



# FALQs

## FREQUENTLY ASKED LEGAL QUESTIONS

### PART II

## CONVEYANCING AND REAL ESTATE

### 1. What due diligence should the buyer undertake before entering into a contract to buy land?

- Get a copy of the title and carry out an official search to confirm the registered proprietor and whether the title is clean;
- If an individual is selling, obtain copy of the seller's National Passport/Foreign ID/Certificate (if Seller is a Foreigner) and KRA PIN Certificate;
- Where a company is selling, obtain a copy of Certificate of Incorporation and KRA PIN. Apply for a current list of directors (CR12) from the Registrar of Companies to confirm shareholding and directors;
- Inspect the property physically;
- Check on any pending litigation relating to the property;
- If the property is being sold by a married person, check on marital consent or if by a person who is single, then you will need to obtain an affidavit of marital status as one of the completion documents;
- If purchasing property in an off-plan arrangement, extra due diligence on the developer is recommended, such as an online search for any reviews on their reliability and accountability in terms of sticking to completion timelines and financial accountability.

### 2. What are completion documents in the land acquisition process?

- These are the documents held by the seller which are handed over to the buyer in exchange of payment of the balance of the purchase price.
- Completion documents vary depending on the tenure of the property.

### 3. Generally, what are some of the completion documents?

- Original Title Deed/Certificate of Title/Lease/Conveyance
- Executed transfer of interest in land/indenture of conveyance
- Consent to Transfer- which could be Commissioner's Consent to Transfer, Land Control Board Consent to Transfer, Head Lessors/Manager's Consent, Spousal Consent
- Clearances -land rent, land rates together with receipts
- Identification documents such as National Identity Cards, KRA PIN Certificates and coloured passport size photographs
- For newly completed properties, certificates such as Certificate of Practical Completion and/or Certificate of Occupation.

### 4. What are the different kinds of consents that I may need in a land transaction?

#### a. Commissioner of Land's Consent

- This consent is usually sought when one seeks to transfer, lease, sub-lease or subdivide property owned under leasehold tenure. This consent is to ensure that the Commissioner of Lands has proper control and management as well as surveillance of land use in the Country.
- The Commissioner may refuse to grant consent. On the other hand, a party may fail to comply with the requirements for grant of the consent. The effect of this is that the transaction becomes void.

#### b. Land Control Board Consent

- This consent is required for all Agricultural Land as defined in Section 2 of the Land Control Act. Therefore, all transactions relating to agricultural land have to be approved by the Land Control Board (LCB) that sits where the agricultural land is situated within 6 months of making the sale agreement between the parties.
- The transactions which require an LCB consent are:
  - i. Sale, transfer, lease, mortgage, exchange, partition and other disposal or dealing with any agricultural land;
  - ii. Division of any such agricultural land into two or more parcels to be held under separate titles other than the division of an area less than 20 acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
  - iii. 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;
  - iv. A declaration of trust of agricultural land situate within a control area dealing in that land.
- Any transaction which requires to have the LCB consent but proceeds without it is null and void.
- There are transactions which are exempt from the LCB consent and they are:
  - i. Transmissions under a will or intestacy of a deceased person unless the same would result in the division of the land into two or more parcels to be held under separate titles;
  - ii. A transaction to which the Government or the Settlement Fund Trustees (in respect of trust land) of a county council is a party;
  - iii. A transaction whose exemption is granted by the President under a Gazette Notice.
- It is important to note that the parties to the agreement may be required to attend a hearing before the LCB with a decision to grant or refuse being communicated later thereon.

**c. Rates Clearance Certificate**

- The essence of rates is to raise revenue for the County Governments.
- It is obtained to show that the owner of the land has no outstanding land rates owed to the County Government.
- The certificate issued is normally valid for a period of 30 days.

**d. Rent Clearance Certificate**

- This certificate is issued by the Ministry of Lands. Land rent is payable by a person who is registered as proprietor/lessee from the Government of Kenya.
- It is used to show that the registered proprietor of the leasehold interest has cleared the annual land rent payable to the Government of Kenya.

**e. Head lessor's consent/lessor's consent**

- This is the consent required during sub-leasing of a lease/charging/transferring.
- It shows that the owner of the Head Lessor/Management Company has consented to the creation of the instrument –be it a lease, charge or transfer.

**f. Spousal consent**

- Spousal consent is crucial in the sale, charging or leasing of matrimonial property. Without a valid spousal consent, the registered transaction is deemed to be invalid.
- A spousal consent is usually in the form of a statement or an affidavit by the consenting spouse.

**5. Other than the completion documents, what other documents are there in a conveyancing transaction?**

- Letter of Offer- in the purchase of property, a letter of offer expresses the interest of the buyer to purchase the property or the seller's willingness to sell the property before any payments are made. It also contains the terms and conditions of the transaction, the purchase price, and the deposit as will be contained in the Sale or Lease Agreement and it usually states that it is subject to contract. It can be prepared either by the seller/ vendor or the buyer.
- The offer letter is signed by the purchaser and the seller. It does not legally bind the parties to a contract but just acts as a proof document. It helps in eliminating the possibility of two buyers getting the same property and makes negotiation easy as the parties understand their positions before getting into the contract.
- Sale Agreement- this sets out the terms of sale including the names of the parties, the purchase price and the mode of payment, the completion period and the completion documents to be furnished by the vendor to enable registration of the transfer of the property in favor of the purchaser.
- Lease Agreement- this sets out the parties to the lease, terms of the lease, the duration of the lease, the rent payable and the area of the land which has been leased.

**6. What are the Law Society of Kenya Conditions of Sale in a Sale Agreement?**  
**[<https://lsk.or.ke/downloads/practice-directions/>]**

- The LSK Conditions of Sale are the customary terms of sale adopted by the LSK and they apply by reference to an agreement for the sale of land unless otherwise excluded or varied by the parties in their agreement.

**7. What is stamp duty? Who pays it and how do I calculate it?**

- Stamp duty is a tax charged pursuant to the Stamp Duty Act, Cap 480 on several transactions such as stock, shares or transfer of property.
- The rate of stamp duty on transfer of immovable property varies depending on the location of the property.

- Rural areas attract a stamp duty of 2% of the value of the land while urban areas attract a duty at the rate of 4% of the value of the land.
- It is the buyer's responsibility to pay the stamp duty on transfer of immovable property.

### **8. What is the difference between land rents and land rates?**

- Land rates are levies imposed on all parcels of land and payable to County Governments.
- Land rent is levy imposed on leasehold parcels of land where the annual rent has been reserved at the time the grant is being issued and is payable to the National Government through Ministry of Lands and Physical Planning.

### **9. What are cautions and who may lodge them?**

- A caution is a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice was entered can be taken without first informing the person who gave the notice. It is also known as a caveat (Section 2 of the Land Registration Act).
- Section 71 of the Land Registration Act provides that any person can lodge a caution so long as he/she claims a contractual or other right over the land amounting to a defined interest capable of creation by a registrable instrument (for example a lease).
- This can be done with the Registrar against any dealing which is inconsistent with your interest in the property.

### **10. Can I enter into an oral agreement to buy land?**

- No. Section 38 of the Land Act 2012 as well as Section 3 of the Law of Contract Act provide that for an agreement to buy land to be enforceable in court, it ought to be in writing and signed by each party with witnesses attesting to the signatures.
- This means that if you enter into an oral agreement to buy or sell land, the courts would not recognize the agreement as having taken place in the event there are any disputes.

### **11. What is a charge?**

- A charge is a security for advances of money by a lending bank to the owner of an immovable property with the property as the security.

### **12. Who is a chargee and chargor in a charge transaction?**

- A Chargor is the owner of the property which is being used as security while the Chargee is the lender of the money/financier.

### **13. What is the difference between a mortgage and a charge?**

- A mortgage transfers an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan.
- A charge on the other hand does not transfer any interest in the property but designates the land as security for the debt.
- In a mortgage, if the borrower defaults, then the bank's interest in the land becomes absolute meaning that the ownership automatically transfers to the Bank.
- A charge on the other hand only gives the right to payment without transferring the title to the property unlike a mortgage which transfers an interest in specific immovable property.
- A mortgage is also secured by a mortgage deed while a charge is secured by a charge document.
- In short, a Mortgage says: "take my land until I pay you" while a charge says "give me the money if I fail to pay, take my land".

#### 14. Does a buyer or an owner of land need spousal consent before charging land?

- Yes, before a spouse who holds land or a house in his or her name individually can legitimately dispose of that land the lender ought to inquire from the borrower on whether their spouse has consented to the creation of the charge.

#### 15. What happens if I take out a charge on my property without spousal consent

- If the spouse undertaking the transaction deliberately misleads the lender by the answers to the inquiries made, the transaction shall be void at the option of the spouse who has not consented to the disposition.
- Therefore, the bank cannot exercise its statutory power to sell the land and recover the amounts borrowed as the charge document upon which the loan advancement is based is void.
- This provision, Section 93 of the LRA, has however opened up room for mischief as borrowers are now approaching banks for charges then deliberately leaving out the spousal consent or even misleading the banks as to their marital status only to have the charge declared null and void after disbursement and utilization of the funds. However, the Courts as well as the banks are clamping down on such mischief by carrying out extensive due diligence into the marital status of a borrower before advancing any finances, one way being requiring a spousal consent.

#### 16. What are the types of charges and how are they created?

##### a. Informal Charge

- An informal charge is created where a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land with the repayment of money or money's worth obtained from the charge.
- In an informal charge, the chargor deposits any of the following:
  - i. A certificate of title to the land
  - ii. A document of lease of the land
  - iii. Any other document which it is agreed evidences ownership of land or a right to interest in land.
- A chargee holding an informal charge may only take possession of or sell the land on obtaining an order of the court to that effect.

##### b. Formal Charge:

- A formal charge shall take effect only when it is registered in a prescribed register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.
- The difference between a formal charge and an informal charge is that once the formal charge is registered, there is no need for the bank to seek for an order of the court in order to sell the land upon default of payment.

##### c. Further Charge:

- A further charge is an additional facility by the same lender to the same borrower on the security of the same property.

##### d. Second Charge:

- A second charge is a separate charge over the same property but through a different bank/lender.

**e. Sub-charge:**

- This is whereby the bank charges the rights it has under the charge therefore creating a charge out of a charge in order to raise money as an alternative to assigning the debt. The sub-chargee has the double security of the original chargor and the original chargee.

**17. What are the basic requirements of a charge instrument?**

- The terms and conditions of charge
- An explanation of the consequences of default
- The reliefs that the chargee is entitled to including the right of sale

**18. What are the implied covenants by a chargor?**

The implied covenants of the chargor are contained in Section 88 of the Land Act. They include:

- To pay the principal money on the day appointed in the charge agreement and so long as any of this money remains unpaid, to pay interest on the money in the manner specified in the charge agreement;
- To pay all rates, charges, rent, taxes and other outgoings that are at all times payable in respect of the charged land;
- To repair and keep in repair all buildings and other improvements upon the charged land and to permit the chargee or its agents to enter the land and examine the state and condition of such buildings and improvements after seven days' notice to the chargor until the charge is discharged;
- To ensure by insurance or any other means that resources will be available to make good any loss or damage caused by fire to any building on the land, and where insurance is taken out, it is done so in the joint names of the chargor and the chargee with insurers approved by the chargee and to the full value of the buildings;
- If the land is agricultural land, then to use it in a sustainable manner in accordance with the principles and conditions with which the land is held;
- Not to lease or sublease the charged land or any part of it for more than a year without the previous consent in writing of the chargee and which consent shall not be unreasonably denied;
- Not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;
- In the case of a charge of a lease, during the continuance of the charge to pay, perform and observe the rent, covenants and conditions contained in or implied by and in the lease and on the part of the lessee to be paid, performed and observed and to keep the chargee indemnified against all proceedings, expenses and claims on account of non-payment or non-observance of any covenants and conditions;
- If the charge is a second or subsequent charge, to pay interest from time to time accruing on each prior charge when it becomes due and will at the proper time repay the principal money; and
- If the chargor fails to meet their obligations under the title or lease, the chargee may spend any money which is reasonably necessary to remedy the breach and may add the amount so spent to the principal money owed by the chargor.

**19. What are the remedies of a chargee?**

The remedies of a chargee as listed in Section 90 of the Land Act, 2012 are as follows:

- If a chargor defaults in any obligation, then the chargee may serve on them a notice, in writing to pay the money owing or perform the obligation within one month.
- This notice shall contain the following information:

- a) The nature and extent of the default by the chargor;
  - b) If the default consists of non-payment of any money, the amount that must be paid to rectify the default and the time (being not less than 3 months) for the repayment of the same;
  - c) If default is failure to perform an obligation in the charge agreement the thing that must be done or desist from being done must be stated and the time allowed (being not less than 2 months) within which the default ought to be rectified;
  - d) The consequence if the default is not rectified within the time specified in the notice, which is that the chargee will proceed to exercise the remedies;
  - e) The right of the chargor in respect of certain remedies to apply to the Court for relief against those remedies.
- If the chargor does not comply within 2 months after the date of service of the notice, then the chargee may exercise the following remedies:
    - a) Sue the chargor for any money due and owing under the charge;
    - b) Appoint a receiver over the income of the charged land;
    - c) Lease the charged land, or if the charge is of a lease, sub-lease the land;
    - d) Enter into possession of the charged land; or
    - e) Sell the charged land.

## **20. What must be done before the Chargee exercises their power to sell the charged land?**

A chargee's power of sale and persons on whom a notice to sell must be served upon are contained in Section 96 of the Land Act, 2012. The requirements are:

- Before exercising the power to sell the charged land, the chargee must serve the chargor a notice to sell and shall not proceed to complete any contract for sale until 40 days have lapsed from the date of this notice to sell.
- A copy of the notice to sell shall be served upon:
  - a) The Commission, if the charged land is public land;
  - b) The holder of the land out of which the lease has been granted if the land is a lease;
  - c) A spouse of the chargor who had given consent;
  - d) Any lessee and sub-lessee of the charged land or any buildings on the charged land;
  - e) Any person who is a co-owner with the chargor;
  - f) Any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale had notice;
  - g) Any guarantor of the money advanced under the charge;
  - h) Any other person known to have a right to enter on and use the land or the natural resources in or under the charged land by affixing a notice at the property.

## **21. What are the duties of the chargee to the chargor while exercising the power of sale?**

These duties are contained in section 97 of the Land Act, 2012 and include the following:

- A chargee who exercises the power to sell charged land owes a duty of care to the chargor to obtain the best price reasonably attainable at the time of the sale;
- Ensure that a forced sale evaluation is undertaken by a valuer before the sale;
- If the price at which the land is sold is 25% below the comparable price of similar property, then it shall be assumed that the chargee is in breach of the duty imposed above and the chargor may apply to Court for an order that the sale be declared void.

## **22. Can the chargee buy the charged land after exercising its statutory power of sale?**

- A chargee exercising the power of sale may buy the charged property but only with leave of Court, as stipulated in Section 100 of the Land Act.
- This leave is only granted where the chargee satisfies the Court that a sale of the charged land to the chargee is the most advantageous way of selling the land so as to comply with the duty to attain the best price.

## **23. What is discharge of charge and at what point is it done?**

- Upon the payment of all money secured under a charge and performance of all other conditions and obligations thereunder by the chargor, the chargee and chargor then execute a discharge of charge instrument showing the charge agreement and security over the chargor's property is lifted.
- Under Section 85 of the Land Act, it is an implied right of the chargor to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under power of sale.

## **24. What is the transfer of a charge?**

- This is whereby a request is made to the chargee to transfer the charge to a person named in the request. This person, subject to the consent of the chargor and which shall not be unreasonably withheld shall be either of the following:
  - a) Any person who has an interest in the land or lease that is subject to the charge;
  - b) Any surety for the payment of the amount secured by the charge; and
  - c) Any creditor of the chargor who has obtained a decree for sale of the land.

## **25. What is consolidation of charges?**

- This is whereby a chargor who has more than one charge with a single chargee on several securities may discharge any of the charges without having to redeem all charges.

## **26. What is tacking?**

- This is the giving of further advances or credit to the chargor on a current or continuing account. This is different from a further charge which is taken from the same chargee and same property but on a different account.

## **27. What is compulsory acquisition of land?**

- This is the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation. The provisions on Compulsory Acquisition of Interests in Land are contained in Part VIII of the Land Act, 2012.
- This power is subject to Article 40 (3) of the Constitution which prohibits the state from compulsorily acquiring property without due compensation or offering the owner access to Court.
- All land to be compulsorily acquired shall be geo-referenced and authenticated by the office or authority responsible for survey at both national and county government.

## **28. When may my land be compulsorily acquired?**

- Land may be acquired compulsorily if the Commission certifies (at the request of either the national or county government) in writing that the land is required for public purposes or in the public interest as related to and necessary for the fulfillment of a stated public purpose.

## 29. What is the process of compulsory acquisition in Kenya?

- First, the National or County Government must issue a request to the Commission [NLC] for the acquisition of your land on its behalf.
- If this request is approved by the Commission, the Commission publishes a notice to that effect in the Gazette and the County Gazette and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.
- At least 30 days from the date of publishing the notice of intention to acquire the land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land.
- At least 15 days before this inquiry, a notice must have been published in the Gazette and County Gazette and a copy of the notice served on every person who appears to be interested in the land.
- This notice of inquiry shall call upon interested persons to deliver a written claim of compensation to the Commission not later than the date of inquiry.
- At the hearing, the Commission shall make a full inquiry into the persons interested in the land and receive written claims of compensation from those interested.
- Upon conclusion of the inquiry, the Commission shall prepare a written award in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.
- On the making of the award of compensation, the Commission shall serve on each interested person a notice of the award and offer of compensation.
- Upon acquisition of land but before possession, the Commission may agree with the owner that instead of receiving an award the person will receive a grant of land, not exceeding the value of the amount of compensation.
- After the notice of award has been served on all persons interested in the land, the Commission shall promptly pay compensation in accordance with the award to the persons entitled thereunder.

## 30. How is the amount of compensation payable determined by the Commission / what does it prove?

- The size of the land to be acquired;
- The value, in the opinion of the Commission, of the land;
- The amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and
- The award shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.

## 31. What happens when land is owned by two or more persons as co-tenants?

- The award shall state the amount of compensation awarded in respect of each interest to the land and the shares in which it is payable to those persons.

## 32. Can I challenge the compulsory acquisition of my land?

- Yes, under Article 40 (3) of the Constitution everyone has the right to access a Court of Law regarding the compulsory acquisition of their land.
- Section 128 of the Land Act states that any dispute regarding compulsory acquisition of land may be referred to the Environment and Land Court for determination.

## 33. Which are the different tribunals in land dispute resolution?

- **Environment and Land Court (ELC)** [<https://www.judiciary.go.ke/courts/environment-and-land-court/#overview>] is a specialized Court which has the jurisdiction to hear and determine

all disputes relating to land including public, private and community land contract disputes, compulsory acquisition disputes, disputes relating to land administration and management as well as issues relating to environmental planning and protection and any other dispute relating to the environment and land. This court is established pursuant to Article 162 (2) (b) of the Constitution and the Environment and Land Court Act, Act No. 19 of 2011.

- **National Environment Tribunal** which has mandate of hearing appeals on environment matters, giving NEMA [ <https://www.nema.go.ke/> ] directions on complex matters, has power to appoint environmental assessors, may hear and determine appeals on forestry matters and may hear and determine appeals on wildlife matters. It is established under Part XII of the Environmental Management and Co-ordination Act, Cap 387.
- **Business Premises and Rent Tribunal (BPRT)** [ <https://www.judiciary.go.ke/business-premises-rent-tribunal/#1533122336886-5b48abde-c457> ] which is established under Section 11 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act to handle disputes relating to controlled tenancies. A controlled tenancy is a tenancy of a shop, hotel or catering establishment that is either not reduced into writing, or if it is reduced into writing is for a period not exceeding five years, is determinable within five years from commencement thereof or is specified by the Cabinet Minister to be a controlled tenancy.
- It should be noted that no tenancy to which the Government, Community or a local authority is part shall be a controlled tenancy. This means if one of the parties, either the tenant or landlord is the Government then the dispute cannot be heard by the BPRT.
- An appeal lies from the decision of the Tribunal to the High Court.
- **Rent Restriction Tribunals** [ <https://www.judiciary.go.ke/rent-restriction-tribunal/> ] are established under Section 4 of the Rent Restriction Act, Cap. 296. They are there to determine disputes between landlords and tenants for dwelling houses which have a standard rent not exceeding KES 2,500/-. They also make provisions for regulating the increase of rent, the right to possession, the exaction of premiums and fixing of standard rents in relation to controlled residential premises, to resolve disputes between landlords and tenants of the controlled tenancies in relation to service charge, repairs of the house, recovery of rent arrears etc.

### 34. Can I file a land related suit in any other Court other than the Environment and Land Court?

- Yes, you can. Section 9 of the Magistrates Court Act confers jurisdiction on magistrate courts to determine claims relating to environment and land related issues as per the pecuniary limits set under the same Act.
- Filing of land matters in the Magistrates' Courts is governed by pecuniary jurisdiction. This means that the value of the subject matter (value of the land) will determine the level of the Magistrate's Court in which you will file the case if there is no ELC Court.
- The pecuniary division of the Magistrates' Courts is set under Section 7 of the Magistrate's Court Act as follows:
  - a) Chief Magistrate Court- KES 20 Million
  - b) Senior Principal Magistrate- KES 15 Million
  - c) Principal Magistrates Court- KES 10 Million
  - d) Senior Resident Magistrate Court- KES 7 Million
  - e) Resident Magistrate Court- KES 5 Million

### 35. What happens if I file a land dispute matter in the wrong court? Will my case be struck out and I have to file a new one?

- Filing of land related disputes in the wrong court usually happens in cases where there is an overlap between the commercial and land aspects of a dispute. For instance, if you file a case on failure to pay balance of purchase price in a land related matter which ought to be filed at the ELC in a Commercial Court since you figured the dispute is over payment of money as per the sale agreement hence of a commercial nature.

- If your advocate does not realize this, then the clerk at the Court will pick it up and advise you on the proper court to file the matter. If the mistake escapes even the diligent clerks at the Judiciary, then the judge or magistrate will identify the error and request that the matter be transferred to the appropriate court.
- This will not warrant the filing of the case again. However, all subsequent documents ought to be filed at the ELC.

**36. What is the difference between the Sectional Properties Act, 2020 [<https://gerivia.co.ke/1268/sectional-properties-act-2020-highlights/>] and the Sectional Properties Act 1987?**

- The Sectional Properties Act, 2020 applies to leasehold properties with unexpired residue terms of not less than 21 years while the threshold under the Sectional Properties Act, 1987 (Repealed Act) was 45 years;
- Under the 2020 Act, sectional units shall now be issued with a certificate of title (freehold property) or certificate of lease (leasehold property) and the title shall include each unit's proportional share in the common property while the Repealed Act provided for issuance of title deeds for sectional units.
- Introduction of an internal dispute resolution mechanism. The 2020 Act provides for an internal dispute resolution mechanism through a dispute resolution committee to determine disputes relating to the enforcement of by-laws. Any appeals from the dispute resolution committee will be made at the ELC. The Repealed Act required certain disputes and proceedings to be referred to the BPRT.
- The 2020 Act has also introduced more protection for investors by requiring that a Corporation seeking to invest any funds not immediately required by it to obtain an endorsement through a special resolution passed in accordance with the 2020 Act. Additionally, Corporations are not permitted to acquire or dispose of an interest in immovable property.
- Corporations cannot now make by-laws that permit material change in use or density of common properties without approval of the County Government.
- The 2020 Act also increases the grounds for terminating sectional property status to include substantial or total damage to the building and compulsory acquisition.
- The Repealed Act also contained provisions relating to rescission of a purchase agreement by a purchaser, mandatory contents of a purchase agreement and protections afforded to purchasers with regard to handling of invested funds by a developer. These have been omitted in the 2020 Act.
- The 2020 Act also requires sectional plans to be geo-referenced.

**37. What does the Sectional Properties Act, 2020 apply to?**

- It applies in respect to land held on a freehold title or a leasehold title where the unexpired term is not less than 21 years and there is intention to confer ownership.

**38. What does the Sectional Properties Act, 2020 deal with?**

- The Act deals with the division of buildings into units to be owned by individual proprietors and common property to be owned by the proprietors of the units as tenants in common.

**39. What is a sectional unit?**

- A sectional unit is a space situated within a building and includes its proportionate share in the common property. They include apartments, flats, maisonettes, town houses or even offices.

**40. Under the Sectional Properties Act, 2020, where and how is a sectional unit described?**

- It is described in a sectional plan by making reference to the floors, walls and ceilings within a building.

#### **41. How will I confirm ownership of a sectional unit?**

- Ownership of a sectional unit is confirmed through a certificate of lease (for leasehold property) or through a certificate of title (for freehold property).

#### **42. What are the examples of long- term leases?**

- Any lease for more than 21 years intended to confer ownership of apartments, flats, maisonettes, town houses or even offices.

#### **43. Is a long- term sub- lease registered before the enactment of this Act affected and if so, what can be done?**

- Yes, a long-term sub-lease registered prior to the commencement of Sectional Properties Act, 2020 is affected. Owners of the sectional units will be required to convert their long-term leases so as to comply with Section 54 (5) of the Act. This conversion can be initiated by the developer, the management company or the owner and must be done within two years from the commencement of the Sectional Properties Act, 2020.

#### **44. What is common property under the Sectional Properties Act, 2020?**

- Common property is defined under the Act as so much of a parcel as is not comprised in a unit shown in a sectional plan.
- Common property is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units.
- The common property and each unit on the sectional plan shall have rights of support, shelter and protection for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, air, and all other services of whatsoever nature including telephone, radio and television services over the parcel and the reasonable use of enjoyment of the same by each owner of a unit.

#### **45. What is a Corporation under the Sectional Properties Act, 2020?**

- It is the body corporate incorporated under Section 17 of the Sectional Properties Act.
- The Corporation is constituted on registration of a sectional plan. The Corporation consists of all persons who are owners of units in the parcel to which the sectional plan relates or those who are entitled to the parcel when the sectional arrangement is terminated under the 2020 Act.
- The provisions of the Companies Act, 2015 shall not apply to the Corporation.

#### **46. What are some of the functions of the Corporation?**

- a) Carry out any duties imposed on it by the by-laws;
- b) Unless by unanimous resolution, all proprietors otherwise resolve, to insure and keep insured the buildings and any other improvements on the parcel against fire;
- c) Effect such other insurance as it is required by law;
- d) Pay premiums in respect of any policies of insurance effected by it;
- e) Keep the common property in a state of good repair;
- f) Comply with notices from the county government or public body requiring repairs to, or work to be performed in respect of the land or any building or improvements thereon;
- g) Control, manage and administer common property and do all things necessary for enforcement of the by-laws;
- h) Do all things necessary to ensure the property is well managed including engaging the services of a property manager or any other persons they deem necessary; and
- i) Establish and maintain a fund for administrative expenses sufficient for the control, management and administration of the common property.

#### 47. Can one advocate act for both the purchaser and the seller in a conveyancing of land transaction?

- Yes, though it poses certain risks. The Advocate has to discuss any conflict of interest and weigh the interests of both parties. It is the choice of the parties to choose whether to continue with the same advocate or not.
- In the event of a dispute arising out of the Conveyancing transaction where the Advocate has acted for both parties, the Advocate should not act for any of the parties in the subsequent dispute (see *King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) & Another v M/s Kaplan & Stratton Advocates* [1993] eKLR).

#### 48. What is the role of an advocate at every stage of the conveyancing process?

- Initial stages: Advise the client, conduct due diligence by investigating the title and draft the conveyancing documents.
- If acting for the vendor, the advocate should ensure that the vendor indeed has good title to transfer. This means checking the history of the property and any encumbrances or other things that may affect the property.
- Contractual Stages: If acting for the vendor the advocate drafts the contract according to his client's specifications.
- The purchaser's advocate on the other hand, reviews and approves the draft contract vis a vis his or her client's concerns. The purchaser's advocate here may raise requisitions which are any questions or requests regarding the contract and the land in question.
- Post contractual stages: After the signing of the sale agreement prepared by the vendor's advocate and the payment of the deposit, the vendor's advocate gathers the completion documents as well as drafts the transfer deed in preparation for the time the purchaser is ready to pay the balance of the purchase price.
- The purchaser's advocate on the other hand at this time carries out a pre-completion search to ensure that there are no last-minute problems. He or she then makes a check-list of what is to happen at completion ensuring that nothing has been overlooked.
- Completion: The vendor's advocate ties up loose ends which might include registration of any discharge of charge. He or she also ensures that his or her client has the requisite completion documents. Finally, he ensures that the purchaser is ready with the balance of the purchase price which is to be exchanged for the completion documents.
- The purchaser's advocate on the other hand will attend to payment of stamp duty on the transfer. After payment of the balance of the purchase price, the purchaser's advocate ensures that the transfer is registered in the name of his client.

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