



Fall | 24



INTERNATIONAL LAWYERS NETWORK



C. MPUTHIA ADVOCATES
Buying and Selling Real Estate in Kenya



This guide offers an overview of legal aspects of buying and selling real estate in the requisite jurisdictions. It is meant as an introduction to these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may have been some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.



KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER KENYAN LAW

I. STANDARD FORMS OF AGREEMENTS

- A. The transaction usually begins with a letter of offer from the seller setting out the purchase price, completion period, description and details of property and any other salient terms of the intended purchase. The purchaser is given a time within which he may or may not accept the offer. Issuance of letters of offer is not mandatory, however if the letter of offer and acceptance is made it may be deemed to be a contract.
- B. Most parties prefer to enter into a formally binding sale agreement. In Kenya, any transaction for sale of land must be in writing as provided under Section 3(3) Of the Law of Contract Act. Contracts for sale of land must also be witnessed by a registered Advocate.
- C. There are many forms of sale agreement and parties are free to choose the terms of sale. Section 38 of the Land Act provides that no suit can be brought in a breach of contract case unless the agreement is in writing.
- D. The Law Society of Kenya provides a model sale agreement and the Law Society Of Kenya Conditions Of Sale 2015. Most agreements adopt this format except where any clause is specifically omitted/exempted in the agreement between the parties.

II. BROKERS

- A. Each party is free to appoint a broker to act on their behalf in the transaction. Broker fees are paid as per the commission/agency agreement between the appointing party and the broker.

- B. Real estate agents are licensed under the Estate Agents Act. Fees are guided by Legal Notice 198 of 2012 or by agreement between the parties.
- C. The relationship between the parties is governed by separate agency agreement between the parties. Agreement should conform to the Consumer Protection Act as far as full disclosure and representations are concerned.

III. BUYER'S INSPECTIONS

- A. Due diligence on seller: - for individuals' verification on identification numbers and tax numbers, for registered bodies undertake a search of the business and company to verify ownership and company status.
- B. Due diligence on title deed: - land verification search to ascertain ownership and presence of any encumbrances and other overriding interests on the land such as long-term leases, mortgages, easements, and cautions. The due diligence is also to ascertain the permitted user of the land as residential, commercial, industrial, or other user. Search done on Ardhi Sasa Online Platform. (www.ardhisasa.lands.go.ke)
- C. Due diligence on other documentation: - Verification of regulatory approvals and compliance checks. Verification of building permits, architectural plans, survey maps and other documents
- D. Physical due diligence: - Buyer physically inspects the property by viewing beacons, land boundaries. If the buyer is purchasing a building, then he/she



physically inspects the building. If the buyer is buying a building off-plan, then he/she will inspect the show house to ascertain standards. Most contracts of sale are sold on “as is basis, “therefore necessitating physical inspection.

for a maximum 99-year-old leasehold term. A non-citizen is one who has not acquired Kenyan citizenship or if it is a company/trust one whose majority ownership is comprised of non-citizens. In as much as the provision is in the Constitution it has not yet been effected. In practice non-citizen individuals and entities still own land under freehold terms or leasehold terms exceeding 99 years.

IV. FORMS OF CONVEYANCE IN KENYA

A. LAND RIGHTS IN KENYA

1. Land in Kenya is classified as either public, community or private land under Article 61 (2) of the Constitution.
2. Public land includes all land held by state agencies, county and national government and includes minerals, forests, roads and water bodies. Public land is held by government and is managed by the National Land Commission. No dispositions can be made of public land except by legislation. (Article 62 Constitution Of Kenya
3. Community land is land held by authorized group representatives of any community or held by a specific community. It includes ancestral and grazing rights. No dispositions can be made on community land except by legislation in Parliament (Article 63).
4. Private land is land held by individuals or other registered entities. It includes freehold land and leasehold land. Dispositions of privately held land can be made by private contract. (Article 64 Constitution).
5. Article 65 of the Constitution places a limit as to the land rights of non-citizens. Non-citizens can hold land

B. TYPES OF LAND TRANSACTIONS IN KENYA

6. Transfer of land: - Section 43-49 of the Land Act. A transfer will include a conveyance, transfer, assignment, transfer of lease and other instrument that records transfer of disposition in land. A transfer gives the transferee land ownership rights once the transfer deed is registered. A transfer is made subject to the permitted user, conditions on title (if any) and interest in land (leasehold/freehold). Transfers are made subject to any other interests registered against the title. If a long-term lease is registered against the title then the transfer shall be subject to lease. If a mortgage/charge is registered against the title, then the transfer shall be subject to the charge.
7. Transmission of land: - this is disposition of interest in land after the death of the registered owner. Under Section 48 of the Land Act upon death of a co-owner of land in a joint proprietorship then the remaining interest shall be transmitted to the surviving co-



owner. Upon death of a tenant in common then his/her share shall be transmitted to his/her estate. The same applies to the sole owner of any title, then his/her title would be transmitted to their estate under Section 50 of the Land Act.

8. In the event of bankruptcy, the bankrupts' trustee shall be registered as the proprietor under Section 52 Land Act. Under Section 53 the title to a liquidated/wound up company is passed on to the liquidator through a transmission
9. Leases: - Part VI recognizes various forms of leases of private land and include periodic leases, short term leases, leases terminating on occurrence of future event, future leases, sub-leases, and other forms. The terms of leases can be statutory under Part VI of the Land Act, express (as drafted by parties) and implied (by conduct).
10. Charges: - Recognized under Part VII of the Land Act. Must be made in prescribed form to charge the interest in the title on payment of existing or contingent debt or the fulfillment of a condition. Charge of matrimonial property cannot be effected unless spousal consent is given. Section 80 charged land operates only as security and does not create any land rights in favor of charge. Charges rank in order in which they have been registered (Section 81) allowing for the creation of subsequent charges subject to the prior chargees' consent. Charges can be transferred under Section 86. The charger has a

right to discharge his property under Section 85 once he completes the obligations. Chargee powers remedies and rights are set out under the Land Act.

V. THE "CHECK-THE-BOX" REGULATIONS

- a) Property transactions are subject to the Land Act, Land Registration Act, Sectional Properties Act, Distress for Rent Act and the Landlord and Tenants (Hotels, Shops and Catering Establishments Act).
- b) Stamp Duty Act and Finance Act which provide the rate of tax payable in property transactions. The Income Tax Act would apply if an entity were tax exempt.

VII. FORM OF DEED

- A. The Land Registration Act No. 3 of 2012 Subsidiary Legislation contains the form of deed and instruments effecting dispositions in land. The instruments/deeds must be in approved statutory format

VIII. CLOSING COSTS/ADJUSTMENTS

- A. The Vendor pays capital gains tax on net gain at a rate of 15% of the gain
- B. The purchaser pays stamp duty at a rate of 4% of purchase price in urban areas. In rural areas the percentage is 2% of the purchase price
- C. Where land is leasehold then consent to transfer/lease/charge is paid at a rate of approximately USD 10 if the land is non-agricultural. If the land is agricultural then land control board consent must be given and costs between USD 60-100 depending on the nature of consent. Special Land Control Board Consent is approximately USD 100.



D. The purchaser shall pay the registration fees of less than USD 10

E. The parties pay their advocates legal fees for acting for them in the transaction. Usually, each party pays its own advocate. A guide on the legal fees payable is contained in the Advocates Remuneration Order, 2014. Advocates may opt to follow the Remuneration Order or charge a higher fee as agreed on between the parties.

IX. OTHER CLOSING DOCUMENTS

A. The instrument of conveyance in triplicate which must be signed, dated, and witnessed by an advocate

B. Copies of the parties' tax certificates (PIN) and identification documents (identity card or passports). v In the event of a transmission the certificate of grant.

C. Three colored passport sized photographs

D. In the event of conveyance of a lease hold title interest, a rent clearance certificate and consent to transfer/charge. In the event of agricultural land, the Land Control Board Consent

E. Stamp duty/capital gains payment slip

F. Any other document required or requested for by the regulatory body.

G. Residential Properties: Seller has to have a smoke/carbon monoxide in

X. RECORDING REAL ESTATE DOCUMENTS

A. An application to register interest in land is made to the Land Registrar in the approved statutory format.

B. There is a land registry that registers all dispositions in land and the land registry maintains a record of all transactions in the land register

C. The registrar shall issue the relevant document upon completion of the conveyance transaction

XI. ANNUAL COSTS FOR PROPERTY OWNERSHIP

A. Annual land rent paid annually as indicated in the title deed. Annual land rent is payable only in leasehold titles. Estate that are held as freeholds are not subject to any annual rents.

B. Rates payments payable to the county government at the rate assessed