WOMEN’S LAND RIGHTS HANDBOOK
KENYA
Foreword

Across Africa, land is integral to identity and existence. Access to and ownership of land for women is often problematic, particularly when the law and culture collide. Land issues, including family property matters, are often determined within entrenched cultural norms where a hybrid legal interpretation of both customary and national law is applied.

In spearheading efforts to secure women’s rights to land in Africa, the Commonwealth Secretariat focuses on reconciling customary norms with more formal judicial processes, national laws and international and regional human rights standards to address both policy imperatives and realities on the ground.

Between 2006 and 2010, the Commonwealth Secretariat, under the mandate provided by the Commonwealth Plan of Action for Gender Equality 2005–2015, conducted a series of regional and national meetings and training sessions in Cameroon, Namibia, Kenya and Nigeria to address the issue of women’s rights, culture and the law. These interventions drew on the rich experience of local and national officials, women activists, traditional leaders, judges and rural and indigenous women.

One outcome arising from the meetings was the development of a legal handbook for use in four Commonwealth African jurisdictions – Cameroon, Kenya, Nigeria and Sierra Leone – in order to specifically inform women, especially rural women, lay
magistrates and traditional chiefs on the various laws and legal processes relating to property matters, including women’s access to and ownership of land. Dr Meena Shivdas (Gender Adviser) and Ms Sarah Coleman (Legal Officer) co-ordinated the Secretariat’s work on women’s land rights. Ms Allison Lindner provided valuable research assistance.

The Secretariat is grateful to Hon. Justice Sarah Ondeyo-Omolo (Kenya), Hon. Justice Florence Awasom (Cameroon), Hon. Justice Nyawo Finda Matturi Jones (Sierra Leone) and Hon. Justice Chima Centus Nweze (Nigeria) for technical guidance on the framework for the handbooks. The Secretariat is also grateful to Justice Sarah Ondeyo-Omolo, the legal expert who provided the technical input for this handbook.

We hope this resource will assist in the identification and dissemination of applicable national laws and relevant regional and international human rights standards, as well as the appropriate legal practices/procedures relating to land and other property rights in Kenya, particularly for those women caught between culture and the law.

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Introduction

All human beings are born free and equal in dignity and in rights and have the right to own property alone or in association with others.\(^1\) Kenya is a member of the international community and a signatory to various international and regional human rights instruments. These instruments, in line with the Universal Declaration of Human Rights (UDHR)\(^2\), establish the principle of equality of all members of the human race and proscribe discrimination on grounds of sex, among others. Following the UDHR (1948), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)\(^3\), the African Charter on Human and Peoples’ Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR)\(^4\) among others, establish the following human rights principles and standards with regard to women’s rights:

- Equality of men and women before the law
- Equality in rights during marriage and at its dissolution
- The right of every person to enjoy protection of the law on a basis of equality and without discrimination on grounds of sex
- The right to own property alone or in association with others; this includes the right to own and access land.

By acceding to the above and many other human rights instruments, Kenya undertook to comply with international

\(^1\) Universal Declaration of Human Rights, Articles 1 and 17
\(^2\) Adopted and proclaimed by the General Assembly resolution 217A(III) of 10 December 1948
\(^3\) General Assembly resolution A/Res/34/180 ratified by Kenya on 9 March 1984
\(^4\) General Assembly resolution 220A(XXI), UN Doc A/6316 (1966) ratified by Kenya on 1 May 1972
human rights standards set out in those instruments and to do the following things:

- Embody the principle of equality of men and women in the national constitution and in legislation in line with the requirement of CEDAW Article 2(a)
- Eliminate discrimination against women in general, particularly in marriage relations, and ensure equality in rights for both spouses regarding ownership, acquisition, management and disposition of property including land (CEDAW Article 16 (h))
- Adopt legislative measures to proscribe discrimination against women, particularly those in the rural areas, to enable them participate in and benefit from rural development; this is in line with CEDAW Article 2.
- Ensure that rural women have access to agricultural credit/loans and that women do not suffer discrimination in the area of land reforms and land ownership in settlement schemes (CEDAW Article 2).


The National Land Policy (NLP)\(^5\), which was enacted before the Constitution of Kenya 2010, mainstreamed gender and recommended constitutional guarantees to ensure the protection of human rights of all the people of Kenya and, in particular, to provide protection against laws, customs and practices which discriminate against women in the area of land rights. The Bill of Rights provides for equality of all persons.\(^6\) This equality includes
the right of men and women to enjoy all fundamental rights and freedoms, including land ownership and access thereto on a basis of equality. Discrimination on account of sex is prohibited.

The Constitution in Article 21 requires the state to enact legislation in fulfillment of its international obligations in respect of human rights and fundamental freedoms. Such legislation has not been enacted and the Constitution does not give a timeframe within which this legislation should be enacted. However, the general rules of international law form part of the law of Kenya under the Constitution and as such any treaty or convention ratified by Kenya forms part of the law of Kenya.

Prior to the enactment of the current Constitution, land tenure in Kenya was governed by a multiplicity of laws. The scenario changed with the enactment of the Land Act No. 6 of 2012, which revised and consolidated the old laws.

The Land Registration Act No. 3 of 2012 revised, consolidated and rationalised the registration of titles to land in order to give effect to the principles of devolved government. The following land laws, which have now been repealed, are some of the laws that have governed land tenure since independence:

- Registered Land Act – RLA
- Government Lands Act – GLA

5 Available at http://www.kenyalaw.org
6 Constitution of Kenya 2010, Article 27
7 Constitution of Kenya 2010, Article 2(5)
8 Constitution of Kenya, Article 2(6)
9 Chapter 300, Laws of Kenya (now repealed)
10 Chapter 280 of the Laws of Kenya (Former Crown Lands Act) (both repealed)
• Registration of Titles Act – RTA\textsuperscript{11}
• Land Titles Act – LTA\textsuperscript{12}
• Indian Transfer of Property Act 1882 – TPA
• Way Leaves Act Cap 292\textsuperscript{13}
• Land Acquisition Act\textsuperscript{14}

This Handbook will focus on the various ways through which women and all Kenyans can acquire, access or own land. The Handbook will also focus on the judicial and administrative processes through which women in Kenya can acquire and realise their land rights. This is important since the enactment of the Constitution in 2010 and the new land laws in 2012 has completely transformed land management and administration in the country. With a new Constitution in place and the enactment of new land laws, this Handbook should help in creating awareness which will encourage women to arise and claim their land rights. The book will also serve as a reference point for all relevant actors working towards the achievement, by women, of their rights to land.

\textsuperscript{11} Chapter 281 of the Laws of Kenya (now repealed)
\textsuperscript{12} Chapter 282 of the Laws of Kenya (now repealed)
\textsuperscript{13} Chapter 292 of the laws of Kenya (now repealed)
\textsuperscript{14} Chapter 295 of the Laws of Kenya (now repealed)
Section 1:
will consider types of land ownership and the ways in which different forms of title and interests in land are registered, with provisions specific to agricultural land as well as the adjudication of land disputes.

Section 2:
will consider how family law impacts on land rights in Kenya by covering matrimonial property upon divorce, testate and intestate succession, polygamy and the rights of succession of children.

Section 3:
elaborates on the judicial and administrative processes for compulsory acquisition of land and compensation; cautions and dispositions affecting land.

Section 4: Case Law
4 will consider case law covering all aspects of women’s land rights in Kenya as set out in the previous sections.

What is the highlighted text?
Some words in this handbook are quite difficult. We have made these words stand out on the page, like this: word. You will find an explanation for these words in the boxes called ‘Words you need to know’. We have also highlighted any mention of legislation, constitutional provisions and international and regional human rights instruments for ease of reference. At the beginning of each section you will also find a list of the relevant laws discussed.
Relevant legal provisions

Constitution

2010 Constitution of Kenya

Article 40, Constitution of Kenya 2010

Article 61, Constitution of Kenya 2010

Article 63, Constitution of Kenya 2010

Article 65, Constitution of Kenya 2010

Domestic Laws

Environment and Land Court Act No. 19 of 2011

Land Act No.6 of 2012

Land Adjudication Act Revised 2009 (1977)


Land (Group Representatives) Act Revised 2012 (1970)

Land Registration Act No.3 of 2012


**International Laws**

**International Covenant on Civil and Political Rights**
Accession 1 May 1972

**International Covenant on Economic, Social and Cultural Rights**
Accession 1 May 1972

**Convention on the Elimination of All Forms of Discrimination against Women**
Accession 9 March 1984

**African Charter on Human and Peoples’ Rights**
Ratified 23 January 1992

**Optional Protocol to the African Charter on Human and Peoples’ Rights**
Signed 17 December 2003
Section 1: Land Ownership and Registration of Title
Section 1: Land Ownership and Registration of Title

Domestic Legal Provisions Related to Land Ownership and Registration of Title

Land Act No.6 of 2012 (2012)
Land Adjudication Act Revised 2009 (1977)
Land Registration Act No.3 of 2012
Land (Group Representatives) Act – Chapter 287

According to Article 61 of the Constitution of Kenya 2010 all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. The Constitution proceeds to classify land as public, community or private land. In mainstreaming gender, Article 60 of the Constitution provides that land holding, use and management must promote the principles of equitable access and security of land rights while upholding the elimination of gender discrimination in law, customs and practices related to land ownership and property in land.

15 Art 61
Section 5 of the Land Act provides for various forms of land tenure, namely freehold, leasehold, customary land tenure and other partial interests, including but not limited to easements and licenses. Section 20(1) of the Land Act empowers the National Land Commission (the Commission) to issue licenses for temporary occupation of public land for a period not exceeding 5 years.

Section 5 of the Land Act provides for equal recognition and enforcement of land rights arising under all of the above tenure systems as well as non-discrimination in ownership of and access to land under all tenure systems.
1(a): Forms of Land Tenure

Freehold Tenure

This is the largest quantity of land rights which the state can grant to an individual owner of private land. Freehold tenure confers absolute rights of land use and disposition. However, these rights are subject to spousal rights over matrimonial property and trusts including customary trusts, among other overriding interests specified in section 28 of the Land Registration Act No. 3 of 2012 (LRA).

Leasehold Tenure

This form of tenure confers upon a proprietor the right to use land for a specified period of time in exchange of certain obligations, such as payment of rent and rates. This kind of tenure is applicable to both public and private land ownership. If the leasehold tenure is in respect of public land, the Commission is required by section 36 of the Land Act to publish a notice of the availability of public land for use through lease or agreement. The publication shall be made in the Gazette and in at least two daily newspapers of nationwide circulation. Such notice shall call upon interested persons to submit applications.

At the expiration of a leasehold tenure over public land, if the land is not required for public purposes section 13 of the Land Act empowers the Commission to offer the immediate past

16 Land Registration Act No. 3 of 2012, section 28(a)
17 See number above 16 section 28(b)
leaseholder **pre-emptive rights** to allocation of that land. However, this provision will only apply if the immediate leaseholder is a Kenyan citizen.

**Periodic Leases – Section 57 of the Land Act**

A periodic lease is created in any of the following instances:

a) If the term of the lease is not specified and there is no provision for the giving of notice to **terminate** the tenancy;

b) If the lease is with regard to **agricultural land**, a periodic lease shall be for a period of six months;

c) If at the **expiration** of any lease the **lessee** remains in possession with the **consent** of the **lessor** in the absence of an agreement as to the period of such continued possession, a periodic lease is created;

d) If the owner of a piece of land allows any person exclusive occupation of the land at a rent and the lease agreement is not in writing.\(^{18}\)

**Termination of Periodic Tenancy/Lease – Section 57 (4) of the Land Act**

A periodic tenancy may be **terminated** by either party giving notice of not less than the period of the tenancy, to expire on the date rent is payable.

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\(^{18}\) The Land Act No. 6 of 2012, section 57(2)
**Short Term Leases – Section 58 of the Land Act**

A person can become entitled to land by way of a short-term lease. A short-term lease may be made orally or in writing and such a lease is not a **registrable interest** in land. A lease is short-term if it is for a period of 2 years or less and contains no **option** of renewal. Periodic leases that are not in writing also fall under this category of rights.

**License for Temporary Purposes**

Whenever public land becomes available for use through **license** or agreement, section 36 of the Land Act **empowers** the **Commission** to publish a notice of such availability inviting those interested to submit their applications for **consideration**. Publication of such notice shall be made in the **Gazette** and at least two daily newspapers of nationwide circulation.

Section 20 of the Land Act **empowers** the **Commission** to **grant** a person a **license** to use **unalienated** public land for a period not exceeding 5 years. Such **license** may be issued upon such conditions as may be **prescribed** therein. The **licensee** may, with the **consent** of the **Commission**, **transfer** the benefit of the **license** to another person. The **transfer** and **consent** shall be endorsed on the **license**.

**Termination of License for Temporary Purposes**

Such **license** may be **terminated** by the **Commission**:

a) If the **licensee** defaults in payment of rent for one month from the date when it became payable;
b) If the licensee is in breach of any term or condition of the license;

c) By a notice issued by the Commission any time after the expiration of nine months from the date of the license.

**Customary Land Rights and Trusts**

This form of tenure was practiced prior to the advent of colonialism where land ownership, access and control depended on a socially and culturally known and accepted arrangement among the members of any given community.

African customary laws in Kenya generally have a concept of a trust inherent in them. Under this form of tenure, land belonged to the community as a whole and members of the community have rights of access and use.

Customary land rights of ownership and access, in so far as they are consistent with the Constitution, are a recognised form of tenure. This form of tenure is still practiced in former trust land areas where land adjudication, consolidation and registration have not taken place.

The case of **Mukangu v Mbui**19 demonstrates that although customary law rights in land are extinguished upon registration of the land, interests which arise in right only of possession or actual occupation, without legal title, are equitable rights binding on the land and the registered proprietor as they create a trust in favour of the occupant of such land.

19 The Land Act No. 6 of 2012, section 57(2)
Section 3 of the Judicature Act provides for the application of customary law to resolve disputes of a civil nature where one or all the parties are affected by such customary law. The customary law applicable must however not be **repugnant** to justice or morality or **inconsistent** with written law.

**Words you need to know**

- **absolute rights** unlimited rights
- **agricultural land** land used for agricultural purposes which is not within a municipality, a township or a market
- **breach** contravene or violate
- **Commission** the National Land Commission
- **confer** give, grant, bestow
- **consent** approval or permission
- **consideration** payment in cash or by some other means
- **customary land tenure** ownership whose rights are derived from Kenyan customary law, whether formally recognised by legislation or not
- **disposition** any sale, charge, transfer, grant, partition, exchange, lease, surrender and includes a usufructuary rights in land or a lease and any other act by the owner of a land or under a lease where the owner’s rights over that land or lease are affected
**easement** is a non-possessory interest in another person’s land allowing the holder to use the land to a particular extent or restricting the proprietor’s use of the land to a particular extent

**elimination** removal, abolition, eradication

**empower** authorise

**enforcement** implementation

**equitable access** fair and unbiased right to use

**expiration** conclusion or termination

**extinguish** invalidate or cancel

**freehold** the unlimited right to use and dispose of land subject to the rights of others

**Gazette** the Kenya Gazette or County Gazette

**gender discrimination** biased treatment of a person because the person is female or male

**grant** allow

**inconsistent** not in agreement or contradictory

**interest** right or entitlement
**land adjudication** administrative process of ascertaining land rights through arbitration

**land consolidation** administrative process, considered economical, of merging or combining small pieces of land for purposes of registration under one title

**lessee** a person to whom a lease is granted or a person who has accepted a transfer of a lease

**lessor** a person by whom a lease is granted and includes a person who has accepted the transfer or assignment of the reversion of a lease

**license** permit, authorisation or permission given by the National Land Commission in respect of public land, or by the proprietor in respect of private or community land, or a lease allowing the licensee to do some act in relation to the land subject matter of the lease which would otherwise be a trespass

**matrimonial property** property acquired during marriage

**obligation** duty or responsibility

**option** the freedom or right to choose

**overriding interests** a right to property

**partial interests** rights that are limited

**prescribed** set or approved
proprietary in relation to land, a lease means the person named in the register is the owner; in relation to a charge of land or a charge of a lease means the person named in the register of the land or lease as the person in whose favour the charge is made.

pre-emptive rights rights afforded to persons with an interest in land before they are offered to the general public

rates duty or taxes

registrable capable of being registered

repugnant goes against

spousal rights rights deriving from marriage

state government

tenure occupancy or possession

terminate end

transfer the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected

unalienated not able to have the ownership transferred
1(b): Methods of Acquisition of Title to Land

All Kenyans without discrimination as to sex can acquire title or an interest in land through any of the methods discussed below:

**Allocation of Public Land**

Title to land may be acquired through direct allocation of public land by the Commission, on behalf of the national and county governments.

The allocation may, among other ways, be by public auction to the highest bidder and subject to the reserved price, or on application confined to a particular group to ameliorate their landlessness. Before such allocation, the Commission must issue a notice of intention to the public and interested parties at least 30 days before offering public land for allocation, failing which the allocation shall be void.

**Purchase and Transfers**

Women, like any other Kenyan, can acquire title to land by purchasing land on the open market. All agreements for the sale or purchase of land must be in writing, signed by the parties and witnesses. A proprietor of any land, lease or charge can transfer the same to any person with or without consideration by signing the transfer instrument and filing the instrument at the Lands Registry upon payment of a fee prescribed by the Commission. The transfer is completed upon registration of the transferee as proprietor.

20 The Land Act No. 6 (2012), section 7
21 See no. 22 above, section 12
22 Land Registration Act No. 3 (2012), section 37 and The Land Act No. 6 (2012) section 43
**Land Adjudication Process**

This is a process under the Land Adjudication Act\(^{23}\) carried out to ascertain rights and interests of those claiming to have such rights and interests in trust land areas. Adjudication transforms ownership from customary tenure to individual tenure through demarcation, survey and registration of title.

**Prescription or Adverse Possession**

Under the Limitation of Actions Act\(^{24}\) a person will acquire a registrable interest in a particular piece of land through adverse possession of the land. Any person who claims to be entitled to land by adverse possession/prescription can apply to the Court for an order that she/he be registered as the proprietor of that land. The Claimant must prove that he/she has been in exclusive possession of the land openly, as of right and without interruption, for a period of 12 years, either after dispossessing the owner or after the owner discontinued possession of his own volition. Refer to Kanda Kimamet v Chepkiyeng Kimamet (kimamet) Chebobei [2009] eKLR. Eldoret HCCC 218/2000).

**Settlement Programmes**

Another way of acquiring title to land is through land settlement programmes by the government. Section 134 of the Land Act empowers the Commission, acting on behalf of national and county governments, to implement settlement programmes and provide access to land for shelter and livelihood. These programs are meant to benefit squatters, those displaced by conflicts or
other causes, and any other landless Kenyans. The beneficiaries of such programmes are identified by sub-county selection committees where women have representation.

Section 34 of the Land Act empowers the Commission to reserve public agricultural land or to purchase private land for resettlement of the landless. The process involves the reservation of public land or the purchase of private land by the Commission, demarcation and registration of each portion in the name of a landless person. At the end of the process, the landless take possession of the demarcated portions, duly registered with a title deed.

**Transmissions on Death of Joint Proprietor (Joint Tenancy) – Section 60 of the LRA**

When land is registered in the names of two or more persons, the proprietors are referred to as joint tenants or tenants in common. An instrument in favour of such proprietors and the registration giving effect to that instrument must show:

a) Whether the proprietors are joint tenants or tenants in common;

b) The share of each tenant if they are tenants in common.

However, with effect from the effective date,\(^{25}\) except with the leave of Court, the only joint tenancy that is capable of being created is between spouses. Any joint tenancy other than that between spouses, purported to be created without the leave of a Court, shall be deemed to be a tenancy in common.\(^{26}\)

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23 Chapter 284 of the Laws of Kenya
24 Chapter 284 of the Laws of Kenya, section 7
25 The commencement date of the LRA, i.e. 2 May 2012
26 Land Registration Act No. 3 of 2012, section 91(8) Available at http://www.kenyalaw.org
In the case of joint tenants, title to land can be acquired through transmission.

Upon the death of a joint proprietor, the interest of the deceased tenant shall vest in the surviving tenant(s) jointly. Section 60 of the LRA mandates the Registrar, upon proof of the death, to delete the name of the deceased tenant from the register by registering the death certificate.

**Transmission on Death of Sole Proprietor or Proprietor in Common – Section 61 of the LRA**

Land, a lease or a charge can be owned in common. Under such ownership, each proprietor is entitled to an undivided share in the land, lease or charge.

When a sole proprietor or a proprietor in common dies, his/her share is treated as part of his estate and title will revert to the personal representative as proprietor in that capacity. The Registrar is required to indicate in the register against his/her name, that the personal representative is so registered, either as Executor of the Will or as administrator of the estate of the deceased.

Once the grant has been confirmed, the Registrar may register by transmission any transfer of land by the personal representative or any surrender of a lease or discharge of a charge by the personal representative.

**Transmission on Bankruptcy**

A person can acquire an interest in land, a lease or a charge through an order of Court adjudging bankrupt, a proprietor of
such land, a lease or a charge. Once a certified copy of the Court order, or an order to the effect that the estate of a deceased person be administered according to the law on bankruptcy, is filed with the Registrar, such a person will be registered as the trustee in bankruptcy of the land, lease or charge.

A trustee in bankruptcy will be described in the register as ‘trustee of the property of […] a bankrupt’.

**Transmission in Other Cases – Section 65 of the LRA**

A person can acquire an interest in land, a lease or charge by virtue of an order of the Court or by certificate of sale made or issued under the law. On application to the Registrar and supported by the instrument of transfer, the applicant shall be registered as the proprietor.

**Long-term Leases Exceeding 21 Years Created Out of Private Land – Section 56 of the Land Act**

Interests in private land may also be acquired or may be alienated through long-term leases exceeding 21 years. Under section 56 of the Land Act, the owner of private land can lease that land or part of it to any person for:

a) A specified period, or
b) The lifetime of either the lessor or the lessee, or
c) An indefinite period to be terminated by either party to the lease.

27 The Land Registration Act No. 3 of 2012, Section 63
acquire(d) to get or to obtain; got or obtained

adjudication the process of ascertaining claims of rights over land in trust land areas for purposes of registration

administrator of the estate a person to whom a grant of letters of administration has been made under the Law of Succession Act

adverse possession the acquisition of property rights through open, peaceful, continuous and uninterrupted occupation of the land with the knowledge of and without any opposition from the owner for a period prescribed by law

agricultural land land used for agricultural purposes which is not within a municipality, a township or a market

alienated sold or disposed of

capacity competence, ability or power

charge financial claim against a property

claimant person claiming to have a right

consideration payment in cash or by some other means

Commission the National Land Commission

ameliorate to improve or upgrade
effect consequence

empowers authorises

estate all the money and property owned by a person at the time of death

Executor person appointed by the Testator to execute a Will
deceased dead

interest a right or claim that a person has in land

grant in this section means grant of letters of administration, grant of probate of the Will or grant of summary administration of the estate of the deceased proprietor

lessor a person by whom a lease is granted

lessee a person to whom a lease is granted

personal representative Executor or administrator of a deceased person

prescribed set or approved

proprietor owner

purported claimed or implied

Registrar the Chief Land Registrar, County Land Registrars and any other persons appointed as such by the Public Service Commission
registrable capable of being registered

reserve set aside

reservation of public land setting aside of land

spouse husband or wife

squatters unlawful tenants or occupants of a piece of land

tenure occupancy or possession

terminated ended

transfer the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected

transferee a person who receives land, a lease or charge passed through a transfer

transmission the passing of land, a lease or a charge from one person to another by operation of law on death, bankruptcy or otherwise

distrusted includes a personal representative

vest transfer

void invalid
Land Ownership and Access Under the Land (Group Representatives) Act – Chapter 287

- Article 63 of the Constitution
- Land (Group Representatives) Act – Chapter 287

The above Act applies to land ownership in the arid and semi-arid areas of Kenya. In these areas, land vests and is held by communities or groups identified on the basis of ethnicity, culture or similar community interests like pastoralists.

Registration of Land – Second Schedule of the Land (Group Representatives) Act

Under the above Act,

a) After the process of adjudication, all persons recorded in the adjudication register as having an interest in the group land are entitled to become members of the group;

b) Each group elects not more than ten and not less than three group representatives who get registered and hold land for the benefit of the whole group;

c) The group representatives hold land as such and exercise powers over the land in consultation with the group members;

d) Members own land in undivided shares. They live on the land free of charge with their families and are entitled to use the land and its natural resources.

28 Chapter 287 of the Laws of Kenya, Available at http://www.kenyalaw.org
Charging and Other Dispositions of Group Land

The process for the above is as follows:

a) The group representatives cannot dispose of group land except with the consent of the whole group, representatives and the Registrar of group representatives (Registrar);

b) With the consent of the Registrar, the representatives and the entire group, the representatives may charge the land for a loan for development purposes.

Words you need to know

adjudication the process of ascertaining claims of rights over land in trust land areas for purposes of registration

arid land dry, barren, infertile land

charge financial claim against a property

consent approval or permission

culture way of life

ethnicity traditional way of life

interest a right in or over land

Registrar the Chief Land Registrar, County Land Registrars and any other persons appointed as such by the Public Service Commission

semi-arid land area has little rain but is not completely dry
REGISTRABLE INSTRUMENTS

- Lease Instrument
- Charge Instrument
- Transfer Instrument
- Cautions – Section 71 of the LRA
- Inhibitions – Section 68 of the LRA
- Restrictions – Section 76 of the LRA

**Interest Conferred by Registration – Section 24 of the LRA**

Under Section 24 of the LRA, registration of a person as proprietor of land vests in that person absolute rights of ownership. Similarly, the registration of a person as the proprietor of a lease vests in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging thereto.

Section 25 of the LRA provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration, shall not be liable to be defeated and are free from all other interests and claims. However, the proprietor’s title is subject to:

a) The leases, charges and other encumbrances, conditions and restrictions (if any) noted in the register;

b) Spousal interests over matrimonial property as will be discussed in Chapter 3;

c) His/her obligations as a Trustee including customary trusts and the other overriding interests shown in section 28 of the LRA.
Words you need to know

**absolute rights** unqualified or unlimited rights

**acquired** got or obtained

**adjudication** the process of ascertaining rights over land for purposes of registration

**charges** financial claims against a property

**consideration** payment in cash or by some other means

**defeated** challenged

**encumbrances** impediments

**first registration** registration of title immediately after land adjudication process

**interest** a right or entitlement in or over land

**matrimonial property** property acquired during marriage

**obligation** duty or responsibility

**overriding interests** rights subject to which a registered proprietor holds title to land

**proprietor** owner

**restrictions** limitations
spousal interests the rights of a spouse in or over land

trustee includes a personal representative

vests transfers

Rectification of the Register – Section 80 of the LRA

The Court can order rectification of the register by directing that any registration be cancelled or amended if satisfied that the registration was obtained, made or omitted by fraud or mistake. However, the register shall not be rectified to affect the title of a person who is in possession, having acquired the land, lease or charge for valuable consideration, unless s/he:

a) Had prior knowledge of the omission, fraud or mistake;
b) Caused such omission, fraud or mistake;
c) Substantially contributed to the omission, fraud or mistake by any act, neglect or default.

According to section 81 of the LRA, any person who suffers damage as a result of rectification of the register is entitled to indemnity. However, no indemnity is payable to any person who caused or substantially contributed to the damage by fraud or negligence.

Certificate of Title to be Conclusive Evidence of Proprietorship – Section 26 of the LRA

Under section 26 of the LRA, a certificate issued upon a purchase and transfer of land or upon a transmission by the proprietor is
conclusive evidence of absolute ownership of the land described in the said certificate. This is subject to any conditions that may be endorsed on the certificate. If the certificate was acquired corruptly or through fraud to which the proprietor was a party, such ownership can be challenged in a Court of law.

**Compulsory Acquisition**

The absolute rights of a proprietor over a title to land are subject to compulsory acquisition by the government upon payment of compensation if the land is required for public purposes or in the public interest.

After the land has been compulsorily acquired, if the public purpose or interest justifying the acquisition ceases or fails, the Commission may offer the original owner(s) or their successor(s) in title preemptive rights to reacquire the land, subject to the full amount of compensation being refunded.

### Words you need to know

- **absolute** unqualified or unlimited
- **acquired** got or obtained
- **amended** altered, modified or revised
- **compensation** damages, reparation

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29 The Land Act, 2012, Act No. 6 of 2012, section 110
30 Section 29, section 111 of the Land Act and Constitution of Kenya, 2010, Article 40(3)(b)
**compulsory acquisition** the power of the state to deprive or acquire any title or other interest in land for a public purpose subject to payment of compensation

**Commission** the National Land Commission

**consideration** payment in cash or by some other means

**first registration** registration of title immediately after land adjudication process

**indemnity** compensation

**interest** a right in or over land

**pre-emptive rights** rights afforded to persons with an interest in land before they are offered to the general public

**proprietor** owner

**rectification** alteration, amendment

**substantially** to a large extent

**transfer** the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected

**transmission** the passing of land, a lease or a charge from one person to another by operation of law on death, bankruptcy or otherwise
**Capacity to Register**

a) Article 40 of the Constitution of Kenya 2010  
b) Section 47 (1) of the Land Registration Act (LRA)  
c) Section 27 of the Land Act

All Kenyans, without discrimination as to sex, are entitled to own land and any property of any description anywhere in Kenya. Section 27 of the Land Act *empowers* a *child* to hold title to land through a *trustee*.

Section 47(1) of the LRA provides that the name of a person under the age of 18 years may be entered in the Register to enable the *interest* of the *minor* to be held in trust. Such land shall be registered in the name of the *guardian* as *trustee* either on *first registration*, as a *transferee* or on *transmission*. Such registration does not permit a *minor* to deal with land or any *interest* in the land. When the *interest* of any *child* has been so registered, the *Registrar* is required to enter a *restriction* immediately.

**Land Holding by Non-Citizens**

At independence, the post-colonial government issued many leases to non-citizens who were mainly former white settlers. Most of these leases were for a period of 999 years. Article 65 of the current Constitution has drastically changed the leasehold *tenure* of non-citizens. A person who is not a citizen of Kenya may now hold land only on the basis of leasehold *tenure*. Such a lease shall not exceed 99 years.

Any current lease, in favour of a non-citizen which *purports* to
confer an interest in land greater than a 99 year lease is, by virtue of Article 65, construed as conferring upon that person, a 99 year leasehold interest and no more.

Words you need to know

child an individual who has not attained the age of 18 years

construe to interpret or to be understood to mean

confer bestow, give, award

empowers authorises

guardian a custodian

interest right or entitlement

minor an individual who has not attained the age of 18 years

purports claims, implies

Registrar the Chief Land Registrar, County Land Registrars and any other persons appointed as such by the Public Service Commission

restrictions limitations

tenure occupancy or possession

transferee a person who receives land, a lease or a charge through a transfer
**transmission** the passing of land, a lease or a charge from one person to another by operation of law on death, insolvency or otherwise

**trustee** includes a personal representative
1(c): Land Alienation

Contracts over Land

A proprietor of land may alienate his/her right to the land by way of sale, lease, charge, partition or transfer.

All contracts for sale or for disposition of an interest in land must be in writing and signed by all the parties thereto. The requirement for each signature to be attested by a witness who was present when the contract was signed by such party is a mandatory requirement. If the contract relates to a legal mortgage, such consent is mandatory.

However, this requirement does not apply if a contract is made in the course of a public auction.

Breach of Contract by Purchaser – Section 38 of the Land Act

If the purchaser has taken possession of the land pursuant to a contract of sale but is in breach of the contract, section 38 of the Land Act empowers the vendor to rescind the contract by resuming possession peaceably or by obtaining an order from the Court in accordance with the provisions of section 41 of the Land Act.
Words you need to know

**alienate** to sell or dispose of

**attested** evidenced

**breach** violate or contravene

**charge** financial claim against a property

**consent** approval or permission

**contract** agreement

**disposition** any sale, charge, transfer, grant, partition, exchange, lease, surrender and includes a usufructuary rights in land or a lease and any other act by the owner of a land or under a lease where the owner’s rights over that land or lease are affected

**empower** authorise

**interest** an entitlement

**mandatory** compulsory

**partition** subdivide

**proprietor** land owner, property owner

**rescind** annul or cancel
transfer the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected

transfer vendor

Procedure for Obtaining Order for Possession

A vendor seeking to rescind a contract of sale and regain possession is required by section 41 of the Land Act, to serve a notice on the purchaser informing him/her:

a) The nature and extent of the breach complained of by the vendor;

b) If the vendor considers that the breach is capable of being remedied by payment of a stated amount of money;

c) Whether the vendor considers that the breach can be remedied by the purchaser doing or desisting from doing anything or paying reasonable compensation or both, all of which should be done within a period of thirty days from the date of the notice;

d) The period within which the purchaser should remedy the breach if such breach is capable of being remedied;

e) The consequence should the vendor fail to remedy the breach;

32 The Land Act No. 6 of 2012, section 41
f) If the vendor considers that the breach is not capable of being remedied, the vendor may seek a Court order to repossess the land.

Words you need to know

- **breach**: violate or contravene
- **compensation**: damages or reparation
- **contract**: agreement
- **desisting**: abstaining from, discontinuing
- **rescind**: annul or cancel
- **vendor**: person selling land

Relief Against Vendor’s Decision to Rescind Contract of Sale of Land

A purchaser can seek relief against a vendor’s decision to rescind a contract of sale of land:

a) After the vendor serves the purchaser with a notice and proceeds to apply to the Court for an order of possession of the land; or

b) If the vendor has peaceably entered in the land to take possession the purchaser may apply to the Court for relief against the rescission of contract. The purchase can institute
separate proceedings or make an application within the proceedings by the vendor for an order of possession.

Alienation in Cases of Joint Ownership – Section 91 (4) of the LRA

If the land is occupied jointly, dispositions can be only by all the joint proprietors. Each joint tenant can transfer their interest to all the other tenants and to nobody else.

Alienation by Tenants in Common – Section 91 (5) and 91 (6)

Except with the written consent of the other tenant(s) in common, no tenant in common can deal with their undivided share in favour of another person other than another tenant in common.

Partition by Tenant in Common – Section 94 of the LRA

Partition can only be made:

a) With the consent of all the tenants in common occupation of land;

b) Subject to any other written law that requires consent to subdivision of such land;

c) In accordance with the agreement of the tenants in common.
Alienation by Way of a Charge – Section 80 of the Land Act

Under section 80, every charge instrument has effect as security while the chargee has all the powers and remedies in case of default by the chargor. These include the remedy to exercise the statutory power of sale when there is default in payment.

A charge instrument shall contain the terms and conditions of sale, an explanation of the consequences of default and the reliefs that the chargor is entitled to, including the right of sale.

Informal Charges – Section 79(6) of the Land Act

The owner of private land or a lessee can by an instrument in the prescribed form charge his/her interest in the land or lease to the bank or any financial institution as security for the repayment of an existing or future debt.

Charge Over Matrimonial Home – Section 79(3) of the Land Act

If the property to be charged is the matrimonial home, the charge shall be valid only if:

a) The document or form used to apply for the charge or to grant the charge is executed by the chargor and any spouse of the chargor living in that matrimonial home, or

b) There is evidence from the document that it has been assented to by all parties.
Creating an Informal Charge – Section 79 (6) of the Land Act

An informal charge can be created where:

a) A chargee accepts a written and witnessed undertaking from a chargor stating the intention to charge his/her land or interest in land to secure credit from the chargee, and

b) The chargor deposits with the chargee either the certificate of title to the land, a document of lease of land or any other document which proves ownership of land or interest in the land.

An informal charge is valid whether or not it has been registered.

Remedy of Chargee Under Informal Charge

In case of default in making repayments, section 79(7) and (9) of the Land Act provide that a chargee cannot take possession of or sell land whose title document has been deposited by the chargor under an informal lease, without an order of the Court.

Formal Charge – Section 79(5) of the Land Act

This is a charge whose registration is a mandatory legal requirement. Since it can take effect only when it is registered in the prescribed register, a chargee cannot be entitled to exercise any of the remedies under that charge unless it is registered.

34 The Land Act No. 6 of 2012, section 79(1)
Words you need to know

**charge** financial claim against a property

**chargee** the bank or financial institution to whom a charge has been given as security for the repayment of an advance of money or money’s worth, or to secure a condition

**chargor** the person borrowing money from the bank/finance institution on the strength of a charge instrument

**consent** approval or permission

**contract** agreement

**disposition** any sale, charge, transfer, grant, partition, exchange, lease, surrender and includes a usufructuary rights in land or a lease and any other act by the owner of a land or under a lease where the owner’s rights over that land or lease are affected

**effect** consequence

**executed** carried out or implemented

**grant** allow

**interest** right or entitlement

**lessee** a person to whom a lease is granted

**mandatory** compulsory
proprietor owner

prescribed set or approved

rescission cancellation or withdrawal

spouse wife or husband

transfer the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected

valid legal/legally binding

vendor person selling land

Forfeiture of Lease

A lease interest in public land will be forfeited if the lessee defaults in payment of rent for a period of 12 months after such rent became due or if the lessee is in breach of terms or conditions of the lease. Where such default has occurred, the Commission is empowered by section 31 of the Land Act, to commence Court proceedings to recover the land subject of the lease. If the case is proved, the Court shall declare the lease forfeited and the Commission will be at liberty to re-enter the land.

35 The Land Act No. 6 of 2012, section 31
**Forfeiture of License**

The Commission is empowered by section 32 of the Land Act to apply to the Court to declare a license forfeited if:

a) The licensee fails to pay rent for a period of 30 days after it becomes due, or

b) The licensee fails to comply with or breaches any condition in the license.

According to section 35 of the Land Act, such forfeiture does not extinguish the debt owed to the Commission, neither does acceptance by the Commission of payment of such rent operate as waiver of the Commission’s right to seek a declaration of forfeiture.

**Co-ownership Between Spouses**

A spouse who holds land or a dwelling house in his/her name individually can undertake a disposition of the land or dwelling house. However, if that disposition is a charge, consent to such disposition by the other spouse(s) is a mandatory requirement in accordance with section 93(3) of the LRA.

The lender is duty bound to inquire from the borrower that the spouse(s) has consented to the charge.

If the disposition is an assignment or a transfer, the assignee or transferee is duty bound to inquire from the assignor or transferor whether the spouse or spouses have consented to the transaction.

If the spouse undertaking the disposition misleads the lender,
assignee or transeree by the answers to the inquiry, the disposition shall be void at the option of the spouse who has not consented to it under section 93(4) of the LRA.

Words you need to know

**Commission** the National Land Commission

**consent / consented** approval or permission / approval or permission given

**breaches** violates or contravenes

**charge** financial claim against a property

**disposition** any sale, charge, transfer, grant, partition, exchange, lease interest in a land or a lease and any other act by the owner of land or under a lease where the owner’s rights over that land or lease are affected

**empowered** authorised

**extinguish** invalidate or cancel

**forfeited** surrendered or lost

**forfeiture** surrender

**inquiry** investigation, examination

**interest** right or entitlement
**lender** a person to whom a charge has been given as security for the repayment of an advance of money or money’s worth or to secure a condition

**lessee** a person to whom a lease is granted

**license** permit, authorization or permission given by the National Land Commission in respect of public land or by the proprietor in respect of private or community land or a lease allowing the licensee to do some act in relation to the land subject matter of the lease which would otherwise be a trespass

**licensee** the person occupying land in accordance with the terms of a license

**mandatory** compulsory

**option** the freedom or right to choose

**spouse** wife or husband

**transfer** the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected

**transferee** a person who receives land, a lease or charge through a transfer

**transferor** the person who passes land, a lease or charge through a transfer

**void** invalid
1(d): Transactions Affecting Agricultural Land

If a disposition agreement relates to agricultural land situated in a land control area, according to section 6 of the LCA consent of the relevant Land Control Board must be sought and obtained, failing which the transaction shall be null and void. As was held in the case of Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njonjo such agreement cannot, in law, be enforced.

Application for Consent – Section 8 of the LCA

Applications for consent must be made within 6 months of the making of the agreement for the controlled transaction. This period can be extended by the Court on application.

Transactions that Require Consent of the Land Control Board – Section 6 of the LCA

a) Sale, transfer, lease, mortgage, exchange, partition or other disposal of or any dealing in agricultural land which is situated within a land control area;

b) The division of any such agricultural land into two or more parcels to be held under separate titles;

c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or cooperative society which for the time being owns agricultural land situated within a land control area.

37 Civil Appeal No. 26 of 1979. eKLR, Available at http://www.kenyalaw.org
38 The Land Control Act, Section 8
Words you need to know

**agricultural land** land used for agricultural purposes and which is not within a municipality, township or market

**consent** approval, permission

**controlled transaction** a transaction subject to administrative or quasi-judicial control

**disposition** any sale, charge, transfer, grant, partition, exchange, lease, surrender and includes a usufructuary rights in land or a lease and any other act by the owner of a land or under a lease where the owner’s rights over that land or lease are affected

**division** separation or partition

**enforced** implemented

**LCA** abbreviation for Land Control Act, Chapter 302 of the Laws of Kenya

**land control area** an area where transactions affecting agricultural land must receive consent of the Land Control Board

**null and void** cancelled and invalid

**partition** subdivide

**transfer** the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected
**Grant or Refusal of Consent of The Board in Controlled Transactions**

The Land Control Board decides land transactions on a purely economic and social basis. There is no legislation compelling the Board to consider the views of spouses or other family members before granting or refusing consent to any transaction, particularly where the land subject matter of the application is matrimonial property.

In deciding whether to grant or refuse consent, the Land Control Board shall:

a) Consider the effect which the grant or refusal of consent is likely to have on the economic development of the land in question

b) Consider the effect the grant or refusal of consent is likely to have on the maintenance or improvement of standards of good husbandry in the area within which the land is situated.

Consent will be refused if:

a) The person to whom the land is to be disposed is unlikely to farm it well or develop it adequately

b) The person is unlikely to be able to use the land profitably for the intended purpose

c) The person already has sufficient land

d) In the case of division of land into two or more parcels, the division is likely to reduce the productivity of the land.
**Appeals/Void Transactions – Section 9(2) of the LCA**

When consent is refused, an agreement to a controlled transaction becomes void:

a) On the expiry of the time limited for appeal\(^{39}\) under section 11

b) Where an appeal is entered and dismissed on the expiry of the time limited for appeal\(^{40}\) under section 13

c) Where a further appeal is entered under section 13 and dismissed.

**Recovery of Consideration – Section 7 of the LCA**

Any money or other consideration paid in the course of a controlled transaction that becomes void is recoverable as a debt by the person who paid it from the person to whom it was paid.

**Acts in Furtherance of Void Transactions – Section 22 of the LCA**

It is a criminal offence for a person to:

a) Pay or receive money; or

b) Remain in possession of a piece of land in furtherance of a transaction that has become void.

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\(^{39}\) Within 30 days of the copy of the Board’s decision being delivered or posted to him/her

\(^{40}\) Within 30 days of the copy of the Board’s decision being delivered or posted to him/her
Words you need to know

**agricultural land** land used for agricultural purposes and which is not within a municipality, township or market

**consideration** payment in cash or by some other means

**consent** approval or permission

**controlled transaction** a transaction which is subject to administrative or quasi-judicial involvement

**division** separation, partition

**effect** consequence

**grant** allow

**improvement** upgrade, enhancement or development

**matrimonial property** property acquired during marriage

**null and void** cancelled and invalid

**purchaser** buyer

**spouse** wife or husband
Instruments of Dispositions – Section 43 of the LRA

All instruments affecting the disposition of land must be in the form prescribed under the LRA or any other written law. An instrument affecting any disposition of private land shall be of no effect unless it is so registered in accordance with the relevant law relating to the registration of such an instrument. Consequently, all leases, charges, transfers, etc. must be registered and stamp duty paid in order to give them effect.

Section 37 of the LRA empowers a proprietor to transfer land, a lease or a charge to any person with or without consideration by executing an instrument in the prescribed form or in such form as the Registrar may in any particular case approve. Apart from executing the instrument, the transferee is required by section 44(5) of the LRA to file the instrument with the Registrar attaching the following documents:

a) Copy of identity card or passport
b) Copy of a Personal Identification Number Certificate
c) Passport size photograph
d) Marriage certificate, where applicable
e) Any other document as the Cabinet Secretary may prescribe.

A transfer is completed by payment of the prescribed fee and registration of the transferee as proprietor.
Certificate of Payment of Rent – Section 38 of the LRA

If the land is situated within the area of a rating authority, the Registrar shall not register any instrument purporting to transfer or to vest any land or a lease of land unless there is a written statement from the relevant government agency confirming that all outstanding rates and any other charges payable to the agency in respect of the land have been paid. These include all rates and charges for the last 12 months up to the date when the application for transfer is made.

Certificate of Payment of Rent – Section 39 of the LRA

Similarly, the Registrar shall not register any instrument which purports to transfer or create an interest in land unless a certificate is produced with that instrument confirming that no rent is owing to the national or county government in respect of the land.

Some land transactions require the consent of the Land Control Board. An instrument to effect a land transaction which requires such consent shall not be registered unless the Registrar is satisfied that the necessary consent has been obtained.
Words you need to know

**rating authority** an authority to whom taxes are payable

**Cabinet Secretary** the Cabinet Secretary responsible for matters relating to land

**charge** financial claim against a property

**consent** approval or permission

**consideration** payment in cash or by some other means

**disposition** means any sale, charge, transfer, grant, partition, exchange, lease, surrender and includes a usufructuary rights in land or a lease and any other act by the owner of a land or under a lease where the owner’s rights over that land or lease are affected

**effect** consequence

**empowers** authorises

**executing** carrying out, implementing

**interest** right or entitlement

**prescribed** set or approved

**proprietor** owner

**purports/purporting** claim, implies; claiming, implying
**rates** duty or taxes

**Registrar** the Chief Land Registrar, County Land Registrars and Land Registrars appointed under sections 12 and 13 of the LRA

**transfer** the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law. In addition, a transfer is the instrument by which such passing is effected

**transferee** a person who receives land, a lease or charge passed by an act of transfer

**vest** transfer
Section 2: Family Law
Section 2: Family Law

Domestic Legal Provisions Related to Family Law

Land Act No.6 of 2012
Land Registration Act No.3 of 2012

In matters of succession and inheritance by women of land and other property questions would normally arise as to whether the Claimant was the wife of the deceased so as to entitle her to inherit his property. In order to prevent a woman from inheriting her husband’s land and other property, her in-laws would claim the absence of a legally recognised marriage between her and the deceased. Payment of dowry or bride price is common requirement for a valid customary law marriage in all of the tribes of Kenya.

2 (a): Matrimonial Property

Joint Tenancy/Ownership\textsuperscript{41} – Section 91 (8) of the LRA

Except with leave of the Court, the only joint tenancy/ownership recognised in law is between spouses. Any joint tenancy/ownership, other than that between spouses, purported to have been created without leave of the Court takes effect as a tenancy in common.

\textsuperscript{41} With effect from 2nd May, 2012, when the LRA became operational
Co-ownership between spouses – Section 93 of the LRA

Land obtained by one spouse for the co-ownership and use of both or all spouses is presumed to be held by the spouses as joint tenants and the Registrar is under obligation to register the spouses as such unless:

a) The certificate of ownership clearly states that one spouse is registered as the only proprietor;

b) The certificate states that the spouses are taking the land as joint tenants.

c) The presumption is rebutted in the manner shown in (a) and (b) above.

Land Registered in Name of One Spouse – Section 93(2) of the LRA

When land is registered in the name of one spouse, the other spouse(s) can acquire an interest in the said land in the nature of ownership in common. Such rights are acquired when a spouse or spouses, by their labour or other means, contribute to the productivity, upkeep and improvement of the land. The rights gained by a spouse by way of contribution, are recognised as if they were registered.

Matrimonial Property

Upon dissolution of marriage, and in the absence of legislation to regulate matrimonial property, the Courts in Kenya have applied section 17 of the 1882 Married Women’s Property Act of England
(MWPA) in disputes involving the sharing of property \textit{acquired} during marriage. Section 17 of the MWPA reads as follows:

\begin{quote}
In any question between husband and wife as to the title to or possession of property [...] either party may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice [...] and the Judge of the High Court may make such orders with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.
\end{quote}

In \textit{Fathiya Essa v Mohamed Alibhai Essa}\textsuperscript{42} where the parties \textit{professed} the \textit{Muslim} faith, the Court of Appeal for the first time held that the 1882 MWPA of England applies to \textit{Muslims} as it does to other Kenyans.

\textbf{Contribution by Spouse to Acquisition of Property}

The Kenyan Courts have made landmark decisions in determining the property rights of women particularly landed property \textit{acquired} during marriage. In \textit{Kivuitu v Kivuitu}\textsuperscript{43} and in subsequent decisions, the Courts have continued to take into account a wife’s \textit{direct and indirect contribution} to the acquisition of property to \textit{determine} the wife’s entitlement to such property.

Such contribution may be financial (direct) or by way of labour or services rendered on the domestic front (indirect), as was expressed by Kwach JA in \textit{Nderitu v Nderitu}\textsuperscript{44} where he considered childbearing which increased the size of the family, as a contribution by the wife.

\textsuperscript{42} Civil Appeal No. 101 of 1995. Citation (1995) LLR 384 (CAK) Available at http://www.kenyalaw.org
\textsuperscript{43} Civil Appeal No. 26 of 1985, Available at http://www.kenyalaw.org
\textsuperscript{44} Civil Appeal No. 203 of 1997, Available at http://www.kenyalaw.org
Words you need to know

**acquire /acquired** to obtain or to get / got or obtained

**Claimant** person claiming to have a right

**determine** decide or conclude

**direct contribution** financial input or financial payment

**improvement** upgrading, development or enhancement

**indirect contribution** input by taking up services and responsibilities in the family, providing labour

**interest** right or entitlement

**obligation** duty or responsibility

**matrimonial property** property acquired during marriage

**Muslim** any person who professes the religion of Islam

**profess** own, confess or acknowledge

**proprietor** owner

**purported** claimed or implied

**rebutted** refuted or showed to be false
Registrar the Chief Land Registrar, County Land Registrars and any other persons appointed as such by the Public Service Commission

spouse wife or husband

upkeep maintenance, preservation or conservation

valid legal/legally binding
2 (b): Property Rights Under The Law of Succession Act

Enacted in 1972, the Law of Succession Act (the LSA), became operational in 1981. The Act provides for both testamentary and intestate succession and applies to all Kenyans, except those who profess the Islamic faith. Male and female children have the same inheritance rights under the LSA.

**Those who profess the Muslim Faith – Section 4 of the LSA**

The LSA does not apply to testamentary or intestate succession of the estate of any person who at the time of death was a Muslim. The devolution of the estate of any Muslim will be governed by Muslim law.

However, the provisions of Part VII of the LSA relating to the administration of estates, in so far as they are not inconsistent with Muslim law, shall apply to the estate of any Muslim who dies before, on or after 1 January 1991.

**Words you need to know**

- **children** in this section means both minor and adult sons and daughters of a deceased person and includes an unborn child, as long as that child is eventually born alive. It includes adopted children.
- **estate** all the money and property owned by a person at the time of death.
inconsistent not in agreement or contradictory

intestate dying without making a Will

Muslim any person who professes the religion of Islam

Muslim law the law applicable to a Muslim person at the time of his/her death

profess own, confess or acknowledge

Testate Succession

Capacity to Make Wills – Section 5 of the LSA 46

Any person of sound mind who is not a minor has the capacity to make a Will. A female person, whether married or unmarried has the same capacity to make a Will as does a male person.

Invalid Wills

A Will made through fraud, coercion or mistake is void.

A Will whether oral or written is void if at the time of making the Will the Testator, due to illness or drunkenness, was in such a state of mind that she/he could not know what she/he was doing. The case of Julius Wainaina Mwathi v Beth Mbere Mwathi & Another 47 demonstrates this position.

45 Chapter 160 of the Laws of Kenya.
46 Chapter 160 of the Laws of Kenya, Available at http://www.kenyalaw.org
47 Civil Appeal No. 123 of 1992, Available at http://www.kenyalaw.org
**Oral Wills – Section 5 of the LSA**

A *Will* can be oral or in writing but a written *Will* cannot be **revoked** by an oral *Will*. An oral *Will* is **valid** only if:

a) It is made before two or more competent persons; and

b) The **Testator** dies within three months from the date of making the oral *Will*. If the oral *Will* is made by a member of the armed forces during a period of active service, the *Will* shall be **valid** if she/he dies during the same period of active service, notwithstanding the fact that she/he died more than three months from the date of the oral *Will*.

If there is conflict in the evidence of witnesses as to what was said by the **deceased** in making the oral *Will*, unless the contents of the oral *Will* are proved by an **independent witness**, the oral *Will* shall be **invalid**.

**Written Wills – Section 11 of the LSA**

A written *Will* shall be **valid** only if:

a) The **Testator** has signed it or affixed his *mark* on it;

b) It has been signed by some other person on behalf of the **Testator** in the presence of and by the direction of the **Testator**;

c) The signature of the **Testator** or such other person has been **attested** by at least two **competent witnesses** who must have seen the **Testator** or the other person sign or affix their thumb print on the *Will*;
d) The signature or the mark of the Testator, or the signature or mark of the person signing for him/her, is so placed that it appears to have been intended to give effect to the Will;

e) Each of the witnesses sign the Will in the presence of the Testator.

A person can, in the Will, appoint an Executor or Executors of the Will. According to section 14 of the LSA, the Executor of a Will is a competent witness to prove the validity or invalidity of a Will.

**Words you need to know**

- **attested** evidenced
- **capacity** competence, ability or power
- **competent witness** a person of sound mind who has attained the age of 18 years
- **deceased** dead person
- **effect** consequence
- **Executor of a Will** a person appointed by the Testator to implement the Will
- **independent witness** a witness who is not a beneficiary under a Will or the spouse of any such beneficiary
Revocation, Alteration and Revival of Wills – Section 17 of the LSA

A Will may be revoked or altered by the maker at any time when he/she is competent to dispose of his/her free property by Will.

Revocation of Will

a) A written Will cannot be revoked by an oral Will – Section 18 of the LSA

b) A Will or codicil can only be revoked by another Will or codicil

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invalid not legally binding, not legally recognised
mark thumb print
minor an individual who is below the age of 18 years
revoked cancelled
Testator the person making a Will
valid legally binding
void invalid
Will a legal declaration by a person of his/her wishes regarding the disposition of his/her property after his/her death

LSA – abbreviation for Law of Succession Act, Chapter 160 of the Laws of Kenya
Revocation of Will by Testator’s Marriage – Section 19 of the LSA

a) A Will shall be revoked by the marriage of the maker of the Will.

b) Where the Will is expressed to be made in contemplation of marriage to a specified person, it shall not be revoked by the marriage to that person.

Effect of Obliteration or Alterations in a Will – Section 20 of the LSA

a) Obliteration and alterations made in a Will after execution have no effect, unless

b) They are countersigned by the Testator and his/her signature duly witnessed by a person who saw the Testator signing against the alterations or obliteration.

Revival of Wills – Section 21 of the LSA

a) A Will that was wholly revoked can only be revived by re-execution.

b) If only part of the Will was revoked, that part can only be revived through re-execution or by a subsequent Will or codicil showing an intention to revive it.
Words you need to know

**alteration** variation or amendment

**codicil** a document that explains, modifies or revokes a Will or part of a Will

**effect** consequence

**execution** implementation or carrying out

**obliteration** destruction, elimination

**re-execution** implement again or carry out again, effect again

**revocation** cancellation

**revival** restoration

**revoked** cancelled, rescinded or withdrawn

**subsequent** Will successive or consequent Will

**Testator** is the person making a Will

**Will** a legal declaration by a person of his/her wishes regarding the disposition of his/her property after his/her death
Intestate Succession – Part V of the LSA

Where the Intestate is Survived by a Spouse and a Child or Children – Section 35 of the LSA

Where the deceased died without making a Will, the surviving spouse is entitled to:

a) The personal and household effects of the deceased absolutely;

b) A life interest in the whole residue of the net intestate estate.

If the surviving spouse is a widow, her life interest shall terminate upon re-marriage to another person. Upon the death of a surviving spouse or upon re-marriage of a widow, the net intestate estate shall devolve upon the surviving child, if there be only one, or children in equal shares.

Where the Intestate Deceased is Survived by One Spouse but No Child or Children – Section 36 of the LSA

The surviving spouse is entitled to:

a) The personal and household effects of the deceased absolutely;

b) The first KSh 10,000 out of the residue of the net intestate or 20 per cent, whichever is greater but the minister may by Gazette notice vary this amount;

c) A life interest in the whole of the remainder, but if the surviving spouse is the widow her life interest terminates when she re-marries.
Power of a Spouse during a Life Interest – Section 37 of the LSA

A surviving spouse enjoying a life interest can during the period of the life interest, sell any of the property subject of the life interest if necessary for his/her own maintenance. This can only be done with the consent of co-trustees and all adult children.

In the case of immovable property, e.g. land, the exercise of this power is subject to approval of the Court.

Where the Intestate is Survived by a Child or Children but No Spouse – Section 38 of the LSA

If the intestate has left a surviving child or children but no spouse, the estate shall devolve upon the child, if there be only one, or upon the children in equal shares.

Where the Intestate has Left No Surviving Spouse, Child or Children – Section 39 of the LSA

The estate shall devolve to the kindred of the deceased in the following order of priority:

a) Father of the deceased; or if dead

b) Mother of the deceased; or if dead

c) Brothers and sisters, and any child or children of the brothers and sisters, of the deceased person in equal shares; or if none

d) Half-brothers and half-sisters, and any child or children of such half-brothers and half-sisters, in equal shares; or if none
e) The relatives who are in the nearest degree of lineage up to the sixth degree, in equal shares.

If the intestate was not survived by any of the people listed above, then the intestate estate shall devolve upon the state and be paid in to the Consolidated Fund.

Section 39 clearly discriminates against the mother of a person who is not survived by a spouse, child or children in so far as the father of the deceased is ranked in priority to the mother of the deceased.

**Where an Intestate was Polygamous – Section 40 of the LSA**

If the intestate has married more than once under any system of law that permits polygamy:

a) His personal and household effects and the residue of the net intestate estate will in the first instance be divided among the houses according to the number of children in each house

b) Each wife surviving him is treated as an additional unit to the number of children in that house

c) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall follow the rules set out in sections 35-38, as discussed above.
Child’s Property to be Held in Trust – Section 40 of the LSA

Any property devolving upon a child or children shall be held in trust for them in equal shares in the case of more than one child.

Rules of Distribution on Intestacy in Scheduled Areas – Section 32 of the LSA

The rules of distribution on intestacy discussed above and contained in Part V of the LSA, do not apply to agricultural land and crops thereon or livestock in the various districts set out in the schedule appearing in that section.49 According to section 33 of the LSA, the law applicable to distribution of this category of properties, on intestacy, is the customary law applicable to the tribe or community of the deceased.

However, such customary law will only apply if it is not repugnant to justice and morality and if it is not inconsistent with written law.50

49 West Pokot, Turkana, Samburu, Mrsabit, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado and Narok
50 The Judicature Act, section 3(1)
Words you need to know

**absolutely** completely or entirely

**agricultural land** land used for agricultural purposes which is not within a municipality or a township

**child/children** both minor and adult sons and daughters, includes unborn children subsequently born alive and adopted children

**consent** approval or permission

**deceased** dead

**estate** all the money and property owned by a person at the time of death

**Gazette** the Kenya Gazette or County Gazette

**inconsistent** not in agreement or contradictory

**interest** right or entitlement

**intestacy** the state of absence of a Will

**intestate** dying without making a Will

**intestate estate** the estate of a dead person in respect of which she/he has died without making a Will

**kindred** relatives
**life interest** right/entitlement that lasts for life

**net intestate estate** the estate of a dead person in respect of which she/he has died without making a Will after payment of all expenses and liabilities

**personal and household effects** clothing and articles of personal use, furniture, appliances, pictures, ornaments, food drink, utensils and all other articles of household use to be associated with a matrimonial home

**repugnant** goes against

**spouse** wife or husband

**state** government

**terminates** ends

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**Provision for Dependents – Part III, Sections 26 – 29 of the LSA**

For purposes of Part III of the Act and according to section 29, a dependent means:

a) The wife or wives, or former wife or wives, and the **children** of the **deceased** whether or not maintained by the **deceased** immediately prior to his death;

b) The **deceased’s** parents, step-parents, grandparents, grandchildren, step-children, **children** whom the **deceased** had taken into his family as his own, brothers and sisters and
half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death;

c) Where the deceased was a woman, her husband, if he was being maintained by her immediately prior to the date of her death.

Any person claiming not to have been adequately provided for by Will or intestacy can apply to the Court under section 26 of the LSA for reasonable provision to be made in his/her favour. Such application should be made before confirmation of grant of representation.

In making provision for the dependent, the Court has the discretion to:

a) Order a specific share of the estate be given to the dependent;

or

b) Make provision by way of lump sum or periodical payments.

**Circumstances to be Taken in To Account by the Court**

The Court will consider:

a) The nature and amount of the deceased’s property;

b) Any past, present or future capital or income from any source of the dependent;

c) The current and future needs of the dependent;

d) Whether the deceased had made any advancement or gift to the dependent during his life time;
e) The conduct of the dependent in relation to the deceased;

f) The situation and circumstances of the deceased’s other dependents and beneficiaries under any Will;

g) The Testator’s reasons for not making provision for the dependent

The case of Irene Macharia v Margaret Wairimu Njomo & another\(^5\) demonstrates the circumstances which the Court would normally take into account when determining the entitlement of each dependent.
2 (c): Jurisdiction of Court – Section 47 of the LSA

In any place where both the High Court and Resident Magistrate’s Court are available, the High Court has exclusive jurisdiction to make all grants of representation and determine all disputes under the LSA.

In areas where the High Court is not available, the High Court may be represented by a Resident Magistrate appointed by the Chief Justice and duly Gazetted for that purpose.

**Words you need to know**

- **beneficiaries** all those who are entitled to inherit the estate of a deceased person
- **child/children** sons or daughters; can be over or under 18 years of age
- **deceased** dead person
- **determine** decide or conclude
- **estate** all the money and property owned by a person at the time of death
- **Gazetted** published in the Kenya Gazette or the County Gazette
- **grant** official act giving powers
**Lack of Jurisdiction**

1. Section 48 of the Law of Succession Act (LSA)
2. Section 76 of the Law of Succession Act (LSA)

A Resident Magistrate does not have jurisdiction to:

a) To determine disputes or issue grants in all cases where the value of the estate of a deceased person exceeds KSh 100,000; or

b) Revoke such grant once a grant is issued.

**No Grant to Certain Persons – Section 56 of the LSA**

A grant of representation cannot be issued to:

1) More than four persons in respect of the same property;
2) Any person who is a minor or who is of unsound mind;
3) Any person who has been declared bankrupt.
Grant of Letters of Administration Section 56 - 58 of the LSA

No grant of letters of administration can be issued:

a) With or without the Will annexed, to a body corporate other than the public trustee or a trust corporation;

b) In the case of an intestate estate, to one person unless that person is the public trustee or a trust corporation;

c) With Will annexed, to one person except if that person is the public trustee or if the Testator appointed one or more trustees in the Will.

Preference Given in Cases of Intestacy – Section 66 of the LSA

In determining to whom a grant of letters of administration should be issued where a deceased died intestate, the Court will normally be guided by the following order of priority:

a) Surviving spouse with or without other beneficiaries;

b) Other beneficiaries in the order of priority as set out in Part V of the Act;\(^{52}\)

c) The public trustee and creditors.

\(^{52}\) Section 39 of the LSA
2 (d) Procedure for Obtaining Grants – Section 67 of the LSA

The procedure for obtaining a grant of letters is as follows:

a) Filing of Petition for grant;

b) Then a notice of application issued and published. The notice invites those with objections to notify the Court within a period of 30 days from the date of publication of the notice;

c) Section 68 requires that objections be lodged in the prescribed form within the period specified in the notice;

d) Then if an objection has been lodged, the Court must give notice to the objector to file an answer to the application and a cross application, within the period specified in the notice;

e) If no answer or cross application are filed, section 69 requires the Court to proceed and make a grant on the original application;

f) If answer and cross application are filed, the Court is mandated by section 69(2) of the LSA, to determine the dispute.

Confirmation of Grant – Section 71 of the LSA

After the expiration of six months from the date of the grant, or such shorter period as the Court may direct, the holder of a grant is required by section 71 to apply to the Court for confirmation of the grant for the purpose of distributing the assets of the deceased.
Application for confirmation can be made before the expiration of six months if:

a) There are no dependents; or

b) The only dependents are of full age and have consented to the application for confirmation.

Section 73 requires that within 1 year from the date of the grant, the Court shall give notice to the holder of a grant to apply for confirmation.

**Confirmation in Cases of Continuing Trusts – Section 72(a) of the LSA**

a) Where there is a continuing trust, the Court shall confirm the grant, subject to appointment as administrators jointly with the surviving administrator, not less than one and not more than three persons as proposed by the surviving administrator.

b) If the continuing trust arises after confirmation with only one surviving administrator, section 75A requires the surviving administrator to immediately apply to the Court to appoint as co-administrators not less than one and not more than three persons as proposed by the surviving administrator.

**Failure to Make the Application – Section 75A(2) of the LSA**

If within three months of there being a continuing trust, a sole surviving administrator fails to apply to the Court for appointment of additional administrators, the Court can appoint additional administrators on:
a) The application of any interested party
b) The application of a creditor or debtor of the estate
c) Its own motion.

Confirmation in Cases of Intestacy – Section 71(2) (d) of the LSA

In cases of intestacy, confirmation of grant shall not be made until:

a) The Court is satisfied as to the respective identities and shares of all beneficiaries

b) The grant has specified all beneficiaries and their respective shares.

Words you need to know

administrator a person to whom a grant of letters of administration has been made under the LSA

beneficiaries all those who are entitled to inherit the estate of a deceased person

consented given approval or permission

continuing trust a trust that does not end upon the death of the grantor

deceased dead

determine decide or conclude
**estate** all the money and property owned by a person at the time of death

**expiration** conclusion or termination

**full age** having attained the age of 18

**grant of letters of administration** the act of formally giving document issued by a Court of probate appointing a person to manage the estate of the deceased who did not leave a Will

**grant** official act giving powers

**intestacy** the state of absence of a Will

**intestate** dying without making a Will

**intestate estate** the estate of a dead person in respect of which she/he has died without making a Will

**jurisdiction** authority to administer justice; hear and determine a case

**minor** a person who is under 18 years of age

**own motion** on its own without being asked to

**petition for grant** an application to a Court for a grant of letters

**prescribed** set or approved
revoke cancel

spouse husband or wife

Testator the person making a Will

trustee a personal representative

Will a legal declaration by a person of his/her wishes regarding the disposition of his/her property after his/her death
Section 3: Judicial and Administrative Processes
Section 3: Judicial and Administrative Processes

Domestic Legal Provisions Related to Judicial and Administrative Processes

Land Act No.6 of 2012
Land Registration Act No.3 of 2012
Environment and Land Court Act No.19 or 2011

Process of Compulsory Acquisition

The Commission is required by section 107 of the Land Act to:

a) Publish in the Gazette and County Gazette a notice of intention to compulsorily acquire land;

b) Deliver a copy of the notice to the Registrar who shall make an entry in the register of the intended acquisition;

c) Serve a copy of the notice upon every person who appears to the Commission to be interested in the land.

Interested persons include any person whose interests appear in the Land Registry, the spouse(s) of any such person, any person in actual occupation of the land as well as the spouse(s) of that person.
Words you need to know

**acquire** to get or to obtain

**Commission** the National Land Commission

**Gazette** the Kenya Gazette or County Gazette

**interest** right or entitlement

**Registrar** Chief Land Registrar, County Land Registrars and Land Registrars appointed under sections 12 and 13 of the LRA

**spouse** wife or husband

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**Inquiry as to Compensation on Compulsory Acquisition of Land**

At least 30 days after publication of the notice of intention to **acquire** land, the **Commission** is required, by section 112 of the Land Act, to fix a date to hear issues of propriety and claims for **compensation** by persons interested in the land. It is a **mandatory** requirement that the Commission publishes a notice of the **inquiry** in the **Gazette** and County **Gazette** at least 15 days before the **inquiry**.

The notice shall be served upon all those interested in the land calling upon them to deliver a written claim of **compensation** to the **Commission**. The written claims should be submitted to the **Commission** not later than the date of the **inquiry**.
The Compensation Hearing

For the purpose of an inquiry, the Commission has all the powers of the Court to summon and examine witnesses including persons interested in the land. It also has powers to compel production of documents of title to the land. The public body for whom the land is being acquired and all interested parties have a right to be heard, to produce evidence, and to call and to question witnesses at the inquiry.

At the hearing the Commission is required to determine those who are interested in the land and to receive written claims of compensation.

Award of Compensation - Section 113 of the LRA

The Commission is required by section 113 of the Land Act, 2012, to prepare a written award in which a separate award shall be made for every person whom the Commission has determined has an interest in the land. The award must specify the shares in which the compensation is payable to co-tenants. The award of the Commission is final and conclusive evidence of:

a) The size of the land to be acquired;

b) The value of the land; and

c) The amount of compensation payable, whether the persons interested in the land have or have not appeared before the Commission.

53 LRA- abbreviation for Land Registration Act No. 3 of 2012
Notice of the Award

The Commission is required under section 114 of the Land Act, 2012, to serve a notice of the award on each person whom it has determined to have an interest in the land. Such notice shall include an offer of compensation.

However, according to section 114(2) of the Land Act, before taking possession of the land, the Commission may agree with the person who owned the land that instead of receiving an award, the person shall receive land of which the value does not exceed the amount of compensation offered. Upon conclusion of such agreement, the person will be considered to have received all the compensation she/he was entitled to.

According to section 120 of the Land Act, the Commission will take possession of the acquired land only after the compensation offered has been paid.

Words you need to know

acquire(d) to get or to obtain; got or obtained

compensation damages, reparation

Commission the National Land Commission

Court in this section means the Environment and Land Court established under the Environment and Land Court Act, No. 19 of 2011
**determine(d)** decide(d) or conclude(d)

**Gazette** the Kenya Gazette or the County Gazette

**inquiry** investigation, examination

**interest** right or entitlement

**mandatory** compulsory

**written award** a written decision containing a specified amount to be paid as compensation

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**Instruments Restricting Disposition**

**Inhibitions – Section 68 of the LRA**

On the application of an interested party, the Court can make an order (**inhibition**) preventing the registration of any dealings in any land, lease or **charge**. The **inhibition** can be made for a particular period or until a further order is made. A copy of the order duly sealed by the Court is a **registrable** instrument and section 68 of the LRA empowers the **Registrar** to register it in the **appropriate register**.

Until such registration is made, the **inhibition** cannot have any **effect** on the land, lease or **charge**. As long as the **inhibition** remains registered, no instrument **inconsistent** with it can be registered.
Cancellation of Inhibition – Section 70 of the LRA

Registration of an inhibition can be cancelled in any of the following ways:

a) On the expiry of the period stated in the inhibition;

b) Upon proof to the Registrar of the occurrence of an event stated in the inhibition;

c) On the land, lease or charge being sold by a chargee unless such sale is also inhibited by the inhibition;

d) By a consequent order of the Court.

Lodging of Cautions – Section 71 of the LRA

A caution is a registrable instrument lodged with the Registrar to prohibit the registration of any dispositions of the land or the making of entries affecting the land, lease or charge. It can prohibit the registration of dispositions and the making of entries generally or to the extent expressed in the caution.

Who Can Lodge a Caution?

The following individuals can lodge a caution:

a) Any person who claims a right to obtain an interest in the land, lease or charge. Such right must have been created by a registrable instrument;

b) Any person entitled to a license;
c) Any person who has presented a bankruptcy petition against the proprietor of any land, lease or charge.

According to section 72 of the LRA, any other disposition that is inconsistent with the caution cannot be registered while the caution remains registered except with the consent of the cautioner or an order of the Court.

Words you need to know

appropriate register correct register

bankruptcy petition an application filed in the Court by a person who is owed money by the person against whom the application is made, or by the person who is unable to pay his/her debts, for an order that s/he should be declared unable to pay his debts, and that a trustee should be appointed to manage his/her financial affairs for purposes of paying debts

cautions caveat, limitation

cautioneer the person who has registered a caution

charge financial claim against a property

chargee the bank or financial institution to whom a charge has been given as security for the repayment of an advance of money or money’s worth or to secure a condition
consent permission or approval

consequent order subsequent order

disposition dealings or transactions

effect consequence

empowers authorises

inconsistent not in agreement, contradictory

inhibition an order preventing registration of any dealings in land, leases or charge

license permit, authorisation

prohibit forbid, disallow or make illegal

proprietor owner

registrable capable of being registered

Registrar the Chief Land Registrar, County Land Registrars and any other persons appointed as such by the Public Service Commission

trustee includes a personal representative
**Procedure for Withdrawal or Removal of Caution – Section 73 of the LRA**

A caution can be withdrawn by the cautioner, removed by an order of the Court or the Registrar.

The procedure is as follows:

a) Any person seeking the removal of a caution is required by section 73(2) of the LRA to make an application to the Registrar for such removal;

b) Upon receipt of the application, the Registrar will serve a notice on the cautioner informing him/her that the caution will be removed at the expiration of the time stated in the notice;

c) If the cautioner raises no objection, the Registrar may remove the caution at the expiry of the time stated in the notice;

d) If the cautioner objects to the removal of the caution, the Registrar will hear the parties at his/her offices and make appropriate orders in the matter.

If the caution is withdrawn or removed by an order of the Court or Registrar, its registration shall be cancelled in accordance with section 73(6) of the LRA.

**Restrictions – Section 73 of the LRA**

The Registrar can on his/her own motion, or on application by an interested person, after hearing all those concerned, make an order
A restriction may prohibit or restrict all dealings in any land, lease or charge or it may restrict or prohibit only those that do not comply with specified conditions.

A restriction can be expressed to endure for a particular period, until the occurrence of a particular event or until a further order is made. It is an instrument whose registration is mandatory according to section 76(2) (b).

Once a restriction has been entered, the Registrar is required under section 77 of the LRA to give notice, in writing, of the restriction to the proprietor affected by the restriction. An instrument that is inconsistent with the restriction cannot be registered while the restriction remains registered.

**Removal or Variation of Restrictions**

A restriction may be removed or varied at the Registrar’s own motion or on the application of any person affected by the restriction and who desires to have the restriction removed. Before the removal, the Registrar is required to serve a notice of intention to remove the caution on the proprietor. If no objection is raised by the proprietor, the restriction may be removed.

If the proprietor objects to removal, the Registrar is required to determine the matter by giving the parties affected by the restriction an opportunity to be heard before appropriate orders are made.

Any person affected by a restriction can also apply to the Court to have the restriction removed.
Words you need to know

caution caveat, limitation
cautioner person who has registered a caution
charge financial claim against a property
determine the matter to decide the issue
endure to last or to remain in force for a particular period
expiration conclusion or termination
inconsistent not in agreement, contradictory
own motion on his own and without being called upon
mandatory compulsory
proprietor owner
Registrar the Chief Land Registrar, County Land Registrars and any other persons appointed as such by the Public Service Commission
restriction restricts or prohibits any dealings in land, lease or charge, or prohibit only those that do not comply with certain conditions

54 The Land Registration Act, section 78
Section 4: Case Law
Section 4: Case Law

Registration of Title

Absolute Rights of Registered Proprietor

The case of *Esiroyo v Esiroyo*\(^5\) involved the rights of third parties over land registered under the Registered Land Act (now repealed). The registered proprietor of the land sued his two sons seeking to evict them from the land accusing them of constant family rows and fights with him hence his desire to exclude them from the land. They had forcefully entered the land and settled on it, although they had their own land elsewhere on which they lived. The sons relied on Luhya customary law to lay their claim on the land which the Court found was ancestral land.

Applying section 28 of the RLA which is similar to section 25 of the LRA, Kneller J (as he then was) held that rights under customary law were extinguished upon registration of land under the RLA and were not among the overriding interests listed in section 30 of the Act. Such registration gave the proprietor absolute rights over the land which could only be defeated as provided under the law. While section 30 listed overriding interests that every registration was subject to, a person who forcefully entered land registered in his father’s name, more so

\(^5\) (1973)EALR 388
when he had his own land on which such a person lived, did not acquire any interest capable of recognition in law.

In Obiero v Opiyo & 3 others, the Plaintiff was the widow of one Opiyo who died in 1938 while the defendants were the sons of the co-wife. The Plaintiff was the registered proprietor of the land in dispute measuring about nine acres. Before the Plaintiff’s registration, there had been conflicting claims to the land by the defendants but these had been determined in her favour by the adjudication committee. The defendants who had lived on this land prior to registration claimed customary law rights over the land. Following the Esiroyo case, the Court (Bennett J), found that they never had any customary law rights in the land and that even if they had had such rights, they were extinguished upon registration. He categorically stated that as a registered proprietor, the title was 'free from all other interests and claims whatsoever' and issued an injunction restraining the defendants, their wives, servants or agents from continuing to trespass on the land in dispute.

**Customary Law Resulting Trusts – Section 28(b) of the LRA**

Although the registration of land extinguishes customary land rights, such registration does not relieve the proprietor of his/her obligation as a trustee. According to section 28 of the LRA, such trusts including customary law trusts are overriding interests protected in law. If a person holds land in a fiduciary capacity under customary law and has it registered under the statute, the customary law trust is transformed to the provisions of the statute and is protected.
In *Mukangu v Mbuí*, the subject matter of the case was ancestral land which was later registered in the name of the Appellant. His son (Respondent) had, with the knowledge and consent of the Appellant, lived on the land since 1956 and had built a permanent house on it. The Appellant sought to remove him from the land and settle him on another piece of land elsewhere. The Respondent claimed interest in the land and argued that since the subject had been ancestral land, the Appellant could only hold it subject to customary law trust in favour of the Respondent who had been residing on the land before registration and had continued to do so after registration. The High Court upheld the Respondent’s case and the proprietor appealed.

Dismissing the appeal, the Court held that interests that arise in right only of possession or actual occupation of land without legal title to the land are equitable rights binding on the land and on the registered proprietor. Such rights possess legal sanctity without being noted on the register and are overriding interests which should be protected so that the person entitled to those rights continues in occupation of the land.

It was further held that since the Respondent had been in possession and occupation even before registration, such occupation and possession gave rise to a trust capable of protection under the law and he was entitled to remain in possession and occupation of the land in dispute.

56 1972 EA
57 Civil Appeal No. 281 of 2004 (Nyeri), (2004) e KLR Available at www.kenyalaw.org
**Acquisition of Title by Prescription/Adverse Possession**

In *Kanda Kimametv Chepkiyeng Kimamet Chebobei*, the Applicant and the Respondent are brothers who owned land adjacent to one another. The Respondent fraudulently and secretly reduced the applicant’s land by 6.5 acres and erected a boundary, making the disputed portion part of his land. He resided on a different piece of land elsewhere but the Applicant fenced the disputed portion together with his land and continued to openly cultivate the portion with the knowledge of the Respondent for a period of 27 years. The Respondent raised no objection to the Applicant’s fencing and continued possession and cultivation all this time, neither did he assert his rights to the portion in dispute.

The Applicant filed this case seeking a declaration that he was entitled, by adverse possession, to the portion in dispute even though it was registered as part of the land of the Respondent. The Court held that since the Applicant had been in quiet, peaceful and uninterrupted possession and occupation of the land by way of cultivation for over 27 years and with the Respondent’s knowledge, he had acquired title by operation of law through adverse possession. It ordered subdivision of the Respondent’s land so that the portion in dispute, measuring 6.5 acres, be hived off and registered in the name of the Applicant.

In *Kasuve v Mwaani Investment Ltd & Another*, any person who claims to have become entitled to land by adverse possession/prescription may apply to the High Court for an order that she/he be registered as the proprietor of the land. In the above case,
the Court of Appeal held that the Claimant must prove that she/ he has been in exclusive possession of the land, openly and as of right and without interruption, for a period of at least 12 years either after dispossessing the owner or after the discontinuation of possession by the owner of his own volition.

**Land Alienation**

*Transaction Void for Lack of Consent of the Land Control Board*

Transactions concerning agricultural land situated within a land control area must receive the consent of the Land Control Board of the area in which it is situated. Lack of such consent renders the transaction void.

In *Leonard Njonjo Kariuki v Njoroge Kariuki alia Benson* Njonjo by a written agreement in 1971, the Respondent sold the suit land to the Appellant at KSh 5,000. The Appellant paid KSh 3,000 and took possession of the land. The Appellant filed suit in 1975 for orders that the contract be specifically performed. The suit land was agricultural land situated in a land control area.

The Respondent pleaded that the transaction was void for lack of consent of the Land Control Board. The Magistrate’s Court ruled that the Respondent could not rely on that defense to avoid commitments he had entered into and ordered specific performance.

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58 The Land Act 2012, Act No. 6 of 2012, section 7(d)
59 Eldoret HCCC No. 218 of 2000 (OS), (2009) eKLR Available at http://www.kenyalaw.org
60 (2004)1 EA
61 Civil Appeal No. 28 of 1979, eKLR, Available at http://www.kenyalaw.org
On appeal to the High Court, the magistrate’s decision was reversed and the High Court ruled that the transaction was void for lack of consent of the Land Control Board.

The Appellant (Plaintiff) appealed against the decision of the High Court. The Court of Appeal held that since the subject land was agricultural land, situated in a land control area, consent of the Board was a mandatory requirement in terms of section 6 of the LCA.62

Since such consent had not been sought within the time stipulated by the law, or at all, the Court held that the transaction was void for lack of consent of the Board. In allowing the appeal, the Court of Appeal further held that the only remedy available to the Appellant under section 7 of the LCA was recovery of the purchase price paid to the Respondent.

**Family Law**

*Lack of Capacity to Make a Will*

A Will shall be invalid if at the time it was made the state of mind of the Testator was such that she/he did not know what she/he was doing.

In the case of Julius Wainaina Mwathi v Beth Mbene Mwathi & another63 the deceased, who had never married, died in 1987 leaving no children. He was survived by one brother (Appellant) and two sisters. The only property comprising his estate was a
piece of land. Two days before his death, he is said to have made a Will and bequeathed the land to the Appellant. According to the Appellant, the deceased dictated his wishes as the Appellant reduced them into writing after which the deceased thumb printed the Will. The Will was witnessed by the Appellant and his wife.

It transpired that on the date of the alleged Will, the Appellant removed the deceased from his mother’s house and took him to the Appellant’s house where the Will was made. The validity of the Will was challenged by the Respondents on the ground that it was not voluntary as the deceased was too sick to understand what he was doing. The High Court found that at the time when the alleged Will was made, the deceased was too sick and could not walk without support. The Court took into account the conduct of the Appellant, who kept the Respondents away from the process, and found no evidence to prove that the deceased freely and consciously dictated the Will. It revoked the Will and granted the parties an equal share of the land in dispute.

The Court of Appeal concurred and found that the Appellant failed to discharge the onus of proving that he did not procure the execution of the alleged will by unfair means. However, the Court applied Kikuyu customary law and found that the Respondents were not entitled to inherit the land.

Balancing the Rights of Dependents on Intestacy

In the case of Irene Macharia v Margaret Wairimu Njomo the Appellant and the deceased were married under the African Christian Marriage and Divorce Act. During the subsistence of the marriage, the deceased and the Appellant acquired landed property which was registered in their joint names. They had no child and they were legally separated in 1989.

Thereafter, the deceased started cohabiting with the First Respondent out of which relationship a daughter was born. There was no evidence of celebration of a marriage between the First Respondent and the deceased. The deceased died intestate leaving the landed property and a sum of KSh 186,000. The First Respondent failed to provide any evidence to support the existence of a marriage between her and the deceased and the Court found that she was not the wife of the deceased. The Appellant was the only wife entitled to inherit.

The Court considered that the landed property was passed to the widow by operation of the law since it was jointly owned and was not subject to distribution. The Court also held that she was in gainful employment and that the daughter of the deceased, who was a minor, was more entitled to the money than the Appellant.

So as not to be seen to have disinherited the Appellant, the Court awarded her KSh 10 out of the KSh 186,000. The rest of the money went to the minor daughter of the deceased.
Women’s Property Rights Within and at Dissolution of Marriage

Property Registered in the Joint Names of Spouses

In Kivuitu v Kivuitu66, the husband and wife agreed to buy a house for their occupation as the matrimonial home. The husband travelled to New York to attend sessions of the United Nations Security Council. The wife searched and found a suitable house, negotiated the purchase price and signed the sale agreement. All this was done with the concurrence of the husband. The husband paid the deposit and the mortgage installments. The husband had wanted to register the house in his sole name but the wife was opposed to this so it was registered in their joint names without specifying the shares of each party.

On dissolution of their marriage the wife filed suit seeking, among others, an order that since the house in dispute was matrimonial property it should be sold and the proceeds shared between her and the husband in equal shares. The High Court ruled that she was entitled to a quarter share in the house. Both parties appealed and the husband argued that the wife acted as his agent and was not entitled to a share in the house as she had made no financial contribution to its acquisition.

The Court (Omolo Ag. J A as he then was), in the leading judgment made the following observations which the rest of the Court agreed with and which formed the judgment:

66 Civil Appeal No. 26 of 1985, Reported in (1991) 2 KAR 241
a) If a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the Courts must take it that such property, being a family asset is owned in equal shares.

b) The wife made financial contributions to the family income and budget either through paid employment and family businesses.

The Court awarded the wife a 50 per cent share in the property and ordered a valuation to be carried out so that the husband pays half the value of the house to the wife.

Most importantly, though orbiter, the learned Judge recognised that a wife’s contribution to the acquisition of family property can be direct (financial) or indirect (by way of her services towards the welfare of the family). Such services can be quantified to entitle a wife to a share in matrimonial property.

The case of Fathiya Essa v Mohamed Alibhai Essa was the first time that the Court considered whether the Married Women’s Property Act 1882 (MWPA) of England would apply to Kenyan Muslims in view of the fact that the Quran has elaborate principles regarding property acquired during marriage. The Court clarified that the MWPA would apply as much to Muslims as to other Kenyans, thereby rejecting the application of the principles of Islamic law.

The parties to this case contracted an Islamic marriage in 1972, which subsisted until 1988 when it was dissolved. At the time of the
marriage, the wife was in salaried employment while the husband ran a family business. The wife later resigned and was absorbed in the running of the family business. Three properties were acquired during the marriage. Two of these were registered in the sole name of the husband while the third one, the matrimonial home, was registered in their joint names. On dissolution of their marriage the wife applied to the Court for a declaration that each of the two properties registered in the husband’s name was jointly owned by the parties and that they should be sold and the proceeds divided equally between the husband and wife. As for the matrimonial home which was registered in their joint names, the wife sought an order that the same should be divided equally between the parties.

Following *Kivuitu v Kivuitu* the Court (Omolo J A) in the leading judgment held that where property acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law assumes that the property is held in equal shares. For the property registered in their joint names, the husband was ordered to pay half its value to the wife. With regard to the commercial property registered in the sole name of the husband, the wife proved that she had made a substantial contribution to its acquisition and it was held that she was entitled to a half share therein.

Omolo J A clarified that since the decision of the Court in *Kivuitu v Kivuitu*, although the law regarding the ownership of property registered in the joint names of spouses had been fairly

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67 Civil Appeal No. 101 of 1995, Citation: (1995) LLR 384 (CAK) Available at http://www.kenyalaw.org

68 The principles that relate to ascertainment of property rights between spouses on divorce. Islamic marriages are generally governed by an ante-nuptial contract which prescribes the property rights of the parties.
settled, the Court in that case, did not lay any general principle of equality applicable to all properties acquired during the subsistence of a marriage.

In Tabitha Wangechi Nderitu v Simon Nderitu Kariuki\textsuperscript{69}, the parties were married under Kikuyu customary law. The husband was in a charcoal selling business while the wife was a housewife; she later, with assistance from the husband, started a business selling secondhand clothes. It was not in dispute that she always gave the proceeds of sale to the husband who banked it in his account at the Kenya Commercial Bank. All the property acquired during the marriage were registered in the sole name of the husband. Upon dissolution of the marriage in 1992, the wife applied to the court under the MWPA for orders that all the property acquired during the subsistence of the marriage was jointly owned by her and her husband. Both the High Court and Court of Appeal held that the MWPA being a statute of general application, applied to customary law marriages in Kenya.

A full bench of the Court of Appeal (five judges) was constituted to hear the appeal in Peter Mburu Echaria v Priscilla Njeri Echaria\textsuperscript{70}. This was pursuant to a request by counsel for the Appellant, who was asking the court to depart from the decision in Kivuitu’s case. The request was in line with the practice of the court in all cases where the court is asked to depart from a previous decision.

The court held that the Kivuitu case dealt with property that was registered in the joint names of the spouses and was therefore correctly decided, both on facts and law as it did not lay any general principle of equal division of property. The Court of
Appeal was of the view that both Omolo Ag J A, as he then was, in the Kivuitu case and in subsequent cases, and Kwach J A, as he then was, in the Nderitu case, ‘though undoubtedly guided by a noble notion of justice to the wife were ahead of the Parliament when they said that the wife’s non-monetary contributions have to be taken into account and a value put on them.’

In the Echaria case, the court decided the entitlement of each spouse on the basis of their financial contribution and placed the wife’s financial contribution at KSh 72,000, which the court found amounted to a quarter share in the land in dispute; this translated to 30 acres of land. The court held that a wife claiming to be entitled to a property purchased during the subsistence of a marriage must prove a monetary contribution to its acquisition.

Property Rights of Women Under the Law of Succession

Right of Daughters to Inherit Family Land/Property on a Basis of Equality with Brothers

The courts have rendered progressive decisions on the rights of daughters to inherit family land/property. In the case of *Rono v Rono & Another*, the subject of the appeal was a piece of land comprising part of the estate of the deceased who died polygamous and intestate. The High Court, Nambuye J (as she then was), had ruled that although the daughters of the deceased were entitled

69 Civil Appeal No. 203 of 1997, eKLR Available at http://www.kenyalaw.org
70 Civil Appeal No. 75 of 2002, (2007), eKLR Available at http://www.kenyalaw.org
72 Civil Appeal No. 66 of 2002, Available at www.kenyalaw.org
to inherit the land of their father, they would each inherit a share that was less than that of their brothers because they would get married and also inherit from their husbands.

On appeal, the Court of Appeal upheld the provisions of section 38 of the LSA and the principle of non-discrimination on the basis of sex. The court set aside the distribution and found that the learned Judge had no factual basis for drawing a distinction between the sons on one side and the daughters on the other, and ruled that both the sons and daughters of the deceased were each entitled to an equal share (14.44 acres) in the land.

In the Matter of the Estate of Lerionka Ole Ntutu, the deceased, a member of the Maasai, a pastoral community in Kenya, died intestate. Maasai customs prohibit daughters of a deceased man from inheriting his land because it is expected that daughters will get married and inherit from their husband’s clan. The sons of the deceased relying on this custom were opposed to their sisters inheriting the land that comprised the estate of their deceased father.

The High Court, Rawal J (as she then was), held that a customary law which denies daughters the right to inherit their father’s land was repugnant to justice and morality and could not be applicable to the estate of the deceased. She made reference to human rights instruments that Kenya had ratified and ruled that the daughters of the deceased, together with their brothers, had an equal right to inherit their father’s land.

The right of married daughters to inherit the land of their deceased father was confirmed by Koome J (as she then was) In the
matter of the Estate of Mugo Wandia. The son of the deceased had urged the court to find that it was against Kikuyu customary law for a married daughter to inherit her father’s land. Confirming the right of daughters to inherit their fathers land on a basis of equality with their brothers, the court made reference to Kenya’s obligations at international and regional levels through human rights instruments the country had signed.

Right of Surviving Spouse to Inherit – Section 35(1) of the LSA

In Elizabeth Karua M’Rutere v Joshua M’Ikiungu Kuura & 2 others, the High Court confirmed the right of a surviving spouse (widow without sons) to inherit her deceased husband’s land. In this case, the deceased was survived by a widow and daughters but no sons. Meru customary law prohibits a widow without sons from inheriting the land of her dead husband. Male relatives of the deceased relied on this custom to claim that they were entitled to inherit the land in dispute. They argued that since she did not have any sons and since her daughters were married, she held the land in their favour as a trustee and sought a court order to that effect.

The court held that no such trust existed and the male relatives of the deceased were not entitled to inherit the land in dispute. The court applied section 35(1) of the LSA and awarded the widow a life interest in the land to devolve upon her daughters upon her death. The life interest would determine if she were to re-marry.

73 High Court of Kenya sitting at Nairobi in HC Succession Cause No. 1263 of 2000 available at www.kenyalaw.org
74 High Court of Kenya sitting at Nakuru in High Court Succ Cause No. 320 of 2007: Available at http://www.kenyalaw.org
75 Meru HC Succ Cause No. 48 of 1983, eKLR available at http://www.kenyalaw.org