



FROM THE GROUND UP

A LEGAL TAKE ON STRUCTURING
REAL ESTATE DEVELOPMENT
PROJECTS

LETTER FROM THE EDITOR



Unquestionably, recent world events such as the war in Ukraine, the downturn in the global economy, widespread drought due to climate change, and the lingering effects of COVID-19 have continued to influence many lives as food, fuel, and commodity prices have hit the roof.

The real estate and construction sectors were not spared as the increase in the cost of materials persisted throughout 2022 and into the early part of this year affecting construction timelines as developers tightened their belts. On the flipside, technical challenges in digitization of the Nairobi land registries has proven a major stumbling block to successful completion of property transactions as stakeholders navigate new territory with “Arghisasa”, the government’s new online land information and process management system.

Despite these obstacles, the past twelve months has seen continued interest in the Kenyan real estate market which remains a safe and viable investment option for developers, financiers, property owners and investors.

At FMC, we have a strong focus on real estate and project work in the residential and commercial ecosystems. We advise a broad spectrum of clients on land due diligence, property acquisitions for large scale projects, structuring and management of joint ventures, transactional sales and leasing, post-completion infrastructure and services and estate planning and management.

If you are looking to tap into the vibrant real estate sector, this edition of Legal Take explores a wide range of issues critical to understanding projects and land transactions.

KEY AREAS OF FOCUS

- ♦ Digitization of land records and processes.
- ♦ Approvals for developers when starting construction.
- ♦ Estate planning for investors.
- ♦ Joint ventures and structuring considerations.
- ♦ Key legal documentation for investors.
- ♦ Sectional titles.
- ♦ Technology infrastructure in real estate developments.

As you aim to invest in real estate, I hope you enjoy reading our articles, learn where to start and what to consider and acquire the necessary information to help you make informed choices.

Finally, I would like to pass on my gratitude and appreciation to all the amazing, dedicated and brilliant lawyers and support team at FMC who have contributed to this edition.

Sincerely,

Joshua Indeke

Communications Officer

March, 2023

DIGITIZATION OF LAND RECORDS AND PROCESSES IN KENYA

BY DIANA WARIARA

Land ownership in Kenya is associated with wealth and financial security which has allowed landowners to leverage on the economic value of the land to undertake dealings such as securing financing, joint ventures for real estate projects, and sale of land. As a result, numerous manual transactions were undertaken daily at the Land's Registry. Over time, however, it has become clear that manual transactions are flawed by certain inefficiencies such as fraud, corruption, and unreasonable delays thus affecting the confidence of end users such as landowners, developers, financiers and investors in the reliability and efficiency of the land administration system.

Consider the example of a developer and landowner entering a joint venture to start a new residential or commercial development project which will involve off-plan sales during the construction period. They and their investors are required to undertake several interactions with the lands registry to ensure the structure and viability of their project from an investor perspective is sound.

Some of these interactions will include:

1. Land searches to verify ownership of the project land.
2. Land transfer of the project land to the special purpose vehicle that will sell the project.
3. Registration of change of user to allow multi-dwelling units.
4. Transactional sales of off-plan units from by the SPV to investors.
5. Due diligence by investors prior to committing to purchase a unit.
6. Registration of unit titles in favour of investors once the project is completed.

To ensure comfort of all the parties, the land records data needs to be accurate and verifiable, while the land processes need to be efficient and easy to access and use. This has not always been the case, as evidence by the problems raised above.

To deal with these problems, the Government has started to gradually digitize most processes associated with land transactions, for instance, payment of stamp duty via i-tax and most recently adoption of "**Ardhi Sasa**" which is a program that aims to digitizing all land records in Kenya.

Essentially, the Ardhi Sasa platform relies on blockchain technology similar to the technology used to facilitate Bitcoin transactions and works as follows:

1. when a transaction is carried out on the platform, it is classified together in a cryptographically protected block and sent out to all concerned parties for confirmation. Each category of these transactions is known as a block.
2. the confirmed block of transactions is then time-stamped and added to a chain in a linear, chronological order.
3. the entire chain is consistently updated so that every ledger in the network is the same giving each party the ability to prove who owns which property at any given time.

Ideally, the Ardhi Sasa platform should look to promote several benefits to the land processes in Kenya, key among them being promoting transparency, ensuring sanctity of title documents and land records, enabling access to information, curbing corruption and creating an online database that would act as a massive yet secure storage center. In this article we explore the lessons and challenges from implementation of the Ardhi Sasa system so far.

THE PROCESS OF CONVERSION

Prior to Ardhi Sasa, land registration was undertaken manually under two systems, these being the registration of deeds and the registration of titles.

The **registration of deed system** entailed maintenance of a public register in which documents affecting interests in a registered land were documented. The deed registration system meant that the deed itself, being a document which described an isolated transaction, is registered. In this case, such a deed is mere evidence of the recorded transaction and is by no means proof of title. The most that can be made from a deed is to invoke the records as proof (on the face of it) of the fact that the transaction in question did occur. It was not sufficient to prove the validity or legitimacy of such transactions. Registration of deeds was common in Nairobi and Coastal registries.

The registration of title system refers to the maintenance by the state of an authoritative record of all rights in relation to parcels of land. Such parcels may from time to time be vested on specific individuals or legal entities and subject to any limitations that may be disclosed in the register itself save for such overriding interests. Under this system, the government guaranteed all rights shown in the land register.

Currently these two systems have been marred with various inefficiencies as the systems are heavily dependent on human input. Consequently, issues such as fraudulently acquired titles and land grabbing were prevalent and as a result the sanctity of titles to land were often in question. Furthermore, the state of our land registries, which are meant to be custodians of titles, were in deplorable condition. This being partly attributed to the unscrupulous land officials who facilitate corrupt practices in such transactions, poor and haphazard maintenance of lands records, high costs associated with carrying out land transactions and a lack of transparency in land processes amongst other issues. The Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive, and sustainable. It further provides that principles of equity and transparency shall be paramount in administration of land. This provision has in turn informed the decision to digitize of land records as a way of curing the short comings of manual process as well as ease the nature of carrying out business in Kenya.

Digitization of land records requires that there be a migration of information kept in the manual register to the digital register. As such, this process is being undertaken through a process known as conversion that requires the closure of all manual registers and opening of digital registers. The conversion process is undertaken in the following steps below:

1. Preparation of the Cadastral Maps by Survey of Kenya which serves as a unified survey document. This process is done concurrently with preparation of a conversion list that has details of the properties with their old title number, new title numbers and their acreage.
2. Once the conversion list is ready, the Cabinet Secretary of Lands and Physical Planning shall publish the same in the Kenya Gazette. Within ninety days from the gazette date, landowners may file an objection if there are any issues regarding the property. Once the property has been converted, all manual transactions on the property are suspended until the conversion process is complete.
3. If no objections are raised within the gazette notice period, landowners of parcels listed in the gazette notice are required to apply for the replacement

of their old title documents with new title documents under the Land Registration Act, 2012 according to the Registrar's notification. It is worth noting that all interests recorded under the old title are replicated in the new title document.

4. Once the new title is issued, the conversion process is deemed to have been completed and all transactions relating to the land e.g., payment of land rates, registration of all instruments such as charges, leases, transfers are undertaken on the Ardhi Sasa platform.

CHALLENGES UNDER ARDHI SASA

Despite the launch of the Ardhi Sasa platform in April 2021, the process has experienced several challenges in its implementation, some of which are captured below:

1. Stalled transactions

Applications for conversion on the Ardhi Sasa platform tend to stall at 50% or 75% with no clear path to completion. This problem seems to be emanating at the interdepartmental verification stage where there is cross-referencing and verifying of data across three departments i.e., Land Administration, Survey of Kenya, and Land Registration – which is a process that precedes the replacement of titles. These undue delays make the situation worse as key stakeholders are unable to time their transactions or even transact with gazetted properties until the conversion process is complete.

2. Missing data

It seems that not all property details have been scanned. As such proprietors and advocates are unable to file applications for replacement of title until all property details have been scanned and enumerated by the respective parties.

3. Communication hiccups

Once applications have been made, feedback on ongoing transactions lodged on the platform not forthcoming. As such, one is forced to make several follow ups with staff on the backend via calls or visits to their offices to receive updates or information on the status of the transaction. This is not what one would envisage when interacting with a digital platform.

4. Issuance of new titles

Once the application for replacement of title has been done, one is required to book an appointment at the registry to surrender

their current title for issuance of a new title with the new title number. It been noted with great concern that after the title has been surrendered there are undue delays in issuance of a new title. This has in turn inconvenienced proprietors as they are unable to transact on the properties and harbors panic as they have no document to prove ownership over their property.

5. Sensitization of landowners

Many Kenyans are still in the dark on the operations of the Ardhi Sasa platform and the current conversion process. As such, they do not appreciate the benefits the platform may yield and this in turn limits its adoption and impact. Currently, many proprietors are yet to initiate the conversion process making processes like due diligence difficult to undertake. This issue will only persist with implementation across the country. As such, there is a need for more awareness-raising campaigns and training programs to educate Kenyans about the platform.

6. Due diligence roadblocks

Conducting searches on the platform is challenging especially where details of the property have not been listed on the system or the proprietor has not initiated the conversion process. This makes it difficult to verify property ownership records making undertaking of diligence on transactions such as off plan projects an uphill task.

7. Lack of supporting infrastructure

The successful implementation of the Ardhi Sasa platform is heavily reliant on digital infrastructure. Many parts of Kenya still lack reliable internet connectivity and many Kenyans living in rural areas do not have access to computers consequently this may lead to slow data transfer making it difficult for users to access the platform.

The above challenges have adversely affected key stakeholders such as land proprietors, banks, sacco and conveyancing lawyers as they have led to stalling of property transactions and in some instances termination of the said transactions. One of the more prominent stakeholders, the Law Society of Kenya, recently held peaceful protests in Nairobi and across the country dubbed "Ardhi Sasa, Ardhi Tasa" and raised serious concerns as to the efficiency of the system. The aim of the protest was to bring to the public eye the issues that Advocates and their clients facing which were being ignored or neglected by the Ministry officials and

hopefully lead to a quick resolution of the same.

Implementation of the digitization process has had a serious bearing on property development projects where landowners and developers have been unable to obtain financing from banks due to challenges in undertaking their due diligence or registration of charge instruments on the Ardhi Sasa platform against the property's register. Further, Developers have seen undue delays in acquisition of properties due to the inefficiencies of the system and last of all, due diligence for investors has been an uphill task due to the challenges of obtaining land searches on the platform.

CONCLUSION

Roll out of the Ardhi Sasa platform to other parts of the country has already commenced and it is clear from the new Cabinet Secretary for Lands that they are committed to seeing it through and has given an ambitious deadline of June 2023 for completion of this process. While this would be desirable for all concerned stakeholders, there remains a lot of apprehension on the rushed implementation across the country while the issues in Nairobi remain unresolved.

It is imperative that implementing officials learn from the challenges experienced in the pilot to ensure a smooth implementation throughout the country. There have also been calls to examine digitization of other sectors such as the digitization of the Companies Registry which was undertaken in 2017 and processes on the system were gradually implemented both digitally and manually.

The above notwithstanding, digitization of land records is certainly a step in the right direction as it offers an intervention to provide reliable and quality services through an efficient and effective service mechanism. It is, however, important that roll out to the said process be done in a proper manner to ensure the issues affecting the manual register do not manifest on the new platform which will consequently affect its reliability and efficiency, thereby affecting service delivery to Kenyans. Swift action and full stakeholder participation is required to resolve the issues facing the system currently, lest it lead to a nationwide halt of all land transactions.

AUTHOR PROFILE

Diana Wariara is a Senior Associate at the firm with an interest in real estate, construction and conveyancing law. She advises a wide range of clients on real estate & construction matters and has achieved successful conclusion of numerous contractual assignments for her client's projects. Adept in legal advisory, regulatory, compliance, conveyance and corporate and commercial law. Diana is keen on looking for ways to improve and evolve processes in handling dispute resolution, resolving legal issues, reviewing documents, drafting legal documents and effectively representing client contractual interests.



THE KEY APPROVALS REQUIRED BY DEVELOPERS WHEN STARTING CONSTRUCTION

BY FAITH LINDA

We are living in times when many developments are coming up and investors are investing to enable them to have assets to secure their future. As we embark on this journey of construction, we need to be careful of whom to trust and this can only be done when proper documents are put in place. Prior to any construction, the law obligates developers to obtain a wide range of approvals.

WHAT ARE APPROVALS?

These are documents that are issued by national and county government authorities to sanction the construction of a new building to take place. These approvals consider all aspects of construction including physical and land use planning, environmental effects, land user, and resource management. Government agencies look across these aspects to determine whether proposed constructions are up to code.

WHY SHOULD WE GET APPROVALS?

- a. It is a legal requirement that all construction developers must undergo a permitting process before they start construction, at all stages as may be required depending on the construction. Any development constructed without proper approvals runs the risk of demolition.
- b. Approvals build trust in investors who want to purchase into projects knowing very well you have everything in place. As Ronald Reagan said, "Trust but verify". Sharing these approvals shows that developers have nothing to hide and allows investors to verify their authenticity.
- c. This also shows transparency in what developers intend to do; hence this will build a developer's brand.

- d. Approvals also ensure that any developments are safe for their intended purposes. Bodies such as the National Construction Authority (NCA) & National Environment Management Authority (NEMA) are in place to protect the safety of the occupiers of developers together with the surrounding areas.

The following are the approvals one needs when starting construction. Please note that failure to have the approvals or missing out on some of the approval's, the construction will not take place and legal measures will be instigated upon the developer.

1. SURVEY PLANS FROM SURVEY OF KENYA

A cadastral survey plan or a registered plan provides the details of the boundaries of a property, as well as its area. This is done so that the land is clearly identified by the landowner and confirmed at the Registry. Developers will often purchase property, believing it is suitable for development when it isn't. A proper survey can help avoid this.

Conducting a land survey is essential for anyone intending to buy a property or develop a piece of land. It provides you with the information you need to figure out whether you're making the right decision to purchase and how to proceed with it.

2. ARCHITECTURAL/BUILDING PLAN APPROVAL

Architectural plans, sometimes called "blueprints" of how the proposed building works, including floor plans, elevations, and sections, in accordance with the requirements of the rules and regulations of the authority. Architectural Plan Approvals are issued by the respective county government in which the proposed development

is intended to be constructed. The architectural plan approvals may specify certain conditions to be met with relation to the construction prior to its commencement.

3. LICENSE FROM NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA)

According to Environmental Management and Co-ordination Act Chapter 387, NEMA's objective and purpose are to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

The NEMA license is to ensure that any proposed construction does not have negative effects on the environment, and if it does, developers have been protected against such effects.

4. RESOURCE AUTHORITY (WRA) APPROVALS

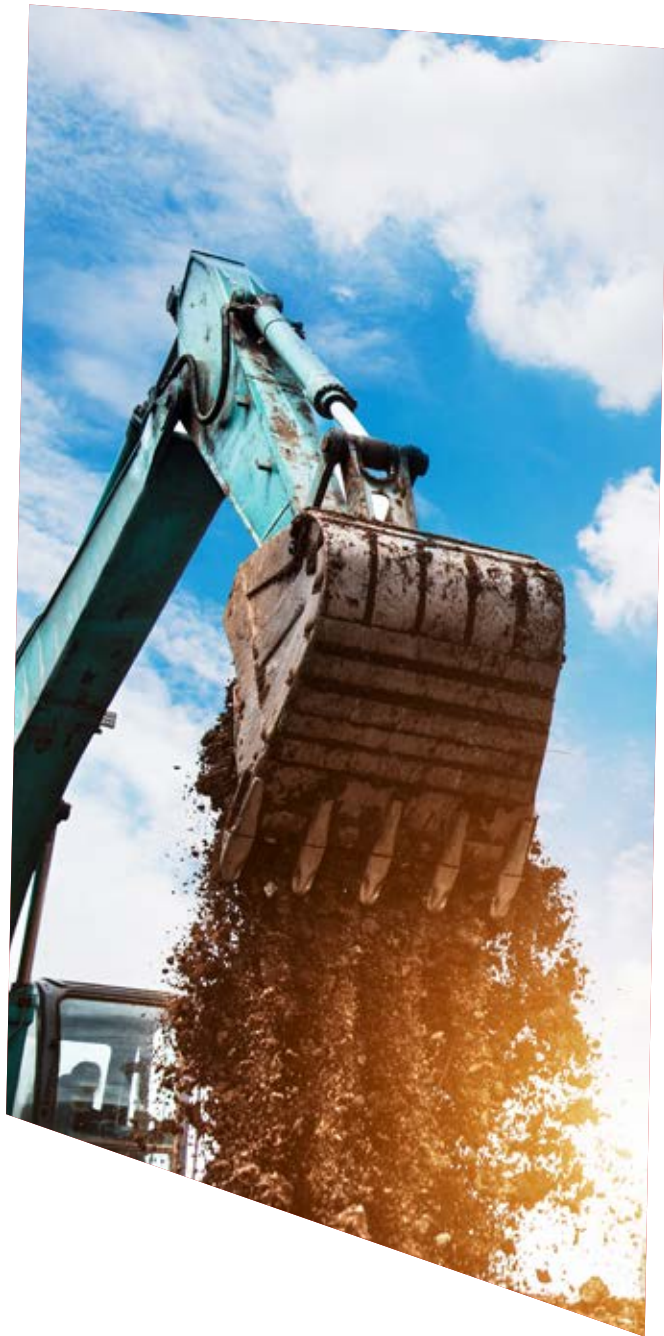
The WRA mandate is to manage and regulate the use of water resources. The Water Resource Authority Approvals are issued to any constructions that:

- a. involve the use of water resources; or
- b. drain pollutants into water resources or swamps.

An example of use of water resources is the drilling of boreholes by developers to provide water to the premises. WRA Approvals should be obtained before any drilling work can commence.

5. NATIONAL CONSTRUCTION AUTHORITY (NCA) APPROVALS

This is a body that regulates, streamlines, and builds capacity in the construction industry. It also keeps a register of all construction



works happening across the country. It is the duty of a developer to register their projects with NCA. The NCA License is issued to a developer confirming that the requisite construction levies have been paid, and it gives certain stipulations regarding construction of the building, including inspection of construction and notification should the project change from the agreed plans. Constructing a building without NCA's approval is a criminal offense.

6. CHANGE OF USER APPROVAL

This is obtained when the existing use of the property doesn't permit construction of a development. Change of User is issued at two levels the county and national levels. At the County Government, we get the approval for a formal change of using them to permit the use of the Land which should be obtained by the developer. Afterward, the developer must apply to the Ministry of Lands to approve the proposed change of user.

7. KENYA CIVIL AVIATION AUTHORITY (KCAA) APPROVALS

The KCAA is the body tasked with ensuring aviation safety in Kenya. Any developers intending on constructing buildings close to an airport or an airstrip must seek the KCAA's authorization. This is to make sure that the building that is about to be constructed does not pass a certain level of height that would obstruct the flight of aircrafts or the use of an airport/airstrip.

AUTHOR PROFILE

Faith Linda is an Office Administrator at the Firm currently pursuing a course in Human Resource at The College of Human Resource Management. Faith assists the Projects team by ensuring that investors receive their documents in good order and they are up to date on their legal fee payments. She also provides support in preparation and execution of legal documents.



ESTATE PLANNING IN REAL ESTATE: HOW CAN I PROTECT MY INVESTMENT?

BY ANNE MUMBI

The real estate market is booming in Kenya with many individuals based locally and, in the diaspora, looking for new opportunities to invest in off-plan properties. Whenever one sees a poster about a new project that has commenced or is near completion there is a chance that they would be asking themselves whether the time has come for them to take a leap of faith and invest in real estate.

As you consider your next investment, it is prudent to know that your future assets need protection especially if you are thinking of creating generational wealth for your family and loved ones. This can be achieved through estate planning and management which is a process through which a person puts in place structures which will safeguard their hard-earned wealth in the unfortunate event of their incapacitation or demise.

AS AN INVESTOR IN REAL ESTATE HOW DO YOU USUALLY INVEST IN PROPERTY?

Many investors tend to purchase property in projects in a variety of ways:

1. Alone
2. Jointly with one or two people e.g. a spouse, siblings or with friends
3. Jointly with a child

Each of these ways is unique in several ways. For example:

a) When you buy property alone, you are generally free to use it as you wish without the need to consider other co-owners. It is important to prepare for eventualities as your death may leave the property at risk of being lost without a clear succession plan.

b) In co-owned property, a benefit is that the property cannot not be transferred without the consent of the co-owners, which is important where many parties contribute to its acquisition. The downside of this is that decision-making regarding the property may at times take a long time or may give rise to disputes.

c) Where property is held "jointly" with a child then the parent essentially holds the whole property (or a portion) in trust for the child until the child reaches the age of majority. Such property ownership helps restrict dealings in the property until the child becomes an adult and is able to make informed decisions and also the property cannot be subject to claim by a creditors. A parent who has bought property in trust for their child cannot sell that property freely as their child's interest is protected; this may present challenges when the parent has an urgent need to liquidate the property for money.

COMMON ESTATE PLANNING MECHANISMS

Once you identify an opportunity in a development project, you need to start planning ahead for eventualities when signing on as an investor or receiving your title deed. Depending on how you purchase your property, the following can be some of the ways you can plan for your property's future:

1. Making a Will once you acquire property

A will is a legal document that expresses a person's wishes as to how their property is to be distributed after their death, states the custody of their minor children (if any) and which person is to manage the property until its final distribution. When a person dies without a will, the court will need to determine who is the rightful beneficiary of your estate, thus risking property going to beneficiaries who may not have been preferred by you.

2. Buying the apartment using an investment vehicle such as a company

Buying the apartment or land under company would be ideal especially where there are many purchasers since the company can own property and enter into contracts in its own name. The shareholders in the company can sign an agreement that helps structure what happens to their stake in the company which owns the property in the event one of them passes away.

The above are not exhaustive as a lot depends on the assets you own, but they do give an indication of early decisions that need to be made when making investments in real estate. As such, a continuous assessment of your property portfolio as you gain wealth is critical to determine what structures work well for you going forward.

BENEFITS OF ESTATE PLANNING

- a. You have peace of mind which helps you plan on how you shall preserve your property for your beneficiaries;
- b. You can leave your property to whomever you choose.
- c. You can protect your beneficiaries from 'predators' who may wish to take advantage of your beneficiaries in your absence.
- d. You can appoint a trusted guardian for your minor children who cannot manage the property or defend themselves in the event of a dispute while young.
- e. You can prevent or reduce family wrangles or other disputes that may arise on your demise.
- f. You can ensure that your property does not fall into disrepair or mismanagement.

CONCLUSION

One of the myths we need to burst is that planning for the future does not mean one is dying or that they are inviting the angel of death into their lives. It is simply taking charge of one's life and learning of ways to preserve their wealth. When it comes to real estate, planning is crucial to ensure preservation of property for future generations. It is not just a preserve of the wealthy but actually for everyone who has assets to protect and pass on to their loved ones.

AUTHOR PROFILE

Anne Mumbi is an associate at the firm with vast knowledge in succession law, real estate, intellectual property and commercial law. She has advised various clients on how to plan their estate, how to apply for intellectual property and real estate matters such as applying for replacement of title on the Ardisasa platform.



JOINT VENTURES: HOW STRANGERS CAN BECOME BUSINESS PARTNERS FOR LONG-TERM SUSTAINABLE GAINS

BY FIDEL MWAKI

As Kenyans we invest a lot in the real estate sector but most often the land is then left idle, underutilised or misused since improvements to the land may require substantial capital which the landowner may not have. Joint Ventures offer an increasingly popular route for landowners to realise long-term value over their land.

In recent times, joint ventures have been commonly used in multi-use residential and commercial property developments with many landowners and property developers benefitting significantly from returns on investment once projects are completed and occupied by new owners and tenants.

Typically, a joint venture in the real estate context is a commercial arrangement between one or more parties for development of property for sale or rent where each party contributes in some way towards the success of the project having considering its scope and viability and expecting certain returns at the end.

The arrangement is ordinarily set down in written terms under a JV agreement which provides for certain obligations for each of the parties.

WHO ARE THE USUAL PARTIES TO A JV AGREEMENT

LANDOWNER

The owner of the project parcel often times can be an individual, their family or a corporate entity. Because landowners can be very diverse, this can at times create complexities where for example, several co-owners of a property may individually view the risk and reward differently.

DEVELOPER

The developer generally is the brains behind the idea and has a critical role to convince other parties of the feasibility of the project. As the party who will oversee the construction aspect, the developer should provide comfort to other parties that they have the technical expertise and commercial know-how to execute the project within agreed timelines.

FINANCIER(S)

This role can be filled by the developer or a third party who may not be involved in the day-to-day operations

of the joint venture but supports the project through by funding part or all of the project and may have an interest in the return on the project once it is completed.

SPECIAL PURPOSE VEHICLE (SPV)

The SPV is the project company established by the other parties to act as the face of the project to the outside world. The beauty of the SPV to the parties is that it limits their risks to the contribution they make and the SPV can enter into third party contracts and fulfil legal and commercial obligations in its own name.

WHAT ARE THE KEY PROVISIONS UNDER A JV AGREEMENT

CONTRIBUTION

This sets out what each party is contributing to the pot. For example, if the landowner is contributing half their parcel, then the provisions would expressly state this. A financier who supports the project by providing a third of funding will want to have this recorded. Whereas a developer who agrees to take on the entire responsibility for project management of the construction phase should ensure that its obligation is set out from the get-go.

The risk in the project can then be apportioned correctly, based on their respective contribution to the joint endeavour.

CONSIDERATION

The consideration for each party's contribution i.e. their return on investment can be quantified in percentages or amounts depending on the agreement between the parties.

Typically, for a landowner, their contribution may be equivalent to the value of land they put into the project, while a developer and/or financier may receive or share in the remainder of the project. Sometimes contribution can be measured differently i.e., as a profit share of total sales or in terms of future rental income depending on whether parties wish to maintain a short or long-term relationship, post completion.

PROJECT DELIVERABLES

A critical point for all parties including financiers to understand is the

deliverables by each party and how they can be achieved.

Real estate construction generally works on pre agreed estimated timelines; however these are usually subject to all sorts of factors that may cause delays in completion such as shortages of key materials such as steel and cement or exchange rate fluctuations affecting price of imported commodities. For landowners, delays in transfer of the project land to the SPV are common and this can create friction with developers and financiers if not handled well or anticipated early.

It is important for deliverables by each party to be set out concisely and supported by contingencies or penalties for delays in performance.

DISPUTE RESOLUTION MECHANISMS

In an ideal world, real estate projects would start and end without a hitch, however this does not always play out in that manner.

Parties need to agree on how disputes between them are settled, with confidentiality and binding resolutions being key considerations. A project that in the public appears to have a lot of infighting can destabilise its viability as investors looking to buy in to the project may become sensitive or jittery if they feel the owners are not aligned internally.

Common commercial practice seems to indicate that dispute resolution mechanisms such as negotiation, mediation and arbitration are best suited to handling disputes among JV parties due to their confidentiality and binding nature.

TYPICAL PROJECT STRUCTURE

Prior to executing a JV agreement, the parties would incorporate the SPV for the project.

Under the terms of the JV agreement, the developer would contribute a certain percentage towards their expertise and personnel to deliver the project while the landowner would contribute a certain percentage in the form of land. A financier may also come in as a party to provide funding depending on the needs of the project and, if so, may require a stake in the SPV to protect its investment.

Illustrated below is a **typical JV structure** that parties may use in some way or form.



An SPV also has certain **constitutional documents** such as articles of association that govern the internal relationship between the parties, subject to the terms of the JV agreement. These documents would include provisions on decision-making, rights of shareholders, how to appoint directors and key personnel, authority required to approve certain transactions and guidelines on how to treat future exits from the SPV.

TIMELINE

The **timeline** for execution of joint ventures in real estate can vary due to all manner of factors; some commercial, others legal. Some of the issues parties may need to consider when negotiating or determining a timeline for a project are the project appraisal and due diligence by the parties, development of project plans and drawings, construction approvals negotiating the JV agreement, marketing the project and the construction period.

POTENTIAL ROADBLOCKS

Joint ventures typically involve substantial capital investments that can and at times do fall foul of all manner of roadblocks, for example:

TRUST ISSUES AMONG JV PARTNERS

Because parties tend to be operating at arm's length with some having never done business together before, it is important that good open working relationships are established quickly from the very beginning. For example, developers engaging with landowners

need to be able to show capability and capacity to complete projects within reasonable budgets and on time. This is key for landowners who are being asked to give up their land on the promise of a significant return in the future.

Trust between parties will help the relationship stay strong even when external factors may try to derail the project as it picks up steam.

UNFORESEEN EVENTS

Construction sites can be victim of unforeseen events such as labour strikes, political events, government action, or even Acts of God that can slow down or significantly delay completion. The best-case example in recent times being the Covid-19 pandemic, an unforeseen worldwide event that affected movement of people across the globe which led many construction sites to shut down for a while due to restrictions affecting work spaces.

Unforeseen events are always listed in construction agreements and third-party sale/lease contracts as events that may delay or halt performance of the contract. Joint venture parties should be keen to find ways to mitigate against them to ensure that the project meets the deadlines they set out from the start.

WHAT TO DO NEXT IF YOU ARE CONSIDERING A JOINT VENTURE

Agree from the onset on commercial terms e.g. what you each put in and what you each will get out of the arrangement.

Having vague terms and inconsistent arrangements can cause unnecessary disputes down the line.

Conduct due diligence on each other.

The landowner should interrogate the developer on its capacity to handle projects of sizeable nature, while the developer should ensure to undertake thorough due diligence on the land that will be used for the project. Both parties should be comfortable with the ability of any third party financier to bankroll the project and get appropriate assurances that funds are available and ringfenced for the project.

Seek the right professionals to help guide your project;

from corporate and real estate lawyers, tax experts and finance professionals to sales and marketing consultants, project managers and architects – all of whom are vital cogs in dream team. As parties to a joint venture, you should work with a team that has capacity and experience to be able to advise and deliver on your goals while reducing your risk.

Have faith and appreciate some element of risk.

Joint ventures are not small undertakings and they demand a lot from each partner both in terms of risking capital. On the flipside, it is important to trust your partners to do the best for each other to ensure a successful end result that stretches relationships and brings value to all concerned.

AUTHOR PROFILE

Fidel Mwaki is a Kenyan-qualified Advocate with extensive knowledge and experience in real estate in Kenya whose practice currently centres on real estate developments and related commercial transactions. He represents clients developing multi-use commercial and residential real estate projects including advising on structuring joint venture arrangements and project documents such as construction contracts, agency agreements, sale agreements and long-term leases.



ARE YOUR PAPERS IN ORDER? A BRIEF UNDERSTANDING OF KEY LEGAL DOCUMENTATION FOR INVESTORS WHEN BUYING AN APARTMENT

BY KASEYI FAITH

The concept of buying off plan has gained traction in Kenya with many investors being attracted to it due to the low prices. If you are planning to buy an apartment, there are several important documents that you must receive to prove you are the legal and beneficial owner of the apartment. These documents are usually included in a sale agreement as completion documents. Sale agreements fully protect the rights and interests of the buyers and the Developer since they state each party's obligations and remedies in case of breach of contract.

So, what are some of these completion documents that you should expect once you finish paying the purchase price?

1. Title Deed

An original certificate of lease or sectional title duly registered in your name at the Lands Registry. A title deed is an official, legal document which has information about the person who owns the apartment. Just like you have a birth certificate to prove who you are, the apartment will have a file that proves who owns it.

2. A Transfer

A stamped and registered transfer is a legal proof that the transfer has been made from the previous owner to your name. This document is submitted for registration in order to get a title deed. A transfer also shows that the proper legal process was followed in getting a title deed.

3. KRA Payment e-Slip

The original KRA e-slip is obtained from the buyer's Advocates which is proof that the stamp duty on the apartment was paid. Stamp duty is a tax charged on any transfer of property and all buyers must pay stamp duty.

4. Valuation Form

A certified copy of the valuation for stamp duty form approved by the Government Valuer is used to have

the property valued on the amount to be paid as stamp duty. This form gives investors an idea of how much the apartment is valued and how much stamp duty must be paid for the Apartment.

5. Practical Completion Certificate

For any investor to take possession of an apartment, they need to have a certified copy of the practical completion certificate which is issued by the Developer's architects. This document establishes the fact that the building was constructed according to the approved building plans and has been completed by the contractors.

6. Occupation Certificate

An investor must have a certified copy of the occupation certificate from the relevant County Government. This is issued to establish the building is finally ready to be occupied and the construction has been done according to a sanctioned plan. Use of the property, without obtaining this certificate, exposes the buyer to penalty under the applicable building by-laws, besides the risk of demolition of the property.

7. The Sectional Plan

This document shows the divisions of the development into units, where each individual unit is located, and the common areas managed collectively by the Corporation. The sectional plan must be registered once the construction was completed.

8. Certificate of Registration of the Corporation

Certificate of registration of the corporation shows that the corporation has been registered at the Registry. The Corporation shall consist of all the owners in the development and some of its functions shall be ensuring all

common areas are maintained, pay the premiums in respect of any policies of insurance and do all other things to ensure the development is well managed including engaging the services of a property manager.

9. Registered By-Laws

The by-Laws are the rules and regulations that will govern the development. They specify membership, disputes resolution mechanisms and duties of the Corporation. It is an important document to have as every apartment owner is a member of the Corporation.

10. License from the National Construction Authority (NCA)

Having this document shows that the Developer submitted the proposed construction plans to the NCA and those plans were approved, allowing for the Developer to construct the development. This gives one peace knowing the building is fit for occupation both legally and physically.

11. License from the National Environmental Management Authority (NEMA)

This certifies that the project was approved by National Environment Management Authority and the Environmental Impact Assessment License was issued of which the project Developer fulfilled any the conditions while developing the project. Any constructions that are not approved by NEMA are illegal and risk demolition.

As an investor, it is important to be keen when reviewing your legal documentation to ensure you receive the right documents and have comfort that the proper procedures were followed, and approvals were obtained when the apartment was completed.

AUTHOR PROFILE

Kaseyi Faith is a legal secretary at the firm. She plays a key role within the legal team in drafting of sale agreements and managing project reports, including identifying double bookings, preparing project updates ensuring investors receive all their legal documentation in good order.



UNPACKING THE NEW SECTIONAL TITLES PROCESS IN KENYA

BY ALFRED NYAGA

Over the years, the real estate industry has been booming in Kenya due to the quest of many Kenyans to own property as a way of investment and to secure their future. This significant growth has necessitated the need to align property laws affecting sectional units with the Constitution of Kenya 2010 and existing land laws. This reform led to the introduction of the new Sectional Properties Act, 2020 (the Act).

The Act seeks to guarantee the rights of property owners by conferring absolute rights to individual unit owners over their sectional units. The Act gives the unit owners greater power and liberty to deal with their units as they please whether through leasing, transferring, disposing, and even charging the sectional property without requiring the consent of the Headlessor or management company as has previously been the case.

WHAT IS A SECTIONAL TITLE UNDER THE ACT AND HOW DOES ONE ACQUIRE IT IN A NEW PROJECT?

A **sectional title** is a form of title conferring ownership of a unit together within a residential or commercial development. The ownership of such a unit also includes ownership of a share of the common property with other unit owners in the building or development. Sectional titles are therefore appropriate for multi-use developments that result in apartments, flats, maisonettes, townhouses, and office units.

As new developments come up, they are required to conform to the requirements under the Act. Investors looking to purchase units at such a project should aim to understand the process of acquiring a sectional title which is set out below.

STEP ONE: PREPARATION OF A SECTIONAL PLAN

A sectional plan is a designated plan describing two or more units. It is drawn up by a licensed surveyor and must be based on the building plans which are approved by the County Government once it has satisfied itself that the building plans conform to the county By-Laws on constructions and developments.

For the surveyor to prepare a sectional plan, the project company and/or the developer of the property must present proof of ownership of the parcel of land to which the sectional plan shall apply. The proof of ownership of the parcel of land would be the title deed or certificate of lease.

The parcel of land which the development will be set up must be properly **geo-referenced** and approved by the Survey of Kenya which is under the Ministry of Lands. Geo-referencing of the parcel of land involves obtaining the coordinates of the land, development, and unit from a specific or unique location on the earth surface. Thereafter, a sectional plan is prepared from the referenced points.

The sectional plan must be signed by the surveyor and the owner of the property or the project company before it is presented to the land registrar for registration.

STEP TWO: REGISTRATION OF GEO-REFERENCED SECTIONAL PLAN

This process of acquiring a sectional title is initiated in the Ministry of Lands by presenting the sectional plan in quadruplicate for registration by the Registrar who must confirm that all the documentation accompanying the sectional plan are in order before registering it.

Documents accompanying the sectional plan for registration

The following documents must be presented to the Registrar when presenting the geo-referenced sectional plan for registration:

1. Application for registration Form LRA 9;
2. Original certificate of title or lease;
3. An application for incorporation of the Corporation; and
4. List of the persons who are owners the development and list can be amended and updated from time to time as investors continue to purchase the units.

STEP THREE: CLOSURE OF THE MOTHER TITLE REGISTER

Once the sectional plan is registered, the Registrar will review the application to ascertain that it is in order then close the register of the parcel of land and open a separate register for each unit described in the sectional plan.

Once the register relating to the mother title is closed, the title deed is surrendered to the land registry and any interests which were noted on the mother title are transferred to the registers for each unit. The interests registered against the mother title are then endorsed on the sectional title documents. Some of the interests which can be noted on the mother title are charges or easements with respect to the mother title.

STEP FOUR: ISSUANCE OF THE SECTIONAL TITLE

The Registrar shall proceed to open new registers depending on the nature of interest that was in the title or lease that was submitted.

The certificate of title or lease for the unit includes a share in the common property apportioned to the owner of the unit. All the interests against the main title are endorsed on all the sectional titles issued in respect of the sectional units.

STEP FIVE: ESTABLISHMENT OF THE CORPORATION

On registration of a sectional plan, a Corporation will be constituted. Thereafter, the registrar shall issue a Certificate of Registration in respect of the Corporation. The Corporation is responsible for the management of the common areas. It is registered by the Registrar of Lands and is not subject to the provisions of the Companies Act, 2015 unlike the previous regime where the management company was under the ambit of the Companies Act. The Corporation is only subject to the Sectional Properties Act, 2020.

The common property is to be held by owners as tenants in common in shares proportional to the unit factors in their respective units. The share in the common property shall be endorsed on the title deed issued by the Registrar. On opening a register for a unit, the registrar shall include in that register the share in the common property apportioned to the owner of that unit. The share in the common property shall also be included in the title deed for the unit. It is worth noting that the common properties and/or areas are not owned by the Corporation.

The Corporation manages the common areas on behalf of the unit owners in accordance with the



provisions of the Act and by-laws adopted by the members. The Sectional Properties Regulations, 2021 provide for the model By-Laws for the Corporation which must be registered by the Registrar. If there are any amendments to the By-Laws, the Registrar must be amenable to the said amendments before they are registered.

CONCLUSION

In culmination, it is important for investors and prospective investors in sectional units to understand the new legal regime governing sectional titles for apartments, flats, maisonettes, townhouses, and office units. This will enable the investors to make informed decisions on real estate investments and the management of their common properties. Accordingly, understanding the new regime avoids issues of lack of proper sectional titling and fraudulent acquisition of titles.

As they say, information is a very powerful tool.

AUTHOR PROFILE

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TECHNOLOGY INFRASTRUCTURE IN REAL ESTATE DEVELOPMENTS

BY LEWIS NDONGA

Many real estate developers and investors may believe that construction and occupation of property developments is purely a matter of professional construction and proper legal titles. However, such developments are not just brick and mortar. In the digital age, there is more that developers, property managers and investors must consider when looking to improve the quality of services offered at their projects, including taking advantage of technology.

Planning for technology integration in infrastructure enables developers, property managers and apartment owners to absorb technology for the benefit of owners and occupiers.

HOW CAN DEVELOPERS AND PROPERTY MANAGERS INTEGRATE TECHNOLOGY INTO DEVELOPMENTS?

The buck stops with the developers and property managers; it is their responsibility to ensure that any tech advancements included within a development are made to improve the lives and services offered at the premises. In our experience, we have seen developers integrate the following infrastructure within their developments:

1. Integration of smart utility systems such as smart water meters – Kenya Power hit the ground running in integrating pre-paid electricity meters in homes across Kenya, which eliminated the norm of visiting Kenya Power offices and inspection of the old electricity meters. However, we have seen other utilities such as water being managed by smart meters, which ensures remote tracking of water consumption and identifying accurate water bills.
2. Telecommunications and internet – in this age, every developer must consider fitting their developments with Wi-Fi access, with the latest digital report by KEPIOS placing Kenya's internet penetration rate at 42% of the total population. However, telecom companies in Kenya such as Safaricom are always looking to increase their connectivity in particular areas. Developers can consider

any proposals advanced for the installation of telecommunication infrastructure on their developments. This improves the quality of connectivity that their occupiers enjoy at the development.

3. Access and Security Infrastructure – to ensure security of residents and occupiers of developments, developers and property managers have turned to access restriction through security systems such as biometric access, tailored to ensure that only residents and any welcome guests gain access to the development. Furthermore, surveillance systems such as CCTV have been included as a means of curbing insecurity within premises.
4. Damage Mitigation Infrastructure – developments are always at risk of destruction by unplanned events such as fires. In an attempt to reduce the damage from such risks, developers have resorted to systems such as smoke and fire detection systems, automated water sprinklers. These greatly reduce the level of damage in the event of a fire.
5. Property Management IT Services – it is becoming more efficient to operate with hybrid paper and tech office systems. Property managers are increasingly aware that they need to involve some level of software infrastructure to increase efficiency of management services. These systems are built to automate functions such as rent tracking & collection, bulk messaging, apartment occupations, etc.,

WHY IS IT NECESSARY TO ENSURE A SEAMLESS INTEGRATION OF TECH INFRASTRUCTURE INTO DEVELOPMENTS?

In our experience we have found that developments with proper tech infrastructure enjoy the following benefits:

1. Technology improves the quality of services given to occupiers of apartments. Infrastructure such as biometric access restriction, automated fire detection and smart utility meters ensures

that occupiers enjoy the highest standard of services and security during their occupation.

2. Automated tech infrastructure reduces errors. This is particularly evident with property management services, where software tracks payments of rent, provides accounting services to managers and ensures all occupiers receive notices through bulk messaging.
3. Tech infrastructure such as biometric restriction and CCTV surveillance systems guarantee a high level of security and deter any potential criminal activities.

WHAT ARE THE LEGAL CONSIDERATIONS TO BE MADE CONSIDERING THE ABOVE?

While we support tech integration in developments, we are also cautious to note that there are some key legal considerations that must be made while using tech infrastructure. These include:

1. Data Privacy

Following the enactment of the Data Protection Act, 2019 together with its enabling Regulations (the **DPA**), the discussion on compliance with Kenya's privacy laws has taken a leap forward. The DPA gives specific provisions, dictating how any individual's personal data is meant to be used. Integration of tech services such as biometric access restriction, property management software necessitates a discussion on the use of any personal data belonging to occupiers of the premises.

Developers need to be keen to ensure any use of personal data is in line with the DPA, more so ensuring that:

- a. All individuals consent to the use of their personal data. This includes storage, disclosure and even transmission.
- b. All processing is done according to the principles of data protection.
- c. The rights of individuals are always protected.
- d. All data is secured, and unauthorized access is limited as much as possible.



This is important especially with the collection of sensitive personal data such as biometrics, and financial information. The DPA gives additional protections on the use of sensitive personal data, including a compulsory requirement for obtaining consent and giving proper safeguards against unauthorized access or breach of data security.

2. Service Level Agreements and Non-Disclosure Agreements

Developers and managers need to ensure that any engagement with IT service providers such as software managers, internet service providers, security and surveillance systems specialists and suppliers of utility meters are bound by specific provisions under a service level agreement. Under a service level agreement, developers and manager must be keen to check on:

- a. The scope of services offered.
- b. The duration of the engagements.
- c. The payments and terms of payments.
- d. Remote and on-site repairs and maintenance services.
- e. Confidentiality and data privacy.
- f. Termination and retention of data.

Considering the data traffic between service providers and developers, it is important to put non-disclosure agreements in place. This secures any information shared between the parties and ensures obligations are fulfilled in line with Kenya's privacy laws.

3. Licensing

For telecom companies seeking to install telecommunication equipment on developments, there is a need to clarify the legal arrangement between the parties. Licenses from developers to such companies allow them to use the development for a specified purpose, but does not give the telecom companies any legal title over the development. Licenses also ensure that developers retain the right to visit installation sites.

CONCLUSION

Necessity breeds invention.

Day to day functions at a development require that developers and managers seek to improve the lives of occupiers and the quality of services offered. Technology must be seen as a tool for the advancement of man, in the same category as the wheel and combustion engines. Developers, managers and investors must be keen to integrate technology for their benefit but must keep in mind all legal considerations while doing so.

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Lewis Ndonga is an associate at the firm with an interest in commercial law, corporate advisory and more particularly tech law. Throughout his time with FMC, he has advised real estate developers, landlords and property managers on data protection compliance, IT service level agreements and consultancy contracts and non-disclosure obligations.







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