

Kaplan &amp; Stratton

# Legal Bulletin



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## Special points of interest:

- New land laws commenced on 2<sup>nd</sup> May 2012
- Foreigners may not hold an interest in land in excess of a 99-year lease
- Long leases for more than 25 years will be given separate titles

## The New Land Laws

The rapid passage of the new land laws through Parliament and their commencement on 2<sup>nd</sup> May 2012 are presenting significant challenges to all stakeholders. The Land Act 2012, the Land Registration Act 2012 and the National Land Commission Act 2012 replace almost all the existing laws relating to land. Although the elimination of the several previous systems of land law is welcome, insufficient thought has been given to the transitional process. In particular, regulations and forms which are required to make the new laws fully operational can only be promulgated when a Cabinet Secretary has been appointed. This will not happen until after the next election. There has been some progress with the Lands Registry in establishing interim arrangements which will, hopefully, allow land transactions to proceed in the meantime but a number of uncertainties remain.

There is some confusion as to whether Parliament intended to repeal the Land Control Act. Clarification is being sought but for the moment, it appears that this Act will remain in place.

The Land Act contains the substantive new land law and is broadly modelled on the previous Registered Land Act (RLA). We believe that this may well prove to be a mistake. The RLA was an act introduced in 1963 and was unique to Kenya and the Cayman Islands. It is considered to be particularly suitable for commercial and industrial property. The provisions for taking security over land in the new Act are highly unsatisfactory from a lender's perspective. This is likely to inhibit both the primary mortgage market and the development of a secondary market through the securitisation of mortgages, depriving the country of financing for much needed housing

development.

The following are a couple of the important features and changes under the new legislation:

### Land Tenure

Freehold tenure has not been abolished. The new Constitution provided that foreigners may not hold an interest in land in excess of a 99-year lease. This is repeated in the new laws. Contrary to some popular belief, the Constitution took effect on 27 August 2010 when foreign-held freehold reverted to the State (to be replaced by a 99-year lease) and long-term leaseholds were curtailed to 99-years. Unfortunately the new Acts do not provide for registration formalities or mechanism for the issue of the new 99 year leases. It is also still unclear on whether the 99-year leases will commence on 27<sup>th</sup> August 2010 (our preferred view) or the date of first issuance of the title.

### Leases

Long leases for more than 25 years will be given separate titles. This is a helpful development for housing schemes without formal subdivision and is largely due to a number of last minute changes during the passage of the laws through Parliament. There are still some practical aspects to be resolved including the requirement for geo-referenced plans approved by the statutory body responsible for the survey of land ■

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## Unclaimed Financial Assets Act



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*“Holders of  
Unclaimed Assets to  
submit a report by 1st  
November 2012 and  
hand-over Unclaimed  
Assets to the  
Authority”*

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The Act came into force on 16th December 2011. The Act appears to be loosely based on similar legislation from North America and Australia. In essence:

- Holders of unclaimed financial assets must (a) make enquiries to establish ownership (b) determine whether they are holding any unclaimed financial assets which have been abandoned within the meaning of the Act (c) file a report annually with the new Unclaimed Financial Assets Authority and (d) pay or deliver the abandoned assets to the Authority.

- Those most affected will be banks and financial institutions who will have to carry out a major exercise to ensure that they are able to comply with the Act.

- Others are insurance companies (mainly with regard to life insurance policies), the courts with regards to unclaimed court funds, advocates and others holding financial assets in a fiduciary capacity and the holders of utility of deposits where the services have been terminated.

However, almost every business will be affected to some extent as the unclaimed assets can include any share or other interest in a business and also unclaimed wages.

The Act enumerates what constitutes unclaimed financial assets which range from bank accounts to gift vouchers and, more particularly, the periods after

which they are considered to be abandoned. This for us is the first major source of concern. The periods are (a) very short, between 2 years and 5 years and (b) have retrospective application. In the little comparative legislation which we have looked at, the periods are usually much longer (6 years plus).

The Act came into force in December 2011 but the first major deadline for those affected will be 1st November this year when a report for the 12-month period ended 30th June 2012 must be filed.

The Act allows the Cabinet Secretary to prescribe other classes of financial assets which may be subject to the Act.

So what to do:

All those holders of unclaimed assets are required to use all reasonable efforts to locate the owner and to notify the owner about those assets. These efforts are to be made in such manner and in within such period as the Authority may prescribe. Problem No. 1: no Authority in place. Problem No. 2: no prescribed regulations.

Nevertheless, you will need to be prepared to make a report by 1st November 2012 with regard to the position as at 30th June 2012. The penalties for non-compliance are substantial, including not only the usual fines and imprisonment but also the possibility of interest being levied on assets which are not turned over to the Authority ■

## Beach Front Properties

Ever since H E Mzee Jomo Kenyatta issued a roadside directive it has been the practice of the registrar at the coast to insist that Presidential consent is required for the sale or purchase of a beach front property (which included first and second row properties). There has never been any statute or legal basis for requiring such consent, but if it was not obtained, the Registrar would reject an application to transfer beach front properties. When challenged, the Registrar would explain that Presidential consent was required for security reasons and was in the national interest. However this argument held no water since the transfer of plots located on Kenya's other borders did not require similar consent.

Recently the Mombasa branch of the Law Society of

Kenya and other individuals challenged the requirement for Presidential consent in the High Court of Kenya. It was argued “*that since there is no statute to back the requirement of a Presidential consent, the procedure currently being adopted to obtain such consent is shrouded with bribery and corruption and takes a long time inflating the costs in registration of transfers.....that the entire procedure of obtaining presidential consent has been unlawful and is tainted in illegality, corruption and abuse of office.....*”.

The Registrar did not file a response to the petition filed by the Law Society and the presiding judge ruled that the requirement for consent was unconstitutional, illegal and discriminatory. Therefore, Presidential consent is no longer required and it should now be easier to transfer beach front properties ■

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## Statute Tracker

### Acts

Finance Act	Various commencement dates
Intergovernmental Relations Act	Assented; not yet commenced
Transition To Devolved Government Act	Commenced 9th March 2012
Land Act	Commenced 2nd May 2012
Land Registration Act	Commenced 2nd May 2012
National Land Commission Act	Commenced 2nd May 2012
Supplementary Appropriation Act	Commenced 10th May 2012
Kenya School of Government Act	Commenced 1st July 2012
Kenya Deposit Insurance Act	Assented; not yet commenced
Public Service Superannuation Act	Assented; not yet commenced

### Bills

Statute Law (Misc. Amendments) Bill	Pres. assent withheld
Traffic Amendment Bill	Awaiting Pres. assent
County Governments Bill	3rd Reading
Public Financial Management Bill	3rd Reading
Prohibition of Pyramid Schemes Bill	1st Reading
Social Assistance Bill	1st Reading
Public Private Partnerships Bill	1st Reading
National Drought Management Bill	1st Reading
Internally Displaced Persons Bill	1st Reading
Public Service Commission Bill	1st Reading
Public Benefits Organisations Bill	Awaiting 1st Reading
VAT Bill	Awaiting 1st Reading
Central Bank (Amendment) Bill	Awaiting 1st Reading
Capital Markets (Amendment) Bill)	Awaiting 1st Reading
The Finance Bill	Awaiting 1st Reading
The Sports Bill	Awaiting 1st Reading
Crime & AML (Amendment) Bill	Awaiting 1st Reading

## LEXAfrica

Africa is a land of great opportunity but it is also associated with diverse challenges and risks. Any new or established business in Africa must be positioned off a strong legal base. Local networking, advice and assistance are essential when venturing into unknown territory.

LEXAfrica, Africa's first true network of leading law firms, was co-founded by Kaplan & Stratton together with leading South African law firm, Werksmans Attorneys, in 1993 and grew from the need for law firms to provide clients (both local and international) with legal and business advice in whichever jurisdiction they may find themselves, particularly in relation to expanding Africa-to-Africa business.

The LEXAfrica legal network was a forerunner in recognising the opportunities offered by the broader African market and the importance of acquiring a comprehensive understanding of applicable laws, business etiquette, as well as cultural practices when safeguarding any business investment.

Today the LEXAfrica law community is an

established legal network in Africa and is comprised of leading law practices in 28 African countries.

The network focuses on general corporate and commercial law as well as litigation and dispute resolution. It has strict membership criteria and a member code of conduct based on best practice and world class standards of legal practice.

Each LEXAfrica member is an independent law firm but members often work together on cross border and other matters to provide a comprehensive legal service to clients. LEXAfrica does not charge referral or other fees to clients.

In the broader context of the African Renaissance and NEPAD, lawyers have a role to play in promoting the rule of law and democracy, as well as the harmonisation of business laws between African countries to facilitate trade and investment. LEXAfrica plays an important role in developing, promoting and leveraging African professional legal skills in this broader context ■



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## K&S Rankings 2012/2013

### Chambers Global

Tier 1 - Corporate Commercial

Tier 1 - Dispute Resolution

*"This large, established firm continues to offer the full array of legal services. It has strong teams in real estate and IP as well as wide-ranging corporate capability. Sources say: "They report regularly and their advice is clear and timely." "A well-informed panel of partners." The firm has long offered a full repertoire of dispute services and appears in prominent litigation and arbitration cases. Sources say: "The client gets undivided attention and the partners make a great effort to understand the issues and the business."*

Ranked by Chambers Global as leading law firm for 11 consecutive years.

### International Financial Law Review 1000

Tier 1 - Financial and Corporate

*"Clients have high praise for the firm. "Very good in their degrees of accuracy, they understand the commercial aspects - really bring out nicely what the interest of the party is and bring about speedy negotiations," says one. Another adds: "very pro-active, I like the way they push transactions through, nothing is ever left pending with them... whenever I go to them I feel a burden off my shoulders"*

Ranked by IFLR as leading law firm for 9 consecutive years.

### PLC Which Lawyer

Recommended as a leading Corporate Commercial law firm in Kenya

### Legal 500

Tier 1 - Corporate and Mergers & Acquisitions

Tier 2 - Privatisation and Projects

Tier 1 - Dispute Resolution

*"Kaplan & Stratton „deal with a transaction as if they are the dealmakers and not just the transaction counsel. The firm's practice is „among the best in Kenya “*

Continuously ranked as leading law firm by Legal 500.

### ManagingIP - Euromoney

Tier 1 - Trademark Prosecution, Trademark and Copyright Contentious

Tier 1 - Patents Prosecution

## Recent Deals and Matters

### TransCentury Limited

Advised TransCentury on the listing of shares by introduction on the Nairobi Securities Exchange.

The deal, one of the first of its kind in Kenya, was a multifaceted capital markets transaction involving listing by introduction and subsequent options to convert up to US\$ 75 Million worth of listed Mauritian bonds ■

*Partners: Amar Grewal-Thethy*

### Hewlett Packard

High Court Constitutional Petition No 51 of 2012: Kenya Toner and Suppliers Limited -V- Director of Weights and Measures, Minister

of Trade and Industry and Attorney General and Hewlett Packard Company and Hewlett Packard Development Company

Hewlett Packard Development Company L.P. is a multinational Information Technology Corporation. K&S was instructed to represent HP as an interested party in a Petition instituted by Kenya Toner and Suppliers Limited in which it was seeking *inter alia* the release of counterfeit goods alleged to have been seized in violation of its constitutional rights to privacy and property. This matter involved the infringement of HP's trade marks by counterfeiters. Counterfeiting in Kenya has undermined profitability and the economy of manufacturers of genuine products. Cross-border trading in counterfeits compounds the

problem. Multiple legal questions arose from a new and complex constitutional framework applied in different legislative regimes. There were concerted efforts to undermine HP's case. The Petition was dismissed on 4th May 2012 thereby paving the way for the prosecution of the counterfeiters ■

*Partners: James Muthui and Peter Hime*

### Shelter Afrique

Transaction legal counsel on the issue by Shelter-Afrique of its KES 3 billion medium term paperless note programme on the Nairobi Securities Exchange ■

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## Kaplan&Stratton Advocates

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Kaplan & Stratton is a leading law firm in Kenya. We provide legal services and commercial advice. With more than 40 qualified lawyers, including partners, associates and paralegals, the firm is the largest in East and Central Africa.

Kaplan & Stratton has an outstanding reputation for advising clients in the field of investment, banking, corporate and commercial law and complex litigation and dispute resolution. We have been involved in many of the important developments in the field of business in Kenya the region's principal economy.

We work for private sector businesses, governmental and international donor agencies, parastatals, NGOs and multinational corporations. We have advised on legislative reforms and have sat on legal reform committees ■

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### Featured Lawyer Profile



**James Muthui**  
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James Muthui joined Kaplan & Stratton in May 2004. Prior to joining Kaplan & Stratton, James was an associate at Hamilton Harrison & Matthews Advocates. He has been a partner in the Litigation & Dispute Resolution department at Kaplan & Stratton since August 2008. He has considerable experience in advising and representing clients on commercial disputes, employment and retirement benefits disputes, environmental and conservation law, intellectual property disputes, land disputes, insolvency and security realisation, company law and private international law.

A qualified Kenyan advocate, James' clients consist primarily of corporate bodies and organisations from diverse sectors locally and internationally including manufacturing agriculture, finance, health, advertising, environmental conservation, donor agencies, Non Governmental Organisations and religious organizations ■

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*This bulletin is not intended to offer professional advice and you should not act upon the matters referred to in it without taking specific advice. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.*

*These regular bulletins provide incisive commentary on recent legal developments. If you have any comments on the bulletin, would like to receive further details on the subject matter or would like to stop receiving such communications from us, please send an email to [KS@kapstrat.com](mailto:KS@kapstrat.com) or call your usual point of contact at Kaplan & Stratton.*

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