

26TH MARCH 2014

PRELIMINARIES OF CONVEYANCING

DRAFT NOTES

WAMBUI KYAMA

- **What is “execution” ?**

This means the SIGNING of or the making of an imprint on documents for the purpose of authentication or acknowledging the same.

- **Signatures?**

Signing a document is the writing or affixing of a person’s name or mark to represent his name by himself or by his authority with the intention of authenticating a document as being his and binding on him. Must be usual or customary way of putting the mark.

- Written
- Initials
- Dark blots?
- Mark
- Typing ??
- Thumb print -Men use their left thumb & Women use their right thumb

LEGAL BASIS FOR SIGNING DOCUMENTS

| | |
|--|---|
| S. 3(3) of the Contract Act | No suit shall be brought upon a contract for the disposition of an interest in land unless:-is signed by ALL the parties thereto” |
| s.44 of the Land Registration Act | Requires that every instrument effecting any disposition under the Act shall be executed by each of the parties consenting to it. |
| | Section 44 (2) of the LRA provides that execution consists of appending a persons signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument. |

CASE LAW 1

First Post Homes Limited Vs Johnson [1995] 4 All E R 355

Typing ones' name is not a signature within the meaning of S. 2 of the LPA which provides that to sign is one's "mark, name or initial". (On the letter agreement was typed only the purchaser's name but the plan annexed and identifying the land sold was signed. Held ,the two were not one document and typing or printing is not signing)

CASE LAW 2

Goodman V J Eban 1954 1 Q B 550 per Denning LJ : "... in modern English language usage when a document is required to be 'signed' by someone, that means he must write his name with his own hand on it"

- Own hand (or by attorney)
- Authenticity and validity
- What of e-signatures? E-signatures? yet to be embraced in conveyancing transactions. See S83P of the Information & Communications Act (Cap 411A)
- Section 3(3) of the Law of Contract Act and juristic persons

ACTUAL EXECUTION

Who should sign?

| | <u>ENTITY</u> | <u>PERSONS TO SIGN</u> |
|--|--|---|
| | Individual | Signature of individual |
| | Business name | Signature of proprietor |
| | Company | Seal attested by 2 directors or a director and the secretary |
| | Other juristic persons eg societies, trusts, NGO etc | Ascertain the proper signatory from the constitution of the organization. |
| | Parastatals | Ascertain signatory from the establishing Act |
| | Co-operative Societies (Co-operative Societies Act) | Limited societies- seal Unlimited-ascertain from their internal rules |
| | Limited Liability Partnerships | The Partners |

- **Where is the signature to be placed ?**

- Signature block at the end of the document
- (Endorse) or initial Every page.
- Avoid an absolute signature block page.

THE SIGNATURE BLOCK 1

- **SEALED** with the Common Seal of the Chargor (?)

JUPITER NGONGO LIMITED(?))
 in the presence of:-)
)
) *seal*
DIRECTOR)
)
)

DIRECTOR/SECRETARY

In the Presence of
 Advocate

THE SIGNATURE BLOCK 2

SIGNED by the Purchaser **SUMUNI**)
 in the presence of :-)
)
)
)
) **SUMUNI'S SIGNATURE**

ADVOCATE

)
)
)

ATTESTATION AND VERIFICATION

Attestation refers to proper witnessing of the execution or signing.

Legal basis

-S(3) of the Law of Contract Act... "the signature of each party has been attested by a witness who is present when the contract is signed by such a party." Presence is critical.

S44 (3) of the LRA- A document should be attested by:

- Advocate of the High Court of Kenya,
- a Judge,
- a Magistrate
- or a notary Public

- If executed in Kenya
 - A judge or magistrate
 - The registrar/deputy registrar of the High Court
 - The registrar general, deputy registrar general and any assistant general
 - An administrative officer
 - A superintendent of prisons
 - An advocate
 - A bank official
- If executed outside Kenya
 - A notary public

VERIFICATION

S45 (1)(B) LRA- A person executing an agreement

- shall appear before a registrar or any public officer prescribed by the Act and be accompanied by a credible witness for the purpose of establishing identity unless known by the registrar a witness shall establish his identity.

- The purpose of verification is to confirm that a person freely and voluntarily executed the document. A certificate will be completed to this effect.

- The registrar may dispense with verification under section 45(3) of the LRA in certain circumstances.

Effect of Legal Notices 146-153 of 2006.

- Under LRA- title to land is guaranteed by the state the state indemnifies a person who suffers loss as a result of any error in the register. See S. 79-84 of the LRA
- Due to this guarantee extra caution is required in execution of documents.

POWERS OF ATTORNEY

Authority in writing by which one person enables another to act for him.

- Authority is to do some lawful act for and in the donor's stead
- Contained in a Letter of Attorney
- Authority can be specific /special or general
- Donor must have capacity to donate such powers and authority.
- Authority may be irrevocable or revocable

SPECIAL AND GENERAL POWERS OF ATTORNEY

Usually if there is some consideration and interest conveyed it will be irrevocable.

- PA is special if limited in authority and it will be construed strictly.
- General when one appoints another to do all that one could legally do including to donate that which has been donated.
- Instances of use include: sale of unregistered land or when one is outside jurisdiction or of ill health
- Revocation
 - Automatic: death, disability, bankruptcy
 - Voluntary: self through notice

FORMS OF POWER OF ATTORNEY

- **Statutory : S. 48 of the LRA**

Mayfair Holdings Ltd Vs Ahmed 1990 KLR 340

- **To be effective and valid a PoA must not only take the prescribed statutory format but must also be executed and verified as prescribed by the Act, stamped and registered.**

SIGNATURE BLOCK BY A POWER OF ATTORNEY

- SIGNED on behalf of SUMUNI)
)
- By MAPENI the duly authorized)
- Attorney by virtue of a Power of Attorney)
- Registered As number I/PA xxxxx)
)
-)In the Presence of

Please note that execution by a Power of Attorney is subject to attestation and verification requirements

STAMP DUTY REGULATION

What is Stamp duty revenue(tax) raised by the Government The collection thereof is the responsibility of the Collector of Stamp Duty (KRA)

- Chapter 480 regulates Stamp Duty
 - S. 5: Every instrument relating to property in Kenya if specified in the schedule fetches specified duty unless exempted by the Act.
 - S. 6 : payment must be within 30 days of execution of document or a few days of it being received in Kenya
 - S.20 : window for late payment subject to a penalty *and* with the leave of the Collector
 - Penalty is 5/= for every 20/= duty which was payable in each quarter.
 - Act also provides for exemptions, adjudications and relief.

Effect of NON-COMPLIANCE OF STAMP DUTY

- a) Declined Registration- S. 46 of the LRA provides that ...an instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the Stamp Duty Act.
- b) **Non-recognition and voidance**
 - S. 19(1) of the Stamp Duty Act- Can not be presented or admitted in evidence
 - S. 19(2) of the Stamp Duty Act- Can not be filed, enrolled, registered or acted upon
 - **Failure to pay stamp duty -Attracts a criminal responsibility/liability.(See S. 113)**

STAMP DUTY: AMOUNT PAYABLE

- **Amount payable is that prescribed by the Act on advise of the Minister for Finance .**
- **Payable by the recipient of interest. Purchaser, Chargee,Chargor,Lessee,etc**

| Transaction | Amount |
|--|---|
| Transfers | 4% of value of property if within a city or municipalities 2% of value of property if outside a city or municipality |
| Leases | 1% of annual rent or averaged annual rent if for 3 years or less 2% of annual rent or averaged annual rent if for more than 3 years |
| Charges | 0.1% of amount secured |
| Discharges/ Releases/ Reconveyance | 0.05% of amount redeemed |
| Gift intervivos (During the life of the Donor) | Same as transfer |
| Transmission | Nominal duty to transfer to beneficiary if transfer is to 3 rd party, full duty is payable |
| Other Documents | Sale agreements, surrender of lease, power of attorney – nominal duty |

STAMP DUTY PROCESSING

- Applicant presents document for assessment by collector. Fills Form SD1

- Assessor confirms if duty is payable, counterchecks info on the form and document, ascertains amount and endorses both Form and document
 - Applicant pays amount in designated bank
 - Returns document with proof of payment to Collector
 - Collector reconciles records and stamps document by franking
- Audited by Government accountant and dispatched

STAMP DUTY RELIEFS AND EXEMPTIONS

- **Under Cap 480.**
 - S.17 : adjudication in collector's discretion
 - S.106 : general ministerial recommendation for relief or to exempt in the interest of the public
 - Development partners, research institutions, agric
 - S.117 : General statutory exemptions
 - Educational institutions
 - Family investment companies(LN 92 of 2007)
 - S.52(2)-charitable institutions, 52(6) -trustees
 - S.96 –subsidiary companies
- **Other Statutes**
 - Central bank of Kenya Act (Cap 491)- S.7.
 - Export Processing Zone Act (Cap 517)-S.29(2).
 - Shelter Afrique Act (Cap 493).
 - Privileges & Immunities Act (Cap 179)
 - Companies Act (Cap 486)-assurances in winding up

Depends entirely on who is liable to pay

CONSEQUENCES OF STAMP DUTY IN A GIVEN SET OF FACTS

- Is it payable?
- What is the rate?
- Who pays or is liable to pay?
- On which document?
- Is there relief or is it exempt?
- Clear, calculate the amount inclusive of any penalty

STAMP DUTY REFORMS

- Challenges in the processing itself
- Rates payable esp. on transfers
- Persons liable to pay or documents
 - From each according to his means
 - First time home owners
 - Mortgaged homes
 - Retirees
 - **Estate beneficiaries should at worst have a clawback**
- **E-stamping.**
- **Reverse liability-transferors not transferees.**

CLEARANCE CERTIFICATES

- Basically of two types to assist Govt collect revenue.
 - Rates
 - Rent

RATES CLEARANCE CERTIFICATE

Basis- Valuation of Rating Act (VRA) and Rating Act (RA). Purpose is to raise revenue for local authorities.

- Rates are payable on each parcel of land. The certificate must be produced when transferring, or leasing land under S. 28 and S. 38 of LRA
- VRA provides for valuation of land within a local authority other than rate on the annual value of agricultural land. The valuers inspect and prepare a valuation roll for the various properties.
- Exempted properties include, churches, cemeteries, hospitals educational institutions etc
- RA S 3 gives basis of collection of rates
- The rates are calculated based on the area, for agricultural land, the agricultural rental value rate is adopted. Other methods are prescribed in S 5
- Rates are payable on each parcel of land and it matters not where the land is. Regulated by the Rating Act (Cap 267). Must be produced when 'transferring, vesting or leasing land'.
- Process-
 - Obtain demand note by giving Land Reference no.
 - Pay outstanding rates
 - Pay the prescribed Clearance Certificate fees. The current fee is kshs. 10,000/-
 - Obtain Rates Clearance Certificate- it lasts for 30 days. It is issued under S21(1) of RA

RENT CLEARANCE CERTIFICATE

- Rent Clearance Certificate
 - Issued on leasehold properties by Lessor
- Must be produced when 'creating any interest in land', unless the rent is a peppercorn
 - Section 28 of the LRA
 - Section 39 LRA
- Issued in Nairobi no matter where the land is situate.
- Process of obtaining Rent Clearance Certificate
- Govt grant
 - Obtain a Rent Demand Note from the Ministry of Lands Registry by using copy of title

- Pay outstanding rent at NBK or KCB submit proof of payment
- Apply for Rent Clearance Certificate and pay prescribed fee
- Clearance issued after audit
- Challenges include
 - poor records-incomplete records
 - centralization
 - processing the clearance itself.
- Where the Local Authority is the Head lessor eg Umoja, Harambee, Mariakani
 - Obtain a demand note from the Local Authority
 - Pay outstanding ground rent;
 - Pay prescribed fee of kshs. 7000
 - Consent is endorsed on the document

CONSENTS

1. CONSENT FROM A LOCAL AUTHORITY

- Obtained when the LA is the Head Lessor.
- Upon payment of rates and ground rent the Town Clerk endorses the LA's consent on the conveyancing document.

2. LAND CONTROL BOARD CONSENT

Required for agricultural land S2 of Land Control Act. Under S6 of the Act, certain transactions in agricultural land are termed "controlled transactions" and are invalid unless they are effected with the consent of the LCB.

These requirements are sale, transfer, lease, mortgage, exchange, partition or other disposal of agricultural land etc

You don't require consent for transfer by virtue of a will or intestacy

Consent must be obtained within 6 months of the agreement or it becomes null and void

Excludes non-agricultural land, transmissions, Government transactions and exemption by the President through a Gazette Notice.

Consent is to be sought for each controlled transaction- Practice Instruction Ref. GEN/F/38 dated 7th January, 1983 from the Chief Land Registrar which was the subject of the Fred FedhaVs Majani case eKLR 2010

- Process
 - Application is made in prescribed form within 6 months of the making of the agreement to the local district board
 - The LCB may require attendance of the applicant
 - Considerations under S 9 made
 - Consent may be granted in prescribed form
- Challenges- The qualifications of board members is not provided so there is the risk of misuse of this power; the running of the boards need to be professionalized
- Numerous and each ,maybe or maybe not for a reason. Could be statutory (concept of eminent domain) or out of ordinary agreement.
- For a transaction one may need:/or a combination of
 - Commissioner of Lands' Consent/ Landlords'
 - Land Control Boards' Consent.
 - Kenya Railways' Consent.
 - KAA's Consent.
 - Mortgagee's or Chargee's consent .
 - Presidential Consent.

Consent of trustees to National Parks.

COMMISSIONERS CONSENT
- Applies in the case of all leasehold properties. It will be a condition of the Grant or title.
- Must settle rent (and meet all conditions of the Grant).
- Application is in the prescribed Form and be made by Advocate or the registered proprietor and submitted in triplicate.
 - Pay prescribed fees of 1000/=
 - Correspondence file sought and application processed

- **Challenges include: missing correspondence files, pending restrictions, Ndungu Comm. Report**

PRESIDENTIAL CONSENT

- **Realm of controlled transactions**
- **Coastal beach fronts- purpose is to secure Kenya.**
- **Processed through the**
 - **Provincial Security chiefs**
 - **then the Commissioner of Lands**
 - **Office of the President.**
- **Challenges: discriminatory, red carpet too long.**
- **Please note that in the previous land laws and the current ones there was no legal requirement for presidential consent. It was an administrative process and not a legal one. The requirement for presidential consent for coastal properties was recently dispensed with in Civil Appeal No. 191 of 2012.**

KAA & KR CONSENT

- **KAA consent applies to dealings with land adjacent to or bordering flight paths**
- **KR consent will apply to land adjacent or adjoining railway lines**
- **Purpose was safety of passengers and users/owners of the subject land alike.**
 - **Critical when advising client as to prescribed user or intended user of the parcel besides being a completion document.**
- **Excluded: non- agricultural land, transmissions, Govt transactions, Presidential intervention**

Non citizens can not be given the consentLack of control of these boards is a challenge.

- **Application is made in the prescribed Form 1.**
 - **To local district Board by either or both parties**
 - **Considerations under S .9 after hearing the party(ies)**
 - **Consent granted using prescribed Form**
- **Applications must be for each controlled transaction**

- *Fred Fedha & Anor Vs Majani 2010 eKLR*

Challenges : Lack of control of these boards has resulted in a “quagmire of confusion”.

LACK OF CONSENT

- Responsibility to obtain consent rests with he who intends to dispose of an interest
 - LSK Conditions of Sale # 16.
- Lack of consent means transaction is void.
 - Jacob Gichuki Minjire Vs AFC CACA 61 of 1982
 - Kariuki Vs Kariuki 1983 KLR 225
 - Fedha Vs Majani
 - S.20 of Cap 302
- In conclusion, it is one Completion Document susceptible to abuse.