

## **GUIDE TO REGISTRATION OF SECURITIES IN KENYA**

This Guide provides a brief description of the procedure for the registration of common Instruments creating Securities in Kenya.

The guide only covers commonly prepared securities of two types, namely

- a) Securities that require registration at the Companies Registry and;
- b) Securities that require registration at the Lands Registry.

For each of the above securities, a brief overview is given of the law governing their followed by the practical steps to be followed starting from the drawing up of the Instrument comprising the security to the issuance of a certificate or other evidence of completion of the registration process.

### **A. SECURITIES REGISTERED AT THE COMPANIES REGISTRY**

The principal or commonly prepared securities that require registration at the Companies registry and which will be considered in this Guide are the Debenture and Chattels Mortgage.

#### **1. Debenture**

The Companies Act (Cap 486) of the laws of Kenya provides the legal regime for the registration of debentures and the issuance of a Certificate as evidence of the said registration.

The issuing of a debenture by a company is done pursuant to powers conferred to the company by its Memorandum and Articles of Association. In practice in addition to the said powers a resolution by the Board of Directors of the company allowing creation of the debenture will be prepared and executed by the directors of the company.

The procedure for registering a debenture is as follows:-

- a. Conducting of a search on the company file at the Companies Registry to ascertain the existence of the company together with information that is pertinent to the creation of a debenture such as establishing that the provisions of the Memorandum and Articles of Association of the company empower it to create a debenture.

b. Drawing up of the Instrument of debenture

c. Execution of the debenture.

The Companies Act provides for execution of the debenture by appending of the company seal which is to be witnessed by the signatures of two directors of the company or one director of the company and its company secretary. Execution of the debenture by the financier is not a mandatory requirement

d. Assessment of Debenture to stamp duty and payment of assessed stamp duty.

Assessment of a debenture to determine the stamp duty payable to the Kenya Revenue Authority is done at the Companies Registry. Presently stamp duty payable has been lowered from 0.2% to 0.1% of the sum secured. This change came into effect following the budget speech read in June 2010.

In order to assess a document to stamp duty there is need to have the Personal Identification Numbers (PINs) of the parties to the transaction (in the case of a debenture the PIN of the lender and the borrower). A PIN is issued by the Kenya Revenue Authority. After assessment of payable duty payment of the tax is made at specified banks which remit details of the payment to the Companies Registry to facilitate the stamping of the debenture instrument.

e. Lodging of the debenture with the Registrar of Companies for stamping.

The Instrument of Debenture is then presented at the registry where an endorsement is made on its first page signifying the payment of duty.

f. Lodging the debenture at the Companies Registry for registration upon making payment, usually a standard fee.

g. Issuance of a certificate as evidence of the creation of a debenture.

## **2. Chattels Mortgage**

The creation of Chattels Mortgage is governed by the Chattels Transfer Act (Cap 28) of the Laws of Kenya. The creation of Chattels Mortgages in Kenya is largely restricted to securities owned by individuals. In this regard, companies are considered to be adequately served by securities arising from debentures and other forms of Charges provided for in the Companies Act.

Registration procedure:

- a. Where the chattels over which a chattels mortgage is created are registered at a public registry such as is the case with motor vehicles then prior to the preparation of a Chattels Mortgage a search relating to the asset is conducted at the relevant registry to ascertain its existence and other pertinent matters that may affect the security.
- b. Drawing up and execution of the Chattels Mortgage instrument.
- c. Assessment of the Chattels Mortgage to stamp duty and payment of assessed stamp duty. Presently stamp duty payable has been lowered from 0.2% to 0.1% of sum secured.
- d. Lodging of the Chattels Mortgage with the Registrar of Companies for stamping.
- e. Lodging of the Chattels Mortgage at the Companies registry for registration upon payment of a standard fee.

## **B. SECURITIES REGISTERED AT THE LANDS REGISTRY**

The principal or commonly prepared security that requires registration at the Lands registry and which will be considered by this Guide is the Charge/Mortgage. Also, given the fact that a Transfer of property into the name of a borrower may be necessary prior to the creation of a Charge the Guide will also mention the steps involved in a Transfer or sale of property.

In order to appreciate the manner in which securities are created over land in Kenya it is worth mentioning that land in Kenya is registered under a number of registration laws/regimes. As a result slightly different procedures and references to documents are given for transactions in land governed by the distinct land registration regimes. Three of the commonly encountered land registration regimes are the Registration of Titles Act (Cap 281), the Registered Lands Act (Cap 300) and the Government Lands Act (Cap 280) of the laws of Kenya. However, it is worth noting that most of the land in Kenya is governed by the Registered Lands Act regime.

### **Legal Charge/ Legal Mortgage**

Under the Registered Lands Act the form of an Instrument creating a Charge and other documents generally required to effect various types of transactions must be approved by the Chief Lands Registrar. In the other land laws/regimes discretion is provided over the form to be taken by the Instrument of Charge

and Instruments relating to all other transactions. Another distinction brought about by the existence of various land regimes is that under the Registration of Titles Act and the Registered Lands Act the Instrument created to indicate a Creditor's interest in real property is referred to as a Charge while under the Government Lands Act the same Instrument is referred to as a Mortgage.

In a nut shell, the procedure to be followed in the registration of an Instrument creating a Charge is as follows:-

- a. Conduct of an official search over the particulars of the title to the property to be charged so as to ascertain ownership and the nature of any encumbrances that may exist over the property.
- b. Drawing up of the Instrument of Charge.
- c. Execution of the Charge. The Charge is executed by both the Chargor (the person who owns the property being charged) and the Chargee (the lender in whose favour the Charge is created). In certain instances there will be 3 signatories to the Charge as is the case where the Chargor (the owner of the property over which a Charge is to be created) and the person to whom the funds are lent (borrower) are distinct persons and are hence required to execute the charge together with the Chargee.
- d. Obtaining all the necessary consents and clearances to enable the registration of the Charge. In this regard, where land is held under leasehold tenure then the consent of the Lessor to the Charge is required together with a Land Rent Clearance Certificate. Where the Charge is over agricultural land then the Consent of the Land Control Board is required. Where the land is situated within a municipality and land rates are payable then a Land Rates Clearance Certificate would be required to be issued by the Local Authority within which the property is located.
- e. Assessment of the instrument to stamp duty and payment of the assessed stamp duty. Presently stamp duty payable is 0.1% of the lent amount.
- f. Lodging of the Charge at the Lands Registry for stamping.
- g. Registration of the charge at the Lands registry upon payment of a standard registration fee. The Charge is accompanied by the original document of Title to the property to be charged so as to enable the making of an endorsement on the said title document indicating the existence of the Charge as an encumbrance over the property.

### **Procedure with regard to Transfers**

- a. Conduct of an official search over the particulars of the title of the property to be charged so as to ascertain ownership and the nature of any other encumbrances that may exist over the property.
- b. Drawing up and execution of a sale agreement for the property.
- c. Drawing up and execution of the Instrument of Transfer.

The Transfer is executed by both the Transferor (the person who owns the property and is selling it) and the Transferee (the person purchasing the property)

- d. Assessment of the instrument of Transfer to stamp duty and payment of assessed stamp duty. Assessment of a Transfer to determine the stamp duty payable to the Kenya Revenue Authority on the Transfer is done by a Government Land Valuer at the Lands Registry. Stamp duty payable on the transfer of real property is computed at either 4% for land situated within a municipality or 2% for property located outside a municipality. Both parties to the transaction require a PIN.
- e. Lodging of the Instrument of Transfer at the Lands Registry for stamping.
- f. Registration of the Transfer upon payment of a standard fee. When lodging the Instrument of Transfer for registration the same should be accompanied by the original documents of Title to the property.

Under the Registration of Lands Act the old Title Deed of the property is delivered up and cancelled and a new Title in the name of the new proprietor issued. In the case of the Registration of Titles Act and the Government Lands Act the existing document of title is duly endorsed with a memorandum of the transfer by the Registrar of Lands clearly indicating that the property has been transferred to the Transferee.