

CHARGING MATRIMONIAL PROPERTY? BANKS MUST DO MORE!

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Land Control Act

The Land Control Act, Cap 302, remains in force. Land control boards therefore remain

operational and must provide consent for any transaction on agricultural land. However, under the Act, these boards are not legally obliged to protect matrimonial property if registered only in the name of one spouse. But administrative procedures put in place over the years have ensured that the boards refuse consent for transactions like charge or sale if indeed there is obvious evidence that the registered proprietor wished to move a transaction on a matrimonial property/home without the consent of the other spouse and children. This hasn't however been fool proof since some registered men would "rent-a-wife" just for the transaction at hand. Beyond that, the registered spouse could exclusively move the transaction without the other. But the new laws have now changed all this and all lending institutions must up their game.

The Land Act 2012

Specifically, Section 79 (3) of this new law which came into effect on 2nd May 2012 states that "a charge on a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons".

The import of this is even more worrying when one takes into account the provisions of section 78 which indicates that this applies to all charges including those made before the coming into effect of the Act and in effect at that time.

Those who get lax in observing the above have to worry about the provisions of section 105 (1). It provides that "the court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between parties". This provides a good entry point and latitude for aggrieved spouses.

The Land Registration Act 2012

This new law, which will govern the registration of title to land in Kenya, further protects matrimonial property. Section 28 (a) provides that unless the contrary is expressed in the register, spousal rights over matrimonial property will be deemed to be overriding interests on registered land without having to be noted on the register. This implies that rights to matrimonial property will be recognized for any property registered under the Act even if a search or

inspection conducted against such property may not reveal such an interest.

Banks must be careful and vigilant

The above legal provisions underlie the need for banks and other lending institutions to be a lot more careful and vigilant while transacting with matrimonial property in Kenya. They will need to ensure that they obtain unequivocal consent from the subject spouse(s). Regulations to be developed by the Cabinet Secretary in charge of the Ministry of Lands and the National Land Commission once in office will be expected to clarify the procedural details regarding these new requirements. While it is expected that litigation may increase with the coming into force of provisions with such wide legal implications, hence increasing the costs of doing business, the underlying reasons have been noble. If well implemented to protect the legitimate matrimonial rights to property and not used to frustrate the efforts of lending institutions, then these provisions will result in win-win situations for chargors and chargees. But if poorly administered to unduly increase transaction time and costs, then banks and other institutions would probably end up shifting business to less cumbersome property transactions, hence denying citizens a much needed service.

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