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Executive Summary

A recent decision of the High Court of Kenya has called into question the validity of titles deeds issued after 2013 by declaring the new forms of Title Deeds (which include Government freehold and leasehold titles) to be unconstitutional, null and void. The Court also took the unusual, and potentially controversial, step of declaring that the order would not be effective until 20th December 2017 giving the Government time to rectify the position. The decision only applies to titles issued after 2013 using the new forms. Therefore, any titles issued before 2013 or transactions undertaken in relation to such titles are not affected. In response to the decision the Government has established a task force to rectify the position. However, we do anticipate some short-term difficulties for persons holding or attempting to obtain new titles, particularly where they are required for the purposes of development and the financing of development.

Case Background

When the Land Registration Act, 2012 (the **Act**) came into force in 2012 (along with the Land Act, 2012 and the National Land Commission Act, 2012) it significantly overhauled the administration of land in Kenya.

The Act gave the Cabinet Secretary (**CS**) the authority to make regulations prescribing the forms to be used under the Act. In making these regulations, the CS was to take into account the advice of the National Land Commission (**NLC**), facilitate public participation and table the legislation before Parliament.

Unfortunately the CS did not follow this procedure and proceeded to gazette regulations prescribing the forms to be used in respect of Government leases and freehold titles without input from the NLC, the public or parliament. The Court therefore found that the regulations were unconstitutional, null and void.

As a consequence forms of title including Leases, Title Deeds, Grants and Certificates of Lease or Title made by the CS are null and void. However, cognisant that such an order would cause disruption in the land registration system the Court stayed the effect of the order for a specified time period of 366 days to allow the regularization of the process. The court also held that the declaration of invalidity would not operate "retroactively".

Who is Affected?

The Judgement only applies to titles issued after 2013 using the new forms. The Judgement is also not intended to operate retroactively, only titles issued using the new forms by the CS after the date of the Judgement but, prior to 20th December 2017 will only be valid if the CS complies with the regularisation process. In default of compliance, all forms of title issued between 20th December 2016 and 19th December 2017, will become null and void from 20th December 2017.

Any ongoing registration of titles processes remain valid but may become invalid if remedial action is not taken by the Government.

Who is not affected?

Any titles issued before 2013 or transactions undertaken in relation to such titles are unaffected. The Judgement does not apply or have any adverse effects on transfers, charges and other registrable instruments completed prior to or after the Judgement.

What happens next?

As of the date of this note, we are not aware of any stay of the Judgement or any appeal made against the orders issued.

The CS has now set up a task force to carry out the regularisation procedure with a timeline of 2 months from the date of the Judgement. It is not guaranteed that the process will be completed within the stipulated time frame. We therefore anticipate some short-term difficulties for persons holding the new titles or attempting to obtain new titles, particularly where they are required for the purposes of development and the financing of development.

For further advice about any of the information contained here please feel free to contact:

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