

ISSUE 01

KALYA

ADVOCATES

NEWSLETTER



SINCE

KALYA
ADVOCATES

1989

IN THIS ISSUE

<i>Understanding the Mortgage Process from a Lawyer's Perspective</i>	-----	<i>Pg 2</i>
<i>Re-opening of Charges</i>	-----	<i>Pg 3</i>
<i>That Director, Officer of the Company, or Third Party is not Above the Law</i>	-----	<i>Pg 5</i>
<i>Redundancy and Employment Law by</i>	-----	<i>Pg 7</i>
<i>The Applicability of the 'Child of Tender Years' Doctrine in Kenya in Light of Children</i>	-----	<i>Pg 9</i>
<i>Family Trusts: The New Tool for Estate Planning and Management</i>	-----	<i>Pg 11</i>
<i>Valuation of Land During compulsory acquisition</i>	-----	<i>Pg 13</i>
<i>Applicability of Section 3(5) of the Law of Succession Act- A Preview of the Historical Background and its Conflict with the Marriage Act No. 4 of 2014</i>	-----	<i>Pg 15</i>
<i>Can minors own property? Here's what you need to Know</i>	-----	<i>Pg 17</i>
<i>Thinking of gifting your child an apartment? Can minors own property? Here's what you need to Know</i>	-----	<i>Pg 17</i>

FOREWORD

BY MR. WILSON K. KALYA

During my admission to the bar in 1986, barely a thousand Advocates were practicing in Kenya. Today, the number has shot to more than twenty thousand. Most recently, 822 advocates were admitted to the bar in one swoop!

A lot has changed over the years. The typewriter was slowly replaced by the computer and making door-to-door visits to engage with our clients has been modernized by such, a Law Firm's Newsletter.



Firm's Newsletter.

In this inaugural quarterly newsletter, the Team at Kalya & Company Advocates has prepared insightful articles from why you should create a trust over your estate to the processes of land valuation during compulsory acquisition. We also have a guest feature on the 'Child of Tender Years' doctrine.

As the Latin phrase *Tempora mutantur et nos mutamur in temporibus* goes, Times change and we must change with the times. Here's to Kalya & Company Advocates embracing the modern times and joining the bandwagon of digital communication to engage with our clients and inform the general public.

"It's every lawyer's dream to help shape the law, not just react to it"- Alan Dershowitz



Edited by;
Barbara C. Sang -
Advocate of the
high court



Designed by
Wanjohi Ian
Martin

www.sparklemedia.agency
0712899454

For more information, you may reach us at kalyacounsel@gmail.com or 0778-450-555. Our offices are at Eldoret 2nd Floor Sakong House along Kenyatta Street and Nairobi Unit A1 PCEA Flats along Jabavu Road.

We hope you will enjoy this first publication as much as we enjoyed preparing it.

UNDERSTANDING THE MORTGAGE PROCESS FROM A LAWYER'S PERSPECTIVE

BY RACHEL C. KEINO- HEAD OF CONVEYANCING AND COMMERCIAL LAW

While buying a home can be a major milestone in life, it is a huge financial decision and the process can be quite arduous. For example, do you know how many steps there are in getting a mortgage from your financial institution all through registration? How can you prepare for the process? What are the requirements at your lawyer's office?

A mortgage, sometimes referred to as a charge, is a financial arrangement/agreement between you and your lender that can finance ownership of your home (or such like asset) in exchange for a loan amount to be repaid in monthly installments.

The main requirements are; Title or copy of the title (sublease, sectional title, title deed, certificate of lease, certificate of title or a conveyance as the case may be), Sale agreement if purchasing property, and the documents we commonly refer as KYC (Know Your Client) that include identification papers among others.

Once armed with the above, below is an outline typically followed where the subject property is being purchased directly from the seller (existing title);-

- Conducting due diligence
- Execution of documents (charge, transfer) by our client
- Issuance of Undertakings/Guarantees towards the completion of documents that may Include executed transfers, consents, clearances, the original title, etc)
- Valuation for assessment of Stamp duty and payment of stamp duty (on both the loan and on the transfer)

- Stamping of documents and booking at the Lands Office
- Registration and finally
- Disbursement of funds



The general challenges typically encountered during this mortgage process range from missing deed files due to the current digitization process (Ardhi Sasa) and the rather slow and bureaucratic process toward the disbursement of funds.

Nonetheless, at Kalya & Company Advocates, we pride ourselves in our timely service with integrity. Over the years since the firm's inception in 1989, we have helped many people (and families) settle into their dream homes. We are also empaneled in all the major financial institutions in Kenya so you can count on us towards property ownership and financing with our various partners.

Rachel C. Keino - Senior Associate - Property, Conveyancing & Commercial Law



RE-OPENING OF CHARGES

BY KAREN C. CHESOO- HEAD OF LITIGATION & B.K. KIPRUTO

A matrimonial home is defined under the Land Act as any property which is leased or owned by one or both spouses and occupied by the spouses as their family home. A court has the power to re-open charges of whatever amount secured on such homes in the interest of justice between the parties. This is provided for in the Land Act, Section 105.

The power of the court to reopen charges under Section 105 of the Land Act must be read together with the provisions of Section 106 of the Land Act which provides for the guidelines to be taken into consideration when the court exercises its power to re-open charges on matrimonial homes.



As per Section 106, the court may direct that the charge shall have effect subject to modifications as ordered by the court.

The court may also make an order requiring the chargee to repay the whole or part of any sum paid under the charge or any related collateral agreement by the chargor. An order can also be made requiring the chargee to pay any compensation to the chargor which the court shall think fit. Finally, the court may direct the chargee, being a corporate body to cease acting in a discriminatory manner concerning the granting of charges.

It is important to note that the power to re-open charges is not the same as the position of the law regarding charges on matrimonial homes before the enactment of the Land Act. The position then was that matrimonial property could not be sold for lack of consent of a spouse. With the Land Act in place, the consent of a spouse was made mandatory.

In the case of Julius Mainye Anyega vs Eco Bank Limited [2014] eKLR, the court dismissed the claim that the subject security was matrimonial property after confirming that necessary spousal consents were obtained and requisite notices of sale properly issued. The court went on to state; "...The true position of the law on matrimonial properties is that a mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the mortgagor. These protections once availed will not prevent the sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility"

Karen C. Chesoo
Senior Associate -
Litigation



In the case of Michael Ronoh Kimutai & 2 Others v Consolidated Bank Of Kenya Ltd [2013] eKLR the plaintiffs were guarantors for Uday Patel Company Limited which was the principal debtor and which had taken out a loan secured by charges on three properties of the guarantors. The principal debtor had defaulted and was indebted to the tune of millions. In this suit, the plaintiffs approached the court seeking to invoke the power of the court to reopen a charge to delay the chargee from exercising its power of sale over the charged properties.

"Deceive not thy physician, confessor, nor lawyer"- George Herbert

The court found that before it could only grant relief if it would have to be satisfied that the properties therein constituted a matrimonial home as per Sections 105 and 106. The suit was dismissed as they did not constitute matrimonial property.

Secondly, the grounds for the re-opening of a charge have to be justifiable. They may include:

- The age, gender, experience, understanding of the commercial transaction, and health of the chargor at the time when the charge was created if the chargor is an individual.
- The financial standing and resources of the chargor relative to those of the charge at the time of the creation of the charge.
- The degree to which, at the time of the creation of the charge, the chargor was under financial pressure and the nature of that pressure.
- The interest rates prevailing at the time of the creation of the charge and during the continuation of the charge and the relationship of those interest rates to the interest rate applying from time to time in the charge.
- Any other factors that the court considers relevant.

In the case of *Wilstone Mdindi Mwawugunga v Kenya Women Microfinance Bank Plc* [2022] eKLR in which the applicant sought the re-opening of the charge on the matrimonial home of the applicant, the court found that the applicant did not deny the amount due and owing or the legality of the contract. No good reason had been given for defaulting in repayment. None of the grounds to justify the re-opening of the charge had been substantiated. The court was of the opinion that the discretion conferred upon the court to consider the re-opening of a charge was not in the interest of justice in that particular case. Doing so would have amounted to rewriting the contract afresh yet its validity was not in question.

In conclusion, it has been established that courts can only re-open charges in the interest of justice to the parties if it is proved that the charge is on a matrimonial home. It has also been found that there has to be a justifiable reason for the court to re-open the charge. The justifiable reasons for re-opening the charge have to be within the considerations set out under Section 106 of the Land Act.



This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact Karen Chesoo (chesoo@kalyacounsel.com) or your usual contact at our firm.

THAT DIRECTOR, OFFICER OF THE COMPANY, OR THIRD PARTY IS NOT ABOVE THE LAW

DERIVATIVE SUITS; THE CURE FOR KENYA'S RETAIL SECTOR BY BEATRICE J. KIPKESEI ASSOCIATE – ADVOCATE

The retail sector has a great impact on the economic development of a nation. It is an intrinsic part of our daily lives Nations that have enjoyed the greatest economic status and social progress have a vibrant retail sector. Retailing plays a predominant role in the economic development of a country.

From the recent occurrences in Kenya, it is not in dispute that Kenya's retail sector is AILING. Ailing from gross mismanagement, internal fraud negligence, illegal/ultra vires acts, breach of duty and trust, dishonesty, and corporate governance issues arising from either the board of directors, officers, or third parties in the companies or corporations thereunder.

As a result of the said ills, several corporations, and companies have closed down under this sector to wit Nakumatt Holdings Ltd, Tuskys (Tusker Mattresses Ltd), Uchumi Supermarkets Ltd, South African-based retail giant Shoprite Holdings Ltd, Botswana-based Choppies Enterprises Ltd amongst others. Several Kenyans were rendered jobless while several manufacturers and the banking sector counted losses.

Stakeholders e.g., Kenya Union of Commercial Food and Allied Workers (KUCFAW), Kenya Association of Manufacturers (KAM), and the Ministry of Trade, Industrialization, and Enterprise Development have tried in vain to salvage the situation.

So, the question is could these companies have been salvaged? We admit, YES. How? Through Derivative Suits/Actions

A derivative suit/ action is a mechanism governed by Part XI of the Companies Act, 2015 under sections 228 to 242 thereof which allows shareholders to litigate on behalf of the company/corporation often against an insider (whether a director/ majority shareholder or other officer of the company) or a third party, whose action has allegedly injured the company.

It is a tool of accountability to ensure redress is obtained against all wrongdoers of a company. When a company's directors commit fraud, act negligently, commit gross mismanagement, etc., legal action can be taken against them to help put the company back on the right track. This way, the company will be salvaged.



When to take legal action?

If you believe that the Company's board of directors, officers, or a third party is guilty of fraud, gross mismanagement, negligence, acting ultra vires, breach of duty and trust, default, illegality, or corruption while dealing with the company then pursuing a derivative lawsuit may be a viable cause of action.

How to institute/take action

First, the claim MUST be by a member of the company and the cause of action MUST vest in the company.

The institution of a derivative suit/action involves a two-stage procedure. One must first seek leave of the court to continue with the claim where one must demonstrate that the suit is in the best interest of or for the benefit of the company.

Both the application seeking leave to proceed with the action and the main suit itself is technical and procedural in nature. It therefore follows that it is wise to engage the services of an expert in the field to represent one in court i.e. a commercial lawyer.

TAKE HOME

Good corporate governance is crucial for the long-term success of the Kenyan economy. To achieve good corporate governance, legal liability is essential, because only legal liability can deter serious managerial behavior.

This is where derivative actions/suits come in as a potentially powerful elixir for corporate governance ills. It is a functional necessity for meaningfully enforcing directors' duties, which in turn ensures the company's stability and sustainability and consequently protects and improves our economy.

“Let us protect investors through derivative litigation. USIKIMYE, DEFEND THE COMPANY, SECURE YOUR INTERESTS, AND SAFEGUARD THE ECONOMY”



Beatrice Kipkesei Associate – Advocate

If you intend to file a derivate suit, it is strongly recommended to engage a commercial disputes lawyer as they have the necessary expertise to handle this technical and procedural action.

“Where there’s a will, there’s a lawyer”- Robert Gonzales

This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact Beatrice (kipkesei@kalyacounsel.com) or your usual contact at our firm.

REDUNDANCY AND EMPLOYMENT LAW BY

BY CLAIRE N. KARUGA ASSOCIATE – ADVOCATE

Section 2 of the Employment Act, 2007 defines redundancy as the “loss of employment, occupation, job or career by involuntary means through no fault of an Employee, involving termination of employment at the initiative of the Employer, where the services of an Employee are superfluous and the practices commonly known as the abolition of office, job or occupation and loss of employment”.

Following the instability of the economy, most Employers have been forced to lay off employees on account of redundancy. Section 40 of the Employment Act, 2007 lays down the procedure to be followed by Employers in cases of termination on account of redundancy.



Employers are mandated to follow the below listed laid down procedure in cases of Redundancy:

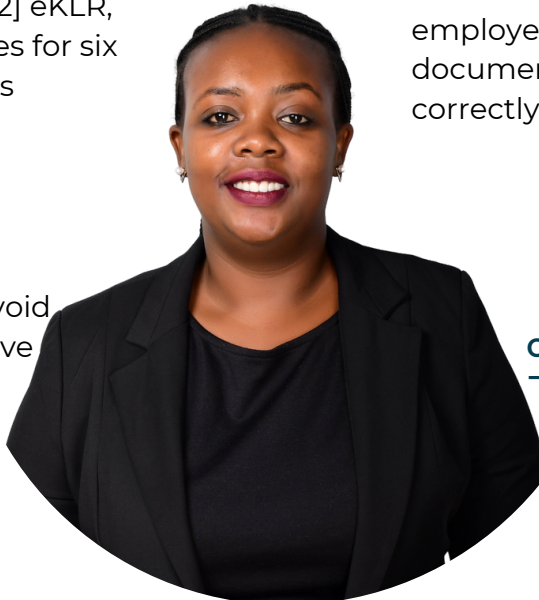
- Issue a one-month notice in writing. Where an employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy; where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer.
- Selection of employees to be declared redundant has to have due regard to;
- Seniority in time, skill, ability, and reliability of each employee of the particular class of employees affected by the redundancy;
- Payment of terminal benefits in cases where there is in existence a collective bargain agreement between an employer and a trade union.
- Where leave days are due the employee is entitled to be paid the accumulated leave days in cash.
- One month's notice or one month's wages in lieu of notice; and
- Severance pay at the rate of not less than fifteen days' pay for each completed year of service.
-

Consequences of failing to follow the laid down procedure:

- The employee can institute a claim for unlawful termination.
- The employee will be entitled to one month's salary in lieu of notice.
- Payment for leave days not taken and/ or overtime worked.
- Severance pay of not less than 15 days for each completed year of service.
- General damages which may be calculated at a year's salary.

In the case of *Dennis Leak Ojuok v Population Services Kenya [2022] eKLR*, the court held; "I award damages for six months gross monthly wages as damages for the unfair termination."

Act and the Laws of Kenya to avoid lengthy and potentially expensive employment claims down the line. We offer legal advice to clients on these processes and can assist with drafting letters to employees and any termination



We do advise employers to ensure all matters involving employees are properly documented and carried out correctly per the Employment

**CLAIRE N. KARUGA ASSOCIATE
– ADVOCATE**

BIGMAN YOUNG

*"Lawyers are operators of toll bridges which anyone in search of justice must pass"-
Jane Quinn*

This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact Claire Karuga (karuga@kalyacounsel.com) or your usual contact at our firm.

THE APPLICABILITY OF THE 'CHILD OF TENDER YEARS' DOCTRINE IN KENYA IN LIGHT OF CHILDREN ACT 2022 AND THE EVOLVING PARENTAL ROLES IN THE 21ST CENTURY

BY GUEST WRITER IRINE A. ODHIAMBO

The Children Act 2022 ("the Act") took effect on 26th July 2022, thereby repealing Children Act No. 8 of 2001. The Act has been hailed as being progressive, matching up to the requirement under Article 53(2) of the Constitution that the child's best interests are of paramount importance in every matter concerning the child. Among other revolutionary aspects of the Act, the primary considerations in evaluating the best interests of the child have been expanded under the 1st Schedule to include, among others, the child's age, maturity, background, any distinct special needs, and the relationship of the child with his/her parent(s) or guardian(s).



It is worth noting that the Act does not mention the 'child of tender years', defined as a child under the age of 10 years under Section 2 of the Repealed Act. This was the foundation upon which the 'Child of Tender Years' doctrine was established through the years. So, was the omission of this definition in the Act an oversight on the part of the legislators or was it a deliberate move in light of the evolving parenting roles in the 21st Century? This article proposes the latter.

The 'Child of Tender Years' Doctrine

In the case of *SMM v ANK* [2022] eKLR, the mother lived in the United States while the father lived in Kenya and had been with the children (who were under the age of 10 years) for a continuous period of about 7 years. Fearing that the mother would take the children to the United States, he quickly applied for custody of the children, which the Trial Court awarded him. On appeal by the mother, Ngugi J largely upheld the Trial Court's decision and considered a wide range of factors that would work against the children's best interests if they were to relocate to the United States to be with their mother.

In so doing the Judge looked at the history of the 'Tender Years' doctrine under Common Law, where the custody of children was always given to the fathers as part of their property rights. This, however, changed during the Industrial Revolution when the specification of gender roles gave rise to the 'Tender Years Doctrine'.^[1] As such, it was considered best practice to grant the custody of children under the age of 10 years to the mothers unless there existed exceptional circumstances. It is on this basis that the Court in *Githunguri v Githunguri* [1979] eKLR, awarded custody of the children to the mother, adding that the custody of very young female children should be granted to their mother unless there are exceptional circumstances.

[1] *SMM v ANK* [2022] eKLR, para 70-74

Since the Githunguri case, Kenyan courts have steadily developed jurisprudence on the general rule that children under the age of 10 years should stay with the mother unless it can be shown that the mother is of disgraceful conduct, has immoral behaviour and keeps bad company, among other exceptional circumstances.² However, in light of the currently evolving parental roles where there are increasingly stay-at-home dads who are more involved with their children, a strict application of the doctrine would be unfair to the parents and worse still, against the best interests of the child which it sought to protect in the first place.

The Best Interests of the Child Principle

¹ *SMM v ANK* [2022] eKLR, para 70-74

² See *Sospeter Ojaamong v Lynette Amondi Otieno Civil Appeal 176 of 2006*; *Mehrunnisga v Parves* [1981]; *K.M.M v J.I.L* [2016] eKLR;

This doctrine posits that the welfare of the children is the primary factor that must always be given paramountcy in deciding custody cases as guided by Article 53 (2) of the Constitution. For this reason, the best interests of the child, at any given moment, may result in the custody of very young children being awarded to the father, even though the mother may be a decent person capable of raising the children. The Act, under the First Schedule, lists various considerations that must be had before awarding custody. They include:

- The age, maturity, stage of development, gender, background, and any other relevant characteristic of the child.
- The relationship of the child with the child's parent(s) and/or guardian(s) and any other persons who may significantly affect the child's welfare.



- The preference of the child, if old enough to express a meaningful preference.
- The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity.
- The stability of any proposed living arrangements for the child
- The parties' motivation and capacities to give the child love, affection, and guidance.
- The child's adjustment to the child's present home, school, and community.
- The capacity of each parent or guardian to allow and encourage frequent and continuing contact between the child and the other parent and/or guardian(s), including physical access.
- The capacity of each parent and/or guardian(s) to cooperate or to learn to cooperate in child care.
- The effect on the child if one parent/guardian has sole authority over the child's upbringing; and,
- The existence of domestic abuse between the parents/guardian(s), in the past or currently, and how that abuse affects the emotional stability and physical safety of the child.

This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact Barbara Sang (barbara@kalyacounsel.com) or your usual contact at our firm.

FAMILY TRUSTS: THE NEW TOOL FOR ESTATE PLANNING AND MANAGEMENT

BY JACKLINE J. ROTICH

A Trust is essentially a legal relationship that exists between a Settlor (creator of the trust), a Trustee (a protector of the trust), and a Beneficiary. These parties can either be individuals or legal entities.

The Trustees (Perpetual Succession) (Amendment) Act, 2021 under section 3D introduced family trust. The Act instigated family trusts for planning or managing the personal estate. The previous regime of trust failed to provide a comprehensive law that catered to estate planning and management. Individuals labored in establishing family companies, offshore trusts, or simple trusts in Kenya to facilitate their estate management needs. The introduction of family trust has fostered the pre-existing gap in legislation.

family

It has become a common occurrence for productive family assets to survive for at least three generations. This is subject to poor management leading to wastage by the immediate successive generation. The Family Trust is made in contemplation of such challenges and fashioned to preserve and create wealth for multiple generations to come.

The Family trust seems to be a cure to the never-ending family disputes over a deceased estate. The Trustees (Perpetual Succession) Act provides for a discretionary trust, in this case, trustees to a family trust have room to change the terms of the trust to avoid poor spending or otherwise wastage of the estate by beneficiaries to a trust.



Further, section 3D(1) of the Act notes that a family trust can be incorporated. This means that the trust can operate as a separate legal entity and can own assets under its name. It can also be sue and be sued under its name. Section 3D(2)(C) also notes that a family trust shall be a non-trading entity. The Act seeks to further cater to settlors who are zealous to solely protect the trust property from wastage.

The Act goes further to introduce the office of the enforcer under section 3J. The role of the enforcer is to overlook the work of the trustees(s) and shall hold the trustee accountable for their work. The enforcer may even act in place of the trustee during the hearing and determination of any suit. The enforcer is additionally vested with the power to pursue legal action against the trustees. From the foregoing, it appears the drafters of the Act seemed to prevent the issue of breach of duty of care by trustees. The establishment of the enforcer dispenses with the need for litigation as the enforcer can undertake remedial action against trustees who are in breach of the terms of the trust.

The introduction of a family trust in the present legislation also stands to safeguard a deceased testamentary power where the deceased will has been declared invalid by Court.

In such an instance, the deceased property is administered according to the rules of intestacy which are lengthy, expensive, and leaves out individuals that do not form part of the family of the deceased. Section 3D of the Act notes that beneficiaries of a family trust need not be related to the deceased. The family trust ensures that the deceased wishes are respected and protected from the interference of the Court.

Notably, the Trustees (Perpetual Succession) Act now introduces irrevocable trusts under section 3A. Where a family trust is also irrevocable, the estate of the settlor of the trust property is protected from bankruptcy proceedings. Therefore, the beneficiaries of the trust can freely enjoy the trust property without the impending fear of Creditors who seek to settle their debts.

Family trusts also benefit from an array of tax exemptions. For instance, the Income Tax Act has been amended under section 36(g) which notes that property sold or transferred into a registered family trust is exempted from income tax. Similarly, section 52(20(b) of the Stamp Duty Act, exempts any conveyance or transfer to a registered family trust.

Conclusively, the family trust is a great tool to avoid probate and unwarranted litigation as it seeks to remedy many gaps in the pre-existing forms of trust in Kenya.

This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact Jackline Rotich (kalyacounsel@gmail.com) or your usual contact at our firm.



JACKLINE J. ROTICH

VALUATION OF LAND DURING COMPULSORY ACQUISITION

BY DEBORAH J. CHIRCHIR

The Government has the authority to acquire land through various methods including Compulsory Acquisition. An acquisition request is made to the National Land Commission by an acquiring body. Criteria and guidelines to be adhered to by the acquiring body in the acquisition of land are provided for by the Commission. Section 111 of the Land Act states that If land is acquired compulsorily, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. The Commission shall make rules to regulate the assessment of just compensation.

During the process of compensation of land acquired through compulsory acquisition, a valuation of the land has to be done.

Before 2019, there was no express provision on how land would be valued. However, with the enactment of the Land Value (Amendment) Act in 2019, a Land Value Index was introduced. The Act describes a Land Value Index as *“an analytical representation showing the spatial distribution of land values in a given geographical area at a specific time.”*

The Land Act No. 6 of 2012, the Land Registration Act No. 3 of 2012, and the Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2012 were all directly impacted as a result of the Land Value (Amendment) Act, 2019 and technically modified by it.



The Act goes on to explain the various forms of compensation after introducing essential provisions on the appraisal of the value of the land acquired compulsorily.

Although this new legislation promises to change the face of Land Valuation during Compulsory Acquisition, it is difficult to overlook the obvious loophole. The Land Value (Amendment) Act applies criteria in the valuation of community land and freeholds. It is important to note that the different land tenures are governed by different legislations and Community Land to be specific is governed by the Community Land Act. It is simply fair to differentiate the valuation of community land from that of private land. Section 5(4) of the Community Land Act provides for compulsory acquisition by the state but is subject to full compensation or by negotiated settlement. The Land Value (Amendment) fails to recognize this section.

Having seen the important role that the National Land Commission plays in the process of Compulsory Acquisition, the Commission has not been involved in the development of the Land Value Index. That mandate has been bestowed to the

Cabinet Secretary in consultation with county governments and is to be approved by the National Assembly and the Senate. This, in my opinion, compromises the work of the National Land Commission in valuation.



Despite its shortcomings, we must however commend the legislation for establishing a Land Acquisition Tribunal. The Tribunal has jurisdiction to hear and determine appeals from the decision of, the National Land Commission in matters relating to the process of compulsory acquisition of land.

The Land Act No. 6 of 2012, the Land Registration Act No. 3 of 2012, and the Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2012 were all directly impacted as a result of the Land Value (Amendment) Act, 2019 and technically modified by it.

Enactment of the Land Value (Amendment) Act is a big step to ensuring that Land rights are protected but the legislature has to go back to the drawing board and revise the issue of valuation of community land.

This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact us at kalyacounsel@gmail.com or through your usual contact at our firm.



BY DEBORAH J. CHIRCHIR

APPLICABILITY OF SECTION 3(5) OF THE LAW OF SUCCESSION ACT- A PREVIEW OF THE HISTORICAL BACKGROUND AND ITS CONFLICT WITH THE MARRIAGE ACT NO. 4 OF 2014

BY ROSESTHER W. AKISO

Before the Law of Succession Act came into force, there was a myriad of laws that were in place whose applicability posed challenges on how they would be aptly applied to native Africans. Customary law was such a law that used to apply to succession matters of the deceased African estate. The customary law was the predominant law before the advent of colonialism. It provided for both the testate and intestate succession of an African.

Upon ingress of colonialists, other laws were introduced to complete African customary law hence a conflict ensued. African customary law was stifled with a condition that it would only apply as long as it was not repugnant to justice and morality. When Christianity set in, the limbo was whether an African who had converted to Christianity and adopted Western life would be governed by which law; when it came to personal matters such as divorce, marriage, and succession in which they felt that they should be governed by Western law.

Before 1st July 1981, there were four systems of law of succession in Kenya applying to four socio-ethnic groups of people in Kenya such as Hindus, Muslims, Africans, and Europeans. The Law of Succession was passed to merge all four systems of the law of succession to create uniformity and avoid conflicts. However, the intention has remained elusive. Upon the enactment of the Marriage Act, a conflict has a risen with the Law of Succession Act, especially on issues of marriage and succession.

A look at Section 3 (5) of the LSA espouses that notwithstanding the provisions of any other written law, a woman married under a system of law that permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the Act. The courts have given effect to Section 3 (5) of Cap 160 (LSA). In *Irene Macharia vs. Margaret Njomo & Partick Harrison (Civil Appeal No. 139 of 1994)*, in this case, the deceased celebrated a statutory marriage with the appellant in 1978 and got separated in 1989 and the deceased started cohabiting with the first Respondent. The two had a daughter. Disputes arose as to how the property left by the deceased was to be shared between the Appellant and the infant. It was held that under Section 3 (5) of cap160 (LSA), a woman married to a man who had contracted a statutory monogamous marriage was a lawful wife for the act and her children are accordingly children within the meaning of the act.



Under Section 9 of the Marriage Act, a married person shall not, while in a monogamous marriage, contract another marriage. This provision is in direct conflict with the provision of Section 3(5) of the LSA as it impugns a marriage contracted when there is a subsisting marriage. In the Matter of the Estate of Reuben Mutua, it was observed that the deceased having contracted a statutory marriage could not contract another marriage under customary law, and therefore Josephine was not a wife for the Law of Succession and was not entitled to receive provision from Mutua's estate.



The above case has been considered to be erroneously decided as it sacrifices Section 3 (5) LSA at the alter of Section 9 of the Marriage Act hence, deftly creating a conflict.

In the case of Irene Macharia supra, it was observed that Mutua's Case was wrongly decided because at the time Mutua died the LSA Cap 160 was in force and that Section 3 (5) was effective and alive.

Ruenji's Estate and Re Ogolla's Estate which supports Section 9 of the Marriage Act have been termed no longer good law as they were decided before the Advent of Section 3 (5) LSA.

Our understanding of the law is that law is a regulation in place to guide society when and how it came into force. There is a need to promote congruence between the conflicting laws so that conflict existing between them is decimated and uniformity is enhanced. As long as the provisions in conflict remain in our statutes confusion will still flare. This will cause insurmountable injury that is open to crippling the judicial system if not addressed.



BY ROSESTHER W. AKISO

This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact Barbara Sang (barbara@kalyacounsel.com) or your usual contact at our firm.

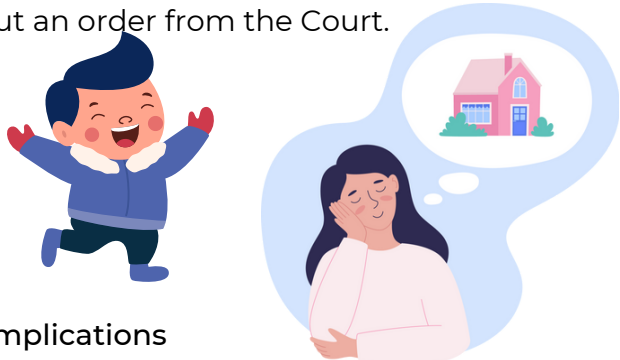
CAN MINORS OWN PROPERTY? HERE'S WHAT YOU NEED TO KNOW

BY BARBARA C. SANG

Kenyan law allows minors to own property in their name. By way of initiating a transfer of property to a minor and attaching their birth certificate, the concerned Land officials will infer the creation of a trust relationship. Upon turning 18 years of age, the property may then be fully transferred to your child and the trust revoked.

This ownership of property by a parent on behalf of a minor creates a trust relationship between you and your child. This means that your child becomes the owner /proprietor of the property and you must deal with the property only in ways that are beneficial to him.

The law allows the parent to make investments that are beneficial to the minor on his behalf but accurate accounts must be kept and produced whenever required. Despite this general position, no disposition of the property can be undertaken without an order from the Court. This is to say that no sale, lease, mortgage, surrender, release, or any other transaction that affects the interest held in the property may be carried out without an order from the Court.



Tax Implications

Any income chargeable to tax under the Income Tax Act, and received by you in your capacity as a trustee is deemed to be your income, and as such appropriate returns should be filed.

However, transfer from a parent to a child is exempt from Capital Gains Tax and may be exempted from Stamp Duty. An application for exemption from stamp duty may be made to the Collector of Stamp Duty as there is no monetary consideration in this transfer, and it is also between immediate family members.

Irrevocability of the Trust

Once the transfer has been made, the law considers the minor as the legal owner of the property, and as such the trustee (parent/guardian) has no legal authority to revoke the trust. When the minor attains the age of majority, he has the power to direct how the property should be managed on their behalf. They can also demand that the property be transferred to them

Duties and Responsibility of a Trustee (Parent/Guardian)

- Act in good faith towards the beneficiary (minor). This means a trustee must be honest and reasonable at all times
- Act in the best interests of the minor. This requires a trustee to act with the reasonable care, skill, and diligence that an ordinary business person would expect.
- Duty to preserve trust property. A trustee must conserve the trust property (including the income and capital) against loss.
- Not to make a personal profit from the trust. A trustee has no right to make a profit from the trust, if any profit is made from the trust, the trustee must account for the profit to the minor (when they attain the age of majority).

- A trustee must keep an updated and accurate record of accounts and make this available to the minor (when they attain the age of majority) upon their request.
- Duty to act in person. Generally, a trustee has no right to delegate their duties to a third person, there are exceptions to this rule, such as engaging accountants and lawyers to perform specific tasks.

To sum it up, yes, you can gift your child a property for ownership in their name but through the creation of a trust relationship that will cease to exist once they turn the age of majority (18 years)



Disadvantages of this Trust Relationship

The trust beneficiary (minor) has the right to take possession of the trust property at the age of 18 and deal with it as he sees fit. Additionally, if a trustee breaches any of their duties under a trust or the general law, they may be held personally liable. For example, if a trustee fails to exercise their duties in good faith and in the best interests of the beneficiaries by placing their interests above those of the beneficiaries.

This article is for informational purposes only and should not be taken as legal advice. If you have any queries or need clarification, please do not hesitate to contact Barbara Sang (barbara@kalyacounsel.com) or your usual contact at our firm.



BY BARBARA C. SANG

MEET THE TEAM

INDIAN YOUNG



Wilson K. Kalya.
Founder & Managing Partner



**Rachel C. Keino - Rachel as
Head of Conveyancing &
Commercial Law.**



**Karen
Chesoo - Head of
Litigation**



**Beatrice J. Kipkesi
-Associate Advocate.**



**Claire N. Karuga
Associate Advocate.**



**Jackline J. Rotich -
Associate Advocate.**



**Rosesther W. Akiso
-Associate Advocate.**



**Barbara C.
Sang- Associate
Advocate.**



**Deborah J. Chirchir
-Associate Advocate.**

MEET THE TEAM

ANGELIAN YOUNG



**Tabitha
Cheruiyot -
Accountant**



**Elizabeth
Jepkorir-
Accountant**



**Doris- Conveyancing
Secretary**



**Zablon Bikeri- Senior
Conveyancing Officer**



**Benard Maitui -
Conveyancing
Officer**



**Chris Aloo -
Conveyancing Officer**



**Lydia Mulama -
Senior
Secretary**



**Tabitha Cheremu
Receptionist/Secretary**



**Pamela Nanzala
-Court Clerk**



**David Cheruiyot
- Court/Registry
Clerk**



**Kella- Administrative
Assistant**



**Gladys Nanjala-
Office Courier**



**Mary Omollo -
General Staff**



**Brenda Anyangu - Associate
Trainee**



**Lynn
Chebet - Associate Trainee**



Brenda Jesang- Intern



**Benard Kipruto
-Associate
Trainee**