



FALQs

FREQUENTLY ASKED LEGAL QUESTIONS

PART I

CONVEYANCING AND REAL ESTATE

1. What is the legislative framework governing Conveyancing and Real Estate in Kenya? [<http://kenyalaw.org:8181/exist/kenyalex/index.xql>]

- The Constitution of Kenya, 2010 - Chapter 5 of the Constitution which is titled “Land and Environment” provides a legal framework for transactions in land in the country;
- National Land Commission Act, 2012 (NLCA) which provides for the functions and powers of the National Land Commission (NLC);
- Land Registration Act, 2012 (LRA) and the Land Registration (General) Regulations, 2017 which consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration;
- Land Act, 2012 which gives effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land-based resources;
- Community Land Act, 2016 which provides for the recognition, protection and registration of community land rights, their management and administration;
- Sectional Properties Act, 2020 which provides for the division of buildings into units, ownership of common property of buildings and for the use and management of these units and common areas;
- Distress for Rent Act (Chapter “Cap.” 293) which provides for recovery of rent arrears by a landlord from a tenant by seizing and selling the tenants goods;
- Land Adjudication Act (Cap. 284) which provides for the ascertainment and recording of rights and interests in Trust land;

- Registration of Documents Act (Cap. 285) which provides for registration of documents;
- Rent Restriction Act (Cap. 296) which restricts the increase of rent, fixes standard rents in relation to dwelling houses and for other incidental purposes connected with the relationship of landlord and tenant over a dwelling house;
- Landlord and Tenant (Hotels, Shops, Hotels and Catering Establishments) Act (Cap. 301) which provides for the protection of tenants in commercial premises from eviction or exploitation;
- Land Control Act (Cap. 302) which regulates transactions affecting agricultural land and establishes the various Land Control Boards;
- Landlord and Tenant Bill, 2021 which underwent the 1st reading on 25th March 2021. The Bill seeks to consolidate the laws relating to the renting of business and residential premises and repeal the Distress for Rent Act, the Rent Restriction Act and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, set Tribunals for dispute resolution among other purposes. We shall keep an eye on whether the Bill will be enacted into law.

2. Which Acts of Parliament relating to administration and management of land were repealed following the enactment of the post 2010 land laws?

Acts Repealed by the Land Registration Act:

- The Registered Land Act (RLA) Cap. 300
- The Government Lands Act (GLA) Cap. 280
- The Land Titles Act (LTA) Cap. 282
- The Registration of Titles Act (RTA) Cap. 281
- The Indian Transfer of Property Act, 1882

Acts Repealed by the Land Act, 2012:

- The Wayleaves Act (Cap. 292)
- The Land Acquisition Act (Cap. 295)

Acts Repealed by the Community Land Act, 2016:

- The Land (Group Representatives) Act (Cap. 287)
- The Trust Lands Act (Cap. 288)

3. What is the role of the National Land Commission (NLC)?

[\[https://www.landcommission.go.ke/\]](https://www.landcommission.go.ke/)

- The (NLC) is established under Article 67 of the Constitution of Kenya, 2010. Some of its functions include the management of public land, to advise the Government on issues to do with the national land policy, carry out investigations on any complaints regarding traditional land injustices and recommend the redress available, carry out research into the ideal management of national resources and assess land tax and premiums.

4. What is the role of the Ministry of Lands and Physical Planning vis a vis NLC?

[\[https://lands.go.ke/\]](https://lands.go.ke/)

- In 2014, the NLC sought an advisory from the Supreme Court (In the Matter of the National Land Commission [2015] eKLR) on its role vis a vis the Ministry of Lands. Under the same, the Supreme Court noted that there was a need for separation of these roles.
- In its opinion at Paragraph 310, the Court clarified that the NLC had authority in respect to various processes leading to the registration of land.

- However, neither the Constitution nor statute law confers upon it the power to register titles in land. The task of registering land title lies with the National Government, and the Ministry has the authority to issue land titles, on behalf of the said Government.

5. What is the effect of registration of a person as a proprietor of land?

- Section 24 of the Land Registration Act states that the registration of a person as the proprietor of land shall vest in the person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
- The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities.

6. What is the effect of a Certificate of Title?

- Section 26 of the Land Registration Act construes the holder of a Certificate of Title issued under the Act as the absolute and indefeasible owner unless the holder of this title document fraudulently obtained the certificate of title.
- However, this indefeasibility of the certificate of title can be challenged on the ground of fraud or misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

7. What is conveyancing of land?

- Conveyancing is the change of rights to land from one person to another through a process facilitated by the land registration system.

8. What interests in land are capable of registration in Kenya?

- Registration of interests in all public land;
- Registration of interests in all private land;
- Registration and recording of community interests in land.

9. What is the difference between title deeds bearing an I.R Number and C.R Number?

- Under the previous independence Constitution, title to land in Kenya was registered under the Registered Land Act (Repealed) or the Registration of Titles Act (Repealed).
- Under the two Acts, there were two registries with the Coast title deeds being maintained at the Mombasa Lands Registry and prefixed as C.R. Number and upcountry titles being maintained at the Nairobi Lands Registry and prefixed I.R. Numbers.
- Title documents issued under the RLA were title deeds and those issued under RTA were certificates of title.
- It is key to note that with the repealing of these Acts, all titles previously registered under the RLA or RTA would then be considered as having been registered under the Land Registration Act.

10. Do I have the right to own land in any part of Kenya and if so, who can own land in Kenya?

- Yes, you have the right to own land in any part of the country. Article 40 (1) of the Constitution of Kenya states that every person has the right to either individually or in association with others acquire land and own property of any description in any part of the country.

11. Can Foreigners / Non-citizens own land/property in Kenya?

- Having answered the first question in the affirmative, any person can own land in Kenya including foreigners. Non-citizens can own property in Kenya and enjoy all the legal rights and protections afforded to citizens. Article 65 (2) of the Constitution however restricts foreigners to the ownership of land ONLY on leasehold for a maximum of 99 years after which the lease has to be renewed or vacated.

12. What are some methods of acquiring title to land?

These are laid out under Section 7 of the Land Act, 2012 and they include:

- Allocation - transfer of public land by the Government to individuals for a specified time and for a specific use often with the imposition of certain conditions;
- Land adjudication process - this is when the rights and interests to land are determined and recorded in areas of community land. Land owners point out their boundaries which are then demarcated, surveyed and recorded;
- Compulsory acquisition - this is the process through which the Government acquires land from an individual for public purposes but subject to fair and timely compensation of the individual;
- Prescription - prescription is a non-possessory interest in land through the long, continuous use of the land. The law now provides that one can acquire title to land even when he has not been in possession of such land if he can show that he has used the land for a long period of time. The statutory period for one to acquire land by prescription, which is an easement, is twenty years. Section 32(1)(c) of the Limitation of Actions Act provides that where an easement has been enjoyed, peacefully and openly as of right, and without interruption, for twenty years, the right to such access is absolute and indefeasible.
- Settlement programs - this is land provided by the Government to persons such as squatters, internally displaced persons displaced by either conflict, disasters or development projects;
- Transmissions - this is the passing of land, a lease or a charge from one person to another by operation of law on death, insolvency or otherwise;
- Transfer - this involves the buying of land from a willing seller by the payment of money or any agreed consideration vide a contract for the sale of land;
- Long term leases exceeding twenty-one years created out of private land; or
- Any other manner prescribed by an Act of Parliament for example Adverse Possession under the Limitation of Actions Act.

13. What is adverse possession of land and what are its ingredients?

- Adverse possession: This is a process by which the entire ownership of an estate is extinguished by lapse of time. In Kenya, this time is twelve (12) years. The ingredients for one to acquire property via adverse possession in Kenya are:

- a) The possession must be for a period of twelve (12) years;
- b) It must be demonstrated that there was open, peaceful, uninterrupted and unpermitted possession of an estate in land for a continuous period of twelve years. This means that the 'intruder' must have taken possession of the land openly, the owner ought to have known or have had means to have known but did not act on his right of ownership and let the possession be;
- c) The right accrues only to that part of land that is not only possessed but also in which some positive act as would be done by the owner has been done, for instance construction of a house.

14. What are the classifications of land in Kenya?

- Public Land
- Community Land
- Private Land

15. What are proprietary rights in land?

- A proprietary right refers to either an estate in land or an interest in land. Proprietorship rights are categorized into freehold and leasehold.

16. What is a Freehold interest in land?

- This is a right to use and enjoy the land for the duration of the grantee and that of his/her heirs and successors. This right is also known as a fee simple.
- Freehold interests are freely transferrable during the life of the owner by way of gift, sale, adverse possession or on the death of the owner by way of will or the rules of intestacy (death without a will) [See Land Law and Conveyancing: Principles and Practice by Prof. Tom Ojienda, SC]

17. What is a leasehold?

- A leasehold refers to the bundle of rights contained in a lease.
- Section 2 of the Land Act defines a Lease as "the grant, with or without consideration, by the proprietor of land of the right to exclusive possession of his or her land, and includes the right to be granted and the instrument granting it, and also includes a sub-lease but does not include an agreement for lease."
- What this essentially means is that for a lease to be valid there has to be four (4) essentials fulfilled as underlined below;
- Conferment of a right to exclusive possession relating to a defined premise/land, pertaining to a definite period or to a period though not ascertained, is capable of being ascertained [See Land Law and Conveyancing: Principles and Practice by Prof. Tom Ojienda, SC].

18. What is the meaning of exclusive possession?

- Exclusive possession means that the tenant must acquire the right of possession to the exclusion of the landlord and all persons claiming through him.

19. What are the different types of leases?

The different types of leases are as defined in Part VI of the Land Act, 2012 which contains General Provisions on Leases. They include:

- Periodic leases - this is a lease which the term is not specified and no provision is made for the giving of notice of termination of the tenancy and where the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable and in relation to agricultural land the periodic lease shall be for six months.
- Additionally, if the owner of land permits the exclusive occupation of the land at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.
- Short-term lease - a short-term lease is made for a term of two years or less without an option of renewal. A periodic lease is considered to be a short-term lease. A short-term lease need not be in writing and may be made orally. It is not a registrable interest in land.
- Future Lease - this is a lease to land made to begin at a future date not being later than 21 years after the date on which the lease agreement is executed.

20. What are the implied covenants in every lease?

- Implied covenants in leases are contained in Sections 65 and 66 of the Land Act, 2012. Implied covenants in a lease are terms and conditions which bind the lessor and lessee or confer certain rights and obligations to either of them regardless of whether they were contained in the lease agreement.
- They are set in the Act to ensure that either party does not take advantage of the other by leaving out some terms and conditions which are their rights as lessors or lessees. For instance, the unconditional payment of rent by the lessee as an obligation or the ensuring that the property is fit for the purpose which is being leased at the commencement of the lease as an obligation to the lessor.

21. What are some of the implied covenants in every lease that bind the lessor?

- That so long as the lessee pays the rent and observes and performs the conditions in the lease, the tenant shall peaceably and quietly possess the land during the term of the lease without any interruption from the lessor;
- Not to use or permit any adjacent or neighboring land owned by the landlord to render the leased land unfit or less fit for any purpose for which it had been leased;
- If only part of the building is leased, to keep the roof, all external and main walls and main drains, and the common parts and common installations and facilities including common passages and walkways in a proper state of repair;
- If any dwelling place is leased, then to ensure that the same is fit for human habitation at the commencement of the lease and shall be kept fit for human habitation during the lease;
- If the leased premises or any part of them is damaged by any means not occasioned by the tenant, damage which renders the premises unfit for use, the landlord should use the rent to the repair the damage;
- If under the lease agreement, the tenant had specified a specific use of the land and during the period of lease the land cannot be used for those purposes then the tenant may terminate the lease agreement; and
- To pay all rates, taxes, dues and other outgoings that are payable in respect of the leased land except to the extent otherwise specified in the lease.

22. What implied covenants are there in every lease in favor of the lessor?

- The Lessor may either personally or by agents enter the leased land or building at any reasonable time for the purpose of inspecting the condition and repair of the premises and for carrying out repairs and making good any defects that is his or her obligation to do so.
- However, in the exercise of that power, the lessor shall not unreasonably interfere with the occupation and use of the land and buildings by the lessee.
- Terminate the lease by serving a notice of intention to terminate the lease on the lessee where;
 - a) Any rent is unpaid for one month after the due date for payment whether or not a demand in writing for payment has been made by the lessor or an agent of the lessor;
 - b) The lessee has failed for a period of one month to observe or perform any condition, covenant or other term the observation or performance of which has been assumed by the lessee expressly or impliedly in the lease.

23. What are some of the conditions implied in leases that are binding on the lessee?

- Bound to pay the rent reserved by the lease at the times and in the manner specified in the lease;
- To use any land in a sustainable manner and in accordance with any conditions imposed on the use of that land by the lease or any unwritten law and in particular not to cut down injure or destroy any living tree on the land unless the purpose for which the land has been leased cannot be carried out without doing so;
- To yield up the land and buildings in the same conditions as they were when the lease began except that the lessee shall not be bound to repair damage or restore the land and buildings to the same conditions they were if the conditions is caused by reasonable wear and tear, fire or explosion not caused by the lessee, civil commotion, natural causes;
- Keep all boundary marks in repair; and
- Keep all buildings comprised in the lease in a reasonable state of repair.

24. What is the difference between a lease and a license?

- A lease creates an estate or proprietary interest in land whereas a license creates only a personal permission to be on the land.
- Another way to distinguish between the two is that a lease is for a fixed period whereas a license does not have to be for a fixed and ascertainable period of time.
- A leasehold interest can also be transferred whereas a license cannot.

25. What is a sub-lease?

- A landowner holding a freehold or leasehold interest from the Government may grant a sub-lease out of the leasehold or freehold interest.
- Sub-leases may also be issued by third parties conveying some or all of the leased property for a shorter term than that of the head lease.
- This concept of sub-leases is very common in the ownership of apartments in Kenyan cities.

26. How are sub-leases (generally referred to as long term leases) used in the ownership of apartments/semi-detached maisonettes in Kenya?

- Usually the Vendor is registered as proprietor Lessee from the Government of Kenya of the piece or parcel of land. Under the sub-lease the owner of the land is known as the Lessor.
- The Lessor causes erection upon the land apartments or semi-detached maisonettes together with pathways, driveways shops, parking areas, gardens, playgrounds and other usual amenities.
- The Lessor then enters into an Agreement to Lease/Sale Agreement with a Purchaser (Owner), where the Lessor agrees to grant to the Purchaser/Owner a Sub-Lease once the Purchaser/Owner has paid to the Lessor the purchase price.
- The Lessor then forms a Management Company (the Manager) and appoints it for purposes of acquiring reversionary interest in the land on behalf of all owners in the estate and for managing the estate and the owner of each apartment/semi-detached maisonette in the estate will simultaneously with the registration of his/her sub-lease be entitled to membership in the Manager. Such membership remains as an inseparable portion of the sub-lease granted. Each owner is entitled to one (1) share in the Manager.
- After registration of all the sub-leases over an Estate in favour of the respective Purchasers/Owners and the last of the shares in the Manager have been transferred, the Lessor transfers the reversionary interest in the said land to the Manager and from the date of transfer of the said reversionary interest all obligations and like benefits contained therein on the part of the Lessor vest in and are to be carried out by the Manager.
- With the coming into force of the Sectional Properties Act (SPA), 2020, use of sub-leases/long term leases for sectional units will be replaced by Certificate of Title (freehold property) or Certificate of Lease (leasehold property). See Part II of this series for more details on the effects of the SPA, 2020.

27. What is joint tenancy?

- Joint tenancy is defined in Section 2 of the Land Act. It is a special and concurrent form of ownership by two or more persons of the same property. The individuals share equal ownership of the property and have equal undivided right to keep or dispose of the property.
- Joint tenancy creates a right of survivorship which means that if any one of the joint tenants dies, the remainder of the property is automatically transferred to the surviving owner.
- Four main essential elements for a Joint Tenancy are:
 - a) The joint tenants own undivided interests in the property as a whole with each share being equal and no tenant owning a larger share of the same;
 - b) The estates of the joint tenants are fixed and unalterable by any condition for exactly the same period of time (the tenant's lifetime);
 - c) The joint tenants hold their property under the same title; and
 - d) The joint tenants all enjoy the same rights until one of them dies. As seen under survivorship, the death of one joint tenant automatically transfers the remainder of the property to the surviving owner/owners.

28. What is a Tenancy in Common?

- A Tenancy in Common is defined in Section 2 of the Land Act, 2012 as a form of concurrent ownership that can be created by deed, will or operation of laws.
- As was clarified by the Court in the case of Isabel Chelangat vs Samuel Tiro Rotich and Other (2012), a tenancy in common is where two or more holders hold the property in equal but undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants.

- In other words, they have separate interests only that it remains undivided and they hold the interest together.

29. What is the difference between a Joint Tenancy and a Tenancy in Common?

- The largest factor that distinguishes the two is the doctrine of survivorship in the Joint Tenancy. In a Tenancy in Common, the share of one tenant is not affected by the death of one of the co-owners in that there is no right of survivorship.
- Hence, upon the death of one tenant in the Tenancy in Common, his or her interest does not devolve to the other tenants but to the estate of the deceased tenant.
- Aside from the doctrine of survivorship, another difference is that unlike in Joint Tenancy where there is equal ownership, in a Tenancy in Common one tenant may have a larger share of property than the other tenants.
- In a Tenancy in Common one is also able to dispose of their share in the property without the restrictive conditions placed in Joint Tenancy.

30. What is matrimonial property as pertaining to co-ownership of property?

- Matrimonial Property is defined in Section 6 of the Matrimonial Property Act, 2013 as follows:
- “For the purposes of this Act, matrimonial property means—
 - (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”
- The section excludes Trust land from matrimonial property and also provides that parties to an intended marriage may enter into an agreement before their marriage to determine their property rights (commonly known as a pre-nuptial agreement).
- As contained in the Matrimonial Property Act, where a spouse obtains leasehold land for co-ownership and use by both spouses, the spouses are presumed to own the land as joint tenants.
- This means that if one of the spouses intends to transfer or charge the matrimonial property then they need to acquire the consent of the other spouse as the joint tenant.
- “Matrimonial property” is different from “matrimonial home” with the former having a wider meaning. Matrimonial home is defined in Section 2 of the Matrimonial Property Act to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

31. What are overriding interests in land?

- Enjoyment of registered land is subject to overriding interests. These are interests in land enjoyed by third parties and which need not always be registered with the Registrar of Lands. If unregistered, they are considered by the Court to have been held by the owner of the land in trust for the person who is liable to enjoy them or has been enjoying them.
- Overriding interests are listed under Section 28 of the Land Registration Act and ought to be taken into account by any registered owner of land. They are:

- a) Trusts including customary trusts;
- b) Rights of way, rights of water and profits;
- c) Natural rights of light, air, water and support
- d) Rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- e) Charges for unpaid rates and other funds which without reference to registration under the Act are expressly declared by any written law to be charged upon the land;
- f) Rights acquired or in process of being acquired by virtue of any written law relating to limitation of actions or by prescription
- g) Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- h) Any other rights provided under a written law.

Spousal rights over matrimonial property and leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies are no longer listed as overriding interests having been deleted by Act No. 28 of 2016, S. 11 (a) and S. 11 (b) respectively

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