

REAL ESTATE LEGAL OVERVIEW 2024: HIGHLIGHTS OF KEY CONTRACT AMENDMENTS



Preamble

Unpacking significant legal shifts we have seen in real estate contracts over the past year from mid-2023 through early 2025 and what they mean for the way we negotiate, advise, and transact



Outline

- ❑ Developers' legal battles with lenders and the risk of auctions
- ❑ Circumventing the land conversion process
- ❑ Hidden risks to freehold title status
- ❑ Sectional titles | Multi-layered completion and exclusive use areas
- ❑ Key case law influences
- ❑ Green building compliance and sustainability obligations



Developers' legal battles with lenders and the risk of auctions

- When a developer takes a loan secured by a charge over the project land, that charge creates a legal interest in favour of the lender – and until it is discharged, the lender has superior rights to the property, including the power to sell if the developer defaults.
- The buyer's rights are legally subordinated to the lender's charge. Even if a buyer pays in full, their right to title or possession can be overridden by the lender, who can proceed to auction the entire property under the statutory power of sale.

Developers' legal battles with lenders and the risk of auctions

Contractual response: Disclosure clauses and verification whether payments should be routed through a bank account that has been approved by the lender.

Should the Vendor wish to obtain financing for construction of the Estate from any lender before the Completion Date, the Vendor shall inform the Purchaser in writing of its intention to obtain such financing and charge the Property in favour of such lender, and the Vendor shall further procure and deliver to the Purchaser the following:

- *the lender's letter confirming that there shall be no fetters to issuance of partial discharges of charge in respect of the Premises on Completion; and*
- *the details of the liquidation bank account held with or sanctioned by the lender into which the outstanding sale proceeds should be remitted.*

Circumventing the land conversion process

- There is ongoing a land migration and conversion exercise: The Ministry of Lands is migrating titles to a new land register, and conversion has been necessitated by the creation of new land registration units. In addition, many of the Ministry's departments are currently digitizing their processes.
- These processes entail an integrity test on all title documents and are designed to clean up records.
- Validity of title documents may be called into question in future if a title document has not been properly converted and migrated to the new system.

Circumventing the land conversion process

Contractual response: Warranties on title status.

The Vendor fully complied with all statutory and regulatory requirements relating to the conversion and migration proceedings applicable to the Property and that the Certificate of Title in the name of the Vendor dated [] was issued in accordance with the relevant legal process and further that there are no procedural irregularities, defects, or pending issues (now or likely to arise) that would challenge the validity, enforceability, or sanctity of the Certificate of Title.*

Hidden risks to freehold title status

- Beneficial control or ownership of freehold land by a non-citizen can trigger Article 65 of the Constitution.
- Pursuant to Article 65, a non-citizen may hold land on the basis of leasehold tenure only, such lease not to exceed ninety-nine (99) years. The meaning of “citizen” in the context of land ownership by a corporate is a body corporate wholly owned by one or more citizens.
- There is unclear transparency on whether registries will always automatically convert freehold land associated with non-citizens to 99-year leases. Automatic conversion may in some cases undermine the buyer's expectations.



Hidden risks to freehold title status

Contractual response: Warranties on title status.

No event or circumstance has occurred, nor is any pending, that would cause the tenure of the Property to be deemed a 99-year lease under Article 65 of the Constitution of Kenya, 2010 or otherwise jeopardize the Property's freehold status.

Sectional titles | Multi-layered completion and exclusive use areas

- Georeferencing is carried out after construction is finished therefore it is an "as-built" survey. The order of events is – construction completion, post-construction georeferencing, sectional plan preparation, sectional title processing, and completion.
- This introduces the need for ultimate certainty regarding the completion of transactions. Over and above the projected construction completion date, when the building is expected to be handed over to the developer, there should be a fixed date providing a clear target and deadline for completion, being the date when the developer expects to be in possession of the sectional titles following georeferencing.



Sectional titles | Multi-layered completion and exclusive use areas

Contractual response: Contracts are more likely to reference the designation of exclusive use areas and provide extended timelines for sectional title registration.

The Vendor shall allocate to the Purchaser as part of the purchase of the Premises, the exclusive use rights to the two (2) car parking bays designated as car parking bays number..... and (together the "Parking Bays"), for the sole and exclusive use of the Purchaser.

"Common Areas" means all portions of the Land and the Estate that are not designated as individual units or areas designated for exclusive use by specific unit owners including the Parking Bays.

Key case law influences

- **Court of Appeal's decision in Civil Appeal No. 65 of 2019 – Kenya Revenue Authority v. David Mwangi Ndegwa.**

The court has ruled that the sale of commercial premises is subject to Value Added Tax (VAT). Though this case did not directly address the issue of mixed-use properties, it was observed that mixed-use properties may require apportionment based on existing VAT practices.

- **The Supreme Court decision in Petition 8 (E010) of 2021 – Dina Management Limited v. County Government of Mombasa & 5 Others.**

Most commentary focused on how it raised the bar for buyers, but not enough has been said about how registered owners (sellers) must now exercise caution when issuing warranties in sale agreements.

Key case law influences

Contractual response: The days of "clean title" just because it is on the register are over.

The Vendor will not provide warranties for matters that the Purchaser is required to verify through their own due diligence.

Green building compliance and sustainability obligations

- ESG Clauses are gaining prominence. Landlords are inserting sustainability covenants especially for commercial spaces.
- Likewise, tenants are demanding contractual assurances tied to green certifications or sustainable utility systems.
- **Contractual response:** EDGE Certification maintenance and renewal clause.



Green building compliance and sustainability obligations

The Lessor covenants to make reasonable efforts to renew and maintain the EDGE Certification of the Building throughout the Term of the Lease by ensuring compliance with all requirements for certification renewal that are commercially viable and reasonably practicable under the prevailing standards for EDGE Certification renewal process. The Lessor shall notify the Lessee in writing within thirty (30) days of becoming aware of any risks to certification or renewal that may materially affect the Building. The Lessor shall not be held liable for any loss or cost arising from failure to maintain the certification due to onerous changes in certification requirements, or circumstances beyond the Lessor's control.



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