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UNDER ONE ROOF:

ANALYSIS OF THE SECTIONAL PROPERTIES' LEGAL FRAMEWORK

The concept of sectional titles in Kenya can be traced back to the early 1960s, during the drafting of the now repealed Registered Land Act (Cap. 300) Laws of Kenya (**the RLA**). The RLA was meant to be the overarching substantive land legislation for post-independent Kenya. However, at the time, legislators were not open to the concept, hence the issue was shelved until its revival in the 1980s, following concerted efforts by the Law Society of Kenya, the Land Review Commission and the Ministry of Lands and Settlement. These efforts culminated in the enactment of the Sectional Properties Act, 1987 (**the SPA, 1987**), with the intention of introducing titled ownership for flats and apartments, which were becoming increasingly predominant in the country. In 1990, the Sectional Properties Regulations were promulgated to operationalize and facilitate implementation of the SPA, 1987.

Although these legal developments ushered in a new era of compartmentalised ownership of units, a challenge subsisted in terms of the roll out of the concept countrywide. The concept was only aligned with the RLA titles, yet there were other subsisting forms of land ownership which predated the RLA, such as the Government Lands Act (Cap. 280) Laws of Kenya, the Registration of Titles Act (Cap. 281) Laws of Kenya, the Land Titles Act (Cap. 282) Laws of Kenya, amongst others. Therefore, it was difficult for a developer who did not hold RLA head title, to implement the sectional title concept in his development. This legal incongruity led to the evolution of subleases as alternative titles, mostly in developments where the developer held a non-RLA head title.

Upon promulgation of the Constitution in 2010, the need for uniformity of property holding was appreciated. Consequently, in the spirit of Article 68 of the Constitution, several statutes were enact-

ed to serve as a common denominator for property related transactions in the country. The Land Act and the Land Registration Act were introduced in 2012 with the Sectional Properties Act being recently enacted in 2020 (**the SPA, 2020**). Unlike its 1987 predecessor, the SPA, 2020 extends to all forms of ownership of land and head titles, with the intention to replace all subleases with sectional titles. However, the law allows a developer the latitude to retain either the sublease or sectional property ownership. In 2021, new Sectional Properties Regulations were gazetted, to facilitate implementation of the SPA, 2020 and contain the following salient features.

Transition of Subleases into Sectional Titles

Conversion of subleases into sectional titles can be initiated either by a developer, management company or the owner of an individual unit. The process entails the registration of sectional plans that have been prepared by a surveyor and approved by the county government; a sectional plan delineating the various units in any building; closure of the existing (lease) records of the units; opening of new individual (sectional) records for the respective units; transfer of information that existed in the closed records to the newly opened records e.g. ownership, charges, caveats etc; and issuance of sectional titles for the respective units.

Once a sectional title is issued, each unit becomes separate, with its corresponding distinct share in the common property. This exclusivity enables the direct levy of outgoings such as land rent or rates against each unit, as opposed to the head title.

The Registrar is empowered to register a restriction over any title, to prevent further dealings, until the concerned parties comply

with the conversion process. The SPA, 2020 has set a conversion deadline of 27th December 2022, being two (2) years from when the Act came into force on 28th December 2020. Given the current-working conditions at the Ministry of Lands it remains to be seen whether the target will be met.

Establishment of a Corporation and its Mandate

Once a sectional plan in any development is registered, the Registrar is required to constitute the respective owners of the units into a corporation. A corporation is a recognised legal entity, and has several functions under the SPA, 2020 including maintenance of the common areas; insurance of the common property; administration of the by-laws of the concerned development; enforcement of the terms and conditions relating to the land on which the development is erected; and establishment and maintenance of a fund for the corporation's expenses.

The corporation should be run by a board of management, which is required to convene annual meetings. In the corporation's meetings, members are entitled to exercise voting rights in proportion to the units which they own. Where a property is charged, the lender is entitled to exercise that right in lieu of the owner. In the discharge of its functions, a corporation is required to periodically levy each unit owner an apportioned sum, as the owner's contribution towards the corporation's fund. Where the owner fails to remit the required amount, the corporation reserves the right to register a caution against the owner's unit. The caution shall operate as a charge over the particular unit, securing the outstanding amount.

A corporation is also required to constitute a dispute resolution committee, to resolve any disputes members may have regarding the enforcement of the corporation's by-laws. The reference of a dispute to the said committee, however, does not deprive an aggrieved party of any other legally available remedies.

Lastly, it is noteworthy that the corporation is also an integral party in any tenancy arrangement involving a unit. The owner of the unit is required to notify the corporation in writing, of his or her intention to let out the unit. The owner is equally required to undertake to repair any damage the tenant may occasion to the premises. Equally, the owner should notify the corporation once a tenancy ends. In the course of the rental arrangement, the corporation has power to evict any tenant who contravenes any by-law, where the owner does not intervene despite the corporation's request to forewarn the tenant.

Inclusivity of Physically Challenged Persons

Every Kenyan has the freedom to move and reside anywhere within the country pursuant to Article 39 of the Constitution which provides for the freedom of movement. Physically challenged persons enjoy further protection under Article 54 of the Constitution, which requires that they should be treated in a dignified and respectful manner.

Flowing from these constitutional dictates, the SPA, 2020 has sought to facilitate the peaceful habitation of such persons in any development. Under the SPA, 2020, a corporation is prohibited from promulgating any by-law by which a visually challenged owner is disallowed to keep or use a guide dog within a development. This equally extends to making flats accessible by physically challenged persons.

New Transactional Requirements

Previously, there have been instances where purchasers have entered into transactions not knowing that developers had been financed to put up units. In some cases, unscrupulous developers would pocket the sale proceeds, without servicing their loans.

Having been enacted under the prism of "Ease of Doing Business", the SPA, 2020 has also curtailed the red tape that applied to sublease arrangements, such as having to defer to a management company for transactions including selling or charging a property in a development.

Upon such developers' default, the financiers would invariably move to secure their proceeds by exercising their statutory power of sale, after serving the requisite legal notices. They would then proceed to auction the units, thereby exposing the purchasers.

As a legal safeguard to prospective purchasers, the SPA, 2020 imposes a duty on any developer selling a unit to avail certain documents including the purchase agreement; the by-laws or proposed by-laws of the development; the management agreement or proposed management agreement (where applicable); the recreation agreement or proposed recreation agreement (where applicable); copy of the head title or sectional title (as applicable); copy of sectional plan or proposed sectional plan; and copy of a charge, where there is a subsisting charge affecting the particular unit.

Where a property is charged, a developer shall notify the purchaser of the charge particulars including the principal amount applicable, the repayment instalments, relevant interest rate and repayment duration. This is a significant stride towards full disclosure, which will empower purchasers to make informed decisions on whether or not to proceed with transactions.

Penal Sanctions for Non-Compliance

The SPA, 2020 has created some offences, for which there are prescribed punishments. For example, the failure by a proprietor to comply with the sectional plan registration requirements or the failure of a developer to avail the prescribed documents to a purchaser. The defaulter is, upon conviction, liable to pay a fine of up to KES. 20,000,000 or one (1) year imprisonment or to both. The SPA, 2020 also imposes a general fine of up to KES. 250,000 upon conviction for any other contravention of the statute.

Summation

The enactment of the SPA, 2020 is a significant leap forward in the quest to standardised and proper documentation pertaining to sectional property in the country. Having been enacted under the prism of "Ease of Doing Business", the SPA, 2020 has also curtailed the red tape that applied to sublease arrangements, such as having to defer to a management company for transactions including selling or charging a property in a development.

The exclusion of such intermediaries has enabled direct transactions with the government as far as their properties are concerned, thereby hastening the turn-around-time for closing transactions. Furthermore, the SPA, 2020 has entrenched the Constitutional requirement for inclusivity, by prohibiting the exclusion of assistive animals in developments, by visually impaired persons. This is a major development which ought to be applauded and commended.

Transparency has been enhanced in property transactions, as developers now have a duty of disclosure in terms of the documents and information they should avail to prospective purchasers. This will ensure that purchasers make informed decisions regarding transactions in future. To eventually realise the country's aspiration of becoming a business-friendly destination, the national government not only needs to roll out the sectional property framework, but conclusively oversee and implement the digitisation of land records, so that the records are easily available and accessible when required.