PROPERTY AND LAND LAW IN KENYA

The objectives of the course is to equip one with the knowledge of the various categories of property rights in land and to know a bit about construction of forms and other documents used in the registration system.

There is a determination process that can put to rest disputes and the course gives a clear understanding of the basic administration mechanisms in relation to property rights.

Nature of creation of property rights

Process of transfer and transmission of property rights

Elements of the Registration System.

DEVELOPMENT & ADMINISTRATION OF PROPERTY RIGHTS IN LAND IN KENYA:

This is a fairly generalised topic that treats various topics as indicated. The intention is to get a legal profile of the existing framework within which issues relating to development and administration of property rights in land.

Land as property

Its centrality in the production process and that simply means that land remains the major means of production as compared to the other factors of production and in our situation an agricultural based economy, land assumes a greater significance because we all know that agriculture is the main stay of our economy even with the emphasis placed on the drive towards industrialisation.

Consequently all transactions that take place in relation to land are bound to be more complex than if you are dealing with other forms of property and hence the need to formulate an appropriate framework within which the obligations that arise are dealt with. The other characteristic is the scarcity of land, this is purely a function of the fact of our increasing population and the pressures that are exerted. Several implications emerge e.g. the fact of guaranteeing land or access thereto for the people becomes almost impossible. This means that land cannot just be treated like other species of property that one is conversant with. Elasticity is another factor. It is the case that one cannot increase supply of land from what one has, it does not expand and so its availability in terms of supply remains virtually constant. That complicates matters and hence the need for regulation.

Land bears what other forms of property cannot match, that is its capacity to accommodate various interests either simultaneously or and this is in reference to its ability at any given time or within a given progression take care of various interest that may be conferred to different people without there being any conflict whatsoever. for example where there is a grant of lease hold interest, a right goes out or certain benefits are conferred. It is of that category that can entertain simultaneous or successive interests.

The fact that land is attached to each other creates or gives rise to certain mutual rights and obligations, notable among such rights would be the right of support that my property

which is adjacent to yours expects and is entitled to, those rights and obligations arise and they are enforceable at the behest of whichever party has been robbed. That places a complex scenario and there is a legal framework for determining what obligations will ensue by reason of these obligations. The fact that it is indestructible makes it unique in a sense, although land is amenable to waste, it is virtually incapable of being destroyed.

There is the aspect relating to its ability to be conceptualised both in vertical and horizontal terms and the significance attached to this is understood when one considers the notion of property which means that contrary to traditional belief, it is possible to have within the same physical solum property that is suspended on top of 3rd or 2nd floor owned by different people that is made possible through the concept of sectional property unlike in the past where a title document could only issue from a given area this was the traditional notion. It is now possible to have several titles depending on how many flats are there in one piece of land and that makes it unique. The issue of mutual rights and interests and obligations has to be dealt with. There are certain things that have to be necessarily shared so there are rules that will regulate those arrangements. Facilities such as parkings, pools etc.

On account of the foregoing characteristics which are associated with land as a form of property, there are certain important issues which arise true principle issues relate to

1. The manner in which land can be commoditized so that it is placed at par with any other forms of property that can be availed in the market;
2. The issue as to who exercises control over it.

In the context of development and administration of property rights, the first aspect can be construed as relating purely to the choice between operating an unregistered land system on the one hand and that of operating a recorded or registered land system on the other. In a nutshell this boils down to no more than a comparative perspective of the merits and demerits of these two systems. One of the registered system and the other one of recorded system. The second aspect relating to control is related to the first one in the sense that it is the entity on whom such responsibility falls that will ultimately regulate all manner of transactions or activities which may be undertaken in relation to land. In terms of regulations one has to think about terms of levels that are created, the duties and obligations that arise and their enforcement so that their involvement leads as back to the noted quality of land as a form of property.

Registration of land offers the surest route towards the commoditisation of land and availing it easily and safely in the market place in the same way as one would expect in the other types of goods. What registration does is that it records interest in land so as to facilitate their ascertainment. As a process registration can be understood as involving recording of interests in land so as to facilitate and it makes effective any transactions in relation to such land by availing all material details on such property which can be easily accessed through carrying out of a search of the register. Once duly effected registration has the effect of

passing an interest in land in favour of the person so registered. Of course this then effectively makes registration as a process to serve two broad functions

1. AS a documentary manifestation of land as a commodity;
2. Avails a mechanism for providing vital information or a data bank for regarding the exact status of any registered property at any given time, this presupposes that the register will be updated at all time to reflect this position.

In comparison to the register system, there has to be something noted and under the system, title to property is very difficult to determine the process involved in determining who owns what. The process is tiresome, risky and expensive and fraught with uncertainties. It is the traditional practice of title investigation if one wants to appraise themselves of the title. That is deduced historically going back to what transactions may have transpired regarding that property regarding that picture the entire process is conducted without the benefit of registration and the purchaser has to investigate the unregistered title to ensure that there are no adverse claims to such property which preceeds the transaction, which is the decision to buy the property which accordingly means that the purchaser bears full responsibility for whatever is the outcome. The duty of caring that an eventuality such as any claims with regards to the same property do not spring after he had ostensibly acquired the property. That has its risks as well, there are a number of disadvantages which are considered as transferring to advantages that the registered system carries with it. For property bias, it is the trend that this is almost being replaced by a compulsory requirement in most jurisdictions that the registration of title to land be the rule rather than the exception. This system has been there a long time and it is not until the early 1920's that they started phasing it out. It is still common in areas that have not been declared adjudication regions.

ADVANTAGES OF REGISTRATION

The registered land system give title assurance so that in terms in administering property rights we have that title assurance that bestows confidence on any person dealing with the property in the sense that the owner will have been portrayed as having a good title to pass with regard to the property. Such assurance is achieved through the process of maintenance of organised or systematic state recording and issuance of title document system to each successive owner of the property in question, which then is reflected in the register in a chronological order, it is easy to learn the history of the property if one wishes. It also establishes a system of public data bank of some sort which contains records of all property titles such data can be accessed easily and is available to almost the entire public through conducting a search so that any interested persons can easily take advantage of that.

The other advantage is that it makes available a property map plan of scientific accuracy which is based on survey work that proceeds the process of adjudication and registration. Such a map is revised and updated regularly so as to offer a clear picture in terms of identifying the property so one cannot be easily fooled by fraudsters.

In certain cases this system also serves to preserves in a secure place important documents of titles relating to various properties which would otherwise be completely lost or unsafe if left

in private hands. It has also been suggested that the system serves as a constructive public notice i.e. the records that the system serve as a notice to all and sundry as to the true status of the registered property. By reason of that fact, it has been suggested further that it protects potential purchasers for value against other unregistered adverse interests which may have been acquired prior to the purchasing of the property in question since such unregistered interested are not reflected anywhere in the register and are therefore deemed to be unknown. By protecting the purchasers, they are effectively cushioned against uncertainties that characterise the unrecorded system. It has also been suggested that given the current policy towards the registration system, it helps in an important way towards abolishing the earlier inconclusive and costly title investigation system which characterises the unregistered system. Instead it seeks to substitute one that is final and absolutely authoritative which can be carried out at the lands registry using the assistance of experts incharge of the registry. Again the fact that it leads to the creation of a register means that all interests that affect that title be they mortgages, charges or whatever burdens that the title is subject to will easily be disclosed so that one makes an informed choice so that short of overriding interests that are never reflected on the register, everything else that affects that title would be evident and made available to the interested parties. The process also leads to the proprietor of the particular property an official title document. That official document bears details of the entries to be found in the register but most importantly it is a document that can be used by the proprietor in a number of transactions because it is valid and legitimate and the business practices w3hether it is seeking financial or offering security in other aspects, it makes it possible for the owner to rely on such official documentation.
Register system carries the provision of short and complicated forms that can be used in complex deals like when you want to take a mortgage, charge etc one need not refer to an expert as it simplifies some of these activities. The fact that the intention is to create a public record means that there is a mechanism through which the public can access.

THE DIFFERENT LEGISLATIVE REGIMES OF LAND REGISTRATION

(REPEALED ACTS)

In this country, one can talk of at least five different statutory legislation regimes which operate side by side for good measure you can throw in a sixth one which is rather fringe as it depends on one of the other five.

THE DOCUMENTS ACT

This particular piece of legislation was enacted in 1901 although its history dates way back to 1896 when the colonial administration then in place felt the need for a simple registration system to be put in place for this country. Registration of documents systems was recommended in Kenya based on experiences that the British had had with it in Zanzibar. What the system creates is a simple registration of deeds system which are reflected in the register of documents so created. Under the system, any document can in fact be registered but especially those relating to transactions in land such as government grants of land but otherwise there is no prohibition against other documents not touching on land not being registered under it. The Act provides for both an optional and obligatory registration

regime. For instance under Section 4 thereof there is a requirement that all documents conferring or purporting to confer, declare, limit or extinguish any right, title or interest in land must be registered. Such registration must occur within one month after execution failing which the same cannot be called in evidence or adduced in court without first seeking and obtaining a leave of court to do so. similarly it is a requirement under4 the Act that documents of a testamentary nature must also be registered under the Act. Optional registration is addressed under Section 5 which provides for a non compulsory registration so that it remains to be done at the instance of the person seeking to register such documents. The registrar is actually granted a discretion in whether or not to accept any such document which though not compulsory or registerable may be presented to him for purposes of registration . All that the registrar will have to do will be to set out his reasons in writing and furnish the presenter with the same. Examples of documents whose registration are not compulsory but which may be registered and the insistence of the owner include Wills, Power of Attorney, Building Plans and in exercise of this discretion under the Act the registrar of documents will not accept any documents for registration if the document in question is not proper or where the requisite registration fee or stamp duty where applicable have not been paid. The most significant feature of this registration feature is the fact that the records kept thereunder serves merely to show that the transaction in question took place but it does not say anything about the validity or legitimacy of the transaction itself.

LAND TITLES ACT

The background to this particular registration regime lies in the doubts and the uncertainties that shrouded the question of individual property ownership within the Coastal Region so individual titles to land at the coast was in effect what led to its enactment. Under purely administrative arrangements between the Sultanate of Zanzibar and the colonial authorities, IBEA part of the sultans dominion was ceded to the British under a concession agreement and this was the so called 10 mile coastal strip. The terms of that arrangement bound the British to administer the area but subject to the rights of the inhabitants which included property rights such as the inhabitants may be having. The coastal region was settled by those inhabitants mixture of Arabs and Africans much earlier than the coming of the British so their property preceded the advent of imperialism. The registration regime created under this act was meant to give recognition to those long established claims of ownership and adjudicate them so that claimants would get recognition under the Act. Before this arrangement was put in place there had been a lot of difficulties experienced by property owners and uncertainties about these titles and they worked out adversely in terms of investments it hindered investments and in terms of development it hindered development as people could not deal with their properties in the market. This is what made it necessary for the Act to be introduced in 1908. it was introduced with a view to creating a registration system that would be applicable only to the coastal region and this was particular more so given that the hinterland was adequately catered for by the series of the Crown Land Ordinances beginning with the one of 1902. these ordinances were meant to facilitate white settlement within the interior and did not do much for land owners at the coast. The

system of registration under this Act was borrowed from the 1907 Act NO. 3 of Ceylon present day Sri Lanka where it had proved effective. It provided for a registration system in favour of individual title claimants within the coastal region provided that they could prove their claims to the properties they owned and so an adjudication process became necessary and one was created and a compulsory registration system was put in place. Property owners were obligated to present their claims and so they were supposed to lodge their claims to the land registration court that was created under the Act. This court was presided over by a recorder of titles and a deputy who were expected to deal with such claims as may be lodged. Claimants were required to prove furnish evidence of ownership upon successfully proving such claims they were issued with various documents of title depending on the nature of their ownership or certificates of ownership were issued in respect of freehold property so any successful claimant who could prove the nature of their holding would obtain a certificate of ownership or certificate of mortgages would be issued in respect of mortgage of immoveable property whereas a certificate of interest would issue to those who could demonstrate the existence of other rights of whatever kind in the land subject matter. What it set in motion was a process of not conferring as it were any rights or interests but merely ascertaining and endorsing the same through extending recognition to such rights through of issuance of various documents of title. Registration of such interest in the register created under the Act would in effect bring to an end any rival claims that could evolve over such land. Title documents would issue with a short description of a document proving such ownership being noted in the register thereafter all subsequent documents or transactions relating to the same land would consecutively be entered in the register in the order in which they were presented and the effect of creating the register with all the entries was that it would be conclusive as to the question of ownership so that a certificate of title would make the owner of the holder thereof have a title that was good against the whole world. Similarly certificate of ownership would make the holder thereof as the undisputed owner of all the property, trees buildings standing on the land as at the date of that certificate unless or a memorandum noting or having entries to the contrary was produced to contradict that position. Once the adjudication process was complete the resulting position was that all unclaimed land or such land as was not subjected to successful claims would be designated Crown Land and became freehold property which could be dealt with by the government or the Crown in the normal manner including being subject to the exercise of powers of alienation or disposition.

GOVERNMENT LANDS ACT

This was an adaptation of the previous Crown Lands Ordinance, and in effect replaced the crown ordinance of 1915 that is when it was promulgated. Its objective was to provide for among other things deed plans and achieve better administration and registration of government plans in land and of govt dealings thereof. All grants of govt land and transactions relating thereto were required to be registered under the Act. The other objective that this particular legislation sought to achieve was that of offering a remedy to all instances of defects patent on earlier registration systems especially that offered by the RTA.

The model that the GLA adopts is similar to the registration machinery that is employed by the Land Titles Act.
It is a requirement under the Act that all future grants of govt land have to be registered in line with the provisions made under the Act. Similarly all past documents relating to govt land previously registered under the RDA have to be re-registered under the provisions of the Act so as to b ring them under the ambit of the govt lands Act as provided for in the Act of course this is consistent with the objectives set out under the Act to cure registration defects under the earlier registration statutes especially the RDA. It is also the intention under the system to introduce a fairly advanced system of registration of deed plans and procedures touching on a wide range of activities or transactions relating to land such as the leasing out regulating and other disposal of govt land. It also accommodates other dealings in relation to such lands such as the need for more scientific plan through accurate surveys so that one can have in effect a land grade of govt land reflected under this particular registration system. The overall effect that this introduction had was that of ushering in an English type of conveyancing which is dependent more on registration rather than an unregistered system especially when it comes to govt grants and other land dealings in relation thereto.

REGISTRATION OF TITLES ACT

This is a 1920 Act introduced with the purpose of facilitating the process of transfer of land through a registration of transfer system and essentially its purpose was to introduce in this country a title registration system based on the Torrens principles. This is a system that was introduced in Australia but which worked there so well that it achieved widespread acceptance in other jurisdictions. Our own Act is modelled on the 1897 Registration of Titles Act of the Federal Malay States present day Malaysia as well as on the 1890 Transfer of Lands Act of the Australian State of Victoria and it gets aspects of both legislation. In terms of features the main point of departure implicit on this particular Act is opposed ot the earlier ones and especially the GLA is that whereas the earlier ones before it merely provide for a recording of documents system without conferring any additional benefits, the registration arrangement under this Act confers on the land owner what is expressly identified as an indefeasible title which is state guaranteed.

The other Acts or earlier Acts as we have seen in the case of the RDA provide for a registration of a documents which envisages the occurrences but is silence on the issue of validity leave alone the indefeasibility of such a title. In the case of the LTA, we have noted that it does not confer anything it only recognises and records a fact that is borne out on the ground but in the case of this particular registration the intention is not only to issue grants and note them through the recording system but to guarantee a title as incapable of being defeated once duly granted. All future grants of govt land and certificates of ownership of land within the coast be registered under it , remember Govt land is subject matter of the GLA whereas the arrangement of the Coast involves issuances of certificates to recognise the situation of land ownership that preceded any registration regime. If there is a requirement

in subsequent Act, in effect the legislature is saying that we do not wish to repeal what was done under the earlier acts such as the GLA but we want you to redo it and it makes it a conversion process to bring the land at the coast under the ambit of GLA and it is from here that we head closer to getting all the registration processes under one Act.
Any land owner who has had his title registered under the GLA is required under the Act to apply to the registrar to have the same registered under the provisions of the Act and this comes with an advantage as it enables the landowners to enjoy the benefits of state guarantees of the resulting titles. It is not strictly a requirement that conversion be compulsory but the projection is that with certain advantages floated under this Act, eventually we would embark on the route whereby registration under all previous Acts would be phased out to enable us achieve the ultimate goal of having in future all land in the country brought under the umbrella of a single registration statute. The desire to stop that multiplicity and work towards a single registration statute began with this legislation. The truth is that it never advanced that course as far as expected but it was a recognition that there was need for a unified rather than multiple registration system in this country.
One who wishes to take advantage of the provisions of the Act will present the original title for endorsement at the same time submit subsequent documents relating to the title so that what in effect happens one abandons registration one opts out of the earlier registration that they fell within and from that point on they become part of the this registration without losing sight of the fact of where the title emanated from.

REGISTRERED LAND ACT

The quest for a unified registration system of course can be argued to have started in earnest with the enactment of this particular statute. This was not the only objective that it had in fact its introduction is closely connected with the African Land question in the face of the existence of what amounted to an elitist system of title registration under the earlier Acts which appeared to cater only for the interests of white settlers and coastal Arabs to some extent with regard to private claims to land. Throughout this period it is instructive to note that no thought and no provision was made for registration of title to land owned by indigenous people or land falling within the so called native areas or special reserves. It is not until the run up to independence that serious thought was given to introducing a number of initiatives that would address this particular omission i.e. the failure to bring native occupied areas under the ambit of registration. Prior to its introduction there was special areas act of 1960 which started of the process which preceded the enactment of THE RLA Cap 300.

It is with the coming of independence and the struggle that preceded this that alerted the indigenous people to the fact that they could agitate for rights after serving in the 2nd world war and the demand for independence led to the speedier process of addressing the African Land Question which came through recognising that they needed to guarantee titles to indigenous people in regard to the land that they occupied. With a wide range of reforms in mind, the grievances by indigenous people regarding land or the shortcomings attendant to

that could be attended to through the an ambitious registration system that was the RLA which sought to introduce for the first time registration in the native areas. The Act also sought to provide a conversion process whereby titles that had issued under previous registrations would be re-issued at whatever appropriate time under the provisions of the RLA in more or less the same issues that RTA had sought but achieved very little of. It also sought to achieve individualisation of title to customary law since in any case the area to which it first applied was with regard to indigenous occupied areas where communal mode of ownership was the rule rather than the exception.

It sought to provide not just a registration system per se but also a code of substantive law which could regulate all matters relating to land ownership as provided for under the Act as well as simplifying the process of conveyancing such land so that unlike other registration which were merely a registration code, here was a move away from that so that substantive law as well as a code for conveyancing was found in the same place. For the other registration regimes the substantive law is to be found in the Indian Transfer of Act.
Native lands were supposed to be registered and the constitutional arrangement was that the title was vested in the local authorities within whose jurisdictions those lands fell. The land communally occupied by the native which could be other the Act could be declared adjudication regions and thereafter claimants would prove their claim or title to that land and where consolidation was desirable it would be done before the land finally registered. The land consolidated and adjudicated would then be registered to individuals and in any event not to more than 5 persons and absolute ownership is created under the Act.

In the case of land registered under the previous statutes, if it fell under the trust lands and fell due for renewal, the renewal would be exclusively done under the registration system created by the RLA and those that had not expired would still be deemed valid until such a time that they fell due for renewal then the conditions of the RLA would apply. Through this arrangement the conversion process ensured that through a gradual process,

The Act introduces the highly advanced system of indexing of property showing all the registered land within a particular area and all the information including size, title numbers, any claims, encumbrances or burdens which may affect such land. The RLA registered is regarded as conclusively and final authority on the issue of ownership of land infact first registration is expressly provided for as being unimpeachable, it cannot be impugned on any grounds whatsoever. Title Deeds are issued as prove of absolute ownership under the Act and this is for the land in the country side. In the case of township properties certificate of lease issues for these properties. Both are evidence of ownership. It has been doubted given the wide scope of objectives or goals that the Act sought to accomplish, whether these goals or objectives are predicated on sound principles, i.e. the goal of guaranteeing sanctity of title regardless of how it is procured. The objective of having a unified registration system without providing for a first tract method of achieving that and leaving it to the events contemplated under the earlier registration Acts to play to the full before it is evoked. The

very element of individualising title of land that has been corporately owned, the wisdom of doing that and all these have raised disaffection in how the statute with its provisions has worked out so far, whether to discredit it and call for a radical overhaul is an issue that occupies the minds of most people today. As of now we have it alongside others and until al properties including those that are valid for 999 years, then we have to wait for much longer before the conversion process sees the light of day and that is why some people have rubbished the whole process and are advocating for an overhaul.

SECTIONAL PROPERTIES ACT

The Sessional Properties Act NO. 21 of 1987 this is not a distinct and independent registration system because it is clear that any registration carried out under this regime should be deemed to be carried out under an RLA registration. It introduces a vertical dimension to the issue of property issue. It makes it possible for an owner to own a property on a floor without owning the ground on which the property stands. The old notion of property is one that is novel in the sense of that a vertical dimension rather than the traditional notion of owning the physical ground is

Regardless of the fact that it does not own the ground on which such a unit stands. Classic example is like a scenario of a block of flats i.e. Delamare Flats are a good case in point. You can have a highrise building with many floors and each floor has separate units that are distinct from each other and one can own a unit on any floor without having to trace the owner from the owner on the ground floor. You can own the property suspended up in the air. There are mutual rights and obligations that arise under such an arrangement because if it is a highrise building it will have common stairway, parking, garden pool, runway and therefore rights and obligations have to be carefully balanced so that everyone can share equally in the common amenities. It is the case that such proprietors would enjoy their own units subject to the rights of all others.

The requirement under the Act is that if there are burdens like costs to be shared out equitably amongst the various proprietors. The requirement is that for these sectional properties notion to apply to any property it can only be effective where the residual term is not less than 35 years since Sectional Properties appeals only in major towns where scarcity of land is experience. The residual term of the grant should not be less than 45 years and any property that is affected by the provisions of the Act are deemed to be registration under the RLA. The fact that we have mutual rights and obligations on which the enjoyment of the sectional property unit depends means that there are certain limitations that will have to be imposed as a matter of necessity if the concept is to work. Mutual rights and obligations precludes owners of the units from behaving unfairly as all owners expect the right of support. The idea was to ascertain the question of ownership of such land as these particular areas had not been subjected to a registration regime and the idea was to bring them under a registration regime.

INTERESTS OVER LAND

ENCUMBRANCES:

These are rights enjoyed in the land of another person other than the one entitled to enjoy such rights. The exercise of ones rights over his land,

1. Mortgages:
2. Charges;

These are a creation of statutes and have the effect of subjecting the property so burdened to some limitations which have the potential to defeat the registered proprietor rights of ownership with regard to such property. In our case, mortgages are a creation under the Indian Transfer of Property Act whereas Charges apply under the RLA exclusively. The ITPA and related statutes that draw from it is what we associate with mortgages whereas charges apply in the case of RLA. Both serve the same purpose and are in the nature of encumbrances that play a significant role in the capitalist mode of production. They feature prominently in borrowing transactions and it has been suggested that they perform certain functions in a capitalist economy which include allowing people in the periphery of the production process to be integrated into such a process.

It has also been suggested that it is one way through which those desirous of owning homes can find an appropriate institution to enable them realise such ambitions so as an institutions it facilitates that kind of desire. It serves as a way of reallocating property rights in the society in the sense that probably in the case of a defaulting party where a loan has been advanced, the property becomes available to be sold in the common market as well as guaranteeing that the person advancing the loan does not lose out but it makes available the money to acquire rights over property subject of sale.

The circumstances under which mortgages and charges can be said to be encumbrances is what entails. Anybody desirous of borrowing money has to offer security and land is one of the recognised means of offering security and you have the property mortgaged or charged by drawing a special instrument that conforms with the respective requirements of the law and you have it registered against the property you put up as security. Provided that you benefit from the financial accommodation you must perform all the conditions you sign up to and there are duties placed on the financier but the fact remains that your interest in the property has not been done away with and you retain a bit of that. When the debt is paid you are entitled to a clean title and you are discharged from liability. As long as you have not paid, there are activities that one cannot engage in because of the burdens that the property suffers from under that arrangement.

CREATION OF MORTGAGES & CHARGES

There are certain general principals that apply and they are essentially statutory requirements.

1. A Charge/Mortgage must be evidenced in writing under Cap 23 and any purported instrument that is intended to pass as charge/mortgage is ineffective unless it is in written form;
2. Mortgage/Charge must be in a prescribed form or instruments provided for under various legislations which allow for creation and they must be registered under section 59 of ITPA and 65 of RLA
3. Instrument must contain acknowledgment signed by borrower to the effect that he understands the effect of the transaction in particular the fact that upon default in repayment, the property will be subject to sale as applied under S. 74 of RLA.
4. where the repayment date is not fixed within the instrument creating the particular encumbrance, it is the case that the date arising in the case of a mortgage created under ITPA shall be payable within 6 months after receipt of demand notice and in the case of charge created under RLA within 3 months after receipt of demand notice.

The obligations of the parties are standard and the lender is confined to having the security and realising it in case of default or reconveying the property back to borrower if security offered has been dealt with. The bulk of obligations are with the borrower if the transaction is to work along the rules created. The borrower must honour his obligations which may have arisen prior to the charge. The borrower must also pay all rates and taxes because the question of ownership remains with him and he must ensure that the property is in good repairable condition a requirement meant to safeguard the lender's interest so that it does not lose value. Property value is central to the institution since for the statutory powers of sale bank on the property being the same or better than when the transaction was done.

MORTGAGES & CHARGES

Mortgages and Charges are borrowing commercial transactions whereas mortgages apply to such transactions created under the ITPA charges are a feature of similar transactions carried out pursuant to the provisions of the RLA to the extent that the obligations and duties created restrict the powers of the registered proprietor from dealing freely with his property. Transactions in mortgages and charges amount to burdens on land or on property offered as security and in especially a capitalist economy they have assumed great significance as a way of accessing credit facilities from financial institutions or with the help each property owner may develop their properties using their titles as security in consideration for the loan or credit advanced.

The transactions involved require that property owners desirous of accessing funds approach financial institutions who are willing to accommodate them financially to a certain level agreeable on the footing of security to be offered by property owners in the form of the titles that they hold.

The idea of mortgages is said to have originated from ancient Roman Law and practice although it has also been accepted that Mohammedan Law as well as common law has traits

which point to these forms of transactions. Under ancient Roman Law two forms of Mortgage transactions can be identified the first aspect of the mortgage institution to develop under this law was the form that was known as the *Fiducia* as a form of mortgage this involved a fiduciary relationship between a lender and a borrower whereby the property in question was given to the lender extending the facility in return for a loan and it was a condition under this arrangement that upon default such property would be forfeited to the lender regardless of the value comprised in it.
The second aspect of the mortgage institution under Roman law was identified as the *Pigmus* which entailed a transfer of possession of the property pledged as security but without the element of forfeiture as was the case in the first example. Upon default the property in question was merely sold and not forfeited so that there was a possibility of the borrower getting back something that in the event that the property fetched something more than was owed.

There was a third realm distinct from the first two with different rules being applicable though it is not very clear how it worked but the *Hypotheca* involved a pledge without the need for the property being delivered instead what the creditor had was a kind of power of sale which could be exercised in the event of there being a default. When such a power was invoked the duty to render accounts for the proceeds from such a sale arose and it is a much stricter requirement than the practice involved in the Pigmus.

Under Mohamedan Law the starting point is that the idea of charging interest or having any gain over and above what has been extended as the principal amount is offensive to the Islamic religion. Mohamedan law does not accommodate the element of charging interest. Their equivalent of mortgage institutions is what they call the *Bye-Bilwafa* and this is what comes close to a mortgage institution and the borrower pledges his property to the lender for the money for sums advanced with the promise of repayment for the principal sum that is advanced. The lender has a right to take any benefits such as rents and profits that accrue from such a property until such a time that the amount advanced will have been fully recovered even though there is no duty to render accounts the fact that this is a religious arrangement and is premised on religious doctrine, the expectation is that utmost good faith is expected on the part of the lender to make this system work so that he will take no more than his entitlement after which he will turn the property over to the owner.

At Common Law, the institution of mortgage took the form of the pledge of a property to the lender coupled with the transfer of possession rather than title. Originally the mortgage institution at common law manifested itself by way of pledge of a property to the lender but not the title thereto. This eventually developed into what is known as the English mortgage which is a form of conveyance of the property in question with the understanding that the mortgagee will reconvey the property in question to the mortgagor upon payment of the principal sum and any interest that may have accrued.

Equity of Redemption gave the mortgagor a general right to redeem his property on or before the actual date of redemption whereas the equitable right regime gave the borrower what was a form of grace period which extended long past the actual contractual date of redemption for the borrower enjoyed a right to redeem the property even long after the expiry of the agreed date of redemption. A borrower did not have to live in mortal fear of losing his property merely because he had failed to meet the deadline as set in the contractual date of redemption.

THE LAW OF MORTGAGES AND CHARGES IN KENYA

A number of statutes could be applicable in this regarding i.e. the RLA and the ITPA, the Banking Act, Central Bank of Kenya Act, GLA and the RTA are all relevant. They have specific provisions which apply in the event of there being such transactions between the parties i.e. under the Central Bank of Kenya Act there is a requirement that lending institutions must take security in the course of advancing loans to borrowers. The banking Act Cap 488 initially appeared not to accommodate this particular requirement of insisting of security before any loans are advanced and prior to an amendment where Section 2 provided that the lending was to be done at the risk of individual banks but this was altered by Act NO. 9 of 1999 which made the security mandatory and the change came after traumatising experiences when a number of indigenous banks went under or collapsed without having anything to turn to or to enable them realise their security so that particular loophole has since been sealed.

The statutory definition of mortgages and charges are found in the ITPA and the RLA Section 58 of ITPA defines mortgage as a transfer of security in immovable property for the purpose of securing payment of money advanced by way of a loan in existing of a future date or the performance of an engagement which may give rise to a pecuniary liability.
Charges are defined in S. 3 of RLA as an interest in land securing payment of money or moneys worth or the fulfilment of any condition and includes a sub charged and the instrument creating a charge.
Section 65(4) of the RLA is clear that a charge shall not operate as a transfer but shall have effect as security only and that is a fundamental distinction which the RLA tries to draw between the character of a charge vis-à-vis a character of a mortgage
The principle difference is that in a mortgage the title to the property is the security

Under section 58 of the ITPA there are four classes of legal mortgages and Section 58 (5) lists those classes as follows

1. Simple Mortgages – these can be created by delivery of possession of the property which is the security and further to that the mortgagor binds himself to personally pay the mortgage money and agrees that the mortgage property will be sold in the event of his default so that the proceeds realised therefrom can be applied towards discharging the mortgage debt. It is also possible to create what is known as the USUFRUCTUARY and this requires that you deliver your possession to the

mortgagee further to that such a mortgagee should be authorised to retain the property in question until such time that the mortgage debt will have been fully repaid. The mortgagee has rights to receive benefits accruing from that property and apply such benefits towards repaying of the mortgage debt.

2. There is also the benefit of creating Mortgage by Conditional sale and here the mortgagor ostensibly sells the mortgaged property to the mortgagee subject to the condition that the sale will become absolute as the specified date in the even that the mortgagor defaults in his payments. In the alternative upon the remapayment of the mortgage debt the ostensible sale becomes void at which point the mortgagee is obligated to transfer the property back to the mortgagor.

The English Mortgage – here the mortgator binds himself to repay the mortgage money on a certain date and actually transfers the mortgage property absolutely to the mortgagee subject to a proviso that in the event of the mortgagor repaying fully the debt there will be a retransfer of the property back to him. It is imperative to understand the points of departure between those classes of mortgages under Section 58.

It is also possible to talk of Equitable Mortgages – these are creatures of equity rather than statutes especially in the UK where much of our lawa comes from. In Kenya we have statutory provisions for creation of mortgages i.e. the provision of the equitable mortgages act Cap 291, we have something tin the GLA Section 102 which suggests that we can create equitable mortgages by deposists of title deeds with the mortgagee and the Registation of a memorandum of such a deposit to formalise such transactions.

Sec 98 of the ITPA provides for a creation of some form of mortgages which are not adverted to under Section 58(5) because that provision provides for creation of a mortgage based on the contractual understanding of the parties which then defines the rights and obligations under that arrangement. In other words it gives the party a free hand in shaping the sort of arrangement that they want to have when drawing the mortgage instruments and has been refered to as anomalous mortgage to the extent that they do not have any attributes that are similar to what is offered under S 58 of that Act. Section 59 requires registration of mortgages securing a sum in excees of KShs. 200 those must be effected by wayt of a registered instruments and must be duly executed signed by the mortgagor and attested by at least 2 witnesses. where the amount is not in excess of 200 the transaction may be effected by delivery of the property concerned and the option remains open to the parties.

Section 100(a) of the ITPA provides that such instruments if duly registered confers onto the parties the powers and remedies that are available to them under the Act. There is an attempt to relate such transactions with charge transactions reached under the RTA and the relevant provisions which talk asbout powers and remedities under the GLA. There is an attempt to equate parties concluding transactions under the ITPA with those

that become chargees under a charge created pursuant to S 46 of the RTA. There are certain essentials of a charge that is alluded to under Section 100 of the ITPA, there must be under S 46 of RTA a chargor, a disclosure of the nature of the property being charged whether it is freehold or leasehold a statement regarding the land reference number and a description, there must be an indication of the amount advanced, the lender must be named and described, there must be an acknowledgment of the receipts of the loans advanced, a covenant for repayment of the advanced loans and the rate of the interests to b e paid must be specified any special arrangements agreed by the parties must be disclosed and there must be a charging clause which binds the borrower to repay the sums involved plus interests. The charging clause should take the form of e.g. for the better securing of the said facility or loan, I so and so charge my property etc.

THE NEW LAND ACTS

Pursuant to the Constitution of Kenya, three Acts of Parliament have been enacted and came into force on 2nd May, 2012:

- Land Act, 2012
- Land Registration Act, 2012
- National Land Commission Act, 2012

THE REPEALED ACTS The following Acts have been repealed:

- The Indian Transfer of Property Act, 1882
- The Government Lands Act
- The Registration of Titles Act
- The Land Titles Act
- The Registered Land Act
- The Wayleaves Act; and
- The Land Acquisition Act

HIGHLIGHTS HIGHLIGHTS OF THE CHANGES BROUGHT BY THE NEW LAND ACTS:

- To have one registration system and one Land Registry - Note: this has not yet been implemented.
- Titles to be called certificates of lease or certificates of title - Note: this has not yet been implemented.
- 3 categories of land have been created – public land, community land and private land
- New laws have been introduced dealing with ownership of land by non-Kenyan citizens.
- Consent of spouse to certain transactions is a key change.
- Land and Environment Court
- Several changes have been brought to laws on leases and the laws on charges.
- Format of documents have changed – Note: no forms have been prescribed as yet.
- National Land Commission – Note: the Commission is not yet constituted. Changes have been put in place but a lot remains to be done in terms of implementation thereby causing uncertainty.

CLASSIFICATION OF LAND Under the new laws, land has been classified into
(a) Public Land; (b) Private Land; and (c) Community Land.

- Public land is defined pursuant to Article 62 of the Constitution and includes unalienated land, land occupied by a State organ, land transferred to the State, land to which no heir can be identified, minerals, forests, reserves, national parks, water catchment areas, sea, lakes, rivers, land between high water mark and low water mark, any land not classified as private ©Anjarwalla & Khanna, 2012 LAND LAWS OF KENYA I October 2012 I Page 4 land or community land. The National Land Commission is responsible for administration of public land.
- Community land is defined pursuant to Article 63 of the Constitution and includes land lawfully registered in the name of group representatives, land lawfully transferred to a specific community and any land declared to be community land by an Act of Parliament. Community land shall be managed in accordance with the law enacted pursuant to the Constitution. However, the law has not yet been enacted and the Constitution provides for a 5 year period within which legislation has to be enacted.
- Private land includes registered land held by any person under freehold tenure, land held by any person under leasehold tenure and any other land declared private land under any Act of Parliament. Land can be converted from one category to another.

OWNERSHIP OF LAND BY NON-KENYAN CITIZENS

A significant change under the new laws is that:

- freehold land cannot be owned by a non-Kenyan citizen; and
- a leasehold interest of over 99 years cannot be held by a non-Kenyan citizen.

Therefore any freehold land owned by a non-Kenyan citizen is deemed to have been converted into a 99 year leasehold interest commencing from 27/8/2010 and any leasehold interest with an unexpired term of over 99 years is deemed to be converted into a 99 year leasehold interest commencing from 27/8/2010. As yet there is no procedure in place for conversion of freehold title to leasehold so, for example, if prior to the coming into effect of the new Constitution a non-Kenyan citizen owned freehold land and you conduct a land registry search today the result will still show the non-Kenyan citizen as owning the land on freehold tenure.

The Constitution states that a body corporate/company is deemed to be a Kenyan citizen only if it is 100% owned by Kenyan citizens. Therefore a company with even one shareholder who is a non Kenyan citizen would only be entitled to own a leasehold interest of 99 years or less. It is unclear whether a freehold title or title with an unexpired term of over 99 years that is owned jointly by a Kenyan citizen and a non-Kenyan citizen would be converted to a lease of 99 years or whether the tenure would remain intact.

REVERSION OF TITLE – EXPIRY OF LEASEHOLD TERM Section 13(1) of the Land Act provides: "Where any land reverts to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenyan citizen and that the land is not required by the national or the county government for public

purposes." (emphasis ours). No such right is available for a non-Kenyan citizen; non-Kenyan citizens need to check their titles and be aware of the above change. On expiry or termination of a leasehold term held by a nonKenyan citizen, the land will vest in the national or county government pursuant to section 12(6) of the Land Act. The land then can be allocated in accordance with criteria prescribed by the National Land Commission.

CONTRACTS OVER LAND

A contract for disposition of an interest in land has to be in writing, signed by all parties and witnessed. Otherwise, neither party can bring a suit in relation to the contract. However, this does not apply to a contract made in course of public auction. It is not recommended to give early possession on a sale of property as, if the purchaser is in breach, then an elaborate procedure needs to be followed to regain possession which involves service of a notice detailing the breach, applying to court to seek an order for possession and defending any claim brought by the purchaser for relief against rescission of the contract.

PREJUDICIAL DISPOSITIONS

Laws relating to prejudicial dispositions have been introduced under the Land Registration Act. If land is disposed by a person who is unable to pay his creditors in an attempt to delay or defeat the exercise by his creditors of any right to recourse to the land or any interest therein, the creditor may apply to court to set aside the prejudicial disposition. For example, John owns a plot of land and is in debt and is worried his creditor may obtain a court order to attach his land to recover the debt, John may decide to transfer his land to a good friend or grant a long lease of his land to a relative so as to prevent the creditor from attaching his land. If the creditor can prove that John's intention was to defeat his claim to John's property (for example, by proving that John sold his plot at an undervalue price) then the transfer may be set aside. A transfer would not be set aside against a bona fide purchaser for valuable consideration who has no knowledge of the creditor's claim. There is no time frame within which a prejudicial disposition may be set aside. Banks would need to be careful and include as part of their due diligence procedure a check that the registered owner proposing to charge his land to the bank did not acquire the land under a circumstance which could fall under a prejudicial disposition.

RIGHTS OF SPOUSE TO LAND Under the Land Registration Act, a spouse will acquire an interest in his/her spouse's land if the spouse contributes by labour or other means to the productivity, upkeep and improvement of the land. The spouse's interest shall be recognized as if it is registered against the title to the land. Under the Land Registration Act, marriage includes a civil, customary or religious marriage.

CONSENT OF SPOUSE REQUIRED FOR DISPOSITION OF LAND Where a spouse who holds land or a dwelling house in his/her name individually and undertakes a sale of that land or dwelling house, th

KEY CHANGES IN THE LAWS OF LEASES

- Long-term leases Section 54(5) of Land Registration Act provides that the Registrar shall register long-term leases and issue certificates of lease over apartments, flats, maisonettes,

townhouses or offices having the effect of conferring ownership, if the property is properly geo-referenced and approved by the statutory body responsible for the survey of land. Geo-referencing is defined as "the reference of an object using a specific location either on, above or below the earth's surface". In lay terms this means a survey of a property and the preparation of a survey plan.
Director of Surveys shall put in place the process of geo-referencing.
• Unlawful eviction A new provision dealing with unlawful eviction is part of the new land laws. A tenant who is evicted contrary to the terms of his lease is immediately relieved of the obligation to pay rent or other monies due under the lease or from performance of any covenants of the lease. A tenant is considered as having been evicted if on the commencement of the lease the tenant is unable to obtain possession of the land or buildings or part thereof as a result of any action or non action of the landlord contrary to the express or implied terms of the lease. This would arise, for example, when a landlord has entered into a lease with a tenant in respect of premises to be comprised within a new development but at the time of the commencement date expressed in the lease the development is not ready such that the tenant cannot obtain possession of the premises at the commencement date expressed in the lease. A tenant who is aggrieved as a result of unlawful eviction may commence an action against the landlord for remedies. Landlords of new developments need to be careful of this provision.

KEY CHANGES IN THE LAWS RELATING TO CHARGES

The Land Act applies to all charges including those created before the commencement of the Land Act.
• Types of Charges There are currently only two types of charges that are now capable of being created under the new land regime. These are: o Informal charges The New Laws now recognize a form of charge known as an informal charge that can be created quite simply. The charge can take 2 forms:
♣ a written and witnessed undertaking, the clear intention of which is to charge the chargor's land, for example, a letter of offer requiring a charge to be created which is consented to by the borrower may now be construed to be an informal charge; and
♣ a chargor depositing documents of title to the land, for example, a certificate of title or a certificate of lease.

It is possible to register an informal charge so banks are likely, in the interest of time, to take this type of charge as they await the formalities of preparation of a formal charge. However it is not likely to be a popular security as a chargee holding an informal charge may only take possession of or sell the land on obtaining a court order to that effect.

Formal charges Formal charges only take effect on registration and a chargee cannot exercise any of its remedies under the charge unless it is so registered.
• Titles issued under Government Lands Act and Land Titles Act Titles to GLA and LTA property are not deemed to be titles under the new Act and will need to be examined and

re-issued. In addition, unlike the registers for RTA and RLA land that will continue to be maintained, the register of GLA and LTA land will need to be prepared afresh. Accordingly, until this process is done, it will not be possible for a bank to take security over GLA and LTA land. This means that if the land you are holding has a GLA or LTA title, it will not be possible to offer this land as security until new titles are issued.

• Transfer of charges The Act recognises transfers of charges at the request of the chargor in writing at any time other than when a chargee has taken possession. A similar request may be made by the following persons, subject to the consent of the chargor:

o any person who has an interest in the land that has been charged;

o any surety for payment of the amount secured by the charge; and

o any creditor of the chargor who has obtained a decree for sale of the charged land (it is not clear though why a creditor would need the chargor's consent if he has a decree).

The chargee on receiving written request and on payment of the amount secured by the person(s) making the request and the performance of all obligations secured by the charge shall transfer the charge to the person named in the written request. There is a section under the Finance Act amending the Stamp Duty Act to the effect that stamp duty will not be charged when a person transfers a charge from one bank to another. This section came into effect on 2nd May, 2012.

• Fetter to Right to Discharge A chargor is entitled to discharge a charge at any time prior to the sale of charged land. Any provision that seeks to deprive the chargor of the right to discharge or fetter the exercise of this right or stipulates a collateral advantage that is unfair or unconscionable or inconsistent with the right to discharge is void. A chargee may provide in a charge that a chargor may exercise its right to terminate a charge before expiry of its term and such chargor,

(i) shall give one month's notice; or

(ii) shall pay one month's interest at the prevailing interest rate or a lesser rate as may be agreed and all other monies secured by the charge.

• Reopening of charges The Land Act has now vested on the court the power to re-open a charge. This essentially means that even though all the formalities and approvals were in place at the time of entering into a charge and a valid security is created, the court may "re-open" the charge or a chargor, chargee or the Land Registrar may apply to court to reopen a charge.

THE COMMUNITY LAND ACT, 2016

Ownership of land in Kenya by communities is an aspect that the former land legislation did not comprehensively address and the enactment of the Community Land Act, 2016 is a milestone in the ownership and registration of Community Land. Section 11 of the Community Land Act, 2016 provides for registration of land held by Communities i.e. organized group of users of Community Land who share a common ancestry, culture, livelihood, socio-economic interests, geographical space or ethnicity. The Act will be instrumental in enabling communities that own land communally to register their land upon the registration of their community (GOK, 2016). To safeguard Communities during

compulsory acquisitions, section 5 of the Act emphasizes the fact that Community Land can only be compulsorily acquired in accordance with the law for a public purpose and upon prompt and just compensation.
In section 4, the Act provides for the relevant County Governments to hold trust for communities in cases where the community land is not registered and any monies payable as compensation for compulsory acquisition should be deposited in an interest earning account and transferred to the community upon registration.

COMPULSORY ACQUISITION

Compulsory acquisition is the involuntary transfer of property by a private owner to the government. Also referred to as eminent domain is usually the power possessed by the state over all the property in the country. Through this power they are able to acquire land compulsorily for the public use. This acquisition must be done according to the law (constitution and Land Act 2012.

Power of entry to inspect land. Sec 108. (1) The Commission may authorize, in writing, any person, to enter upon any land specified in a notice published under section 107 and inspect the land and to do all things that may be reasonably necessary to ascertain whether the land is suitable for the intended purpose.

Payment for damage entry for inspection. Sec 109. As soon as practicable after entry has been made under section 108, the Commission shall promptly pay in full, just compensation for any damage resulting from the entry.

Notice of acquisition and effect of acquisition on plant and machinery. Sec 110. (1) Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfilment of the stated public purpose.

Compensation to be paid. Sec 111. (1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

There are certain conditions that the government must satisfy to exercise this power. They are as follows:
i. Land must be private property.
ii. The government must be have the capacity to take physical possession of the property. They cannot acquire that which is intangible.
iii. The property should always be for public purpose. If the acquisition is not for the public benefit then it will be an illegal acquisition therefore the property cannot be used for any other purposes. For instance land that was left unused in the construction of a road cannot be sold or used for any other purpose and should be marked as road reserves.
iv. The private owner of the land must be paid full compensated in full. The compensation should be adequate and should be paid without any unreasonable delay. There are many factors to be considered such as; the expenses incurred by a person who has to change his

residence, damage caused by the publication in the Gazette, damages that may be incurred on the owner's other property

The property can be acquired temporarily or permanently depending on the government's purposes for it.

The procedure for both types of acquisition to be followed is:

i. The government informs the Minister of Lands of their intentions to acquire the land.

ii. The Minister for Lands directs the Commissioner of Lands in writing to acquire the land compulsorily.

iii. Commissioner of Land publishes a notice in the Kenya Gazette to inform the public of their intentions. A copy is sent to everyone to be affected by the acquisition and they are informed of the venue and date of the inquiry to be held.

iv. Commissioner determines the value of the land as per the Land Acquisition Act.

v. Commissioner declares an award of compensation in writing to people affected by the acquisition. This award is final unless challenged in court. If one is not satisfied with the amount they should accept it but must indicate that they have accepted it under protest. Thereafter they proceed to court to make their claims.

GENERAL POWERS OF REGISTRARS

The respective Registrars may:

a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question;

b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;

c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under the LRA is not performed;

d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and

e) order that the costs, charges and expenses as prescribed under the Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of the Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit (section 14, LRA). 3.

Effect of Registration Indefeasibility of title is emphasized under section 24 of the LRA which is couched in similar terms as section 27 of the RLA and section 23 of the RTA and provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Equally, 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 and subject to all implied or expressed agreements, liabilities or incidents of the lease.

The rights of a proprietor can only be subject to any registered leases, charges, encumbrances, conditions and restrictions, if any, shown in the register; and to overriding interests envisaged in section 28 of the LRA. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. The title of that proprietor shall not be subject to challenge, except:- a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Certified copies of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar shall be received in evidence in the same manner as the original.

Facilitator;

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