Tax Act (Cap 470) raised so as to secure the payment of tax by a defaulter.

6.5.1 Implied Covenants into an RLA Charge

Pursuant to section 69, the following covenants or agreements are statutorily implied into the charge with the chargee binding the chargor:

• To pay back the principal money on the day stipulated in the charge and if the same or part thereof remains unpaid, to pay interest thereon.
• To pay all rates, taxes and other outgoings which are at any time payable in respect of the charged property.
• To repair and keep in repair all buildings and other improvements upon the charged land and to permit the chargee or his agent to enter the land and examine the state and condition of such buildings and improvements. The chargee must however seek to enter the property at a reasonable time and after giving the chargor a reasonable notice.
• To insure and keep insured all buildings upon the charged land or comprised in the charged lease against loss or damage by fire in the joint names of the chargor and chargee with insurers approved by the chargee to the full value thereof.

Section 67 RLA.
• In the case of a charge of agricultural land, to farm the land in accordance with the rules of good husbandry within the meaning of an law for the time being in force governing agricultural tenancies.

• In the case of a charge of land or of a lease, not to lease the charged land or any part thereof, or sublease the whole or any part comprised in the charged lease, for any period longer than one year without the previous consent in writing of the chargee, but such consent shall not be unreasonably withheld.

• Not to transfer the land, lease or charge charged or any part thereof without the previous written consent of the chargee but such consent shall not be unreasonably withheld.

• In the case of a charge of a lease, during the continuance of the charge to pay the rent reserved by the lease and observe and perform the agreements and conditions thereof.

• Where the charge is a second or subsequent charge, that the chargor will pay interest from time to time accruing due on each prior charge when it becomes due, and will at the proper time repay the principal money due on each prior charge.

• Where the chargor fails to comply with any of the agreements implied by paragraphs (b), (c), (d), (e), (g) and (h) that the chargee may spend such money as is necessary to remedy the breach, and may add the amount so spent to the principal money, and thereupon the amount shall be deemed for all purposes to be part of the principal money secured by the charge.

6.5.2 Chargor’s Rights under an RLA Charge

The basic right of a chargor under an RLA charge is the right of redemption embodied under section 72 of the Act and which allows him to redeem his property anytime before the sale under section 77 by the chargee in exercising his power under section 74. Section 72 further states that any agreement or provision which purports to deprive the chargor of this right of redemption shall be void and that land, lease or a charge shall be deemed to have been sold when a bid has been accepted at the auction sale.

The chargor is entitled redeem the charged land, lease or charge before the date specified in the charge by paying to the chargee interest on the principal sum secured thereby up to that date plus any other money then due or owing under the charge.\textsuperscript{493} He is also entitled to redeem the charged property after the date specified in the charge.\textsuperscript{494} Where no such date is

\textsuperscript{493} Section 72(2) RLA.
\textsuperscript{494} Section 72(3) RLA.
specified, he shall give the chargee three months’ notice of his intention to redeem the charge or shall pay him three month’s interest in lieu thereof.

In the event that the chargor wishes to repay the money secured by the charge yet the chargee is absent or cannot be found, or the Registrar is satisfied that the charge cannot be discharged otherwise, the chargor may deposit the amount due with the Registrar in trust for the person entitled thereto.\textsuperscript{495} Having done this, the obligations of the chargor under the charge ceases and the Registrar cancels the registration of the charge and pays the amount deposited to the chargee if the chargee applies for it within six years of the date of deposit, and if the amount is no so paid it shall be paid into the Consolidated Fund.

\section*{6.5.3 Chargee’s Remedies under the RLA Charge}

The RLA provides the chargee with three basic remedies in case of default on the part of the chargor in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in the charge. These remedies stated under section 74 of the Act include:

1. Appointment of a receiver
2. Statutory power of sale and
3. Action on the personal covenant to repay the money lent.

Before the chargee avails him of the use of the above remedies, the chargor must be in default for a continued period of one month and the chargee may serve the chargor with a notice in writing requiring him to pay the principal.\textsuperscript{496} Even then, it is after the chargor fails to comply, within three months of the date of the service, with the aforementioned notice, that the chargee may appoint a receiver or sell the charged property.\textsuperscript{497} A brief exposition of each of these remedies ensues hereunder:

\subsection*{i. Appointment of a Receiver}

The basic rules governing this right are similar to those discussed under the ITPA. Noteworthy is that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further

\begin{footnotes}
\item[495] Section 72(4) RLA.
\item[496] Section 74(1) RLA.
\item[497] Section 74(2) RLA.
\end{footnotes}
notice served on him. This position was clarified in the case of *Munga Concrete Works Ltd v Industrial Development Bank Ltd.*\(^{498}\) the defendant advanced a sum of Kshs. 3.5 Million by way of a term loan to the plaintiff on the security of the suit property and a debenture granted by the RLA. Subsequently the plaintiff defaulted loan and the defendant invoked the powers of sale conferred by the charge. In its judgment, the Court of Appeal held that:

\[\text{Under section (2) of section 74, if the appellant failed to comply with the notice and pay the arrears, the respondents could appoint a receiver of the income of the changed property or sell the charge property. But, the respondent having appointed a receiver as was the case here, could not exercise the power of sale unless the appellant failed to comply with 3 months of the date of September, 8, 1986 with a further notice served on him under sub-section (2). There is no evidence that there was a further notice served on the appellant pursuant to sub-section (2) of section 74.}\]\(^{499}\)

Once a proprietor of a charge of land or a lease has appointed a receiver under section 74 he shall, in the absence of any express provision to the contrary contained in the charge, have power to grant leases in respect of the charged property and to accept a surrender of any lease so granted and of any lease created by chargor.\(^{500}\) He may also execute in the place of the chargor any instrument required to effect such lease or surrender provided that all these powers shall be subject to the provisions of the Act and of any other written law.

Pursuant to section 75(2) every lease granted by a chargee must fulfill the following four conditions:

- Be made to take effect in possession not later than twelve months after its date;
- Reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without a fine or premium being obtained;
- Be for a term not exceeding twenty-one years; and
- Contain a declaration by the chargee that he has appointed a receiver, with the date of the appointment.

The Act makes it mandatory that the appointment of a receiver under the powers conferred by section 74 shall be in writing signed by the chargee.\(^{501}\) Such a receiver may be removed at

\(^{498}\) Civil Appeal No. 18 of 1998 (Court of Appeal at Nairobi).

\(^{499}\) See also Albert Mario Cordeira v Cyperr Enterprises Ltd & another, Nairobi HCCC No. 2430 of 1996

\(^{500}\) Section 75(1)

\(^{501}\) Section 76(1) RLA.
any time and a new receiver appointed by writing signed by the chargee. The receiver is
deemed to be an agent of the chargor for the purposes for which he is appointed and the
chargor shall be solely responsible for the receiver’s acts and defaults unless the charge
otherwise provides. In that capacity, the receiver has the power to demand and recover all
the income of which he is appointed receiver, by action or otherwise. Other provisions with
respect of the appointment of a receiver are contained under section 76(5-8).

ii. Statutory Power of Sale

The general principle is that sale must, unless otherwise allowed by the court, be by way of a
public auction. In exercising his power of sale the chargee is expected to act in good faith and
have regard to the interests of the chargor. As already stated above, the right to sale only
accrues when there has been default for one month before receipt of notice by the chargor
from the chargee and there has been non-compliance by the chargor for three months after the
receipt of the initial notice. The following conditions apply when the chargee exercises his
power of sale:

- The impending sale must be advertised to the public.
- The chargor must be informed of the same.
- Unlike under the ITPA, there is no right of foreclosure under the RLA.
- Pursuant an amendment introduced by Act No. 14 of 1991, Statute Law (Repeal and
  Miscellaneous Amendment) Act, where the charged land is agricultural land the
  chargee shall, at least one month before exercising his power of sale, serve a notice on
  the District Commissioner of the area in which the charged land is situated of his
  intention thereof.
- Further, where a chargee had appointed a receiver and he intends to pursue the
  remedy of sale (after abandoning the receivership), he must serve a fresh 3 months
  notice as aforesaid.

502 Section 762) RLA.
503 Section 76(3) RLA.
504 Section 76(4) RLA.
505 See section 80 RLA states that “for the avoidance of doubt, it is hereby declared that the charge shall not be
  entitled to foreclose, nor to enter into possession of the charged land or the land comprised in a charged lease or
to receive the rents and profits thereof by reason only that default has been made in the payment of the principal
sum or of any interest or other periodical payment or of any part thereof or in the performance or observance of
any agreement expressed in the charge.”
506 See section 77(6) RLA. The section further states that the District Commissioner may, within fourteen days
  of the service of the notice, apply by originating summons to the High Court for an order that the sale of the
  charged land be postponed, and the court may if it is satisfied that the sale would result in persons (other than
  the chargor and his family) being evicted from the charged land and the eviction of such persons would either
cause undue social difficulties or cause public disorder in the neighbourhood, order that the sale shall be
  postponed for such period not exceeding six months as it thinks fit.”
Where after the sale, the debt is not fully discharged by the proceeds from the sale; the chargee is further entitled to file a suit for the recovery of the balance.

Upon the sale, the chargee himself does the transfer of the property.

In addition, the sale must be subject to the Auctioneer Rules 1997. Pursuant to these rules, the auctioneer should, upon receipt of a letter of instruction, write to the owner of the property giving such owner not less than forty-five days notice within which to redeem the property by payment of the amount due as set out in the letter of instruction.\footnote{See Rule 15, Auctioneer Rules 1997.} If the forty-five days expire and the owner has not paid, the auctioneer should give at least 14 days notice for the sale of the property. In total, therefore, the earliest period within which the property may be sold would appear to be about sixty days.\footnote{See Dr. Simon W. Chege v Paramount Bank of Kenya Ltd, Civil Suit No. 360 of 2001 (Ringera J) and Nathakal M. Rai v standard Chartered Bank (K) Ltd, Milimani Civil Case No. 830 of 1999.}

It ought to be observed here that in the case of \textit{Komassai Plantations Ltd v Bank of Baroda Kenya Ltd},\footnote{(2003) 2 EA 532 (Nyamu Jon 27 May 2003).} Nyamu J expressed a contrasting view on the application of Rule 15(d) of the Auctioneers Rules. In particular, the learned judge held that the said rule is ultra vires the Auctioneers Act. In this case, the respondents had issued notice to the applicants of intention to sell the suit property to realize security on a loan. The applicants sought an injunction restraining the respondent from doing so. The applicant contended that the statutory notice issued under the ITPA was invalid since it gave notice of less than 3 months; that the notification of sale was improper as it was addressed to the directors of the applicant and that compliance with the Auctioneers Rules had not been made. In holding that Rule 15(d) is a nullity, the learned judge stated thus:

‘The Auctioneers Act No. 5 of 1996 has expressed its general purpose as follows: “an act of Parliament to consolidate and amend the law relating to auctioneers, to provide for licensing and regulation of the business and practice of auctioneers and for connected purposes.” In the face of this very clear objective of the Act, I hold that providing in the subsidiary legislation made under the Auctioneers Act for 45 days’ notice before the sale is ultra vires the Auctioneers Act and its general purpose as expressed above and, therefore, rule 15(d) of the Auctioneers Rules made under the Act is a clog on the power of sale and violates section 69A and 69B of the TPA and section 65 and 74 of the RLA (chapter 300). In so far as it purports to provide for an additional notice under the Auctioneers Act. The creation of a new law to provide for
an additional redemption notice in the subsidiary legislation is clearly ultra vires the Auctioneers Act and a clog on sections 69A and 69B of the TPA and sections 65 and 74 of the RLA. I therefore hold that rule 15(d) is void and a nullity.'

The decision of Nyamu J in the aforementioned case is in the minority and lacks any backing from the Court of Appeal. Courts have continued to treat Rule 15(d) of the Auctioneers Rules as being valid. Therefore, the law as it stands today requires that for the mortgagor to exercise his statutory power of sale he must satisfy both the provisions of the RLA and Auctioneer Rules specifically as it regards the issuance of notice. Ringera J summarized the position in *Martha Khayanga Simiyu v. Housing Finance Co. of Kenya and 2 others*,510 as follows:

‘The above understanding of pertinent provisions of the Registration of Land Act and the auctioneers rules lead me to the conclusion that the service of both an adequate statutory notice and a notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under Registered Land Act. Without compliance with those statutory commands, there can be no valid exercise of the power of sale and accordingly it cannot be said that the chargors equity of redemption is extinguished in any sale conducted in breach thereof. Without compliance with those conditions precedent the purported sale would be void and liable to be nullified at the instance of the chargor.’

As such, in *Joshua Muli Kiilu v Housing Finance of Kenya Ltd & Another*,511 a temporary injunction was issued restraining the defendant from exercising its statutory power of sale for failure to comply with Rule 15(b) of the Auctioneer Rules which require the Auctioneer to indicate the value of the property to be sold. In *Gitau Muiruri v Standard Chartered Bank (K) Ltd.*,512 O.K. Mutungi J, Having been convinced that service of Notification of Sale on the plaintiff was a mere fabrication by the auctioneers, held that, ‘hence no notification of sale was effected upon the plaintiff, and on this alone, the intended sale is invalid.’

A defective notification of sale can only be cured by the issuance of a new valid notice. In *Usafi Services Ltd v consolidated Bank of Kenya & 3 others*,513 the mortgagee admitted having issued an erroneous notification of sale that did not give 45 days statutory notice but it

511 High Court (Milimani) Civil Case No. 2003 of 2000.
512 High court (Milimani) Civil Case No. 424 of 2004.
513
argued that since the sale failed the error had been cured. In rejecting this argument, O.K. Mutungi stated:

‘Once the legal provisions on realization of the security are not complied with, in the present case failure to give the requisite notification of sale, the fact that the public auction did not take place does not cure the unlawfulness of such an aborted sale. The cure lies in the issuance of a fresh notification of sale that complies with the legal provisions, it is irrelevant that a chargee’s statutory right of sale has arisen. The unlawfulness of exercising such right sweeps the legality completely off its feet.’

The above quotation implicitly raises the question as to the position in law when a valid power of sale aborts. The courts have held that in such circumstances the auctioneers are not bound to issue a new notification of sale but they must issue a fresh advertisement of the intended sale. The position at common law is stated at page 308 of Fisher & Lightwoods Law of Mortgages (8th edn) as follows:

‘If after demand, the sale stopped on receipt of a cheque for the amount due under the mortgage, but the cheque is afterwards dishonored, the right of sale and the running of notice having been only suspended revive, and the power may be exercised without serving a new notice.’

This common law position was expounded in Wood v Murton, where Lush J decided that point as clearly as anything can be decided. In a deed of mortgage, the mortgagor agreed that in default of payment of interest for seven days after notice, the mortgagee should have an absolute power of sale. Default was made. On the sixth day, the interest due was reduced by payment on account and bill of exchange accepted by the mortgagor was dishonoured. The mortgagor then attempted to sell and the mortgagee contended that a new notice should issue. Lush J said:

‘The bill suspended the remedy by auction for the mortgage debt and prima facie, it suspended also the running of notice. Both revived when the bill was dishonored, and the plaintiff was then remitted to the position in which he stood when the bill was given. I cannot infer an agreement that if the bill was not paid, the plaintiff should

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515 (1877) LJ QB 191; Vol 87 LTR 788.
begin again and give a fresh notice which would be to place him in a worse position than he was in when he consented to give time.’

In Kenya, reference must be made to the leading case of *Nathakal M. Rai v Standard Chartered Bank (K) Ltd & another*.\(^{516}\) In this case Onyango-Otieno J held that where the auctioneer has given a notice of 45 days and the sale is subsequently stopped by the court; the auctioneer need not give another notice just like the chargee is not required to give another notice under section 74 of the RLA every time a sale is suspended to accommodate the chargor. He also clearly stated that this position does not apply to advertisement which must be done every time the sale is due as the place of sale may be different from the place advertised earlier.

The rationale behind this principle was also enunciated in the case of *Margaret Nduati & another v Housing Finance Company of Kenya*.\(^{517}\) The court stated that the 45 days notice, need not be repeated every time a sale is scheduled as the purpose is to give the mortgagor a chance to redeem the charged property and if that chance given has not been utilized by the mortgagor, it would be no more than a time consuming exercise issuing another notification of sale.

Thus in *Jacob Ochieng Muganda v Housing Finance Co. Ltd*,\(^{518}\) it was stated that after the initial 45 days notice has been given under rule 15(d) of the Auctioneers Rules, the mortgagee is not obliged, if the sale is temporarily suspended, say by acceptance of repayment proposals from the debtor or even a court order, to re-issue another notice before the process is resumed. In *Kyangavo v Kenya Commercial Bank Ltd & another*,\(^{519}\) the position was aptly summarized as follows by Njagi J:

‘I share the view of Justice Onyango in Rai v Standard Chartered Bank (K) Ltd when he says that the notification of sale need not be given every time. But advertisement need to be done afresh every time fresh instructions are received by the auctioneer, and the sale should be at least 14 days after the first newspaper advertisement.’

But in *Kennedy Kamau Ngarunya t/a Daily Chick Supplies v ICDC & another*,\(^{520}\) Hewett J held a different opinion on the question of re-issue of the notification of sale. He intimated

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516 High Court Civil Case No. 830 of 1999 (Onyango-Otieno J on 13 July 1999).
518 HCCC (Nairobi) No. 1436 of 1999.
519 (2004) 1 KLR 126
520 High Court Civil Suit (Milimani) No. 797 of 2000
that, ‘it would certainly have been good practice to serve a fresh correct notification of sale for the second sale because amongst other things the amount required to redeem would have changed.’ This view, however, is not reflective of the general position taken by courts on the issue.

It is prudent to appreciate that being subsidiary rules, the Auctioneer rules are subject to statutory provisions. The import of this is that once a sale has been declared null for failure of satisfying statutory requirements under the RLA, the procedures under the Auctioneer Rules are automatically rendered of no legal consequence even if they were complied with. Particularly, the application of the Auctioneer Rules is dependent on the validity of the statutory notice under the RLA.

Hence in Kanorero Ruia Farm Ltd & 3 others v National Bank of Kenya, it was held that, ‘he notifications of sale under the Auctioneer Rules and the subsequent advertisement for sale cannot be valid and effectual if no valid statutory notice has been issued.’ In similar vein, Kasango J in Stephen Mugera Gakenge v Kenya Commercial Bank Ltd & Another, had this to say in this regard:

‘I do not think I need to consider the question of the validity of notification of sale notices as the same draw their validity from the validity of the mandatory statutory notice the issue of which crystalises the mortgagee’s power of sale and if the same mandatory notices are not valid then it goes without saying any more that notification notices also cannot stand.’

It is also important to note that the courts have held that where a valid statutory notice have been given, then specific irregularities under the Auctioneers Rules does not render the power of sale a nullity. Thus in David Ngugi Mbuthia v Kenya Commercial Bank & another, Ringera J held that the non-compliance with Auctioneers Rules in respect of specification of the time for viewing the property is a mere irregularity which does not invalidate the sale. In Romanus Okeno v Bank of Baroda, it was held that even if the notification of sale does not state the valuation of the charged property carried out within the last 12 months, the defect is limited to the said notification of sale but does not render the sale null and void.

521 HCCC No. 699 of 2001 (Ringera J on 19th February 2002).
522 Milimani HCCC No. 304 of 2001 (Ringera J on 5th June 2001)
A mortgagor who has thus been prejudiced by a defective auction sale can only be remedied in damages. This is applicable both under the RLA and the TPA. The judgment of Ringera J in *David Ngugi Mbuthia v Kenya Commercial Bank Ltd & another*, 524 lays down this principle. He stated that under section 69(B)(2) TPA, a person damnedified by a transfer of property by mortgagee to an auction purchaser pursuant to any irregular or improper exercise of the statutory power of sale is entitled to recover any damages directly suffered by him from the auctioneer. The same judge restated the position in the case of *Hilton Walter Osinya & another v Savings & Loan (K) Ltd & another*, 525 as follows:

‘Although the provisions of rule 15 of the Auctioneers Rules, 1997 are couched in mandatory terms, they must be read as being subject to provisions of the substance enactment under section 26 of the Auctioneers Act which provides that any person injured by the unlawful and improper exercising any power by a licensed auctioneer shall be entitled to recover damages directly suffered by him from the auctioneer by action but does not nullify the subsequent auction.’

A distinction must, however, be drawn between situations where a security has been realized in contravention of the Auctioneers Rules and situations where it is sought to restrain the exercise of the power of sale which is manifestly in violation of the Auctioneer Rules. In the case of *Jagjit S Thathy v Middle East Bank*, 526 counsel for the plaintiff drew this distinction in support of the plaintiff’s move to restrain the defendant from proceeding with the intended sale in exercise of its power of sale. The plaintiff contended that the sale was unlawful, as the bank had failed to comply with the requirement under section 69A, in that no valuation of the property had been carried out at least 21 months prior to the intended sale. In accepting the distinction drawn by the plaintiff’s counsel, the court said as follows:

‘I accept that distinction myself. It appears to stand to reason and to be in conformity with both the provisions of section 26 of the Auctioneers Act and section 69B 1(2) of the TPA to hold that anybody who suffers injury or loss as a result of the wrongful or improper exercise of the powers of an auctioneer or the power of sale generally has his remedy in damages only. However, it is a *non sequitor* to suggest that one who is about to be damnedified by such an improper or irregular exercise of either the powers of an auctioneer or the general power of sale isn’t entitled to stop the intended injury on its tracks particularly where the intended breach is a serious one.’

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525 HCCC (Nairobi) No. 274 of 1998 (Ringera J on 5 Mar 2002).
526 (2002) KLR 1
The notion that a mortgagor injured by a defective power of sale by the mortgagee can only recover damages seems to stem from the protection accorded by law to a bona fide purchaser for value without notice of property in an auction sale. Generally, the purchaser is not enjoined to inquire into the rights of the mortgagee to sell. Jurisprudence on this issue flows from the leading case of Captain Patrick Kanyagia & another v Damaris Wangeci & others,\[527\] where the Court of Appeal held that there is no duty cast, in law on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.

The question of the protection of a purchaser for value without notice was also canvassed in the case of Priscilla Krobought Grant v Kenya Commercial Finance Co. Ltd. & 2 others,\[528\] the Court of Appeal held that a purchaser at a public Auction was protected by section 69(B) and could only lose the protection if it was proved that there was an improper or irregular exercise or the statutory power of sale of which the purchaser had notice.

Though there are multiple cases reflecting judicial application and interpretation of statutory power of sale under the RLA, as already shown above, it is the question of statutory notice under section 74(1) that has often ignited highly contested litigation. Consequently, several principles underlying the chargee’s power of sale under the RLA have been laid down and firmly entrenched by the courts. Underlying these principles is the requirement that unless the chargee issues a valid statutory notice under section 74(1) RLA then his attempt or purported exercise of his statutory power of sale is null and void. An exposition of the jurisprudence in relation to the statutory power of sale under the RLA ensues hereunder.

It is trite law that a valid notice under section 74(1) RLA must clearly indicate that the notice period of three months will begin to run from the date of the service of the notice. Accordingly, any notice that states that the notice period will begin to run from the date of the notice is bad and fatal in law. Thus in John Karongo v Housing Finance Co. Ltd & Another,\[529\] the courts said, ‘the notice gave the applicant three months from the date of the notice. That was wrong. Three months must in law start running from the date of the service of the notice and whatever else the notice says, it must make that clear.’

\[527\] Civil Appeal No. 150 of 1993 (Omollo, Akiwumi and Shah JJA on 11 August 1995).
\[528\] Civil Appeal No. 227 of 1995.
\[529\] Civil Case No. 1203 of 2001, (High Court at Nairobi)
In *Gichora v Family Finance Building Society*, the applicants suing as joint administrators of the estate of the deceased sought an injunction restraining the defendants from exercising their statutory power of sale. This was on the ground that no sufficient notice had been issued to the plaintiff as required by statute. In particular the date of service of the notice was lacking. The court held as follows:

‘Section 74(1) fixes the commencement date of the notice. The notice runs from the date of service of the notice on the chargor. The date of the notice is immaterial. From the evidence or record the date of service is lacking and hence the date when the ninety days is supposed to start running is unknown. In those circumstances I agree with counsel for the applicant that there is no evidence that a valid statutory notice has been served on the applicants as by law enjoined.’

Similarly, in *Muigai v Housing Finance Company of Kenya Ltd & Another*, the plaintiff borrowed money from the first defendant and secured the repayment thereof by charging his land. Subsequently he defaulted in repaying the money and the 1st defendant, after allegedly giving a notice, sold the charged property by auction to the second defendant. In the said notice, the 1st defendant demanded payment in full within three months from the date of the notice. It was held that the notice was invalid as it referred to three months from the date thereof instead of from the date of receipt. The court also proceeded to state that:

‘I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute which derogates from the chargor’s equity of redemption. Without service of a valid statutory notice, the power of sale does not crystallize and any subsequent service of notification of sale and the actual auction are merely acts pursuant to a pretended power of sale. As such they are a nullity in law.’

It is also settled that where the chargor contends that the statutory notice was not served, the burden of proof lies on the chargee to prove that indeed he served the notice. The *locus classicus* in this regard is the case of *Nyangilo Ochieng & Abel Omuom v Fanuel B. Ochieng, Gladys Oluoch and Kenya Commercial Bank Ltd* where the Court of Appeal stated the position in the following words:

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532 Civil Appeal No. 148 of 1995.
‘It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered Land Act. That burden is not in any matter on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.’

In view of this decision, it is clear that in the absence of proof by the mortgagee that notice was indeed served on the mortgagor, the courts are constrained to infer that the statutory power of sale is void. Notice under the RLA may be effected in one of the ways stated under section 153 of the Act wit the following:

- It may be served on him personally.
- It may be left for him at his last known place of residence or business in Kenya.
- It may be sent by registered post to him at his last known postal address or at his last known postal address in Kenya.

As concerns service by registered post, the decision in the case of Francis Ng’ang’a Munida v Equity Building Society\(^{533}\) is of relevance. The court stated that, ‘It is for the chargee to prove that service. If it is by post the chargee must show that he did register the notice and that he posted it. … In the absence of such evidence the inevitable conclusion will be that the statutory notice was not served and consequently the sale by auction was void.’ Thus in Stephen Mugera Gakenge v Kenya Commercial Bank Ltd & Another,\(^{534}\) the notice exhibited by the respondent was found to be invalid for, \textit{inter alia}, there was no evidence of the letter having been sent by registered post i.e. no copy of certificate of registration was annexed to prove that it was indeed sent.

In Stephen Obadiah v Euro Bank Ltd & 3 others,\(^{535}\) the mortgagor posted the statutory notice to the mortgagor at the address given in the charge document prompting the mortgagor to argue that the notice was not served. The court held that posting the notice to the mortgagor at the address given in the charge document, ‘constitutes satisfactory evidence of good service in terms of section 3(5) of Interpretation and General Provisions Act and consequently the complaint by the plaintiff that the notice required to be served under section 74 of the Registered Land Act was not served lacks substance.’

\(^{533}\) Civil Case No. 1592 (High Court at Nairobi).  
\(^{534}\) \textit{Infra} n. 307.  
\(^{535}\) Civil Case No. 5 of 2001 (High Court at Nairobi).
In the case of *Ooko v Barclays Bank of Kenya*, the plaintiff who was previously an employee of the defendant, filed an application seeking an interlocutory injunction to restrain the defendant from exercising his statutory power of sale. Her main ground was that the statutory notice were addressed to an address which she claimed she had never used and whose registered owner she did not know. The defendant argued that since it had sent the statutory notice through the address through which all previous correspondence with the defendant had been sent, the notice should also be deemed to have reached her.

In finding that the plaintiff was prima facie served with the requisite statutory notice observed that the plaintiff had used the address when she sought employment with the defendant and had indeed received correspondence addressed to her through that address as proved by some of the letters annexed to her own affidavit. Accordingly, the mortgagee had rightly sent the notice to the mortgagor’s last known address. But where the notice is posted to the wrong address, it would not be deemed to have been served on the mortgagor. This was the case in *Muigai v Housing Finance Co. of Kenya Ltd & another*.

In addition to the above enunciated principles, it has also been laid down that where the principal debtor and the chargor/mortgagor are two different entities, the statutory notice should be served on the chargor/mortgagor not the principal debtor. The underlying rationale of this principle is as was stated by the Court of Appeal in the case of *Trust Bank Ltd v Kiram Ramji Kotendia* that, ‘But however correctly a notice is worded, it has and must, at the end of the day, be served upon the mortgagor or chargor.’

In *Stephen Mugera Gakenge v Kenya Commercial Bank Ltd & Another*, the plaintiff charged the suit property to the 1st defendant to service overdraft loan facilities extended to Gakenge Maize Millers Co. Ltd. upon default by the plaintiff, the 1st defendant purported to exercise its statutory power of sale as a result of which the plaintiff sought to restrain the sale. Two different statutory notices were exhibited. One was exhibited by the applicant and the other was exhibited by the respondent. The one exhibited by the applicant was addressed to Gakenge Maize Millers and in the court held, ‘That notice is clearly not valid as Gakenge Maize Millers is the principal debtor but is not the chargor.’

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537 Supra n. 296.
538 Civil Appeal No. 61 of 2000
539 Civil Case No. 1558 of 2001.
540 The one exhibited by the respondent was also found to be invalid for it stated that the chargee would after expiry of three (3) months from the date of the notice sell the charged property.
The case of *Kositany & Another v Industrial & Commercial Development Corporation (ICDC) & another*,\(^{541}\) also aptly demonstrates this principle. In this case, Kabobo & Co. Ltd, a company associated with one Simon Kositany, who had passed away, had obtained a loan during his lifetime from the 1st respondent (the ICDC). The late Kositany had executed a charge as security for the loan. After the company was unable to repay, the ICDC sought to sell the charged property. Even though this was after the death of Kositany, ICDC’s notice of intended sale was addressed to Kabobo Co. Ltd and copied to the late Kositany. The plaintiff thus brought the application seeking to restrain the intended sale on the ground that ICDC had not served any member of the late Kositany’s family with the statutory notice of sale. In its judgment, the court stated;

‘A statutory notice sent to the company of which a deceased person who was a former director or shareholder, is not a statutory notice sent to a mortgagor or a chargor. Such a notice being invalid, the mortgagee’s or chargee’s statutory power of sale could not be said to have arisen and consequently no instructions could not issued to the auctioneers firm to sell the suit property.’

The above case also raises the question as to the position in law when the chargor dies. In *Ragui v Barclays Bank of Kenya Ltd*,\(^ {542}\) the court categorically stated that ‘a statutory notice addressed to a deceased person is invalid and has no effect. In this case the statutory notice ought to have been served upon the administrators of the estate.’ In *Olao v National Bank of Kenya*,\(^ {543}\) auctioneers notice was purportedly served when the chargor was deceased. The auction was for that reason stopped.

On another plane, the courts generally frown from restraining the mortgagee from exercising his statutory power of sale.\(^ {544}\) In particular, a dispute as to the amount due under a mortgage will not stop the exercise of the statutory power of sale. Accordingly, as was established in the case of *Shah v Devji*,\(^ {545}\) the courts do not normally grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a

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\(^{542}\) (2002) 1 KLR 647.
\(^{543}\) HCCC No. 65 of 1999.
\(^{544}\) See Ramakrishna v Official Assignee (1922) 45 Madras 774 where it was held that ‘the mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagor by the instrument namely statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties.’
\(^{545}\) (1965) EA 91.

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dispute as to the amount due under the charge. This principle is well set out at page 332 at paragraph 725 of the Halsbury’s Laws of England (4th ed) vol 32, as follows:

‘The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects the manner in which the sale is being arranged.’

Mulla on Transfer of Property also echoes the principle when the learned author states that ‘an injunction will not issue restraining a mortgagee from exercising his statutory powers of sale because the amount is in dispute.’ In *Kenya Commercial Bank v Harunani*, the plaintiff sued the defendant for money on account of an advanced loan which was unpaid by the defendant. The defendant denied owing that amount but admitted that he obtained a loan from the bank. The parties had entered into a contract whereby the defendant accepted the interest rates stated at inception and such other rates and penalties as the plaintiff in its discretion may charge. The defendant averred that the interest charges were exorbitant, punitive, arbitrary, excessive and disputed. In its judgment the court stated:

‘A dispute as to the amount due under a mortgage will not stop the exercise of the statutory power of sale. It is settled that the mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects the manner in which the sale is being arranged.’

The court also stated in this case that the mortgagee would be restrained, however, if the mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due to him, unless on the terms of the mortgagee the claim is excessive. In *Aberdare Investments Ltd v Housing Finance Co of Kenya & Another*, the Court of Appeal reiterated this point by stating that for a chargee to be restrained, the chargor must pay the amount claimed in court to the chargee and not simply make an offer of redemption based upon probable or possible future sales of other properties.

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546 Mulla on Transfer of Property Act, 3rd Edition at page 479.
547 (2002) 2 KLR 691.
548 See also Joseph Okoth Waudi v National Bank of Kenya, Civil Appeal No. 77 of 2004; Lavuna & others v Civil Servants Housing Co. Ltd & Savings & Loan Kenya Ltd, Civil Appeal No. 14 of 1995; Middle East Bank (K) Ltd v Milligan Properties Ltd, Civil Appeal No. 194 of 19998; Caesar Njagi Kunguru v Kenya Commercial Bank Ltd, HCCC No. 1543 of 2000; and Habib Bank AG Zurich v Pop-in (K) Ltd & others, Civil Appeal No. 147 of 1989 (Court of Appeal on 8 Dec 1995) etc.
549 Civil Appeal No. 227 of 1998 (Court of Appeal on 26 March 1999).
The dictum of Bombay High Court in *Jagjivan v Sharidhan* is worth quoting here. The court said that, 'the owner of equity of redemption can only stay the sale *pendente lite* by paying the amount due in court by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.'

The mortgagor/chargee may also be restrained from exercising his power of sale when it is proved that he is exercising the power oppressively or improperly. Pall J in *Muhani & another v National Bank of Kenya Ltd*, 550 stated that ‘the very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale. As such the High Court held in *John Mutere & another v Kenya commercial Ltd & another*, 551 that the court has no power to prevent the exercise of statutory power of sale which has accrued unless it can be shown that the power is being exercised oppressively or improperly.

Further, a mortgagor seeking to restrain the mortgagee from exercising his statutory power of sale must ordinarily satisfy the conditions for granting an injunction as set out in the leading case of *Giella v Cassman Brown & Co.Ltd*. 552 Other conditions precedent for granting an equitable remedy must also be satisfied. The mortgagee is, for example, required to come to a court of equity with clean hands. 553 He must also make full disclosure of material facts related to the case. 554

he must establish a *prima facie* case as was the case in *J.L. Lavuna & Others v Civil Servants Housing Co. Ltd and Savings and Loan Kenya Ltd*. 555 court will not grant a stay as in the of *George Gikubu Mbuthia & 3 Others v Small Enterprises Finance Co. Ltd & another* 556 where the application for stay was found to be a mere delaying tactic, and in *Aberdare Investments*

550 (1990) KLR 73.
552 (1973) EA 378.
553 In Muigai v Housing Finance Co. of Kenya, Ringera J commented thus on the conduct of the mortgagor, ‘as regards the conduct of the plaintiff, it is no doubt deplorable. He is in arrears, his promises to repay have come nought and even if he boast of paragraph 4 of his supporting affidavit that he has indefatigably endeavored to service the said loan and that he is still ready and willing to regularize the payments thereof and/or redeem the security in full rings hollow.’ However, he also noted that, ‘I am of the opinion that if the devil must be hanged, he must only be hanged in strict conformity with the relevant law. the lendor has failed to comply with that law and the court cannot in the premises put the noose on the borrower’s neck.’
556 Civil App. No.54 of 1998 at Nairobi (unreported)
Co. Ltd v Housing Finance Co. Ltd & another\(^{557}\) where the application for stay was founded on an assertion that the chargee ought to avail to itself any of the other remedies available to it rather than exercising its statutory power of sale. The court categorically stated:

‘The choice of remedy for the recovery of unpaid loan under a mortgage is that of the mortgagee and the mortgagor can not tell the mortgagee to take such action as may suit the mortgagor.’

It is noteworthy that the exercise of the power of sale has occasioned great suffering to many family members across Kenya in cases where family land used to secure a loan by the head of the family or some other person (with consent of the head of the family), usually without first consulting with the family members has been sold to offset the debt. In a lot of cases, family members are not even notified of the change of family property to secure a loan.

After sale of family land, many families have found themselves landless without any recourse to the law. An attempt has been made in recent years to moderate the provisions regarding a chargee’s power of sale by requiring that, in cases of agricultural land, notice of intention to sell be served by the chargee on the District Commissioner of the area in which the land is situated.\(^{558}\) Upon receipt of notice, the District Commissioner may, at the instance of an affected party, petition the High Court to postpone the sale for a definite period of time on grounds that the sale would result in persons being evicted from the charged land thereby occasioning undue social difficulties, or cause public disorder in the neighbourhood. But, such an application cannot be made if those would suffer eviction or some other difficulties are the family members of the charger, or the charger himself. Therefore, the power of sale of registered properties still has potential to expose members of a family to great suffering.

Further, financial institutions have found it difficult to realise the security provided by agricultural land. The reasons for these vary but revolve largely around the continued perception that agricultural land is family land, and not purely a commodity for economic development. In view of this difficulty, the attraction of agricultural land as a collateral has diminished and a number of banks and credit institutions do not now accept agricultural land as collateral.

\(^{557}\) Civil App. No.227 of 1998 at Nairobi (unreported)

\(^{558}\) See Act No. 14 of 1991.
iii. **Action to Recover the Money Lent**

Section 74(3) of the RLA restricts the chargee from recovering the debt by way of a civil suit save under the following circumstances only:

a. Where the chargor is bound to repay the money secured by the charge. In this circumstance, a transferee from the chargor shall not be liable to be sued for the money unless has agreed with the chargee to pay the same. Further, no action shall be commenced until a notice served in accordance with section 74(1) has expired. The court may, at its discretion, stay a suit under this limb notwithstanding any agreement to the contrary, until the charge has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge.

b. Where the property is destroyed through no act of the chargee or the chargor, and the chargor, despite being served with a notice to provide/furnish the chargee with additional security does not. As in the case above, the court may, at its discretion, stay the suit until the chargee has exhausted all his other remedies against the charged property.

c. Where the chargee is deprived of the whole or part of his security, by, or in consequence of, the wrongful act or default of the chargor.

From the above analysis of remedies available to the chargee under the RLA, it is noticeable that a chargee has so few remedies principally because it abolishes or severely restricts other remedies which may be available to him under, say for instance, the ITPA. The remedies of foreclosure, possession and consolidation are restricted under this Act. Indeed the latter two may be said to non-existent under the RLA. This is because section 80 states that a chargee may not enjoy any right of entry into possession or foreclosure while section 84 states that a chargee has no right of consolidation, unless the right is expressly reserved in at least one of the charges.

**6.6. EQUITY OF REDEMPTION IN MORTGAGES AND CHARGES**

At every stage of the evolution of the law of mortgages since the 17th Century, equity has intervened on grounds of conscience in the relationship of mortgagor and mortgagee, with the object of preventing any exploitation of the former by the latter. Equity has always been particularly conscious of the possibility that the lender of money might abuse his superior
bargaining strength and economic capacity by imposing on the borrower oppressive and unconscionable terms or dealing. The balance of legal protection in the mortgage transaction has therefore tended in favour of the mortgagor rather than the mortgagee. Gray and Symes convincingly elaborate the position as follows:

‘Two truisms about human experience have influenced the historical development of the law relating to credit transactions. First, those who lend money commercially are more often and more powerfully motivated by the wish to acquire profit than by the desire to render useful service to the community. Second, those who borrow money tend, on the whole, to be necessitous men who lack bargaining power and who are therefore highly vulnerable to harsh or unconscionable dealing. “Necessitous men”, has been said, “are not truly speaking, free men.”’

It is in this context that equity of redemption holds a fundamental position in transactions involving mortgages and charges thereby requiring specific analysis herein. At common law, if a borrower did not repay the mortgage debt on the contractual date of redemption (legal date of redemption) his right to redeem the property was extinguished. But equity “looking at the borrower with unusual tenderness” and guided by the principle that “once a mortgage always a mortgage” allowed a borrower to redeem his property long after the legal right to redeem had expired.

The equity of redemption simply reflects the view of equity that irrespective of the strict legal and contractual position, the real owner of the mortgaged land is still the mortgagor albeit subject to the mortgage granted to his creditor. The inviolability in equity of the borrower’s right to redeem the loan thus inverts the legal relationship of the parties to the mortgage transaction, and the mortgagor’s ‘equity’ has come to be seen as constituting a proprietary interest in the land which can itself be bought, sold and mortgaged.

560 Equity of redemption has been defined as an interest or equitable right in land. See Re Wells; Swibun-Hanham v Howard (1933) Ch 29.
561 This phrase was coined to refer to the fact that the principal interest of the lender (mortgagee) was to the money and his right to the land was only as security to the money.
562 See Selton v Slade (1802) 7 Ves 265. See also Noakes v Rice (1902) A.C. 24 where Lord McNaghten stated that redemption is the very nature and essence of a mortgage. He noted that it would be inconsistent with the very nature of a mortgage that it should be totally irredeemable or that the right of redemption shall be conferred to certain persons or for limited period or to part only of the mortgaged property.
Accordingly, this practice adopted by the Chancery Courts can be credited with the evolution of both the equitable right to redeem and the equity of redemption. However, the equity of redemption has with time, shed its purely equitable colouring and has assumed the character of a legal and statutory right.

In Kenya, equity of redemption has received legal recognition through a number of statutes. Under the ITPA the borrower is entitled to redeem his property in absolute terms i.e. unconditionally at any time after the principal debt has become due and payable and no notice is required. The right is also recognized under section 72 of the RLA. However, under section 91 of the Companies Act (Cap 486) irredeemable debentures may be created.

### 6.6.1 Essentials Elements of Equity of Redemption

So jealous has been the concern of equity on behalf of the mortgagor that it has established and retains to this day, a doctrine that ‘no clogs’ or ‘fetters’ should be allowed to be imposed upon the mortgagor’s equity of redemption. Any provision in a mortgage transaction which purports to limit, postpone or exclude the mortgagor’s equity of redemption is liable to be struck down as void and unenforceable. Equity thus directs its sharp gaze upon any provision which might have the effect of negating the value of equity redemption belonging to the mortgagor.\(^{564}\)

In essence, the right to redeem is absolute, it cannot be clogged, and it cannot be fettered.\(^{565}\) This element is reflected by section 72 of the RLA, which as already highlighted above, states that, any agreement or provision which purports to deprive the chargor of the right of redemption shall be void. The approach of the courts has been to strike down any fetters imposed on the equity of redemption. Lord Parker described the rule against clogging the equity of redemption in the following terms:

> “The rule may be stated thus: the equity which arises on the failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction.”\(^{566}\)


\(^{565}\) A clog in this context is any condition which restricts the right of the borrower to have the mortgaged property re-conveyed to him on repayment of the mortgage debt. See Warborough Ltd v Garmite (2003) EWCA 1544.

\(^{566}\) Krelinger v New Patagonia Meat and Cold Storage Co Ltd (1914) AC 25 at 48.
Thus in *Saleh v Eljofri*\(^{567}\) the court categorically held that a borrower’s equity of redemption was an essential element of every mortgage and failure to repay the mortgage debt on the contractual date of redemption did not debar the borrower from his right to redeem the mortgaged property. In the case of *Industrial & Commercial Development Corporation v Kariuki & Gacheca Resources Ltd*\(^{568}\) the court stated that the right of redemption subsists until the transfer is registered. In *Fairclough v Swan Bakery Co. Ltd*\(^{569}\) a clause in the mortgage purported to postpone the right to redeem for 20 years. It was held that the clause rendered the property to be irredeemable and that the borrower had a right to redeem the property at an earlier date. Lord McNaghten categorically stated, “Equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption.”

Therefore, a mortgage that contained a clause that conferred on the mortgagee an option to buy the mortgaged property was held to be against the doctrine of equity of redemption.\(^{570}\) Similarly, a clause which allowed the mortgagor only a limited time period within which to redeem the mortgage was void as a fetter on the mortgagor’s right.\(^{571}\) Clauses which confer a collateral advantage on the mortgagee, such as a mortgagor’s promise to buy specified goods only from the mortgagee, are also regarded suspiciously.\(^{572}\)

In *Lewis v Frank Love Ltd*\(^{573}\) the mortgagor and the personal representatives of the mortgagee agreed that if the representative did not demand a repayment of the debt for a period of two years, the borrower would grant them an option to purchase the reversion of a part of the mortgaged property. The court explicitly held that the option was void since it was a clog on the equity of redemption. In *Davis v Symons*\(^{574}\) the court declined to uphold an agreement by which the mortgaged property would belong absolutely to the mortgagee in the event of the borrower dying before him.

However, what appears to be a fetter, albeit not unreasonable, and which does not materially affect the right to redeem may be upheld by the courts. As such in *Knightsbridge Estates Trust Ltd v Byrne*\(^{575}\) Lord Greene stated, “Equity does not reform mortgage transactions because they are unreasonable but is concerned to see that essential requirements of such

\(^{567}\) (1950) KLR 24.
\(^{568}\) (1977) KLR 52.
\(^{569}\) (1912) A.C. 565.
\(^{570}\) Noakes v Rice (1902) AC 24.
\(^{571}\) Salt v Marques of Northampton (1892) AC 1.
\(^{572}\) Samuel v Jarrah Timber and Wood Paving Corporation Ltd (1904) AC 323.
\(^{573}\) (1961) 1 WLR 261.
\(^{574}\) (1934) Ch 442.
\(^{575}\) (1940) AC 613.
transactions are observed and that oppressive or unconscionable terms are not enforced.” He said this in declining to strike down an agreement in which the mortgagors had agreed to repay a loan by installments for over forty years and later wished to borrow from another lender at a reduced rate of interest claiming that the postponement was unreasonable. Accordingly, it is likely that a clause granting the lender a collateral advantage i.e. a right additional to the repayment of the principal and interest will be generally upheld unless it is oppressive, or seeks to violate the right of redemption.

In *kreglinger v Patagonia Meat & cold Storage Co. Ltd*, an agreement in a mortgage provided that a loan to the respondents was to be secured by a floating charge. There was a stipulation that for a period of 5 years from the date of the loan the company would not sell sheep skins to persons other than the lenders provided that the lenders paid the best price obtainable. The agreement was held to be valid, the stipulation being regarded as a collateral contract which did not form part of the main mortgage transaction.

### 6.7. THE DOCTRINES OF TACKING, MARSHALLING AND CONTRIBUTION

#### 6.7.1 Tacking

This doctrine allows a subsequent lender to insist on the repayment of his loan before repayment to a prior lender. There are two types of tacking.

i. **Tabula in Naufragio (Plank in a Shipwreck)**

Where there are three mortgages affecting a single property, the third lender is allowed to get priority over the second lender by paying off the first mortgage and tacking his mortgage into the first mortgage. This form of tacking was abolished in the UK by the 1925 law of property Act. In Kenya, the ITPA (1882) and the RLA have abolished this type of tacking under sections 80 ITPA (1882) and 83 and 92 of RLA. Section 80 of the ITPA states as follows:

‘No mortgage paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And except in the case provided for by section 79, no mortgagor making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.’

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576 See note 242 above.
Section 83 (2) of the RLA provides that except as provided in that section, there is no right to tack.

ii. Tackling of further Advances

Where a lender makes a further loan to a borrower, he is allowed to tack together both loans and to recover them prior to any intervening lender, provided he has not received any notice of the intervening mortgage at the time of the further advance. Section 94 (1) of the 1925 Law of Property (UK) codifies this form of tacking. The same is retained under the ITPA (1882) and the RLA albeit restricted. For instance, the right to tack MUST be reserved in the instrument otherwise the right is lost.

Thus section 83(1) RLA states that provision may be made in the charge for a chargee to make further advances or give credit to the chargor on a current or continuing account, but, unless that provision is noted in the register, further advances shall not rank in priority to any subsequent charge except with the consent in writing of the proprietor of the subsequent charge.

On its part the ITPA states that if a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secures thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

6.7.2 Marshalling and Contribution

Marshalling arises where there are competing mortgages in the sense that the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage. In such a circumstance, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.\(^{577}\)

\(^{577}\) Section 81 ITPA.
On the other hand, contribution arises where several properties, whether of one or several owners, are mortgaged to secure one debt. Under the doctrine of contribution, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debts secured by the mortgage, after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

Essentially marshalling and contribution are principles of equity which have been given the force of law by statute in section 81 and 82 ITPA

6.8. PRIORITY OF CHARGES/MORTGAGES

The general rule is that the charge/mortgage which is first made, is first paid or discharged. For instance, where a subsequent encumbrancer exercises his right of redemption, he has to pay off the prior encumbrances before he can discharge his debt under the mortgage or charge. Priority of charges is under all registration statutes conferred by registration. The charge/mortgage first registered has priority over all subsequent ones.

In general terms, the ITPA states that where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.578

6.9. OTHER FORMS OF SECURITIES FOR ADVANCES

Besides mortgages and charges, there are several other forms of securities for advances. They include, for example, debentures, chattels transfer mortgages, guarantees, letter of hypothecation of goods and bills of lading. The aforementioned securities for advances are tackled each seriatim, albeit rather briefly but concisely.

6.9.1 DEBENTURES

A Debenture is a document which creates or acknowledges a debt due from a company. Such a document need not be, although it usually is, under seal.579 It need not give although it usually does give, a Charge on the assets of the company (borrower) by way of security. It

578 Section 48 ITPA. See also Section 42(1) RTA, Section 27, Cap 285(RDA), section 60, LTA, cap 282, Section 104, GLA, (Cap 280) and Section 48, 78 of ITPA.
579 See Charlesworth and Morse “Company Law” (14th Ed) at Page 64
may or may not be, one of a series. Similarly, it may or may not be secured. In addition, it is always for a specified sum which can only be transferred in its entirety. Further, a Debenture may be collaterally secured by a trust deed.

It is worth noting that there does exist a distinction between debentures and shares. For instance:

The holder of a debenture is a creditor, not a member of the company while a shareholder is a member.

A company may purchase its own debentures but it must not purchase its own shares unless in accordance with specified procedures.

Debentures may be issued at a discount, shares in general may not be. Interest at the specified rate on debentures may be paid out of capital; dividends on shares must be paid only out of the distributable profits.

**Issue of Debentures**

Debentures are generally issued pursuant to the provisions of the articles of the borrowing company. Naturally, there must be a resolution by the Board of Directors of the issuing company to that effect. When debentures have been issued, the prospectus cannot be looked at to ascertain the contract. However, if the contract was intended to be contained in the prospectus and the debenture together or if the prospectus contains a collateral contract, the consideration for which was taking up of the debentures, the prospectus may be looked at.

Generally, an agreement by the borrowing company to issue debentures in consideration of an actual advance of money has the effect of putting the lender in equity in the same position as if the debenture had been issued. Accordingly, it does follow that a contract to take up debenture may be enforced by way of an action for specific performance. There are several kinds of debentures.

**Registered Debentures**: These are payable either to the registered holder or the bearer.

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580 See Lemon vs. Austin Friors Investment Trust Ltd (1926) ch.1 (CA)
581 Supra n. 307
582 Ibid.
583 See Jacobs vs. Batavia & General Plantations Trust Ltd (1924) 2 ch 329 (CA)
**Bearer Debentures**: These debentures are almost similar to registered debentures except that they are expressed to be payable to the bearer and coupons for the interest are attached.

**Redeemable Debentures**: These are debentures which are issued on condition that the company is bound to redeem a certain number each year.

**Perpetual Debentures**: These are debentures which are expressed to be redeemable at a future though uncertain date.

**Charges Securing Debentures**

A charge on the assets of a company given by a debenture in order to secure the money borrowed by the company may either be a fixed charge or a floating charge. In practice, many debentures are secured by both a fixed and a floating charge. Such charges are expressed to cover all moneys “due by the company to the holder including future and contingent liabilities.”

**Fixed Charge**- a fixed charge is a mortgage of ascertained and definite property. It prevents the borrowing company from realising that property i.e. disposing it free of the charge, without the consent of the holders of the charge.

**Floating Charge**- a floating charge is an equitable charge on some or all of the present and future property of a company i.e. the company’s undertaking. It is effective as to future property only when that property is acquired by the company. Thus a floating charge will be valid even if the assets covered do not yet exist. However, a floating charge has the following general traits:

- It is a charge on a class of assets of a company present and future.
- It is contemplated by the charge that until the holders of the charge take steps to enforce it, the company may carry on business in the ordinary way as far as concerns the class of assets charged.

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584 Supra n. 307
585 See Re Yorkshire Woolcombers Association Ltd (1903) Ch 284 (CA)
Priority of Charges

A company which has created a floating charge cannot later create another floating charge over some of the same assets ranking in priority to or in pari passu with the original charge. Unless of course the provisions of the original charge allow it.\textsuperscript{586}

Remedies of Debenture Holders

If a debenture confers no charge, a debenture holder is an ordinary unsecured creditor. Thus if there is a default in the payment of principal or interest it may:

- Sue for the principal or interest and after obtaining judgement,
- Levy execution against the company.
- Petition for winding up of the company by court on the ground that the company is unable to pay its debts.

Where the debenture creates a charge and a default is made in the payment of principal or interest, a debenture holder or the trustee where there is a trust deed may;

- Sue for the principal or interest or
- Present a petition for winding up of the company or
- Exercise any powers conferred by the debenture or trust deed e.g.
  - Appointing a receiver
  - Appointing an administrative receiver of the assets charged
  - Taking possession of the assets charged and carrying on business
  - Selling the assets charged.

General Principles of the Law on Receivership

A receiver takes possession of the property of the company over which he is appointed and realises it for the benefit of the debenture holder(s) He is not a liquidator or an administrator. The distinction between a liquidator and a receiver is simply that whereas a liquidator is appointed with the object of winding up the company and terminating its existence, a receiver may be paid out and the company continues business as before.\textsuperscript{587} On the other hand, an administrator is appointed with the object of saving a company from a winding up and acts for the benefit of the company’s creditors and shareholders generally, whereas a receiver is

\textsuperscript{586} See Re Automatic Bottle Melters Ltd (1926) ch.412 (CA)
\textsuperscript{587} Ibid.
usually appointed by a specific debenture holder to protect his security under a fixed or floating charge.\footnote{Ibid.}  

Generally a receiver may take possession of only part of a company’s property (e.g. of a specific property secured by a fixed charge) but if he take possession of the whole (or substantially the whole) of the company’s property and was appointed by the holders of a floating charge, he is known as an administrative receiver\footnote{Ibid.} Most receivers are in fact, administrative receivers since the major creditors appointing them e.g. Banks, usually take extensive fixed and floating charges as security.\footnote{Ibid.}  

There are two ways of appointing a receiver: either under or pursuant to a power, express or implied, contained in the debenture or trust deed or by an order of the court upon application when there is no such power.\footnote{Ibid.}  

**Appointment by Court**  

It is generally accepted that a court may appoint a receiver when: The principal or interest thereon is in arrears;\footnote{See Bissi vs. Bradford Tramways (1891) W.N. 51} or The company is being wound up;\footnote{See Wallace vs. Universal Automatic Machines Co. (1894) 2 ch.547 (CA)} or The security is in jeopardy. Security is in jeopardy when there is a risk of its being seized to pay claims which are not prior to the debenture holder’s claims. Thus in Re London Pressed Hinge Co. Ltd,\footnote{See Edwards vs. Standard Rolling Stock Syndicate (1893) 1 ch. 574} where a creditor had obtained judgement against the company and was in a position to issue execution, it was held that the debenture holders with a floating charge on the undertaking and property of the company were entitled to appoint a receiver because their security was in jeopardy. Thus a receiver will be appointed on the aforecited ground where execution has issued at the behest of a judgement creditor,\footnote{See Re Victoria Steamboats Ltd (1897) 1 ch 158} where a petition for winding up has been presented by a creditor and there is imminent danger of compulsory winding up\footnote{See McMahon vs. North Kent Iron Works (1892) 2ch 148} and where the company’s works has been closed and the creditors are threatening action.\footnote{Ibid.}  

Ordinarily, appointments by court are infrequent and are only resorted to where the power of appointment of a receiver has not been reserved in the Debenture or other charge instrument. Where the company is being wound up by the court, it can appoint the official receiver as a
receiver. \(^{598}\) It ought to be noted that a receiver appointed by the court is an officer of the court and not an agent of the company or of the debenture holders. He cannot therefore be sued without leave of court. \(^{599}\) He is personally liable for any contracts he enters into. However he is entitled to indemnity out of the assets in his hands for liabilities properly incurred. \(^{600}\)

The effect of appointment by court is to cause floating charges to crystallise which prevents the company from dealing with the assets of the company without his consent. The company’s employees are automatically dismissed (unless the receiver decides to employ them)\(^{601}\)

**Appointment out of Court**

A receiver or manager is appointed out of court when the debenture holder causes a Deed of Appointment of a Receiver Manager to be handed to him or his agent, on his acceptance. The effect of appointment out of court is three-fold: first, Floating charges crystallise and become fixed. This prevents the company from dealing with the charged assets without the receiver’s consent. \(^{602}\) Secondly, when a receiver of the undertaking of the company is appointed, the Directors’ powers of controlling the company is suspended. \(^{603}\) Finally, with regard to the company’s employees, it would appear that since the Receiver Manager is an agent of the company his appointment does not necessarily terminate their employment. \(^{604}\) This distinction between receivers appointed in court and out of court vis-à-vis employees is brought about by the fact that in the former instance, there is a change in personality of the employer while in the latter there is not. \(^{605}\)

**6.9.2 CHATTELS TRANSFER MORTGAGES**

A chattel is defined in Section 2 of the Chattels Transfer Act\(^{606}\) as “any movable property that can be completely transferred by delivery and includes machinery, stock, and the natural increase of stock as hereinafter mentioned, crops and wool but does not include:

- title deeds, choses in action or negotiable instruments.

\(^{598}\) Supra n. 307

\(^{599}\) Ibid; See also Viola vs. Anglo American Cold Storage Company (1912) ch.305

\(^{600}\) Ibid.

\(^{601}\) Ibid at p. 704

\(^{602}\) Ibid.

\(^{603}\) See Newhart Developments vs. Co-operative Commercial Bank (1978) 2 ALL ER 896

\(^{604}\) See the judgement of the English Court of Appeal on Nicoll vs. Cutts (1985) BCLC 322 (CA); see also Griffiths vs. Secretary of State for Social Services (1974) Q.B 468.

\(^{605}\) Ibid.

\(^{606}\) See Generally, Cap 28 of the Laws of Kenya
• shares and interests in the stock, funds or securities of any government or local authority.
• shares and interests in the capital or property of any company or other corporate body or.
• Debentures and interest coupons issued by any government, or local authority or company or other corporate body.

It follows then that a chattel transfer mortgage is an instrument given to secure the payment of money or the performance of some obligation. Under the Chattels Transfer Act, an instrument is defined in Section 2 thereof to include a bill of sale, mortgage, lien or any other document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, whether by way of sale, security, pledge e.t.c. The instrument creating a chattel transfer mortgage must satisfy the provisions of the Act. It must be:

• executed,
• attested,
• contain an inventory of the chattels if more than one and be
• registered.

Further, the same must be in form 4 of the first schedule to the Act with such variations or modifications and additions as are necessary.

6.9.3 GUARANTEES

A contract of guarantee may be defined as a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the “surety”, the person in whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written, and it’s function is to enable the principal debtor to get a loan or goods on credit. Thus a guarantee is essentially a collateral engagement by a person to be liable for the debt of another in case of his default.\textsuperscript{607} It may be oral or in writing.

\textsuperscript{607} See Susan vs. Bank of Scotland (1836) 10 Bligh NS 627
For a guarantee to be valid, it must meet several basic conditions: There must be a principal debt; a consideration; and there must be no misrepresentation. A surety may be discharged from his guarantee by revocation, death, variation, or release.

6.9.4 LETTER OF HYPOTHECATION OF GOODS

Hypothecation of goods is a means of pledging goods as security for a debt or demand without the pledger parting with the possession of the goods. It follows thus that a letter of hypothecation is the instrument defining the terms and conditions under which the goods have been pledged. It may cover goods already in possession of the merchant and goods to be acquired in the future. As regards goods in existence, at the time of hypothecation since they are pledged at security, an interest in rem, must be created by the letter of hypothecation. However, as possession of the goods remains with the borrower, the lender does not by the mere act of hypothecation, acquire any right to take possession of the goods nor any right to sell them, but merely a right by judicial proceedings to realise the value. If the lender seeks such rights, he must reserve them in the instrument. It is thus obvious that as security, a letter of hypothecation is rather weak.  

6.9.5 BILLS OF LADING

A bill of lading is essentially, a document of title to goods. It is frequently employed in mercantile trade and may be pledged as security for an advance.

In conclusion, it is pertinent to note that the law on securities for advances is rather diverse and extensive and it’s parameters as already noted can hardly be pin pointed within the limited scope of this work. Suffice to say that as a general introduction, albeit limited to this rather complex branch of the law this work is useful to both the conveyancer and the student of conveyancing.

CHAPTER SEVEN
CONTROLLED TRANSACTIONS AND LAND USE PLANNING

7.0. INTRODUCTION

Controlled transactions in land are in the main transactions that require the consent of statutory designated bodies so as to gain legitimacy under the law. In essence, no interests in or over land deemed to fall under a controlled transaction regime is capable of being transferred or varied until and when the consent of the statutory body is obtained. Agricultural land and business premises tenancies are the most common subjects of controlled transactions in Kenya.

On the other hand, land use planning is derived from the police power of the state. In this regard the state has the power to control the user of land and developments carried out on land. It is based on the need to ensure sustainable and economic development of land in addition to promoting environmental conservation and preservation. In Kenya, land use planning is embodied in several statutes with Physical Planning Act and Regulations (Cap 286), Local Government Act (Cap 265), Environmental Management and Coordination Act (EMCA)(Act No. 8 of 1999), amongst others.

This chapter gives both controlled transactions and land use planning a critical look with a view of giving the reader an in-depth understanding and appreciation of these regulations. Notably, the reader will be largely exposed to the jurisprudential trend that have emanated from the Kenyan Courts in regard to controlled transactions.

7.1. CONTROL OF DEALINGS IN AGRICULTURAL LAND

The control of dealings in agricultural land is effected primarily through the Land Control Act (Cap 302). The historical context and the detailed exposition of the aims of the Act were dealt with under Chapter two above. Here, the emphasis is on the application of the Act as a regime of controlled transactions of agricultural land in Kenya.

7.1.1 The Land Control Act (Cap 302)

As was earlier noted, the Land Control Act was enacted with an aim of regulating, by means of public control, the manner in which the owner of an agricultural, or the interest holder in such land is supposed to deal with the land. As the preamble reads it is ‘an Act of Parliament
to provide for controlling transactions in agricultural land’. In seeking to examine the control of transactions under this Act, the starting point should be to define the subject matter of the Act i.e. agricultural land. The Act in Section 2 thereof defines agricultural land as:

(a) Land that is not within-
   (i) A municipality or a township; or
   (ii) An area which was, on or at any time after the 1st July, 1952, a township under the Townships Ordinance (now repealed); or
   (iii) An area which was, on or at any time after the 1st July, 1952, a trading center under the Trading Centers Ordinance (now repealed); or
   (iv) A market;
(b) Land in the Nairobi Area or in any municipality, township or urban center that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of the Act,

Other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose.

The Act gives power to the Minister to by notice in the Gazette apply the Act to any area if he considers it expedient to do so. He has power to divide a land control area into two or more divisions if he considers it expedient to do so. He is also given power to establish a land control board for every land control area or where it is divided into divisions, for each division. The membership of a land control board comprises the District Commissioner of the district in which the land control area or division is situated, or a District Officer deputed by him in writing, who shall be chairman; not more than two other public officers; two persons nominated by the council having jurisdiction within the area of jurisdiction of the board; and not less than three and not more than seven persons resident within the area of jurisdiction of the board. The Minister appoints all these members. There is a proviso to the effect that not less than eight and not more than twelve persons shall be appointed as

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609 Note that the Act is essentially non-judicial, basically because it is administered by Boards set there under.
610 Section 3 Land Control Act (Cap 302 Laws of Kenya)
611 Section 4
612 Section 5(1)
613 Section 5(2) and Paragraph 1 of the Schedule
614 Ibid.
members of the board; and more than one-half of the members shall be owners or occupiers of agricultural land within the area of jurisdiction.\textsuperscript{615}

The crux of the Act is its Part III that provides for the control of dealings in agricultural land. A controlled transaction is defined under this Part as:

(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area.\textsuperscript{616}

It is also expressly noted, for the avoidance of doubt that the declaration of a trust of agricultural land situated within a land control area is dealing in that land and as such, a controlled transaction under the Act.\textsuperscript{617} However, under Section 6(3) certain transactions are exempted from control. They include:

(a) The transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) A transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.\textsuperscript{618}

The Act provides that any transaction in agricultural land defined above is ‘void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act’.\textsuperscript{619}

The upshot of this provision is that parties to a transaction pertaining an agricultural land

\textsuperscript{615} Ibid.
\textsuperscript{616} Section 6(1)
\textsuperscript{617} Section 6(2)
\textsuperscript{618} A Settlement Fund Trustees is a body designated to handle all lands declared to be settlement lands. The trustees on behalf of the Government administer these lands. See Part IX (Sections 114-120) of the Constitution of Kenya for the definition and regulation of Trust Land.
\textsuperscript{619} Section 6(1)
must apply and obtain the consent of the land control board before they enter into the transaction.\textsuperscript{620} If this consent is not sought and/or obtained, then any money or other valuable consideration paid in the course of a controlled transaction that has thus been rendered void, that money or consideration should be recoverable as a debt by the person who paid it from the person to whom it was paid.\textsuperscript{621} The application to obtain the board’s consent must be made within six months of the making of the agreement between the parties concerned.\textsuperscript{622} If no application is made or if the Board does not give its decision within the six months following the application for consent, or if the Board withholds the consent, then the transaction is void.\textsuperscript{623}

In general terms the procedure for obtaining the consent of the Land Control Board can be summarizes as follows:

a. The applications for consent to a divisional land control board is made in a prescribed form No.1 in triplicate within 6 months of agreement in any agricultural transaction listed above. A fee of Kshs.125/- for resultant plot is payable on submission of each application at the Commissioner of Lands office for agricultural land whose title is registered under the Registration of Titles Act. In the case of land registered under the Registered Land Act the fee is payable at the respective district treasury.

b. All applications for partition, excision or subdivision of agricultural land are accompanied by five copies of the subdivision plan competently prepared on durable material showing such details as; sizes of resultant portions, access roads and any existing permanent building.

\textsuperscript{620} An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board. Usually the application is made to the District Land control Board which obtains/exists in the district where the land is situate.

\textsuperscript{621} This section, however, should prejudice Section 22 which provides that ‘where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person-

\begin{itemize}
\item[(a)] Pays or receives any money; or
\item[(b)] Enters into or remains in possession of any land,
\end{itemize}

In such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

\textsuperscript{622} Section 8(1)

\textsuperscript{623} Note that under Section 8(2) the land Control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by the Act, its decision is final and conclusive and cannot be questioned in any court.
c. The divisional land control board considers the application and it either grants or refuses consent in a prescribed form that must be signed by or on behalf of the chairman.

Consent of the Land Control Board for purposes of sub-divining agricultural land requires further analysis here. The requirement to obtain consent before sub-diving land is meant to avoid the fragmentation of agricultural land into non-economical units that would counter the development of the agricultural sector. However, it was not until recently when parameters were defined as to what is deemed to comprise an economically viable unit.

On 2nd June 2005, the Land Control (Minimum Acreage) Regulations were introduced under the Act and provided that:

‘No land control board shall consent to division or subdivision of any agricultural land into two or more parcels to be held under separate titles if the size of any of the resultant parcels will be less than one hectare.’

Immediate concerns were raised focusing on the possibility of implementation of the regulations. For example, the notice did not state what would be the fate of transactions where registration was pending while consent had already been granted by the LCB and the parties had already heavily committed themselves financially. Other concerns related to land subject to the Act and located near urban centers. The import of the notice is to hinder the Proprietors of these properties from subdividing the properties and consequently convert the properties into residential plots. It would have been necessary for the Minister to specify the areas where these regulations shall apply.

Furthermore, considering that a major contributor to sub-division of agricultural land is the sharing of ancestral land by families where siblings share a parcel of land inherited from their parents. Invariably, the inherited land is hardly two acres but is later subdivided for settlement by the various families set up their heirs. The implementation of the provisions of these regulations would undoubtedly have been frustrated in such circumstances.

There was also general concern that these new regulations would only serve to proliferate informal land transactions with the attendant danger of fuelling land disputes and conflicts. Perhaps it is due to the foregoing issues that the Government revoked the provisions of these
regulations in 2006 against mounting pressure from stakeholders over the negative effects of the regulations.

**a) Factors in considering an application for consent**

In deciding to whether to grant or refuse consent, the board is obliged to adhere to the factors mentioned under Section 9 of the Act. In this regard, the land control board shall:

(i) have regard to the effect which the grant or refusal is likely to have on the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry within the land control area;

(ii) act on the principle that consent ought to be refused where-

(a) the person to whom the land is to be disposed of-

(i) is unlikely to farm the land well or to develop it adequately; or

(ii) is unlikely to be able to use the land profitably for the intended purpose owing to its nature; or

(iii) already has sufficient agricultural land; or

(b) the person to whom the share is to disposed of-

(i) already has sufficient shares in a private company or co-operative society owning agricultural land; or

(ii) would, by acquiring the share, be likely to bring about the transfer of the control of the company or society from one person to another and the transfer would be likely to lower the standards of good husbandry on the land; or

(c) the terms and conditions of the transaction (including the price to be paid) are markedly unfair or disadvantageous to one of the parties to the transaction; or

(d) in the case of the division of land into two or more parcels, the division would be likely to reduce the productivity of the land;

(iii) refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not-

(i) a citizen of Kenya;\(^{624}\) or

\(^{624}\)The upshot of this provision is that the Act is meant to prevent foreigners from buying land in Kenya at will. Section 24 of the Act has however worked against the original intention of the Act. This section gives the president power to exempt any dealings in and from the requirement of the Land Control Act. So that if a foreigner or a company in which a foreigner has shares wants to buy land they are required to seek the president’ exemption.
(ii) a private company or co-operative society all of whose members are citizens of Kenya; or

(iii) group representatives incorporated under the L and (Group Representatives) Act; or

(iv) a state corporation within the meaning of the State Corporation Act.

b) Provincial land control boards and the Central Land Control Board

The Act also establishes Appeals Boards to which an applicant whose transaction has been denied consent by a land control board may lodge an appeal. In this regard, Section 10 states that ‘the Minister shall establish for each province which contains a land control area, in consultation with the Provincial Commissioner of that province, a provincial land control appeals board.’ Any appeal should be made to the provincial board for the province in which the land in question is situated and should be within thirty days of the copy of the board’s decision being delivered or posted. This board has absolute discretion to hear and determine all appeals made to it under the necessary provisions and subject to the right of appeal to the Central Appeals Board the decision of the provincial board is final and conclusive and cannot be questioned in any court.

The Act, under Section 12, also establishes the Central Land Control appeals Board that is designated to receive appeals from decisions of the provincial appeals boards. As is the case in provincial appeals boards, appeals to the central land appeals board must be lodged within thirty days of the copy of the provincial land control board’s decision being delivered or posted. It similarly has absolute discretion to hear and determine all appeals made to it.

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625 This provision only makes reference to private companies and co-operative societies. It therefore does not apply to public companies. To go around it, advocates have advised their clients to convert private companies to public companies to allow them ownership of agricultural land (illustrated in the Court of Appeal case of David Munene Kairu v Michael Shaw and Others Civil Appeal No. 21 of 1985).

626 This board consists of the Provincial Commissioner who is the chairman; not more than two other public officers appointed by the Minister; and not less than two and not more than five persons appointed by the Minister: provided that more than one-half of the members of the board shall be owners or occupiers of agricultural land within the province. See Paragraph 2 of the Schedule.

627 Section 11(1)

628 Section 11(2)

629 The board is composed of the Minister, who shall be the chairman; the Minister for the time being responsible for economic planning; the Minister for the time being responsible for agriculture; the Minister for the time being responsible for home affairs; the Minister for responsible for co-operatives and social services; and the attorney-General. (See Paragraph 3 of the Schedule). Under Section 12(3) it is stated that the commissioner of Lands shall be secretary of the Central Land Control Appeals Board, and shall attend and speak at meetings, but may not vote.

630 Section 13(1)
under the necessary provisions and its decision is final and conclusive and shall not be questioned in court.\textsuperscript{631}

c) Judicial interpretation of the Land Control Act

The Court in Kenya has had a myriad of opportunities to interpret salient legal issues arising from the application of the Land Control Act. To begin with, it must be noted that Section 6(1) of the Act has been the subject of many legal disputes owing to the fact that many a people dealing in agricultural land have negligently, ignorantly or otherwise failed to seek the consent of the land control board and, therefore, rendered their transactions void for all purposes under the Act.\textsuperscript{632} In this regard the leading case of \textit{Peris Gichuki and Jacob Gichuki Minjire v. The Official Receiver and Interim Liquidator Rural Urban Credit Finance Company Limited and John Wachika Maina},\textsuperscript{633} is instructive. In this case in which the suit property was agricultural land and thus would be governed by the Act, the Court of Appeal held that because no consent of the land control board had been granted, the sale of the suit property by auction became void after the period provided by the Act. The Court said that:

\begin{quote}
“\textit{It has been held many times by this court that despite the rigours of the Act, so long as that Act remains on the statute books its provisions are mandatory and there is no room to bring in the ameliorating provisions of equity to help the buyer. It is for Parliament to have a second a look}”
\end{quote}

The same was pointed out in the case of \textit{Gabriel Makokha Wamukota v. Sylvester Nyongesa Danait}\textsuperscript{634} by Apollo J.A.\textsuperscript{635} Similarly in the Court of Appeal case of \textit{Githinji and Another v.}

\begin{footnotesize}
\textsuperscript{631} Section 13(2)
\textsuperscript{632} The phrase “void for all purposes” has been interpreted in \textit{Onyango & Another v Luwayi (1986) KLR 513-516}. In this case, the respondent sued the first appellant for eviction from a parcel of agricultural land of which he (the respondent) was registered as the owner. The appellants’ case was that the land had been purchased by first appellant from the respondent through the second appellant, and the sale was the subject of a dispute before a panel of elders. The trial magistrate gave judgment in favour of the respondent and the appellant appeal against that decision to the High Court was unsuccessful. The appellant appealed to the Court of Appeal contending that the Magistrate had no jurisdiction to hear the suit and that the judge erred in dismissing their case for lack of the consent of the land control board to the sale transaction. In holding that the trial magistrate had had jurisdiction over the suit the Court of Appeal said that, “…an agreement that is held to be void for all purposes could not be the basis for a reference to a panel of elders. If a transaction is void for all purposes nothing of it is left that could constitute a case of a civil nature. No complaints of any nature remain to be resolved after a transaction related to agricultural land is held to be void. For that reason…the appellants’ case that there was an issue of trespass which could be referred to elders is unsustainable. The words “void for all purposes” must be interpreted to mean what they say.”
\textsuperscript{633}Civil Appeal No. 135 of 1996 (Nairobi)
\textsuperscript{634} Civil Appeal No. 6 of 1996
\textsuperscript{635} In this case, the Court also dealt with issue of the finality of the board’s decision. In his judgment, Justice Platt said, “Once consent is given, the decision of the land control board would be final and conclusive and could not be questioned by any court. If on the other hand consent is refused there is a right of appeal”. The
\end{footnotesize}
Munene Irangi, an arbitrator’s award was set aside because the arbitrator did not consider whether the sale of the suit land has obtained the consent of the relevant land control board. In Samuel Ndung’u Mungai v. Rosemary Muhumi Gachuru, the transaction was declared void, as consent was not sought. In Grace Wananda v. Charles Edward Njoroge, by an agreement dated 7th December 1984, the appellant agreed to sell her six ordinary shares in the undertaking known as Kiamonyi Farm Limited, to the respondent for a consideration of Ksh. 3000/=.

The shares were in respect of the appellant’s interest, right and title in parcels of agriculture land known as plot numbers 119 and 211. The consent of the relevant board was not applied for or obtained, therefore, the transaction was declared null and void for all intents and purposes. Numerous other cases have dealt with this issue; to mention but a few there is Stanley Mbugua Gachie v. Lakeli Waithera and 2 Others, William Gatuh Murathe v. Gakuru Gathimbi, and Bogetutu Farmers Co. Ltd v. Mohammed Hassan and Another.

Tied with issues emanating from Section 6(1), has been the question as to whether damages for breach of contract is recoverable upon a transaction under the Act declared void for want of the board’s consent. In the case of Jacob Minjire Gichuki v. Agricultural Finance Corporation the appellant brought an action seeking, inter alia, an order for specific performance of the contract in which the subject matter was agricultural land, in addition to general damages for breach of contract. The Court succinctly stated as follows:

Court was of the view that once a valid consent has been granted by the board nothing can be done to intervene in any transaction related and that it is functus officio and cannot be withdrawn not even by the board.

In this case, the suit property was agricultural land but upon its transfer the consent of the relevant land control board was not obtained. There was supposedly an arbitration award which recommended that the superior court should order the appellant to transfer the suit land to the respondent without delay. The transferee had, inter alia, made improvements, because pursuant to the agreement, the respondent had take possession of the suit land and had planted more tea on it besides that which was already part of its development. He had also built three semi-permanent houses thereon.

See also Re Estate of Mangece (2002) 2 KLR 399 where the parties signed an application for consent of the board but failed to present it to the Land Control Board due to the death of one party. The question was whether the sale of the land in question was nevertheless enforceable against the administrator of the estate of the deceased. It was held that “since the application for the consent of the Land Control Board to the sale had not been presented to the Board and thus the consent of the Board had not been obtained, the sale could not be enforceable to the administrator’s as the application for consent became void upon the lapse of six months before its presentation to the board.”
“...The sale was a controlled transaction within the meaning of the Act, which required the consent of the relevant land control. At that time, this should have been applied for within 3 months from date of sale. It was never done...with the result that the agreement for sale became void 3 months from 28th June 1978. The consequence of this was that when the appellant filed suit on 31st August 1979 the agreement was already void for all purposes. He was not in law entitled to any damages for loss of bargain...any person who decides to be party to a controlled transaction must be presumed to understand the risks involved and in particular, that it is a transaction in which freedom of contract is abridged by law and the parties to the contract do not have the last say”.

The judgment of Law J.A. in Leonard Njonjo Kariuki v. Njoroge Kariuki is very clear as to the question whether a party to a void transaction under the Act can recover any damages. He said as follows:

“No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. The only remedy open to a party to a transaction, which had become void under the Act, is that he can recover any money or consideration paid in the course of the transaction, under section 7 of the Act. See also the decision of this Court in Cheboo v. Gimnyigei (civil appeal no. 40 of 1978) (unreported) in which a majority of this Court disagreed with the view expressed by Madan, J.A. that compensation for improvements was recoverable in addition to the money or consideration paid in the cause of a transaction, which has become void under the Act. Had the Act so intended, it would have so provided”.

In the above-referred case of Elizabeth Cheboo v. Mary Cheboo Gimnyigei, Madan J.A., held the view that general or special damages would be recoverable under the Act. He said, “I do not think money or other valuable consideration referred to in section 7 is limited to the purchase price only. Such a restricted interpretation would be an abhorrent affront to judicial conscience. This may be a bold and new interpretation to place upon section 7 but it is consonant with justice and equity”. However, this was a view in the minority for, as already seen above, the position in law was set by the majority of the court who laid it down that only the money or other valuable consideration which has been paid in the course of a controlled transaction is recoverable.

645 Civil Appeal No. 26 of 1979
646 Civil Appeal No. 40 of 1978
A consistent criticism that has been leveled against the Act is that it is an “engine for fraud” in that it provides room for unscrupulous people to defraud innocent citizens. Indeed in *Harambee Cooperative Savings and Credit Society Ltd. v. Mukinye Enterprises Ltd.*\(^{647}\), the court appreciated that the Land Control Act had often been the subject of adverse criticism by the courts in Kenya because of the sometimes harsh and oppressive manner in which it interferes with freely negotiated contracts. However, the words of Law J.A. in *Kariuki v. Kariuki case*\(^{648}\) render these criticisms a nullity. He stated thus:

“When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked”.

In the same vein Kwach J.A. in the case of *Jacob Minjire Gichuki v. Agricultural Finance Corporation*\(^{649}\), in response to the appellant’s submission that the Act (Land Control Act) was being used by unscrupulous people to defraud innocent citizens, said that, ‘if as he lamented, the Act is being used by unscrupulous people to defraud innocent citizens the short answer to that is that, that is a matter of Parliament. Our duty as judges is to interpret the law and apply it as it stands. We are not concerned with consequences.’

It would also appear that besides the inability to recover damages for breach of contract, even compensation for improvements subsequently undertaken on the property cannot be recovered. Only monies or consideration paid thereunder are recoverable as a civil debt. In the leading case of *Chemelil Sisal Estate Ltd. v. Makongi Ltd.*\(^{650}\), the Court held that the stipulations set out in Sections 7 and 22 of the Act relating to the repayment of money or consideration were not punitive but were geared towards restoring the parties to their *status quo ante* (i.e. position before they entered the agreement). The Court also clearly stated that the improvements though they have some connection with the land, they do not appear to arise under an agreement made void in relation to them.

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\(^{647}\) Civil Appeal No. 25 of 1981

\(^{648}\) See n. 26 above.

\(^{649}\) See n. 25 above.

\(^{650}\) (1967) E.A. 166
The Court has also chanced in a number of times to deal with the question of the grant of consent applied out of the time limit (six months, initially three months). In *Francis Maina Mathi v. Peter Nguru Bedan*\(^{651}\), the consent of the board was obtained five years later so that the transaction failed. Similarly in *Stanley Mbugua Gachie v. Lakelia Waithera and 2 others*, the transaction was deemed void the consent having been given three years and seven months late. In the Court of Appeal case between *Ethan Karuri and Mabuti Gituru, Ndambiri Kithaka and Muchira Kithaka*\(^{652}\), the consent of the board was given three months and sixteen days after application (out of time). On this basis the trial judge dismissed the suit. In the Court of Appeal Madan J.A. upheld this decision. He took the view that because the consent of the board was given out of time it was a nullity. He said that,

“The decision of the land control board is final and conclusive in respect of consent validly given and it cannot be questioned in any court. While the court may not inquire into the correctness of the consent, the court is not precluded from inquiring into the validity of the consent to determine whether it was regularly and popularly given”.

He was thus of the opinion that the provisions of the Act were of an imperative nature and there was no room for the application of any doctrine of equity to soften its harshness. In the same case, Potter J.A. looked into Section 9(2) of the Act which then provided that if the board did not determine an application within the period of three months after the application was made, then the application was deemed refused at the expiry of that period. He noted that since the appellant did not appeal against the decision of the board, which amounted to a refusal by its failure to determine his application within three months, then the transaction became void at the end of 30 days from the refusal.

In the case of *Kermoli v. Kermoli*\(^{653}\), the Court of Appeal was called upon to look into the issue whether the land control board gave its consent within time to the transaction between the parties in this case. The determination of this case depended on the interpretation of the word “month”. The Interpretation and General Provisions Act (Cap 2) defines a month as being a calendar month. The question to be decided was what is a calendar month? Platt J.A. in his judgment said as follows:

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\(^{651}\) See n. 27 above.

\(^{652}\) Civil Appeal No. 25 of 1980

\(^{653}\) Civil Appeal No 125 of 1985
“...In either case the expiry of the period is the last day of the period of three months. If the sixth May is taken as the day on which the period commenced, the last day would be the 5th August. Supposing that the day of the application is excluded, the period would start on 7th May and end on 6th August. Hence consent was deemed to have been refused at midnight on 6th August. Hence if consent was given on 7th August, it is one day too late”.

Based on this, the learned judge declared the contract null and void saying, “I am very sorry to be forced to this conclusion and I would be happily agree to some extension if the law permitted me to do so. As it does not, the appeal must be allowed”. He suggested that Parliament should consider a further legislation aimed at empowering the court to amend time in cases where the land control board has acted a few days over the period.

In the Court of Appeal case of Karuru Munyororo v. Joseph Ndumia Murage, the appellant had been put in prison and could not appear before the land control board. Justice Platt in his judgment said, “It is unfortunate that no provision has been made in the Act to extend the time in such circumstances...the Land Control Act does not provide for any period of disability which may be excluded”. Gachuhi J.A. said that “the provision of the Act is meant to safeguard intending purchasers from losing their money if the sale may not go through. Purchasers should not part with their money until such time consent of the board is obtained according to law”.

It noteworthy that general line of thought that emerges from the application and interpretation of the Land Control Act is that it is wanting in several respects and it largely occasions injustice. Even the Courts have severally admitted that the Act is an instrument of injustice. Indeed, Apaloo J.A. in the Wamukota Case said, “…one may be permitted to doubt whether the Act as judicially construed and applied meets the end of justice or is a reflection of the legislative will”. Despite this admission, the Courts have proceeded to assert the express provision of the Act on the basis that the Courts’ hands are tied and it is upon Parliament to amend the offending sections of the Act or repeal the Act in its entirety.

d) Resolution of Disputes Pertaining to Agricultural Land

The mechanism for the resolution of various disputes pertaining to agricultural land is set out in the Land Disputes Tribunals Act No. 18 of 1990 which Act repealed the Magistrates

654 Civil Appeal No. 154 of 1980
Jurisdiction (Amendment) Act of 1981. Its objects are stated as “an Act of Parliament to limit the jurisdiction of Magistrates’ Courts in certain cases relating to land; to establish land disputes Tribunals and define their jurisdiction and power and for connected purposes.

Section 4 of the Act thus establishes the Land Disputes Tribunal for every registration district which shall be constituted of a chairman (appointed by the District Commissioner) and either two or four elders appointed under section 5. Under section 5, the Minister is empowered to appoint a panel of elders for each registration district. Section 3 defines the limits of the tribunal’s jurisdiction, which it specifically limits to the determination of all cases of a civil nature involving a dispute as to:

a. The division of, or the determination of boundaries to land, including land held in common;
b. A claim to occupy or work land; or
c. Trespass to land.

The judicial interpretation of the Tribunal’s jurisdiction as defined by this section will be dealt with later on in this chapter.

A dispute is instituted by presenting a claim to the tribunal for the area in which the land is situated. Thus where a Tribunal deals with a matter where no claim has been lodged before it, the proceedings and the award thereof, will be deemed null and void. Thus in Gichobi Kithae v Kabuko Githae & 3 others, the decision of the Central Land Dispute Appeals Board was found to be null and void because, amongst other reasons, no claim had been presented to the Land Disputes Tribunal.

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655 The Magistrates Jurisdiction (Amendment) Act of 1981 was passed to solve the conflicting philosophies that were emerging in the 1970s in so far as land adjudication, consolidation and registration was concerned. The regimes under which these processes obtained had the effect of extinguishing customary land rights and thus occasioning injustice. This Act therefore sought to remedy this situation by introducing Section 9 A-E in the Magistrates Court Act (Cap 10) that had the effect of removing from the jurisdiction of the Magistrate’s Court some land matters. The Act provided for the creation of the institutions of the panel of elders which were conferred with the power to deal with matters which were the basis of controversy. They were civil matters involving ownership of land, the division of or determination of boundaries to land held in common, a claim to occupy or work land and trespass to land.

656 For purposes of the Act, “elders” means persons in the community or communities to which the parties by whom the issue is raised belong and who are recognized by custom in the community or communities as being, by virtue of age, experience or otherwise, competent to resolve issues between the parties.

657 Section 3(2) The Land Disputes Tribunal Act, 1990.

The claim is required to be set out in summary form stating the material facts on which the claimant intends to rely. Though the claim is required to be in writing the High Court has held that non-compliance of this requirement will only render the decision of the Tribunal null and void if such non-compliance prejudiced the interested party. In R v The Funyula Land Disputes Tribunal & 3 others, where the Tribunal in question handled a dispute which was not in writing and the applicant was not served with the actual claim, J.K. Sergon J observed as follows:

“I think the comprehensive procedure set out under section 3 was meant to assist the litigants to properly lay the basis of their claims. I find that the provisions of section 3 to mandatory. Though they are mandatory, a party must show that the non-compliance of the procedural requirements substantially prejudiced him. In this matter, it is evident that the applicant participated throughout in the Tribunal proceedings. There is doubt whether he was prejudiced in any material respect. Where the applicant has not been prejudiced then this court will not issue the order of certiorari.”

On receiving the claim, the tribunal registers it in a tribunal’s register of claims kept by it in prescribed manner. The claim must served on the other party to the dispute which service is effected in the same manner as it is done in civil proceedings in court. These provisions are mandatory such that non-compliance renders the decision of a Tribunal made forthwith null and void. In Herbert Mwadhi v The Resident Magistrate Kaloleni & 2 others, the High Court in quashing the decision of the Land Disputes Tribunal at Kaloleni, observed that “the appellant was not served with any pleadings or any documents containing the complaint before the Tribunal and he was therefore condemned unheard against rules of justice.” The same position was emphasized in R v Soy Divisional Land Disputes Tribunal & 2 others, where the court stated as follows:

“I have also taken Mr. Omwenga’s submissions that no claim was laid before the Tribunal is required. It is also evident that despite the fact that Kennedy Opisa was not invited to attend the proceedings or even accorded audience the Tribunal proceeded to determine the matter, and even then to his detriment. I find that this was in total

659 Ibid.
661 All claims received must be numbered consecutively, each year according to their institution. See section 3(3) Land Disputes Tribunal Act, 1990.
662 Section 3(4) Land Disputes Tribunal Act, 1990.
disregard of the mandatory requirement under section 3(2) and (4) of the said Act.... I am of the opinion that the Tribunal’s action was against the rules of natural justice which dictate that no man shall be condemned unheard, a principle that is also well envisaged in the aforementioned section 3(4) of the said Act.”

Each party served with the claim shall, unless the claim is admitted within thirty (30) days after service file with the tribunal an answer containing a reply to the matters stated in the claim and a summary of the facts upon which he wishes to rely. After the answer has been filed, the claim is set down for hearing by the tribunal whereupon the tribunal adjudicates upon the claim and reaches its decision in accordance with African customary law.

The decision of the Tribunal shall be by majority and the Tribunal is enjoined to give reasons for its decision. This requirement been mandatory renders its non-compliance a ground for appeal against the decision and upon which the decision is declared null and void. In Esther Njoki Kinuthia v The Chairman, Gatanga Land Dispute Tribunal, the High Court dealt with this issue and stated thus:

“An examination of the award given by the Tribunal show that the award was not in conformity with the provisions of section 3(8) of the Act which demands that the award shall contain reasons for the decision, a summary of the issues and determination and shall be dated and signed by all the members of the Tribunal. The award does not give any reasons for its decision and it is undated. Failure to comply with this section is sufficient to warrant the interference by the Court. I would allow the application on this ground as well.”

The decision of the Tribunal is thereafter required to be filed in the Magistrate’s Court together with any depositions or documents which have been taken or proved before the tribunal pursuant to section 7(1). Having so received the decision of the Tribunal, the Magistrate’s Court is required to enter judgment in accordance with the Tribunal’s decision.

665 Section 3(5) Land Disputes Tribunal Act, 1990.
666 Section 3(6) Land Disputes Tribunal Act, 1990.
667 Section 3(7) Land Disputes Tribunal Act, 1990. A decision can only be reached by the tribunal after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and after each party has been afforded an opportunity to question the other party’s witness or witnesses. The Tribunal is also obligated to give reasons for its decision, which must contain a summary of the issues and the determination thereof, and it must be dated and signed by each member of the tribunal. See section 3(8) Land Disputes Tribunal Act, 1990.
668 Section 6(2)(b) Land Disputes Tribunal Act, 1990.
whereafter a decree shall issue.\textsuperscript{670} The consequential decree shall be enforceable in accordance with the relevant provisions of the Civil Procedure Act (Cap 21).\textsuperscript{671} It is evident from a reading of section 7(2) that the magistrate has no power whatsoever to question a decision of the Tribunal even if it is defective on the face of it. The Magistrate’s sole role is to enter judgment in terms of the Tribunal’s award. The Magistrate’s role was clarified in \textit{David Cheluget v Kipsang Chepkwony},\textsuperscript{672} where it was held as follows:

“It is clear…that a magistrate has no discretion to question to whether the Land Disputes Tribunal had or had no jurisdiction to grant the award that it awarded. The function of the Magistrate’s Court is to adopt the decision and enter judgment, issue a decree and enforce the decision of the Land Disputes Tribunal. It follows therefore that the Magistrate’s Court does not have jurisdiction to question the Land Dispute’s Tribunal decision. That is left to the parties to question the decision of the Land Disputes Tribunal, through the procedures allowed by the law.”

Any party to a dispute under section 3 who is aggrieved by the decision of the tribunal may pursuant to section 8(1), appeal to the Appeals Committee constituted for the province within 30 days of the decision.\textsuperscript{673} The Appeals Committees are established under section 9(1) of the Act. It constitutes a chairman appointed by the Provincial Commissioner from a panel of elders appointed by the Minister for Lands and Settlement and not less than five other persons appointed by the Minister.

The procedure for conducting an appeal by the Appeals Committee is embodied under section 8 of the Act. It only sits as an appellate body and therefore it cannot hear the dispute afresh as was the case in Gichobi Kithae v Kabuko Githae & 3 others.\textsuperscript{674} In this case, the Central Land Disputes Appeals Board in Kirinyaga ignored the proceedings of the Land Disputes Tribunal and heard the dispute afresh. In clarifying the role of the Appeals Committee, the High Court stated thus:

\begin{footnotesize}
\begin{itemize}
  \item[670] Section 7(2) Land Disputes Tribunal Act, 1990.
  \item[671] \textit{Ibid.}
  \item[672] (2005) eKLR- Civil Case 151 of 2000 (High court at Eldoret).
  \item[673] No appeal lies from the Land Dispute Tribunal directly to the High Court even if it is on a point of law. See the decision of the Court in \textit{David Cheluget v Kipsang Chepkwony} (2005) eKLR- Civil Case 151 of 2000 (High court at Eldoret), where it was clearly stated that, “Once the Land Disputes Tribunal’s award has been adopted by the Magistrate’s Court, the only avenue available to the parties is to apply for the judicial review under Order 53 Civil Procedure Rules (Cap 21) and section 8 and 9 of the Law Reform Act (Cap 26). There is no avenue for filing an appeal to the High Court, the way the appellant has done in this case. It does not matter even if the appeal is on technical points of law raised by the appellant herein.”
  \item[674] (2005) eKLR- Civil Appeal 1 of 1998.
\end{itemize}
\end{footnotesize}
“The matter before the Committee having been an appeal the Committee ought to have reconsidered and evaluated the evidence which was tendered before the Tribunal and only call further evidence in respect of specific issues where the need for such evidence has been justified.”

The Appeals Committee determining a matter must be constituted by only three members appointed under section 9 of the Act. Where the Appeals Committee is improperly constituted, then its decision is defective ab initio. Such was the case in Peter Mmini Shaka v James Shaka Martin,675 where the decision of the Western Provincial Land Disputes Appeals Committee was quashed for, amongst other reasons, an improperly constituted committee i.e. the Committee was constituted of four (4) members instead of the mandatory three (3).

Notably, the decision of the Appeals Committee is final on any issue of fact and no appeal shall lie therefrom to any court.676 However, an aggrieved party may lodge an appeal to the High Court on a point of law within sixty days from the date of the decision complained of.677 Alternatively, an aggrieved party may seek for orders of certiorari or prohibition. It ought to be pinpointed that the Land Disputes Tribunal is not conferred jurisdiction to entertain any proceedings which are barred by the statute of Limitations.678 It is also worth noting that there is need to delink these Tribunals from the Provincial Administration who, due to their overwhelming powers with respect to their constitution and procedure, may be in an irresistible position to bring undue influence to bear upon the panelists thus obstructing the course of justice.679

e) Jurisdiction of Land Disputes Tribunal and Provincial Land Disputes Appeals

The courts have had to intervene especially in the interpretation of questions emerging out of the application of the Land Disputes Tribunal Act, 1990. Many of these questions have related to the jurisdiction or lack of it of the Land Disputes Tribunals and the Appeals Committee. No doubt, these questions are a function of the limited jurisdiction accorded to the Land Disputes Tribunal under section 3(1) of the Act. In more often than not, the

676 Section 8(8) Land Disputes Tribunal Act, 1990.
677 Section 8(9) Land Disputes Tribunal Act, 1990. Before admitting an appeal, a judge of the High Court in which the appeal is lodged must first ascertain and certify that an issue of law (other than customary law) is involved.
678 Section 13(3) Land Disputes Tribunal Act, 1990.
679 For a critique of the Act see Opiyo A. Linet, “The Strengths and Limitations of the Land Disputes Tribunal Act No. 18 of 1990 as the Legislatures Ultimate Response in Addressing the Land Law Problem Regarding Status of Customary Land Rights upon Registration under the Registered Land Act (RLA),” Unpublished LLB Dissertation, presented to the Faculty of Law, Moi university.
Tribunals have purported to resolve disputes or determine questions relating to title to land or ownership thereof. Consequently these decisions have been quashed by the High Court. The confusion that has attended many Tribunals in this regard was well elaborated by Khamoni J in the case of *Wamwea v Catholic Diocese of Murang’a Registered Trustees*. He said:

‘Land Disputes Tribunals and Provincial Land Disputes Appeals Committees hardly like to work within limits of their jurisdictions and parties, by law not permitted legal representation go before the Tribunals and Provincial Land Disputes Appeals Committees without caring to know there are limits to exercising jurisdiction, and battle their respective cases up to the end before the loser go to the High Court where representation by advocates is permitted, to inform the Court that “they have suddenly realized” there are limits in exercising jurisdiction and that where they first went the Land Disputes Tribunals and Provincial Land Disputes Appeals Committees who handled their cases had no jurisdiction to adjudicate in disputes over title to land and that “because the opposite sides won”, they, the losers, want all those proceedings nullified because of lack of jurisdiction on the par of Land Disputes Tribunals and Provincial Land Disputes Appeals Committees who entertain, hear and decide every dispute relating to land taken before them (Tribunals and Appeals Committee) lack of jurisdiction notwithstanding. Of course the successful parties before Land Disputes Tribunals and Provincial Land Disputes Appeals Committees hardly concede, even where they should that there was lack of jurisdiction on the part of the land Disputes Tribunals and Land Dispute Appeals Committees and the whole situation becomes a good reflection of how irrational our society behaves so that it is the fluent, the flowery languaged, the loud mouthed, the sweet speaker, the orator, the cunning and the likes, who wins the day in the public eye however irrational he may be.’

A look into a few of the cases will shed more light on this assertion. In *Republic v Josphat Mbugua Kiumu, Chairman Lari Division Land Dispute Tribunal & Another*, the Tribunal in question made an award whose effect was to order the applicant (Josphat Mbugua Kiumu) to transfer his registered piece of land to his two wives. In quashing that decision, the High Court observed that the matter related to the question of ownership of land and not merely putting up a boundary. Kasanga Mulwa J thus said, “This being a registered land it appears that the Tribunal went outside the provisions of section 3 and 159 of the Land Dispute Tribunal Act and the Registered Land Act respectively. By dividing the land between the two

681 Misc. Civil App. No. 310 of 2000
wives, while the second wife was not a party to the proceedings, the Tribunal seems to have misguided itself as to its jurisdiction. Furthermore, the Tribunal has no right in law to divide the objectors land when he is still alive.”

It thus trite law that where the land in question is registered land and the dispute relates to title or ownership thereof, then the Land Dispute Tribunals and/or the Provincial Land Dispute Appeals Committees cannot purport to resolve the same. In *Jotham Amunau v The chairman Sabatia Division Land Disputes Tribunal & Another*, the Court stated that, “It is clear that the proceedings before the Tribunal related both to title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of section 3(1) of the Land Disputes Tribunal Act. By section 159 of the Registered Land Act such a dispute can be tried by the High Court or by the Resident Magistrate’s Court in cases where such latter court has jurisdiction.”

Similarly where a Land Disputes Tribunal purported to adjudicate over a matter related to a claim of trust, the Court quashed its decision. In doing so it was stated:

“The property herein has at all material times been registered in the name of the appellant. It still is. The effect of the decision is that the Tribunal would have adjudicated on a dispute touching on registered land and ownership thereof. This it cannot do. The law on this issue is clear, that the Land Dispute Tribunal have no jurisdiction to decide on matters of title and ownership to land. The claim of the interested parties herein is based on a claim of trust. This can only be litigated in the civil courts with appropriate jurisdiction.”

The same fate meets the decision of a Tribunal that makes an award to transfer land by virtue of adverse possession. So is a Tribunal’s decision that deals with contractual questions over land and the sale of the same. In this regard, the words of the Court in the case of *Esther Njoki kinuthia v The Chairman, Gatanga Land Dispute Tribunal & 2 others*, are instructive. It was observed:

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682 See Ombiro Ong’ang’a v Nyatome Nyaramba, Civil Appeal No 243 of 2003 (High Court at Kisii); R v Chairman, Kapsabet Division Land Disputes Tribunal & Another (2006) eKLR- Misc. App. 296 of 2005 (High Court at Eldoret).

683 Civil Appeal No. 256 of 2002 (Court of Appeal at Kisumu).

“The land in dispute comes under the RLA chapter 300 laws of Kenya and relates to interest in the land being an interest which is registrable under this Act. The dispute is not confined to subdivision of the land or determination of the boundaries. It relates to the issue as to whether there was a sale of the portion of the land. The sale of the portion of land is disputed and there is also the question whether the purchaser had complied with the terms of the agreement. As it is now, it is a question of determining whether there was a breach of the contract or not. This consideration fails under section 159 of the Registered Land Act. These two sections read together takes the matter out of the jurisdiction of the Tribunal.”

In *Herbert Mwadhi v The Resident Magistrate Kaloleni & 2 others*, the Kaloleni Land Disputes Tribunal challenged an auction sale in which the applicant had bought a parcel of land and the same registered in his name. In quashing the decision, the High court held that the Tribunal had no power to oust an auction sale for that was the province of a civil court with proper jurisdiction.

It is also important to note that the jurisdiction of Land Dispute Tribunals and the Provincial Land Dispute Appeals Committee is also limited to geographical areas. They can only adjudicate over disputes related to agricultural lands situated within their geographical limit. Thus in *Kageche v David Ng’ang’a Kioi*, the decision of the Central Provincial Land Dispute Appeals Committee was held to be null and void when in purported to deal with land situated in Nakuru region in the Riftvalley Province. The High Court stated, “I have no doubt in my mind that the appeals Tribunal for central province acted beyond its geographical, as well as subject matter, jurisdiction. The Committee took upon itself to determine issues of title to land, which is not within their jurisdiction as well as land in Nakuru District which is outside the boundaries of Central Province.”

7.2. CONTROL OF DEALINGS IN TENANCY RELATIONSHIPS

Another genre of transactions in land that are subject to the province of controlled transactions is dealings in tenancy relationships. In this respect the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) and the Rent Restriction Act are the basic statutes of relevance. The regulations obtaining under these two legislations are discussed below.

686 Misc. App. No. 117 of 2004 (High Court at Mombasa).
687 (2006) eKLR – Civil Appeal No. 252 of 2004 (High Court at Nairobi).
7.2.1 The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301)

Business premises tenancies are subject of controlled transactions under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301). This Act sets out tenancy standards below which voluntary agreements under the ITPA and the RLA may not fall. The Act overrides any other law which is in conflict with it as regards controlled tenancies. This position was entrenched in the much-celebrated case of Bachelor’s Bakery Ltd v Westlands Securities Ltd. The Court of Appeal in declaring that the provisions of the Landlord and Tenant Act prevailed over those of the Transfer of Property Act, stated as follows:

‘The Act is legislation of a special nature enacted solely for the protection of tenants. It allows the parties a choice of occupation of premises under a controlled or uncontrolled tenancy, in the first case, within the ambit and in the second case, outside the ambit of the Act. In the instances to which the provisions of the Act are declared to apply, it overrides any other written law which is in conflict with its provisions.’

Protection under the Act depends basically on the duration of the tenancy and the purpose for which the tenancy is created. As to the latter factor i.e. the purpose for which the tenancy is created, the Act relates to premises leased for purposes of running shops, hotels and catering establishments. Therefore, where the demised premises are used to run a school or a petrol station under an operator agreement, then the Act does not apply.

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689 A shop is defined by the Act to mean premises occupied wholly or mainly for the purposes of retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth. See section 2(1).
690 A hotel in the context of the Act means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration. See section 2(1).
691 A catering establishment is defined by the Act to refer to any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises. See section 2(1).
692 See Dynamic Institute of Management & Accountancy (DIMA) v Apollo Insurance Co. Ltd., Civil Appeal No. 18 of 2000 (High Court at Nairobi). In this case, the appellants ran a school in the demised premises which the Tribunal found that it was not a shop in the context of Cap 301. The High Court upheld this decision and went ahead to say as follows, “As the preamble to the Act suggests, the main design of Cap 301 was to protect tenants of certain premises from eviction or exploitation and related matters. In my view, the name the parties give to their business may not have any magic in deciding whether the same is controlled or not. The court must in each case investigate all circumstances to decide for itself whether the tenancy was a controlled one or not. I think that should be a matter of judicial discretion and not the subject of strict definition. I say this because some of the names given to businesses today may not necessarily be appropriate and to use such name in deciding the rights of parties may result into injustice which Cap 301 intended to remedy.”
693 See Kibutiri v Kenya Shell Ltd, Civil Case No. 3398 of 1998 (High Court at Nairobi). In this case the applicant was a proprietor of a petrol station under an operator agreement. The respondents alleged a breach of
A controlled tenancy is defined under section 2(1) of the Act to mean tenancy of a shop, hotel or catering establishment: -

(a) Which has not been reduced into writing; or

(b) Which has been reduced into writing and which-
   a. Is for a period not exceeding five years; or
   b. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
   c. Relates to premises to which the Act has been extended to apply the Minister vide a Gazette Notice.\(^694\)

As such in *African Universal Merchandise Ltd v Kulia Investments Ltd*,\(^695\) section 2 was affirmed by the court by stating that a tenancy for period exceeding five years is excluded from the definition of a controlled tenancy if the tenancy is created by an agreement which has been reduced into writing. The same holding was reached in *Dynamic Institute of Management & Accountancy (DIMA) Ltd. v Apollo Insurance Co. Ltd.*\(^696\) where the tenant executed a letter of offer containing the terms and conditions of the lease but refused to execute the formal lease agreement. In deciding that the tenancy fell out of the purview of a controlled tenancy, the High Court said thus:

“All said and done, I am of the view that the parties before me intended to enter into a written lease of more than five years and although the formal lease was not in fact executed the letter of offer executed by the Appellant on 13th Nov, 1998 constituted a written tenancy between it and the Respondent. Since the same was for a period of more than five years, it is not subject to the provisions of Cap 301 and is, therefore, not a controlled tenancy.”

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\(^694\) Section 2(2) states that the Minister may, by notice in the Gazette, specify, by reference to rent paid or to rateable value entered in a valuation roll under the Valuation for Rating Act, classes of shops, hotels or catering establishments tenancies of which shall be controlled tenancies regardless of the form or period of such tenancies.

\(^695\) (1986) KLR 529.

\(^696\) Civil Appeal No. 18 of 2000 (High Court at Nairobi)
The most essential feature of a controlled tenancy is that it can only be terminated or altered in accordance with the provisions of the Act.\(^{697}\) Therefore, according to section 4(2) of the Act, a landlord who wishes to terminate or alter a controlled tenancy must give notice to the tenant in the prescribed form.\(^{698}\) Likewise, a tenant who wishes to obtain a reassessment of the rent or alter any term or condition of a controlled tenancy must give notice to the landlord in the prescribed form.\(^{699}\) On either part, the notice shall only take effect after two months after the receipt thereof by the receiving party.\(^{700}\)

Failure to give notice in the prescribed form renders the efforts of the party wishing to alter or terminate the tenancy a venture in futility. The Decision of the Court of Appeal in *Tiwi Beach Hotel Ltd. v Juliane Ulrike Stamm*\(^{701}\) is instructive in this regard. It said:

“If the appellant thought that those letters were notices, I must disabuse it of that notion by stating at once that they were not in the prescribed form and consequently had no effect on the respondent’s tenancy. For this reason alone the respondent was entitled to an order restraining the appellant and the judge was therefore perfectly justified in making this order.”

Further, in *Lall v Jeypee Investments Ltd.*,\(^{702}\) it was held that a landlord issuing a termination of tenancy notice had to count the date of effectiveness of notice from the time of receipt of

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\(^{697}\) Section 4(1) The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301. The procedure for terminating a controlled tenancy under the Act was well summarized in the case of Manaver N. Alibhai t/a Diani Boutique v South Coast Fitness & Sports Center Ltd., Civil Appeal No. 203 of 1994 (Court of Appeal at Mombasa).

\(^{698}\) A notice under the Act may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any servant residing with him or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address. It is also stipulated that such a notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be. See section 4(6).

\(^{699}\) Section 4(3).

\(^{700}\) Section 4(4). This section, however, has the following provisos:

- Where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but the provision of the Act, the tenancy would have, or could have been, terminated;
- Where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;
- The parties to the tenancy may agree in writing to any lesser period of notice.

See *Auto Engineering Ltd v M. Gonella & Co. Ltd.*, (1978) KLR 248 where Hancox J said that “we can well understand that any cutting down of the tenant’s rights so far as the period of notice is concerned might make serious inroads into the protection intended to be conferred…. Obviously, therefore the time limit imposed by section 4(5) must be strictly construed.”

\(^{701}\) (1991) KLR 658.

\(^{702}\) (1972) EA 512.
the same by the tenant; and the notice itself had to be formal and expressed in the prescribed forms. It was said thus:

“I do not accept the argument that the landlord shall be exonerated because he used the form that was available to him at the time he gave the notice. In my opinion it matters not that at the time of giving notice by a landlord no form has been prescribed or there is in existence prescribed form which is not in conformity with the provisions of the Act. A landlord giving notice must strictly comply with subsection (5). If I may use a word from the judgment of Plowman, J in Zenith Investments (Turquay) Ltd. v Kammins Ballrooms Co. Ltd. (No. 2) (1971) 1 WLR 1032 at p. 1036, the court is forbidden by subsection (5) to enforce any notice which is not given in strict conformity with the provisions of the Act.”

In Joseph O. Osebe v Jerry Mayieka & Another, the plaintiff entered a lease agreement with the first defendant to occupy the suit premises as a tenant where carried on a business of a hotel and catering services. When the lease expired, the same was extended for a further period of one year presumably under all the conditions contained in the expired lease agreement except for the monthly rent which was adjusted. He was later served with a letter purportedly issued by the second defendant claiming to be the new owner of the premises requesting him to vacate the suit premises. The question before the court was whether or not the letter by the second defendant requiring them to surrender the premises was a notice in the meaning of Cap 301. In the spirit of the Tiwi Beach Case, Martha Koome J held in the following terms:

“Since the expiration of the lease, the suit premises fell under the purview of a controlled tenancy…. The landlord was obliged whoever he was, either the first or second defendant, to comply with the statutory provisions under the Act. If the second defendant thinks that he was not obliged to give notice, this being a controlled tenancy, he has no choice but to comply with the statutory provisions…. The notice issued by the second defendant purportedly to terminate the tenancy is null and void as it is not in the prescribed form.”

In addition to the above requirements, a tenancy notice must specify the grounds upon which the alteration or termination is sought. Further, such a notice must require the other party to

703 (2006) eKLR- Civil Case No. 62 of 2006 (High Court at Nakuru).
704 Section 4(5).
intimate whether or not he intends to comply with its requirements, within thirty (30) days of receipt thereof.\textsuperscript{705} Upon receipt of the notice the other party may, before expiry of the notice, refer the matter to the Business Premises Tribunal, established under section 11 of the Act.\textsuperscript{706}

Upon reference to the Tribunal, the tenancy notice ceases to be of any effect, until and subject to the determination of the dispute by the Tribunal.\textsuperscript{707} Under section 10 of the Act, if the tenant chooses to comply with the notice, or fails to inform the landlord of his non-compliance or fails to refer the matter to the Tribunal, then the tenancy will stand altered or terminated on the date specified on the notice. The landlord can thereupon commence eviction proceedings in the High Court, as the Tribunal is no longer vested with the requisite jurisdiction.\textsuperscript{708}

Note must be taken that section 10 limits itself to a notice issued by the landlord and does not cover that issued by the tenant. This point was clarified in \textit{Birds Paradise Tours & Travel Ltd. v Hotel Secretaries},\textsuperscript{709} where the tenant/plaintiff filed a notice for the assessment of rent under section 4(3) of the Act. The landlord/respondent however did not respond to the notice and it was thus argued that at the expiry of the notice the terms and conditions of the tenancy stood altered as per the notice. In rejecting this argument, it was stated that:

“Section 10 of the Act in making provision as to the effect of notice where there has been no reference to the Tribunal limits itself to the notice of a landlord thereby excluding from its application the case where no reference has been made to the Tribunal by a landlord in respect of a tenant’s notice whilst section 6(1) of the Act gives to either the landlord or tenant the right to refer a matter to the Tribunal and prescribes what shall happen upon such referenced, the Act in section 10 provides only for a landlord’s notice to have effect so as to alter the terms and conditions of a controlled tenancy where the tenant fails to signify his disagreement with the notice to refer the matter to the Tribunal under section 6 of the Act. No similar provisions exist in respect of the effect of a tenant’s notice.”

A distinction must also be made between a reference under section 6(1) and a complaint under section 12(4) of the Act. Tribunal receives references for purposes of adjudicating over the dispute. Their decisions may be appeallable. On the other hand, the Tribunal receives

\textsuperscript{705} \textit{Ibid.}  
\textsuperscript{706} Section 6(1).  
\textsuperscript{707} \textit{Ibid.}  
\textsuperscript{708} See Jitendra Mathurdas Kanabar & 2 others v Fish & Meat Ltd, Civil App. No. 267 (High Court at Nairobi)  
\textsuperscript{709} (1990) KLR 58.
complaints for investigative purposes and its decision in this regard is not appealable. This distinction was clearly drawn in Dynamic Institute Management & Accountancy (DIMA) Ltd. v Apollo Insurance Co. Ltd., where the appellant feeling aggrieved by certain matters filed a complaint in the Tribunal. It was dissatisfied by the order of the Tribunal and appealed to the High Court. In holding that the appeal did not lie to the High Court, it was stated as follows:

“References to the Tribunal are provided for by section 6(1) of Cap 301 while complaints, as seen earlier, are provided for under section 12(4) of the same Act. The two matters are different and where the same Act expressly provides for appeal in respect of one and not the other, it follows that the other not provided for is not appealable as of right.”

Earlier on, in the case of Re Hebtulla Properties, the High Court had dealt with this issue clearly stating that the right of appeal to the High Court conferred by section 15(1) of the Landlord and Tenant Act from an order or determination of a tribunal on a reference to it does not extend to an order of the Tribunal made on a complaint, and that the jurisdiction of the Tribunal to hear complaints under section 12(4) is restricted to minor matters. Thus in Pritam v Ratilal, Madan J (as he then was) held that section 12(4) did not entitle the Tribunal to make an order for eviction and envisaged complaints other than eviction such as a landlord turning off a common water tap (or today, electricity switch). Similarly, in Choitram v Mystery Model Hair Salon (in which the judgment as reported is wrongly attributed to Madan J.) Simpson J who decided the case said:

“I am of the opinion however that the term “complaint” is intended only to cover complaints of a minor character. The term “investigate” does not necessarily imply a bearing. Such complaints would include complaints by the tenant of the turning off of water, obstruction of access and other acts of harassment by the landlord calling for appropriate orders for their rectification or cessation but not including payment of compensation for any injury suffered.”

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710 Civil Appeal No. 18 of 2000 (High Court at Mombasa).
711 (1979) KLR 96.
712 (1972) EA 560.
713 (1972) EA 525.
714 See also Machenge v Kibarabara (1973) EA 481
In a 2006 decision in *Ruth K. Wachira t/a Amigirl Beauty Palour v Chairman Business Rent Tribunal*, however, Anyara Emukule J. has sought to sharply differ with the above cited decisions. First, he lays the foundation of his decision by submitting that reference within the meaning of section 6 of the Act is related to a tenancy notice under section 4(2) and (3). Therefore, this section does not diminish the right of a party to make a reference in respect to any other section of the Act provided the demised premises falls under the application of the Act. He thus dispels of the notion that a reference can only be made under section 6 of the Act. He explains his position thus:

“Perhaps the notion that there is no right of reference to the Tribunal in respect of any complaint under section 12(4) is derived from the definition of the word “reference” in section 2 of the Act where ‘reference’ means- “a reference to a Tribunal under section 6 of the Act.” Reference under section 6 of the Act relates specifically to a tenancy notice given under section 4(2) and (3) of the Act (either for termination of a tenancy or reassessment of the tent of a controlled tenancy), if those cases be referred to as “major” complaints it does not diminish the power to make reference to the Tribunal under other sections of the Act, including a determination or order arising from making a complaint under other section 12(4) of the Act provided that the only qualification to that right. It does not matter that “any complaint” reassess the rent is a “reference.” The result is either case is a determination and order by the Tribunal. Neither diminish the right of a aggrieved party to a “reference” or to “a complaint” by a determination and order therein of a tribunal to appeal.”

Based on the above understanding, he argues on the second instance, that an aggrieved party by the decision of the Tribunal in respect of both a reference under section 6 and a complaint under section 12(4) is entitled to appeal to the High court. He contends that the basis of an appeal under section 15(1) of the Act is whether a party is aggrieved by “any determination or order of the Tribunal.” In this context, it is immaterial whether the issue before the Tribunal is a reference or a complaint. The question is or should be “has the Tribunal made a determination or an order?” As such the case of Heptulla Properties, cannot be the basis for the propositions either that the Tribunal has no jurisdiction to determine a “complaint” referred to it under section 12(4) or that it exceeded its jurisdiction or that there is no right of appeal in terms of section 15(1) of the Act. At this point, I should allow Him to speak for

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“The right of an appeal is in respect of any determination and order therein in respect of a reference or a complaint by the Tribunal under the Act. An aggrieved party from a determination and order from a complaint under section 12(4) of the Act is in my respectful view entitled to an appeal; as much as a person aggrieved by a determination and order pursuant to a reference under section 6 or other determination and order of the Tribunal under any of the powers conferred upon the Tribunal under section 12(1)(a)-(n) inclusive of the Act or any other provision of the Act conferring jurisdiction to the Tribunal to determine any matter thereunder.”

Thirdly, Anyara Emukule J. holds that section 12(4) of the Act and the word “complaint” used therein, does not refer or was not meant to refer to a complaint of a minor nature as held in earlier cases. He also submits that the word “investigate” as used in that section does not necessarily exclude a hearing. Note that in Choitram v Mystery Model Hair Salon\(^\text{716}\) it was said that the term “investigate” does not imply a hearing. To the contrary, Emukule J. holds, “I do not accept that the expression “complaint” as used in section 12(4) of the Act means or was intended to cover a complaint of a minor character or that the word “investigate” does not necessarily exclude a hearing. Perhaps the best form of investigation is to get all the parties together and hear them first hand rather than through correspondence to and from the parties without end.” He thus distinguishes the present case with that of Re Heptulla Properties\(^\text{717}\) in the following terms:

“In this matter, the complaint was not about a minor acts such as turning off water taps or electricity early in the night. It was about non-acceptance of rent, the demand of the existence of landlord and tenant relationship. So the expression “any complaint” may include major complaints relating to a controlled tenancy. The Tribunal was perfectly entitled to investigate by way of a hearing of the parties and to make the orders it did. The case of Heptulla Properties and other cases cited therein are clearly distinguishable from the current one and are no guide in this matter.”

It is also stipulated under the Act that where the landlord is himself a tenant, the termination of the landlord’s tenancy shall not trickle down to terminate the sub-tenancy.\(^\text{718}\) Further, where a landlord gives a tenancy notice to his tenant, he may at the same time give a similar notice to any person to whom the tenant has sub-let the whole or any part of the premises.\(^\text{719}\)

\(^{716}\) (1972) EA 525
\(^{717}\) Supra n. 439.
\(^{718}\) Section 5(1).
\(^{719}\) Section 5(2).
In such circumstances, the Tribunal may consolidate any references made to it by the tenant and the sub-tenant.\textsuperscript{720}

In addition to the above conditions, where the Landlord intends to terminate the tenancy and has issued a notice to that effect, section 7(1) limits his grounds for termination of the tenancy to the following:

(a) The tenant has failed to repair and maintain the premises pursuant to the tenancy;
(b) The tenant has defaulted in paying rent for a period of two months after such rent has become due or he has persistently delayed in paying rent;
(c) The tenant has committed other substantial breaches of his obligations under the tenancy;
(d) The landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant.
(e) That on termination of the tenancy the landlord intends to demolish or reconstruct the premises comprised in the tenancy. In *Kimakia Cooperative Society v Green*,\textsuperscript{721} Hotel it was held that the order to give the landlord possession for purposes of renovation or reconstruction is one for legal possession terminating the existing tenancy, even if a new tenancy is envisaged. The case of *Heath v Drown*,\textsuperscript{722} was quoted in support of this position. Here, Lord Kilbrandon who wrote the leading opinion of the majority explained the situation under similar but identical legislation in the Landlord & Tenant Act (1954) of England which is probably the inspiration of the Landlord & Tenant Act (Cap 301) of Kenya. He said thus:

‘The holding referred to in section 30(1)(f) (allowing a landlord to take possession when he intends to demolish or reconstruct as in section 7(f) Cap 301) is *ex hypothesi* one in respect of which there is a subsisting tenancy, for a new lease has been finally disposed of. ‘Obtaining possession of the holding’ (SC by the landlord) must, in my view mean

\textsuperscript{720} Section 5(3).
\textsuperscript{721} (1988) KLR 242. The facts of the case were as follows: the respondent had been a tenant of the respondent under controlled tenancy running from 1967 for five years. But it appeared to have been continued after 1976 where upon the respondent complied with an order of the Business Premises Tribunal to give vacant possession of the premises to the appellant for the purposes of renovation. After the renovations the Tribunal gave an ex parte order requiring the appellant to breach a partition wall it had built and to give the respondent his old premises. These orders were later nullified by the High Court which also ruled (erroneously) that after the order for the tenant to vacate for purposes of reconstruction, the tenancy had continued uninterrupted. The appellant was found liable in damages and costs on account of the respondent’s counterclaim for lost business. The appellant appealed.
\textsuperscript{722} (1973) AC 498.
putting an end to such right of possession of the holding as are vested in
the tenant under the terms of his currency tenancy. This is the ordinary
meaning ‘obtaining possession’ in the context of the relationship of
landlord and tenant. Moreover an examination of the Act shows that when
the word ‘possession’ is used it mens the legal right to possession of land.’

(f) That on the termination of the tenancy the landlord himself intends to occupy for a
period of not less than one year the premises comprised in the tenancy for the
purposes, or partly for the purposes, of a business to be carried on by him therein,
or as his residence.

(g) That the tenancy was created by the subletting of part only of the premises
comprised in a superior tenancy of which the landlord is the owner of an interest
in reversion expectant on the termination of that superior tenancy.

Consequently, circumstances not envisaged by the Act does not terminate a controlled
tenancy at the instance of the landlord. Therefore, for example, the death of a tenant has no
effect of terminating the tenancy. This was established in the case of Waljee v Rose\textsuperscript{723} where
it was stated:

“It is to be noted that there is nothing in the Landlord and Tenant (Shops, Hotels &
Catering Establishments) Act to suggest that death of the tenant would terminate a
controlled tenancy under the common law: ‘A tenancy does not terminate by the death
of the lessee, but will vest in his legal personal representative who are entitled to give
or receive the proper notice to quit’. See Woodfall: Landlord and Tenant (27\textsuperscript{th} edn.),
page 964.”\textsuperscript{724}

The ultimate upshot of the procedure and conditions of the Act is that a controlled tenancy
can only be altered or terminated in accordance with the Act. The case of Dr. Esther Kanini
Mutakha & 3 others v Mutati Transporters Ltd\textsuperscript{725} is worth noting here. In this case, the
defendants undertook certain renovations of the premises comprising the tenancy without
informing the plaintiff. As a result of the said renovations, building materials were dumped at
the entrance and the corridors leading to the offices of the plaintiff. The said renovations and
alterations resulted in the plaintiff being forced to use one entrance; whilst before the

\textsuperscript{723} (1976) KLR 25
\textsuperscript{724} See also Alex Kadenge Mwendwa v Grace Wangari Ndikimi & 2 others, (2006) eKLR- Civil Suit no. 2974
of 1991 (High Court at Nairobi).
\textsuperscript{725} (2005) eKLR- Civil Case No. 2 of 2004 (High Court at Nakuru).
renovations there were two entrances. A veranda in the front of her leased premises was blocked off. The grills that were placed at the entrance to the demised premises were removed. The water supply to the demised premises were cut off. It became apparent that the defendant did this deliberately because it had secured what it considered to be lucrative tenant. In holding that the activities of the landlord were illegal, Kimaru J had this to say:

“It appears that the defendant set out to frustrate the plaintiff to either abandon this suit or alternatively vacate the premises after the condition of the tenancy had been altered to the detriment of the plaintiff. The defendant believes that it can pay its way out of any legal logjam that may result from its actions; hence the offer that that they were ready to compensate the plaintiff for the inconvenience that she had suffered. The law however does not work that way. Where an individual has been given certain protection by the law, in this case the plaintiff as a protected tenant under the Landlord and Tenant (shop, Hotels and Catering Establishments) Act (Cap 301 laws of Kenya), the courts of law which enforce the requisite provision of the law. The defendant cannot opt or choose to ride roughshod on a tenant even if it thinks it has the financial muscle to pay compensation. I therefore hold that the said renovations and alterations were undertaken to frustrate and force the plaintiff out of the demised premises. The defendant never intended to follow the law to terminate the plaintiff’s tenancy. Where a defendant breaches the law and in the process affects the right of the plaintiff, the courts have to intervene.”

As the above pronouncement reveal, there is no opting out of the provisions of the Act if the demised premises are declared to be under its application.

**The Business Premises Tribunal: Powers and Salient Features**

As already noted above, the Business Premises Tribunal is established under section 11 of the Act. It is the primary body for adjudicating matters related to controlled tenancy as was stated in *Alex Kadenge Mwendwa v Grace Wangari Ndikimi & 2 others*. In this case the plaintiffs lodged a controlled tenancy dispute in the High Court their justification been that the High Court is vested with superior powers. This, he did even despite the fact that the respondents had filed a reference in the Business Premises Tribunal. In dismissing the suit, J.B. Ojwang indicated that:

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726 (2006) eKLR- Civil Suit no. 2974 of 1991 (High Court at Nairobi).
“There is a jurisdictional question attached to the definitions of rights and obligations in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301), which takes the basic dispute settlement forum to be the Business Premises Tribunal; and the jurisdiction of that Tribunal is not to be excluded but for good cause. When, therefore, the deceased tenant submitted a business premises dispute before the Tribunal, he thereby activated a legal process which required the plaintiff herein to deal in the first place with that Tribunal and not leapfrog into the High Court. I therefore reject counsel’s submissions that the plaintiff’s grievances should only have been resolved in the High Court.”

The Tribunal consists of a person or persons appointed as such by the Minister. Upon a reference been made to the Tribunal, it may approve the terms of the tenancy notice or order that it be of no effect or it may make such further order(s) as it thinks appropriate. It thus enjoys a wide range of powers enumerated under section 12(1) of the Act, amongst others, as follows:

(a) To determine whether or not any tenancy is a controlled tenancy;
(b) To determine or vary the rent to be payable in respect of any controlled tenancy;
(c) To apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
(d) Where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge.
(e) To make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits;

However, the Tribunal doesn’t have or exercise jurisdiction over criminal matters. It therefore cannot entertain any criminal proceedings for any offence whether under the Act or

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727 Section 9(1). See also Section 9(2) where it is stated that without prejudice to the generality of section 9(1), a Tribunal may, upon any reference-

Determine or vary the rent to be payable in respect of the controlled tenancy, having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market, and disregarding-

Any effect on rent of the fact that the tenant has, or his predecessors in title have, been in occupation of the premises;
Any goodwill attached to the premises by reason of the carrying on thereat of the trade, business or occupation of the tenant or any such predecessor;
Any effect on rent of any improvement carried out by the tenant or any such predecessor otherwise than in pursuance of an obligation to the immediate landlord;
Terminate or vary any of the terms or conditions of the controlled tenancy, or any of the rights or services enjoyed by the tenant, upon such conditions, if any, as it deems appropriate.
otherwise. It also has no powers which are the sole province of the High Court. For example, the Tribunal has no power to order stay pending appeal728 or issue an injunction.729 Appeals from the decision of the Tribunal lies to the High Court.730 Strangely, it is provided by the Act that the decision of the High Court on any appeal from the Tribunal shall be final and shall not be subject to further appeal.731 Further, the schedule to the Act outlines terms and conditions which are implied by the Act in controlled tenancies whether or not they are in the prescribed form.

7.2.2 Rent Restriction Act (Cap 296)

The Rent Restriction Act (Cap 296) is a an act of parliament which makes provisions for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house. Essentially, the Act aims at protecting tenants of dwelling-houses to which it applies from arbitrary increase of rents, or dispossession by landlords. The Act applies to all dwelling-houses,732 other than the following:

- Excepted dwelling-houses,733
- Dwelling-house let on service tenancies;734
- Dwelling-houses which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished.735

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729 See Narshidas & Co. Ltd v Nyali Air Conditioning & Refrigeration Services Ltd, Civil Appeal No. 205 of 1995 where the Court of Appeal said, “What does a controlled tenant confronted with an illegal threat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act, as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. The tribunal has no jurisdiction to do so as was held by High Court in the case of the Republic v Nairobi Business Premises Rent Tribunal & others, ex parte Karasha (1979) KLR 147 and also in the case of Re Hebtulla Properties Ltd., (1979) KLR 96.”
730 Section 15(1).
731 Section 15. Traditionally where an appeal is from a decision of the Tribunal under the Landlord and Tenant Act Cap 301, two judges of the High Court are appointed to hear the appeal. The reason for this is that the High Court is the final court of appeal. It does mean though that a single judge cannot hear such appeal. Indeed they can. See Josephat Thuo Githachuri t/a Kiarigi Building Contractors v Parkview Properties Ltd (2005) eKLR-Civil Appeal 539 of 2001 (High Court at Nairobi).
732 Section 2(1 Rent Restriction Act, Cap 296. a dwelling-house means any house or part of a house or room used as a dwelling or place of residence, and includes the site of the house and the garden and other lands and buildings let therewith and not as a separate entity or source of profit. See section 3(1).
733 An excepted dwelling-house means a dwelling-house belonging to any class which the minister may, by notice in the Gazette except the provisions of the Rent Restriction Act. For example, under Gazette Notice 4662/1966 all dwelling-places which are the property of and let to the tenant by the Government, Kenya Railways, the Kenya Ports Authority, the Kenya Posts and Telecommunication Corporation or a Local Authority were excepted from the application of the Act.
734 A service tenancy in relation to a dwelling-house, means a letting by the landlord to an employee in connection with his employment. See section 3(1).
The Act at section 4(1) empowers and obligates the Minister to establish such Rent Tribunals, having jurisdiction in such areas as he may think fit. As such, the Rent Restriction Tribunal is the primary dispute resolution machinery under the Act and where, for example, one institute two concurrent proceedings before the Tribunal and the High Court, the same will be referred back to the Tribunal. The Tribunal consists of the chairman, a deputy chairman and a panel of members all of whom are appointed by the Minister. In its proceedings, the Tribunal is presided over by the chairman or deputy chairman and must consist of the person so presiding and two members selected by the Permanent Secretary to the Ministry responsible for administration of the Act.

Thus, where the chairman of the Tribunal dies the Tribunal ceases to be lawfully constituted and the remaining members cease to have any jurisdiction. In Agapito Pereira v Said Bin Seif Properties, the appellants appealed against a decision of the Rent Restriction Tribunal on the ground, amongst others, that it was not properly constituted. In particular, it was contended that the proceedings commenced with only the chairman and one member present. It held that this was contrary to section 4(5) of the Act and that the position could not be vitiated by a reading of the provision to the section as the provision operates only in the absence of the selected members.

Obviously, the proceedings must also be in tandem with the rules of natural justice. In the afore-cited case of Agapito Pereira, a member who was sitting at the Tribunal was appointed a valuer and his report was relied upon in the assessment of the rent. It was held that the deliberations of the Tribunal were rendered null and void for they were in contradiction with the rules of natural justice.

Matters considered by the Tribunal are decided by the votes of the majority of the persons constituting the Tribunal with the one presiding having both a casting and a deliberative vote. Under the Rent Restriction Regulations made under the Act, Regulation 9 provides that a member of the Tribunal shall not participate in a decision of Tribunal unless he has been present through the whole of the hearing. However, when the point arising in a proceeding

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735 See section 3(1) for a detailed description of a standard rent.
737 Sections 4(2), (3) & (4) RRA.
738 Section 4(5) RRA.
739 Thakkar & Another v Joram & Others (1973) EA 133.
before a tribunal is one on a point of law, then it shall be reserved to and pronounced upon by the person presiding exclusively.

Further, the chairman of the Tribunal acting alone has jurisdiction to deal with all interlocutory applications which are not of such a nature as to effect a decision in matter which is in issue between parties. Where he is of the opinion that a question arising in the proceedings before the Tribunal involves a substantial question of law, he may, and shall if any party to the proceedings so requests, adjourn the proceedings and refer that question of law to the High Court for a decision. Upon such a decision been given by the High Court, the Tribunal shall dispose of the proceedings in accordance with that decision. Indeed, it trite law that the Tribunal has the same jurisdiction and powers in civil matters as are conferred upon the High Court. In addition to the aforementioned, the Tribunal has, amongst others, the following powers under the Act:

(a) To assess the standard rent of any premises either on the application of any person interested or of its own motion;
(b) To fix in the case of any premises, at its discretion and in accordance with the requirements of justice, the date from which the standard rent is payable;
(c) To apportion payment of the rent of premises among tenants sharing the occupation thereof and the rent payable in respect of different premises included in one composite tenancy;
(d) To fix the amount of service charge where it is part of the rent payable.
(e) To permit the levy of distress for rent.

The circumstances under which standard rent under section 5(1)(a) the Act and cited above would be assessed, were well summarized in the case of J.D. Sumaria & 4 others v Vaibaivaji & Another. The question before the court for determination was whether a party having known the rent of the premises in question would go to the Tribunal for assessment of the rent. M.A. Ang'awa J in addition to clearly stating that parties cannot by consent agree on standard rent, proceeded to set out the circumstances under which the standard rent is assessed as follows:

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741 Section 4(8) RRA.
742 Section 4(9) RRA.
743 See Rent Restriction Tribunal v Rawal Ex parte Mayfair Bakeries Ltd (1985) KLR 167.
744 Section 5(1) RRA.
745 A composite tenancy means a tenancy comprising more than one dwelling-house where the tenancy is expressed to be in respect of, or where a single rent is expressed to be payable in respect of, all those dwelling-houses.
746 Civil Appeal No.192 of 1994 (Unreported).
“The standard rent of a premises that is established for a dwelling house is that which was there on the 1\textsuperscript{st} of January 1981. Once this fact is known and established, there is no need to go for assessment of the standard rent. The standard rent being that which was established on the 1\textsuperscript{st} of January 1981. There are situations where the standard rent as of 1.1.81 was not known because the premises were not let then. In such a case, the landlord would apply for the assessment of the rent. The Rent Restriction Tribunal would then assess the standard rent…. The other situation is when the standard rent is known but the rents are uneconomical. The Tribunal can reassess the standard rent. The fact though is, to rely on this request, there must be standard rent first. The landlord has to then show to the Rent Restriction Tribunal that the rent does not yield “a fair capital return or the costs of return and market value of land as of 1.1.81.” The landlord has to prove the value of land, the rent he is getting is uneconomical and the capital is poor.”

The Rent Restriction Tribunal, like the Business Premises Tribunal, is also empowered to investigate any complaint relating to the tenancy of premises made to it by either a tenant or the landlord of those premises. \(^{747}\) In Rent Restriction Tribunal v Rawal Ex parte Mayfair Bakeries Ltd,\(^ {748}\) the High Court confirmed that “the powers of the Tribunal are not restricted to those conferred by section 5 of the Act. Section 6 confers upon it additional powers to investigate any complaints relating to the tenancy of premises made to it by either a tenant or the landlord of such premises.”

The decision, determination and order of the Tribunal under the Act are conclusive, and no appeal lies therefrom to any court save in the following instances where the appeal lies to the High Court: \(^ {749}\)

(a) In the case of an order under section 6(5) made by the Tribunal having investigated a complaint; or
(b) On any point of law; or
(c) In the case of premises whereof the standard rent exceeds one thousand shillings a month, on any point of mixed fact and law.

\(^{747}\) Section 6(1) RRA.
\(^{748}\) Supra n. 467.
\(^{749}\) Section 8 (1) & (2) RRA.
Thus, unlike under the Landlord & Tenant Act (Cap 301) where it has been held that there are no appeals available to the High Court from an order of the Tribunal having investigated a complaint, the same is not true of the Rent Restriction Act. Under the latter, it is express that an appeal lies to the High Court where a party feels aggrieved by order of the Tribunal having investigated a complaint. Indeed, as was held in Rent Restriction Tribunal v Rawal Ex parte Mayfair Bakeries Ltd, there is nothing in the Act that shows of two categories of complaints i.e. minor and major complaint, as has been the case in the Landlord & Tenant Act (Cap 301).

No further appeal lies from the decision of the High Court under the Act. It is further provided that where any person is aggrieved by any decision, determination or order of a person acting under powers delegated to him under section 5(3); he may apply to the Tribunal for a review of that decision. However, no further appeal shall lie from such a review.

Section 10 to 14 of the Act relate to the limitation of increases of rent by the landlord. In particular, section 11 states that the landlord can only increase rent by notice in writing to the tenant and a copy thereof delivered to the Tribunal. Section 14 provides the conditions under which an order for recovery of any premises or for the ejectment of a tenant can be made. In Kimani v Republic it was emphasized that possession may not be by a landlord recovered unless the notice given is given for one of the reasons set out in one of the subsections of section 14(1) of the Act. Where the notice is given pursuant to a wrong section of the Act, the notice is not rendered invalid unless substantial prejudice has been occasioned to the tenant by the mistake. In Cheema v Rodrigues, the appellant/landlord filed a suit in the Rent Restriction Tribunal seeking the eviction of the respondent/tenant on the ground that he (the landlord) needed to give his family occupation of the premises occupied by the respondent. The appellant gave the respondent a notice to vacate which was stated to be given under section 15(1)(h) instead of 15(1)(e) of the Rent Restriction Act. The Tribunal decided that the notice had a fundamental defect and was not valid. On appeal it was held that the mention of section 15(1)(h) of the Rent Restriction Act did not cause any prejudice and it was wrong for the Tribunal to take it upon itself to hold the notice invalid without affording an opportunity to the plaintiff’s/appellant’s counsel to deal with the matter.

750 Supra n. 467.
752 (1989) KLR 382.
In the event that the landlord issues a notice pursuant to section 14(1) (i) on the ground that he wishes to reconstruct the premises, it has been held that provided such a landlord has proved a fixed and genuine intention to reconstruct premises to better and higher standards, then he should be given the chance to do so and the mere fact that his tenant is not likely to obtain alternative accommodation should not be a reason enough to hinder the development.\textsuperscript{754}

7.3. LAND USE PLANNING

Land use planning is the systematic assessment of physical, social and economic factors in such a way as to encourage and assist land users in selecting options that increase the productivity, are sustainable and meet the needs of society. It is therefore a deliberate exercise aimed at directing the use and development of the land resource. The objective is to provide an appropriate spatial framework within which environmental and socio-economic activities of a country or region can take place in an orderly and coordinated manner. This is intended to lead to:

- Efficient and effective use of resources.
- Reduce conflicts in land use.
- Environmental conservation and sustainability.
- Reduced regional development imbalances.
- Provision of well planned human settlements thereby reducing the occurrence of slums and informal settlements.
- Efficient provision of infrastructural facilities.

7.3.1 LAND USE PLANNING PRACTICE IN KENYA

Land use planning practice in Kenya can be traced to the colonial era when the colonial government, confronted by a rapidly urbanizing country, found it necessary to formulate planning laws that would regulate the nature of spatial planning in the country. It achieved this through the enactment of the Town Planning Act (Cap 134 of 1931). The scope of this Act was limited to gazetted towns and urban areas.

In the post colonial era, this Act was supplemented by the Land Planning Act (Cap 303 of 1968). This was meant to broaden the scope of planning to include the preparation of plans

\textsuperscript{754} See Lakhani v Nyanza Woolen Shop (1991) KLR 597.
for broader areas or regions. The two laws thus provided for the creation of an overall framework, institutional arrangements and procedures for spatial planning. They facilitated the preparation of plans ranging from regional long term physical development plans prepared for provinces and districts, to short term (action) plans for municipalities, towns and smaller trading centers.

The two pieces of legislation, however, could not be able to cope with changing planning needs i.e. the control of haphazard urban developments. The need therefore arose for the enactment of a law that would fill the loopholes in the existing legislation. This led to the enactment of the Physical Planning Act (Cap 286) which became operational on 28th October 1998. This new Act repealed both the Town Planning Act of 1931 and the Land Planning Act of 1968. This is the main law under which land use planning in Kenya is currently being undertaken. However, there are other laws in existence which relate to land use planning i.e. the Local Government Act (Cap 265), the Agriculture Act (Cap 318), and the Environmental Management Act No. 8 of 1999 and the Acts governing the Regional Development Authorities.

(a) The Physical Planning Act (Cap 286)

The Physical Planning Act provide for the preparation and implementation of physical development plans and for connected purposes. The Act provides for the establishment of the office of the Director of Physical Planning who shall be the chief Government advisor on all matters relating to physical planning. It also provides for the establishment of the Physical Planning Liaison Committees for arbitration in land use planning conflicts. These committees are categorized into the following groups:

- The National Planning Liaison Committee.
- The Nairobi Physical Planning Liaison Committee.
- District Physical Planning Liaison Committees.

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755 Section 4(1) & (2) Physical Planning Act. The Director is mandated, amongst other things, to:
1. Formulate national, regional and local physical development policies, guidelines and strategies;
2. Be responsible for the preparation of all regional and local physical development plans;
3. From time to time initiate, undertake or direct studies and research into matters concerning physical planning;
4. Advise the Commissioner of Lands and local authorities on the most appropriate use of land including management such as change of user, extension of user, extension of leases, subdivision of land and amalgamation of land; and
5. Require local authorities to ensure the proper execution of physical development control and preservation orders.

756 Section 8(1) Physical Planning Act
757 Section 8(2) Physical Planning Act
- Municipal Physical Planning Liaison Committees.

The Act also provides for the preparation of Regional and Local Physical Development Plans. The developments are prepared for the purpose of improving land and providing for the proper physical development of such land, and securing suitable provision for transportation, public purposes, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purposes.

The crux of the Physical Planning act in so far as regulation of land use and planning is concerned, is Part V which deals with control of development. Section 29 thereof, vest on each local authority the power:

(a) To prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;
(b) To control or prohibit the subdivision of land or existing plots into smaller areas;
(c) To consider and approve all development applications and grant all development permissions;
(d) To ensure the proper execution and implementation of approved physical development plans;
(e) To formulate by-laws to regulate zoning in respect of use and density of development; and
(f) To reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.

It is stipulated that no person is allowed to carry out development within the area of a local authority without a development permission granted by the local authority. Failure to obtain development permission before carrying out any development is an offence liable for punishment. Consequently, such development is null and void and it shall be discontinued with the concurrent requirement that the developer restore the land to its original condition.

An applicant for development permission must make the application in the prescribed form and submit it to the clerk of the local authority responsible for the area in which the land

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758 Section 8(3) Physical Planning Act.
759 Section 8(4) Physical Planning Act.
760 See section 16 & 24 Physical Planning Act.
761 Section 30(1) Physical Planning Act.
concerned is situated. The application must be accompanied by such plans and particulars as are necessary to indicate the purposes of the development. The local authority may in respect of development application submitted to it, grant the permission with or without conditions or refuse to grant the permission stating the grounds of refusal.

Any person aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13 of the Act. An appeal from such a liaison committee lies to the National Liaison Committee from which a further appeal lies to the High Court.

Where in the opinion of a local authority any development application involves matters of major public policy, it may refer the matter to the relevant liaison committee. A person aggrieved by the decision of the liaison committee shall appeal to the National Liaison Committee from whence an appeal lies to the Resident Magistrate’s Court.

In addition, if in connection with a development application a local authority is of the opinion that proposals for industrial location, dumping sites, sewerage treatment, quaries or any other development activity will have injurious impact on the environment, the applicant shall be required to submit together with the application an environmental impact assessment (EIA).

(b) The Local Government Act (Cap 265)

The Local Government Act also contains provisions pertinent to land use planning. In particular, section 166 of the Act empowers municipal councils, county councils and town councils to prohibit and control the development and use of land and buildings in the interest of the proper and orderly development of areas under their jurisdiction. In this regard, there are established the Town Planning and Works Committees of Local Authorities which is primarily concerned with land use planning in the local authorities.

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762 Section 31(1) Physical Planning Act.
763 Section 31(2) Physical Planning Act.
764 Section 33(1) Physical Planning Act.
765 Section 33(3) Physical Planning Act.
766 Section 33(4) & (5) Physical Planning Act.
767 Section 35(1) Physical Planning Act.
768 Section 35(3) & (4) Physical Planning Act.
769 Section 36 Physical Planning Act.
(c) The Agriculture Act (Cap 318)

The Agricultural Act (Cap 318) seeks to control the agricultural operations including control over the user, preservation, management and development of agricultural land. As Onalo opines ‘the rationale of the provisions of the Agriculture Act is that a farmer is forced to do what is in his own best interest and in the interests of the agricultural economy of the nation.’ The Act gives the Minister for Agriculture wide powers in connection with the user, preservation and management of agricultural land.

**Land Preservation Order**- this requires the owner or occupier of the land to take or desist from certain actions in order to preserve his land. Section 48 provides for the making of land preservation rules by the Minister, rules which may, inter alia, require that any vegetation planted in contravention of a land preservation order be uprooted or destroyed without any compensation. One may also, for instance, be prohibited from breaking or clearing the land for the purpose of cultivation, or required to drain the land and construct artificial drains, gullies etc.

By virtue of section 54, an order is registered against the title of the land in the appropriate register of titles, and is deemed an encumbrance on the land and remains so registered despite a change of owner or occupier until it is cancelled.

Where people enter and to the work required in pursuance of a land preservation order, the expenses are debt due to the Government, and the Minister may declare that the debt shall be deemed to be a land preservation loan. Accordingly, such a loan becomes a registrable mortgage taking priority after any previously registered mortgage and charges.

**Land Development Order**- this may be made by the Minister against the owner of agricultural land requiring him to execute such development programmes as the Central Agriculture Authority established under the Act may consider necessary for the proper development of the land for agricultural purposes. Appeals against the making of a land preservation or management order lies to the Agriculture Appeals Board as stipulated in sections 58 and 72 of the Act.

**Land Management Order**- this can be made by the Minister when satisfied that land has either ceased to be managed or supervised or is being managed and supervised so

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inadequately that such an order is necessary to prevent further deterioration. It gives the Minister power to occupy and manage the land to bring it up to a better standard of husbandry with the help of his agents and servants of the government, the costs of the management being defrayed against the profit.

As per section 187(2) holding shall be occupied and managed by the Minister to the exclusion of the owner. While the order is in force, the Minister may lease or sell the land, after giving the owner or occupier an opportunity to show cause why the land should not be leased or sold. But this does not operate to prevent the owner from selling the land. It also does not operate as an order of confiscation. Compensation must be paid for any loss the owner suffers by reason of the making of the order, and the price for which the land is sold by the Minister must be paid over to the owner or held in trust for the mortgagee as the case may be.771

(d) The Environmental Management and Coordination Act No. 8 of 1999

The Environment Management and Coordination Act, 1999 (EMCA) creates an overall and all-embracing agency for the management of the environment as opposed to hitherto existing legislation that set up sectoral agencies often leading to regulatory competition.772 Prior to the enactment of the Act, environmental management components had been formulated largely in line with natural resource sectors. EMCA was therefore developed as a framework law and is at now the only piece of legislation that contains the most comprehensive system environmental management in Kenya. The Act is based on the recognition that improved legal and administrative coordination of the diverse sectoral initiatives is necessary in order to improve national capacity for the management of the environment, and accepts the fundamental principle that the environment constitutes the foundation of our national, economic, social, cultural and spiritual advancement.

The Act contains numerous provisions that are relevant to land use and planning. To start with, the National Environment Action Plan Committee established under the Act is required to prepare, every five years, a national environmental action which shall include, inter alia,

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an analytical profile of the various uses and value of the natural resources.\textsuperscript{773} Part V of the Act embodies provisions for protection and conservation of the environment with the effect that no development shall be carried out on certain areas (e.g. rivers, lakes, wetlands etc.) without a prior written approval issued under the Act.\textsuperscript{774}

A fundamental feature of the Act is Part VI which provides for Environmental Impact Assessment (EIA). EIA is the tool through which environmental law integrates environmental concerns into socio-economic planning. Although there is no clear and concise definition of EIA, there is great consensus on some of its basic tenets—its aims and objectives. Generally, EIA can be said to be the study of the effects of proposed action on the environment.\textsuperscript{775} It seeks to compare the various alternatives which are available for any project or programme.

It is a decision-making tool based on predictions whose ultimate objective is to aid judgmental decision-making by giving the decision maker a clear picture of the alternatives which were predicted, and the trade-offs between the disadvantages of each of the alternatives.\textsuperscript{776} EIA attempts to weigh the environmental effects on a common basis with economic costs and benefits in the overall project evaluation. Should this be done the decision maker is less likely to inadvertently overlook an environmental consequence in arriving at his decision.

In this regard, EMCA at section 58 provides that any person being a proponent of a project specified under Schedule II of the Act, shall, before proceeding with the project submit a project report in the prescribed form giving the prescribed information. In essence the Act puts a duty on a proponent of a project to conduct an EIA and submit a report thereof. Such an EIA must be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under the Act. The ultimate upshot of Part VI is that anyone intending to conduct a project under the jurisdiction of the Act must obtain an EIA licence before proceeding with his project.

In conclusion, it is imperative to appreciate that Kenya has diverse ecosystems which include forests, wetlands, marine and coastal systems, national parks, arid and semi arid lands (ASALS), water sheds, lakes and drainage basins. The user of these lands, given their

\textsuperscript{773} Section 37 EMCA.
\textsuperscript{774} Sections 42-57 EMCA.
\textsuperscript{775} Ahmed Y.J. & G.K. Sammy, 1987, Guidelines to Environmental Impact Assessment in Developing Countries, Nairobi, UNEP, p. 3
\textsuperscript{776} Ibid.
ecological integrity, fragile ecosystem, cultural relevance and strategic location, is in addition to being under the jurisdiction of EMCA governed by specific statutes. Water resources are governed by the Fisheries Act (Cap 378), the Lakes and Rivers Act (Cap 409), the River Basin Development Authorities Act (Cap 443), the Maritime Zone Act (Cap 371, the Irrigation Act (Cap 347) and the Water Act No. 8 of 2002. Lands covered by forests are governed by the Forests Act (Cap 385) while those that form part of parks fall under the Wildlife (Conservation and Management) Act (Cap 376).
CHAPTER EIGHT
CONSTRUCTION OF CONVEYANCES AND DOCUMENTS

8.0. THE BASICS OF CONSTRUCTION

Construction of conveyances and documents simply entails the determination of the intention of the parties as expressed in a conveyance or document. According to the Black’s Law Dictionary it is “the act of process of interpreting or explaining the sense or intention of a writing (usually a constitution, statute or instrument) or the ascertainment of a document’s meaning in accordance with judicial standards.” In more often than not, the need for construction arises where there is a dispute in respect of the conveyance or the words and phrases therein are ambiguous in nature. This is sometimes occasioned by poor drafting.

It is prudent to appreciate that theoretically, difficulties of interpretation can arise frequently with oral as with written documents, sine spoken words are no more or no less capable of conveyancing an unequivocal message than written words but in practice this is not found to be so, and disputes of interpretation arise almost exclusively from written documents. The reason, no doubt, is that witnesses giving evidence about their terms of an oral contract consciously or unconsciously inject into their evidence something more than a straight recollection of the words used, so that what they tell the tends to be their understanding of the words of the contract rather than the plain unvarnished words themselves. Having resolved whatever conflict might exist in the evidence of the court therefore almost always finds itself accepting a version of the contract that is susceptible only of the meaning attributed to it by the witnesses whose evidence was accepted.

When called upon to construe a document or a conveyance, the courts will always endeavor to give effect to the intention of the parties as expressed in writing. However, this general principle is not applicable where upon construction; the intention identified is likely to lead to an illogical conclusion. Where a conveyance uses words and phrases which are capable of two or more meanings and does not show in which sense the parties intended to use them, the court may either declare the conveyance void or decide on which of the available interpretations is to be given to the disputed word or phrase.

777 Bryan A. Garner (ed), BLACK’S LAW DICTIONARY, (8th ed), Thomson West, USA, 2004
In construing a conveyance, the general principle is to read the conveyance as a whole. Thus in *Raven Coal Corp v Absher*\(^{778}\) it was stated that, ‘a fundamental rule of statutory construction requires that every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary.’ It is therefore important that the following parts of a conveyance be considered: the parties (as named); the date (as noted); the recital of grantors titles; the testatum; the statement of consideration; receipt clause; operative words employed; the description of the parcels; the habendum; covenants and reservations; the testamonium and attestati

8.1. THE RULES OF CONSTRUCTION

A rule of construction is a principle that either governs the effect of the ascertained intention of the document or agreement containing an ambiguous term or establishes what a court should do if the intention is neither express nor implied. Generally, similar rules to those used in the construction of statutes and other legal documents are applicable in the construction of conveyances. The rule or rules to be applied will depend on the nature of the case, some of the rules being perhaps entirely inappropriate on the facts. Nor do they rank in any order of priority. These rules are:

8.2.1 The Golden Rule

The golden rule presupposes that words used in a conveyance must be accorded their ordinary and natural meaning. This means that the words or phrases which are subject of construction must be given their obvious, ordinary meaning as they are generally understood and accepted in English language. Thought referring to the construction of statutes, Parke B., in *Becke v Smith*\(^{779}\) explained the scope of this rule as follows:

> ‘It is very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further.’

\(^{778}\) 153 Va 332, 149 SE (541) (1929)
\(^{779}\) (1836) 2 M & W 195
Similarly, Joubert JA in the South African case of Coopers & Lybrand v Bryant\(^{780}\) well expounded the rule as follows:

‘According to the ‘golden rule’ of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument…. The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself….’

The learned judge proceeded to state that the correct approach to the application of the ‘golden rule’ of interpretation after having ascertained the literal meaning of the phrase in question is, broadly speaking, to have regard to the following:

a. to the context in which the word or phrase is used with its interrelation to the contract or document as a whole including the nature and purpose of the contract or document;

b. to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted;

c. to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intention.

### 8.2.2 Ejusdem Generis Rule

Ejusdem generic is Latin for ‘of the same kind.’ Hence, where a document lists specific classes of persons or things and then refers to them in general, then the general statements only apply to the same kind of persons or things specifically listed. The rule dictates that the word or phrase which is in dispute should be given a meaning which is in consonance with the genre i.e. the kind of words immediately before or after the word in dispute. For example, where a document refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, “vehicles” would not include airplanes since the list was of land-based transportation.

\(^{780}\) (1995) 3 SA 761(A) 767E-768E
The correct use of the rule depends entirely upon reading words in their context and not in isolation. The operation of the rule is illustrated by the judgment of Wessels J in the case of 
\textit{Wade & Acton v Dinsdale}.\textsuperscript{781} The question for determination was whether the document in question had granted the plaintiff the right to extract gold or minerals generally including tin. The learned judge said:

\begin{quote}
‘now the whole of the agreement with the exception of the general terms in clause 14, on which the plaintiffs rely, deals specifically and particularly with gold. By clause 14 it is provided that the agreement shall apply to all claims, ground or rights which either party to the agreement may acquire within a specified time and radius. These words, taking them as they stand are sufficiently wide to include almost any kind of right; but accepting these terms in their widest sense we would arrive at the most absurd conclusions and would read into the contract provisions which in my opinion the parties never intended should be there. If the defendant, for instance had acquired servitude such as a grazing right, it would to my mind have been absurd for the plaintiffs to contend that they were under this contract entitled to a share therein. If the parties had intended that the contract should apply to minerals, nothing would have been easier for them than to have inserted a provision to that effect. Where the subject matter of contract is specific and particular, any general terms such as these must be construed to apply to matters ejusdem generic.’
\end{quote}

This example must not be permitted to give the impression that the application of the rule is always such a straightforward matter. In \textit{Grobbelam Van de Vyer},\textsuperscript{782} Schreiner JA observed as follows:

\begin{quote}
‘The application of the ejusdem generis principle of interpretation often gives rise to difficult problems. It is not possible to lay down any simple rule which will provide clear guidance as to when wide general language is to be narrowed down to conform with the scope of associated words; nor can the reasons which may lead to the association in a contract or a statute of narrow specific words with wide, general ones be summarized with any approach to completeness and accuracy.’
\end{quote}

\textsuperscript{781}1954 I SA 248 (A) 254 D

\textsuperscript{782}
As with all the rules of construction, the ejusdem generis rule must be employed to reveal and not to conceal the common intention of the parties. This is particularly important where the document uses a term like “etc”. The application of the rule to the interpretation of the abbreviation “etc” is well demonstrated by Hugo J in Ocon (Pty) Ltd Administrator where he noted:

‘Where a genus is in fact established and the word ‘etc’ is added the….ejasdem genus construction seems to me to indicated. The more generic words precede ‘etc’ the more limited its effect must be. Thus ‘oranges’ etc may well mean all fruit; while ‘oranges, lemons, grape fruit etc’ will almost certainly be limited to citrus fruit. On the other hand, if the preceding words are not confined to a genus then ‘etc’ will tend to extend the meaning rather than limit it, so e.g. ‘oranges, peaches, etc’ will probably include all fruit.”

8.2.3 False Demonstratio non-fact

This rule basically states a false description should not vitiate the conveyance in question. For instance, a false reference to a land reference number should not vitiate the entire conveyance on the base of the false reference number alone.

8.2. THE CONSTRUCTION OF DOCUMENTS AND PAROLE EVIDENCE RULE

The parole evidence rule (or also referred to as the integration rule) requires that no extrinsic evidence shall be relied on to contradict add or vary what is clearly expressed in writing in a conveyance. In other words, no oral evidence may be adduced to add, vary, subtract or contradict a written document. However, in certain exceptional circumstances, such evidence may be introduced to explain ambiguous whether patent or latent. The rule is well summarized by Wigmore on evidence as follows:

‘This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in the former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: when a

783 Natal 1991 4 SA 71(D) 761-J
A jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of the act.\(^\text{784}\)

This rule serves the important purpose of ensuring that where the parties have decided that a contract or their intentions should be recorded in writing, their decision will be respected and the resulting document will be accepted as the sole evidence of the terms of the contract. The importance of this rule has been well articulated by Corbett JA in the South African case of *Johnston v Leal*.\(^\text{785}\) He said:

‘It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add or to modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract…. To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered.’

One does not need a very fertile imagination to see how, necessary as the rule is, it can lead to injustice if rigorously applied by excluding evidence of what the parties really agreed. It has therefore been the constant endeavor of the courts to prevent the rule being used as an engine of fraud by a party who knows full well that the written contract does nor represent the true agreement.

The parole evidence rule is embodied in statute at sections 99 to 105 of the Evidence Act (Cap 80 Laws of Kenya). Section 98 starts by saying that no evidence of any oral agreement or statement shall be admitted in order to contradict, vary, add to or subtract from the terms of a written document. But various exceptions follow: a fact that will invalidate the document may be admitted, such as evidence of fraud, intimation, illegality, want of due execution, want of capacity, failure of consideration, or mistake of fact or law. An oral agreement may be admitted if the written agreement is silent on the particular point covered by the oral agreement.

\(^{784}\) Wigmore, Evidence, 3rd ed, vol 9, sec 2425

\(^{785}\) (1980) 3 SA 927 (A) 943B
Again an oral agreement may be admitted if it serves as a condition precedent to the written agreement. For example, if a tenant tells the landlord that he will not sign the agreement until he promises that the rabbits will be kept down or the drains are in order, then if the landlord agrees, then such evidence will be admitted. The condition precedent must not be inconsistent with the terms of the document, which is perhaps another way of saying that the condition must be a true condition suspending the operation of the contract without arising any of its term. Thus in Angell v Duke, evidence of a prior oral agreement to increase the amount of furniture in a furnished house, inducing the execution of a lease, was held inadmissible because the written lease specified the amount of furniture and a prior oral agreement to increase this amount therefore conflicted with written lease.

Judicial dicta on the parole evidence rule stems from the case of Jacobs v Batavio where the court stated as follows:

‘It is firmly established as a rule of law that parole evidence cannot be admitted to add, vary or contradict a deed or other written instrument. Accordingly, it has been held that (except in cases of fraud or rectification and except, in certain circumstances, as a defence in actions for specific performance) parole evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties.’

Prior to this decision, Lord Denman in Goss v Nugent had stated the principle thus, ‘by the general rules of the common law if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during its preparation so as to add or subtract from or in any manner to vary or qualify the written contract. Halsbury’s Laws of England shows that the parole evidence rule applies to all forms of evidence outside the contract itself, not merely oral evidence. Quoted in Robin v Gervon Berger Association Ltd & others it is stated:

786 See Morgan Griffith (1871) LR Ex 70; Erskine v Adeane (1873) LR 8 Ch App 756
787 De Lassale Guildford (1901) 2 KB 215 (CA)
788 (1875) 32 LT 320
789 (1924) 1 Ch D 287 at 295.
790 5 B & Ad 54. See also Marguard & Co. v Bicard (1921) AD 366 (Solomon JA); Lowrey v Steadman (1914) AD 532.
792 (1986) 1 WLR 526; (1986) 1 All ER 374.
‘Where the intention of the parties has been reduced to writing, it is general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, draft, articles, conditions of sale or preliminary agreements, either to show that intention or to contract, vary, add to the terms of the document…. Extrinsic evidence be received in order to prove the object with which a document is executed, or that the intention of the parties was other than appearing on the face of the instrument.’

In east Africa, the case of Danodar Jinabhai & Co Ltd v Eustace Sisal Estates Ltd\textsuperscript{793} is instructive. Here, Spry JA quoting Moulton LJ in Mills v United Countries Bank Ltd\textsuperscript{794} stated that it is a general rule of interpretation that where there is an express provision in a contract, the court will not imply any provision relating to the same subject matter. In Kenya, the High Court in the case of Housing Finance Co of Kenya v Palm Homes Ltd & others,\textsuperscript{795} the court ha to apply the parole evidence rule to reach its decision. In this case, the second defendant who had, with the third defendant acted as sureties and guaranteed the repayment of a loan advanced to the first defendant, claimed that he had signed the mortgage deed as a nominee of the third defendant and that the understanding was that no personal liability would attach. He made this claim having been sued by virtue of the fact that the first defendant had defaulted in repaying the loan and even after the mortgagee exercised its power of sale, the loan was not fully offset. In rejecting the claim by the second defendant, the court stated:

‘That mortgage deed is a contract between the plaintiff on one part and the defendants on the other part drawn in clear and unambiguous terms needing no parole evidence to explain or clarify. The parole evidence the second defendant has adduced before me to persuade me that he was a “nominee” or “agent” of the third defendant or anyone else and therefore not liable under the guarantee, to pay the loan after the first defendant has defaulted in paying that loan is not acceptable.’

The test for introducing parole evidence was laid down in the case of Bakshish Singh & Bros v Panafic Hotels Ltd\textsuperscript{796} where the court stated that ‘where the time for completion in a building contract signed by the employer is blank, even the employer and the contractor are

\textsuperscript{793} (1966) (2) ALR Comm. 514
\textsuperscript{794} (1912) 1 Ch 231
\textsuperscript{795} (2002) 2 KLR 93.
\textsuperscript{796} (1986) KLR 538. See also Kemp v Rose (1858) 65 ER 910 (Sir John Stuart).
told verbally of the date, there must be something very strong in the case before the court can allow the introduction of that term into such a contract by parole evidence.’
CHAPTER NINE
MODERN DEVELOPMENTS IN LAND LAW AND CONVEYANCING

9.0. INTRODUCTION

So far the concern of this book, to a greater extent, has been the processes that precede the transfer of land from one person to another. This has been achieved by making references to statutes and caselaw on conveyancing. But there are current legal and administrative changes and happenings that are bound to have an impact on land law and conveyancing, either directly or indirectly. In addition, there are historical, socio-political and cross-cutting issues that bring land law and conveyancing into sharp focus. In this regard, this book will be incomplete without shedding light into these issues and generally into modern developments in land law and conveyancing. This final chapter, therefore, gives the reader an exposition of recent and current developments that have an impact on land law and conveyancing.

9.1. COMMISSION OF INQUIRIES INTO LAND LAW AND CONVEYANCING ISSUES

Few if any developing countries can equal Kenya’s record of regular review of factors and circumstances affecting its processes of political, social and economic development. This has taken many forms among which are commission of inquiries, task forces and probe committees. The field of land law and conveyancing has had its share of this phenomenon. Commissions of inquiry in this field dates back to the colonial era.

In 1919 the Land Settlement Commission was established to consider plans for allocation of land to ex-soldiers from the United Kingdom. Later the Economic Commission and the Land Tenure Commission were established to look into the question of African reserves. The former, opposed the principle of reserving land for exclusive Africa population while the latter accepted the principle, but considered that African reserves should contain relatively little unused land. These were followed by the East African Commission which reported in favour of greater security for Africans on the land.

In 1934, the Kenya Land Commission was appointed as a result of a recommendation made by the Joint Select Committee of Parliament which had been established to consider the issues arising from the report of the Hilton Young Commission on Closer Union and Native

798 Cmd. 4556 (1934).
Policy in East Africa.\textsuperscript{799} Its terms of reference required it to consider African grievances arising from past alienations of land to non-Africans and how to remedy them. In 1953 the East African Royal Commission\textsuperscript{800} was set up to consider possible measures to improve the standard of living of a rising East African population, and in particular to consider, \textit{inter alia}, the economic development of land already in occupation, the adaptations and modifications of customary tenure necessary for the full development of the land, and the opening for cultivation and settlement of land not fully used.

That the independent Government has followed the phenomenon of commissions of inquiry is therefore not a surprise. Today, commissions of inquiry draw their legitimacy from the Commissions of Inquiry Act (Cap 102). This is the foundation upon which an inquiry may be commissioned. In recent years, there has been two commission of inquiries established to look into matters relevant to land law and conveyancing: the Commission of Inquiry into the Land System of Kenya and the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land. These commissions are the subject of discussion hereunder.

\textbf{9.1.1 The Commission of Inquiry into the Land Law System of Kenya}

The Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Framework for Land Administration (herein the Commission or the Njonjo Commission) was established in November 1999 with Charles Mugane Njonjo as its chairman.\textsuperscript{801} The broad terms of reference of the Commission, \textit{inter alia}, read as follows:

- to undertake a broad review of land issues in Kenya and to recommend the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use systems;
- to undertake an analysis of the legal and institutional framework of land tenure and land use in Kenya and to recommend a programme or programmes of legislation that would give effect to such policies;
- to recommend guidelines for a basic land law and complementary legislation and associated subsidiary legislation.

\textsuperscript{799} Cmd 3234 (1929).
\textsuperscript{800} Cmd. 9475 (1953).
\textsuperscript{801} See Gazette Notices No. 6593 & 6594 of 16\textsuperscript{th} November 1999 as read together with Gazette Notice No. 1797 of 31\textsuperscript{st} March 2000, Gazette Notice No. 2972 of 19\textsuperscript{th} May 2000 and Gazette Notice No. 4445 of 21\textsuperscript{st} July 2000.
• to take into account all customary laws relating to land and so far as practicable, to incorporate such of those laws, with such modifications, if any, as may be considered to be desirable for the purposes of making them consonant with present day conditions.

• to incorporate in such new legislation, if thought desirable in the interests of people of Kenya, with or without modifications, the provisions of any laws of other states relating to the tenure of or dealings with land and of any rights or interests thereto or therein;

• to prepare a draft or drafts of such new or amending legislation as may be necessary to implement the recommendations of the Commission to be developed as indicated above; and

• to make such further recommendations as the Commission may deem necessary.

The Commission in undertaking its mandate received written memoranda from the public addressing matters under inquiry. It visited provinces and districts collecting information through public hearings. In addition, the Commission visited Tanzania, Botswana, Egypt, Israel, India, England and Australia with a view of making a comparative analysis and to gain from best practices. The outcome of the inquiry was a report which was presented to the President in November 2002. Though the Commission was degazetted before it completed its work, it is notable that it made important recommendations that have influenced current thinking and reform on land law and conveyancing. The Report of the Njonjo Commission contains, inter alia, the following:

First, the Commission proposed the establishment of a land policy for Kenya and an outline of the key principles to underpin such a policy. The Commission observed that the goal of land policy in Kenya should be to establish a framework of values and institutions that would ensure that land and associated resources are held, used and managed efficiently, productively and sustainably. Further, it noted that the land policy should establish a land system that is economically efficient, socially equitable, environmentally sustainable and operationally accountable to the Kenyan people. It churned out principles to govern diverse aspects of land law and conveyancing including, inter alia, principles regarding sovereignty over land; classification of land; land tenure; tenure of land based resources; productive and sustainable use of land; management and development of land etc.

804 Ibid.
Secondly, the Commission made recommendations land policy recommendation. Though the
Commission recognised that it is neither necessary nor desirable to legislate all aspects of a
national land policy, it nevertheless underscored the necessity of new legislation in the area
of land and conveyancing.\textsuperscript{805} It recommended four responses in this regard:

- the restructuring of the land administration system in such a way as to ensure that it
  functions under the National Land Authority and the District Land Authorities which
  have been recommended in the Report as the main institutional framework for land
  administration;
- the privatisation of non-core land administration functions where appropriate;
- greater use of traditional community mechanisms in such matters as land delivery,
  dispute processing and Sectoral management of land based resources; and
- capacity building for an efficient and cost effective management system.\textsuperscript{806}

In addition, the Njonjo Commission made an exposition of the constitutional position of land
in Kenya. It called for the entrenchment, in the constitution, of aspects of land policy,
particular those relating to the location of radical title, the power of compulsory acquisition,
the nature and mode of exercise of the regulatory power of the state and the protection of
national heritage.\textsuperscript{807} It summarized this as follows:

\begin{quote}
\textquote{Land to Kenyans is an emotive issue. It was at the core of resistance to British
rule at the turn of the last century and subsequent agitation for land thereafter
up to the time of the struggle for independence. It is therefore a central
category of property in the lives of Kenya and as such requires special
treatment in the Constitution.}\textsuperscript{808}
\end{quote}

Finally, the Commission made proposals for a new institutional framework for land
administration.\textsuperscript{809} In particular it proposed the setting up of independent institutions both at
the national and local levels to direct, supervise, monitor and control the administration of all
land matters currently handled by the Technical Departments of the Ministry of Lands and

\textsuperscript{805} Paragraph 224 Njonjo Report.
\textsuperscript{806} Paragraph 227 Njonjo Report.
\textsuperscript{807} Paragraph 225 Njonjo Report.
\textsuperscript{808} Paragraph 235 Njonjo Report.
\textsuperscript{809} Chapter 7 Njonjo Report.
Settlement.\textsuperscript{810} In this regard, it proposed the establishment of the National Land Authority at the national level and the District Land Authorities at the district levels.\textsuperscript{811}

9.1.2 The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land

The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (hereinafter the ‘Commission’ or ‘Ndungu Commission’) was appointed by President Mwai Kibaki on 30\textsuperscript{th} June 2003 with Paul Ndritu Ndungu as its chairman.\textsuperscript{812} The vice that prompted the creation of this Commission is well captured in the opening statement (preamble) of the Gazette Notice that established the Commission. It states:

‘whereas it appears that lands vested in the Republic or dedicated or reserved for public purpose may have been allocated by corrupt or fraudulent practices or other unlawful or irregular means, to private persons, and that such lands continue to be occupied contrary to the good title of the Republic or in a manner inconsistent with the purposes for which such land were respectively dedicated or reserved.’

Thus the appointment of the Commission was an indication that the law and practice of allocating public land in the country had led to a crisis in the country’s land relations warranting state intervention. In view of the complex political and legal web in which land grabbing schemes had been operationalized, the Commission was given wide latitude of mandate. It was required, inter alia:

(a) to inquire generally into the allocation of lands, and in particular-

(i) to inquire into the allocation, to private individuals or corporations, of public lands or lands dedicated or reserved for public purpose;

(ii) to collect and collate evidence and information available, whether from Ministry based committees or from any other source, relating to the nature and extent of unlawful or irregular allocations of such lands; and

\textsuperscript{810} Paragraph 298 Njonjo Report.
\textsuperscript{811} Paragraph 304 Njonjo Report.
\textsuperscript{812} Gazette Notice No. 4559 of 4\textsuperscript{th} July 2003.
(iii) to prepare a list of all lands unlawfully or irregularly allocated, specifying particulars of the lands and of the persons to whom they were allocated, the date of allocation, particulars of all subsequent dealings in the land concerned and their current ownership and development status;

(b) to inquire into and ascertain –

(i) the identity of any persons, whether individuals or bodies corporate, to whom any such lands were allocated by unlawful or irregular means; and

(ii) the identity of any public officials involved in such allocations;

(c) to carry out such other investigations into any matters incidental to the foregoing as, in the opinion of the Commissioners, will be beneficial to a better and fuller discharge of their commission;

(d) to carry out such other investigations as may be directed by the president or the Minister for Lands and Settlement;

(e) to recommend –

(i) Legal and administrative measures for the restoration of such lands to their proper title or purpose, having due regard to the rights of any private person having any bona fide entitlement to or claim of right over the lands concerned;

(ii) Legal and administrative measures to be taken in the event that such lands are for any reason unable to be restored to their proper title or purpose;

(iii) Criminal investigation or prosecution of, and any other measures to be taken against, person involved in the unlawful or irregular allocation of such lands; and
Legal and administrative measures for the prevention of unlawful or irregular allocation of such land in the future; and

In fulfilment of its mandate the Ndungu Commission carried out public hearings, thematic hearings, and organized consultative workshops. It analysed official records and reports pertinent to its scope of work, received letters and memoranda from the public. It is important to observe that although the Commission was given a wide evidence gathering mandate, it was implicit in the terms of reference that its principal sources of information would be official Government records and reports of past commissions and committees. In June 2004, the Commission presented its report to the President. The Report documents the findings and the recommendations of the Commission. Amongst its findings, inter alia, are the following:

- Abuse of Presidential Discretion in the allocation of un-alienated Government land;
- Usurpation of Presidential powers by the Commissioner of Lands;
- Use of forged letters and documents as authority to allocate Government land;
- Illegal transfer of undeveloped leasehold land
- Illegal allocation of land compulsorily acquired for public purposes;
- Illegal allocation of land reserved for public purposes by the Commissioner of Lands;
- Illegal allocations of private lands surrendered to Government and local authorities; and
- Double allocations of public land under different statutes.

Having made the above finding, the Commission prepared a detailed list of all illegal and irregular allocations of public land; the areas where such lands are situated; the identity of all the allottees (beneficiaries) and the identity of all the officials involved in such unlawful allocations. It detailed the current of each of such lands. It made numerous recommendations whose main thrust is the rectification or revocation of titles of all illegally/irregularly acquired land and repossession of the same by the Government. It also recommended the creation of a Land Titles Tribunal to oversee the rectification and revocation of titles.

To justify this recommendation, the Commission relied on several arguments. It argued that the doctrine of sanctity of title as embodied under the RLA and RTA and other statutes is a

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814 Ndungu Report, p. 67.
myth and has indeed fuelled the illegal ad irregular allocations of public land in the
country.815 The Commission therefore held the view that sanctity of title depends on its
legality and not otherwise. Consequently, a title acquired illegally is not valid in the eyes of
the law.

The Commission, quoting Megarry and Wade,816 also submitted that there is no such concept
at common law as “absolute” title. In support of this, the Commission argued that the
availability of rectification and revocation (in both the RLA and RTA) emphasizes the
principle that titles are relative, not absolute, and that no title is completely free from the
danger that some better right to land may be established. It also challenged the concept of
first registration arguing that where land has been registered under the RLA since 1963 then
its first registered proprietor is either the government or the appropriate County Council,
whether the register shows such registration or not.817

Further, the Commission argued that even where land illegally or irregularly allocated has
changed hands to a bona fide purchaser without notice; it is still possible to revoke these titles
particularly where the said lands have not been developed. This argument was hinged on the
fundamental principle of land law that a person (interest holder) cannot transfer a greater or
better interest to another than he himself holds. Therefore, if one acquired land which was
illegally/irregularly allocated then the transaction is illegal from the very beginning (void ab
initio). It stated:

‘…a person having a leasehold interest cannot purport to transfer a freehold
interest to another in the same parcel of land as the latter is greater than the
leasehold. This also means that the holder of an illegal title cannot transfer and
pass on a legal title to another person in the same parcel of land.’

It proceeded to stated as follows:

‘If this principle is to be applied to third parties who acquired illegally
allocated public land from the original allottees, it means those titles are illegal
without exception. Nor would the manner of acquisition make any difference
(purchase, gift, transmission or mortgage). The ultimate consequence of this

815 Ndungu Report, p. 15-16.
816 Discussion on Indefeasibility of Title in Megarry & Wade, The Law of Real Property, London, Sweet &
Maxwell, 6th Edition at pp. 278-290
817 Ndungu Report, p. 59.
conclusion is that a decision to revoke would, if implemented extinguish all such interests since they never existed in the eyes of law in the first place.’

The Commission also observes that the above argument cannot be defeated by constitutional protection of property under section 75 of the Constitution. This is because, the Commission notes, is that section 75 of the Constitution is meant to protect legitimate holders of property from compulsory acquisition of their property. The constitution in this regard only seeks to protect legally acquired property and not otherwise. The Commission states, ‘the supreme law of the land cannot by any stretch of imagination purport to protect stolen property (in this instance, public land acquired contrary to law). It is the considered opinion of this Commission that illegally acquired land is not property falling under the category that is protected by section 75 of the Constitution against state expropriation without compensation.’ This argument will thus from the basis of repossession of illegally/irregularly allocated land without the guarantees of section 75 of the Constitution.

In reference to the state as the guarantee of registered title, the Commission argued that the state only guarantees the correctness of all the entries in the register with regard to a specific title. That it seeks to make the search of information beyond what is noted on the register superfluous. Therefore, any person who suffers loss as a result of the incorrectness of the register has to be compensated by the Government which has guaranteed the correctness of the register. In conclusion, it was noted, ‘Guarantee of title is against loss and not an assurance of all time legality of title.’

The above arguments have been severely criticised for being contrary to the law as stipulated in the statutes and interpreted by the court. In addition, by virtue of the fact that the Commission merely relied on documentary evidence, it has been argued that it failed to adhere to the principles of natural justice in its proceedings. In other words, by publishing the names of those persons allegedly holding illegally/irregularly allocated land, the Commission did not give these persons a right to be heard. In addition, the Commission

818 Ndungu Report, p. 57-58.
819 Ndungu Report, p. 58
820 Ndungu Report, p. 60
821 Ibid.
822 See Tom Ojienda, “Illegal or Irregular Titles: Colloquial Overtones” in , (2005) 1 LSKJ, pp. 13-29
823 The duty of Commissions of Inquiry to adhere to the principles of natural justice is embodied at section 3(3) of the Commissions of Inquiry Act (Cap 102). See also Olool v Telecommunications Corporation (1982-88) 1 KAR 655 & John v Rees (1969) 1 KAR 655
has been viewed as a witch hunting venture especially by powerful personalities in the former regime who were adversely mentioned in the Commission’s report.

9.2. LAND LAW, CONVEYANCING AND CONSTITUTIONAL REVIEW

The clamour for constitutional review began in the early 1990s and were capped by the 1997 Inter-Parties Parliamentary Group (IPPG) which identified a number of issues that required reform in Kenya. On 8\textsuperscript{th} December 1998, the Constitution of Kenya Review Commission Act came into law setting down the basis for constructional review and establishing organs to facilitate public involvement in the review of the Constitution. In July 2000, the Constitution of Kenya Amendment Bill was passed into law providing the appointment of fifteen commissioners to review the constitution. In November 2000, the leader of the review team, Professor Yash Pal Ghai, promoted the idea of a joint commission formed by the parliamentary-led commission and the ufungumano initiative. After lengthy negotiations the merger of the two constitutional review teams began in January 2001, and amendments were introduced to the Constitution of Kenya Review Commission Act 2000 to accommodate the merger.

The Constitution of Kenya Review Commission (CKRC) (hereinafter referred to as the ‘Commission’ or the ‘Ghai Commission’) traversed all the corners of the country collating and collecting information from the citizens. It, among others, received written memoranda, held public forums and workshops with a view of getting the constitutional views and wishes of Kenyans. Thereafter, the National Constitutional Conference was convened at the Bomas of Kenya in Nairobi to discuss the views thus far collated and collected. Ultimately, the National Constitutional Conference adopted the Draft Constitution (Bomas Draft) which was later amended by the Attorney-General to constitute what came to be known as the Wako Draft or the Draft Constitution of Kenya. It is this draft that was subjected to the National Referendum in 2004 but it failed to see the light of day for majority of Kenyans voted against its adoption. The call for a new constitution thus continues to date.

It cannot be gainsaid that the question of land has been a major issue in the constitutional review. The general feeling among the Kenyan populace has been that the current Constitution inherited from the colonial regime, vests massive powers on the President on land issues. In addition it has been said that the current Constitution does not recognize the uniqueness of land and instead lumps it with other categories of property. Accordingly, there have been calls to adequately define issues of land in the Constitution. As earlier stated
above, the Njonjo Commission recommended the inclusion of fundamental land issues in the constitution.\textsuperscript{825} The Commission was rightly of the view that any meaningful land reform to be undertaken in the country have to be accompanied by the relevant constitutional changes in order to have a firm foundation.\textsuperscript{826} The importance of including land as a constitutional component has been well articulated by Professor Issa Shivji. He stated:

‘Land is an important resource and central to the life of a nation. Land policy and the system of ownership of land (land tenure) should be a matter of long-term development defining the very character of the country. Major principles governing land should be the result of broad national and social consensus and should therefore be embodied in the constitution. These are not matters which should be left to be defined by the government of the day and embodied in an ordinary Act of Parliament.’\textsuperscript{827}

In essence, the constitution should spell out general and broad principles for the governance of land, and establish an efficient and equitable institutional framework for land ownership, administration and management. In recognition of this, the Draft Constitution (the Wako Draft) sought to lay down some fundamental principles on land law. Chapter seven of the Draft dealt solely with land and property. It stated that land in Kenya is the primary resources and the basis of a livelihood for the people and it shall thus be held, used and managed in a manner which is equitable, efficient, productive and sustainable.\textsuperscript{828} It bestowed upon the Government the duty to define and constantly keep under review a national land policy ensuring the following principles:

(a) Equitable access to land and associated resources;
(b) Security of land rights for all land holders, users and occupiers in good faith;
(c) Sustainable and productive management of land resources;
(d) Transparent and cost effective administration of land;
(e) Sound conservation and protection of ecologically sensitive areas;
(f) The discouragement of customs and practices that discriminate against access of women to land; and

\textsuperscript{825} Chapter 6, Njonjo Report.
\textsuperscript{826} Paragraph 238, Njonjo Report.
\textsuperscript{827} Issa Shivji, Not Yet Democracy: Reforming Land Tenure in Tanzania, HAKIARDHI, Dar es Salaam, 1998, p. 46
\textsuperscript{828} Article 77 Draft Constitution of Kenya (Wako Draft).
(g) Encouragement of communities to settle land disputes through recognised local community initiatives consistent with the constitution.\textsuperscript{829}

On classification of land, the Wako Draft stated that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.\textsuperscript{830} It designated land as public,\textsuperscript{831} community\textsuperscript{832} or private.

Article 58 of the Draft Constitution contained provisions for the protection to property. The Draft also empowered the state to, \textit{inter alia}; regulate the use of any land, interest or right in land in the interest of defence, public safety, public order, public morality, public health, land use planning or the development or utilization of property.\textsuperscript{833} If adopted, it would have created the National Land Commission as the primary body charged with the administration and management of land and the resolution of disputes arising from land matters.\textsuperscript{834} Other provisions that the Draft contained in respect of land include those relating to incidents of tenure like property rights of spouse\textsuperscript{835} and landholding by non-citizens.\textsuperscript{836}

\section*{9.3. THE LAND LAW (AMENDMENT) BILL 2005}

The Land Law (Amendment Bill) 2005\textsuperscript{837} (hereinafter ‘the bill”) is a follow up to the Ndungu Report with the aim of providing a legal framework for the implementation of the Report. It therefore proposes the enactment of an amendment to the GLA, to establish and operate the Land Titles Tribunal, and making consequential amendments to a few other enactments namely the RTA, the Land Consolidation Act, the Land Adjudication Act, the Land Disputes Tribunals Act, and the RLA. A brief discussion of the amendments follows hereunder.

\begin{footnotesize}

\begin{enumerate}
\item See Article 86 Wako Draft.
\item Article 78 Wako Draft
\item Public land classified under Article 79(1) (a) to (e) shall vest in and be held by district governments in trust for the people resident in the relevant district and shall be administered on their behalf by the National Land Commission/ public land classified under Article 79 (1) (f) to (m) shall vest in and be held by Government in trust for the people of Kenya and shall be administered on their behalf by the National Land commission. Public land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and terms of he disposal or use.
\item Community land shall vest in and be held by communities identified on the basis of ethnicity, residence or community of interest. Any unregistered community land shall be held in trust by district governments on behalf of the communities. Community land shall not be disposed of or otherwise used except in accordance with an Act of Parliament. Parliament shall enact legislation to give effect to this Article. See Article 80 Wako Draft.
\item Article 80, Wako Draft.
\item Article 5, wako Draft.
\item Article 82, Wako Draft.
\item Article 83, Wako Draft.
\item Kenya Gazette Supplement No. 82 (Bills No. 26), 24\textsuperscript{th} November 2005, p. 1189
\end{enumerate}
\end{footnotesize}
a. The Land Titles Tribunal

The Ndungu Report expressly recommended the creation of a Land Titles Tribunal to deal with the revocation and rectification of illegally/irregularly acquired titles. Having observed that under current legal framework, it is only the High Court that can rectify invalid titles, the Ndungu Commission viewed the creation of another body to solely deal with rectification and revocation of titles as the best option. The rationale behind this recommendation was explained thus, ‘what is needed is a simple, readily accessible forum that can dispense with some of the more arcane rules of evidence and reach a decision within a matter of days or less. Provided that the forum is working full time on the one subject of rectification of titles, the huge number of titles to be checked could be dealt with in a reasonably short time.’

The Commission thus proposed that the GLA be amended to create a Tribunal with several separate divisions each of which will constitute a sitting Tribunal with power to declare any registered title to land either valid, illegal or irregular. Further, that such a Tribunal will also have power to rectify any titles on conditions it may impose to ensure the State in its role as trustee for the people of Kenya receives the full benefit of any disposition of any of its land.

It is this express recommendation that prompted the publication of the Land Law (Amendment) Bill 2005. The Tribunal would be created by insertion of new sections 147A-147F to the GLA with section 147B being the legal foundation of the Tribunal. It is envisaged that The Tribunal would be a quasi-judicial body. It would have the same jurisdiction and powers as conferred upon the high court in civil matters. The Tribunal shall consist of a chairperson, a vice chairperson and nine other members all appointed by the Minister, all with specified qualifications and credentials. The Tribunal will have separate Divisions each of which will constitute a sitting with power to declare any registered title to land as valid, illegal or irregular.

The proposed section 147D will provide the procedure by which any party aggrieved by the decision of the Tribunal may appeal to the High court for redress. Under subsection (3) of the proposed section 147(c), the Tribunal shall not be subjected to the evidence Act and Civil Procedure Act and Rules in its proceedings.

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838 Ndungu Report, p. 68
839 Ndungu Report, p. 69
840 Ibid.
841 Clause 2, Land Law (Amendments) Bill 2005
The Bill also proposes to amend section 18 of the GLA to empower the Minister to give consent to the division or subletting of town plots in deserving cases where the building conditions have not been met. The exemption will only be for a limited period and subject to the conditions thereto as shall be determined by the Minister.

Further, it is proposed to amend section 148 of the GLA to empower the Minister to make rules and regulations for the better carrying out of the provisions of the Act and to provide for the procedures and rules of the Tribunal. Such rules may prescribe the manner and procedure by which the Land Titles Tribunal shall conduct its business, the fees payable therein and how the costs of the proceedings shall be provided for.

b. Land Consolidation Act

The Bill proposes to amend the section 9 of the Land Consolidation Act to reduce the number of members of an Adjudication Committee from a minimum of twenty five to new minimum of nine and maximum of fifteen members. The memorandum of objects and reasons submits that past experience has shown that the large membership of the Committees leads to delays in delivery of judgment and the Government now seeks to ameliorate this situation.

The Bill also proposes to amend section 25 of the Land Consolidation Act to require the Committee to indicate all land in which objections or appeals have been raised. The policy herein is to provide a leeway for finalization of Adjudication Registers for parcels which are not subject to objections or appeal cases. In furtherance of this policy, the Bill proposes that a new section 27A be inserted in the Land Consolidation Act to provide the legal framework for the preparation of No objection Registers as aforesaid. It is similarly proposed to amend section 27 of the Land Adjudication Act to provide for the preparation of No Objection Registers by Adjudication Officers.

No doubt the Bill raised immediate concerns particularly because it seeks to enforce the contentious recommendations of the Ndungu Report. It is not clear whether the enactment of the Bill will further be pursued in the light of the Draft National Land Policy which if adopted by Parliament will create mechanisms for dealing with the problems raised by Ndungu Report.

842 Clause 4, Land Law (Amendments) Bill 2005
c. The Land Adjudication Tribunal

The Bill proposes to amend section 29 of the Land Adjudication Act and transfer the appeal process from the Minister to a Land Adjudication Tribunal to be appointed by the Minister. The policy justification herein is that the pending appeals and objections are too numerous to be expeditiously determined by the Minister. The Land Adjudication Tribunal will be better placed to dispose of these pending cases.

Finally, the Bill proposes to amend section 3 of the Land Disputes Tribunals Act to oust the jurisdiction of the Land Disputes Tribunals regarding the determination of boundary disputes to land. This section is in conflict with section 21(2) of the RLA which empowers the Land Registrar to determine and indicate the position of a disputed boundary. The amendment will remove the conflict and avoid practical duplicative powers between the Land Registrar and the Land Disputes Tribunals.

9.4. GAZETTE NOTICES NO. 300 AND 301 OF 19TH JANUARY 2007

On 19th January 2007, the Chief Justice, in exercise of his powers under section 65 of the Constitution, published Gazette Notices 300 and 301. Under Gazette Notice No. 300, Practice Note 4 was promulgated directing that all judicial review proceedings and constitutional applications and references be filed at the Central Registry of the High Court in Nairobi except where leave of the Chief Justice for filing in any District Registry is obtained. On its part, Gazette Notice No. 301 sought, amongst others, to create a Land and Environmental Law Division at the High court in Nairobi.

No doubt, these Notices have a direct impact on the practice of land law and conveyancing in Kenya. As it was noted in Chapter Eight, most decisions of the Rent Restriction Tribunals, the Business Premises Tribunal, and the Land Disputes Tribunal are constantly subject to judicial review. This means that the Practice Note on judicial review will necessarily impact on land law and conveyancing. Notably, the creation of the Land and Environmental Law Division was lauded as been timely and prudent. The relevance of such a division has been emphasized by the Draft National Land Policy which also proposes the creation of a Land Division of the High Country.

However, the provisions on judicial review raised immediate concerns prompting the filing of suit by the Law Society of Kenya (LSK) to stay the enforcement of the Notices. The stay was granted and therefore the Notices are non-operative as at now. Lawyers across the country
and as represented by the LSK raised several concerns on the Notices in so far as it restricts the filing of judicial reviews and constitutional references in the Central Registry.

First, it was argued that the Notices contravene the express provisions of section 65(3) of the Constitution. The said section allows the Chief Justice to make rules with respect to practice and procedure of the High Court in relation to powers of the High Court to supervise civil and criminal proceedings before subordinate courts and other tribunals. It was therefore argued that the Practice Note No. 4 is *ultra vires* section 65(3) of the Constitution for the said section only confers the Chief Justice the power to make rules only with respect to the supervisory role of the High court. It does not relate to the supervision of the High Court in matters touching on its jurisdiction.

Secondly, a concern was raised that Practice Note. 4 contravenes section 60 of the Constitution which gives the High Court unlimited original jurisdiction in all civil and criminal matters. By requiring that judicial reviews and constitutional references be filed only in Nairobi, the Notice had the effect of ousting the jurisdiction of the High Court sitting outside Nairobi. In view of the fact that there is only one High Court in Kenya, the Notice was seen to be discriminatory in its nature and effect.

It was also argued that the Practice Note No. 4 had the effect of centralising the adjudication of the matters in question in Nairobi thus hindering the access to these registries and ultimately justice to a majority of Kenyans who live far outside Nairobi. In addition, the move was said to only add to the congestion and backlog in the already overwhelmed Central Registry at Nairobi. By virtue of the fact that the determination of the suits filed by the LSK is still pending at the High Court it is not desirable to discuss the merits or otherwise of these issues.

**9.5. DRAFT NATIONAL LAND POLICY 2007**

It is conventional that many of the problems that are inherent in the administration and management of land in Kenya today is partly to be blamed on the lack of a national land policy. For this reason, there have long been calls for the formulation and implementation of a national land policy. Following the recommendation of the Njonjo Commission, the Government embarked on the formulation of a national land policy in 2004. The formulation was based on a wide consultative process with the aim of producing a policy whose vision

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would be to guide the country towards efficient sustainable and equitable use of land for prosperity and posterity.

The formulation process had a three-tier management structure. At the top was the Minister for Lands and Housing whose role was to oversee the process and responsible for the final drafting of the policy for submission to Parliament. At the second level, was the Steering Committee which was chaired by the Permanent Secretary in the Ministry of Lands and Housing. The steering Committee was mandated to set the overall goals and guidelines for the process and to ensure that the process was linked to national and other Sectoral process. At the third level were Thematic Groups which were responsible for one of the six broad policy land issues. These were:

- Rural land use, environment and informal sector;
- Urban land use, environment and informal sector;
- Land tenure and social cultural equity
- The legal framework;
- Land information management system; and
- Institutional and financing framework for implementation.

Under the direction of their chairpersons, the above thematic groups undertook the following tasks:

- Identified issues related to their specific theme about which policy recommendation needed to be made;
- Produced topical/research issues papers for each issue identified;
- Facilitated and participated in thematic group meetings, joint group workshops and regional workshops and institutional visits;
- Integrated the issue papers into one issues and recommendations report taking into account inputs from stakeholder workshops and institutional visits.

In addition, there was a Coordinating Unit, headed by National Coordinator. The Unit provided the link between the Steering Committee and the Thematic Groups. It also provided technical and administrative services to other operational levels.

The formulation process sought contributions from stakeholders from public, private and civil society. In order to collect views from the said stakeholders, regional workshops were organized in all the eight provinces in the country. Some of the interest groups that were consulted included: Community Based Organizations (CBOs), Faith Based Organizations
(FBOs), Non Governmental Organizations (NGOs), local authorities, provincial administration and heads of Government departments.

The product of the formulation process is the Draft National Land Policy 2007 published in March 2007 and currently awaiting Parliamentary adoption. The draft policy has been widely published in print and electronic media to ensure wide dissemination. In summary, the Draft National Land Policy represents a structured approach to land administration and management in Kenya. The policy codification provides a systematic platform for addressing current issues such as access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal settlements, outdated legal framework, institutional framework and information management. Significantly also, the Draft National Land Policy also addresses constitutional issues such as eminent domain, police power as well as tenure. The new Land Policy recognizes the need for security of tenure for all Kenyans including such marginalized groups as women, pastoral communities and informal settlement residents. Its main highlights are as follows:

- The Policy designates all land in Kenya as Public, Community or Private
- The Policy recognizes and protects customary rights to land. It adopts a plural approach, in which individual tenure and customary tenure co-exist as equal partners. The rational for this plural approach is that the equal recognition and protection of individual and customary tenure will facilitate the reconciliation and realization of the critical values which land represents.
- The Policy recognizes and protects private land rights and provides for derivative rights from all categories of lands rights holdings
- The Policy recommends reform of the institutional framework for land administration and management to ensure devolution of power and authority, participation and representation, justice, equity and sustainability
- Three institutions are suggested for managing land affairs in the country namely: The National Land Commission, The District Land Boards and Community Lands Boards
- A Land Court Division and District Land Tribunals will also be set up for dispute resolution.
- The policy also recommends Alternative Dispute Management mechanisms to strengthen access to justice in land-related matters

- Policy formulation, implementation, resource mobilization and monitoring and evaluation will be performed by the Ministry of Lands
- Land issues requiring special intervention such as historical injustices, land rights of minority communities and vulnerable groups will be addressed through the participation of such groups in decision making over land and land-based resources.

In essence, the Draft National Land Policy presupposes the overhaul of the entire legal framework on land law and conveyancing. It proposes enactment of the Land Act and the Land Registration Act\(^\text{845}\) which shall be the primary legal framework on land law and conveyancing. These two Acts shall have the effect of repealing a number of current statutes including the following: the Government Land Act; Trust Land Act; the Land Adjudication Act; the Land Consolidation Act; the registration provisions of the RTA, the LTA and the RLA; the Land (Group Representatives) Act; and the Land Disputes Tribunal Act (No. 8 of 1990). It suggests the amendment of the Survey Act and the review of the Rent Restrictions Tribunal Act and the Landlord and Tenant (Shops, hotel and Catering Establishments) Act. In addition the Draft policy recommends the enactment of specific legislation governing division of matrimonial property to replace the Married Women’s Property Act of 1882 of England.\(^\text{846}\)

**9.6. E-CONVEYANCING AND CROSS BORDER LEGAL PRACTICE**

The world today stands, not only at the height of globalization and regional integration but also at the apex of technological and scientific advancement. These phenomena are quickly permeating through all spheres of human life. The legal sector is thus experiencing these changes and must therefore change too to reflect societal needs and advancement.

The era of electronic and digital information technology has brought with it the need to consider the computerization of the conveyancing practice. According to Professor R.W. Staudt, ‘lawyers for the twenty-first century must learn to use electronic information tools to find the law, interact with governmental agencies, prepare their own work and communicate with courts, other lawyers and their clients.’\(^\text{847}\) Particularly, in the field of conveyancing Robbert Abbey and Mark Richards rightly point out that ‘the pressure for innovation and change is already here upon us…if conveyancers are to survive, they will need to adapt and

\(^{845}\) Paragraph 145 (j) Draft National Land Policy
\(^{846}\) Paragraph 222(b) Draft National Land Policy
change to the needs and demands of society. Information technology must help in this respect.\textsuperscript{848}

It is in this light that Kenya as a legal system and lawyers as individuals must embrace electronic conveyancing (e-conveyancing). The adoption of the Draft National Land Policy is a good starting point in this direction. The Draft Policy stipulates that the Government shall computerize land records and facilitate access to land information. \textsuperscript{849} It also states that the Government shall modernize the infrastructural apparatus for land delivery, through computerization and use of other electronically linked systems. \textsuperscript{850}

The Draft Policy envisages the creation a Land Information Management System i.e. a computer-based information system that enables the capture, management, and analysis of geographically referenced land-related data in order to produce land information for decision-making in land administration and management. \textsuperscript{851} Ultimately, it would be prudent for Kenya to consider the enactment of a legislation aimed at enabling e-conveyancing in the country.

On another front, the advent of the East African Community (EAC) has come with bounty opportunities for lawyers and conveyancers in the region. With the harmonization of laws across the country, the entry of Rwanda and Burundi into the Community and the fast-tracking of the Community into a Political Federation, lawyers must be ready to carry conveyancing at a cross-border level. This requires in-depth knowledge of international commercial transactions and the laws and practice of the individual countries of the Community. In the final analysis, no doubt, e-conveyancing and cross-border legal practice poses challenges for conveyancers that must be embraced to secure a bright future for conveyancing practice in Kenya.

\textsuperscript{848} Robbert Abbey & Mark Richards, A Practical Approach to Conveyancing, (3rd ed), Blackstone Press Ltd., London, 2000, p. 23
\textsuperscript{849} Draft National Land Policy, para. 145(f)
\textsuperscript{850} Draft National Land Policy, para. 152(a)
\textsuperscript{851} Draft National Land Policy, para. 155
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</tr>
<tr>
<td>Private land</td>
</tr>
<tr>
<td>Public utility land</td>
</tr>
<tr>
<td>Rectification</td>
</tr>
<tr>
<td>Registered conveyancing</td>
</tr>
<tr>
<td>Registration</td>
</tr>
<tr>
<td>Registration of document/deed</td>
</tr>
<tr>
<td>Registration of title</td>
</tr>
<tr>
<td>Restrictive covenant</td>
</tr>
<tr>
<td>Rule of construction</td>
</tr>
</tbody>
</table>

345
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Security of tenure/title</td>
<td>the guarantee that title to land is certain and non-contestable and that the title holder is free to pass on to a purchaser without constant challenges</td>
</tr>
<tr>
<td>Setting apart</td>
<td>the acquisition of trust land by Government</td>
</tr>
<tr>
<td>Simple mortgage</td>
<td>a legal mortgage where there is no delivery of possession but the mortgagor binds himself to personally pay the mortgage money and agrees that the mortgaged property will be sold upon his default and the proceeds thereof be applied towards discharge of the mortgage debt</td>
</tr>
<tr>
<td>Stamp duty</td>
<td>a tax levied on conveyances/documents under the Stamp Duty Act (Cap 480 Laws of Kenya)</td>
</tr>
<tr>
<td>Statutory power of sale</td>
<td>the power granted by statute to a mortgagee to sell the mortgaged property upon default by the mortgagee and failing to exercise</td>
</tr>
<tr>
<td>Surrender</td>
<td>yielding up of the term of the lease to the person who has the immediate estate in reversion in order that, by mutual agreement the term may merge in the reversion. The surrender may be either express, that is by an act of the parties having expressed intention of effecting a surrender, or by operation of the law, that is an inference from the acts of the parties</td>
</tr>
<tr>
<td>Title</td>
<td>a set of facts upon which a claim to a legal right or interest is founded. Title can exist even when there is no pre-existing legal interest or right vested in person who claims he has title</td>
</tr>
<tr>
<td>Transmission</td>
<td>the passing of land, lease, or charge from one person to another by operation of law i.e. upon death, insolvency or bankruptcy of the proprietor</td>
</tr>
<tr>
<td>Trust land</td>
<td>land held by county councils in trust for the local community under the jurisdiction of the county council</td>
</tr>
</tbody>
</table>
and as defined by section 114 of the Constitution of Kenya

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unalienated Government land</td>
<td>Government land which is not for the time being leased to any other person or in respect of which the Commissioner of Lands has not issued any letter of allotment</td>
</tr>
<tr>
<td>Unregistered conveyancing</td>
<td>arises where land in question is not registered</td>
</tr>
<tr>
<td>Usufructuary mortgage</td>
<td>legal mortgage whereby possession is delivered to the mortgagee who is given authority by the mortgagor to retain the property in question until the mortgage debt is fully paid</td>
</tr>
<tr>
<td>Tabula in naufragio</td>
<td>a category of tacking, Where there are three mortgages affecting a single property, the third lender is allowed to get priority over the second lender by repaying off the first mortgage and tacking his mortgage into the first mortgage</td>
</tr>
<tr>
<td>Tacking</td>
<td>the right that allows a subsequent lender to insist on the repayment of his loan before repayment to a prior lender</td>
</tr>
<tr>
<td>Tacking of further advances</td>
<td>a category of tacking, Where a lender makes a further loan to a borrower, he is allowed to tack together both loans and to recover them prior to any intervening lender, provided he has not received any notice of the intervening mortgage at the time of the further advance</td>
</tr>
<tr>
<td>Vendor</td>
<td>the person selling or intending to sell/transfer a parcel of land or interest therein</td>
</tr>
</tbody>
</table>

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APPENDICES
FORMS AND PRECEDENTS
Appendix I: Table of Conveyancing Statutes
Section 75(i)

Cap 164

Cap.
Commencement:
11/5/1956
Cap.
commencement:
12/12/1963

Cap. 280
Commencement:
18/5/1915

The constitution of This Section guarantees land rights, which
Kenya
provides that no individual will be deprived of
his/her rights over land without a justifiable
cause. Land acquisition is justified for the
following purposes; defence, public safety, public
order, public morality, public health, town and
country planning and for the development and
utilization of any property in such manner as to
promote public benefit.
Trustees (Perpetual An Act of Parliament to provide for the
Succession) Act
incorporation of certain trustees for the purposes
of perpetual succession to property and for
purposes connected therewith
266 The Valuation for An Act of parliament to empower local
Rating Act
government authorities to value land for the
purpose of rates; and purposes incidental to or
connected therewith.
267 The Rating Act
An act of Parliament to provide
for the imposition of rates on land and buildings
in Kenya; to amend the law relating to valuation
and rating in Kenya; and for purposes connected
therewith and incidental thereto
The
Government An Act of Parliament to make further and better
Lands Act
provision for regulating the leasing and other
disposal of Government lands, and for other
purposes. Land allocated or leased under the Act
is subject to provisions of the following statutes:











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Public Health Act (Cap 242) – S –
115-128: provisions relate to injury to
health
Local Government Act (Cap 265):
empowers Local Authorities to make
by-laws for the purposes of carrying
out any of their functions and
protection of amenity
Agriculture Act (Cap 318): gives
Minister for Agriculture wide powers
in connection with preservation, land
development and management orders.
Physical Planning Act No. 6 1966:
provides a legal basis for plan
preparation and gives them legal force
to bind land owners and developers to
comply for a sustained planned
environment
Land Control Act (Cap 302): provides
for control of transactions in
agricultural land
Trust Land Act (Cap 288): provides


| Cap. 281 excepting Part III commencement 21/1/1920 | The registration of Titles Act | An Act of Parliament to provide for the transfer of land by registration of titles |
| Cap 282 | The Land Titles Act | The Land Titles Act Ordinance was enacted in 1908 to enable Colonial authorities determine the land “owned privately” and thereby identify uncommitted land (which was then declared Crown land) for alienation to the European settlers at the Coast |
| Cap 283 | The Land Consolidation Act | It is an Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of land in the special areas; for the registration of title to and of transaction and devolution’s affecting such land and other lands in the special areas; and for purposes connected therewith and incidental thereto |
| Cap. 284 | The land Adjudication Act | An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto |
| Cap 285 | The Registration of Documents Act | Intended to be a register for documents. Sec. 4 of the Act provides that all documents conferring or purporting to confer, declare, limit or extinguish any right title or interest, whether vested or contingent to, in or over immovable property (i.e. land) other than such documents as may be testamentary in nature....shall be registered within one month after their execution. If not registered, it cannot be tendered in court as evidence without consent of the court. Sec. 5 under the Act provides for registration of any document at the option of the owner while the registrar retains right to refuse. |
| Cap. 286 | The Physical Planning Act | An Act of Parliament to provide the preparation and implementation of physical development plans and for connected purposes |
| Cap 287 | The Land (Group Representatives) Act | At independence the Government’s policy was to achieve optimum land utilization and equitable land distribution. Group farming became a solution in the drier pastoral areas where traditional land tenure led to the misuse of grazing land |
| Cap. 288 | The Trust Land Act | An Act of Parliament to make provision for Trust land |
| Cap 295 | The Land Acquisitions Act | Is the most commonly used Act in land acquisition and derives its powers from Sec. 75(i) of the Constitution. The Act provides for the requirements and procedures by which registered interests in land can be distinguished to provide land for public purpose. It was last amended in 1990 to establish Land Acquisition Compensation Tribunal to hear and determine appeals before access to High Court. |
| Cap. 299 | The Survey Act | An Act of Parliament to make provision to surveys and geographical names and the licensing of land surveyors, and for connected purposes |
| Cap. 300 | The Registered land Act | An Act of parliament to make further and better provision for the registration of title to land, and for the regulation of dealings in land so registered, and for purposes connected therewith |
| Cap. 302 | The land Control Act | An Act of Parliament for controlling transactions in Agricultural land |
| Cap. 318 | The Agriculture Act | An Act of Parliament to promote and maintain a stable agriculture, to provide for the conservation of the soil and its fertility and to stimulate the development of agricultural land in accordance with the accepted practices of good land management and good husbandry. |
| Cap. 480 | The Stamp Duty Act | An Act of Parliament to make provision for the levying and management of stamp duties; and for purposes connected therewith and incidental thereto |
| | The Sectional Properties Act, 1987 | An Act of Parliament to provide for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common and to provide for use and management of the units and common property and for connected purposes |
### Appendix II: Table of Prescribed Forms

<table>
<thead>
<tr>
<th>Form under R.L.A</th>
<th>Form under R.T.A</th>
<th>Heading</th>
</tr>
</thead>
<tbody>
<tr>
<td>B, C OR D</td>
<td>Title Deed</td>
<td></td>
</tr>
<tr>
<td>F&amp;O (I) &amp; O (III)</td>
<td>Transfer of Land</td>
<td></td>
</tr>
<tr>
<td>G&amp;O (ii) &amp; O (iv)</td>
<td>Transfer of Lease</td>
<td></td>
</tr>
<tr>
<td>G&amp;O (ii) &amp; O (iv)</td>
<td>Transfer</td>
<td></td>
</tr>
<tr>
<td>R.L. 4</td>
<td>Transfer by Charge in Exercise of Power of Sale</td>
<td></td>
</tr>
<tr>
<td>R.L. 5</td>
<td>Transfer of Profit</td>
<td></td>
</tr>
<tr>
<td>R.L. 6</td>
<td>Transfer of Undivided Share</td>
<td></td>
</tr>
<tr>
<td>R.L. 7</td>
<td>Transfer by Personal Representative to A Person Entitled Under a Will or on An Intestacy</td>
<td></td>
</tr>
<tr>
<td>R.L. 8</td>
<td>Lease</td>
<td></td>
</tr>
<tr>
<td>R.L. 9</td>
<td>Charge</td>
<td></td>
</tr>
<tr>
<td>R.L. 10</td>
<td>Memorandum of Discharge of Charge by Deposit of Document Title</td>
<td></td>
</tr>
<tr>
<td>R.L. 11</td>
<td>Surrender of Lease</td>
<td></td>
</tr>
<tr>
<td>R.L. 12</td>
<td>Grant of Easement</td>
<td></td>
</tr>
<tr>
<td>R.L. 13</td>
<td>Grant of Profit</td>
<td></td>
</tr>
<tr>
<td>R.L. 14</td>
<td>Release of Easement Profit Restrictive Agreement</td>
<td></td>
</tr>
<tr>
<td>R.L. 15</td>
<td>Severance of Joint Ownership</td>
<td></td>
</tr>
<tr>
<td>R.L. 16</td>
<td>Application for Partition</td>
<td></td>
</tr>
<tr>
<td>R.L. 17</td>
<td>Power of Attorney</td>
<td></td>
</tr>
<tr>
<td>R.L. 18</td>
<td>Revocation of Power of Attorney</td>
<td></td>
</tr>
<tr>
<td>R.L. 19</td>
<td>Application to be Registered as Proprietor on Transmission</td>
<td></td>
</tr>
<tr>
<td>R.L. 20</td>
<td>Repealed by Succession Act</td>
<td></td>
</tr>
<tr>
<td>R.L. 21</td>
<td>Repealed by Succession Act</td>
<td></td>
</tr>
<tr>
<td>R.L. 22</td>
<td>Caution/Caveat</td>
<td></td>
</tr>
<tr>
<td>R.L. 23</td>
<td>Appeal to Chief Land Registrar under Section 150 (1)</td>
<td></td>
</tr>
<tr>
<td>R.L. 24</td>
<td>Notice of Intention to Appeal to the High Court</td>
<td></td>
</tr>
<tr>
<td>R.L. 25</td>
<td>Application to Inspect Register/Application for Personal Search</td>
<td></td>
</tr>
<tr>
<td>R.L. 26</td>
<td>Application for Official Search/Posted Search</td>
<td></td>
</tr>
<tr>
<td>R.L. 27</td>
<td>Certificate of Official Search</td>
<td></td>
</tr>
<tr>
<td>R.L. 28</td>
<td>Application for Registration Mutation Form</td>
<td></td>
</tr>
<tr>
<td>R.L. 29</td>
<td>Mutation Form</td>
<td></td>
</tr>
<tr>
<td>R</td>
<td>Summons to Produce Grant, Certificate</td>
<td></td>
</tr>
<tr>
<td>W</td>
<td>Application to Register a Restriction</td>
<td></td>
</tr>
<tr>
<td>X</td>
<td>Application to Withdrawal/Modify a Restriction</td>
<td></td>
</tr>
<tr>
<td>P(1)</td>
<td>Notice of Withdrawal of a Caveat</td>
<td></td>
</tr>
<tr>
<td>P(2)</td>
<td>Application for Removal of a Caveat</td>
<td></td>
</tr>
<tr>
<td>Y</td>
<td>Application for Certified/Uncertified copy of Document</td>
<td></td>
</tr>
<tr>
<td>Z</td>
<td>Application for Provisional Certificate of Title</td>
<td></td>
</tr>
</tbody>
</table>
### Appendix III: Table of Conveyancing Fees Payable as at 1st September, 2003

Fees payable under RTA CAP. 281, GLA. 280, LTA. CAP. 282 & RDA CAP. 285

<table>
<thead>
<tr>
<th>Fee Particulars/Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) For every document presented for registration</td>
<td>250/- per title</td>
</tr>
<tr>
<td>b) For every notice (excluding notice given on registration of a Caveat)</td>
<td>250/- per title</td>
</tr>
<tr>
<td>c) For acceptance of an affidavit</td>
<td>250/- per title</td>
</tr>
<tr>
<td>d) For correcting errors or supplying omissions in the register under Section 120 of the Act</td>
<td>250/- per title</td>
</tr>
<tr>
<td>e) For every personal search</td>
<td>125/- per title</td>
</tr>
<tr>
<td>f) For every postal search</td>
<td>250/- per title</td>
</tr>
<tr>
<td>g) On appeal to the Principal Registrar from an order refusing to register a document under sections</td>
<td>400/-per title</td>
</tr>
<tr>
<td>h) For attendance by an officer of the registry at a place outside the registration office...</td>
<td>1,250/- per day or part thereof</td>
</tr>
<tr>
<td>i) On resubmission for registration of any document previously rejected because of error thereon or for failure to comply with any prerequisite of registration</td>
<td>250/-</td>
</tr>
<tr>
<td>j) For every copy of a registered document or abstract folio where the number of pages or folios does not exceed five</td>
<td>100/- per copy of such pages or folios.</td>
</tr>
<tr>
<td>(ii) Where the number of pages or folios exceed five</td>
<td>100/- per copy plus 5/- each extra page/folio</td>
</tr>
<tr>
<td>a) On making application to bring land under the operation of the Registration of Titles Act for every 10,000/- or part thereof of the unimproved value of land</td>
<td>250 per title</td>
</tr>
<tr>
<td>b) For every instrument presented for registration.</td>
<td>250 per title</td>
</tr>
<tr>
<td>c) For every notice (excluding notice given on registration)</td>
<td>250 per title of a caveat</td>
</tr>
<tr>
<td>d) Taking any declaration or affidavit</td>
<td>250 per title</td>
</tr>
<tr>
<td>e) For making entry in or correction of the register under Section 81(3) of the Act</td>
<td>250 per title</td>
</tr>
<tr>
<td>f) For making entry in or correction of the register under section 82(2) of the Registration of Titles Act</td>
<td>250 per title</td>
</tr>
<tr>
<td>g) For entering withdrawal or modification of a restriction Under section 82(4) of the Registration of Titles Act</td>
<td>250 per title</td>
</tr>
<tr>
<td>h) For preparation of a certificate of title under Registration Of Titles Act</td>
<td>450 per title</td>
</tr>
<tr>
<td>i) On appeal to the Registrar-General from an order refusing to register a document under Section 33 of the Act</td>
<td>400 per title</td>
</tr>
<tr>
<td>j) For attendance by an officer of the registry at a place outside the registration office</td>
<td>250 per day or part of a day</td>
</tr>
<tr>
<td>k) For every application for a provisional certificate under Section 71 of the Registration of Titles Act</td>
<td>450 per title</td>
</tr>
<tr>
<td>l) For attestation by the registrar under section 58 of the Registration of Titles Act</td>
<td>50 per attestation</td>
</tr>
<tr>
<td>m) For every personal search</td>
<td>125 per title</td>
</tr>
<tr>
<td>n) For every postal search</td>
<td>250 per title</td>
</tr>
<tr>
<td>o) On resubmission of any instrument previously Rejected because of error therein or failure to comply with any prerequisite of registration</td>
<td>250 per instrument Rejected</td>
</tr>
</tbody>
</table>
(p) For every copy of a registered instrument or abstract folio
   (i) where the number of pages or folios does not exceed five 100 per copy of such
   pages of folios
   (ii) where the number of pages or folios exceed five 100 per copy of first 5
   pages/folios plus Shs.5 any extra

(Note: In (i) and (ii) above, a folio or a page or a register (title) shall be
   deemed to be two folios or pages).

(q) For any act or thing not otherwise provided for 200 per such act or thing

k) For any act or thing not otherwise provided for in R.T.A 200/- and 400/- for the
   others.

With the exception of the fees specified in subparagraph (h) above, all the other fees shall be
paid by means of adhesive revenue stamps affixed to the prescribed form in the place provided

APPROVAL FEES

<table>
<thead>
<tr>
<th>Fee Description/Particulars</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) For approval of subdivision of land within an urban area</td>
<td>125/- per resulting portion</td>
</tr>
<tr>
<td>(b) For approval of building plans</td>
<td></td>
</tr>
<tr>
<td>(i) where the built-up area does not exceed 200 square meters</td>
<td>750/-</td>
</tr>
<tr>
<td>(ii) where the built-up area exceeds 200 metres</td>
<td>250 for every 100 square meters or part thereof</td>
</tr>
<tr>
<td>(iii) for alterations or additions to an existing structure</td>
<td>750/-</td>
</tr>
<tr>
<td>(iv) for late submission of building plans and construction without approved plans</td>
<td>5000/- for land in municipality 1,000/- in urban centres</td>
</tr>
<tr>
<td>(v) for building plans exceeding the stipulated site coverage</td>
<td>10,000/- for municipalities 5,000/- for urban centres</td>
</tr>
<tr>
<td>(d) For approval of changes of user, extension of user and extension of term of lease</td>
<td>5,000/- for a municipality 1,000/- for urban centres</td>
</tr>
<tr>
<td>(e) For approval of allocation of plot</td>
<td>2000/-</td>
</tr>
</tbody>
</table>

LAND CONTROL BOARDS

Application Fees

<table>
<thead>
<tr>
<th>Application</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>For every application for consent to a controlled transaction</td>
<td>250/-</td>
</tr>
<tr>
<td>For every appeal to the Provincial Land Control Appeals Board</td>
<td>500/- per transaction</td>
</tr>
<tr>
<td>For every appeal to the Central Land Control Appeals Board</td>
<td>1000/- per transaction</td>
</tr>
<tr>
<td>For every application for exemption under Section 24 of the Act</td>
<td>10,000/- per Application</td>
</tr>
<tr>
<td>For each unofficial member of a Land Control Board</td>
<td>500/- inclusive of lunch for every attendance</td>
</tr>
<tr>
<td>For each unofficial member of Provincial Land Control Appeals Board</td>
<td>1300/- inclusive of lunch for every attendance</td>
</tr>
</tbody>
</table>

LAND DISPUTES TRIBUNALS

Application fees

<table>
<thead>
<tr>
<th>Application</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transaction</td>
<td>Rate</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>(a) For every lease, conveyance, agreement, concession or license excluding a temporary occupation license</td>
<td>1,250/-</td>
</tr>
<tr>
<td>(b) For every temporary occupation license</td>
<td>1,250/-</td>
</tr>
<tr>
<td>(c) For every other document</td>
<td>750/-</td>
</tr>
<tr>
<td>(i) if by separate deed</td>
<td>500/-</td>
</tr>
<tr>
<td>(ii) if by endorsement</td>
<td></td>
</tr>
</tbody>
</table>

FEES PAYABLE UNDER THE REGISTERED LAND ACT CAP .300

<table>
<thead>
<tr>
<th>Fee Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. On application for a title deed or a certificate of lease where the applicant requests the inclusion of all subsisting entries</td>
<td>125/-</td>
</tr>
<tr>
<td>b. On application for the preparation of a surrender of lease, discharge of charge, release of easement, release of profit or lease of restrictive agreement, application to serve a joint proprietorship, application for partition, notice of revocation of power of attorney or a caution except where item 4 applies</td>
<td>250/-</td>
</tr>
<tr>
<td>c. On application for the preparation of any instrument not herein above described except where item 4 applies</td>
<td>250/-</td>
</tr>
<tr>
<td>d. On application for the preparation of any instrument which in the opinion of the registrar requires substantial additions to or variations from the prescribed form. Such fee not exceeding 1,250/- as the Chief Land Registrar may assess</td>
<td></td>
</tr>
<tr>
<td>e. On application for registration on filing or any instrument for each title affected (i) where the amount or value of the consideration or the value of the interests affected by the registration, does not exceed Sh.2000 or where the annual rent or other annual payment reserved does not exceed Sh.200</td>
<td>125/-</td>
</tr>
</tbody>
</table>
(ii) Where the amount or value of the consideration, or the value of the interests affected by the registration exceeds Sh.2,000 but does not exceed Sh.20,000 or where annual rent or other annual payment reserved exceeds Sh.200 but does not exceed Sh.2,000

(iii) In any other case - Provided that, where the instrument has been previously rejected as unfit for registration and relates to more than one title, the fees shall be calculated as if only one title were affected

**OTHER FEES**

<table>
<thead>
<tr>
<th>Name</th>
<th>Particulars</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subdivision Fees</td>
<td>For opening new registers consequent upon a partition or subdivision for each parcel resulting - (a) where the value of the interest before partition or subdivision did not exceed Sh.20,000 (b) in any other case</td>
<td>75/-</td>
</tr>
<tr>
<td></td>
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<td>150/-</td>
</tr>
<tr>
<td>Combination fees</td>
<td>On application for the combination of two or more parcels (a) Where the value of the interest after combination does not exceed Sh.20,000 (b) in any other case</td>
<td>125/-</td>
</tr>
<tr>
<td></td>
<td></td>
<td>125/-</td>
</tr>
<tr>
<td>Inspection fees</td>
<td>On application to inspect under section 36 (1) for each title inspected</td>
<td>125/-</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Search fees</td>
<td>On application for an officer for an official search under section 36 (2) for supplying particulars of the subsisting entries in the register searched</td>
<td>100/-</td>
</tr>
<tr>
<td>Miscellaneous Fees</td>
<td>(a) On application for a copy of the existing register</td>
<td>100/-</td>
</tr>
<tr>
<td></td>
<td>(b) On application for a copy of an earlier edition of the register</td>
<td></td>
</tr>
<tr>
<td></td>
<td>On application for a copy of the instrument</td>
<td>100/-</td>
</tr>
<tr>
<td></td>
<td>On application for a copy of a registry map or filed plan</td>
<td>100/-</td>
</tr>
<tr>
<td></td>
<td>For fixing a boundary on the application of any person under section 22(1)</td>
<td>1,250 per day</td>
</tr>
<tr>
<td></td>
<td>For determining or indicating the position of a disputed or an uncertain boundary under the Act</td>
<td>1,250 per day</td>
</tr>
<tr>
<td></td>
<td>For attendance of any officer of the registry at a place outside the registration office</td>
<td>1,250 per day</td>
</tr>
<tr>
<td></td>
<td>(1) for any formal proceeding or hearing conducted by a registrar under the Act...</td>
<td>750</td>
</tr>
<tr>
<td></td>
<td>(2) for an appeal under section 150 of the Act-(a) on appeal to the Chief Land Registrar</td>
<td>250</td>
</tr>
<tr>
<td></td>
<td>(b) on stating a case for the opinion of the High Court (excluding costs and court fees)</td>
<td>500</td>
</tr>
<tr>
<td></td>
<td>For any act, matter or thing not otherwise specifically herein before provided</td>
<td>400</td>
</tr>
</tbody>
</table>
Appendix IV: Agreement for Sale

DATED 1999

AGREEMENT FOR SALE

of

Title Number:

Drawn by:

THIS AGREEMENT FOR SALE is made the day of 1999 between
BETWEEN ___________________________ of Post Office Box Number ______, Nairobi (hereinafter called "the Vendor" which expression shall where the context so admits include her personal representatives and assigns) of the one part and both of Post Office Box Number ______, Nairobi (both hereinafter called "the Purchasers" which expression shall where the context so admits include their respective personal representatives and assigns) of the other part and WITNESSES as follows:

1. The Vendor has agreed to sell to the Purchasers and the Purchasers have agreed to buy from the Vendor the property described in Clause 2 below for the purchase price mentioned in Clause 4 below. The parties=
P.O. Box ______, Nairobi.

2. The property being sold is Title Number: _____________________________ measuring approximately ___________________ (_____) hectares which is an agricultural property.

3. The interest sold is freehold.

4. The agreed purchase price is Kenya Shillings (Kshs.__________________________/=) of which the sum of Kenya Shillings (Kshs.__________________________/=) shall be paid by the Purchasers to the parties lawyers on execution of this Agreement.

5. The balance of the purchase price shall be paid by the Purchasers to the parties lawyers on completion.

6. The property is sold with vacant possession on completion.

7. The property is sold subject to the terms and conditions on which the Vendor held the same but otherwise free from all encumbrances.

8. Completion shall take place at the offices of the parties= lawyers on or before ("the completion date") or such earlier date as the parties may agree when:
(a) The Vendor shall hand over to the parties lawyers all the original documents
(b) The Purchasers shall pay to the parties lawyers the balance of the purchase price.
(c) The parties lawyers shall, on receipt of the amount referred to above, shall arrange for the registration of the Transfer of the said property into the Purchasers’ names.

(d) On registration of the said property in the Purchasers’ names and on possession of the said property having been given by the Vendor to the Purchasers, the parties lawyers shall pay the purchase price to the Vendor.

9. The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions in this Agreement.

10. Both parties will pay in equal shares the advocates’ costs on this transaction but the Purchasers shall pay for the stamp duty and registration fees on the Transfer.

11. Possession of the said property shall be given by the Vendor to the Purchasers after the Purchasers pay the full purchase price to the parties lawyers.

12. The Vendor will obtain the Land Control Board consent to transfer well before the completion date.

13. Time shall be of essence to this Agreement.

IN WITNESS whereof this Agreement was duly executed by the parties hereto the day and year first above appearing.

SIGNED by the said Vendor )
in the presence of: )

SIGNED by the said Purchaser )
in the presence of: )
Appendix V: Conveyance

DATED 1999

CONVEYANCE

of

Land Reference Number: ________________, Nairobi.

THIS CONVEYANCE is made the day of 1999

BETWEEN ________________________________ of P.O. Box ______, Nairobi (hereinafter called "the Vendor" which expression shall where the context so admits include his personal representatives and assigns) of the one part and of P.O. Box ________, Nairobi (hereinafter called "the Purchaser" which expression shall where the context so admits include its successors and assigns) of the other part.

WHEREAS

A. The Vendor is the registered owner of the property hereinafter described for an estate in fee simple SUBJECT to the provisions of the Government Lands Act and to the Rules for the time being in force thereunder and subject also to the covenants and the conditions hereinafter referred to but otherwise free from encumbrances (hereinafter called the property).

B. The Vendor has agreed to sell to the Purchaser the said property for an estate in fee simple subject as aforesaid but otherwise free from encumbrances at the price of Kenya Shillings _________________________ (Kshs. ____________/=).

NOW THIS CONVEYANCE WITNESSES as follows:

1. In consideration of the said agreement the Vendor as beneficial owner HEREBY GRANTS AND CONVEYS to the Purchaser ALL THAT piece or parcel of land comprising (__________) of an acre or thereabouts situate in the City of Nairobi in the Nairobi Area of the said Republic known as Land Reference Number ____________ being the property comprised in a Conveyance registered in the Government Lands Registry in Volume N Folio____ File ____ and made between ______________________ (therein described) of the one part and the Vendor of other part (and hereinafter referred to as the said Conveyance) the
boundaries dimensions and abuttals whereof are delineated and described on the Plan annexed to a Conveyance dated ______________________ and registered as aforesaid in Volume N____ Folio ______ and more particularly on Land Survey Plan Number deposited in the Land Survey Records Office at Nairobi TOGETHER WITH the buildings and improvements erected and being thereon TO HOLD the same unto the Purchaser for an estate in fee simple SUBJECT to the provisions of the Governments Lands Act and to the Rules for the time being in force thereunder AND SUBJECT ALSO to the covenants and conditions contained or referred to in or implied by the said Conveyance so far as the same affect the property hereby conveyed.

2. The Purchaser hereby covenants with the Vendor that it will perform and observe the said covenants and the conditions in the said Conveyance contained or implied or referred to and which henceforth on the part of the Purchaser ought to be performed and observed so far as the same affect the property hereby conveyed and are still subsisting and capable of being enforced AND will keep indemnified the Vendor and his estate from and against all actions claims and demands on account of the same.

IN WITNESS whereof the Vendor and the Purchaser have duly executed this Conveyance the day and year first hereinbefore written.

SIGNED SEALED AND DELIVERED )
by Vendor in the presence of: )
 )
 )

SEALED with the Common Seal of the )
Purchaser in the presence of: )
 )
Director: )
 )
Director/Secretary: )

Drawn By:
Appendix VI: Transfer

DATED ____________________________ 1999

TRANSFER

of

Land Reference Number:

Drawn by:

TITLE NO: I.R.

I, _________________________________ of Post Office Box Number ________, Nairobi in the Republic of Kenya being the registered proprietor as lessee for the term of ninety nine (99) years from the 1st day of January 1932 (subject however to such Acts charges leases encumbrances special conditions and other matters as are notified by the Memorandum endorsed hereon) and to the annual revisable rent of Kenya Shillings (Kshs. ____________/=) of ALL THAT piece of land situate in the City of Nairobi in the Nairobi Area of the said Republic and comprising by measurement _______________ (____) of a hectare or thereabouts known as Land Reference Number _______ (Original Number ) which said piece of land being the premises comprised in a Certificate of Title registered in the Land Titles Registry at Nairobi aforesaid as Number I.R. _____________ is with the dimensions abuttals and boundaries thereof delineated and described on the plan annexed to a Transfer registered as Number I.R. ____________ and more particularly on Land Survey Plan Number ____________________________ deposited in the Survey Records Office at Nairobi aforesaid and thereon bordered red IN CONSIDERATION of the payment to me of Kenya Shillings _________________________________ (Kshs. /=) by _________________________________ of Post Office Box Number ____________, Nairobi aforesaid (the receipt whereof is hereby acknowledged) HEREBY TRANSFER to the said _________________________________ as joint tenants ALL MY right title and interest in and to the said piece of land.

IN WITNESS whereof this Transfer was duly executed this ___________ day of ____________, 199__.
MEMORANDUM

2. The Registration of Titles Act (Chapter 281 of the Laws of Kenya).
3. The special conditions contained in the said Grant registered as Number I.R.
Appendix VII: Charge

REPUBLIC OF KENYA
REGISTRATION OF TITLES ACT
(CHAPTER 281)
TITLE NUMBER I.R. xxxxxxx

CHARGE

This CHARGE is made the day of Two Thousand and One BETWEEN XXXXXXX of Post Office Box Number xxxxxxx, Nairobi in the Republic of Kenya (hereinafter referred to as “the Chargor” which expression shall where the context so admits include his personal representatives and assigns) of the one part AND XXXXXXXX, N.A., a Limited Liability Company incorporated in the United States of America and registered as a bank pursuant to the provisions of the Banking Act (Chapter 488 of the Laws of Kenya) in the said Republic and having its registered office in Nairobi aforesaid and of Post Office Box Number xxxxxxx, Nairobi aforesaid (hereinafter referred to as “the Lender” which expression shall where the context so admits include its successors and assigns) of the other part.

WHEREAS:

1. The Chargor is registered as the proprietor as Lessee from Taj Mall Limited subject to such charges as are noted on the Memorandum endorsed hereon of ALL THAT the Flat more particularly described in the Schedule hereto (hereinafter called the “Mortgaged Property”).

2. The Lender has at the request of the Chargor agreed to make available to the Chargor credit and other banking facilities in an aggregate sum not exceeding Kenya Shillings Four Million Two Hundred and Seventy Five Thousand (4,275,000.00) exclusive of interest and other charges and upon having repayment thereof with interest and other charges as hereinafter provided and upon having the same secured in the manner as hereinafter appearing.

NOW IN CONSIDERATION of the Lender agreeing to make or continuing to make advances to the Chargor or refraining from demanding immediate payment of sums already advanced to the Chargor by way of loan by permitting the Chargor to overdraw his current account or accounts with the Lender or by giving the Chargor other financial accommodation of such nature and in such manner and within such limits as the Lender may from time to
time in its discretion determine and the premises **THIS CHARGE WITNESSETH** as follows:-

1. The Chargor hereby covenants and agrees with the Lender as follows:-

   (a) One month from the date of this instrument (hereinafter called “the Legal Date of Redemption”) to pay to the Lender or to one of the cashiers for the time being of the Lender such sum not exceeding Kenya Shillings Four Million Two Hundred and Seventy Five Thousand (4,275,000.00) as may then or at any time thereafter be due and owing by the Chargor to the Lender on any current or other account or in any manner whatsoever and discharge all liabilities incurred by the Chargor to the Lender in any manner whatsoever whether in respect of money advanced or paid or for the use of the Chargor or charges incurred on the account of the Chargor or for any monies whatsoever which may then be due or become due or owing by the Chargor to the Lender either as principal or surety and either solely or jointly with any other company society corporation person or persons in partnership or otherwise or upon loans or bills of exchange or promissory notes drafts orders for payment or delivery of money bills of lading or other negotiable or mercantile instruments drawn accepted or endorsed by or on behalf of the Chargor and discounted or paid or held by the Lender either at the request of the Chargor or in the course of business or otherwise or in respect of documentary credits opened or bills of exchange accepted by the Lender on the instructions of the Chargor or their authorised agents or in respect of monies which the Chargor have or shall become liable to pay to the Lender either under guarantee given by the Chargor to the Lender or for money guaranteed by the Lender for and on behalf and at the request of the Chargor or in any other manner whatsoever and whether any such monies or liabilities shall be paid to or incurred on behalf of the Chargor or any other company society corporation person or persons in partnership or otherwise at the request of the Chargor or for any other account whatsoever or otherwise howsoever or for an actual or contingent liability together with commission and other usual bank charges and all other costs charges and expenses (legal costs as between Advocate and Client) as shall or may be paid incurred or suffered by the Lender in anywise in connection with the assertion or defence of the Lender’s rights under this Charge as also for the protection and defence of the property and assets hereby charged as expressed so to be and for the demand realisation and recovery of all monies hereby secured and together with interest (as well after as before any judgment) at the rate specified in the Debenture or such other rate or rates as the Lender shall in its
sole discretion from time to time decide with full power to the Lender to charge
different rates for different accounts such interest to be calculated on daily
balances and debited monthly in accordance with the normal practices of the
Lender **PROVIDED ALWAYS:**

(i) That the Lender shall not be required to advise the Chargor or
either of them prior to any change in the rate of interest so payable nor shall any
failure by the Lender to advise the Chargor as aforesaid prejudice in any way
howsoever the recovery by the Lender of interest charged subsequent to any such
change;

(ii) That the rate of interest payable as aforesaid may from time to time be
increased by the Lender at the Lender’s sole discretion;

(iii) That notwithstanding sub-clause (ii) above in the case of any such
monies or liabilities being also secured to the Lender under an
Agreement or instrument reserving a higher rate of interest than as
aforesaid nothing herein contained shall prejudice the right of the Lender
to recover such higher rate of interest or (as the case may be) the
difference between such higher rate and the rate or rates payable
hereunder.

(b) On the seventh day next after the same shall respectively have been advanced or
otherwise become due to pay to the Lender the total of any other sums which
may be advanced by the Lender to the Chargor on account of such overdraft
facilities or for which the Chargor shall otherwise become liable to the Lender as
aforesaid together with commission and other usual bank charges legal and other
costs charges and expenses as aforesaid and together with interest thereon as
aforesaid:

(c) At any time after the legal date of redemption or as the case may be after such
seventh day as aforesaid **ON DEMAND** in writing made to the Chargor to pay
to the Lender or to one of the cashiers for the time being of the Lender the total
of all monies which shall or may be for the time being owing as aforesaid by the
Chargor to the Lender together with interest at the rate for the time being payable
hereunder such interest to be calculated and debited as aforesaid both before and
after demand the interest owing at the end of each calendar month being added to
the amount owing so as to form one aggregate sum carrying interest at the rate
aforesaid **PROVIDED ALWAYS** that the total monies for which this charge
constitutes a security (hereinafter called “the Mortgage Debt”) shall not at any
one time exceed the sum of Kenya Shillings Four Million Two Hundred and
Seventy Five Thousand (4,275,000.00) together with interest at the rate aforesaid from the time of the Mortgage Debt becoming payable until actual payment thereof AND PROVIDED ALSO that the security hereby constituted shall be a continuing security for the payment of the said sum of Kenya Shillings Four Million Two Hundred and Seventy Five Thousand (4,275,000.00) or so much thereof as may from time to time be outstanding notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may be made with the Lender prior to the execution hereof relating to any security which the Lender may now or at any time hereafter hold in respect of the Mortgage Debt or any part thereof.

2. The Chargor hereby further covenants and agrees with the Lender that during the continuance of this security the Chargor will:
   (a) Duly pay all (if any) rents and all rates taxes duties charges impositions and other outgoings whatsoever payable in respect of or charged assessed or imposed on the Mortgaged Property (herein defined) or on the Chargor or other owner or occupier thereof or the Lender or a receiver in respect thereof including (without limitation) any charge or imposition in respect of any work in or in connection with the construction repair maintenance or improvement of any private road or street and any other charge or imposition of a capital or non-recurring nature AND WILL on demand produce to the Lender the receipt for any such payment AND WILL on or before the execution of these presents deposit with the Lender a sum of money equivalent to the yearly amounts for the time being payable to the Government in respect of land rent and to the Nairobi City Council in respect of the rates provided that if the said land rent and/or rates shall be increased the Chargor shall immediately further deposit with the Lender the amount(s) of such increase(s) AND WILL perform and observe the covenants conditions and stipulations under and subject to which the Mortgaged Property is held AND WILL indemnify and keep indemnified the Lender from and against all claims and demands in respect of or arising out of any non-payment or breach thereof AND THAT all expenses costs and damages incurred paid or sustained by the Lender by reason of any such non-payment or breach shall be deemed to be expenses properly incurred by the Lender in relation to this security,
   (b) Forthwith upon the receipt by the Chargor of any notice schedule list claim or demand or other requirement whatsoever from or by any person firm company local or other authority or any other body whatsoever affecting or likely to affect
or which may affect the Mortgaged Property or any part thereof or the interest of
the Chargor and the Lender or either of them inform the Lender of the receipt
thereof and give to the Lender such further and other information and take at the
expense of the Chargor such action in respect thereof as the Lender shall or may
require,
(c) Keep the buildings and improvements forming part of the Mortgaged Property
including all fixtures and additions thereto in good and substantial repair and
condition to the satisfaction of the Lender,
(d) Permit the Lender or the agents of the Lender with or without workmen or others
at all reasonable times to enter upon the Mortgaged Property and examine the
state and condition thereof AND WILL forthwith repair and make good to the
satisfaction of the Lender all defects and wants of reparation in and to the
Mortgaged Property of which notice in writing shall be given to the Chargor by
or on behalf of the Lender,
(e) Permit the Lender at any time after the creation of this security at the Lenders
discretion to instruct a surveyor or valuer to inspect and report on the Mortgaged
Property and all monies paid by the Lender for that purpose shall be deemed to
be expenses properly incurred by the Lender in relation to this security
PROVIDED HOWEVER that the Lender may at any
time from the date hereof so instruct upon the Lender’s statutory power of sale or of appointment of a
receiver having arisen,
(f) Not pull down waste destroy or interfere or in any manner or by any means
lessen the value of the Mortgaged Property or any part thereof and will not effect
any alterations in and to the Mortgaged Property without the prior written
consent of the Lender,
(g) Not erect place or make nor cause or suffer to be erected placed or made any
buildings or other works on the Mortgaged Property or any part thereof nor make
or cause or suffer to be made any material change in the use of the Mortgaged
Property or any part thereof without the prior written consent of the Lender,
(h) Not surrender or agree to surrender the Mortgaged Property or any part thereof to
any reversioner nor merge nor agree to merge the Mortgaged Property or any
part thereof in any reversion,
(i) Not lease agree to lease accept surrenders of lease charge or part with the
possession of the Mortgaged Property or any part thereof without the prior
written consent of the Lender AND WILL upon the execution of any lease
procure from the lessee a counterpart of such lease duly executed by the lessee
AND WILL forthwith have the same duly registered AND WILL deliver the same to the Lender within One month from the registration thereof,

(j) Not to sell or agree to sell subject to these presents or otherwise the Mortgaged Property or any part thereof without the prior written consent of the Lender,

(k) (i) Insure and keep insured all buildings being or forming part of the Mortgaged Property and such other property and effects of an insurable nature (whether affixed to the freehold or leasehold or not) being or forming part of the Mortgaged Property as the Lender shall at any time and from time to time require to be insured against loss or damage by fire aircraft storm and tempest and such other risks as the Lender may determine in the full insurable value thereof (which expression shall include but not be restricted to the full replacement value thereof) as determined by the Lender from time to time;

(ii) Effect every such insurance in the joint names of the Chargor (as owner) and the Lender (as Mortgagee) or (if required by the Lender in the sole name of the Lender and place the same with some good and solvent insurance company to be approved of in writing by the Lender;

(iii) Immediately after any such insurance shall have been effected or upon the execution of these presents if the same shall have been previously effected produce to and deposit with the Lender the original policy relating thereto;

(iv) Duly and punctually pay all premiums and other monies necessary for effecting and keeping on foot any such insurance and forthwith deliver to the Lender the receipt for or other proper evidence of every such payment;

(v) Hold any monies received under any such insurance as trustees for the Lender and apply the same in or towards making good the loss or damage in respect of which they shall have been received PROVIDED ALWAYS that without prejudice to any obligations to the contrary imposed by law or by special contract the Lender may require that all monies be applied in or towards the discharge of the Mortgage Debt interest thereon and all other monies which under these presents may then be payable by the Chargor to the Lender in respect of this security;

(vi) Not effect without the prior written consent of the Lender any insurance of the said buildings property and effects or any of them otherwise than in accordance with the foregoing covenant and agreement and if any
insurance shall be effected in breach of this covenant and agreement then will hold any monies received thereunder as trustee for the Lender to be applied as if the same arose under a policy effected under the foregoing covenant and agreement;

(l) Not apply for nor obtain any advance or loan which under or by virtue of any law for the time being in force in Kenya or otherwise howsoever would or might rank in priority to or pari passu with or subsequent to the Mortgage Debt and the interest thereon as herein before provided,

(m) Furnish to the Lender or procure that the Lender is furnished annually or oftener (as may be required by the Lender) a balance sheet profit and loss account and trading accounts showing the then position of the Chargor’s affairs at a date not more than One Month previous certified by the auditors for the time being of the Chargor approved by the Lender and also from time to time to give to the Lender or to such person or persons as the Lender shall from time to time appoint such information as they shall require as to all matters relating to the business or any existing or after acquired property or assets of the Chargor or otherwise relating to the affairs thereof,

(n) If required by the Lender, and subject to agreement of all parties, appoint and employ the Lender as the sole or the main banker of the Chargor and all sums received by the Chargor in the course of the Chargor’s business or in respect of subscriptions or calls upon its shares or otherwise howsoever shall be paid by the Chargor to the Lender for the credit of the Chargor in an account or accounts opened or to be opened in the name of the Chargor and the Chargor shall make all payments by cheques drafts promissory notes or bills of exchange drawn on the Lender and all costs and expenses incurred by the Lender in acting as such banker of the Chargor as aforesaid shall be debited to the Chargor and constitute a first Charge upon the Mortgaged Property,

(o) If the Mortgaged Property be an agricultural property farm the Mortgaged Property in a good and husband like manner AND in particular (but without prejudice to the generality of the foregoing) WILL keep in a good state of cultivation and condition clean and free from weeds all portions thereof which are now or may hereafter be put under cultivation and all crops from time to time thereon AND WILL permit the Lender or the agent of the Lender at all reasonable times to enter upon the Mortgaged Property and examine the state of cultivation and condition thereof AND if any land which is now or shall at any time during this security have been under cultivation or the said crops or any part
thereof shall not be found in a proper state of cultivation and condition and notice in writing of any such defect or matters shall be given to the Chargor \textbf{WILL} if and so far as the case will admit make good the same in a proper manner and to the satisfaction of the Lender within the space of three (3) calendar months next after every such notice shall have been so given,

\textbf{PROVIDED THAT} the Lender may withhold its consent in relation to any of the foregoing matters in respect of which such consent is prerequisite as herein before provided without assigning any or any sufficient reason therefore \textbf{AND} the Lender may give such consent upon and subject to such terms and conditions as the Lender shall in its discretion think fit.

3. If the Chargor shall fail to perform any of the foregoing covenants and agreements in Clause 2 hereof it shall be lawful but not obligatory for the Lender to do all or any of the following acts and things that is to say:

(a) To effect payment of rent (if any) and any rates taxes or other charges and impositions as therein mentioned unpaid by the Chargor;

(b) To insure or to keep insured the said buildings thereof in any sum not exceeding the full insurable value thereof (which expression shall include but not be restricted to the full replacement value) as determined by the Lender from time to time.

(c) To enter upon the Mortgaged Property from time to time and repair or keep in repair the said buildings or any part thereof or any fixtures and additions thereto without thereby becoming liable as Mortgagee in possession.

\textbf{AND} the expenses of the Lender in so doing shall be deemed to be expenses properly incurred by the Lender in relation to this security \textbf{PROVIDED THAT} nothing done by the Lender hereunto shall be deemed to be or take effect as a waiver of or shall prejudice any right of action which the Lender may have against the Chargor in respect of any antecedent breach of the said foregoing covenants and agreements or any of them or otherwise or of any other right of the Lender under these presents or otherwise.

4. (a) All costs charges and expenses incurred by the Lender in obtaining or attempting to obtain payment of any monies hereby secured or properly incurred by the Lender in relation to or under this security including (without limitation) such payments as the Lender may consider expedient from time to time to make and
is hereby authorised to make to any person whether the Chargor personally or
anyone acting at the request of the Chargor or a receiver or a subsequent
Mortgagee or to any person acting on the instructions of the Lender in
connection with maintaining repairing amending altering or improving the
Mortgaged Property and all such further and other monies as shall by virtue of
the provisions of sub-clause (b) of this present Clause be deemed to be included
in the expression “expenses” shall:
(i) Bear interest at the rate for the time being payable hereunder upon the
Mortgage Debt from the time of the same having been expended or
incurred until the same shall be repaid;
(ii) Be repaid with interest as aforesaid by the Chargor to the Lender on
demand; and
(iii) Until such repayment be charged upon the Mortgaged Property.

(b) AND IT IS HEREBY AGREED AND DECLARED that the expression
“expenses” shall be deemed to include all costs charges claims damages
expenses and other monies properly paid or incurred by the Lender under this
Charge and (without prejudice to the generality of the foregoing) properly paid
or incurred by the Lender:
(i) In any action proceeding or claim brought by or against the Lender for
the enforcement protection preservation or improvement of the security
hereby created; or
(ii) In any action proceeding claim or demand against or for the recovery of
the Mortgaged Property or any part thereof or any compromise purchase
or getting in thereof (which the Lender shall have full power to effect
without the concurrence of the Chargor); or
(iii) In connection with the negotiation preparation and completion of any
further charge deed of variation or other instrument or document
supplemental to or collateral with this Charge or otherwise relating the
Mortgaged Property (whether or not completed) and any correspondence
and attendances relating thereto; or
(iv) In connection with any proposed lease surrender assurances or other
transaction concerning the Mortgaged Property for which the Chargor
may seek the consent of the Lender (whether such consent be given or
withheld) including legal costs incurred in perusing and (if necessary)
copying any document (whether engrossed or in draft form) required for
carrying out such proposed transaction and any correspondence and attendances relating thereto; or

(v) In effecting any registration which the Lender may deem necessary or expedient for the proper protection of its security; or

(vi) To the Advocates architects surveyors or other professional or technical advisors of the Lender in respect of their costs fees and disbursements for attendances made advice given correspondence written or other work done by such persons or any of them in connection with any of the matters referred to in the preceding paragraphs of this sub-clause or the happening of any one or more of the events specified in the sub-clause (a) of Clause 7 hereof.

AND that legal costs and disbursements paid or incurred by the Lender under this Charge and falling within the definition of “expenses” herein before contained shall as against the Chargor be deemed to include every sum which would be allowed to the advocates to the Lender in a taxation as between advocate and own client to the intent that the Chargor shall afford to the Lender a complete entitlement and unqualified indemnity in respect thereof.

5. (a) For the better securing to the Lender the repayment of the Mortgage Debt interest and all other monies and expenses hereby intended to be secured the Chargor in accordance with the Debenture HEREBY CHARGES all that piece of land more particularly described in the Schedule hereto TOGETHER with the buildings and improvements which now are or may hereafter be erected or be thereon (herein called “the Mortgaged Property”) in favour of the Lender with the Mortgage Debt interest and all other monies and expenses as aforesaid:

(b) PROVIDED ALWAYS that except as otherwise provided by Clause 7(c)(ii) hereof if the Chargor shall on the legal date of redemption or on such other date as the same become payable in accordance with Clause 1 hereof pay to the Lender or to any one of the cashiers for the time being of the Lender all monies herein before covenanted and agreed so to be paid then the Lender shall at any time thereafter at the request and cost of the Chargor discharge and release the Mortgaged Property unto the Chargor or as the Chargor shall otherwise reasonably so direct.
6. **PROVIDED ALWAYS AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED** by and between the parties hereto that the Chargor shall effect all payments in respect or on account of the Mortgage Debt and interest thereon as hereinbefore provided free of bank exchange commission and other similar expenses by credit to such banking account or accounts at such branch or branches of the Lender as the Lender shall or may from time to time require.

7. **PROVIDED ALWAYS AND THIS CHARGE FURTHER WITNESSETH** as follows:

   (a) That the Mortgage Debt and interest hereby secured shall immediately become payable without demand and the statutory power of sale of the Lender shall forthwith become exercisable without any further or other notice:

   (i) Upon the happening of any event in which by the terms and conditions of the Letter Agreement the principal monies and interest hereby secured become immediately payable without demand; or

   (ii) If the Chargor shall commit a breach of any of the covenants and agreements on the part of the Chargor herein contained or implied; or

   (iii) If a management order is made under the provisions of the Agriculture Act (Chapter 318) in respect of their Mortgaged Property or any part thereof; or

   (iv) If any government or governmental authority shall condemn nationalize seize or otherwise acquire or appropriate all or any substantial part of the property and assets of the Chargor or shall take any action for the dissolution or de-establishment of the Chargor; or

   (v) If any civil war revolution insurrection action by local national or foreign or international forces blockade riot or any events being acts of God or otherwise beyond the control of the Chargor shall seriously impair the efficient and proper conduct of the business of the Chargor or render the same unreasonably hazardous; or

   (vi) If a distress or execution either by virtue of any court order decree or process or by appointment of a receiver is levied upon any part of the Mortgaged Property or against any of the chattels or other property of the Chargor situate on about or belonging to the Mortgaged Property and the debt for which such levy is made or receiver appointed is not paid off within seven days; or
(vii) If an order is made or an effective resolution is passed for the winding-up of the Chargor; or

(viii) If the title of the Mortgaged Property shall for any reason be terminated; or

(ix) If the Chargor shall stop carrying on business or the Chargor shall cease to carry on the same; or

(x) If the Chargor shall become bankrupt or make any assignment for the benefit of their creditors or enter into any agreement or make any arrangement with their creditors for liquidation of their debts by composition or otherwise;

(b) That without prejudice to and notwithstanding the provisions herein contained the provisions of Sections 69 to 69G both inclusive of the Transfer of Property Act 1882 of India as applied to Kenya and as amended by the Indian Transfer of Property Act (Amendment) Act 1959 and as varied by these presents shall have full application to these presents and the security intended to be thereby created.

(c) (i) That Sections 61 and 67A of the Transfer of Property Act 1882 of India (as applied and as amended as aforesaid) shall not apply to these presents or the security intended to be hereby created.

(ii) That without prejudice to any equitable right of consolidation it is hereby declared that no property of the Chargor which at the date hereof or at any time hereafter is subject to a Mortgage or Charge in favour of or vested in the Lender shall be redeemed except on payment not only of monies thereby secured but also of all monies hereby secured and vice versa;

(iii) The statutory power to appoint a receiver may be exercised at any time after payment of the monies hereby secured has been demanded and the Chargor has made default in paying the same whether the power of sale has arisen or not;

(d) (i) If at the time of entry into possession or receipt of rents and profits of the Mortgaged Property by the Lender or by any receiver appointed by the Lender such property or any part thereof shall be let furnished under a tenancy which is or becomes binding on the Lender then and in any and every such case the Lender or such receiver shall be entitled to receive and apply the whole of the rent reserved by such tenancy as if it were rent of the Mortgaged Property and neither the Lender nor any such receiver shall be required or bound to make any apportionment of such rent in respect of any furniture or chattels of the Chargor comprised in the tenancy;
(ii) If upon entry by the Lender into possession of the Mortgaged Property or any part thereof such property shall contain any furniture or chattels of the Chargor which the Chargor shall refuse or fail to remove within Twenty-eight (28) days of the Chargor being required in writing by the Lender so to do then and in any and every such case the Lender shall thereupon become and be the agent of the Chargor with full authority at the Chargor’s expense to remove store preserve sell and otherwise dispose of such furniture and chattels as last aforesaid in such manner in all respects as the Lender shall think fit PROVIDED THAT the Lender shall not sell such furniture or chattels hereunder until after the expiration of One month from the date upon which the Chargor were required by the Lender to remove them from the Mortgaged Property as aforesaid;

(iii) The provisions of paragraphs (i) and (ii) of this sub-clause shall not be construed or operate to confer on the Lender any right in equity to any furniture or chattels of the Chargor or any charge or security thereon or otherwise so as to constitute this Charge an instrument under the Chattels Transfer Act (Chapter 28);

(e) That the Lender shall be at liberty without thereby affecting its rights hereunder at any time:–

(i) To determine or vary any credit to the Chargor;

(ii) To vary exchange or release any other securities held or to be held by the Lender for or on account of the Mortgage Debt and interest hereby secured or any part thereof;

(iii) To renew bills and promissory notes in any manner and to compound within given time for payment to accept compositions from and make any other arrangements with the Chargor or any person or persons liable on bills notes or other securities held or to be held by the Lender for or on behalf of the Chargor;

(f) That upon demand being made by the Lender for payment of the Mortgage Debt and other monies hereby secured or upon such Mortgage Debt and other monies for any other reason becoming immediately payable the Lender shall be under no obligation to make any further advances or grant any further facility to the Chargor;

(g) That the Lender may at any time and without notice to the Chargor combine or consolidate all or any of the accounts of the Chargor and liabilities to the Lender and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the
Chargor’s liability to the Lender on any other account or in any other respect whether such liability be actual or contingent primary or collateral joint or several and whether such account and liabilities be at or to one or more branches of the Lender,

(h) That the security hereby given to the Lender shall be without prejudice and in addition to any other security whether by way of pledge legal or equitable mortgage or charge or otherwise howsoever which the Lender may now or at time hereafter hold on the property and assets of the Chargor or any part thereof for or in respect of or any part of the indebtedness of the Chargor to the Lender howsoever arising or any interest thereon,

(i) That this security shall be valid and binding for all purposes notwithstanding any change by amalgamation consolidation or otherwise which may be made in the constitution of the Company by which the business of the Lender for the time being be carried on and shall be available to and enforceable by the Company carrying on that business for the time being,

(j) That after the security hereby constituted has become enforceable the Chargor shall from time to time and at all times execute and do all such acts and things as the Lender may reasonably require for facilitating the realisation of the property and assets hereby mortgaged and charged and for exercising all the power authorities and discretions hereby and/or by law conferred on the Lender,

(k) That the Chargor hereby irrevocably appoints the Lender to be the Attorney of the Chargor and in the name and on behalf of the Chargor to execute and do any assurances acts and things which the Chargor ought to execute and do under the covenants and agreements herein contained and generally to use the name of the Chargor in the exercise of all or any of the powers hereby or by law conferred on the Lender or any receiver or manager appointed by the Lender;

(l) That any notice required or authorised by law or by this Charge to be served by the Lender on the Chargor shall be sufficiently served if it be sent by post in a stamped envelope addressed to the Chargor at its last known postal address in Kenya or if it be delivered to the place of abode or business of the Chargor or the Mortgaged Property \textbf{AND THAT} proof of posting shall be proof of service.

8. In these presents where the context so admits:-
(i) The expression “the Chargor” includes all the successors and assigns of the Chargor;
(ii) The expression “the Lender” includes the successors and assigns of the Lender;
(iii) The expression “month” means calendar month;
(iv) The expression “covenant” means and includes “agree” and “agreement”;
(v) Words importing the singular number only include the plural number and vice versa.

IN WITNESS whereof the Chargor and the duly authorised Attorney of the Lender have hereunto set their hands the day and year first herein before written.

THE SCHEDULE HEREINBEFORE REFERRED TO

ALL THAT the Flat No. 6D situate in the estate in and erected on that piece or parcel of land situate in the City of Nairobi known as Land Reference Number 209/14036 and which said Flat is with the dimensions abuttals and boundaries thereof more particularly described on the building plan registered at the Registry of Documents in Nairobi in Volume D1 Folio 872/18 File Number DXXIX HELD by the Chargor as Lessee for the residue of a term of Ninety-nine (99) years from the First day of September One Thousand Nine Hundred and Ninety-seven (except the last seven days thereof) SUBJECT TO the payment of the annual rent of Kenya Shillings Fifty Seven Thousand and Four Hundred and the Act Special Conditions and other matters contained in the Memorandum hereunder written

SIGNED by xxxxxxxxxxxxxxxxxxxxx )
xxxxxx in the presence of:- )

Advocate )

SIGNED by ... ... ... ... ... ... ... ... the )
duly constituted Attorney of the LENDER )
by virtue of a Power of Attorney Number )
... ... ... ... ... ... ... ... in the presence of:- )

Advocate )
MEMORANDUM

1. The Registration of Titles Act (Chapter 281);
2. The Government Lands Act (Chapter 280);
3. The Special Conditions specified in the Grant registered as No. I.R.xxxxxxx/1.

CERTIFICATE

I HEREBY CERTIFY that I have explained to XXXXXXX (the Chargor) the effect of Sub-section (1) of Section 69 and of Section 100A of the Transfer of Property Act 1882 of India as incorporated therein by the Indian Transfer of Property Act (Amendment) Act 1959 and a copy whereof is set out hereunder and that I am satisfied that he understood the same.

Signed ____________________________

ADVOCATE OF THE HIGH COURT OF KENYA

Section 69(1) of the Transfer of Property Act 1882 of India as amended by the Indian Transfer of Property Act (Amendment) Act 1959 reads as follows:

“69(1). A Mortgagee or any person acting on his behalf where the Mortgage is an English Mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the court, have power when the Mortgage-money has become due subject to the provisions of this section, to sell, or to concur with any other person in selling, the Mortgaged Property or any part thereof either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the Mortgagee thinks fit, with power to vary any contract for sale, and to buy in an auction, or to rescind any contract for sale, and to re-sell, without being answerable for loss occasioned thereby, the power of sale aforesaid is in this Act referred to as the Mortgagee’s statutory power of sale and for the purposes of this Act the Mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the Mortgage instrument has passed or some event has occurred which according to the terms of the Mortgage instrument renders the Mortgage-money or part thereof immediately due and payable.”

AND

Section 100A (1) of the said Act as so amended as aforesaid reads as follows:-
“100A. (1) A chargee under a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act and duly registered under that Act shall have the same rights, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the person in receipt of rent and profits, or any of them) as if the charge were an English mortgage to which section 69 of this Act applies.”

I, XXXXXXX (the Chargor) have read and had explained to me the above Sections and confirm that I fully understand the same.

SIGNED _____________________________ XXXXXXX

Drawn by:-

Xxxxxxx & Company
Advocates
Xxxxxxx
Arboretum Drive
P O Box xxxxxxx
NAIROBI
Appendix VIII: Further Charge

DATED ______________________ 1999

- to

FURTHER CHARGE

- of -

Land Reference Number: ___________________ Nairobi

Drawn By:

TITLE NUMBER I.R

THIS FURTHER CHARGE is made the day of 1999

BETWEEN ________________________________ of Kenya of Post Office Box Number

, Nairobi (hereinafter called "the Borrower" which expression shall where the context so admits include his personal representatives and assigns) of the one part and a bank incorporated in the Republic of Kenya having its registered office at Nairobi in the said Republic and of Post Office Box Number ________, Nairobi (hereinafter called "the Lender" which expression shall where the context so admits include its successors and assigns) of the other part.

WHEREAS

A The Borrower is registered as proprietor as lessee for a term of _____ years from from the Government of the Republic of Kenya (subject to such charges leases and encumbrances as are notified by the Memorandum endorsed hereon to the Acts and to the annual revisable rent of Kenya Shillings __________________________ (Kshs. /=) of ALL THAT piece of land situate in the City of Nairobi in the Nairobi Area of the said Republic containing by measurement __________________________ ( ) of a hectare or thereabouts known as Land Reference Number: being the premises comprised in a Certificate of Title registered in the Land Registry at Nairobi aforesaid as number I.R. __________ is with the dimensions abuttals and boundaries thereof delineated and described on the plan annexed to a Transfer
registered as Number I.R.___________ and more particularly on Land Survey Plan Number___________ deposited in the Survey Records Office at Nairobi and thereon bordered red;

B By a Charge dated the ____________________________ (hereinafter called "the Charge") registered as aforesaid as Number I. R.___________ and made between the Borrower of the one part and the Lender of the other part the Borrower charged to the Lender and Jubilee Insurance Company Limited (therein described) the piece of land hereinbefore described and the developments which were then or might at any time thereafter be erected and made thereon with the payment to the Lender of all sums of money which were then or which thereafter might from time to time become due and owing to the Lender not exceeding the principal sum of Kenya Shillings________________________ (Kshs. ________/=) exclusive of interest and other charges as are therein mentioned;

C The Borrower has requested the Lender to grant to the Borrower further financial accommodation to the extent of an additional principal sum of Kenya Shillings (Kshs. ________/=) making with the advances secured by the Charge a total facility not exceeding the principal sum of Kenya Shillings (Kshs. ________/=) exclusive of interest and other charges (hereinafter called "The Amount Secured") which the Lender has agreed to do upon the terms and conditions hereinafter mentioned.

1. NOW THIS FURTHER CHARGE WITNESSES that in pursuance of the said agreement and in consideration of the premises the Borrower hereby covenants with the Lender that he will on the seventh day next pay to the Lender The Amount Secured or so much thereof as may then be due and owing by the Borrower to the Lender by reason of any advance or transaction referred to in the Charge together with commission and bank charges law and other costs charges and expenses and together with interest thereon at such rate as the Lender may from time to time stipulate to be computed and payable in all respects in accordance with the provisions of the Charge.

2. For the better securing to the Lender the repayment of The Amount Secured the Borrower HEREBY FURTHER CHARGES the piece of land hereinbefore described and the developments which are now or may at any time hereafter be erected and
made thereon with the payment to the Lender of The Amount Secured interest and other moneys hereby covenanted to be paid and also with all costs and expenses which may be incurred by the Lender in obtaining payment thereon or in maintaining defending or realising its security as well as the principal money interest and other monies secured by the Charge.

3. All the covenants provisions and powers contained in or subsisting in relation to the Charge (excluding the covenant for payment of principal and interest) shall be applicable for securing the payment of The Amount Secured or so much thereof as is from time to time due and owing and the interest thereon as fully as if such sum had formed part of the principal money and interest thereon secured by the Charge.

IN WITNESS whereof the Borrower has duly executed this Further Charge the day and year first before written.

SIGNED by the Borrower in my presence)
and I hereby certify that I have explained to)
the Borrower the effect of sub-section (1)
of Section 69 of the Indian Transfer)
of property Act 1882 and that I was)
satisfied that he understood the same.)

MEMORANDUM

b). The provisions of the Registration of Titles Act (Cap 281).
c). The Special Conditions contained in Grant Number I. R. ________.
d). The covenants conditions agreements restrictions and stipulations contained in the said Transfer registered as Number I.R._______.
e) The easements excepted and reserved by the said Transfer.
f) Charge registered as aforesaid as Number I.R._______.
Appendix IX: Discharge of charge

REPUBLIC OF KENYA
REGISTRATION OF TITLES ACT
(CHAPTE R 281)
TITLE NO. I. R. xxxxxxxx

DISCHARGE OF CHARGE

This **INSTRUMENT OF DISCHARGE** is made the … … … … day of … … … … … … Two Thousand and Two BETWEEN XXXXXXXXX BANK LIMITED a Limited Liability Company incorporated in the Republic of Kenya and whose postal address for the purpose of this instrument is Post Office Box Number xxxxxxxx, Nairobi in the said Republic (hereinafter referred to as “the Lender” which expression shall where the context so admits include its successors and assigns) of the one part AND JOHN DOUGLAS XXXXXXXX and PHOEBE WANJA XXXXXXXX both of Post Office Box Number xxxxxxxx Nairobi aforesaid (hereinafter referred to as “the Chargors” which expression shall where the context so admits include their respective personal representatives and assigns) of the other part.

**WHEREAS**:-

1. By a Charge (hereinafter called “the Charge”) whose registration and other particulars are set out in the schedule hereto and made between the Chargors of the one part and the Lender of the other part the Chargors charged unto the lender **ALL THAT** piece of land known as piece of land known as Land Reference Number xxxxxxxx/286 (Original Number xxxxxxxx/10/284) more particularly described in the Charge (hereinafter referred to as “the Mortgaged Property”) in favour of the Lender with payment to the Lender of such sums whose particulars are also set out in the schedule hereto together with interest thereon as therein expressed and all other monies and expenses as are in the Charge more particularly specified;

2. The Chargors have fully repaid all moneys secured by the Charge and have requested the Lender to discharge the Charge.
NOW THESE PRESENTS WITNESS THAT in consideration of all principal monies and interest and other moneys secured by the Charge having been fully paid and satisfied on or before the execution of these presents (the receipt whereof the Lender hereby acknowledges) the Lender as Chargee DOETH HEREBY DISCHARGE THE CHARGE AND RELEASE ALL AND SINGULAR the Mortgaged Property from all principal moneys and interest secured by and from all claims and demands under the Charge.

IN WITNESS whereof the duly constituted Attorney of the Lender has hereunto set his hand the day and year first herein before written.

SCHEDULE HEREBEFORE MENTIONED

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<th>DATE OF INSTRUMENT</th>
<th>REGISTERED AS NUMBER</th>
<th>AMOUNT SECURED</th>
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<td>28/10/1998</td>
<td>I. R. xxxxxxxx/7</td>
<td>K.Shs. 9,000,000.00</td>
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</table>

THE PRINCIPAL AMOUNT SECURED UNDER THE CHARGE IS K.Shs.9,000,000.00

SIGNED by ____________________________________________ )
the duly constituted Attorney of bbbbbbbbbb )
ddddddddddddddddd LIMITED by virtue of a Power )
of Attorney registered as IP/A No…. … … …………… )
in the presence of :- )

Advocate )

Drawn By:
Appendix X: Mortgage

DATED ___________________________ 1999

MORTGAGE

- of -

Land Reference Number:

Drawn by:

File Ref:

THIS MORTGAGE is made the day of 1999

BETWEEN ____________________________ of Post Office Box Number ________,

Nairobi in the Republic of Kenya (hereinafter called "the Borrower" which expression shall where the context so admits include its successors and assigns) of the one part and

a bank incorporated in the said Republic of Post Office Box Number ________, Nairobi aforesaid (hereinafter called "the Lender" which expression shall where the context so admits include its successors and assigns) of the other part.

WHEREAS

(A) The Borrower is possessed of and entitled to the property described in the Schedule hereto (hereinafter called "the Premises") subject as therein mentioned but otherwise free from encumbrances;

(B) The Lender has agreed to grant a financial facility to the Borrower for the principal sum of Kenya Shillings _________________________________ (Kshs /=).

(C) The Lender has required the Borrower to convey to the Lender the Premises by way of Legal Mortgage to secure the payment of all moneys due from the Borrower to the Lender.
NOW pursuant to the above agreement and in consideration of the premises THIS MORTGAGE WITNESSES as follows:-

1. The Borrower hereby covenants with the Lender on the seventh day next (hereinafter called the "Legal Date of Redemption") to pay to the Lender such sums as may then be due and owing by the Borrower to the Lender together with all interest costs charges and expenses hereby intended to be secured AND at any time after the Legal Date of Redemption on demand in writing to pay and discharge all moneys and liabilities including all costs charges and expenses which may from time to time be due and owing to the Lender by the Borrower as herein provided (hereinafter referred to as "the Amount Secured") together with interest thereon calculated at the rate and in the manner hereinafter specified AND this Mortgage shall be a continuing security notwithstanding any settlement of account or other matter whatsoever for the payment and discharge of the Amount Secured together with interest as aforesaid.

2. The Amount Secured shall include:-

   (a) (i) Any moneys advanced or paid by the Lender to or to the account of or for the use of the Borrower; and

   (ii) Any moneys which the Borrower shall or may become liable to pay to the Lender under any guarantee or indemnity given to the Lender; and

   (iii) Any moneys or liabilities paid or incurred by the Lender whether as principal or surety to any other person for or on behalf of or at the request of or otherwise with the authority of the Borrower;

   whether any of the foregoing moneys or liabilities be advanced paid or incurred solely or jointly with or to any other person and whether in any of the following matters or otherwise howsoever:-

   (aa) Upon current or other account or upon loans: or

   (bb) Upon bills of exchange or promissory notes drafts or orders for payment or delivery of money bills of lading or other negotiable or mercantile instruments made drawn accepted or endorsed by or on behalf of the Borrower and discounted or purchased or paid or held
by the Lender whether at the request of the Borrower or in the course of business or otherwise; or

(cc) In respect of documentary credits opened or bills of exchange accepted by the Lender at the request of the Borrower;

(b) The Amount Secured shall also include all bank charges and commissions and all costs charges and expenses incurred or suffered by the Lender:

(i) In obtaining or attempting to obtain payment of any moneys hereby secured; or

(ii) In connection with the assertion or defence of the rights of the Lender hereunder or in the stamping enforcement protection or improvement of the security hereby constituted; or

(iii) In relation to or under this security including but not limited to such payments as the Lender may consider it expedient to make to any person whether the Borrower or any person acting at the request of the Borrower or to any receiver appointed by the Lender or to any subsequent encumbrancer or to any person acting on the instructions of the Borrower; or

(iv) In connection with the maintenance repair alteration improvement insurance or the payment of rates rents taxes charges and assessments in respect of the Premises or any part thereof;

(c) Wherever appearing in this Clause:

(i) Reference to "liabilities" shall include actual and contingent liabilities;

(ii) Reference to "costs" shall include legal costs which if not agreed shall be taxed as between Advocate and Own Client.

3. The Borrower shall pay interest on the Amount Secured (as well after as before any judgement) at such rate or rates per annum as the Lender shall in the sole discretion of
the Lender from time to time decide with full power to the Lender to charge different rates for different accounts and such interest shall be calculated on daily balances and debited monthly by way of compound interest PROVIDED THAT:

(a) The Lender shall not be required to advise the Borrower prior to any change in the rate of interest so payable nor shall any failure by the Lender to advise the Borrower as aforesaid prejudice in any way howsoever the recovery by the Lender of interest charged subsequent to any such change;

(b) In the case of any moneys forming part of the Amount Secured being also secured under an agreement or instrument reserving a higher rate of interest than as aforesaid nothing herein contained shall affect the right of the Lender to recover such higher rate of interest or (as the case may be) the difference between such higher rate and the rate payable hereunder.

4. For the better securing to the Lender the payment of the Amount Secured and interest thereon the Borrower as beneficial owner HEREBY CONVEYS to the Lender the Premises TO HOLD the same unto and to the use of the Lender for all the estate and interest of the Borrower therein specified in the Schedule hereto SUBJECT to the Acts conditions and other matters set out in the said Schedule and SUBJECT ALSO to the provision for redemption hereinafter contained.

5. The Borrower hereby covenants and agrees with the Lender as follows:-

(a) To keep the buildings forming part of the Premises and all fixtures and fittings therein and additions thereto in good and substantial repair and condition to the satisfaction of the Lender and to permit the Lender and such persons as the Lender shall from time to time in writing appoint to enter into and upon the Premises to view and examine the state and condition thereof and forthwith to repair and make good to the satisfaction of the Lender all defects and wants of reparation in and to the Premises of which notice in writing shall be given to the Borrower by or on behalf of the Lender provided that if the Borrower shall fail to do so within one calendar month of the date of service of such notice then the Lender may at any time thereafter enter upon the Premises or any part thereof with or without workmen and others and execute such repairs as may be necessary or proper without thereby becoming liable as a Lender in possession;
(b)  

(i) To insure and keep insured with insurers acceptable to the Lender the buildings forming part of the Premises and all fixtures and fittings therein and additions thereto against loss or damage by fire, lightning, earthquake, storm, flood, explosion, riot and civil commotion, aircraft and such other risks as the Lender may from time to time specify to the full insurable value thereof to the satisfaction of the Lender;

(ii) To deposit with the Lender or as the Lender shall direct the policy or policies of insurances endorsed with a mortgage clause or a memorandum noting the interest of the Lender and duly and punctually to pay all premiums and moneys necessary for effecting and keeping up such insurance and to deliver to the Lender three (3) days before the expiry of any policy the receipt for the payment of the premium to renew that policy;

(iii) Where a sum of money is payable under a policy effected in accordance with this sub-clause or under any other policy effected by the Borrower on the said buildings, fixtures and fittings therein and additions thereto or any part thereof the Lender may require that such sum be applied:

   (aa) In repair or re-building the Premises; or

   (bb) Towards repayment of the Amount Secured; or

   (cc) Partly for one of the aforementioned purposes and partly for any other such purpose.

(iv) (aa) Not to effect without the prior written consent of the Lender any insurance on the said buildings, fixtures and fittings therein and additions thereto or any of them other than in accordance with the provisions of this Clause; and

   (bb) Not to do anything that makes or may make a policy of insurance effected in accordance with those provisions void or voidable;
(v) If default shall at any time be made by the Borrower in effecting or keeping up such policy or policies as aforesaid or in depositing the same or delivering the same or delivering any receipt as aforesaid the Lender may (but without being liable to do so) insure and keep insured the said buildings fixtures and fittings therein and additions thereto in any sum not exceeding the full insurable value thereof;

(c) Not to make any structural alteration or addition to any of the buildings and improvements for the time being forming part of the security hereby constituted without the prior consent in writing of the Lender;

(d) To pay the ground rent (if any) and all existing and future rates and taxes charges assessments and other outgoings payable in respect of or charged assessed or imposed on the Premises or any part thereof or on the Borrower or the owner or occupier thereof including without limitation any charge or imposition in respect of any work in connection with the construction repair maintenance or improvement of any private road or street or of any sewage system and any other charge of a capital or non-recurring nature AND to produce on demand to the Lender the receipt for any such payment AND to observe and perform all the covenants and conditions under and subject to which the Premises or any part thereof is held AND to keep the Lender indemnified against all actions claims and liability on account of any non-payment or breach thereof PROVIDED THAT if the Borrower shall make default at any time in effecting payment of the said rent rates charges assessments and other outgoings the Lender may but without being obliged so to do effect payment of the same;

(e) Forthwith upon the receipt by the Borrower of any notice schedule list claim or demand or other requirement whatsoever from or by any person affecting or likely to adversely affect or which may adversely affect the Premises or any part thereof or the respective interests of the parties hereto therein to inform the Lender of the receipt thereof and give to the Lender such further and other information and take at the expense of the Borrower such action in respect thereof as the Lender shall or may require.
6. The moneys hereby secured or the balance thereof for the time being remaining unpaid shall immediately become due and payable and this security enforceable notwithstanding anything to the contrary herein contained:-

(a) If after the Legal Date of Redemption the Lender shall by notice demand payment in writing from the Borrower and serve such notice upon the Borrower;

(b) If the title of the Borrower to the Premises shall for any reason be terminated or impaired;

(c) If the Borrower shall commit or attempt or purport to commit any breach of the covenants or agreements or conditions herein contained or implied and on the part of the Borrower to be performed and observed;

(d) If a distress or execution shall be levied or enforced upon or against any of the property of the Borrower and not be paid off within seven days;

(e) If a receiver is appointed by the court or by any person over any part of the property and assets of the Borrower;

(f) If the Borrower shall default in payment of any negotiable instrument;

(g) If the Borrower shall commit any act of bankruptcy or if a receiving order shall be made against the Borrower or if the Borrower shall make any arrangement or composition with creditors.

7. **PROVIDED ALWAYS AND IT IS HEREBY DECLARED** as follows:-

(a) That the Borrower has not created any debenture mortgage charge or lien or incurred any other liability (contingent or otherwise) which is material for disclosure to an intending lender and which has not been disclosed to the Lender and that the Borrower is not a party to and knows of no circumstances which may give rise to any litigation of a material character affecting the Premises;

(b) That the Borrower may at any time redeem this security upon giving to the Lender three (3) calendar months' notice in writing AND upon payment of all
moneys due to the Lender hereunder at the expiry of such notice including all interest up to that date;

(c) That the security hereby constituted shall be valid and binding for all purposes notwithstanding any change by amalgamation consolidation or otherwise which may be made in the constitution of the company by which the business of the Lender may for the time being be carried on and shall be available to and enforceable by the company carrying on that business for the time being;

(d) That all costs and expenses of and incidental to the completion of this Mortgage including all stamp duties registration fees and legal charges incurred by the Lender shall be paid by the Borrower;

(e) (i) That if upon entry by the Lender into possession of the Premises or any part thereof the same shall contain any furniture or chattels of the Borrower which the Borrower shall refuse or fail to remove within twenty-eight (28) days of the Borrower being required in writing by the Lender so to do then and in any and every such case the Lender shall thereupon become and be the agent of the Borrower with full authority at the Borrower=s expense to remove store preserve sell and otherwise dispose of such furniture and chattels as last aforesaid in such manner in all respects as the Lender shall think fit PROVIDED THAT the Lender shall not sell such furniture or chattels hereunder until after expiration of twenty-eight (28) days from the date upon which the Borrower were required by the Lender to remove them from the Premises as aforesaid;

(ii) The provisions of paragraph (i) of this sub-clause shall not be construed or operate to confer on the Lender any right in equity to any furniture or chattels of the Borrower or any charge or security thereon.

8. Nothing done or omitted to be done by the Lender hereunder shall be deemed to be or take effect as a waiver of or shall prejudice any right of action which the Lender may have against the Borrower in respect of any antecedent breach of any of the covenants and agreements on the part of the Borrower herein contained or implied or any other right of the Lender hereunder.
9. (a) Section 67A of the Transfer of Property Act 1882 (requiring the Lender to bring suit on other mortgages and charges) shall not apply to this Mortgage;

(b) The powers of sale and appointment of receiver conferred by Sections 69 to 69 G inclusive of the Transfer of Property Act 1882 shall apply to this Mortgage;

(c) The Lender may at any time after entering into possession of all or part of the Premises under the powers herein contained or implied relinquish such possession on giving notice to the Borrower.

10. (a) Section 61 of the Transfer of Property Act 1882 (restricting the right of consolidation) shall not apply to this Mortgage;

(b) Without prejudice to any equitable right of consolidation it is hereby declared that no property of the Borrower which at the date hereof is subject to a mortgage or charge in favour of or vested in the Lender shall be redeemed except on payment not only of all moneys secured thereby but also of all moneys hereby secured;

(c) The security hereby given shall be without prejudice and in addition to any other security whether by way of pledge legal or equitable mortgage or charge or otherwise howsoever which the Lender may now or at any time hereafter hold on any other property for or in respect of all or any part of the indebtedness of the Borrower to the Lender hereunder.

11. The Borrower shall not sell transfer convey mortgage lease agree to lease accept surrenders of leases or otherwise part with the possession of the Premises or any part thereof without the prior consent in writing of the Lender and the provisions of sections 65A and 65B of the Transfer of Property Act 1882 in so far as they relate to the powers of the Borrower shall not apply to this Mortgage.

12. After the security hereby constituted has become enforceable the Borrower shall from time to time and all times hereafter execute and do all such assurances and things as the Lender may reasonably require for facilitating the realisation of this security and for exercising all the powers authorities and discretions hereby conferred on the Lender and in particular the Borrower shall :-
(a) Execute a conveyance of the Premises as the Lender may require.

(b) Perform or cause to be performed all acts and things requisite or desirable for the purpose of giving effect to the exercise of the said powers authorities and discretions;

(c) Give all notices orders and discretions which the Lender may think expedient; For the purpose of this Clause a Certificate in writing signed by the Lender or any agent in Kenya of the Lender to the effect that any particular assurance or thing required by the Lender is reasonably required shall be conclusive evidence of the fact.

13. The Borrower hereby irrevocably appoints the Lender to be the attorney of the Borrower in the name and on behalf of the Borrower:-

(a) To demand sue for and receive money payable under a policy of insurance effected in pursuance of the provisions of this Mortgage and any other policy effected by the Borrower in relation to the buildings and all fixtures and fittings therein and additions thereto forming part of the Premises;

(b) To settle and compromise all claims in relation to a policy specified in the last preceding sub-clause; and

(c) To execute and do any assurances and things which the Borrower ought to execute and do under the covenants herein contained and generally to use the name of the Borrower in the exercise of all or any powers hereby conferred on the Lender or any receiver appointed by the Lender.

14. Upon the final balance of the moneys hereby secured having been paid off and satisfied together with all interest due thereon and upon payment of all costs charges and expenses incurred by the Lender in relation to the Premises the Lender shall at the request and cost of the Borrower re-convey the Premises unto the Borrower or as the Borrower shall direct.

15. Any notice hereunder may be served by the Lender on the Borrower either personally or by sending it through the post in a prepaid letter addressed to the Borrower at the
last known address of the Borrower in the Republic of Kenya or by telex or by
telegram addressed as aforesaid or by some other manner authorised by law. Where a
notice is sent by post it shall be deemed to have been served at the expiration of seven
(7) days after the day on which it was posted and in proving service it shall be
sufficient to show that the envelope containing the notice was properly addressed and
put into the Post Office as a prepaid letter and where a notice is sent by telegram or
telex it shall be deemed to have been served at the expiration of Five (5) days after the
day on which it was sent.

16. In this Mortgage unless the context shall otherwise require :-

(a) Reference to a "receiver" shall include a receiver and manager or receivers and
managers;

(b) The expression "the Borrower" where the Borrower is not a limited liability
company includes his personal representatives and assigns and where the
Borrower is a limited liability company includes its successors and assigns;

(c) Words importing the masculine gender only include the feminine gender;

(d) Words importing the singular number only include the plural and vice-versa and
where there are two or more persons included in the expression "the Borrower"
covenants and agreements expressed to be made by the Borrower shall be
deemed to be made by such persons jointly and severally;

IN WITNESS WHEREOF this Mortgage was duly executed the day and year first
hereinbefore written.

THE SCHEDULE

SEALED with the COMMON SEAL of the said

______________________________

in the presence of :-

______________________________

Director

______________________________
I, an advocate of the High Court of Kenya Certify that I explained to the Directors of the Borrower the effect of Subsection (i) of Section 69 of the Indian Transfer of Property Act 1882 (as amended) and that I am satisfied that they understood the same.

......................................

Advocate

This Mortgage is collateral to a Mortgage created over Land Reference Number 1870/VIII/51 Nairobi.

Director/Secretary
Appendix XI: Reconveyance of Mortgage

This **RECONVEYANCE OF MORTGAGE** is made the … … … … day of … … … … … … Two Thousand and One BETWEEN **DDDDDD OF AFRICA LIMITED** a Limited Liability Company incorporated in the Republic of Kenya and registered as a bank pursuant to the provisions of the Banking Act (Chapter 488, Laws of Kenya) and whose postal address for the purpose of this instrument is Post Office Box Number dddddd, Nairobi in the said Republic (hereinafter referred to as “the Lender” which expression shall where the context so admits include its successors and assigns) of the one part **AND DDDDDD LIMITED** of Post Office Box Number dddddd Nairobi aforesaid (hereinafter referred to as “the Mortgagor” which expression shall where the context so admits include its successors and assigns) of the other part.

**WHEREAS**-

1. By a Mortgage dated the Thirteenth day of May One Thousand Nine Hundred and Ninety-seven (registered in the Government Lands Registry at Nairobi aforesaid in Volume N51 Folio 19/17 File 10881) (hereinafter referred to as “the Mortgage”) **ALL THAT** piece of land situate in the City of Nairobi in the Nairobi Area of Kenya and known as Land Reference Number dddddd/136/140 in the Mortgage more particularly described (hereinafter referred to as “the Mortgaged Property”) was conveyed by the Mortgagor unto the Lender with payment to the Lender of the sum of Kenya Shillings Seventy-six Million Five Hundred Thousand (K.Shs.76,500,000.00) and interest thereon and all other moneys costs charges and expenses as therein mentioned **TO HOLD** the same unto the Lender **SUBJECT** to the provisions for redemption therein contained.

2. The Mortgagor has fully repaid all moneys secured by the Mortgage and has requested the Lender to re-convey the Mortgage.

**NOW THESE PRESENTS WITNESS** that **IN CONSIDERATION** of all the principal monies and interest secured by the Mortgage having been fully paid and satisfied on or before the execution of these presents (the receipt of which the Lender hereby acknowledges) the Lender as Mortgagee **HEREBY RE-CONVEYS THE MORTGAGE AND RELEASES** unto the Mortgagor the Mortgaged Property **TO HOLD** the same unto the Mortgagor for the estate and under the conditions it held the same before the Mortgage **SUBJECT** to the Government Lands Act and the Rules for the time being in force thereunder **BUT OTHERWISE FREED AND ABSOLUTELY DISCHARGED** from all principal monies and interest secured by and from all claims and demands under the Mortgage.
IN WITNESS whereof the duly constituted Attorney of the Lender has hereunto set his hand
the day and year first herein before written.

SIGNED by .. … … … … … … … … … … … … … … … … … … … … … … … … )
duly constituted Attorney of DDDDDD OF )
AFRICA LIMITED by virtue of Power of Attorney )
registered as IP/A No…. … . … . … … … … … … … … )
in the presence of :- )

Advocate )

Drawn By:
Appendix XII: Debenture

DATED __________________________ 1999

to

DEBENTURE

THIS DEBENTURE is issued under Clause ___ (___) of the Company's Memorandum of Association and Article ___ of the Company's Articles of Association and in pursuance to a Resolution of the Directors of the Company dated __________________________.

THIS DEBENTURE is made the day of 1999

BETWEEN ____________________________ of P.O. Box ________________, a limited liability company incorporated in the Republic of Kenya and having its registered office at Nairobi in the said Republic (hereinafter called "the Borrower" which expression shall where the context so admits include its successors and assigns) of the one part and of P.O. Box ________________, a limited liability company carrying on banking business and having its registered office at Nairobi aforesaid (hereinafter called "the Lender" which expression shall where the context admits include its successors and assigns) of the other part.

WHEREAS

The Borrower has requested the Lender to grant to the Borrower a banking facility of Kenya Shillings ___________________________ (Kshs. __________)/=) (hereinafter called "the Amount Secured") and the Lender has agreed to do so upon receiving from the Borrower by way of security a Debenture creating a first charge over all its undertaking goodwill stocks stores books debts property and assets whatsoever both present and future including its uncalled capital for the time being and insurance cover on the foregoing as provided for in the letter of offer dated ________________ addressed by the Lender to the Borrower.

NOW THIS DEBENTURE WITNESSES AS FOLLOWS:
IN CONSIDERATION of the premises and in pursuance of the said agreement it is hereby agreed as follows:-

1. In consideration of the Lender agreeing to make or continuing to make advances to the Borrower by way of loan or by giving the Borrower financial accommodation of such nature in such manner and within such limits as the Lender may from time to time in its sole discretion determine the Borrower HEREBY UNDERTAKES AND AGREES that it will on demand in writing made to it by the Lender pay to the Lender all moneys which now are or at any time hereafter may be due and owing by the Borrower to the Lender or for which the Borrower is or may become liable to the Lender on any current or other account or in any manner whatsoever and discharge all liabilities incurred by the Borrower to the Lender in any manner whatsoever whether in respect of monies advanced or paid to or for the use of the Borrower or charges incurred on account of the Borrower or for any moneys whatsoever which are or may become due or owing by the Borrower to the Lender either as principal or surety and either solely or jointly with any other company society corporation person or persons in partnership or otherwise or upon loans or bills of exchange or promissory notes drafts orders for payment or delivery of money bills of lading or other negotiable or mercantile instruments drawn accepted or endorsed by or on behalf of the Borrower and discounted or paid or held by the Lender either at the request of the Borrower or in the course of business or otherwise or in respect of documentary credits opened or bills of exchange accepted by the Lender on the instructions of the Borrower or its authorised agents or in respect of moneys which the Borrower has or shall become liable to pay to the Lender under guarantee given by the Borrower to the Lender or for moneys guaranteed by the Lender for and on behalf of and at the request of the Borrower or in any other manner whatsoever and whether any such moneys or liabilities shall be paid to or incurred on behalf of the Borrower or any other company society corporation person or persons in partnership or otherwise at the request of the Borrower or in any other manner whatsoever and whether any such moneys or liabilities shall be paid to or incurred on behalf of the Borrower or any other company society corporation or persons in partnership or otherwise at the request of the Borrower or for any other account whatsoever or otherwise howsoever or for an actual or contingent liability together with interest calculated as hereinafter prescribed and together with commission and other usual bank charges and all other costs charges and expenses (the legal costs being as between Advocate and Client) as shall
or may be incurred or suffered by the Lender in anywise in connection with the assertion or defence of the Lender's rights under this Debenture as also for the protection and defence of the property and assets hereby charged or expressed so to be AND if and when any sum so owing by the Borrower to the Lender shall have been demanded or shall have become payable without demand to pay to the Lender interest calculated as hereinafter prescribed on the sum or sums so owing or outstanding from the time of such demand or from the time when the same so become payable until the actual payment thereof (as well after as before judgement) PROVIDED ALWAYS that the total sum for which this Debenture constitutes a security to the Lender shall not at any time exceed the Amount Secured to which shall be added interest as hereinafter prescribed from the time of such moneys becoming payable until actual payment thereof.

2. The Borrower shall pay interest on all moneys and liabilities from time to time due or payable to the Lender as aforesaid at such rates as the Lender shall in its sole discretion from time to time decide with full power to the Lender to charge different rates for different accounts and such interest shall be calculated on daily balances and debited monthly by way of compound interest. The Lender shall advise the Borrower of any change in the rates of interest so payable but without any obligation of giving prior notice to the Borrower.

3. The Borrower HEREBY CHARGES in favour of the Lender ALL ITS undertaking goodwill stocks stores book debts property and other assets whatsoever both present and future including its uncalled capital for the time being with payment and discharge of all moneys and liabilities hereby agreed to be paid or discharged or intended to be secured (including expenses and charges arising out of or in connection with any of the acts authorized by this Debenture).

4. The charge created by this Debenture shall rank as first charge on the assets hereby charged and shall constitute a floating security and the Borrower is not to be at liberty to create any mortgage or charge or other encumbrance upon any of the assets hereby charged to rank either in priority to or pari passu with the charge hereby created it being the intention that the Borrower shall have no power without the prior written consent of the Lender to part with dispose of or alienate any part of the assets hereby
charged except by way of sale in the ordinary course of business and that the proceeds of all such sales shall be paid into the Borrower's account or accounts with the Lender.

5. The securities hereby given and covenanted to be given to the Lender shall be without prejudice and in addition to any other security legal or equitable of whatsoever nature which the Lender may now or at any time hereafter hold on the property and assets of the Borrower or any part thereof or from any third party or in respect of all or any part of the indebtedness of the Borrower to the Lender howsoever arising or any interest thereon.

6. The Lender may at any time and without notice to the Borrower combine or consolidate all or any of the Borrower's accounts with any liabilities to the Lender and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the Borrower's liabilities to the Lender on any other account or in any other respect whether such liabilities be actual or contingent primary or collateral joint or several and whether such accounts and liabilities be at or to one or more branches of the Lender.

7. The Borrower hereby covenants with the Lender:

   (a) To carry on and conduct the business of the Borrower in a proper efficient and businesslike manner;

   (b) To keep proper books of account and therein to make true and perfect entries of all dealings and transactions of and in relation to the said business and to keep the said books of account and all other registers books and documents relating to the affairs of the Borrower at its registered office or other place or places where the same should properly be kept and to procure that the same shall at all reasonable times be open for the inspection of the Lender or such person or persons as the Lender shall from time to time appoint;

   (c) To furnish to the Lender annually or oftener if required a balance sheet profit or loss account and trading accounts showing the true position of the Borrower's affairs at a date not more than Three months previous certified by the Auditors for the time being of the Borrower and also from time to time to give to the Lender or to such other persons as the Lender shall from time to
time appoint such information as it he or they shall require to all matters relating to the business or any existing or after acquired property or assets of the Borrower or otherwise relating to the affairs thereof;

(d) To keep the Borrower's stocks properly warehoused and in good condition and to submit to the Lender a proper and detailed stock report twice in each financial year. One report is to be submitted to the Lender within seven (7) days of the end of each financial year of the Borrower and the other report to be submitted to the Lender six (6) months thereafter without the Lender requesting the same.

(e) To permit the Lender and such person or persons as the Lender shall from time to time in writing for that purpose appoint to enter into and upon the Borrower's property to view the state and condition of the property and assets hereby charged.

(f) To insure and keep with an insurance company approved by the Lender and if required by the Lender in the name of the Lender such of the property and assets hereby charged as are of an insurable nature against loss damage or destruction by fire and such other risks as the Lender may from time to time require to the full value thereof as determined by the Lender from time to time and punctually to pay all premia and other moneys payable for that purpose and to produce to the Lender on demand the policy or policies for such insurance and the receipts for the current premia thereon and at the discretion of the Lender either to apply all moneys received or receivable by virtue of any such policy in making good any loss or damage which may so arise to the Borrower's property and assets or any of them as the Lender may direct or in or towards liquidation of the amount for the time being due to the Lender and if default shall be made in keeping such property and assets in proper working order and condition so insured as aforesaid or in depositing any such policies or delivering any such receipts as aforesaid the Lender may (but without being bound to do so) repair the same or such of them as shall in the opinion of the Lender require repair and may insure and keep insured the same or such of them as the Lender may deem fit and the Borrower will on demand repay to the Lender every sum of money so expended by them for the above purposes
or any of them together with interest thereon at such rates as aforesaid from
time to time of the same having been expended until the actual payment
thereof and until such repayment the same shall be a first charge upon the
property and assets hereby charged and may be debited to any account of the
Borrower with the Lender.

(g) Not to assign alienate let or sublet or part with the possession of any of the
assets hereby charged or covenanted to be mortgaged or charged or any part
thereof without the consent in writing of the Lender first had and obtained and
then only on the condition that the consideration received by the Borrower in
connection with the assignment alienation letting subletting or parting with
possession will be remitted to the Lender in reduction of the amount for the
time being owing under this Debenture;

(h) To comply with and observe all the provisions of the Companies Act (Chapter
486) or any amendment or re-enactment thereof for the time being in force;

(i) To deposit with the Lender a complete and true copy of the Borrowers
Memorandum and Articles of Association in force on the date hereof and of
any amendment made from time to time thereto and not to make or attempt to
make any alteration thereto or to the capital structure of the Borrower without
the prior written consent of the Lender;

(j) To advise the Lender of all countries in which the Borrower is now registered
or carries on business and immediately of any change therein;

(k) If the Borrower extends its business to any other country or countries at its
own expense to procure the registration of this Debenture contemporaneously
with the registration of the Borrower in such country or countries in such
manner as is required by the law of such country or countries to the intent that
this Debenture shall be fully effective and enforceable therein;

(l) Not to remove or permit to be removed any property or assets belonging to or
in the lawful possession of the Borrower to any country where this Debenture
is not registered as aforesaid without the prior written consent of the Lender;
(m) If and for so long as the Borrower is a private Company not to permit any allotment or transfer of shares or change its Directors without the prior written consent of the Lender (which consent shall not be unreasonably withheld);

(n) To advise the Lender promptly in writing of any event or situation tending or likely to have a substantially adverse effect on the Borrower's business or on the security hereby created.

(o) To provide the Lender with copies of three successive latest audited Balance Sheet and or certified audited financial statement of assets and liabilities and any other clarification or information which the Lender may ask for pertaining to the Borrower=s business and securities given to the Lender and to provide within three (3) months of the end of each accounting period a certified copy of audited accounts.

(p) To operate accounts and facilities with the Lender strictly within the prescribed limits save with the written approval of the Lender and to the Lender=s satisfaction and for the agreed purposes.

(q) To undertake to settle all legal and incidental costs incurred in any way whatsoever in the establishment of this banking facility.

8. The principal moneys and interest and other moneys and liabilities hereby secured shall immediately become payable and fall due to be discharged without demand:

(a) If a distress or execution either by virtue of any Court order decree or process or otherwise is levied upon any part of the property and assets of the Borrower or the Borrower commits any act or default by reason of which any such distress or execution might be levied; or

(b) If a receiver is appointed by any Court or by any other person over any part of the property and assets of the Borrower; or
(c) If an order is made or a resolution is passed for the winding up of the Borrower or a petition for such winding up is filed or notice of a meeting to pass such resolution is issued; or

(d) If the Borrower without the consent of the Lender ceases to carry on its business or threatens to cease to carry on the same; or

(e) If the Borrower commits or attempts or purports to commit a breach of the covenants herein; or

(f) If any government or governmental authority shall condemn nationalize seize or otherwise acquire or appropriate all or any substantial part of the property or assets of the Borrower; or

(g) If any civil war revolution insurrection action by local national or foreign or international forces blockade riot or any events being Acts of God or otherwise beyond control of the Borrower shall seriously impair the efficient and proper conduct of the business of the Borrower or render the same unreasonably hazardous; or

(h) If a petition is filed by any interested party for the winding up of the Borrower pursuant to the provisions of the Companies Act.

9. At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the Lender or under the provisions of the Clause 8 hereof and so that no delay or waiver of the rights to exercise the powers hereby conferred shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law the Lender may appoint in writing any person or persons whether an officer or officers or agent or agents of the Lender or not to be a Receiver and Manager or joint Receivers or Receivers and Managers of the property and assets hereby charged or any part thereof upon such terms as to remuneration or otherwise as the Lender shall think fit and may in like manner from time to time remove any receiver or receiver and manager or receivers or receivers and managers so appointed and appoint another or others in his or their stead.

10. Every Receiver or Receiver and Manager so appointed (hereinafter called a "Receiver") shall be the agent of the Borrower and the Borrower shall alone be liable
for his acts defaults and remuneration and he shall have authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any general powers conferred on him by law.

(a) To enter (either personally or by his servants or agents and either accompanied by workmen and others or not so accompanied) upon any land or buildings where any property or assets hereby charged may for the time being be or upon any other land or buildings owned or occupied by the Borrower;

(b) To take possession of collect and get in all or any part of the property and assets hereby charged and for that purpose to take proceedings in the name of the Borrower or otherwise as he may deem expedient;

(c) To sell or let or concur in selling or letting any property or assets hereby charged in such manner and generally on such terms and conditions as he shall think fit to carry any such sale or letting into effect;

(d) To carry on or manage or concur in carrying on or managing the business of the Borrower and for any of those purposes to raise money from the Lender or from other sources with the written consent of the Lender either on the security of any property and assets now or hereafter charged;

(e) To make any arrangements or compromises which the Lender or the Receiver in the interest of the Lender shall think expedient;

(f) To make and effect all repairs improvements and insurances which the Receiver shall deem expedient and to renew such of the plant machinery and effects of the Borrower as shall be worn out or lost or otherwise become unserviceable;

(g) To appoint dismiss and remove managers accountants workmen staff and agents upon such terms as to remuneration or otherwise as the Receiver may determine;
(i) To do all such other acts and things as may be incidental or conducive to any of the matters and powers aforesaid and which the Receiver may lawfully do as agent for the Borrower.

11. All moneys received by the Lender or any Receiver or Receiver and Manager after the security hereby created has become enforceable shall after providing for all costs and expenses incurred in carrying out the sale or disposal of the property and assets hereby charged and carrying on the business of the Borrower be applied:

**FIRSTLY** in payment of all costs charges and expenses of and incidental to the appointment of the Receiver or Receiver and Manager and exercise by him of all or any of the powers aforesaid including the remuneration of the Receiver or Receiver and Manager;

**SECONDLY** in or towards payment to the Lender of all interest and other charges respectively due to it in respect of this Debenture;

**THIRDLY** in or towards payment to the Lender of the Amount Secured due to it by the Borrower on any account in respect of this Debenture and remaining unpaid; and

**FOURTHLY** in payment of any surplus to the Borrower.

12. No purchaser mortgagor mortgagee or other person or company dealing with the Lender or a Receiver or a Receiver and Manager or with its or his attorneys or agents shall be concerned to enquire whether the powers exercised or purported to be exercised have become exercisable or whether any money remains due on the security of this Debenture or as to the necessity or expediency of the stipulations and conditions subject to which any sale or other disposition shall have been made or otherwise as to the propriety or regularity of such sale or other disposition calling in collection conversion or to see to the application of any money paid to the Lender or the Receiver and in the absence of mala fides on the part of such purchaser mortgagor mortgagee or other person or company such dealing shall be deemed so far as regards the safety and protection of such purchaser mortgagor mortgagee or other person or company to be within the powers hereby conferred and to be valid and effectual accordingly.
13. Neither the Lender nor a Receiver shall by reason of the Lender or such Receiver entering into possession of the property and assets hereby charged or any part of them be liable to account as mortgagee in possession or for anything except actual receipts or be liable for any loss upon realisation or for any default or omission for which a mortgagee in possession might be liable.

14. After the security hereby constituted has become enforceable the Borrower shall from time to time and at all times execute and do all such assurances acts and things as the Lender may require for facilitating the realisation of the property and assets hereby charged (including the calling up of any uncalled capital for the time being of the Borrower) and for exercising all the powers authorities and discretions hereby conferred on the Lender or a Receiver.

15. The Borrower hereby irrevocably appoints the Lender or the duly constituted attorney or attorneys of the Lender for the time being or any Receiver or Receivers appointed by the Lender to be the attorney or attorneys of the Borrower and in the name and on behalf of the Borrower to execute and do any assurances acts and things which the Borrower ought to execute and do under the covenants herein contained and generally to use the name of the Borrower in the exercise of all or any of the powers hereby conferred on the Lender or any Receiver or Receivers appointed by the Lender and covenants that it will when called upon by the Lender so to do execute further Powers of Attorney in favour of the Lender or the duly constituted attorney or attorneys of the Lender for the time being or any Receiver or Receivers appointed by the Lender.

16. Upon the final balance of the principal moneys and liabilities hereby secured having been paid off and satisfied by the Borrower itself to the Lender together with all interest due thereon and upon payment by the Borrower to the Lender of all costs charges and expenses incurred by the Lender in relation to this Debenture the Lender shall if requested by the Borrower and at the cost of the Borrower execute a discharge of this Debenture and all other securities granted to the Lender under the provisions in that behalf hereinbefore contained.

17. It is hereby agreed and declared that this Debenture shall be a continuing security notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the
Lender prior to the execution hereof relating to any security which the Lender may now or hereafter hold in respect of moneys hereby secured or any part thereof.

18. The principal moneys and interest hereby secured shall be payable at such branch or branches of the Lender as the Lender may require.

19. Any notice by post shall be deemed to have been duly served four days after posting and in proving such service it shall be sufficient to prove that the letter containing the notice was properly stamped and addressed and put into the Post Office.

20. Upon demand being made by the Lender for payment of the moneys hereby secured or upon such moneys for any other reason becoming immediately payable the Lender shall be under no obligation to make any further advances or grant any further facility to the Borrower.

21. All costs and expenses of and incidental to the completion and enforcement of this Debenture including all stamp duties, registration fees and legal fees shall be paid by the Borrower.

IN WITNESS whereof the Borrower has duly executed this Debenture the day and year first hereinbefore written.

SEALED with the Common Seal of __________

_________________________

in the presence of:-

Director

Director/Secretary
Appendix XIII: Deed of Indemnity

DATED ________________________ 1999

- to-

-and-

DEED OF INDEMNITY

(Re: ____________________________)

Drawn By: _______________________

DEED OF INDEMNITY

IN CONSIDERATION of you ____________________________ and both of P.O. Box ____________, Nairobi (hereinafter called " ____________________________ and " which expression shall where the context so admits include their respective successors and assigns ) respectively guaranteeing and continuing to guarantee and provide security (hereinafter called "the Guarantees") for the financial facilities granted to of P.O. Box Number ________, Nairobi (hereinafter called "the Borrower" which expression shall where the context so admits include its successors and assigns), by of P.O. Box ________, Nairobi (hereinafter called "the Bank" which expression shall where the context so admits include its successors and assigns), I the party whose name and address is set out in the Schedule hereto (hereinafter called "the Director" which expression shall where the context so admits include his successors and assigns): FIRSTLY, do acknowledge that my intention in executing this Indemnity is that and shall suffer no loss by reason of their guaranteeing or continuing to guarantee and provide security for the financial facilities afforded to the Borrower by the Bank: and SECONDLY, in pursuance of such acknowledgements as aforesaid do HEREBY AGREE AND DECLARE AS FOLLOWS:-
1. INDEMNITY AGAINST LIABILITY UNDER THE GUARANTEE

I hereby indemnify you and shall keep you indemnified against all demands, claims, liabilities, losses, costs and expenses whatsoever (including all legal and other costs, charges and expenses you may incur in connection with the undertaking, or in enforcing, or attempting to enforce, your rights under this indemnity) arising in relation to or out of the undertaking or as a result of your having issued the Guarantees. I shall pay and reimburse such sums to you on demand, together with interest on them (as well after as before judgement), from the date when they were first paid or incurred by you until payment of them by me in full, at a reasonable rate of interest per annum above the cost to you (as conclusively determined by you) of acquiring all necessary funds in such currency and manner as you may from time to time decide. I irrevocably authorize you, without prejudice to any other right or remedy, to debit such payment or reimbursement to any account which I may have to you.

2. INDEMNITY AGAINST JUDGEMENT OR ORDER

I further agree that if any judgement or order is given or made for the payment of any amount due under this Deed of Indemnity and is expressed in a currency other than that in which such amount is payable by me under this Deed of Indemnity, I hereby indemnify you against any loss as a result of any variation having occurred in rates of exchange between the date as of which such amount is converted into such other currency for the purpose of such judgement or order and the date of actual payment pursuant to it. This indemnity shall constitute a separate and independent obligation on my part and shall continue in full force and effect notwithstanding and such judgement or order as stated above.

3. AUTHORIZATION TO MAKE PAYMENTS

I irrevocably authorize you to make any payments or to comply with any demands which appear or purport to be claimed or made under the Guarantees without any references to further authority from me, without inquiring into the justification for them or into the validity, genuineness or accuracy of any statement or certificate received by you with respect to or under the Guarantees and despite any contestation on my part, and I agree that any such claim or demand shall be binding on me and
shall, as between you and me, be accepted by me and conclusive evidence that you
are liable to pay or comply to it.

4. EFFECT OF OTHER INDEMNITIES

Your right under this Deed of Indemnity shall be in addition to and shall not be in any
way prejudiced or affected by any other one or more indemnities, guarantees,
securities or obligations which may now or subsequently hold either from me from
any other person. You may at any time and without reference to me give time for
payment or grant any other indulgence and give up, deal with, vary, or abstain from
perfecting or enforcing any other indemnities, guarantees, or other obligations held by
you at any time and discharge any party to them or any of them, and realise them or
any of them, and compound with, accept compositions from and make any other
arrangements with the Bank or any person or persons, as you think fit, without
affecting any liability under this indemnity.

5. RESORTING TO OTHER MEANS OF PAYMENT

You are to be at liberty but not bound to resort for your own benefit to any other
means of payment at any time and in any order you think without in consequence
diminishing my liability and you may enforce your rights under this indemnity either
for payment of ultimate balance after resorting to other means of payments of balance
due at any time notwithstanding that other means of payment have not been resorted
to and in the latter case without entitling me to any other benefit from such other
means of payment so long as any money remains due or owing or payable (whether
actually or contingently) from or by me to you..

6. MODIFICATION OF THE GUARANTEE

The Guarantees may from time to time be modified, amended, renewed or extended,
either in accordance with its original terms, or upon our request and the agreement
thereof of you and the Bank. My liability under this Deed of Indemnity shall continue
to apply to the Guarantee as so modified, amended, renewed or extended from time to
time.
7. **JOINT AND SEVERAL BENEFIT**

The benefit of this Deed of Indemnity shall be deemed to the joint and several benefit of and and any demand for payment made by any one of you shall be deemed a demand made by both of you. Any one of you may release or discharge me from liability under this indemnity or compound with, accept compositions from or make any other arrangements with me without in consequence releasing or affecting the rights of the other party.

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8. **EFFECT OF DELAY OR OMISSION**

No delay or omission on your part in exercising any right, power, privilege or remedy in respect of this indemnity shall impair such right, power, privilege or remedy, or be construed as waiver of it, nor shall any single or partial exercise of any such right, power, privilege or remedy preclude any other exercise of it or the exercise of any such right, power, privilege or remedy. The rights, powers, privileges and remedies provided in this indemnity are cumulative and not exclusive of any rights, powers, privileges or remedies provided by law.

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9. **AMOUNT OF THE DIRECTOR'S LIABILITY**

The amount of my liability under this indemnity shall at all times be subject to the following provisions:

(a) The principal amount recoverable from me hereunder (being the total amount recoverable from me hereunder excluding legal charges fees and interest and other cost accruing after demand upon me) shall be limited to the principal sum of Kenya Shillings (Kshs. ______/=) only.

(b) Legal charges and interest accruing after demand upon us shall be recoverable from me in addition to the principal amount not withstanding that such addition may result in the total amount recoverable from us being an amount in excess of the limit specified in paragraph (a) of this clause.
10. NOTICE

Any notice or demand to be given or made to me hereunder may duly given if sent by prepaid post letter to me at my address written in the Schedule hereto or at my last known address and shall effectual notwithstanding any change of address or death and notwithstanding the return of and of the letter concerned and such notice or demand shall be effective for all purposes Seven (7) days after the posting thereof and in proving service by post shall be sufficient to prove that the letter containing the notice or demand was properly stamped addressed and put into the Post Office.

SCHEDULE

P.O. Box Number 48876, Nairobi

IN WITNESS WHEREOF the Director has executed this Deed of Indemnity the day and year first hereinbefore written.

SIGNED SEALED and DELIVERED)
by the said __________________________

in the presence of:)

)
Appendix XIV: Appointment of Receiver and Manager

DATED ___________________________ 1999

- to -

APPOINTMENT OF RECEIVER AND MANAGER

Re:

THIS APPOINTMENT is made the day of ________________________ 1999 BY
of P.O. Box ____________ in the Republic of Kenya (hereinafter called "the Lender") of
the one part and ____________________________ care of
of P.O. Box ____________ aforsaid (hereinafter called "the Receiver") of the other part.

WHEREAS

A. By a Debenture dated ________________________ (hereinafter called "the Debenture")
and made between ____________________________ (therein described and
hereinafter called "the Borrower") of the one part and the Lender of the other part the
Borrower charged in favour of the Lender ALL its undertaking goodwill assets book
debts and property whatsoever and wheresoever both present and future including its
uncalled capital for the time being with the payment and discharge of all moneys and
liabilities secured by the Debenture.

B. By a Charge bearing even date with the Debenture (hereinafter called "the Charge")
and made between the Borrower of the one part and the Lender of the other part the
Borrower charged in favour of the Lender ALL THAT property known as
Buildings and other improvements erected and being thereon (as
more particularly described in the Charge) by way of security for the monies thereby
secured.

C. Events have happened upon which the power to appoint a receiver and manager under
the Debenture and the Charge has become exercisable.

NOW THEREFORE the Lender in pursuance of the powers given to it by the Debenture and
the Charge or conferred upon it by law or otherwise hereby appoints the Receiver to be the
receiver and manager of the Borrower and to exercise all the powers of a receiver and manager given by the Debenture and the Charge and by law.

AND IT IS HEREBY DECLARED that the Receiver shall be the agent of the Borrower and the Borrower alone shall be responsible for his acts and defaults.

IN WITNESS whereof this Appointment was duly executed by the Lender the day and year first above written.

SIGNED by the duly constituted Attorney of the said)
_______________ )
in the presence of: )
) ) I/PA No.
) )
) )

Drawn By
THIS LEASE is made the __________ day of __________ Two Thousand BETWEEN

FFFFFFFF LIMITED a limited liability company incorporated in the Republic of Kenya having its registered office at Nairobi and of Post Office Box Number _________, Nairobi in the said Republic (hereinafter called “the Lessor”) of the first part ........................................ of Post Office Box Number 78072, Nairobi aforesaid (hereinafter called “the Lessee”) of the second part and ........................................ of Post Office Box Number ........................., Nairobi aforesaid (hereinafter called “the Guarantors”) of the third part.

WHEREAS:

(A) The Lessor is registered as proprietor as Lessee from the Government of Kenya (subject to such charges leases caveats (if any) and encumbrances as are notified by the Memorandum endorsed herein and to the Statutes Special conditions encumbrances and other matters referred to or contained in a Grant registered in the Land Titles Registry at Nairobi I.R.PPPP/1 and to the annual rent of Kenya Shillings Eleven Thousand One Hundred and Fifty-eight (KShs.11,158/=) of ALL THAT piece or parcel of land situate in the City of Nairobi in the Nairobi Area of the said Republic containing by measurement Nought Decimal One Three Four Three (0.1343) of a hectare or thereabouts known as Land Reference Number PPPP/IX/140 being the premises comprised in the said Grant and which said premises with the dimensions and boundaries thereof are delineated and described on Land Survey Plan Number 107902
deposited in the Survey Records Office at Nairobi and thereon bordered red (hereinafter referred to as “the said land”).

(B) A Building has been erected upon the said land comprising of inter alia shops, offices and other accommodation together with the usual conveniences connected therewith known as “PPPP”.

NOW THESE PRESENTS WITNESS that in consideration of the rent hereinafter reserved and of the covenants by the Lessee hereinafter contained the Lessor HEREBY LEASES unto the Lessee ALL THAT the Shop Numbered …… comprising ………………………………………………………. square feet (………… sq. ft.) or thereabouts situated on the …………… Floor of PPPP (hereinafter called “the premises”) which for the purpose of identification is shown on the Building Plan registered in the Registry of Documents at Nairobi in Volume …… Folio ……… File Number ………………. TOGETHER WITH the right for the Lessee and persons authorised by the Lessee to use in common with the Lessor and other Lessees of PPPP and their licencees during such reasonable business hours as the Lessor may from time to time determine:-

(i) The entrance halls stairs landings passages and lifts and escalators for the purpose only of egress from and ingress to the premises;
(ii) The lavatory, washing and other conveniences provided for the use of the Lessee;

EXCEPTING AND RESERVING unto the Lessor the free and uninterrupted use of all water pipes electric conduits wires and drains (if any) in through or under the premises or any part thereof TO BE HELD by the Lessee as tenant for the term of ………… years and ……… months from the …………… day of ……………….. (……/……/……) subject nevertheless to determination as hereinafter provided at the monthly rent of Kenya Shillings ………………………. (KShs……………). The said rent shall be increased by …..% each year and shall be payable monthly in advance (inclusive of service and other charges) by a banker’s cheque as follows:-

AS PER LETTER OF OFFER
1. The Lessee HEREBY COVENANTS with the Lessor as follows:-

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(a) To pay the rent hereby reserved and in the manner aforesaid;

(b) To pay all charges for conservancy water electricity and telephone (if any) in respect of the premises AND in the event of water being supplied to the premises to pay to the Lessor the cost of supplying and installing a meter;

(c) On the date of the commencement of this lease (if not already paid prior to such date) to deposit with the Lessor the sum of Kenya Shillings …………………..(KShs………………) as security for the performance by the Lessee of the Lessee’s obligations under this Lease. The Lessor may apply the deposit towards the Lessee’s obligations and may thereafter allocate any subsequent payment by the Lessee to restore the deposit in full. The deposit shall be refundable to the Lessee (without any interest) after the expiry of this Lease and the delivery up of the premises in proper condition and in accordance with this Lease;

(d) To keep the premises open for business on such days and during such hours as determined by the Lessor from time to time.

(e) To pay (by way of deposit) to the Lessor in addition to the said rent by way of reimbursement to the Lessor of the operating expenses of PPPP a service charge being additional rent of Kenya Shillings ………………… (KShs………) to be paid quarterly in advance together with the said rent. The service charge shall be in respect of the amount from time to time expended by the Lessor in respect of:-

(i) the services of such security staff as the Lessor shall consider necessary for the protection of PPPP

(ii) the services of such cleaners as the Lessor shall consider necessary for cleaning and keeping tidy the common parts of PPPP and the windows therein and the costs of the materials used by such cleaners.

(iii) all charges for electricity consumed in the common parts of PPPP including that for the operation of the lifts and escalators and all other electrically or manually operated apparatus and machinery charges;

(iv) all lift and escalator maintenance charges;

(v) water consumed in and conservancy charges payable in respect of PPPP;

(vi) all repairs and maintenance not being of a structural nature;

(vii) the costs of managing PPPP;

(viii) the costs of all insurance policies in respect of PPPP;
(ix) all rates, taxes, and other charges of every nature and kind which now or may
hereafter be assessed or imposed on the premises the said land or PPPP by the
Government or any local authority;

(x) the costs of any promotional event or activity or exhibition organised by or on
behalf of the Lessor.

The following provisions shall apply in respect of this Sub-clause:-

(aa) The amount of the operating expenses of PPPP shall be computed annually
for the period ending the Thirtieth day of September in each year.

(bb) The Lessee shall within Thirty (30) days after the date of written notification
from the Lessor pay to the Lessor the amount actually owing in respect of
operating expenses as aforesaid in one lump sum in full settlement of the
amount of the service charge attributable to the premises in respect of the
financial year concerned credit being given to the Lessee for all the payments
made by the Lessee to the Lessor as deposit as aforesaid;

(f) To keep the interior of the premises including all floors, walls, and ceilings therein and
also the insides of doors providing access to the premises and the glass windows
(including the outside) locks, fastenings, and keys and all water taps, basins, drains,
down-pipes, water pipes, internal sanitary apparatus, and water tanks therein (but not so
as to make the Lessee liable to replace any water tanks) and also all immersion
heaters, electric light fitting (other than electrical apparatus forming part of the internal
wiring of the premises) and all landlord’s fixtures and fittings therein cleaned and in
good and tenantable repair and condition (fair wear and tear and damage by fire, storm,
tempest, and such other risks against which the Lessor shall have insured save where
the insurance moneys shall be irrecoverable by reason of any act or default of the
Lessee or the servants, licensees, or invitees of the Lessee only excepted) and to make
good any damage caused by the wilful neglect or default of the Lessee or of the
servants, licensees, or invitees of the Lessee to any portion of the premises which are
bound to be maintained under the covenant given by the Lessor in that behalf
hereinafter contained or to the facilities appurtenant thereto.
(g) To permit any caretaker or managing agent employed by the Lessor to enter upon the premises in the ordinary course of his duties and to permit the Lessor and the agents of the Lessor with or without workmen and others at all reasonable times to enter upon and view the condition of the premises and forthwith (so far as the Lessee may be liable) to execute all repairs and works required to be done by written notice given by the Lessor **PROVIDED ALWAYS** that if the Lessee shall not within Fourteen (14) days after service of such notice commence and proceed diligently with the execution of the repairs and works mentioned in such notice it shall be lawful for the Lessor to enter upon the premises and execute such repairs and works and the cost thereof (which expression shall include but not to be limited to all legal costs and surveyors fees and other expenditure whatsoever attendant thereon) shall be a debt due from the Lessee to the Lessor and be forthwith recoverable by action;

(h) To permit the Lessor and the agents of the Lessor with or without workmen and others and with all necessary appliances at all reasonable times (and at any time with or without notice in case of fire defective lavatory fittings water pipes and electric services) to enter upon the premises for the purpose of executing any repairs for which the Lessee may not be liable under the covenants given by the Lessee in that behalf herein contained or any maintenance repairs cleaning examination testing alterations additions improvements or renewals of or to either the premises or any part of PPPP or any adjoining premises or land or to the electricity or water supply or drainage in or under the premises and also for the purpose of painting or treating the outside of all doors or window frames and the exterior of the premises in such colour and in such manner and at such times as the Lessor may desire or direct **PROVIDED THAT** the Lessor shall make good any damage caused thereby to the premises but shall not be liable to the Lessee for any inconvenience or otherwise howsoever in relation to such works or things done as aforesaid;

(i) At the expiration or sooner determination of the term hereby created to paint with two coats of good oil pain (and in the case of walls and ceilings two coats of good plastic emulsion paint) all the wood iron and other parts of the interior of the premises heretofore or usually painted and to grain varnish stop whiten and colour all such parts as have previously been so dealt with such paint varnishing and colouring to be in a colour and shade to be approved of in writing by the Lessor;

(j) Not to use the premises or any part thereof for any purpose other than ......................... without the prior written consent of the Lessor and not to
permit any person to sleep or reside on the premises nor to permit the same or any part thereof to be used for the purpose of storing the personal or other effects of any member of the staff or the Lessee;

(k) Not to permit any part of the premises to be used by others without the prior written consent of the Lessor;

(l) Not to paint affix or exhibit any name or writing or any signboard placard or advertisement in the landings or passages upon or outside any entrances hall window or outside wall of PPPP or any private entrance door or windows to the premises from the landings or passages giving access thereto save in conformity with the Lessor’s architect’s design in size type colour and placing and with the consent in writing of the Lessor first had and obtained PROVIDED ALWAYS that the Lessor shall at the request and cost of the Lessee affix the names of the Lessee in the frame or frames at or near to the entrance doorway to the premises in such manner as is approved by the Lessor;

(m) Not to cause or permit any obstruction to the entrance halls stairs landings passages fire exists lifts and escalators in PPPP;

(n) Not to do or permit to be done anything whereby the policy or policies of insurance on PPPP or any part thereof may become void or voidable or whereby the premium thereon may be increased and forthwith to notify the Lessor of the destruction of or any damage thereto and on demand to repay to the Lessor all sums paid by way of increased premiums and all expenses incurred in or about any renewal of such policy or policies rendered necessary by a breach of this covenant;

(o) Not to transfer sublet or part with possession of the premises or any part thereof without the prior written consent of the Lessor and (if the same is required) of any chargees having a security over the said land and PPPP first had and obtained AND IT IS EXPRESSLY AGREED AND DECLARED THAT upon any breach by the Lessee of this covenant the Lessor may re-enter upon the premises without notice and thereupon the term hereby granted shall determine absolutely. The Lessor expressly reserves the right in its absolute and uncontrolled discretion and without assigning any reason therefore to withhold its consent to any transfer subletting or parting with possession. If the Lessor gives consent the instrument of transfer or subletting shall be registered within two months of the date of the consent with the Lessor’s advocates and a registration fee shall be paid to such advocates and by the Lessee not exceeding
Kenya Shillings ………………….. (KShs………) AND the Lessee will also on demand pay to the Lessor’s managing agent a fee of Kenya Shillings ………………….. (KShs………) in respect of service rendered by it in connection with any transfer or subletting pursuant to the provisions of this sub-clause. Any agreement of subletting shall contain an unqualified covenant by the sub-Lessee in the same terms as this sub-clause. For the purposes of this sub-clause if the Lessee is a private limited liability company or unlimited company any allotment or transfer of shares in the company whereby control of the Lessee shall pass shall constitute a transfer and shall require the consent of the Lessor and (if the case so requires) also of any such chargee accordingly.

(p) Not to make any alterations in or additions to the premises without the previous consent in writing of the Lessor nor to cut maim or injure any of the timbers walls floors ceilings doors windows fixtures or fittings thereof nor to permit any of the aforesaid things to be done PROVIDED ALWAYS that the Lessee with the previous consent in writing of the Lessor having been obtained shall be permitted to:

(i) erect such partitions as shall be desired for the purpose of sub-dividing the premises into sections but all such partitions and all other partitions which may have been erected in the premises by any former lessees thereof shall prior to determination or expiration of this Lease unless otherwise agreed with the Lessor in writing be removed and the Lessee shall make good to the satisfaction of the Lessor all damage occasioned by installing or removing the same;

(ii) effect an interior design and layout of the premises plans for which shall be submitted to the Lessor specifying the materials to be used. The Lessee shall be responsible for the Lessor’s architect’s charges and disbursements which may be incurred in connection with such partition interior design and layout; and

(iii) decorate the premises PROVIDED THAT all such decorations and other decorations which may have been carried on in the premises by any former lessees thereof shall prior to determination or expiration of this Lease unless otherwise agreed with the Lessor in writing be removed and the Lessee shall make good to the satisfaction of the Lessor all damage occasioned by installing or removing the same;

(q) Not to do or to permit or suffer upon the premises anything which in the opinion of the Lessor may be or become a nuisance or annoyance to the Lessor other tenants of
the Lessor or the owners or occupiers of adjoining or neighbouring premises and in particular but without prejudice to the generality of the foregoing not to play any musical instrument or any radio record player or tape recorder in such a manner as in the opinion of the Lessor to constitute an annoyance to the persons aforesaid;

(r) Not to do or to permit or suffer any act which shall amount to a breach or non-observance of any negative or restrictive covenant or special condition contained in any Lease Grant or other instrument under which the said land and PPPP are held by the Lessor or to which they are otherwise subject;

(s) Not without the previous consent in writing of the Lessor to permit to be introduced into any part of the premises any safe or heavy machinery or equipment and not to overload the floors of the premises beyond the margin of safety from time to time prescribed by the architects of the Lessor (which margin of safety it shall be the sole responsibility of the Lessee to ascertain from such architects) and to indemnify the Lessor against all actions claims and demands arising out of any breach of the terms of this sub-clause;

(t) Not to use or permit to be used any passenger lifts or escalators in PPPP for the carriage of any goods package merchandise or offices furniture without the written consent of the Lessor first had and obtained AND ALSO not in any circumstances to allow or permit the total weight of any one load in any passenger lift to exceed the margin of safety prescribed therefore AND ALSO observe at all times the rules as displayed for the operation of the lifts.

(u) Not to permit any open or internal combustion fire to be burned within the premises and not at any time without the previous written consent of the Lessor to introduce or permit to be introduced into the premises inflammable materials of any kind whether for the purpose of repairing or altering the premises or for any other purpose and in the event of any damage to PPPP or loss or damage or any other property of the Lessor or of any other party or death or injure of any persons being caused either directly or indirectly by the burning of any open or internal combustion fire or by the introduction of any inflammable materials (whether or not with consent) to indemnify the Lessor against all losses expenses claims demands and costs whatsoever resulting therefrom including (without prejudice to the generality of this indemnity) current costs of replacement loss of income and public liability.
(v) At the Lessee’s expense to install in the premises such additional fire fighting equipment and appliances as are required by the Lessor if in the Lessor’s opinion (which opinion shall be final and conclusive) the trade business or occupation of the Lessee is such as to necessitate such additional equipment over and above that supplied by the Lessor;

(w) To indemnify the Lessor against any actions claims or demands arising out of leakage or overflow of water from the premises **PROVIDED THAT** the Lessee shall not be liable under the provisions of this sub-clause where any such leakage or overflow arises from structural causes or faults inherent in the design of **PPPP** or of the water reticulation system therein or defects in any material used therein or any failure by the Lessor under the provisions of sub-clause (b) of Clause hereof;

(x) To indemnify the Lessor against all damage loss or injury occasioned to the premises or to any other part of **PPPP** or to any adjoining or neighbouring premises or to any person or persons caused by any act default negligence or omission of the Lessee or the servants agents licensees or invitees of the Lessee;

(y) In the event of **PPPP** or any part or parts thereof being damaged or destroyed by fire or any other risk against which the Lessor shall have insured at any time during the said term and the insurance money under any insurance against fire or such risks as aforesaid effected thereon being wholly or partially irrecoverable by reason solely or in part of any act or default of the Lessee or of any servant licensee or invitee of the Lessee then and in every such case forthwith (in addition to the said rent) to pay to the Lessor the whole or (as the case may require) a fair proportion of the cost of completely re-building and re-instating the same any dispute as the proportion to be so contributed by the Lessee or otherwise in respect of or arising out of this provision to be referred to arbitration in accordance with the provisions of **The Arbitration Act**, Chapter 49 or any Act or Acts amending or replacing the same;

(z) At all times during the continuance of the term hereby created to comply with all laws acts rules regulations or by-laws now or hereafter enacted passed made or issued by the Government of Kenya or any Municipal Township local or other authority in relation to the occupation conduct or user or the premises.

(aa) Within Seven (7) days of the service thereof upon the Lessee to give full particulars to the Lessor of any notice order or proposal relating to or affecting the premises given made or issued under or by virtue of any Act or any rule
regulation order or direction thereunder or under the bye-laws or any competent authority;

(bb) During the last Three (3) months immediately preceding the expiration or determination of the term hereby granted to permit persons with written authority from the Lessor or the agents or the Lessor at reasonable times of the day and upon a previous appointment having been made to view the premises and to permit the Lessor or the agents of the Lessor to enter upon the premises and to affix upon any suitable part thereof a notice board for re-letting the same;

(cc) To yield up the premises at the expiration or determination of the term hereby granted with the fixtures and fittings thereto (other than the partitions fixtures and fittings installed in the premises with the consent of the Lessor pursuant to the provisions of this Lease which shall remain the property of the Lessee) in good and tenantable repair and condition in accordance with the covenants hereinbefore contained;

(dd) To pay all costs in connection with the preparation and completion of this Lease and one counterpart thereof together with all stamp duties and registration fees and other disbursements.

2. The Lessee **COVENANTS AND AGREES** with the Lessor that the Lessee:-

(a) Will not use or suffer the use of any lavatories and water closets for the disposal of refuse or for any purpose which may cause a blockage;

(b) Will not store or place or permit to be stored or placed in or about the premises any engine or moving machinery;

(c) Will pay on demand all costs charges expenses (including advocate’s costs and surveyor’s fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice requiring the Lessee to remedy a breach of any of the Lessee’s covenants and agreements in the Lease contained;

(d) Will comply with and ensure that all persons under the Lessee’s control comply with the current rules and regulations promulgated by the Lessor in respect of **PPPP**.
(e) Will not without the prior written consent of the Lessor alter the electrical equipment or appliances on the premises and will not permit the overloading of the electricity supply;

(f) Will keep the premises free from vermin;

(g) Will not without the prior written consent of the Lessor install any carpet or furniture in the premises in such place or manner as will or may obstruct the use of any emergency window;

(h) To maintain at all times to the reasonable satisfaction of the Lessor an attractive display of any goods sold on the premises in all the windows of the premises and not to paint over or otherwise obscure or block such windows;

(i) Not to obstruct or use any forecourt, hall, staircase, lift, escalator or passageway leading to the premises in such manner as to cause in the opinion of the Lessor any nuisance, damage or obstruction;

3. The Lessor **HEREBY COVENANTS** with the Lessee as follows:-

(a) Subject to Clause 1 hereof to pay all rates taxes charges head rents and outgoings whatsoever which now are or hereafter may become payable in respect of the premises or any part thereof;

(b) Subject to the payment by the Lessee of the rents hereinbefore reserved and provided that all the covenants on the part of the Lessee have been performed and observed and unless prevented by any cause beyond the control of the Lessor to keep in good and tenantable repair and condition of the main structure of **PPPP** including the roof timbers foundations external and load-bearing internal walls (but not the interior faces of such parts of external or internal walls as bound the premises or the rooms therein) and all drains gutters drainpipes water pipes sanitary apparatus wires and cables in or under **PPPP** which serve the same (excluding nevertheless any which lie within the premises and exclusively serve the same) and the entrances staircases landings corridors passenger lifts (if any) and all other parts of **PPPP** enjoyed or used by the Lessee in common with other (hereinafter called “the common parts of **PPPP**”) AND to carry out any repairs to the interior of the premises or to the Landlord’s fixtures fittings and fastenings therein which may become necessary at any time during the term hereby created by reason of structural repairs to or defects in **PPPP** or by reason of any breach or non-performance or the obligations of the Lessor under this clause.
but so that the liability of the Lessor hereunder shall only extend to repairs which may become necessary other than by reason of damage caused by the Lessee or the servants licensees or invitees of the Lessee **PROVIDED THAT** the Lessor shall not be liable for damage caused by or resulting from or arising out of default of any lessees or occupiers of PPPP their servants licensees or invitees with reference to the maintenance or user of any pipes or sanitary water or electrical apparatus therein or caused by any such persons permitting the maximum floor stress of any part of PPPP to be exceeded and **PROVIDED ALSO THAT** the Lessor shall not be liable to the Lessee for any defect or want of repair hereinbefore mentioned unless the Lessor shall have had notice thereof;

(c) Unless prevented by any cause beyond the control of the Lessor to keep clean and adequately lighted the common parts of PPPP during such hours as the Lessor may reasonably decide and to maintain in good working order and repair all apparatus equipment plant and machinery serving the passenger lifts and lift shafts (if any) the water heating system (if any) and the electric lighting and other appliances in the common parts of PPPP **PROVIDED THAT** the Lessor may withdraw the passenger lifts and escalators from service whenever and for such periods of time as may be required for maintenance and repair;

(d) To insure and keep insured PPPP from loss or damage by fire storm tempest and such other risks as the Lessor may deem expedient in some insurance office with underwriters of repute to the full insurable value thereof and to pay all premiums necessary for that purpose **AND** to rebuild or reinstate the premises including the means of access thereto so far as the same may be damaged or destroyed **AND** to apply all moneys received by virtue of such insurance in making good and loss or damage in respect of which the same shall have been received but without prejudice to the liability of the Lessee to pay or contribute towards the cost of such making good in the event of the insurance money being wholly or partially irrecoverable by reason of any act or default of the Lessee or the servants licensees or invitees of the Lessee;

(e) To pay the rent reserved by and to perform and observe the covenants and conditions contained in the Grant Lease or other instrument under which the said land and PPPP are held **AND** to indemnify the Lessee from and against all actions proceedings costs damages claims and demands in respect thereof;
(f) That the Lessee paying the rent hereby reserved and observing and performing the several covenants and stipulations on the part of the Lessee herein contained or implied shall peaceably hold and enjoy the premises during the said term without any interruption by the Lessor or any person rightfully claiming under or in trust for the Lessor.

4. **PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED** as follows:-

(a) If the rent hereby reserved or any part thereof shall at any time be unpaid for fourteen (14) days after becoming payable (whether lawfully demanded or not) or if any of the covenants on the part of the Lessee herein contained shall not be performed and observed then and in any of the said cases it shall be lawful for the Lessor to re-enter upon the premises or any part thereof in the name of the whole and thereupon this Lease shall determine absolutely but without prejudice to the right of action of the Lessor in respect of any antecedent breach of any of the covenants on the part of the Lessee herein contained.

(b) If at any time the premises or any part thereof or the means of access thereout or the landlord’s fixtures and fastening therein shall be damaged or destroyed by fire or other risks against which the Lessor shall have insured so as to render them unfit for occupation or use the Lessor shall (unless the insurance moneys shall be wholly or partially irrevocably by reason solely or in part of any act default or omission of the Lessee) until such time as the same shall again be rendered fit for occupation and use allow to the Lessee a total or proportionate abatement of the rent hereby reserved as the case may be **PROVIDED THAT** the Lessor shall in no circumstances be liable for any damage or loss suffered by the Lessee by reason of such loss or occupation and use of the Premises and **PROVIDED ALSO THAT** the Lessee shall not have any such right of determination of the term hereby created as is contemplated by Section 108(e) of the **Transfer of Property Act, India 1882**;

(c) The Lessor shall not be liable for any loss damage or injury to the Lessee or the servants licensees or invitees of the Lessee caused by:-
(i) Any defect in or negligent working construction or maintenance of the passenger lifts and escalators or of any lighting or other part of the equipment or structure of PPPP or any part thereby;

(ii) Any lack or shortage of electricity water or drainage;

(iii) The overflow of water to the premises from other parts of PPPP which are not in the occupation or control of the Lessor;

(iv) Any act default or negligence of any caretaker attendant or other servants of the Lessor in or about the performance or purported performance of any duty relating to the provision of services or care maintenance or upkeep of PPPP;

(v) Any burglary or theft;

(vi) Any fire howsoever occurring; or

(vii) Any act or default of any lessee of PPPP or any portion thereof or of their servants licensees or invitees with reference to the maintenance or use of any pipes or sanitary water or electrical apparatus therein or the overloading or any floor of any part of PPPP.

**AND** the Lessee shall indemnify the Lessor against all or any claims actions and proceedings by the servants licensees or invitees of the Lessee in respect of such loss damage or injury;

(d) No liability shall attach in respect of any breach of any positive covenant and agreement (other than covenants and agreements for the payment of money) on the part of the Lessor or the Lessee herein contained or implied so long as they shall be prevented from performing the same by statutory restrictions non-availability of labour or materials or matters beyond their control except that if such breach shall occur as aforesaid the Lessor or the Lessee as the case may be shall remedy such breach immediately conditions permit and in the event of any such breach of a covenant or agreement on the part of the Lessee not having been of the said term the Lessee shall forthwith upon such expiration or sooner determination pay to the Lessor such as amount as shall be necessary to remedy such breach as aforesaid;

(e) Neither the Lessee nor the servants visitors or licensees of the Lessee may use any service shift or loading area in PPPP but the Lessor may if it thinks fit upon the written application of the Lessee licence it in writing to use such facilities for such
period and for such purpose and upon such conditions as the Lessor stipulates in such written licence but such licence shall not be unreasonably withheld PROVIDED THAT in no case shall the weight of any one load in such service lift exceed the margin of safety prescribed therefore AND PROVIDED FURTHER that the Lessor may refuse or cancel the use of such facilities by the Lessee at any time if the Lessor in its uncontrolled discretion considers the same to have been abused by the Lessee or that the interests of the Lessor or any other Lessee of PPPP have been or are likely to be prejudiced by the granting of such facilities;

(f) The Lessee shall not be entitled to any right of access of light or air to the premises which would restrict or interfere with the free use of any adjoining or neighbouring property for building or any other purpose;

(g) Except as is provided by sub-clause (b) of this Clause no allowance shall be made to the Lessee for a diminution of rental value and no liability shall fall on the Lessor by reason of any inconveniences annoyance or injury to business arising from the Lessor or the Lessee or others making any repairs alterations additions or improvements in or to any portion of PPPP or the premises or in to any fixture appurtenances or equipment thereof nor shall any liability fall Lessor for failure by it or by other to make any repairs alterations additions or improvements in or to any portion of PPPP or the premises or to the fixtures appurtenances or equipment thereof;

(h) The Lessor shall have the right at any time without the same constituting an actual or constructive eviction and without incurring any liability to the Lessee therefore to change the arrangement and/or location of entrances or passageways doors and doorways and corridors lifts staircases lavatories and washing conveniences or other public parts of PPPP and to change the name number and designation by which it is commonly known;

(i) If the Lessee shall default in the performance or observance of any of the covenants agreements conditions restrictions stipulations and provisions herein contained or implied and on the Lessee’s part to be performed or observed the Lessor may immediately or at any time thereafter and without notice perform the same for the account of the Lessee and if the Lessor shall make any expenditure or incur any obligations for the payment of money in connection therewith including but not limited to advocates’ fees instituting prosecuting or defending any action or proceedings such sums paid or obligations incurred with interests and costs shall be deemed to be additional rent hereunder and shall be paid by the Lessee to the Lessor.
within Seven (7) days of the furnishing or rendering to the Lessee of any bill or statement thereof;

(j) The Lessor and its agents having made no representations or promises with respect to PPPP or the said premises except as herein expressly set forth the taking possession of the premises by the Lessee shall be conclusive evidence as against the Lessee that the Lessee accepts the same as they are and that the Premises and PPPP were in a good and satisfactory condition at the time such possession was so taken;

(k) If the Lessor shall be unable to give possession of the premises on the date of commencement of the said term for any reason the lessor shall not be subject to any liability for its failure to give possession on such date nor shall any such failure in anywise affect the validity of this lease of (save as hereinafter otherwise provided) the obligations of the Lessee hereunder nor shall such failure be construed in anywise to extend the said term PROVIDED HOWEVER that in such circumstances the rent hereby reserved shall not become payable until the date on which the premises become available for occupation by the Lessee;

(l) The failure of the Lessor to seek redress for violation of or to insist upon the strict performance or any covenant agreement condition restriction stipulation or provision or this Lease or of any of the Rules and Regulations from time to time promulgated by the Lessor shall not prevent any subsequent act which would have originally constituted a violation from having all force and effect of an original violation AND the receipt by the Lessor of any rent with knowledge of the breach of any covenant agreement condition restriction stipulation or provision or this Lease shall not be deemed to be a waiver of such breach NOR shall the failure of the Lessor to enforce any such Rule or Regulation as aforesaid against the Lessee and/or any other Lessees in the premises be deemed to be a waiver of any such Rules and Regulations. No provision of this Lease shall be deemed to have been waived by the Lessor unless such waiver be expressly made by the Lessor in writing NOR shall any payment by the Lessee or any receipt by the Lessor of a Lessor amount than the monthly rent hereby reserved be deemed to be other than an account of the earliest stipulated rent nor shall any endorsement or statement on any cheque or any letter be an accord and satisfaction and the Lessor may accept any such cheque or payment without prejudice to its right to recover the balance or such rent or pursue any other remedy in this Lease provided;
Any notice or other communication bill or statement provided for by this Lease shall be in writing and any notice communication bill or statement to Lessee shall be sufficiently served if addressed to the Lessee and delivered to the premises or sent by registered post to the Lessee’s last known address in the said Republic and any notice or communication to the Lessor shall be sufficiently served if delivered to it personally or sent to it by registered post to its last known address in the said Republic or served on any agent authorised by the Lessor to receive or who has in fact on its behalf collected the rent of the premises. Any notice communication bill or statement served by registered post shall be deemed to have been served within Four (4) days following the day on which it is posted.

5.(a) In consideration of this Lease being given to the Lessee at the request of the Guarantor to the Lessor the Guarantor HEREBY GUARANTEES to the Lessor the payment by the Lessee of the rent hereby reserved and all sums payable by the Lessee hereunder and the due performance and observance by the Lessee of all the provisions and conditions hereof and in the event of any default by the Lessee the guarantor HEREBY COVENANTS AND AGREES with the Lessor to pay the said rent and any sums becoming due to the Lessor from the Lessee hereunder and all losses damages expenses and costs suffered by the Lessor as a result of non-payment or breach by the Lessee or non-performance or non-observance of any of the provisions and conditions hereof:

(b) The guarantee aforesaid shall not be discharged by the death or bankruptcy of the Guarantor nor by any time or indulgence granted by the Lessor to the Lessee or by any variation in terms thereof without the prior consent or the Lessor.

In this Lease where the context so admits:-

(i) the expression “the Lessor” includes its successors and assigns;
(ii) the expression “the Lessee” includes its successors and assigns;
(iii) the expression the “Guarantor” includes its successors and assigns;
(iv) words importing the singular number only include the plural number and vice versa and where there are two or more persons included in the expression “the Lessee” or (as the case may be) “the Guarantor” covenants and agreements expressed to be made
by the Lessee or (as the case may be) the Guarantor shall be deemed to be made by
such persons jointly and severally;

(v) where there are two or more persons included in the expression “Lessee” or (as the
case may be) “the Guarantor” such expression shall include all or both or such
persons jointly and severally and all covenants and other provisions herein contained
shall be binding on all or both and each of such persons jointly and severally and any
act default or omission by the Lessee or (as the case may be) the Guarantor shall be
deeded to be an act default or omission by any one or more of such persons.

**AND** the Lessee hereby accepts this Lease subject to the covenants conditions provisions
stipulations and agreements

**IN WITNESS WHEREOF** this Lease has been duly executed the day and year first
hereinbefore written.

**SEALED** with the Common Seal of)
the **LESSOR** in the presence of:

) ) ) )
Director ) )
Director/Secretary ) )

**SEALED** with the Common Seal of)
the **LESSEE** in the presence of:

) ) )
Director ) )
Director/Secretary ) )

**SIGNED by** ......................... )
as Guarantor in the )
presence of :- )
THE MEMORANDUM HEREBEFORE REFERRED TO:

1. The Government Lands Act (Chapter 280)
2. The Special conditions contained in the said Grant.
3. The Leases registered and noted in the said Grant.
Appendix XVI: Sub-Lease

REPUBLIC OF KENYA

THE REGISTERED LAND ACT

(Cap 300)

MINING LEASE

TITLE NUMBER:

We, ___________________________ of P.O. Box _______ in the Republic of Kenya (hereinafter called "the Sub-Lessor") hereby Sub-Lease to

of P.O. Box ______. Nairobi (hereinafter called "the Sub-Lessee") ALL THOSE the mines pits veins beds and seams of Gypsums or Alabaster and Anhydrite (hereinafter called the "demised minerals") lying and being within and under the land comprised in the above mentioned title together with the rights liberties powers and authorities hereinafter contained and being namely:

(i) To search for win work and get raise and carry away make merchantable and dispose of the demised mineral.

(ii) To use and enjoy all such pits shafts grooves tunnels soughs levels trenches sluices way-gates water-gates gutters and other works as are now existing in or under any part of the said land and which have been heretofore used or employed in working the demised minerals or any part thereof for working and carrying away the produce of any other beds bands veins seams and deposits from or out of any adjoining or other mines lawfully worked by the Sub-Lessee.

(iii) To sink drive carry and make such pits shafts drifts and levels way-gates water-gates and other works in upon or under the said land and to erect and construct thereon or therein such engines and machinery and use occupy maintain and amend the same in such a manner as shall be necessary or expedient and to use all or any other lawful ways and means as well for winning working and PROVIDED ALWAYS THAT in
the working and winning of the demised mineral no damage shall be done to any public highway and that such of the demised mineral as lie under or adjacent to any line of public railway shall be won wrought raised or carried away in accordance with and subject to the provisions of any acts of parliament relating thereto TO HOLD the premises hereby granted and demised unto the Sub-Lessee initially for the term of one (1) year from the day of ___________ 199__ (now past) and thereafter automatically renewed for nine one year successive periods determinable nevertheless as hereinafter provided yielded and paying therefore yearly and every year during the said term the monthly consideration of Kenya Shillings (Kshs.__________/=) payable quarterly in advance and the first day of each month clear of all deduction.

1. The Sub-Lessee for itself and for its permitted assigns and to the intent that the obligations may continue throughout the term hereby created covenants with the Sub-Lessor as follows:

a) To pay the consideration hereby reserved or made payable and any increase as hereinafter on the days and in manner aforesaid without any deductions or abatement whatsoever.

b) To pay all existing and future rates taxes payments and outgoings whatsoever which at any time or times shall be imposed and become payable for or in respect of the demised mineral and land or any part therefore or otherwise howsoever in relation thereto and whether payable by the Sub-Lessor or Sub-Lessee in respect thereof except on research as the Sub-Lessee is by law bound to pay notwithstanding any contract to the contrary .

c) To make compensation or satisfaction with the Sub-Lessor and to any occupier or occupiers for the time being of the said land or any part thereof upon over or in relation to which the rights powers and privileges hereby granted are hereby expressed to the made exercisable and to the owner or owners occupier or occupiers of all other land for any damage or injury which shall be done or occasioned by the exercise of the said rights powers and privileges or any of them to the surface of any land or to any buildings roads.
or other works or erections are now erected or made or to be hereafter erected or made on such land or to any vestures or crops standing or growing thereon or to any rivers streams and water courses or otherwise and whether such damage shall have been occasioned by pit banks rubbish heaps railways roads shrinkings or otherwise whatsoever as the Sub-Lessor or such owner or owners or occupiers respectively shall or may be lawfully entitled to for or in respect of such damage or injury such compensation if any dispute shall arise respecting the amount thereof as between the Sub-Lessor and Sub-Lessee to be determined by the arbitration in manner hereinafter provided.

d) To comply with all obligation imposed under or by virtue of any Act or Acts of Parliament for the time being in force and to do and execute or cause to be done and executed all such works acts deeds matters and things as under or by virtue of any such Act or Acts are or shall be properly directed or necessary to be done or executed or in respect of the demised mineral or upon or in respect of any part or parts of the said land upon which the Lessee shall enter or which he shall use or occupy under the liberty in that behalf herein before granted and in particular but without prejudice to the generality of this subclause to comply with all obligations imposed under or by virtue of the Mining Act or any statutory modification or re-enactment thereof for the time being in force and at all times to keep the Lessor indemnified against all claims demands and liability in respect thereof.

c) To keep the said erections and machinery and all pits shafts drifts grooves tunnels soughs levels trenches sluices way-gates water-gates gutters and other works used in connection with the demised mineral in good and substantial repair condition and working order except so far as the same shall cease to be required for the effectual working of the demised minerals.

d) To pay to the Sub-Lessor all costs charges expenses which may be incurred by the Sub-Lessor in abating a nuisance and executing all such works as may be necessary for abating a nuisance in obedience to a notice served by local and public authority.
e) To make and keep in repair at all times during the said term across any railways or tramways made or to be made by virtue of this Sub-Lease such proper and sufficient over under and level crossings with gates gateposts and fastening as may be required by the Sub-Lessor for the use and accommodation of the Sub-Lessor or the person or persons in occupation of the said land.

f) Effectually and properly to fence and protect the said railways and tramways and pits shafts drifts and other openings now made or hereafter to be made on the said land under or by virtue of this Sub-Lease.

g) In working and getting the demised mineral to leave in the said mines sufficient pillars for supporting the roof thereof.

h) In all respect to work manage and carry on the demised mineral regularly and according to the rules and practice of good mining and without unnecessary waste and under the control.

i) Not to interfere with the mines and minerals lying within or under the said land other than the demised minerals or prejudicially to affect the working or the conveyance and the disposal of the produce thereof.

j) To provide and place at all times during the continuance of the said term to have and keep at the pits at which the gypsum or alabaster and anhydrite obtained from the demised minerals or any gypsum or alabaster and anhydrite or other minerals raised led or carried away through any part of the said demised premises or which shall be otherwise worked or rendered workable by virtue of the Sub-lease shall be brought to bank or at some other convenient place or places approved by the Sub-lessee or its agent a sufficient and correct weighing machine with all necessary weights and apparatus for weighing all gypsum or alabaster and anhydrite or other minerals wrought out of the demised minerals or led or carried away or rendered workable by virtue of the powers hereby granted or any of them.
j) At the end or sooner determination of the said term to secure to the satisfaction of the Sub-Lessee or his agents that the surface entrance to every shaft drift or other opening in the said land is provided with an efficient inclosure barrier plug or other device so designed and constructed as to prevent any person from accidentally falling down any shafts or accidentally entering any drift or other opening PROVIDED ALWAYS THAT the Sub-Lessee may upon the Sub-Lessor's request in writing leave and such surface entrances open to serve as watering holes for the Sub-Lessor's animals whereupon the Sub-Lessee's obligations and liabilities hereunder shall cease.

k) At the end or sooner determination of the said term to yield and deliver up to the Sub-Lessor the quiet and peaceable possession of the demised premises with all pits shafts engine houses sheds erections and buildings with the roofs engine houses sheds erections and buildings with the roofs walls and timber hereof and the doors windows and other fixtures belonging thereto and all drifts levels air courses air tubes belonging thereto and all drifts levels air courses air tubes watercourses tram and trolley ways roads railways works and conveniences as shall at any time during the said term be used by the Sub-Lessee in working or carrying on the said mines and the demised mineral in good repair and condition and in particular to deliver up the shafts and principal air courses in a tenantable state unless the same shafts and air courses shall have been previously abandoned or relinquished by the Sub-Lessee with the consent in writing or the Sub-Lessor or his agent (save and except the engines trams trolleys vehicles boxes tubes ropes machinery iron plates rails and chairs and the sleepers and rollers on any tram trolley way or railway and all movable mining stock or plant) used and employed by the Sub-Lessee in upon or about the premises hereby demised (all hereinafter "called the said movable plant") which it shall be lawful for the Sub-Lessee to remove on the expiration or sooner termination of the said term or within six months thereafter on performing or observing the covenants on the part of the Sub-Lessee herein contained) and also within six months after the expiration or sooner determination of the said term to restore to its original state and
condition as near as may be all land which shall have been occupied by any tip or otherwise permanently injured in the exercise of the powers aforesaid or any of them or to pay compensation for such land in case of disagreement between the Sub-Lessor and the Sub-Lessee to be determined by arbitration in manner hereinafter provided.

2. The Sub-Lessor hereby covenants with the Sub-Lessee as follows:

(a) That the Sub-Lessee paying the rents hereby reserved and observing and performing the several covenants and stipulations herein on the Sub-Lessee's part contained shall peaceably hold and enjoy the mines premises liberties and powers hereby demised and granted during the said term without any interruption by the Sub-Lessee or any person rightfully claiming under or in trust from him.

(b) Not to exercise his right of getting working carrying away and disposing of the mines and minerals lying within or under the said land other than the demised minerals under the liberty in that behalf hereinbefore reserved in such a way as unreasonably to interfere with or obstruct the Sub-Lessee in the due enjoyment and exercise of the demised mineral and the right and liberties hereby granted respectively and to make reasonable compensation to the Sub-Lessee for all damage or injury so occasioned to it.

(c) Not at any time during the continuance of the tenancy so long as the Sub-Lessee shall have reasonably observed all the stipulation on its part herein contained to demise or let or agree to demise or let any of the other mines or minerals under the said land to any other Sub-Lessees without previously offering by notice in writing to the demise or let the same to the Sub-Lessee who shall have the option of accepting the terms of the proposed demise or letting offered the Sub-Lessor at any time within three months after service of such notice at the end of which period such option shall not have been exercised by the Sub-Lessor shall be at liberty to demise or let the same to any other Sub-Lessee but so nevertheless that such demise or letting shall not be on more favourable terms than the terms offered to the Sub-Lessee.
(d) On the same written request of the Sub-Lessee made at least One (1) months before the expiration of the term hereby created and if there shall not at any time of such request be any existing breach or non-observance of any of the covenants on the part of the Sub-Lessee hereinbefore contained at the expense of the Sub-Lessor to grant to the Sub-Lessee a Sub-Lease of the premises for a further term from the expiration of the term hereby created for a term at the rent to be agreed by the parties and containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal.

3. Provided always and it is hereby expressly agreed as follows:

(a) If the said rents hereby reserved or any part thereof shall be in arrear for twenty one days and the same shall not be paid when demanded by a note in writing signed by the Sub-lessee or its agents and served upon the Sub-lessee then and in such case it shall be lawful for the Sub-lessee not only to stop the working of any other mineral worked or carried away or made workable by virtue of powers herein contained or any of them but also to enter upon any land in the occupation of the Sub-lessee and to seize and distrain all gypsum or alabaster anhydrite or other minerals which shall be brought to bank form the demised minerals or led raised or carried through the premises hereby demised or otherwise worked and obtained by means of powers hereby granted and to seize and distrain the said movable plant and all the other stock plant and materials of the Sub-lessee to keep and carry away and sell and dispose of in order to pay and satisfy the said rents which shall be so in arrear and also the reasonable costs and expenses of such distress and sale rendering the surplus if any to the Sub-lease.
(b) If any part of the rents hereby reserved shall be unpaid for thirty days next after any of the days thereon the same respectively ought to have been paid as aforesaid whether lawfully demanded or not or incase the Sub-Lessee shall make default in the observance or performance of any of the covenants or agreements herein contained on the Sub-Lessee's part to be observed or performed or in case the Sub-Lessee being a company shall enter into voluntary liquidation (otherwise than for purposes of reconstruction or amalgamation) or if a winding up order or any order appointing a receiver shall be made against the Sub-Lessee or in the case of the assignee of the Sub-Lessee not being a corporation shall become bankrupt or make any assignment for the benefit of their creditors or make any arrangement with the creditors for the liquidation of their debt by composition or otherwise or if the demised premises or any part thereof or the said term or any part of the property real or personal of the Sub-Lessee shall be taken in execution under a judgement or proceeding against the Sub-Lessee or if any distress shall be levied on the Sub-Lessee's goods then and in any of the said case (although no advantage shall have been taken of any previous similar or other default) it shall be lawful for the Sub-Lessor or his agents to re-enter into and upon the demised premises or any part thereof in the name of the whole and to retain repossess and enjoy as if this Sub-Lease has not been made and thereout and therefrom to eject and remove the Sub-Lessee its servants and all the other occupants of the same and upon such re-entry the term hereby created and the liberties and powers hereinbefore granted and every clause and thing herein contained shall absolutely cease and determine but without prejudice to the right of the Sub-Lessor to recover upon any of the covenants and agreements herein contained on the part of the Sub-Lessee which shall then be broken unobserved or unperformed.

(c) If the Sub-Lessee shall be desirous of quitting and delivering up possession of the premises hereby demised and of putting an end to this present demise during the said term and shall serve upon the Sub-Lessor three (3) months notice of such desire and shall reasonably perform and fulfil the said covenants and agreements hereinbefore contained on the Sub-Lessee's part to be paid observed performed and fulfilled respectively and shall deliver up this
Sub-Lease to the Sub-Lessee or his agent then and in such case this present demise shall at the end of such notice period cease discontinue and be utterly void but without prejudice to any right of action which the Sub-Lessee or may or could have had for or in respect thereof.

(d) If the Head-lease under which the Sub-lessor is entitled to the property herein is determined for any reason, then this Sub-lease shall automatically determine forthwith.

4. If any dispute difference or questions shall at any time hereafter arise between the Sub-Lessor and the Sub-Lessee on the account of breach or alleged breach of any of the covenants herein contained or otherwise touching or concerning the working of the demised mineral or in any way relating thereto or touching the construction meaning or effect of the deed or any clause or thing herein contained or the right duties or liabilities of the said parties respectively or touching any valuation matter or thing hereinbefore expressly appointed to be determined or settled by arbitration then every such dispute question or valuation shall be referred to the arbitration of a sole arbitrator under the Arbitration Act or any statutory modification or re-enactment thereof for the time being in force PROVIDED ALWAYS that this clause shall not in any manner abridge any of the right or powers hereinbefore given to the Sub-Lessor or his agent or enable any matter to be submitted to arbitration which under the provisions hereinbefore contained shall be subject to the absolute control or discretion of the Sub-Lessor or its agent.

5. The cost and expenses of and incidentals to the negotiations for the preparation engrossing execution and stamping of this Sub-Lease and counterpart thereof shall be borne by the Sub-Lessee.

6. Any notice required to be served hereunder shall be in writing and shall be sufficiently served upon either party if forwarded to that party by registered post or left at the party's last known address in Kenya. A notice of the Sub-Lessee may be left at the premises. A notice sent by post shall be deemed to be given seven (7) days after
the date of posting thereof AND the Sub-Lessee hereby accepts this Sub-Lease subject to the above covenants conditions provisions stipulations and agreements.

IN WITNESS WHEREOF the Sub-Lessor and the Sub-Lessee have hereunto set their respective seals this day of 1999.

SEALED with the Common Seal of

in the presence of:

Director:

Director/Secretary:

I CERTIFY that the above-named appeared before me on the day of 19 and, being known to me/being identified by of acknowledge the above signatures or marks to be his (theirs) and that he (they) had freely and voluntarily executed this instrument and understood its contents.

Signature and Designation of person certifying

SEALED with the Common Seal of

in the presence of:

Director:
Director/Secretary:

I CERTIFY that the above-named ......... appeared before me on the ................. day of .................................. 19......... and, being known to me/being identified by .......................................................... acknowledge the above signatures or marks to be his (theirs) and that he (they) had freely and voluntarily executed this instrument and understood its contents.

.................................................................
Signature and Designation of person certifying

CERTIFIED that the form of this Sub-lease has been approved under section 108 of the Registered Land Act by the Chief Land Registrar under his reference ........................................... .

CONSENT

................................. the Landlord hereby consents to the within written Sub-lease without prejudice to the Sub-lessee's obligations under the lease dated Signed:
Appendix XVII: Assignment of Lease

ASSIGNMENT OF LEASE

of

Flat let Number Three on Land Reference Number ___________ Nairobi.

Drawn by:

ASSIGNMENT OF LEASE is made the __________ day of __________________ 1999

BETWEEN ____________________________, of care of Post Office Box Number Nairobi in the Republic of Kenya as the executor and trustee of the late (hereinafter called “the Vendor” which expression shall where the context so admits include its successors and assigns) of the one part and ________________________________ a limited liability company of Post Office Box Number ___________ Nairobi aforesaid (hereinafter called “the Purchaser” which expression shall where the contexts so admits include its successors and assigns) of the other part.

WHEREAS:-

(A) By a Lease (hereinafter called “the Lease”) dated the ____________ day of 19____ (registered in the Government Lands Registry in Volume ____ Folio ___) made between ____________________ (therein described and hereinafter called “the Company”) of the one part AND __________________ (therein described) of the other part ALL THAT the property hereinafter described known as Flat let Number Three Selous Court was leased with effect from the ____________ day of 19____ to the said ________________ for the residue then unexpired of the term of ( ) years from the ______ day of ___________________________ 19____ (less the last twenty days thereof) at the annual rent of one peppercorn (if demanded) SUBJECT TO the covenants on the part of the said __________________________ to be performed and observed set out in the Lease.

(B) By an Assignment of Lease dated the ______ day of __________________ 19 (registered in the Government Lands Registry at Nairobi in Volume N.____ Folio
and made between the said __________________________ of the one part and (therein described) of the other part for the consideration therein mentioned ALL THAT the said property was assigned to the said __________________________.

(C) By an Assignment of Lease dated the ______ day of __________________________ 19 (registered in the Government Lands Registry at Nairobi in Volume N.____ Folio ______) and made between the said __________________________ of the one part and (therein described) of the other part for the consideration therein mentioned ALL THAT the said property was assigned to the said __________________________.

(D) The said ________________ died on the _____ day of __________________________ 19 ______.

(E) By a Will with one Codicil and hereinafter called “the said Will” (registered in the Government Lands Registry at Nairobi in Volume N.____ Folio ______) dated the day of __________________________ 19_______ the said appointed __________________________ of P.O. Box _________ to be his executor and trustee.

(F) Probate of the said Will was granted to the said as the sole executor of the said Will by the Probate Division of the Royal Court of Jersey on the ______ day of __________________________ 19_______ and re-sealed by the High Court of Kenya at Nairobi in Probate and Administration Cause Number of ____ by order of the court dated the ______ day of __________________________ 19 ______.

(G) The Vendor has agreed to sell to the Purchaser the said property TOGETHER WITH the Vendor’s __________________________ (_______) shares of Kenya Shillings (Kshs. ________/=) each fully paid in the capital of the Company SUBJECT as aforesaid but otherwise free from encumbrances at the price or the sum of Kenya Shillings __________________________ (Kshs. _____/=).
NOW THIS ASSIGNMENT OF LEASE WITNESSES as follows:-

In consideration of the said agreement and of payment of the said sum of Kenya Shillings (Kshs. ______/=) the Vendor HEREBY ASSIGNES to the Purchaser ALL THAT the Flat let known as Number Three Selous Court situate in the City of Nairobi in the Nairobi Area of Kenya on that piece of land known as Land Reference Number __________ containing by measurement __________________ (______) of an acre or thereabouts being the premises comprised in the First Assignment which said piece of land with the dimensions abuttals and boundaries thereof is delineated on a plan annexed thereon and more particularly on Land Survey Plan Number __________ registered in the Registry of Documents at Nairobi in Volume __________ Folio __________ TOGETHER with FIRST the electric immersion heater and cooker and other fixtures and fittings therein SECONDLY the Store numbered Three on the said Plan THIRDLY garage space numbered Three on the said Plan and FOURTHLY all cisterns tanks covers drain pipes wires ducts and conduits used solely for the purpose of the said Flat let but no others EXCEPT AND RESERVING from the demise the main structural parts of the buildings of which the said Flat let and Store form part including the roof foundations and external parts thereof but not the glass of the windows of the said Flat let or Store nor the interior faces of such of the external walls as bound the said Flat let and Store TO HOLD the same unto the Purchaser for all the residue now unexpired of the said term of Ninety-nine (99) years from the the day of _______ 19 (less the last twenty days thereof) SUBJECT to the said annual rent and to the said reservations exceptions covenants and rights so far as the same are still subsisting and capable of taking effect AND the Purchaser HEREBY COVENANTS with the Vendor that it WILL henceforth during the continuance of the said term of years pay the said annual rent of a peppercorn thereby reserved as and when demanded AND perform and observe the said covenants rights and conditions contained or implied by the Lease and on the part of the Lessee thereunder to be performed and observed so far as the same are still subsisting and capable of taking effect but no further or otherwise AND will indemnify and keep indemnified the Vendor and the estate of the said the FROM and against all actions proceedings costs claims and demands in respect of or arising out of the non-payment of the said rent or non-performance or non-observation of the said covenants rights and conditions or any of such matters so far as aforesaid.
IN WITNESS WHEREOF the duly authorised attorneys of the Vendor have hereunto set their hands and affixed their seals and the Purchaser has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written.

SIGNED by ________________________________  )
and ________________________________  the duly  )
authorized attorneys of the Vendor in the presence of:  )

SEALED with the COMMON SEAL of the Purchaser  )
in the presence:

Director
Director / Secretary  )

__________________________ as Lessor hereby consents to the above Assignment.

Director
For the said  Limited
Appendix XVIII: Extension of Lease

EXTENSION OF LEASE

This EXTENSION OF LEASE is made the day of 1999 BETWEEN

1. VVVVVVVV and RRRRRRRRR of Post Office Box Number ,,,,, Nairobi (collectively called “the Landlord”)

AND

2. HHHHHHHHHHH of Post Office Box Number ,,,,, Nairobi (“the Tenant”).

WHEREAS:

a) The Landlord is registered as proprietor as owner for an estate in fee simple of ALL THAT piece or parcel of land situate in the City of Nairobi in the Nairobi Area of the Republic of Kenya known as Land Reference Number ,,,,/11 (which together with the buildings being thereon is hereinafter called “the Premises”)

b) By a Lease whose particulars are set out in the schedule hereto (“the Original Lease”) the Landlord demised the Premises to the Tenant under the terms rent provisions covenants and conditions more specifically set out in the Original Lease.

c) The Tenant has requested the Landlord to grant to the Tenant a further lease of the Premises for the further term of one (1) year from 1st February, 1999 which the Landlord has agreed to do on the terms hereinafter appearing.

NOW THIS EXTENSION OF LEASE WITNESSETH as follows:-

1. Demise

The Landlord hereby grants and the Tenant hereby accepts a Lease of the Premises for the term of one (1) year from 1st February, 1999.

2. Rent
The rent for the present demise shall be Kenya Shillings One Hundred and Eighteen Thousand Two Hundred and Fifty (K.Shs. 118,250/=) per month payable quarterly in advance.

3. **Determination of Term**

The term of this Lease may be determined by either party upon giving to the other three (3) months’ previous notice in writing of such party’s intention so to do.

4. **Option to renew**

If the Tenant shall be desirous of obtaining a further lease of the Premises and signifies such desire to the Landlord in writing before the expiration of the term of this Lease the Landlord shall grant to the Tenant a further lease of the Premises for the term of One (1) year from the date of expiration of this Lease at such rent as mutually agreed on between the Landlord and the Tenant.

5. **Terms Covenants Conditions etc. of the Original Lease**

The terms covenants conditions and provisions of the Original Lease shall apply to this demise in so far as they are not inconsistent with the conditions contained in this Extension of Lease.

**IN WITNESS WHEREOF** this Lease has been duly executed the day and year first herein written.

**THE SCHEDULE HEREINBEFORE REFERRED TO**

**Particulars of the Original Lease**

**Date:**

**Registered in Volume .......... Folio .......... File .............**

SIGNED SEALED AND DELIVERED by

The LANDLORD in the presence of:-

)  )  )  )  )
CONSENT

We, LLLLLLLL LIMITED hereby consent to the within written Lease PROVIDED that such consent will not prejudice or affect in any way whatsoever our Mortgage dated 3rd July ,,, registered in Volume N50 folio ,, file ,,0.

SIGNED: ..............................................................

For and on behalf of LLLLLL of Kenya Limited

DRAWN BY:-

KKK and Company
Advocates
P O Box
NAIROBI
Appendix XIX: Licence to Occupy Business Premises

LICENCE TO OCCUPY

AN AGREEMENT made the day … … … of … … … … … … … Two Thousand and One

1. PARTICULARS
In this Agreement the following expressions shall have the following meanings.

1.1 The Licensor KKKKK LIMITED of Post Office Box Number BBBBB Nairobi or whose Registered office is at KKKKK House, KKKKK Nairobi.

1.2 The Licensee PPPP the sole proprietor of PPPP & ASSOCIATES of Post Office Box Number ,,,,,,,, Nairobi.

1.3 The Premises Land and buildings shown {for the purpose of identification only} edged red on the plan annexed.

1.4 Designated Space The area shown {for the purpose of identification only} edged red on the plan annexed or such other office or storage (comprising a single area of not less than 1200 square feet) within or outside} the Building as the Licensor may from time to time in its absolute discretion designate.

1.5 Designated Parking The space{s} shown {for the purpose of identification only} marked D & A.

1.6 Access Ways The roads paths entrance halls corridors and staircases of the Premises the use of which is necessary for obtaining access to the egress from the Designated Space and Designated Parking Space or such of them as afford reasonable access and egress as above and as the Licensor may from time to time in {its} absolute discretion designate to the Licensee.

1.7 Licence Period The period from the 1st day of July Two Thousand and One until 31st day of March Two Thousand and Two or the date on which the Licensee's rights under Clause 2 are determined in accordance with Clause 4. 1.
1.8 Licence Fee

Kenya Shillings Thirty Five Thousand (K.Shs.35,000/-) per month payable on or before the 5th day of each month.

2. LICENCE

Subject to Clauses 3 and 4 the Licensor gives the Licensee the right (in common with the Licensor and all others authorized by the Licensor so far as is not inconsistent with the rights given) to use for the Licence Period;

2.1 For the purpose of running an Accountancy practice, the Designated Space;

2.2 For the purpose of parking one (1) private motor car, the Designated Parking Space; and

2.3 For the purposes of access to and egress from the Designated Space and Designated Parking Space, the Access Ways.

3. LICENSEE'S UNDERTAKINGS

The Licensee agrees and undertakes:

3.1 To pay to the Licensor:

3.1.1 The Licence fee of Kenya Shillings Thirty Five Thousand (K.Shs.35,000/-) per month the first payment to be made on or before the 5th day of each month.

3.1.2 On demand a fair and reasonable proportion (apportioned in respect of the Licence Period) of all service charges and other outgoings of a periodically recurring nature incurred in respect of the Premises approximating Kenya Shillings Eleven Thousand (K.Shs. 11,000/-);

3.1.3 VAT from the effective due date of the 1st day of September Two Thousand and One.

3.2 To deposit with the Licensor as security for the performance and observance of the undertakings contained in this Clause Kenya Shillings Forty Five Thousand (K.Shs.45,000/-) such sum to be repayable to the Licensee (less such amount as, shall be due to the Licensor in respect of any non-performance or non-observance by the Licensee) within 14 days of the determination of the Licence Period or such longer period as may be necessary to ascertain such amount due to the Licensor.
3.3 Not to bring any furniture equipment goods or chattels onto the Premises without the consent of the Licensor save as may be necessary for the exercise of the rights given in Clause 2.

3.4.1 To keep the Designated Space and the Designated Parking Space in a clean and tidy condition and free of the Licensee's furniture equipment goods and chattels at the end of the Licence Period.

3.4.2 Not to obstruct the Access Ways or cause the same to become dirty or untidy nor to leave any rubbish on them.

3.4.3 Not to display any signs or notices at the Designated Space without the prior written consent of the Licensor.

3.4.4 Not to use the Designated Space Designated Parking Space or Access Ways in such a way as to cause any nuisance damage disturbance annoyance inconvenience or interference to the Premises or adjoining or neighbouring property or to the owners occupiers or users of such adjoining or neighbouring property.

3.4.5 Not to do any act matter or thing which would or might constitute a breach "of any statutory requirement affecting the Premises or which would or might vitiate 1 whole or in part any insurance effected in respect of the Premises from time to time.

3.4.6 Immediately to give to the Licensor details of the registration numbers of the motor cars which will be parked on the Designated Parking Space and the names of the owners and drivers of such motor cars and to notify the Licensor prior to any change in such details.

3.4.7 To indemnify the Licensor and keep the Licensor indemnified against all losses claims and demands actions proceedings damages costs or expenses or other liability arising in any way from licence any breach of any of the Licensee's undertakings contained in this Clause or the exercise or purported exercise of any of the rights given in Clause 2.

3.4.8 To observe such reasonable rules and regulations as the Licensor may make and of which the Licensor shall notify the Licensee from time to time governing the Licensee's use of the Designated Space the Designated Parking Space or the Access Ways.

3.4.9 To pay to the Licensor on demand and indemnify the Licensor against all costs and expenses (including any VAT) of professional advisers and agents incurred by the Licensor in connection with the preparation negotiation and completion of the licence agreement.
3.4.10 Not to impede in any way the Licensor or its officers servants or agents in the exercise of the Licensor's rights of possession and control of the Premises and every part of the Premises.

4. GENERAL

4.1 The rights granted in Clause 2 shall determine (without prejudice to the Licensor's rights in respect of any breach of its undertakings contained in Clause 3):

4.1.1. Immediately on notice given by the Licensor at any time following any breach by the Licensee of its undertakings contained in Clause 3;

4.1.2 On not less than 28 days' notice given by the Licensor or the Licensee to the other party to expire on the last day of a month;

4.2. The benefit of this licence is personal to the Licensee and not assignable and the rights given in Clause 2 may only be exercised by the licensee {and (his) employees (and customers)};

4.3. The Licensor shall not be liable for the death of or injury to any person or for damage to any property of or any losses claims demands actions proceedings damages costs or expenses or other liability incurred by the licensee or any person referred to in Clause 4.2 in the exercise or purported exercise of the rights granted by Clause 2.

4.4. All notices given by either party pursuant to the provisions of this Agreement shall be in writing and shall be sufficiently served if delivered by hand or sent by recorded delivery to the other party at its (registered office or last known address).

IN WITNESS WHEREOF the Licensor and the Licensee have executed this licence agreement the day and year first hereinabove written.

SEALED with the COMMON SEAL of )
KKKKKK LIMITED In the presence of )
) )
) )
Director )
) )
Director/Secretary )
Signed by the said Surinder Singh

In the presence of

Advocate

Drawn

KKK and Company

KKKKK House

P.O. Box BBBB

Nairobi
Appendix XX: Professional Undertaking

13\textsuperscript{th} July 2001

Axxxxx\& Company
Advocates
Koinange Street
Nairobi

\textbf{Attn: Mr. HH}

Dear Mr. HH,

\textbf{Re: AA (Kenya) Limited \& BB Handling Limited}

We refer to previous correspondence on the above and would kindly request you to let us have the original title documents in respect of the securities held by yourselves together with the duly executed Discharges on the terms of the professional undertaking set out hereunder:

1. That we will hold the documents to your order, returnable on demand and will not release the documents to any Advocate or person whatsoever for any purpose without first obtaining your written consent which will only be granted on such other Advocate giving a Professional Undertaking in terms similar to the present one and on the understanding that whether such Advocate complies with the Undertaking or not, you will continue to hold us liable on our undertaking as herein provided;

2. That we will not utilise the documents for any purpose other than for registering the Discharge and Charge in favour of our client in which case we will let you have a banker’s cheque for

\begin{itemize}
  \item[a)] K.Shs.4,973,364.70 (outstanding as at 27\textsuperscript{th} June, 2001) together with interest accruing on the same at the base rate of 3% p.a (currently 15\%+3\%) up to an agreed limited of K.Shs.5,000,000.00 on account of \textbf{AA Kenya Limited}. Default interest of 1\% per month is charged on any excess over limited;
  \item[b)] K.Shs.8,454,604.10 (outstanding as at 27\textsuperscript{th} June, 2001) together with interest accruing on the same at the base rate of 3\% p.a (currently 15\%+3\%) up to an agreed limited of K.Shs.9,000,000.00 on account of \textbf{BB Handling Limited}. Default interest of 1\% per month is charged on any excess over limited;
  \item[c)] K.Shs.1,471,013.05 (outstanding as at 27\textsuperscript{th} June, 2001) together with interest accruing on the same at the base rate of 3\% p.a (currently 15\%+3\%) up to an agreed limited of K.Shs.1,000,000.00 on account of \textbf{MMM \& Company East Africa Limited}. Default interest of 1\% per month is charged on any excess over limited;
\end{itemize}
Payment of the principal and interest under this clause shall be made to you within seven (7) days of the successful registration of the Discharge of Charge and the Charge or within Sixty (60) days from the date you forward to us the duly executed Discharge of Charge, whichever is the earlier. In this regard, we shall exercise our best endeavours to ensure that registration formalities are completed expeditiously.

3. To pay to you the sum of K.Shs.35,400.00 in respect of your handling charges (all inclusive), such payment to be made at the time of paying the principal and interest owing to our Client as aforesaid.

4. That if the sums outstanding as herein advised are not paid within sixty (60) days from the date when the originals of the title documents and Discharges would in the ordinary course of post be deemed to be received in our offices, then we shall upon demand, return the documents to you in the same condition in which they were upon leaving your offices.

5. We will not present or allow to be presented for registration the Discharge of Charge without simultaneously presenting the Charge in favour of our Client, such joint presentation being subject to the condition that if any of the said instruments is rejected for registration then none of them shall be registered.

We look forward to your confirmation of our Professional Undertaking in the terms aforesaid.

In the meantime, please let us have a counterpart of the Charge to enable us draft the Discharge of Charge.

We look forward to hearing from you.

Yours sincerely,

SSSSSS & COMPANY

SSSSSSSSSSSSSSSSSSSSSSSS

Client.
Appendix XXI: Special Power of Attorney

Appointment

I, MMMM, of Post Office Box Number ***** Nakuru in the Republic of Kenya do hereby appoint ***** BANK OF KENYA LIMITED of Post Office Box Number 30691 Nairobi (hereinafter called “the Attorney”) to be my attorney with authority to do all or any of the acts and things hereunder specified on my behalf in relation to my property known as L R No. 209/***** (hereinafter called “the Property”)

Authority

The Attorney has authority in my name and on my behalf and on such terms and conditions as seen to him expedient to:

1. to sell to any person all or any of my interest in the Property;
2. to charge or mortgage all or any of my interest in the property for any sum at any rate of interest;
3. to lease all or any portion of the property for any term of years at any rent;
4. to demand collect receive and take all necessary steps to recover all rents and other sums owing to me in relation to the property;
5. to obtain or accept the surrender of any lease in which I am or may be interested in relation to the Property;
6. to exercise and execute all powers which are now or shall hereafter be vested in or conferred on me as a lessee or chargee under any Act of Parliament in relation to the Property;
7. to represent me and to appear in my name and stead and on my behalf, before any Land Registry in Kenya and before any other official government or municipal officer or competent local council or any other administrative officers or before any other authority in all matters pertaining to or connected with the Property and to sign and execute all certificates documents contracts and declarations before such authorities or
offices and to perform all actions and matters which may be required by law in connection with this power of attorney;

8. to enter and permit others to enter the Property;

9. to take any action to abate any nuisance;

10. to warn off prohibit and proceed against any trespassers;

11. to enforce any covenant condition and stipulation in any lease or tenancy agreement;

12. to exercise any right of re-entry or re-possession;

13. to give or receive notices for any purpose relating to the Property;

14. to oppose any application which may be detrimental to the Property its occupants its use enjoyment or its value;

15. to bring or defend continue or discontinue any legal proceedings;

16. to refer to arbitration any question affecting the Property;

17. to employ an estate agent Advocate accountant or other professionally qualified person to assist him in the performance of its function;

18. to appoint any agent to do any business which it is unable to do itself or which can more conveniently be done by an agent;

19. to make any payment which is necessary or incidental to the performance of its functions under this power of attorney;

20. for me, and in my name, to sign all such transfers and other instruments and to do all such act, matters and things as may be necessary or expedient for carrying out the powers hereby given and for recovering all sums of money that are now or may become due or owing to me in respect of the Property, and for enforcing or varying any contracts, agreements or conditions binding upon any lessee, tenant or occupier of the Property or upon any other person in respect of the same, and for recovering and maintaining possession of the Property and for protecting the same from waste, damage or trespass;
21. to do all other things incidental to the above powers or which it thinks necessary or expedient in relation to the Property as fully and effectually as I could do them myself.

REVOCATION
I shall not revoke this Power of Attorney as long as I remain indebted in any manner to the Attorney.

IN WITNESS WHEREOF I have hereunto set my hand and seal today this ___ day of 1999.

SIGNED and SEALED by me the ___

said MMMM

in the presence of:-

Advocate
Appendix XXII: General Power of Attorney

POWER OF ATTORNEY

-TO-

SSSSSSS

I, CCCCCC of Post Office Box Number MMM Gab, Botswana HEREBY APPOINT my son SSSSSSSS of Post Office Box Number 60161 Gaborone, Botswana AS MY TRUE AND LAWFUL ATTORNEY for and in my name to manage, transact and generally conduct all lawful business, act or activity on my behalf and in my name without any reference to me AND without prejudice to the generality of the foregoing to sign, attend and otherwise participate on my behalf and in my name (in so far as my signature attendance or participation would be requisite) all documents, correspondence, meetings and other activities relating to:

(a) ordinary correspondence, checks and other bills of exchange;
(b) hiring, leasing, transferring and mortgaging of any of my property;
(c) taking of leases and mortgages by myself;
(d) opening and maintenance of any type of account with any bank or financial institution;
(e) recovery of any and all moneys, debts or property due and owed to myself;
(f) taking delivery of letters, telegraphic messages, drafts, packages and securities of any kind, from the Post Offices or from Railway, Airline, Express or Steamship companies against the necessary receipt and discharge signature;
(g) procurement of insurance against fire, marine or other risks to any of my property, or in which I may be concerned or have or represent any interest;
(h) registration of deeds and other documents and these presents and payment of any and all taxes, fees or other governmental charges on my behalf determined by law;
(i) attachment and distress;
(j) probate and administration of debtors’ estates;
(k) appointment of a liquidator or receiver of any debtor;

(l) institution of proceedings in bankruptcy, insolvency or judicial liquidation;

(m) attending, taking part in or voting at any and all meetings of creditors, shareholders, directors or officers of any corporation or association in which I have an interest or to give proxy therefore;

(n) arbitration, suits, actions and other legal or equitable proceedings in which my interests are concerned;

(o) representation and defence of myself and my interests before any and all judges and courts, of all classes and jurisdictions, in any action, suit or proceeding in which I may be a party or may be interested in administrative, civil, criminal, contentious or contentious-administrative matters, and in all kinds of lawsuits, recourses or proceedings of any kind or nature, with complete and absolute representation of myself, whether as plaintiff or defendant, or as an interested party for any reason whatsoever and with power to institute actions, file statements of defence, exceptions and counter demand, submit proofs and allegations, initiate the regular and special recourses, make bids, undertake the execution of sentences, challenge all kinds of judges or officials, propound interrogatories, request the recognition of signatures or of documents, institute all kinds of actions for the repression of crimes, and desist from all classes of actions, exceptions and recourses; and for the purpose of representing myself before any and all judges and courts and in any action, suit or proceeding whatsoever in which my interests are concerned, to employ, retain, dismiss and grant all necessary powers in favour of solicitors, proctors, lawyers or other persons suitable to defend the rights, privileges and interests of myself; and, in general, to exercise all the rights of myself in all kinds of suits, actions and legal or equitable proceedings, with power to collect the amount sums lodged in Court on behalf of myself and for such amounts collected to make out receipts in legal form;

(p) employment, retention, suspension or dismissal of any and all employees in my employ;
(q) execution signing sealing and delivery of all deeds contracts receipts acknowledgement
notices instruments documents and letters necessary and proper for effectively doing or
causing to be done any or all of the acts and things which the Attorney is by these
presents empowered to do on my behalf;

(r) generally to do or cause to be done for and on my behalf all acts and things whatsoever
whether expressly mentioned herein or not which may seem to the Attorney to be
requisite or expedient to be done or caused to be done on my behalf.

**IN WITNESS WHEREOF** I have hereunto set my hand and fixed my seal this … … day of …
… … … … Two Thousand.

**SIGNED** and **SEALED** by me the said )

 HHHHHH )

 in the presence of:- )

 )

 Advocate )

 **DRAWN BY:-**

 SSSS and Company
 Advocates
 **NAIROBI**
Appendix XXIII: Revocation of Power of Attorney

Date received for Presentation Book Registration Fees
Registration………… Number………………… K.Sh……………Paid

The Form of this instrument is approved under Section 116 of the Registered Land Act Vide Ref: CLR/R/vv/Vol. IV/1v on 11.4.90.

GOVERNMENT LANDS ACT

REGISTERED LAND ACT

LAND TITLES ACT

REGISTRATION OF TITLES AND DOCUMENTS ACTS

CHAPTERS 280, 300, 282, 281 AND 285

REVOCATION OF POWER OF ATTORNEY

THIS DEED OF REVOCATION is made the day of One Thousand Nine Hundred and Ninety-eight by THE FIRST ***** BANK LIMITED of Post Office Box Number mmmm Nairobi in the Republic of Kenya.

1. By a Deed dated the Eleventh day of February One Thousand Nine Hundred and Ninety-four whose particulars of entry in the register of Powers of Attorney and registration districts are set out in the schedule hereto FIRST ***** LIMITED for whom we are the successors appointed MMMM of Post Office Box Number mmmm Nairobi to be its true and lawful Attorney and for it and in its name as attorney to perform all the singular the acts and things set out in the said Deed.
2. As the successors of **FIRST ***** LIMITED**, we **THE FIRST ***** BANK LIMITED** are desirous of revoking the said appointment of Attorney of the said **MMMM**.

**NOW THIS DEED WITNESSETH** that we, **THE FIRST ***** BANK LIMITED** hereby revoke and annul the said Deed of Power of Attorney and every power and authority thereby conferred on the said **MMMM** upon and subject to which the same would be at the date hereof if the said Deed has never been executed in favour of the said **MMMM**.

**DATED** this day of 1998.

**IN WITNESS WHEREOF** we have hereunto caused our common seal to be affixed the day and year first hereinbefore written.

**SEALED** with the common seal )

of **THE FIRST ***** BANK LIMITED** in the presence of:-

Director )

Director/Secretary )

**THE SCHEDULE HEREINBEFORE REFERRED TO**

1. Land Titles Registry – Nairobi – No. IP/A 2bb3/1;
2. Land Titles Registry – Mombasa – No. CR/PA 8bbb10;
3. District Land Registry – Nairobi – No. 4 of 4/bbbb/bbb;
Appendix XXIV: Deed of Hypothecation

REPUBLIC OF KENYA

THE CHATTELS TRANSFER ACT
(CHapter 28)

DEED OF HYPOTHECATION

AFFIDAVIT ON REGISTRATION OF INSTRUMENT

I, … … … … … … … … … … … … … … … of Post Office Box Number dddddd Nairobi in the Republic of Kenya, hereby make oath and say as follows:-

1. The document attached hereto and Marked “A” is a true copy of an instrument under the above mentioned Act, and of every Schedule or Inventory thereon endorsed or thereto annexed or therein referred to and of every attestation of the execution thereof as made and given and executed by DDDDDD.

2. The said Instrument was made and given by the said DDDDDD on the … … … day of … … … … Two Thousand.

3. I was present and saw DDDDDD duly execute the instrument on the … … … day of … … … Two Thousand at the Dddddd Bank Limited business premises, Sound Plaza, Westlands, Nairobi.

4. The said DDDDDD is a sole trader trading as MENENGAI DDDDDD and of Post Office Box Number dddddd, Nakuru and residing at … … … … … … … … … … … … … … … … … … in Nakuru.

5. The name subscribed to the said instrument as that of the witness attesting the due execution thereof by the said DDDDDD is in the proper handwriting of me this deponent.

SWORN at Nairobi this … … …

day of … … … … … 2000

BEFORE ME

COMMISSIONER FOR OATHS
TO: THE MANAGER

DDDDDD BANK LIMITED

SOUND PLAZA

WESTLANDS

NAIROBI

SIR,

IN CONSIDERATION of DDDDDD BANK LIMITED a Limited Liability Company incorporated in the Republic of Kenya and carrying on banking business pursuant to the provisions of the Banking Act (Chapter 488, of the Laws of Kenya) and of Post Office Box Number dddddd Nairobi in the said Republic (hereinafter referred to as “the Lender” which expression shall where the context so admits include its successors and assigns) lending or making FURTHER advances by way of a loan or other banking facilities on the terms and conditions and for the period agreed by the Lender in the aggregate sum of Kenya Shillings Seventeen Million (K.Shs.17,000,000.00) together with interest thereon as hereinafter stated to myself to bring to the maximum aggregate the facilities made available to myself by the Lender the sum of Kenya Shillings Twenty Five Million (K.Shs.25,000,000.00) together with interest thereon as hereinafter provided, I DDDDDD trading under the name and or style of
MENENGAI DDDDDD and of Post Office Box Number dddddd Nakuru in the said Republic **HEREBY HYPOTHECATE** to the Lender by way of first Charge: All goods of the description set out in the Schedule hereto now or at any time hereafter belonging to or in the disposal of me and which are now in or shall at any time hereafter be brought into the premises situate on Plot No. 13, George Morara Avenue, Section 22 Nakuru and L.R. No. dddddd Nakuru, and L.R. No. dddddd/79521/11, Nairobi all in the said Republic respectively being **ALL THAT** the Premises in which I am carrying on my business under the name or style as aforesaid belonging to or in the occupation of me at Nakuru and Nairobi aforesaid or at any of the godowns and or shops and or premises in the occupation of me in the said Republic (hereinafter called “the said Premises”) **AND** all other goods of the description now or at any time hereafter belonging to or in the disposal of me, whether lying in or at any premises or place other than the said Premises or in the course of transit, shipment or delivery (all of which goods, shall hereinafter when referred to collectively be called “the Hypothecated Property”) **TO SECURE** the repayment on demand of all advances made or which may be made to me by the Lender in my account or otherwise and the payment and discharge on demand of all other moneys and liabilities which now are or at any time hereafter may be due or accruing due from me to the Lender, or in respect of which I may be or become liable to the Lender whether in the said Republic or elsewhere, upon any account or in any manner whatsoever and whether actually or contingently alone or jointly with others and whether as principal or surety, including (but without prejudice to the generality of the foregoing) charges for interest as hereinafter mentioned to the date of payment, commission and charges of the Lender and all legal and other costs, charges and expenses incidental to this security or any other security held by the Lender for the indebtedness or any part thereof or to the enforcement thereof.

I, further **AGREE AND UNDERTAKE** as follows:-

1. Interest on the amount from time to time of my indebtedness to the Lender shall be payable at such rate or rates which the Lender for the time being charges to its
Customers **AND IT IS HEREBY AGREED** that the Lender shall in its discretion have full power from time to time to increase or decrease such rate of interest and to charge different rates for different accounts and such interest shall be calculated on daily balances and debited monthly by way of compound interest.

2. All moneys hereby secured shall be paid by me to the Lender on demand (whether orally or in writing). The Lender shall be entitled so to demand payment at any time and shall be under no obligation to grant or continue any advance or accommodation except as the Lender may from time to time in its sole discretion think fit.

3. During the continuance of this security I will keep in the said Premises goods belonging exclusively to me or of which I have full power to dispose of the description set out in the Schedule hereto and of a total market value equal to the amount for the time being of my indebtedness to the Lender plus a margin of fifty (50) per cent or such other percentage as the Lender may from time to time require at its absolute discretion and I shall not except upon sale thereof as hereinafter mentioned or with the prior permission in writing of the Lender remove or permit the removal from the said premises of any of the goods now therein or hereafter brought there into.

4. I shall furnish to the Lender at the close of business hours on the last day of each month and at such other times as the Lender may require, full and correct particulars of all the goods of the said description belonging to or in the disposal of me as aforesaid and then in the said premises and of then market value thereof.

5. I will keep the goods hereby hypothecated separate and apart from all other goods in my possession and will keep the same from being distrained for rent, rates or taxes, or taken or attached under any execution.

6. I will keep the goods hereby hypothecated in good condition and will insure and keep insured the same in the joint names of myself and the Lender against fire and such other risks as the Lender may require to their full value and will on receipt of any
moneys under any such insurances forthwith pay the same to the Lender to be applied in reduction of my indebtedness to the Lender. Notwithstanding anything herein contained the Lender will be at liberty itself to insure all or any of the goods hereby hypothecated and charge the cost thereof to me.

7. Unless otherwise directed by the Lender, I shall be at liberty in the ordinary course of business to sell all or any of the goods hereby hypothecated but I will upon receipt of the proceeds of every sale of the said goods pay the same forthwith to the Lender to be applied in reduction of my indebtedness to the Lender.

8. The Lender or any person authorised by the Lender may at any time or times enter any premises or places where the goods hereby hypothecated or any of them are kept and inspect and take particulars thereof.

9. The Lender or any person authorised by the Lender may at any time or times, after the power of sale hereinafter contained shall have become exercisable, enter any premises or place where the goods hereby hypothecated or any of them may be and take and retain possession of the said goods or any of them and I will, on being so required by the Lender take all steps necessary to give to the Lender or its nominees possession and control of the said goods or any of them, and for that purpose I will endorse and deliver to the Lender all documents of title relating to the said goods or any of them and sign all such documents and do all such acts and things as may be required by the Lender.

10. In the event of one or more of the following events occurring namely:-

(a) If I shall make default in payment on demand of any moneys the payment whereof is hereby secured or in the performance or observance of any term or undertaking contained in this security and on my part to be observed or performed;

(b) If I commit any act of insolvency or if any petition for adjudication or order of adjudication of me as insolvent be presented or make;
(c) If, I being a Company, an order is made or a resolution passed for the winding up of my Company or a petition for such winding up is filed or notice of a meeting to such a resolution is issued;

(d) If a Receiver is appointed of my Company (if I be a Company) of all or any part of my property);

(e) If I cease or threaten to cease to carry on business;

(f) If any execution or other similar process shall be levied or issued against me;

(g) If in the opinion of the Lender the security hereby created is for any other reason in jeopardy but so that this clause shall not be read sui generis with sub-clause(a) to (f) hereof;

**THEN** the Lender or any person authorised by the Lender may without being liable for any loss or damage sustained thereby at any time thereafter sell or realise in the Lender’s absolute discretion and on such terms and in such manner as the Lender may think fit all or any of the goods hereby hypothecated and the Lender may apply the net proceeds of sale and realisation and any other amounts received by the Lender in or towards payment or discharge of all moneys and liabilities the payment or discharge of which is secured by this security and no previous notice to me of any such sale or realisation shall be necessary and I hereby waive any such notice; and I will accept the Lender’s account as sufficient evidence of the amount produced by any such sale or realisation or receipts and of the amount of any costs charges and expenses thereof and I will sign all such documents, furnish all such information and do all such acts and things as may be required by the Lender for enabling or facilitating any such sale or realisation.

11. Subject as hereinafter provided the total amount recoverable hereunder shall not exceed Kenya Shillings Seventeen Million (K.Shs.17,000,000.00) together with interest thereon at the rate or rates as provided herein for repayment of the moneys
and liabilities thereby secured and the legal and other costs charges and expenses incidental to this security and/or the enforcement thereof **PROVIDED THAT**:-

(a) The aforesaid limit or recoverability shall not in any way prejudice or effect any rights the Lender may have independently of this security to recover the total sum due from me on any such account or in any such manner as herein before mentioned or any excess of such total sum over and above the limit aforesaid;

(b) If my total liability exceeds the said limit the Lender may conclusively determine what part of the said total liability not exceeding the limit aforesaid shall be deemed to be secured hereby and what part or parts shall be deemed to be not so secured;

(c) The Lender shall not be obliged to return or repay to me any of the goods hereby hypothecated of which it has taken possession under the provisions thereof unless and until my total liability to the Lender has been paid and discharged and the Lender shall have a lien with full powers of sale-addition to the security heretofore given over all such goods, for any balance of such total liability in excess of the limit aforesaid.

12. Nothing herein contained shall operate so as to merge or otherwise prejudice affect or exclude any other security, guarantee or lien whether of or against me or of third parties which the Lender may for the time being hold or would have held but for this security or any of the Lender’s rights or remedies under any such security, guarantee or lien or otherwise.

13. I hereby declare that apart from the Charge created by a Deed of Hypothecation dated the 30th day of August, 1999 by myself in favour of the Lender to secure the advancement of Kenya Shillings Eight Million (K.Shs.8,000,000.00) to myself from the Lender the goods hereby hypothecated are free from encumbrances and charges and except for any further or other charges I may create or liens I may allow to arise
in the Lender’s favour I undertake that during the continuance of this security I will not create any mortgage or any specific or floating charge over or allow any lien to arise or affect any of the goods hereby hypothecated.

14. This security, being a continuing security will not be affected by any fluctuations or account or by any account or accounts being brought to credit at any time.

15. If I am a firm the words “I”, “Me” and “Myself” wherever used above shall be construed as including the person or persons from time to time carrying on business in succession to the firm. Notwithstanding the foregoing provisions if any change or changes occur in the constitution of the firm I shall forthwith notify such change or changes to the Lender.

**SCHEDULE DESCRIPTION OF GOODS**

All stock in trade including Tyre Sets and all Tyres Tubes and Flaps and all Motor Vehicles Goods and/or Merchandise of every description, and without prejudice to the generality of the foregoing.

DATED at Nairobi this … … … day of … … … … … 2000.

SIGNED by the said www

ssssssssssssssssssssssssssssssssssssssssssssssssss in the

presence of:-

Advocate:

DRAWN BY:
Appendix XXV: Chattels Mortgage

REPUBLIC OF KENYA

THE CHATTELS TRANSFER ACT
(CHapter 28)

CHATTELS MORTGAGE

AFFIDAVIT ON REGISTRATION OF INSTRUMENT

I, … … … … … … … … … … … … … … … of Post Office Box Number dddddd Nairobi in the Republic of Kenya, hereby make oath and say as follows:-

The document attached hereto and Marked “A” is a true copy of an instrument under the above mentioned Act, and of every Schedule or Inventory thereon endorsed or thereto annexed or therein referred to and of every attestation of the execution thereof as made and given and executed by DDDDDD.

(1) The said Instrument was made and given by the said DDDDDD on the … … … day of … … … … … Two Thousand.

(2) I was present and saw DDDDDD duly execute the instrument on the … … … day of … … … … … Two Thousand at the Dddddd Bank Limited business premises, Sound Plaza, Westlands, Nairobi.

(3) The said DDDDDD is a sole trader trading as MENENGAI DDDDDD and of Post Office Box Number dddddd, Nakuru and residing at … … … … … … … … … … … … … … … … … … … … … … … … … … … … … … … … … … in Nakuru.

(4) The name subscribed to the said instrument as that of the witness attesting the due execution thereof by the said DDDDDD is in the proper handwriting of me this deponent.


SWORN at Nairobi this … … … )
day of … … … … 2000 )

) 

BEFORE ME )

) 

) 

COMMISSIONER FOR OATHS )
REPUBLIC OF KENYA

THE CHATTELS TRANSFER ACT

(CHAPTE 28)

CHATTELS MORTGAGE

THIS INSTRUMENT made the ... day of ... Two Thousand

BETWEEN DDDDDD trading as MENENGAI DDDDDD care of Post Office Box Number dddddd Nakuru in the Republic of Kenya (hereinafter called “the Mortgagor” which expression where the context so admits shall include her personal representatives and assigns) being the owner of the Vehicles described in the Schedule hereto (hereinafter called “the Vehicles” which expression shall include all component parts and accessories thereof) IN CONSIDERATION of DDDDDD BANK LIMITED a Limited Liability Company incorporated in the said Republic and carrying on banking business pursuant to the provisions of the Banking Act (Chapter 488, of the Laws of Kenya) and of Post Office Box Number dddddd Nairobi aforesaid (hereinafter referred to as “the Lender” which expression shall where the context so admits include its successors and assigns) lending to the Mortgagor the sum of Kenya Shillings Seventeen Million (K.Shs.17,000,000.00) (hereinafter called “the Principal”) the Mortgagor HEREBY assigns and transfers in favour of THE LENDER the Vehicles by way of Mortgage to secure the payment and discharge to the Lender of all monies which now are or at any time hereafter may be due and owing by the Mortgagor to the Lender or for which the Mortgagor may be or become liable to the Lender in any manner whatsoever in respect of the Principal together with interest thereon at such rate as is hereinafter set out and together also with any other monies properly payable for the insurance repair and preservation of the Vehicles as hereinafter provided and all other costs charges and expenses (the legal cost
being between Advocate and Client) as shall or may be paid incurred or suffered by the Lender in anywise in connection with the assertion of defence of the Lender's rights under this Chattels Mortgage or the protection and defence of the Vehicles or the demand realisation and recovery of all or any monies hereby secured AND if and when the said sums so owing by the Mortgagor to the Lender shall have been demanded or shall have become payable without demand to pay to the Lender interest at such commercial rate or rates then being applied by the Lender on the sum or sums so owing or outstanding from the time of such demand or from the time when the said sum or sums become payable until the actual payment thereof (as well after as before any judgment) PROVIDED ALWAYS that the total principal monies for which this Chattels Mortgage constitutes a security shall not at any one time exceed Kenya Shillings Seventeen Million (K.Sh$17,000,000.00) to which shall be added all other monies costs charges and expenses as aforesaid and interest as herein provided until actual payment thereof AND IT IS HEREBY AGREED AND DECLARED by the Mortgagor as follows:-

1. The Mortgagor shall pay interest on all monies and liabilities from time to time due or outstanding at such rate or rates as the Lender shall at its sole discretion from time to time decide with full power to the Lender to charge different rates for different accounts and such interest shall be calculated on daily balances and debited monthly in the usual mode of the Lender.

2. All payments of the Principal and interest for which this Chattels Mortgage is security shall be payable by the Mortgagor on demand.

3. During the continuance of this security the Mortgagor shall:
   (a) At all times keep the Vehicles comprehensively insured with an insurance office of repute approved by the Lender against loss or damage by accident fire and theft and such other risks as the Lender may from time to time require to the full replacement value of the Vehicles under a policy (hereinafter called “the said Policy”) in the joint names of the Lender and the Mortgagor which states that no payment is to be made to the Mortgagor under the said policy until the Lender’s
interest therein has been discharged and will duly pay all premiums necessary for effecting and keeping up the said policy and will on demand produce and (if required) deliver to the Lender or their authorised agents the said policy and the receipts for payment of premiums. The Mortgagor hereby irrevocably appoints the Lender as the Mortgagor's agent for the purpose of receiving all monies due and payable to the Mortgagor under the said policy and giving a discharge thereof;

(b) Keep the Vehicles in good state of repair and in perfect working order and replace all missing damaged broken or worn out parts with parts of equal quality and value and any such replacement parts shall be subject to this Chattels Mortgage;

(c) Punctually pay all registration charges license fees rent rates taxes and other outgoings payable in respect of the Vehicles or the use thereof and produce to the Lender or their authorised agents on demand the last receipt for all such payments;

(d) Permit the Lender their authorised agents and any person authorised by the Lender or the said agents at all reasonable times to enter upon the land or building in which the Vehicles is for the time being placed or kept for the purpose of inspecting and examining the condition of the Vehicles and if the Mortgagor shall be in default of its obligations under sub-clause (b) hereof for the purpose of effecting repairs to the Vehicles;

(e) Within seven days of receiving any document from any government department local or public authority relating to any matter which might affect the Vehicles give particulars thereof to the Lender;

(f) Punctually pay for all servicing of and repairs and other work done to the Vehicles and spare parts and accessories thereof and keep the Vehicles free from distress execution or any other legal process;
(g) In the event of default by the Mortgagor in respect of any of its obligations under this Chattels Mortgage (in which case the Lender shall without prejudice to its rights under Clause 7 hereof be entitled (but shall not be bound) to take all such actions and make all such payments which the Mortgagor has covenanted but failed to take or make) reimburse the Lender with the expenses of any such actions or payments including without prejudice to the generality of the foregoing expenses incurred by the Lender (including legal costs on a full indemnity basis) incurred by or on behalf of the Lender in ascertaining the whereabouts of taking possession of preserving insuring and storing the Vehicles and of any legal proceedings by or on behalf of the Lender to enforce the provisions of this Chattels Mortgage any expenses of any type referred to in this sub-clause incurred by the Lender shall be charged upon the Vehicles and added to the amount secured hereunder;

(h) If as required by the Lender affix and at all times during the continuance of this security keep affixed to the Vehicles in a prominent position a notice in such form as the Lender shall require stating that the Vehicles is subject to this Chattels Mortgage;

(i) During the currency of this Chattels Mortgage the Lender shall be entitled to the exclusive possession of the registration books of the Vehicles but nevertheless all the liabilities attending ownership of the Vehicles shall be borne by and be the responsibility of the Mortgagor;

4. The Mortgagor shall not without the prior consent in writing of the Lender or their authorised agents create any mortgage charge or encumbrance ranking in priority to or pari passu with this Chattels Mortgage or sell assign pledge part with possession of or otherwise deal with the Vehicles or any interest therein or create or allow to be created any lien on the Vehicles whether for repairs or otherwise, in the event of any breach of this sub-clause by the Mortgagor, the Lender shall without prejudice to the Lender's
rights under Clause 8 hereof be entitled (but shall not be bound) to pay any third party such sums as is necessary to procure the release of the Vehicles from any Charge encumbrances or lien and shall be entitled to recover such sum from the Mortgagor forthwith, until such recovery of such sum together with interest thereon as provided herein from the date of payment shall be charged upon the Vehicles.

5. (a) the Lender after consultation with the Mortgagor shall have full power to settle and adjust with the insurers all questions with respect to the amount of the monies payable under the said Policy;

(b) any monies received on the said Policy shall be applied at the option of the Lender either in or towards making good the loss or damage in respect of which the monies are received or in or towards the payments of the amount outstanding any surplus being paid to the Mortgagor.

6. The whole of the monies remaining payable hereunder shall immediately become due and payable by the Mortgagor to the Lender without demand if any of the following events occur that is to say:-

(a) the Mortgagor shall make default in the payment of any instalment of the Principal and interest payable in accordance with Clause 2 hereof or in the payment of any other monies hereby secured; or

(b) the Mortgagor fails to observe or perform any of his obligations hereunder; or

(c) if the Mortgagor is a Company, an order is made or an effective resolution is passed for the winding up of the Mortgagor; or

(d) if the Mortgagor is an individual, the Mortgagor makes any arrangements or composition with his creditors or any assignment for the benefit of such creditors; or

(e) distress or execution is levied or threatened upon any of the Mortgagor’s property and remains undischarged for a period of seven (7) days; or

(f) the Mortgagor shall cease or threaten to cease to carry on his business; or
(g) a receiver of the Mortgagor's undertakings or any part thereof shall be appointed; or

(h) the Mortgagor does or suffers to be done any act likely to prejudice the effectiveness of the Lender's rights under this Chattels Mortgage or there is good reason to assume that the Mortgagor's financial position or standing has materially deteriorated.

7. At any time after the Principal (or any part thereof) and other money hereby secured shall have become immediately due and payable hereunder the Lender may appoint in writing any person or persons;

(a) to enter (either personally or by its servants or agents and either accompanied by workmen and others or not so accompanied) upon any land or buildings whereof the Vehicles may for the time being be upon;

(b) to take possession or collect and remove the Vehicles;

(c) to sell or let or concur in selling or letting the Vehicles in such manner and generally on such terms and conditions as he shall think fit and to carry any such sale or letting into effect in the name of the Mortgagor or otherwise;

(d) to do all such other acts and things as may be incidental or conducive to any of the matters and powers aforesaid.

8. No relaxation forbearance delay or indulgence by the Lender in enforcing any of the terms of this Chattels Mortgage or granting of time by the Lender to the Mortgagor shall prejudice affect or restrict the rights and powers of the Lender hereunder nor shall any waiver hereunder or any subsequent or any continuing breach hereof.

9. The security hereby given to the Lender shall be without prejudice and in addition to any other security whether by way of pledge legal or equitable mortgage or charge or otherwise which the Lender may now or at any time hereafter hold on any other property and assets of the Mortgagor for or in respect of all or any part of the indebtedness of the Mortgagor to the Lender or any interest thereon.
10. The Lender shall be entitled to assign the benefit of this Chattels Mortgage or any right or rights hereunder including the right conferred on the Lender to enter upon land or buildings to inspect the Vehicles and to repossess the same and any assignment of the benefit of this Chattels Mortgage shall be deemed to include an assignment of the Lender's rights to enter and repossess.

11. The parties hereto expressly adopt the covenants for title set out in the second Schedule to the Chattels Transfer Act (Chapter 28) and such of the covenants provisions agreements powers and definitions set out in the Third and Fourth Schedule thereto as are applicable to these presents and are not inconsistent herewith and the same shall be implied herein as if this were an Instrument under the said Act.

12. The Mortgagor shall pay legal valuation and all other costs and expenses of and incidental to the preparation and enforcement of this Chattels Mortgage and pending payment by the Mortgagor the said costs and expenses shall be a first charge upon the Vehicles **AND FURTHER** the Mortgagor hereby authorises the Lender to debit any account or accounts of the Mortgagor at any branch of the Lender with the said installments interest legal and valuation costs and all other costs and expenses as aforesaid and all other monies payable by the Mortgagor to the Lender under this Chattels Mortgage.

13. At any time during which all monies and liabilities hereby secured have been completely paid off and satisfied by the Mortgagor to the Lender together with all interest due thereon and the Mortgagor has paid to the Lender all costs and expenses incurred by the Lender in relation to this Chattels Mortgage or otherwise in relation to the Mortgagor the Lender if so requested by the Mortgagor at the expenses of the Mortgagor shall effect a discharge of this Chattels Mortgage by securing a Memorandum of Satisfaction.

**IN WITNESS WHEREOF** the Mortgagor has executed this Instrument the day and year first herein before written.
# THE SCHEDULE

# DETAILS OF THE VEHICLES

1. **One Motor Vehicle**
   
   **Registration Number**: fffff114 N  
   **Make**: Leyland  
   **Chassis Number**: ffffffff  
   **Engine Number**: ffffffff  
   **Type of Body**: P/Mover  
   **Colour**: White  

2. **One Motor Vehicle**
   
   **Registration Number**: bbbbb118 N  
   **Make**: Leyland  
   **Chassis Number**: vvvvvvv  
   **Engine Number**: vvvvvvv  
   **Type of Body**: P/Mover  
   **Colour**: White  

3. **One Motor Vehicle Trailer**
   
   **Registration Number**: bbbbb 7287  
   **Make**: Trailer  
   **Chassis Number**: bbbbb  
   **Type of Body**: Skeletal/Trailer  
   **Colour**: White  

4. **One Motor Vehicle Trailer**
Registration Number: bbbbbbbb
Make: Trailer
Chassis Number: vvvvvvvv
Type of Body: Trailer
Colour: Red

5. One Motor vehicle Trailer

Registration Number: vvvvvvv
Make: Trailer
Chassis Number: vvvvvvvv
Type of Body: Tasker/Trailer
Colour: Red

Signed by the said gggggg

in the presence of:-

Advocate:

Duly authorised Officer of the Lender:
Appendix XXVI: Grant of Profit

REPUBLIC OF KENYA
THE REGISTERED LAND ACT
(Cap 300)

GRANT OF PROFIT

TITLE NUMBER:

_________________________ of P.O. Box _______________ (hereinafter called "the Grantor" which expression shall where the context so admits include his personal representatives and assigns) in consideration of Kenya Shillings (Kshs. __________________________/=) (the receipt whereof is hereby acknowledged) HEREBY GRANTS to __________________________ of P.O. Box _________ (hereinafter called "the Grantee" which expression shall where the context so admits include his personal representatives and assigns) the following profit to arise from the interest comprised in the above mentioned title:

1. The Grantor covenants with the Grantee to allow the Grantee to excavate for, extract and haul away any quantity of the substance known as POZZOLANA rock from the portion of property comprised in the above title containing by measurement approximately ______________________ (_______) acres which portion of land is more particularly delineated and described on the plan annexed hereto and bordered in red and marked "A".

2. The Grantor hereby gives the Grantee the exclusive right for the duration of the profit herein to use the portion of the property containing by measurement approximately (______) acres which portion of land is more particularly delineated and described on the plan annexed hereto and bordered in red and marked "B" for the purpose of carrying out their business operation and storing their equipment.

3. The Grantor covenants with the Grantee that the Grantee shall enjoy the profit 4. The Grantor covenants with the Grantee not to lease, sell or otherwise deal with the said land without the Grantee’s written consent.

5. The Grantor covenants with the Grantee that the Grantee shall enjoy the said profit exclusively and the profit is to be enjoyed in gross.
DATED this day of 1999.

SIGNED by the Grantor in the presence of: )

) I CERTIFY that the above-named .............................................................. appeared before me on the

.............................. day of ........................................ 19........ and, being known to me/being
identified by .............................................................. acknowledge the above
signatures or marks to be his (theirs) and that he (they) had freely and voluntarily executed
this instrument and understood its contents.

.................................
Advocate

SIGNED by the Grantee in the presence of: )

) I CERTIFY that the above-named .............................................................. appeared before me on the

.............................. day of ........................................ 19........ and, being known to me/being
identified by .............................................................. acknowledge the above
signatures or marks to be his (theirs) and that he (they) had freely and voluntarily executed
this instrument and understood its contents.

.................................
Advocate

Registered this ........ day of .................................... 19....

Land Registrar.

comprised herein until such time as all the Pozzolana material is exhausted.
Appendix XXVII: Transfer by Way of Gift

DATED ______________________ 1999

to his wife

TRANSFER BY WAY OF GIFT

in

Land Reference Number ____________________ - Nairobi

Drawn by:

TITLE NUMBER I.R.

THIS TRANSFER BY WAY OF GIFT is made this   day of 1999

BETWEEN _______________________________ of Post Office Box Number,
, Nairobi in the Republic of Kenya (hereinafter called "the Donor" which expression shall
where the context so admits include his personal representatives and assigns) of the one
part and his wife _______________________________ of Post Office Box Number
, Nairobi in the said Republic (hereinafter called "the Donee" which expression shall
where the context so admits include her personal representatives and assigns) of the other
part.

WHEREAS

A. The Donor and Donee are registered as proprietor as lessees as tenants in
common in equal shares from the Government of the Republic of Kenya for a
term of_____________________________ (__________) years from
of the property described hereinafter subject as hereinafter mentioned but otherwise free from encumbrances.

B. The Donor and Donee married each other on the ___________________ at .

C. The Donor has agreed with the Donee to transfer by way of gift to the Donee his half share interest in the said property.

NOW THIS TRANSFER BY WAY OF GIFT WITNESSES AS Follows:-

1. The Donor as beneficial owner and in consideration of his natural love and affection for the Donee hereby transfers unto the Donee his half share interest in ALL THAT piece of land containing by measurement __________________ ( ) of a hectare or thereabouts that is to say Land Reference Number (Original Number ______) which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to a Transfer registered at the Land Titles Registry at Nairobi as Number I.R. ________________ and more particularly on Land Survey Plan Number ____________ deposited in the Survey Records Office at Nairobi subject to the following conditions:
   a) The Donee will not during the Donor's life-time charge, transfer, lease or in any way encumber or part with the possession of or in any way deal with the said property without the Donor's prior written consent.

   b) The Donor will live on the said property free of charge for the rest of his life-time.

2. The Donee hereby accepts the said gift from the Donor subject as aforesaid.
IN WITNESS WHEREOF the parties hereto have executed this transfer the day and year first above written.

SIGNED by the said ____________________ )
in the presence of: )
 )
 )
 )
 )
 )

SIGNED by the said ____________________ )
in the presence of: )
 )
 )
 )
 )

MEMORANDUM

1. The Government Lands Act (Chapter 280).

2. The Registration of Titles Act (Chapter 281).

3. The special conditions contained in a Grant registered as Number I.R. ________.

4. The covenants, conditions, stipulations and easements contained in a Transfer registered as I.R. __________.