

REAL ESTATE LAW ALERT

16 AUGUST 2022



INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

KENYA

Playing by the rules: Exercise of statutory power of sale on a deceased's charged land

The Court of Appeal (COA) in *Martevé Guest House Limited v Njenga and Three Others* (Civil Appeal 400 of 2018 [2022]) recently upheld an appeal from the Environmental and Land Court's judgment rendering a chargee's exercise of power of sale over a deceased's charged land void for want of compliance with the Law of Succession Act (Cap 160 Laws of Kenya).

SOUTH AFRICA

The VAT and transfer duty consequences when selling a property used for both residential and commercial purposes

It is not uncommon to sell a property that is utilised for both residential and commercial purposes (for example, a block of flats with shops on the ground floor and residential units above).



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

KENYA

Playing by the rules: Exercise of statutory power of sale on a deceased's charged land

The Court of Appeal (COA) in *Martevé Guest House Limited v Njenga and Three Others* (Civil Appeal 400 of 2018 [2022]) recently upheld an appeal from the Environmental and Land Court's judgment rendering a chargee's exercise of power of sale over a deceased's charged land void for want of compliance with the Law of Succession Act (Cap 160 Laws of Kenya), due to service of statutory and redemption notices to persons who were not administrators of a deceased's chargor estate but later appointed as administrators.

BACKGROUND

Briefly, in *Martevé Guest House Limited*, the deceased had charged the suit property to a bank, as security for a facility advanced to the fourth respondent (the debtor) who defaulted in the repayment of the financed sum. After the deceased's death, the bank issued a demand letter for payment of the outstanding amount to the debtor, who did not make any payment. Subsequently, the bank issued statutory notices of intended sale of the suit property to the first and second respondents (the beneficiaries), who are beneficiaries of the deceased's estate.

At the time when the bank served the notices, no grant of representations had been issued to the beneficiaries. The beneficiaries were subsequently issued with the grant of letters of administration of the deceased's estate. The bank later instructed an auctioneer to sell the suit property, the auctioneer served the beneficiaries with a redemption notice and proceeded to sell the

suit property to the appellant. The appellant paid the full purchase price and the title to the suit property was transferred to the appellant.

Aggrieved, the beneficiaries filed a suit in the Environmental and Land Court, in their capacity as administrators of the estate of the deceased, seeking an order for cancellation of the sale of the suit property to the appellant, as well as general damages. The Environmental and Land Court ruled in favour of the beneficiaries and declared the appellant's title void. The appellant, aggrieved by the judgment, filed an appeal to the COA.

Among the issues for determination by the COA were:

- Whether the deceased person's property, which was charged to a bank, was free property capable of being inherited by the beneficiaries of a deceased's estate.
- Whether service of statutory notice and redemption notices served upon a person who was not an administrator of the deceased's estate but later appointed as an administrator was proper service.

- What was required of the bank, as a chargee, so as to exercise its statutory power of sale as related to a deceased chargor's property where letters of administration had not been issued.

IS A DECEASED'S CHARGED PROPERTY CAPABLE OF BEING INHERITED?

In Kenya, only a deceased person's "free property" is capable of being inherited. The Law of Succession Act defines free property as a deceased person's property which the deceased was legally, competent, and free to dispose of during their lifetime and in respect of which their interest has not been terminated by their death.

In *Martevé Guest House Limited*, the COA held that the suit property was free property and remained part of the deceased's estate subject to the debt. The COA reasoned that although the suit property was charged to the bank, the deceased was competent to dispose of it during her lifetime subject to the bank's consent or settlement of the debt. Further, despite the deceased's

KENYA

Playing by the rules: Exercise of statutory power of sale on a deceased's charged land

CONTINUED

right of disposal being encumbered by the charge, her death did not automatically terminate her interest in the suit property.

ARE STATUTORY NOTICES OR REDEMPTION NOTICES SERVED UPON A PERSON WHO IS NOT YET AN ADMINISTRATOR OF A DECEASED'S ESTATE VALID?

In *Martevé Guest House Limited*, the bank exercised its statutory power of sale after the deceased died and served the statutory notice to the beneficiaries prior to the grant of the letter of administration being issued to the beneficiaries. The COA held that the beneficiaries did not have the authority to negotiate on behalf of the deceased's estate before they were issued with grant of letters of administration.

Any compromise that the beneficiaries entered into before they were issued with the grant was made in their own personal capacity and interest not made on behalf of the estate of the deceased or other beneficiaries. Therefore, failure to comply with the provisions of the Law of Succession Act in exercising the bank's statutory power of sale rendered the entire process an illegality and therefore null and void.

HOW SHOULD A BANK EXERCISE ITS POWER OF SALE OF A DECEASED'S CHARGED PROPERTY WHERE LETTERS OF ADMINISTRATION HAVE NOT BEEN ISSUED?

Section 66 of the Law of Succession Act allows a court to issue a creditor with a grant of letters of administration. However, section 66 lists an order of preference of the persons who the court is entitled to issue the grant of letters of administration with the deceased's surviving spouse, beneficiaries and the public trustee having preference over creditors. The COA held that the bank had the option of applying for the letters of administration for the estate of the deceased to enable it to exercise its statutory power of sale.

The bank could have exercised this option by applying to a court to have the persons entitled to a grant of letters of administration for the deceased's estate to be appointed as the deceased's administrators. This would have enabled the bank to serve the estate of the deceased with the necessary notices through the appointed administrators and give an opportunity for the estate to pay

the debt. If the estate failed to settle the debt, the bank would be able to pursue its statutory right of sale, the administrators stepping into the shoes of the deceased chargor.

CONCLUSION

To sum it up, the courts are inclined to exercise judicial activism where a bank exercises the statutory power of sale over a deceased chargor's land without following procedural requisites under the Law of Succession Act. In exercising statutory right of sale, a chargee should only serve the statutory and redemption notices to persons appointed as administrators by the court. In case there are no administrators appointed, the chargee has the option to apply to the court for grant of letters of administration for the deceased's estate as a creditor in relation to the charged land.

**SAMMY NDOLO, ROBERT GITONGA
AND JOSEPH MACHARIA**



SOUTH AFRICA

The VAT and transfer duty consequences when selling a property used for both residential and commercial purposes

It is not uncommon to sell a property that is utilised for both residential and commercial purposes (for example, a block of flats with shops on the ground floor and residential units above).

It is a generally accepted practice that where a commercial property that is being let (thus, making it an enterprise), is sold as a going concern, then it will attract value-added tax (VAT) at the rate of 0%, provided that the transaction falls within the ambit of section 11(1)(e) of the Value-Added Tax Act 89 of 1991 (VAT Act).

Section 11(1)(e) of the VAT Act provides that the supply of goods and services will be charged with VAT at the rate of 0% where: (i) the subject matter constitutes an “enterprise” as defined in the VAT Act; (ii) such enterprise is being disposed of as a going concern; (iii) it has been agreed in writing that at the date of conclusion of the agreement, the enterprise will be an income-earning activity on the date of transfer; (iv) all the assets of such enterprise necessary for the continued operation of the enterprise are being sold; and (v) both the seller and purchaser are registered VAT vendors.

However, a sale of residential property will result in transfer duty being payable, as opposed to VAT (even in the event that it is subject to a lease and the seller is a VAT vendor).

Following this, the question then arises, what are the VAT and transfer duty consequences in respect of the sale of a property which is being let for both retail and residential purposes (i.e. a hybrid-use property)?

SARS Interpretation Note No. 57 states that:

- Paragraph 4.12.2 provides that in the event that the goods (i.e. the property) is used mainly (that is, more than 50%) for the purposes of an enterprise and partly for other purposes which are supplied as part of the supply of the going concern, then all goods (i.e. the entire property enterprise) is deemed to form part of the going concern.



SOUTH AFRICA

The VAT and transfer duty consequences when selling a property used for both residential and commercial purposes

CONTINUED

- Paragraph 4.12.3 provides that in the event that the goods (i.e. the property) is not used mainly for the purpose of an enterprise, then the supply cannot be a going concern as contemplated in section 11(1)(e) and will be subject to VAT at the standard rate. In instances where the vendor can sufficiently distinguish between the parts of the supply to make it reasonable to sever them and apportion accordingly, the portion of the selling price which relates to the going concern may be zero-rated. The remainder of the portion which is not a going concern must be charged with VAT at the standard rate or transfer duty.

Based on the above, in instances where a hybrid-use property is being sold, we need to consider what the property is “*mainly*” (i.e. more than 50%) being used for.

If the property being sold is being used mainly for purposes of an enterprise, then the whole transaction will be deemed to be zero-rated in terms of section 11(1)(e) of the VAT Act (including the portions of the property not being used for purposes of the enterprise).

However, in the event that the property is not being used mainly for purposes of an enterprise, then the portion of the purchase consideration payable for the property which is used for carrying on the enterprise qualifies for the zero rate in terms of section 11(1)(e), and VAT at the standard rate or transfer duty will be payable on the balance purchase consideration payable for the remaining part of the property (i.e. the portion of the property not being used mainly for purposes of an enterprise). In instances where the apportionment contemplated above cannot be made, the whole transaction will be subject to VAT at the standard rate or transfer duty, as the case may be.

SAMANTHA KELLY



OUR TEAM

For more information about our Real Estate Law practice and services in South Africa and Kenya, please contact:



Muhammad Gattoo
Practice Head & Director:
Real Estate Law
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Bronwyn Brown
Director:
Real Estate Law
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Mike Collins
Director:
Real Estate Law
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Lucia Erasmus
Director:
Real Estate Law
T +27 (0)11 562 1082
E lucia.erasmus@cdhlegal.com



Simone Franks
Director:
Real Estate Law
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Fatima Gattoo
Director:
Real Estate Law
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Simone Immelman
Director:
Real Estate Law
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



William Midgley
Sector Head: Commercial Real Estate
Director: Real Estate Law
T +27 (0)11 562 1390
E william.midgley@cdhlegal.com



Muriel Serfontein
Director:
Real Estate Law
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



John Webber
Director:
Real Estate Law
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Natasha Fletcher
Senior Associate:
Real Estate Law
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



Marlene Heppes
Senior Associate:
Real Estate Law
T +27 (0)11 562 1580
E marlene.heppes@cdhlegal.com



Robert Kaniu Gitonga
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E robert.gitonga@cdhlegal.com



Lutfiyya Kara
Senior Associate:
Real Estate Law
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com



Samantha Kelly
Senior Associate:
Real Estate Law
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2022 11424/AUG