

Real Estate Law

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Have you been released from your personal suretyship or guarantee?

When applying for commercial property mortgage finance, the financial institution may also require additional security in the form of a personal suretyship or guarantee for the obligations of the main debtor.

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INSIGHT INTO
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AND SERVICES**

Have you been released from your personal suretyship or guarantee?

When applying for commercial property mortgage finance, the financial institution may also require additional security in the form of a personal suretyship or guarantee for the obligations of the main debtor.

The financial institution would then generally also require that such suretyship or guarantee be granted as continuing covering security.

Depending on the wording of the guarantee/suretyship, the guarantor/surety could therefore be held liable for all of the present and future indebtedness of the debtor to the financial institution from whatsoever cause arising, including for example debts incurred by the debtor as borrower, guarantor, surety or otherwise.

The security provided by the guarantor/surety could therefore extend further than the initial loan agreement concluded by the debtor and could potentially also serve to secure other debts incurred by the debtor prior to or from time to time after the conclusion of the suretyship or guarantee agreement.

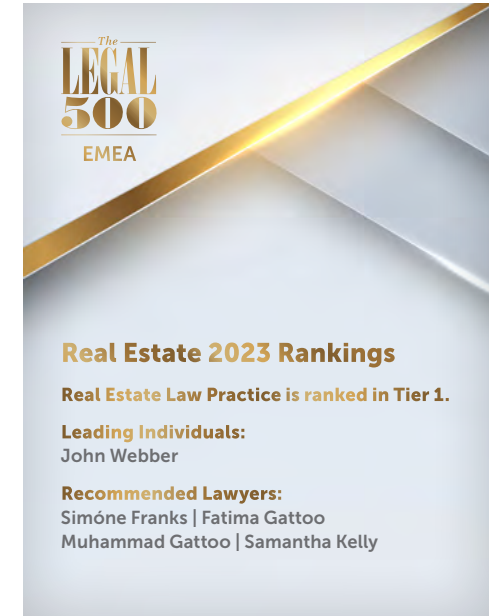
A continuing covering guarantee/suretyship would usually also stipulate that the security

provided will continue to exist regardless of intermediate payment or discharge in whole or in part of the indebtedness by the debtor.

The suretyship/guarantee may also provide that the surety/guarantor not be released from the suretyship without the financial institution's prior written consent or written notification/confirmation of discharge/release.

The surety/guarantor would usually be entitled to request a release from such suretyship/guarantee once all of the obligations secured under the suretyship/guarantee have been discharged in full.

Once the indebtedness secured by the suretyship/guarantee has been extinguished, it would therefore be prudent to obtain written confirmation from the financial institution that the suretyship/guarantee has in fact been terminated and the surety/guarantor has been released.



Have you been released from your personal suretyship or guarantee?

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These continuing security obligations should also be born in mind in the context of a sale of shareholding or member's interest in a borrowing entity.

When a shareholder/member sells shareholding or members' interest in a company/close corporation, a personal suretyship/guarantee previously concluded by such person for the obligations of such company/close corporation could remain valid and enforceable against the seller unless the financial institution holding the suretyship/guarantee has consented to the release of the individual.

The purchaser might agree to replace the seller as surety/guarantor and the sale agreement might provide that the purchaser will use all reasonable endeavours to procure the release of the seller from personal guarantees/suretyships and to furnish replacement guarantees/suretyships.

However, if the financial institution has not released the seller or agreed to replace the seller with the purchaser,

the suretyship/guarantee could still be enforceable against the seller even if the sale of shares/members' interest agreement has provided for the purchaser to replace the seller as surety/guarantor.

It is also important to note that the loan agreement concluded with the principal debtor could include provisions prohibiting a change in the shareholding, membership or control of a borrowing entity without the financial institution's prior written consent.

In addition to obtaining the financial institution's consent to the release of the seller from any personal suretyships/guarantees, it may therefore also be important to obtain the financial institution's prior consent to any such sale of shares or members interest in order to ensure that the borrowing entity does not trigger any default provisions in terms of the loan agreement and in order to prevent potential issues in giving effect to the terms of the sale agreement.

[Simone Immelman](#)



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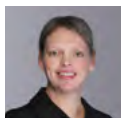
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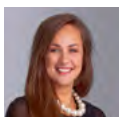
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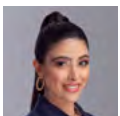
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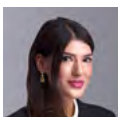
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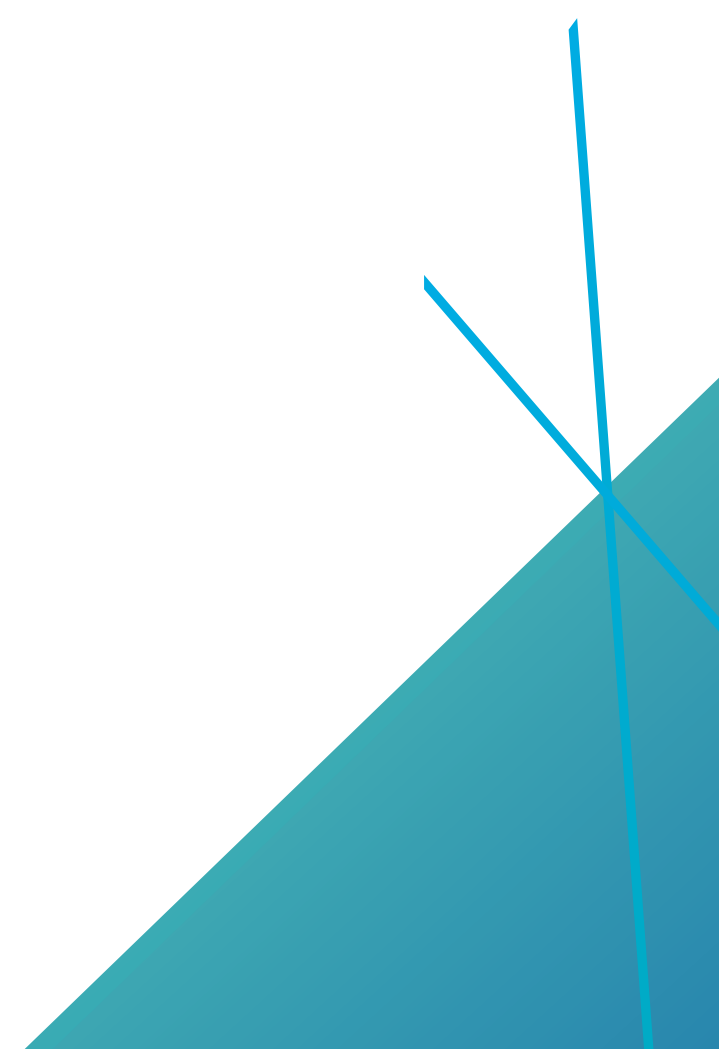
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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