

Kaplan &amp; Stratton

# Legal Bulletin



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## Special points of interest:

- What is matrimonial property?
- Effect of new land laws on matrimonial property
- Ownership by unregistered spouse
- Common and joint tenancy

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## The New Land Laws & Matrimonial Property

### Introduction

The new land laws do not define “matrimonial property”. However, “marital property” has been defined as the property that is acquired during marriage and that is subject to distribution or division at the time of marital dissolution. The Matrimonial Property Bill, 2007 (yet to be passed), defines “matrimonial property” as the matrimonial home or homes; household goods and effects; immovable property owned by either spouse; and any other property acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property.

Matrimonial Property could therefore be said to be the property acquired after the date of the marriage and before a spouse files for separation or divorce. It however excludes inherited property unless there were substantive developments on the inherited property during the subsistence of the marriage.

The Land Act defines “matrimonial home” as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home. This definition creates room for different interpretations as to what constitutes a “matrimonial home”. The Matrimonial Property Bill, 2007, defines matrimonial property as the “matrimonial home or homes...” clearly suggesting that there can be more than one matrimonial home.

“Matrimonial home”, also known as matrimonial domicile has also been defined as the domicile that a husband and wife, as a married couple, have established as their home. A rural and town home are “owned or leased by one or both spouses”, they are “occupied by the spouses” and are regarded “as their family home”. Both are usually the spouses “principal

and permanent home” regardless of whether they physically occupy them at all times or not. They therefore qualify to be matrimonial homes. Holiday homes on the other hand may not qualify. This is because holiday homes are not the “principal and permanent home” of the spouses. The spouses cannot regard a holiday home as a “family home”.

There is no specific definition of the term “spouse” in the new land laws. However, from the definition of marriage as a “civil, customary or religious marriage”, it can be inferred that a spouse is the spouse of a person married under “civil, customary or religious marriage”. It should be noted that this inference leaves out the common law marriages where long cohabitation has led to courts presuming existence of a marriage. The lack of a specific definition can therefore cause practical difficulties in determining whether or not spousal consent was obtained for a land transaction.

### Spousal Rights under the New Land Laws

The new land laws have created statutory rights to land for spouses. These rights include:

#### i) Ownership by unregistered spouse

The Land Registration Act (“the Act”), provides that if land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership has been registered.

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*“If the spouse dealing with the property deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made, the disposition shall be void at the option of the spouse(s)”*

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The rights gained by contribution of the spouse or spouses are recognized in all cases as if they were registered.

**ii) Disposal with Consent of Spouse**

The Act provides that where a spouse who holds land or a dwelling house in his or her name individually charges, assigns or transfers that land or dwelling house, the lender, the assignee or transferee are under a duty to inquire of the borrower, assignor or transferor on whether the spouse(s) have consented to that charge, transfer or assignment.

If the spouse dealing with the property deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made, the disposition shall be void at the option of the spouse(s) who have not consented to the disposition. This therefore means a sale or charge is voidable, if spousal consent is not obtained.

**Common and Joint Tenancy**

Co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common. If two or more persons own land together, they may be either joint tenants or tenants in

common. No joint tenant is entitled to any separate share in the land, that is, the interest in land is jointly owned and upon death of a tenant the interest of the deceased tenant automatically passes to the surviving tenant. Each tenant in common on the other hand, is entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share is treated as part of their estate. During registration, an instrument made in favour of two or more persons must show whether those persons are joint tenants or tenants in common and the share of each tenant, if they are tenants in common.

On and after the effective date (02/05/2012), the only joint tenancy capable of being created without leave of a court is between spouses. Any joint tenancy other than that between spouses that is purported to be created without the leave of a court will be regarded as a tenancy in common. This simply means only spouses are allowed to create joint tenancies without leave of court.

If a spouse obtains land for the co-ownership and use of both spouses, there is a presumption that the spouses hold the land as joint tenants unless there is a specific provision in the certificate of ownership clearly stating that one spouse is taking the land in his or her own name only ■

**The New Anti-trust regime: Challenges with merger control**



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The Competition Bill of 2009 was passed into law on 1st August 2011. The Competition Act, 2010 (“Act”), replaces the previous Restrictive Trade Practices, Monopolies and Price Control Act of 1989.

There is no indication that the Act is based on other competition related legislation, although similarities in the merger control provisions may be drawn from comparable South African anti-trust legislation. The Act is a replacement of the existing legislation with an even broader scope and offers little guidance on the interpretation of its provisions. Whilst the establishment of an independent and autonomous Competition Authority may be seen as a positive step forward, certain provisions of the Act (particularly in relation to merger control) may impact upon a wide range of previously uncontrolled transactions.

**The New Test**

Under the Act, a “merger” is defined as an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.

A merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. In broad terms, a person controls an undertaking if that person (i) beneficially owns more than one half of the issued share capital of the undertaking; (ii) has the ability to control or is entitled to vote a majority of the votes that may be cast at a general meeting; (iii) is able to appoint, or to veto the appointment, of a majority of the directors; or (iv) is a holding company, and the undertaking is a subsidiary of that company.

The Act describes various ways in which a merger may occur including:

- the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question. [“Asset” includes any real or personal property (tangible or intangible), intellectual property, goodwill, chose in action, right, licence, cause of action...];
- the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;
- acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
- exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
- amalgamation, takeover or any other combination with the other undertaking.

Mergers (as defined above) are prohibited if implemented in the absence of an authorising order from the Competition Authority. Part payment of purchase proceeds (i.e. more than 20%) is sufficient to constitute ‘implementation’ in this regard.

The penalties for failing to obtain an authorising order are draconian and do not represent any significant change from the previous legislation. In addition to severe financial and imprisonment penalties, mergers carried out in the absence of an authorising order are declared not to have any legal effect and obligations imposed under any underlying legal agreement are unenforceable.

#### The obvious problem areas

Whilst the Act allows the Competition Authority to declare any proposed merger to be excluded from the merger control provisions, the very broad scope of merger control and related definitions is causing major problems. There are presently no thresholds or other specific tests applied. Until such time as such regulations are published, it is clear that any person who intends to acquire “control” of a Kenyan business undertaking must obtain the approval of the Competition Authority even if that undertaking carries on a completely unrelated business to the acquirer. A transaction between non-

independent enterprises involving a change of control e.g. an internal corporate re-organisation amongst group companies would also require competition approval. This is a significant departure from the previous legislation which was restricted to independent enterprises engaged in similar businesses.

The acquisition of an offshore parent holding company with a Kenyan subsidiary or with downstream assets in Kenya would also seem to require approval of the Competition Authority even if there is no direct change of control in the Kenyan asset. In this regard, the Act stipulates that it has extra-territorial effect which was previously unclear under the old legislation.

The implications of the Act and its inter-relation with The COMESA Competition Regulations, 2004 also needs to be explored. It is our understanding that these regulations are still in the process of being implemented and have only been applied to date to the aviation transport sector.

#### Positives

The Authority has given some sensible guidance on certain aspects of the new legislation. For instance, the debate amongst legal practitioners as to whether the new laws apply to bare asset sales now seems settled. Asset sales of this nature are not regarded by the Authority as being subject to merger control.

A new Chairman of the Competition Authority was also appointed in February of this year (effective January 2012) and approvals to merger control applications are now forthcoming.

#### The immediate future?

The publication of implementing Regulations is eagerly awaited. Whilst it is not clear exactly when these are to be brought into force, tests relating to the size or value of assets of an undertaking would be welcome (in addition to the test for a change of control). Countries such as the UK and Tanzania which apply similar change of control tests have also prescribed notification thresholds based on turnover of the relevant undertaking in a merger transaction. If criteria such as these are applied, this will no doubt go some way in alleviating the obvious problems which the new legislation is causing.

It also hoped that additional exceptions are formulated to provide for transactions which are implemented so as to increase operational efficiencies (e.g. corporate re-structurings) and those which are entirely foreign and have no relevance to the local economy ■

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## Statute Tracker

### Acts

County Governments Act	Announcement of final results of first elections
Assumption of Office of the President Act	Announcement of final results of first elections
Petitions to Parliament (Procedure) Act	Announcement of final results of first elections
Appropriation Act No. 11 of 2012	Commenced 2 July 2012
Statute law (Misc, Amendment) Act	Commenced 12 July 2012
Public Service Commission Act	Commenced 1 August 2012
Public Finance Management Act	Commenced 27 August 2012
Leadership and Integrity Act	Commenced 27 August 2012
Teachers Service Commission Act	Commenced 31 August 2012
Cancer Prevention and Control Act	Assented; not yet commenced
Partnerships Act	Assented; not yet commenced

### Bills

The Elections (Amendment) Bill	To be assented
National Intelligence Service Bill	To be assented
National Security Council Bill	To be assented
Central Bank (Amendment) Bill	To be assented
Capital Markets (Amendment) Bill)	To be assented
Kenya Defence Forces Bill	To be assented
Traffic Amendment Bill	To be assented
National Transport & Safety Authority Bill	To be assented
Breast Milk Substitutes Bill	To be assented
The Finance Bill	3rd Reading
Public Private Partnerships Bill	2nd Reading
Prohibition of Pyramid Schemes Bill	2nd Reading
National Drought Mgmt Authority Bill	2nd Reading
Prevention of Terrorism Bill	2nd Reading
Proceeds of Crime & AML Bill	2nd Reading
Internally Displaced Persons Bill	2nd Reading

## Unfair Termination: Employment Laws



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**C**ourt Judgment declaring Section 45(3) of the Employment Act unconstitutional – *Samuel Momanyi vs The AG & SDV Transami Kenya (Petition 341 of 2011)*

The High Court has in this recent case declared Section 45 (3) of the Employment Act 2007 (the ‘Act’) as being unconstitutional and inconsistent with the provisions of the Constitution of Kenya because the section denies employees the rights and freedoms enshrined in the new Constitution. The new Constitution of Kenya was promulgated on 27th August 2010.

S 45(3) of the Act provides that an employee who has not been continuously employed for a period of at least 13 months before the date of termination shall not have the right to assert that he has been unfairly terminated.

In this case, the employee in question had only been employed for a period of 11 months and 27 days before his employment was terminated for poor performance without being accorded a hearing. The employee referred the matter to the Industrial Court which struck out his claim as he did not meet the criteria set out in S 45(3). The employee appealed to the High Court praying for orders declaring S 45 (3) of the Act as unconstitutional for being inconsistent with his rights under Articles 28, 41 (1), 47, 48 and 50(1) of the Constitution (which essentially provide for the right to fair

labour practices, the right to a fair hearing and access to justice) and for being discriminatory against employees who have served for less than 13 months.

In declaring S 45(3) of the Act as being invalid for its violation of the Constitution, the court held that it was necessary to align the provisions of the statutes enacted prior to the new Constitution (such as the Act which was enacted in 2007) with the provisions of the new Constitution which has a more robust bill of rights.

The practical implication of this ruling for employers is that the hearing procedure required under the Employment Act prior to termination of an employee’s employment must be complied with regardless of the employee’s period of service ■

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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



**Patrick Ikimire**  
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Patrick is a partner in the commercial department having joined Kaplan & Stratton in 1995. He has over 17 years experience in securing protection of various intellectual property rights locally and regionally at ARIPO, including advising on international protection at the WIPO level. His experience also covers prosecuting and defending enforcement or other proceedings on intellectual property rights. Patrick's clients consist of companies primarily in the sectors of pharmaceutical, packaging, plant breeders, manufacturing, research, engineering, cosmetics and other general consumer goods.

He has advised extensively on pre-filing clearance searches in relation to trade marks and industrial designs; oppositions, rectification and invalidation/revocation proceedings on trade marks and industrial designs; patents, utility models and plant breeder's rights; copyright law, geographical indications, intellectual property aspects of e-commerce and biotechnology

Patrick has been ranked as a leading lawyer in Kenya for Intellectual Property work by Chambers Global. They say "he is the other key contact for IP work and has become something of an expert in patents and industrial designs" ■

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