



# NR&Co Quarterly

## ...Legal Briefs



### Table of Contents

- Editor's Note ..... 1
- The Firm ..... 2
- Legislative Updates ..... 3
- Case Highlights..... 6
- Interlude ..... 8
- Contributors' Platform..... 9
- Acknowledgments..... 13

**Editorial team**  
 Rosemary King'ori  
 Rodney Wesonga  
 Catherine Wangui  
 Nashon Odhiambo  
 Ruth Regero

**Contributors**  
 Ruth Regero  
 Jackson Kamenju  
 Rodney Wesonga  
 Sandra Bucha

**Design & layout:**  
 Grace King'ori

**Publisher**  
 Njoroge Regeru & Company Advocates

**Disclaimer**  
 This Newsletter is for informative purposes only and it is not to be relied upon as legal advice. None of the information contained in the Newsletter is intended to create, and receipt of it does not constitute, an advocate-client relationship. Nothing in this Newsletter is intended to guarantee, warranty or predict the outcome of any particular case and should not be construed as such a guarantee, warranty or prediction. The authors are not responsible or liable in damages or otherwise howsoever for any actions (or lack thereof) taken as a result of relying on or in any way using any of the information contained in this Newsletter and shall in no event be liable for any damages resulting from reliance on or use of any of the information herein contained. Nothing contained in this Newsletter should be construed as constituting any legal advice on any subject to any person. It is recommended that readers facing specific situations should take specific advice from suitably qualified professionals.

### KARIBU!

## Editor's Note



Ruth Regero  
ruth@njorogeregeru.com

The COVID-19 pandemic seems to have strum a note rendering all and sundry lost in a tune of disarray struggling to find the steps in keeping up with the motion. Indeed, life is not as we knew it and though this might have a streak of bleakness we must dig deep and find the courage to carry on.

The efforts of containing the pandemic and the various legislation that have spilled over into the year 2021 are an attestation of the persistence of human beings even in the face of adversity. Utilisation of technology has taken root in organisations, the legislature continues to enact progressive laws and the judiciary has yet to waver in interpreting the law and/ or upholding human rights. This is a progressive and futuristic outlook on life; it is an acknowledgment that everything has a time and season and that this too, shall pass.

Alright then, let's jump into this quarter's newsletter. We have set out quite an interesting read for you; to start with we appreciate the ongoing efforts of the Firm towards stewardship and highlight herein our activities at Light and Hope Children's Home in Korogocho, Nairobi.

On the legislative updates, we assess the laws and bills affecting the agricultural sector as well as the digital market place. We also look into the recent Landlord and Tenant Bill, 2021; a Bill bound to be subject to great scrutiny.

Our Case Highlights section sets out precedent-setting cases on the right to housing and unlawful detention of persons by hospitals in respect of failure to pay hospital charges.

The Firm members have also set out herein stimulating articles on: eviction of unlawful occupants from private land, foreign ownership of fee simple estates and private equity in Kenya.

Last but not least, we celebrate a fearless, ambitious, gentle and intelligent creation; a creation that cannot quite be constrained to earthly definitions; a creation that continuously defies the expectations ineptly bestowed upon it. We celebrate the creation that is women.

Have a lovely read and remember to keep marching on.

### Njoroge Regeru & Co. Advocates

Arbor House, Arboretum Drive  
 PO Box 46971-00100 GPO Nairobi  
 Tel: +254-020-2612531/2613646  
 020-3586592/2319224,

Cell: 0722 206 884, 0733 608 141, 0752 431 961  
 www.njorogeregeru.com



**THE FIRM**

The Firm as part of its Corporate Social Responsibility visited Light and Hope Children's Home in Korogocho on 21st

December, 2020. The Children's home caters for children with special needs such as autism, cerebral palsy and down

syndrome. Some of the Firm's members went to the Children's home and donated various foodstuffs and cooking appliances.



## LEGISLATIVE UPDATES

This quarter has been laden with a number of legislation commencing this year as well as introduction of a number of Bills. We highlight hereunder the Tea Act, 2020, the Finance Act, 2020 with particular focus on the Digital Service Tax, the Coffee Bill, 2020 and the Landlord and Tenant Bill, 2021.

### THE TEA ACT, 2020

The Tea Act, 2020 (the “Act”) was enacted to provide for the regulation, development and promotion of the tea industry. Its commencement date was set as 11th January, 2021.

The Act establishes the Tea Board of Kenya (the “Board”), a body corporate tasked with, amongst other functions: -

- a) developing, promoting and regulating the development of the tea industry;
- b) registering tea factories, small scale tea growers, medium scale tea growers, large scale tea growers, warehouse operators, tea packers, tea buyers, exporters, importers, tea brokers, management agents, tea auction organizers, commercial tea nurseries, commercial green leaf transporters;
- c) licensing manufacturers;
- d) facilitating marketing and distribution of tea;
- e) regulating the sale, import and exports of tea; and
- f) undertaking capacity building, technology transfer and technical assistance to the counties on matters related to tea.

The Act also sets out the role of both national and county governments in the development of tea. In that regard, the Board, on behalf of the national government, shall be responsible for licensing and charging of levies whilst each county government shall implement the national government’s policies to the extent that the policies relate to the county. County governments shall further be responsible for:

- a) the development of tea grown within the county;
- b) tea disease and pest control;
- c) markets within the county;
- d) cooperative societies within the county;
- e) registration of commercial tea nursery operators; and
- f) soil and water conservation.

With regard to taxation of tea, the Act requires that fees imposed by a county government should not in any way prejudice national economic policies, economic activities across county boundaries or national mobility of goods, services, capital or labour.

The Act further requires that all tea buyers or exporters value add at least 40% of their annual Kenya tea exports within eight years of the commencement of the Act- 11th January, 2021. Additionally, the Cabinet Secretary, in accordance with regulations made under the Act and in consultation with the Board, is to facilitate the establishment of Common User Facility for tea value addition as may be prescribed.

The Act further grants the Cabinet Secretary the requisite mandate to impose a levy, vide gazette notice, to be levied on tea exports and imports; the tea levy.

In addition to the Board, the Act establishes the Tea Fund and the Tea Research Foundation. The Tea Fund will be managed by the Board and shall consist of: -

- a) monies appropriated by the National Assembly;
- b) monies from the tea levy;
- c) monies from a source approved by the Board; and
- d) grants and donations made to the Board.

The Board is required to apply such monies to income or price stabilization and research and development.

On its part, the Tea Research Foundation is tasked with the promotion, co-ordination

and regulation of research in tea and tea diseases as well as promotion of application of research findings and technology in the development of tea.

With respect to regulations under the Act, the Act empowers the Cabinet Secretary, in consultation with the Board, to make Regulations for the better implementation of the provisions of the Act. Notably, there are existing Regulations, albeit made under a different Act, that support the object and purpose of the Tea Act, namely the Crops (Tea Industry) Regulations, 2020. Under these Regulations, Tea brokers, buyers and the auction organizers shall ensure that the proceeds from the sale of tea are remitted to the tea factories accounts within fourteen days (14) from the date of the auction. Further, a tea factory shall within thirty (30) days of receipt of the proceeds of the sale of tea, pay tea growers at least 50% of payment due for green leaf delivered every month and the balance due to the tea grower shall be remitted within three (3) months from the end of financial year.

### FINANCE ACT, 2020

#### Digital Service Tax

It is estimated that the digital economy sector contributes over USD 11 Trillion to the global economy representing over 15% of the global GDP.

In Kenya, the ICT Sector has been reported to grow at an average of 10.8% per year over the last 5 years with its output amounting to Kshs.427 Billion in 2019.

The Digital Service Tax (DST) is thus pursuant to a government policy aimed at revenue mobilisation.

#### Application

DST applies to supplies made through a digital marketplace and is payable by a person whose income from the provision of services is **derived in or accrues from Kenya** through a digital marketplace. A resident person or a non-resident person with a permanent establishment in Kenya

## LEGISLATIVE UPDATES

can however offset the digital service tax paid against the tax payable for that year of income.

**Rate:** 1.5% of the gross transaction value of services.

**Effective Date:** 1<sup>st</sup> January, 2021

### THE COFFEE BILL, 2020

The Coffee Bill, 2020 (the “Bill”) is part of five agricultural reform bills released by the Ministry of Agriculture as part of on-going agricultural reforms that seek to increase farmers’ income. The Bill proposes several radical changes to the coffee industry aimed at streamlining it, as more particularly outlined below:

#### Coffee Board of Kenya

The Bill proposes the establishment of the Coffee Board of Kenya (the “Board”) whose general objective would be, in consultation with county governments, promotion of competition in the coffee industry as well as general regulation of the coffee industry in the public interest. The Board is also tasked with, amongst other functions: -

- a) Formulating policies in the coffee industry;
- b) Registering and regulating the operations of coffee millers, marketing agents, buyers, roasters, packers, and management agents (registration proposed to be free of charge);
- c) Undertaking capacity building, technology transfer and technical assistance to the counties on matters relating to coffee;
- d) Collaborating with the Coffee Research Institute and other institutions of higher learning in determining the research agenda for the coffee industry; and
- e) Representing the country in national and international forums on coffee related matters.

#### The Coffee Research Institute

The Bill further proposes the establishment of the Coffee Research Institute (the “institute”) that is currently under the Kenya Agricultural Research & Livestock Organization (KARLO) which will be autonomous in its operations, implementation of programs and in the allocation and management of its resources. The institute will be the lead agency in coffee breeding, development of climate-resilient coffee crop varieties and scientific effort to strengthen Kenyan coffee’s resistance to diseases and pests.

The institute will also be the custodian of the Kenyan coffee genome and the primary instrument for making modern genomic resources available.

#### Role of County Governments

Under the Bill, the proposed role of county governments is inter alia: -

- a) Consultation and cooperation with the Board in the development, promotion and regulation of the coffee industry;
- b) Setting up programmes that provide incentives and facilities to farmers such as affordable farm-inputs;
- c) Issue requisite licences such as pulping station licences authorizing holders to operate pulping stations and undertake hulling, and warehouse licences authorizing holders to warehouse coffee. Persons who conduct any coffee business without the requisite licence are subject to a proposed fine not exceeding Kenya Shillings Five Hundred Thousand (Kshs.500,000.00) or an imprisonment term of two years, or to both such fine and imprisonment.

The Bill further provides that a court may order that any coffee in relation to the offence be forfeited to the Board. Coffee that has been forfeited to the Board shall be sold at the Nairobi Coffee Exchange and the proceeds credited to the Board

To properly execute their functions, county governments are allowed to form County Coffee Committees which shall oversee several aspects of the coffee industry at the county level.

#### Registration of Autonomous Societies

The Bill permits factories to register as autonomous societies under the Co-operative Societies Act if they so wish or if members want to be registered as such. This means that factories will no longer be forced to belong to a larger society. The amalgamation of factories into Co-operative Societies was meant to help cut costs, though it did not work. Instead, farmers were previously caught up in debts accrued by Co-operative Societies without their consent.

#### Coffee Millers

If the Bill is enacted into law, factories will have authority to annually appoint their own millers. Further, milling losses are capped at 18% of the total milled coffee in the absence of any agreement to the contrary. This is in a bid to protect farmers from millers who manipulate milling losses.

#### Direct Settlement System

The Bill provides that payments for all coffee shall be done through a direct settlement scheme (DSS) from which direct payments shall be made to all those who have offered a service for coffee. This includes millers, individual farmers and marketing agents. This is meant to reduce instances of delay and lack of accountability in payments.

#### Nairobi Coffee Exchange

The Bill also proposes the establishment of the Nairobi Coffee Exchange through which coffee will be offered for sale vide auction and direct sales. Buyers will be required to remit money to marketing agents within 7 days for all bided coffee.

#### Reintroduction of Coffee Levies

Levies that had previously been scrapped are proposed to be reintroduced and proceeds thereof utilized as follows:-

## LEGISLATIVE UPDATES

- a) 2% levy on gross sales of all coffee which will be remitted to the Coffee Research Institute to support research;
- b) 4% coffee import levy to be calculated on the customs value of the coffee and to be remitted to the Board to support coffee promotion; and
- c) 2% buyers levy which will be split into two, with 1% going to support the Boards regulatory functions and the remaining 1% being reinjected into coffee growing counties to support coffee development.

These levies are to be imposed by the Cabinet Secretary, after consulting with the Board.

Please note that the Bill is currently undergoing consideration at the National Assembly.

### LANDLORD AND TENANT BILL, 2021

The main objectives of the Landlord and Tenant Bill, 2021 are: -

- Consolidation of all laws pertaining to renting of business and residential premises
- Regulation of the landlord-tenant relationship;
- Establishment of Tribunals; and
- Provision for the adjudication of disputes arising from landlord-tenant relationship

Accordingly, the Bill is proposed to apply to all residential premises other than those expressly excepted, service tenancies and those whose monthly rent does not exceed the amount to be prescribed by the Cabinet Secretary. Other premises subject to the Bill are business premises whose agreements have not been reduced into writing and if reduced into writing; are for a term of not more than five years or contain a provision for termination within the first five years other than termination for breach.

The objectives of the Bill are sought to be

achieved through the changes proposed below: -

#### Tribunals

The Bill proposes establishment of tribunals by the Chief Justice whose main purpose will be to determine disputes between landlords and tenants. The powers of the tribunal (s) include: -

- a) Determination of rent payable in respect of any premises and setting of the date at which the rent becomes due;
- b) Apportionment of rent between tenants in cases where many tenants share one premises;
- c) Fixing of the amount payable in respect to service charge;
- d) Reinstating wrongfully evicted tenants;
- e) Issuing permits to landlords who seek to excise land from any premises in order to erect buildings

#### Increase of Rent

The Bill also seeks to regulate increase of rent to the effect that a landlord is not permitted to increase rent unless they have issued the tenant (s) with a ninety (90) days' written notice and twelve (12) months have lapsed since the last increase.

#### Termination of Tenancy

Where a landlord wishes to terminate a specific tenancy, the Bill proposes such landlord to issue a written notice to the tenant giving reasons for the termination of the tenancy. If the tenant refuses to vacate the premises by the date specified in the notice, the landlord may apply to the tribunal for an order to terminate the tenancy and to evict the tenant. The Bill provides that the tribunal will not grant the order if it is found that the landlord is in serious breach of the tenancy agreement.

The Bill provides that there shall be no reference to the Tribunal in respect of tenancies terminated by the landlord on the following grounds: -

- i) Where the landlord has given prior notice of not less than twenty-four (24) months for business premises and not less than twelve (12) months in the case of residential premises;
- ii) The tenant sublets premises without prior consent of the Landlord.
- iii) The tenant has defaulted for Three (3) consecutive months in payment of rent;
- iv) The period of tenancy has expired.

#### Miscellaneous

The Bill provides that a landlord who proceeds to evict a tenant without authority of the Tribunal will be held to have committed an offence liable to a fine not exceeding two (2) months' rent or imprisonment of not more than six (6) months.

The Bill also provides that no landlord shall seize property belonging to a tenant for reason that the tenant has defaulted in payment of rent unless the landlord has obtained an order from the tribunal. In case of death of the tenant, or abandonment of the premises, the landlord may sell the property within the premises in order to recover the rent arrears only after obtaining orders from the tribunal to dispose off the tenants property.

Please note that the Bill was published through Gazette Notice No. 13 dated 12th February, 2021 and therefore public participation is encouraged before the Bill is proceeds to the next stage which is the first reading.

**CASE HIGHLIGHTS**

Precedent-setting cases have been decided on this quarter on a number of vital issues including: the right to housing,

**MITU-BELL WELFARE SOCIETY V KENYA AIRPORTS AUTHORITY & 2 OTHERS; INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (AMICUS CURIAE) [2021] eKLR**

The petitioner was a registered society comprised of residents of Mitumba Village. Mitumba Village and the Mitumba Village Primary School were situated near Wilson Airport. A notice published in the newspapers on September 15, 2011 by the Attorney General gave the residents of Mitumba Village seven days in which to vacate the premises. Despite the fact that the petitioner obtained conservatory orders from the High Court to restrain the demolition of Mitumba Village, the premises were demolished on November 19, 2011. The petitioner thus sought various declaratory reliefs including those that asserted their ownership of the premises and also stating that the forceful eviction and demolition without a relocation option was illegal, oppressive and that it violated the petitioner's rights.

At the High Court, the findings of the court were that the petitioner (appellants) did not own the suit premises. The newspaper notice which was said to be a reminder notice was found by the High Court to be unreasonable, unconscionable and unconstitutional as there was no other notice preceding it and it required vacation of the suit premises within 7 days. The High Court noted that there was no legislation or guidelines developed in Kenya for the eviction of persons occupying land that they were not legally entitled to occupy.

The High Court also made the determination that the right to property included the protection of goods and personal property and it extended to goods and building material that had been destroyed during the demolition. The High Court further found that the eviction and

demolition of the premises pursuant to a seven-day notice and the failure to provide alternative accommodation was a violation of the appellant's rights to housing and other socio-economic rights recognized under the Constitution. Further, the High Court found that evictions could be necessary but due process had to be followed; due process included the issuance of reasonable notice and the conduct of consultations among those affected by the eviction.

Additionally, the High Court determined that the demolition which left other nearby multi-storied buildings intact was discriminatory.

In response to the High Court judgment, the 1st respondent filed an appeal at the Court of Appeal. The Court of Appeal diverged from the decision of the High Court which yielded a second appeal filed by the Appellants at the Supreme Court where the following issues were addressed:

- 1) Structural Interdicts is a supervisory order through which Court controls compliance with its orders.
- 2) The effect of article 2(5) and 2(6) of the Constitution regarding the applicability of international law in general and international human rights in particular;
- 3) Whether U.N Guidelines on Evictions; General Comment No. 7 were part of the laws of Kenya and were of binding effect either under article 2(5) or article 2(6) of the Constitution; and
- 4) When the right to housing under article 43 (1) (b) of the Constitution accrues

The Supreme Court in addressing Whether structural interdicts were recognized reliefs in human rights litigation under the Constitution of Kenya, 2010 held that: -

The Court of Appeal failed to consider Supreme Court decisions concerning interim reliefs that a court could issue to address the violation of a fundamental right. The appellate court appeared to shut

the door on the use of interim reliefs or structural interdicts in human rights and other constitutional litigation.

Interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the courts, had to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other state agency vested with a Constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, had to be realistic, and avoid the temptation of judicial overreach, especially in policy matters. When issuing interim orders, the court could indicate that the orders were interim in nature and that the final judgment had to await the crystallization of certain actions.

The Court further noted that under article 20(5) of the Constitution, the principles that should guide a court in the enforcement of rights provided for under article 43 of the Constitution, where the state claimed that it did not have resources to implement the right were the following: -

- a) it was the responsibility of the State to show that the resources were not available;
- b) in allocating resources, the State had to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals and the court, tribunal or other authority could not interfere with a decision by a state organ concerning the allocation of available resources, solely, on the basis that it would have reached a different conclusion.

An illegal occupation of private land would not create prescriptive rights over that land in favour of the occupants but the same could not be said of an "illegal occupation" of public land. To the contrary, where the landless occupied public land and established homes thereon, they did not acquire title to the land but they had a protectable right to housing over the same.

## CASE HIGHLIGHTS

Faced with an eviction on grounds of public interest, potential evictees that occupied public land, had a right to petition the court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that the eviction may be entirely justifiable in the public interest.

The Court noted that the evictions that the appellant complained of were undertaken in breach of a court order and houses and other property were destroyed. Actions by state organs, carried out in flagrant disregard of court orders, undermined the constitutional order, more so, if they resulted in the violation of citizens' rights.

In conclusion, the Court gave the following orders: -

1. The appeal dated February 5, 2018 was partially allowed.
2. The proceedings were remitted to the trial court, with instructions that appropriate reliefs be crafted and granted in accordance with the Supreme Court judgment and the pleadings at the High Court.
3. No orders as to costs.

### EMMAH MUTHONI NJERI V NAIROBI WOMEN'S HOSPITAL [2021] eKLR

The Petition in this case was premised on the petitioner's contention that her constitutional rights under Articles 27, 28, 29 and 39 being the right to equality and freedom from discrimination, human dignity, freedom and security of the person and freedom of movement respectively had been infringed.

The Petitioner claimed that she was admitted at the Respondent, Nairobi Women's Hospital, on 23rd March, 2018 and discharged on 14th May, 2018 with an accumulated hospital bill of KShs.3,140,144.39. The Petitioner further stated that she managed to pay KShs.1,351,110.00 and her proposals on how to pay the balance were rejected by the Respondent. Instead, the Respondent unlawfully and illegally detained her at the hospital premises and continued to levy charges resulting in the Petitioner's bill rising to KShs.4,029,429.16 as at 10th October, 2018. The Petitioner claimed that the Respondent's actions amounted to false imprisonment and unlawful detention. In her arguments, she relied on, among other statutes, Article 11 of the International Convention on Civil and Political Rights on human dignity, freedom and respect that states that no one should be imprisoned merely on the ground of inability to fulfil a contractual obligation.

The Respondent on the other hand denied detaining the Petitioner unlawfully and levying any illegal charges. It was the Respondent's contention that the Petitioner was at the hospital for unpaid bills and that all charges accrued were for services rendered. The Respondent further stated that the Petitioner was released from hospital on 19th October, 2018, on a written agreement that she would pay KShs.10,000.00 per month until her entire outstanding bill of KShs.2,727,536.05 was fully settled. It is on this premise that the Respondent raised a cross-petition for payment of the outstanding bill aforesaid.

The Honourable Judge W. Korir in making his judgement relied on the case of Sonia Kwamboka Rasugu vs. Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai [2013] eKLR in which the court held that: "Any form of detention not sanctioned by the law that seeks to procure performance of contractual debts is a violation to the right to liberty. It is an affront to human dignity to detain someone on account of a debt that cannot be enforced against them."

The Honourable Judge thus made findings to the effect that the Respondent was not empowered under the law to hold any person within the hospital for failure to pay medical bills. Therefore, the actions of the Respondent in detaining the Petitioner over unpaid medical bills made the Respondent culpable for illegally detaining the Petitioner and infringed on the Petitioner's constitutional rights under Article 28, 29 and 39 of the constitution. In addition, the Honourable Court stated that the Petitioner had no obligation to pay for expenses that may have been incurred by the Respondent in connection with the unlawful detention and that no person should be compensated for costs or expenses incurred in the commission and perpetuation of unconstitutional acts.

The Petitioner was thus awarded KShs.3,000,000 in damages. As for the outstanding bill of KShs. 1,784, 634.39 being the balance as at 14th May, 2018, the same would be set off against the KShs. 3,000,000 awarded to the Petitioner.

INTERLUDE



"EACH TIME  
A WOMAN STANDS UP  
FOR HERSELF WITHOUT  
KNOWING IT,  
POSSIBLY WITHOUT  
CLAIMING IT, SHE STANDS  
UP FOR ALL WOMEN"  
- MAYA ANGELOU



"EXTREMISTS HAVE SHOWN  
WHAT FRIGHTENS THEM  
MOST: A GIRL  
WITH A BOOK"  
- MALALA YOUSAFZAI



"WOMEN BELONG  
IN ALL PLACES WHERE  
DECISIONS ARE BEING MADE.  
IT SHOULDN'T BE THAT  
WOMEN ARE THE EXCEPTION"  
- JUSTICE RUTH  
BADER GINSBURG

*Here is to strong women.  
May we know them;  
May we be them; May we raise them.  
Just as we celebrated International Women's Day on 8th March, we take this quarter to celebrate  
all women that are making strides and breaking barriers in their respective fields.*

## CONTRIBUTORS' PLATFORM

# The 1-5-2A of the Land Act, 2012 Unlawful Occupation of Private Land



Ruth Regero  
ruth@nrorogeregeru.com

The Constitution of Kenya, 2010 acknowledges the inherent right of persons to own property, either individually or in association with others, in any part of Kenya. The Constitution further provides that such right should be enjoyed to the greatest extent consistent with its nature.

Accordingly, as with every other human right, the right to own property imposes a corresponding obligation or responsibility to respect and uphold the right of others to own their legally acquired property. It is therefore unconscionable to occupy or take possession of another person's property without, express or implied lawful authority or without any right or licence under any law.

It is in this vein, we recognise that prior to the enactment of the Land Laws (Amendment) Act, 2016 (the "Amendment Act") and the subsequent Land Regulations, 2017, there was no clear legal framework dealing with eviction of unlawful occupants on land, be it public, private or community land.

The Amendment Act is now well into its 4th anniversary yet unlawful forced evictions seem to be prevalent. We thus highlight hereunder some of the salient provisions

introduced by the Amendment Act [to the Land Act, 2012] and the Regulations in respect of eviction of unlawful occupants on private land.

To begin with, unlawful occupation of private land is expressly prohibited by the Land Act, 2012 (the "Act"). Where there is such unlawful occupation, eviction can only be done in accordance with the Act; the requisite provisions of the Act being within sections 152 A- I.

## Notice

Where the owner of private land is of the opinion that a person is in occupation of their land without their consent, he or she should first issue such person with a written notice of not less than 3 months specifying the terms and conditions of eviction such as the removal of buildings. To this end, the Regulations have already provided for a standard form of eviction notice under Form LA 57.

	The notice can be served by:	Service is deemed effected on:
(a)	Pre-paid Post – to a postal address in or outside Kenya;	The 7th working day after posting (if in Kenya) or the 14th working day after posting (if outside Kenya)
(b)	Delivery at a postal address;	The working day after it was delivered
(c)	Electronic mail; or	The 2nd working day after electronic transmission
(d)	Hand delivery through the national or county government administration officers within the area of their jurisdiction	

\*Working day refers to any day from Monday to Friday between 6.00 a.m. and 6.00 p.m. It also follows that such day should not be a public holiday.

\*In the instance of a large group of persons, the notice should be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land.

\*The notice should also be served on the Deputy County Commissioner and the Officer Commanding the Police Division of the area.

The above provisions are thus crystal clear on the substance and service of the eviction notice. The provisions also take into account that it may be difficult to serve the person in alleged unlawful occupation thus provide for service through the national or county government administration officers.

## Application for Relief

The reasoning behind the 3-month duration of the notice is to provide the person in alleged unlawful occupation, time to seek relief in the event they have a legal and justifiable claim of interest in

the land. Indeed, such application for relief is provided for under section 152 F of the Land Act and the Environment and Land Court may, on such application: -

- confirm the notice and order the person to vacate;
- cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
- suspend the operation of the notice for any period which the court shall determine; or
- order for compensation

## CONTRIBUTORS' PLATFORM

## Procedures During Eviction

In undertaking eviction, there are certain procedures that should be adhered to. Such procedures are aimed at having humane forced evictions/ upholding human dignity. In that regard, the eviction should: -

- be preceded by the proper identification of those taking part in the eviction or demolitions through producing of: original national identification cards, official or staff identification cards or a letter of authorization from the owner;
- be preceded by the presentation of the owner's formal authorization for the action which authorisation should be copied to the national government administrators in the county and the Officer Commanding the Police Division of the area in which the land is situate;
- be carried out in the presence of government officials or their representatives where groups of people are involved;
- be carried out in a manner that respects the dignity, right to life and security of those affected;
- cater for special measures to ensure effective protection to vulnerable groups or persons such as women, children and the elderly;
- include special measures to ensure that there is no arbitrary deprivation of property;
- include mechanisms to protect property left behind involuntarily;
- respect the principles of necessity and proportionality of use of force;
- give the affected persons the first priority to demolish and salvage their property; and
- take place between 6.00 am and 6.00 pm

In the instance there is unclaimed property left behind after eviction, the owner of the land is mandated to remove or dispose by way of public auction, any such property.

## Conclusion

Based on the foregoing the Amendment Act has been hailed as a statute that brought radical changes to the eviction regime.

It essentially places the burden of seeking for relief on the person who is alleged to be in unlawful occupation of private land. The provisions of the Land Act, 2012 should however be adhered to by land owners. Justice J.O. Olola in ***Elc Misc App No.33 of 2019, Atik Mohamed Omar Atik & 3 others v Joseph Katana & another [2019] eKLR*** observed that:

*"...the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. Under Section 152E of the Land Act, any person or persons served with such notice may apply to Court for relief against the notice... Given the obvious repercussions of such an Eviction Notice wherein persons may now be evicted in the absence of a formal Court order, this Court will be reluctant to endorse such an eviction in the absence of the clearest of indications that the would-be evictees were duly served and granted adequate notice to remove themselves from the concerned parcel of land."*

In respect of having police presence during the eviction Justice B. N. Olao in E.L.C. Case No. 190 of 2015 (Formerly ***ELC No. 52 of 2013 Kerugoya, Kirangi Nyamu v Ileri Mbogo & 3 others [2017] eKLR***), averred that:

*"it is the duty of the Police under Section 24 of the National Police Act to preserve peace and maintain law and order. The Police do not therefore need any Court order to do so... It is therefore the general duty of the Police to maintain law and order and they do not need any prompting from any person to do so."*

Simply adhere to the 152 A and there you have it; the responsibility to respect and uphold the rights of others.

## CONTRIBUTORS' PLATFORM

# Foreign Ownership of Fee Simple Interest in Land in Kenya



*Jackson Kamenju*  
*jackson@njorogeregeru.com*

Foreigners enjoy all property rights and protections that Kenyan citizens enjoy, however they are subject to restrictions with regard to the kind of tenure they can hold in land. Article 65 of the Constitution of Kenya, 2010 provides that foreigners may only own leasehold property for a term not exceeding 99 years. All Leases that had a term of more than 999 years were automatically reduced to 99 years by operation of law.

The common understanding of Land Tenures has always been limited to Freehold and Leasehold interests. However, there is a special type of Estate with its root emanating from common law, an Estate in Fee Simple. This type of interest is deemed as freehold interest

## History of Estate in Fee Simple

A brief history on fee simple interest can be traced back to the year 1306. It was practice that where a tenant in fee simple alienated the land, the fee simple continued as long as there were heirs of the new tenant and so on irrespective of any failures of the original tenant's heirs. Fee simple terminated once the original tenant died without leaving any descendants or any collateral. From that time onwards, fee



*Rodney Wesonga*  
*lawyers@njorogeregeru.com*

simple became virtually perpetual. It would terminate only if the tenant for the time being died leaving no heir.

The same was seen in Kenya during the pre and post-colonial era where most land with fee simple interest was held by foreigners. Examples of areas in Nairobi where a number of foreigners own(ed) property in fee simple interest include: some areas of Old Runda, Argwings Kodhek Road, part of Gitanga Road and Kitsuru.

The promulgation of the Constitution of Kenya, 2010 opened up the discourse on Land Tenures in Kenya more so by providing a substantive legal position with regards to foreigners holding long term leases (999 years). The Constitution only makes mention to Freehold and Leasehold interests in Land and there is no mention of Fee Simple Estates. On the other hand, the Land Registration Act, 2012 and Land Act, 2012 have also ignored or have not shed light on Fee Simple Estates.

From the foregoing it is clear that Kenya lacks any instructive law either setting out or explaining the nature of Fee Simple Estates. It is also probable that the Kenyan Courts have not had an opportunity

address themselves on the issue of Fee Simple Estates in Kenya.

Notwithstanding the Lacuna in law as regards to Fee Simple Estates, it is important to note that The National Lands Commission which derives its mandate from the Constitution of Kenya 2010, the National Land Policy (2009) and acts of Parliament, namely the National Land Commission (NLC) Act, the Land Act and the Land Registration Act, all of 2012 has a part to play in regards to ownership of Land by foreigners and specifically where the interest in Land held by the Foreigner by implication exceeds the constitution tenure time limit of 99 years.

The NLC has already Gazetted Regulations for conversion of all Freehold land held in 999 years to 99 years under Legal Notice No. 131/2020. This Legal Notice is still not deemed sufficient enough to address the gray area under Fee Simple interest in land.

As pointed out above, the major concern when it comes to Fee Simple interests held by foreigners is that we don't have procedural or substantive pronouncements either by the NLC, the Ministry of Lands or any Courts in Kenya, and thus the same is deemed to be grey area in law.

There being no substantive law with regard to Fee Simple Estates in land, it is then deemed that all the Fee Simple Estates held by foreigners are to be regarded as held under leasehold interest. Most of the properties held by foreigners within Nairobi County where land rates are payable, are not agricultural properties, they are either Commercial, Residential, or Commercial Residential. Therefore, we can only deem this property to belong to the class of leasehold interest.

## CONTRIBUTORS' PLATFORM

Additionally, if any transfer or sale is carried out where the interest is freehold, the interest is still automatically converted to a leasehold interest. The Courts have addressed the same in the case of *Kunde Road Residents' Welfare Association vs. Deshun Properties Company Limited & Four Others (ELC PETITION NO. 1433 OF 2013)* Justice Gacheru observed the following;

*"...The Constitution at Article 40 guarantees ownership of land in Kenya by any person. Granted, this provision is not absolute as it is subject to Article 65 thereof which restricts land to be held by noncitizens only as leasehold of a term of 99 years and no more. Article 65(2) of the Constitution, in my view, envisages*

*a situation where non-citizens can enter into transactions for acquisition of interest in land that is freehold. Indeed there is no law that prohibits non-citizens from acquiring and owning freehold land, the Constitution however restricts that ownership to leasehold of a period of 99 years. It is therefore my finding that the transfer of the property in question, though the interest therein being freehold to the 1st Respondent being a non-citizen is not illegal as alleged. The bottom line is that the 1st Respondent has acquired 99-year leasehold interest..."*

The above case law also gives rise to very pertinent legal issues, why was the freehold property transferred to a Foreigner in the first instance against the prescribed law? can the law "cleanse" an illegality? does

it mean freehold properties are freely transferable to foreigners?

All these questions cannot be answered conclusively and the only way to address this issues is either by; Parliament amending the Land Laws and clearly setting out the nature of a Fee Simple Estate in contradistinction to leasehold and freehold interest and NLC preparing regulations and procedures for conversation of the Fee Simple Estates.

## Funds without Borders: An Introduction to Private Equity



Sandra Bucha  
lanyers@njorogeregeru.com

Hurdled around with terms such as venture capital and hedge funds, private equity is a medium to long-term financing option provided by private equity firms in exchange for a stake in the equity (shares)

of a company. Similar to venture capital, private equity is an alternative source of investment. However, the primary distinguishing factor between private equity and venture capital is that the former is availed to already established business outfits, usually unlisted companies.

While the history of private equity firms can be traced to around 1946, after the Second World War, the concept of private equity is nothing new. Private equity, as a source of funding, is as old as capitalism itself. Arguably, private equity has gained traction over the last decade or two as a result of the following factors: (1) private equity firms present less hurdles in acquisition of funding compared to banks; (2) private equity firms supplement their capital injections with expertise to aid profit collection by the fund recipient;

and (3) fairly lower interest rates in respect of finance deals. With regard to point (2) stated above, the British Private Equity and Venture Capital Association (BVCA) notes that private equity backed companies have been shown to grow faster than other types of companies. According to the BVCA, such growth is attributable to the provision of both capital and input from experienced personnel.

In Africa, the private equity industry had for the past decade been confined to Southern Africa, with more operations taking place in South Africa as opposed to other Southern African countries. However, the continent's general economic standing following the 2008 global recession saw an influx of private equity firms, which sought to expand their bases of operation from

## CONTRIBUTORS' PLATFORM

South Africa to other African countries. The African Private Equity and Venture Capital Association observed an upward trend in private equity investment in the continent, with the latest figures showing private equity backed deals of USD 3.8 Billion, up from the USD 2.7 Billion in 2018.

Given the growing popularity of private equity as a source of investment and the proliferation of private equity firms, there have been talks on regulation of the same. The growing need for regulation is underscored by the fact that private equity backed deals in East Africa for the period of 2007 to 2018 had an estimated value of over USD 2 Billion, as reported by KPMG and the East Africa Private Equity and Venture Capital Association. A leading

destination for private equity investors in the East Africa region, Kenya has grown to become the third country behind South Africa and Nigeria in terms of private equity transactions in Sub-Saharan Africa, with private equity funds having invested more than USD 750 Million across nearly 50 deals based in Kenya between 2013 and 2015.

The Finance Act, 2020 introduced regulation of the private equity sphere. Section 30 of the Act amended Section 11 of the Capital Markets Act, giving the Capital Markets Authority the additional mandate to license, approve and regulate private equity companies that have access to public funds. Notably, such regulation is limited to only those private equity firms that 'have access to public funds'.

There then exists a lacuna in respect of private equity firms that deal solely with 'private funds'. Currently, there is no piece of legislation that attempts to regulate private equity firms operating within the sphere of private funds. At best, such firms would be regulated based on the form of business entity, not as private equity firms. Thus, it would seem that private equity firms enjoy *carte blanche* in their operations within the country, leaving their clients susceptible to various risks.

*This Article continues next quarter with a focus on Venture Capitals.*

### ACKNOWLEDGMENTS

The editorial team would like to express its sincere gratitude to all those members of the Firm who, in one way or another, contributed to the conception, preparation and eventual production of this Newsletter. The dedication and input of the writers and contributors is appreciated and we look forward to continued support in the issues to follow.

Tel: + (254 ) 020 3586592, 254 020 231 9224  
+ (254 ) 020 2612531, 254 (020) 261 3646  
Mobile: 0722-206-884, 0733-608-141

Email: [info@njorogeregeru.com](mailto:info@njorogeregeru.com)  
Website: [www.njorogeregeru.com](http://www.njorogeregeru.com)  
Dropping Zone No.8  
Revlon Professional Plaza  
Tubman Road / Biashara Street

