

Introduction

Immovable property in Kenya includes land, buildings and anything attached to or permanently fastened on the earth. Individuals or companies often issue immovable property as security to banks over loan funds. Perfection of a security interest involves payment of stamp duty and registration of the security in the relevant registry. The Land Act, 2012, the Land Registration Act, 2012 and the Land Control Act, Cap. 302 Laws of Kenya stipulate the requirements and procedure for registration of a security over immovable property.

Registration of a Charge

Perfection of a security over immovable property is done through registration of a Charge. The procedure for registration of a charge at the Lands Registry is as follows:

- a) Conduct an official search over the property to ascertain the nature of ownership and determine whether there are any encumbrances registered over the property.
- b) Drafting the Charge Instrument
- c) Execution of the charge instrument by the Chargor and the Chargee (bank) in instances where the chargor is the borrower. If the borrower and the chargor are distinct persons, the Charge is executed between the borrower, chargee and the chargor. Execution is done by the parties signing on their designated parts and initializing on every page.
- d) Obtaining all the necessary consents and clearances for registration of the charge.
- e) Assessment and payment of stamp duty to Kenya Revenue Authorities. Lodging the Charge at the Lands Registry for franking.
- f) Registration of the Charge at the Lands Registry upon payment of a standard registration fee and entry is made in Part C of the encumbrance section of the Original Title Document.

Consents

As discussed above it is important to obtain all necessary consents before lodging an application for registration of a Charge. Consents are as follows:

a) LCB Consent.

This is required where the land in question is agricultural land as stipulated in the Land Control Act, Cap 302 Laws of Kenya.

b) Consent of Landlord or Head Lessor

A Lessee must obtain consent of the Lessor before charging property. In circumstances where the chargor owns sectional property on the basis of a long term lease exceeding 21 years and whose mother title is held by a management company, the chargor has to obtain consent from the management company.

What is the effect of Sectional Properties Act No. 21 of 2020 on the requirement to obtain this consent?

Sectional Properties Act No. 21 of 2020 came into force to govern land held on freehold title or on a leasehold title where the unexpired residue of the term is not less than twenty-one years and there is an intention to confer ownership. The Act repealed the Sectional Properties Act, 1987. The Act simplifies the process of registering sectional properties in Kenya and provides for the division of buildings into units to be owned by individual proprietors

Units are registered according to a sectional plan prepared by a surveyor and registered at the Lands Registry. Each unit owner is issued a Certificate of Title for freehold land and a Certificate of Lease for leasehold land. The implication of this is that unit owners do not require consent of the management company to charge their units. Additionally, all long-term sub-leases and leases that were intended to confer ownership of an apartment, flat, townhouse or office that was registered before the commencement of the Act shall be reviewed to conform to the Act within a period of two years from the date of commencement of the Act.

c) Spousal consent

This is obtained if the Chargor is married. A spouse may contest a bank's rights over property registered as a security if the property is a matrimonial home. Obtaining this consent safeguards the bank's statutory right to sale in case of default in payment by the borrower.

d) National Land Commission Consent

If land is leased from the National Government, the chargor must obtain consent from the National Land Commission.

e) County Government Consent

If land is leased from the County Government, the chargor must obtain consent from the County Government before using the property as a loan security.

f) Chargee's Consent

Certain properties are charged more than once depending on the value of the property. It is important for the chargor to obtain consent of a registered chargee before issuing the same as security to a subsequent chargee.

Stamp duty

Stamp duty payable on registration of the Charge is calculated at 0.01% of the borrowed/lent amount. Once stamp duty is paid the charge is franked at the Lands Registry as a confirmation of the payment. Stamp duty is also payable over agreements such as loan agreements and Guarantee and Indemnity agreements. Failure to pay Stamp duty renders the transaction null and Void.

Registration of a Charge

An application for registration of a Charge is accompanied by the franked charge instrument, obtained consents and original title documents. Upon registration an endorsement of the charge is made on the encumbrance section of the original title document.

Conclusion & MK Advisory

The law on perfection of immovable securities is quite broad as it encompasses several acts, some of which have been discussed above. It is crucial strictly adhere to the laws and procedures on perfection of securities so that the bank's rights are protected. At **Muma & Kanjama Advocates**, we have a dedicated team of Real Estate and Commercial Lawyers who are ready to guide and assist you in this and any other matters, to ensure that you stay informed and compliant. Talk to us. We shall be happy to hear from you.

-By Lindah Nechesah & Tony Namiinda-

Should you need further advice or an introductory meeting with us, contact us on:

✚ Tony Namiinda tnamiinda@mumakanjama.com;
✚ Lindah Nechesah lnechesah@mumakanjama.com
Or 020-2716548/9; +254 726604935
Or info@mumakanjama.com