
OVERVIEW OF PERTINENT AMENDMENTS TO LAND LAW STATUTES MADE IN SEPTEMBER 2016

A number of pertinent amendments have been made to the laws governing land in Kenya by the Land Laws (Amendment) Act, 2016. There is now greater clarity regarding the types of transactions that require spousal consent when dealing in property owned by married persons. The amendment to the law has also resulted in clarity regarding the procedure by which expiring leases relating to land held under leasehold tenure granted by the government can be renewed. There has also been a drastic reduction of the mandate of the National Land Commission with a number of the powers it previously exercised reverting to the Cabinet Secretary for Lands. Some of the other changes effected by the said amendments include:

1. Spousal rights over matrimonial property ceasing to be an overriding interest

The Land Registration Act no 3 of 2012 provides for a category of interests over land referred to as overriding interests. These are matters that are taken to affect an interest that a person may hold over land even where the matters do not appear in the register relating to the land. Previously, spousal

rights over matrimonial property were provided for as an overriding interest in the Land Registration Act no 3 of 2012. However, with the coming into operation of the Land Laws (Amendment) Act, 2016 on the 21st of September 2016, spousal rights over matrimonial property have ceased to be an overriding interest.

The Land Laws (Amendment) Act, 2016 has also provided a definition to the term matrimonial property which was previously not defined by the Land statutes. "Matrimonial property" has been defined as any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage. In the past, the absence of a definition to the term had resulted in uncertainty regarding the specific instances in which the consent of a spouse was necessary when transacting in property in which a married person had an interest. With this definition it is now clear that property acquired by spouses prior to their marriage does not qualify as matrimonial property so as to require the consent of a spouse in transactions.

2. Land Registrar empowered to direct the registration of overriding interests

The Land Laws (Amendment) Act, 2016 has further amended Section 28 of the Land Registration Act no 3 of 2012 so as to empower the Registrar to direct the registration of any liability, right and interest provided as an overriding interest so as to have the same defined in a manner the Registrar may deem necessary.

3. Imposition of penalties where documents are presented for registration at a Land registry after prescribed time lines

The Land Laws (Amendment) Act, 2016 has also sought to induce prompt registration of transactions entered into in relation to land by penalizing late registration of documents through the introduction of additional payments to be made for late registration of documents.

Section 36 (4) of the Land Registration Act no 3 of 2012 now provides that where an instrument is presented for registration later than three months from the date of the instrument, then, as well as registration fee, an additional fee equal to the registration fee shall be payable for each of the three months which have elapsed since that date. The said additional fee is, however capped so as not to exceed two times the original registration fees payable.

4. Provision allowing for stay of particular transactions to enable registration of priority land transactions

Section 36 (8) of the Land Registration Act no 3 of 2012 provides for a suspension period to transactions relating to registered land over which an application for an official search has been made. This suspension operates for a period of 14 days from the date on which the application for the official

search is made and in order to apply requires adherence with the following conditions:

- a) the person conducting the official search must have his application for the official search accompanied by a written consent of the proprietor of the land
- b) the application for official search must state within it the particulars of the proposed dealing or transaction in relation to which the search is conducted.

If the above conditions are met then during the 14 day suspension period a properly executed document seeking to effect the transaction mentioned in the official search, if presented for registration, shall have priority over any other document seeking to effect a transaction over the land. The document shall be registered notwithstanding any caution or any other entry for which application for registration may have been made during the suspension period.

5. Execution of documents that are to be registered at Land registries

The amendment to the land laws has also sought to clarify the position with regard to the execution of documents to be presented for registration at a lands registry. Section 44(3) of the Land Registration Act now provides that the execution of any instrument affecting a transaction or disposition of land by a

corporate body shall be effected in accordance with the provisions of the relevant law applicable to the corporate body. For instance, where the corporate body is a company, the Companies Act, 2015 at Section 37 provides for the manner in which legally binding documents relating to companies are to be signed (executed) in order for them to become binding on a company. The Companies Act specifies that documents executed by a company are valid if executed in any one of the following ways:

- i. By affixing of a company's common seal witnessed by the signature of one director.
- ii. Signing on behalf of the company by two authorized signatories of the company.
- iii. Signing by a director of the company in the presence of a witness who attests the signature.

Section 44(3) of the Land Registration Act goes on to provide that where a relevant applicable law is absent then the execution of an instrument affecting disposition of land shall be effected in the presence of either an advocate of the High Court of Kenya, a magistrate, a Judge or a notary public.

6. Clarification of Procedure for renewal of leasehold tenure granted by the government

The Land Laws (Amendment) Act, 2016 has set out a procedure for renewal of a leasehold interest over land. Section 13 (1) of the Land Act No. 6 of 2012 now provides that in the period 5 years before the

expiry of a leasehold tenure the National Land Commission shall be required to notify the lessee by registered mail of the lease expiry date and of the Lessees pre-emptive right to allocation of the land upon application. However, such pre-emptive rights shall only be availed where the lessee is a Kenyan citizen and the land is not required by the national or county government for public purposes.

The new law further provides that if within one year after the notification the lessee shall not have responded then the notification shall be published in one newspaper of nationwide circulation. In addition, where a lease is not granted after an application in the manner provided by the new law the National Land Commission must give the lessee the written reasons for not granting the lease.

Conclusion

The foregoing amendments are laudable as they enhance clarity in relation to property transactions. Indeed, their proper enforcement could serve to expedite transactions relating to land and curb instances where valid land transactions are mired by corruption or delayed because of unclear procedures. Alas, the country has numerous good laws which fail to meet their objectives due to lack of enforcement or poor enforcement. It therefore remains to be seen whether these new laws will be enforced so as to meet their noble objectives.