

Kenyan Land Act - Questions

BRIEF OVERVIEW

The foundation of the new legislation relating to land in Kenya (the “**Land Laws**”) is the Constitution of Kenya that was promulgated on 27th August, 2010 (the “**Constitution**”). Article 68 of the Constitution states that Parliament shall enact legislation to give effect to the provisions of the Constitution relating to land. It is on this basis that Parliament enacted the Land Laws.

The Land Laws came into force on 2nd May 2012 and they comprise of:

- 1) The Land Act (Act No. 6 of 2012);
- 2) The Land Registration Act (Act No. 3 of 2012); and
- 3) The National Land Commission Act (Act No. 5 of 2012).

QUESTIONS

1. **Will all foreigners have their freehold titles reduced to 99 year leasehold titles? What is the purpose of this provision? Is there any clarity as to when the 99 year period will run from? Is it from 27 August 2010?**

Article 65 of the Constitution provides that non-citizens can only hold land on the basis of leasehold tenure which shall not exceed 99 years. S.107(3) of the Land Registration Act provides that for the avoidance of doubt, any lease granted to a non-citizen shall not exceed 99 years. This provision limits foreigners from owning a freehold interest in land as well as any leasehold interest exceeding 99 years.

The purpose of this provision has not been expressly stated in the Constitution or the Land Laws. It has been argued that the provision is aimed at correcting historical injustices emanating from colonial rule where foreigners obtained large tracts of land and are holding the same under freehold tenure in perpetuity.

Neither the Constitution nor the Land Laws indicate when this 99 year leasehold term is deemed to commence. Our assumption is that, without clear indication of when this term commences, for longer leases or freeholds held by foreigners the leasehold will be deemed to have commenced on the date when the Constitution came into force i.e. 27th August, 2010.

2. **Is any compensation payable to the foreigner?**

Article 40(3) of the Constitution provides that the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in or title to land, in accordance with chapter 5 of the Constitution. Article 65, which limits land ownership by foreigners to 99 year leasehold tenure, falls under chapter 5 of the Constitution. Our interpretation of this provision is that the Government is not required to pay compensation to foreigners for the conversion of their freehold and longer leasehold tenure to 99 year leaseholds.

3. **What is the definition of "foreigner" under this law? Would a Kenyan company ultimately controlled by a foreign entity (at any remove) be regarded as a "foreigner" for the purpose of this new law?**

Article 65(3) of the Constitution provides that a body corporate is regarded as a citizen only if it is wholly and exclusively owned by one or more citizens and property held in trust is regarded as being held by a citizen only if the entire beneficial interest under the trust is held by persons who are citizens. This means



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that a company will have to have 100% local shareholding to be considered a citizen.

Ownership refers to shareholding in a company and not to directorships. A company that has Kenyan shareholders but has foreign directors would be considered a local company capable of holding a freehold interest in land or leasehold interest for more than 99 years.

4. Has the Government of Kenya become the landlord of the 99 year lease when the foreigner's freehold has been reduced to a 99 year lease?

De facto yes.

5. Do foreign investors who have been stripped of their freehold title have to pay a rent to their landlord (Government) under their new 99 year lease?

The law does not specify whether any rent is payable.

The nature of a leasehold interest is that there is a liability to pay rent to the landlord. However, the rent payable under each title varies and in some instances it is even set as a peppercorn which in essence means that the land owner does not pay any rent.

6. What are the terms of the new lease? Can the new landlord forfeit it at any time for breach of any provision in the lease?

The Land Laws do not specify what the terms of the leases are. However, S.55 of the Land Act states that, the provisions of the Land Act relating to leases, shall apply to all leases unless the parties provide otherwise in the lease instrument.

S.66 of the Land Act details the implied covenants on the part of the lessee which include, the obligation to pay rent, the obligation to use the land in accordance with the conditions imposed on the use of that land by the lease and the obligation to yield up the property at the expiry of the lease period.

S.65 of the Land Act sets out the implied covenants on the part of the lessor which include, the obligation to grant quiet possession and the right to terminate the lease in the event that the rent is unpaid for one month or if the lessee fails to observe the conditions of the lease for one month.

7. What happens after the end of the 99 year lease? Is there an automatic renewal right or is that only applicable if the immediate past owner is a Kenyan citizen? Will it apply to Kenyan companies? How much would it cost?

S.12(6) of the Land Act provides that at the expiry, termination or extinction of a lease, reversion of interests or rights in and over the land shall vest in the national or county government (as the case may be). S.13(1) of the Land Act further provides that after expiry of the new leasehold interest the land shall be offered to the immediate past holder of the leasehold interest provided that such lessee is a Kenyan citizen. This provision means that a non-citizen is not automatically entitled to renewal of its leasehold interest in land. Previously, renewals of leasehold interest in land were granted as a matter of course.

There are no prescribed fees for a renewal.

8. Can foreigners only sell their leasehold to Kenyan residents or otherwise deal with the title?

Foreigners can sell their leasehold interest to anyone whether the purchaser is a citizen or non-citizen. However, one condition that is usually present in all Government leasehold titles is that any dealings require the consent of the Commissioner of Lands whose functions under the Land Laws will be carried out by the National Land Commission. This consent is an administrative step and does not prevent dealings with leasehold land.

9. Does it affect the value and marketability of the land owned by a foreigner?

At the moment, in our experience, the market value of a new 99 year leasehold or freehold property is the same.

10. Can a Kenyan citizen purchasing a leasehold property from a foreign entity upgrade it to a freehold? If so, what is the procedure and would it be costly?

A Kenyan citizen purchasing land from a foreigner only purchases the 99 year leasehold interest held by the foreigner. There is no provision for "upgrading" the interest to a freehold interest or a leasehold interest of more than 99 years.

11. Do the Land Laws affect a mortgagee's right to enforce its security?

With regard to a mortgagee's right to exercise its statutory power of sale, S. 106 of the Land Registration Act provides that the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts shall not be affected. This section is replicated under S.162(1) of the Land Act. This means that the mortgagee under a mortgage existing as at 2nd May 2012 can exercise its rights under any instrument registered prior to the enactment of the Land Laws.

12. What happens to mortgages over freeholds where the freeholds are owned by foreigners? Does it change anything if the banks who have lent the money are local banks?

The freehold interest held by a foreigner is deemed to have automatically converted to a 99 year leasehold interest and therefore the security attaches to the converted property interest.

Another concern would be the effect on freehold property that at the time the Constitution came into effect was mortgaged by a foreigner to a local bank. Although a local bank (without a single foreign shareholder) could argue that the freehold title was preserved because the Constitution came into effect after the mortgage was created, we think this is academic because:

- i. it is highly unlikely that any bank in Kenya is 100% owned by Kenyan citizens; and
- ii. the freehold interest would be lost at the time the loan is paid back and the property is reconveyed to the foreigner.

13. What guarantees or assurances are there for foreign companies investing in Kenya that their investment will be secure?

Foreign companies investing in Kenya are assured that their investment is secure for the following reasons:

One of the guiding principles in the management and use of land as stated in Article 60(1)(b) of the Constitution and S.4(2)(b) of the Land Act is the security of land rights. As stated earlier, Article 40 of the Constitution protects the right to property save for the provisions of Article 65 which limit land ownership by foreigners to 99 year leaseholds. Article 40(3)(b) of the Constitution provides that no one shall be deprived of property or any interest in property by the State unless the land is needed for public use and prompt payment in full, of just compensation to the person so deprived is made.

The Kenyan court system is relatively advanced and it upholds the rule of law as relates to protection of property rights. Article 27 of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

There is little freehold land remaining in Kenya and most of that is agricultural. Most land in urban areas is held under leasehold tenure for terms that are for 99 years or less.

The value of long leaseholds and freehold land in the market is not starkly different in our experience.

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