

# MONTHLY *Digest*

IN CONVERSATION WITH:

## CYRUS MAINA

*Managing Partner*  
CM Advocates LLP  
(Founder's Story)



### IN THIS ISSUE

#### KENYA

AN EXCLUSIVE INTERVIEW  
WITH CYRUS MAINA  
MANAGING PARTNER  
CM ADVOCATES

LAND, DISTRESS FOR RENT IN KENYA:  
UNDERSTANDING THE RIGHTS OF LANDLORDS  
AND TENANTS

DUTIES OF THE MANAGEMENT CORPORATION

CAUTIONS, RESTRICTIONS & INHIBITIONS

FROM SHELTER TO SUSTAINABILITY  
ENHANCING ESG IN KENYA'S  
AFFORDABLE HOUSING PLANS

UNDERSTANDING TRUST LAW IN KENYA  
A GUIDE TO FAMILY TRUSTS

RECENT TAX CHANGES AFFECTING  
THE REAL ESTATE SECTOR



# Contents

---

03

INTERVIEW WITH CYRUS MAINA - MANAGING PARTNER  
CM ADVOCATES

08

DISTRESS FOR RENT IN KENYA; UNDERSTANDING THE  
RIGHTS OF LANDLORDS AND TENANTS

11

DUTIES OF THE MANAGEMENT CORPORATION

14

CAUTIONS, RESTRICTIONS & INHIBITION

16

FROM SHELTER TO SUSTAINABILITY ENHANCING ESG IN  
KENYA'S AFFORDABLE HOUSING PLANS

19

UNDERSTANDING TRUST LAW IN KENYA; A GUIDE TO  
FAMILY TRUSTS

22

RECENT TAX CHANGES AFFECTING THE REAL ESTATE SECTOR

## CONTRIBUTORS:

Cyrus Maina - (Founder) Managing Partner of CM Advocates LLP

Nisaa Sayed - Advocate and Author's Editor

Joan Maina - Advocate and Assistant Editor

Diana Nderitu - Senior Associate, CM Advocates LLP (Kenya)

Mercy Kirui - Associate Advocate, CM Advocates LLP (Kenya)

Grace Kimunya - Senior Associate, CM Advocates LLP (Kenya)

Eileen Chepkorir - Trainee Advocate, CM Advocates LLP (Kenya)

Stella Orendo - Director, Bio-Climate Solutions

Shalma Nyambura - Associate Advocate, CM Advocates LLP (Kenya)

Tabitha Muchiri - Tax Associate, CM Advocates LLP (Kenya)

*A legal education magazine*

Relevant. Digestible. Actionable



## AN EXCLUSIVE INTERVIEW WITH CYRUS MAINA, MANAGING PARTNER OF CM ADVOCATES LLP

### COMPILED BY:



**Nisaa SAYED**  
Advocate and Author's Editor  
CM Property Digest  
[nsayed@cmpropertydigest.com](mailto:nsayed@cmpropertydigest.com)



**Joan MAINA**  
Advocate and Assistant Editor  
CM Property Digest  
[jmaina@cmpropertydigest.com](mailto:jmaina@cmpropertydigest.com)

---

### **CM PROPERTY DIGEST: Legal Excellence with Cyrus Maina**

*An exclusive interview with Cyrus Maina, Managing Partner of CM Advocates LLP*

#### INTRODUCTION

Welcome back to CM Property Digest, your informative source for in-depth insights and engaging conversations about all matters of property in Africa. We have covered green financing, corporate due diligence, quantity surveying, property development and management, and marketing for real estate in Kenya from a foreign to local perspective and interviewed paragons of the real estate sector in Kenya.

We are pleased to present an exclusive interview with Cyrus Maina, the Founding and Managing Partner of CM Advocates LLP. As the firm celebrates its 10th anniversary and its previous expansion across East Africa with offices in Kenya, Tanzania, Uganda, and Rwanda, Cyrus shares insights on his journey, the firm's achievements, and future aspirations. Join us as we delve into the experiences and values that have shaped his distinguished career and the success of CM Advocates LLP.



**Congratulations on the firm's 10th Anniversary. As the founding and Managing Partner of CM Advocates LLP, can you discuss the challenges and the journey involved in starting the firm? How has that firm evolved over the past decade, and what have been some key milestones in the firm's development?**

Starting CM Advocates LLP was a humbling journey. It began with just Jane Mugo and myself, sharing office space with other law firms due to limited resources and personnel. Jane, who is now one of our partners in the Wealth & Private Clients and the Real Estate Banking and Finance Business units, has been with us from the beginning. Our initial goal was to establish a small boutique law firm, and we never imagined we would reach a decade of growth and success.

One of the significant challenges we faced was finding trustworthy and capable individuals to join our team. Despite these obstacles, we have made remarkable progress over the last ten years. Today, we are proud to have grown into a firm with over 50 lawyers 4 partners, various business unit heads and brand team leads.

A milestone we never anticipated. This growth and success are something we are deeply thankful for, and we attribute our achievements to the grace and blessings of God, who has guided us through this journey and continues to be our source of strength and inspiration.

**Personal values and principles often play a crucial role in shaping one's career. Can you share some of the core values and guiding principles that have influenced your decisions and approach to law throughout your career? How have these values impacted the culture and success of CM Advocates LLP?**

Agility, resilience, and dynamism have been the cornerstones of my approach to law and have significantly influenced the development of CM Advocates LLP. These values have driven our desire to create a dynamic and adaptable law firm capable of navigating the ever-changing legal landscape.

In the past two to three years, we have focused on becoming an international and technology-led law firm, recognizing that technology is the future of legal practice. This forward-thinking mindset has allowed us to stay ahead of trends, ensuring that we provide innovative and efficient legal solutions to our clients.

Our commitment to these core values has fostered a culture of continuous improvement and adaptability within the firm. It has enabled us to embrace new challenges and opportunities with confidence, ultimately contributing to

our growth and success. By prioritizing agility, resilience, and dynamism, we have built a strong foundation that supports our vision of becoming a leading international law firm.

**Your expertise spans multiple areas of law, including corporate and commercial law, real estate, and dispute resolution. Can you share some insight on how CM Advocates managed to adapt and evolve over the past decade?**

Our ability to adapt and evolve over the past decade is rooted in the diversity of our practice areas and our commitment to staying abreast of emerging trends and changes. Initially, we never envisioned practising beyond a few core areas of law. However, as we grew, so did our ambition and scope.

Today, we proudly offer services in more than 25 practice areas. For instance, we recently established a comprehensive practice area focused on Commercial Leases. Additionally, since 2021, we have developed a specialized unit dedicated to climate change and ESG (Environmental, Social, and Governance) issues, and we have pioneered in the area of Private Wealth. Our continuous adaptation to new trends has been instrumental in our growth.

Furthermore, we have expanded into areas that were not traditionally our focus. We now provide tax transactional and advisory services, a domain previously dominated by accounting firms. This diversification has allowed us to meet the evolving needs of our clients and stay competitive in the global market.

Our commitment to growth is underpinned by our vigilance in monitoring international trends and learning from developments in other markets. In this global village, we can quickly consult and adapt to new insights, ensuring that we remain at the cutting edge of legal practice.

**CM Advocates LLP is known for its distinct approach and range of services. What do you believe sets your firm apart from other law firms in Kenya and the broader region? How do you ensure that CM Advocates LLP remains competitive and continues to provide exceptional service to its clients?**

What truly sets CM Advocates LLP apart is our embrace of technology, including artificial intelligence, and our commitment to leveraging these tools to transform our practice. While we maintain the traditional aspects of legal practice, our primary differentiator is our focus on becoming a technology-led firm that pioneers in areas requiring deep research and innovation.

To remain competitive and at the forefront of legal practice, we must be dynamic and excel in research. This approach ensures that we stay ahead of emerging trends both locally and internationally. By continuously integrating advanced technologies, we enhance our ability to provide exceptional service and innovative solutions to our clients.

Additionally, our adaptability to changing market conditions and the influx of capital from different regions has been crucial. We have expanded into areas we previously did not practice, such as exploring fields like medicine and building expertise in life sciences. This diversification allows us to meet the evolving needs of our clients and remain relevant in a rapidly changing global landscape.

By staying vigilant and responsive to new opportunities and challenges, we ensure that CM Advocates LLP continues to deliver top-notch, competitive services, setting a benchmark for legal excellence in Kenya and beyond.

**As the firm seeks to expand its network and reach, can you share your philosophy on attracting and retaining top legal talent?**

At CM Advocates LLP, we firmly believe that our people are our most valuable resource. To attract and retain top legal talent, we are committed to developing a comprehensive HR hiring strategy with the primary goal of becoming the employer of choice for lawyers. This strategy focuses on creating an environment where talented individuals can thrive and feel valued.

We place a strong emphasis on professional development and growth. We aim to nurture our team members to become future leaders, not only within the firm but also across the diverse practice areas and sectors in which we operate. By providing opportunities for continuous learning, mentorship, and career advancement, we ensure that our lawyers are equipped with the skills and knowledge needed to excel in their careers.

Creating a supportive and dynamic workplace culture is also crucial. We strive to foster an inclusive environment where collaboration, innovation, and excellence are encouraged. This approach helps us attract ambitious and talented professionals who are passionate about their work and are driven to achieve their full potential.

In summary, our philosophy on attracting and retaining top legal talent is centred on offering a compelling value proposition that includes career growth, professional development, and a positive, supportive work environment. By investing in our people, we build a strong, dedicated

team that drives the success of CM Advocates LLP.

**Looking ahead, what are your future goals and aspirations for CM Advocates LLP? What is your vision for the firm in the next 10 years? How do you plan to navigate the evolving legal landscape in Kenya and across the region to ensure that the firm continues to grow and adapt to new challenges and opportunities as you enter the next decade?**

In the next decade, my vision for CM Advocates LLP is to establish ourselves as the employer of choice for the most brilliant and ambitious lawyers. We aim to become a leading international law firm, leveraging advanced technology to achieve this goal. Our focus will remain on providing high-quality, timely services to our clients, ensuring that we meet their evolving needs and exceed their expectations.

To navigate the ever-changing legal landscape in Kenya and across the region, we will continue to embrace innovation and stay at the forefront of technological advancements. By integrating cutting-edge technologies into our practice, we can enhance our service delivery and streamline our operations, making us more efficient and competitive.

Additionally, we will invest in the continuous development of our team, fostering a culture of learning and adaptability. This will enable us to stay ahead of emerging trends and proactively address new challenges and opportunities as they arise.

Our commitment to diversification and expansion into new practice areas will also be key to our growth strategy. By exploring and developing expertise in areas such as life sciences, climate change, and ESG, we can offer a broader range of services to our clients and remain relevant in a rapidly changing global market.

Ultimately, our goal is to build a resilient, dynamic, and forward-thinking firm that is well-positioned to navigate the complexities of the legal landscape in Kenya and beyond. Through strategic planning, continuous innovation, and a focus on excellence, we will ensure that CM Advocates LLP continues to thrive and grow in the years to come.

**Which message would you like to give to your team members?**

First and foremost, I want to express that reaching this ten-year milestone is a humbling experience. Growing and expanding the business over the past decade has required immense hard work and dedication. I want to emphasize

the importance of diligence and consistently putting in the effort.

Additionally, success in our field demands honesty, self-leadership, vision, and boldness. It is crucial never to give in to fear and to always believe in yourself. Hold on to the belief that nothing is impossible. With these qualities, we can continue to achieve great things together.

**As the firm celebrates its 10th anniversary, do you have any notable announcements or initiatives you would like to share?**

We are excited to share several significant initiatives as we celebrate our 10th anniversary. Firstly, in the coming days, we will be launching some key projects that we have been diligently working on.

One of our primary goals is to extend our reach and accessibility, particularly to the Kenyan movement and international clients. To facilitate diverse interactions and enhance the consumption of our legal services, we will be relaunching our CM SME Club. This initiative has been a focus for some time, and I am thrilled to see it coming to fruition.

Moreover, we are planning to make strategic changes to our organizational structure. We will be introducing new positions, such as practice managers and possibly principal associates. These roles are integral to our growth strategy and are aimed at fostering leadership and talent development across our various practice areas. By implementing these changes, we are positioning ourselves for continued success and excellence in the future.

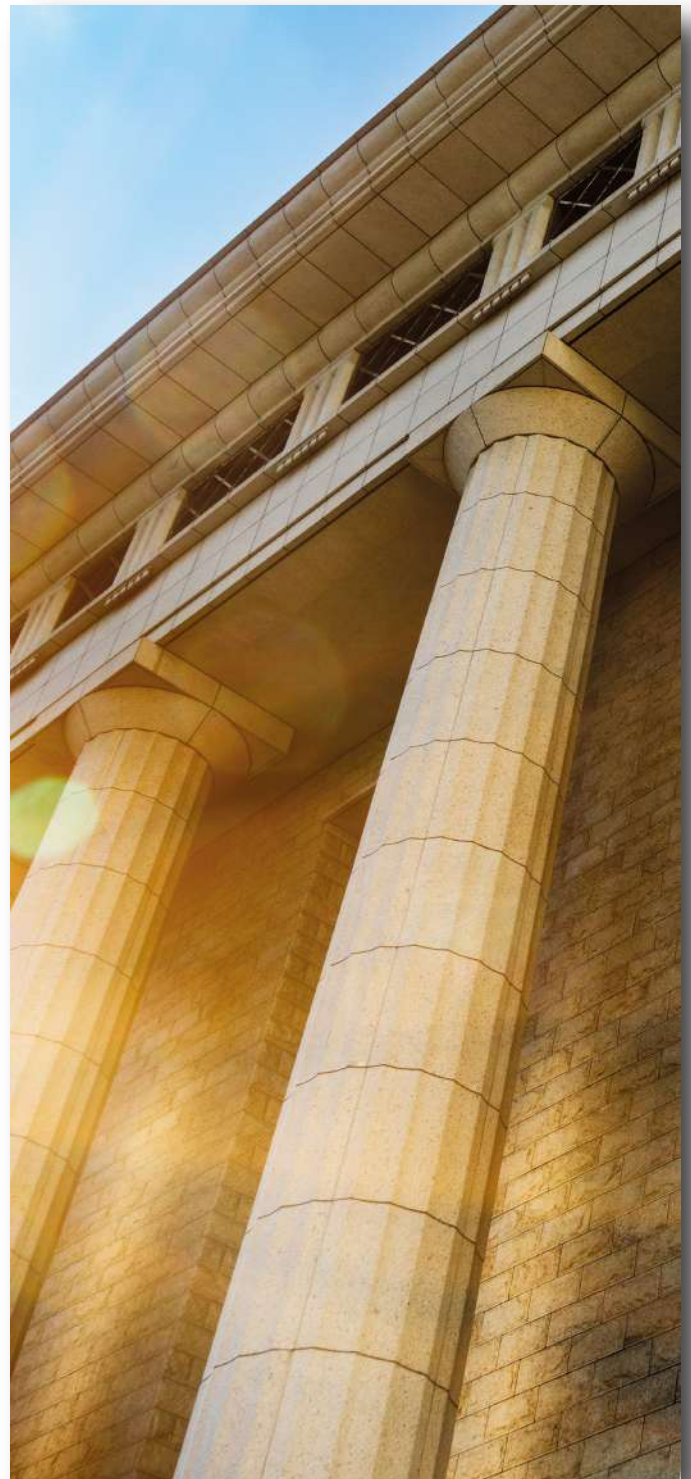
**What advice would you give to young lawyers who are aspiring to build successful careers in law, particularly in Kenya and the broader East African region? Are there specific skills, mindsets, or experiences you believe are crucial for their growth and success in the legal profession?**

I would emphasize that hard work truly pays off. Young lawyers should always believe in themselves, work diligently, and maintain a visionary outlook. The practice of law is vast, but there are always niche areas where one can excel. Those who are hardworking, diligent, forward looking, and honest will find success in the legal profession.

It is also important to have a long-term perspective. Achieving success is not always easy, and it requires patience and perseverance. Self-development takes time, but with the right encouragement, guidance, and training, you can achieve your dreams both locally and

internationally.

I also believe that aspiring lawyers should not limit themselves to being local practitioners. Embrace a broader vision. I am passionate about Pan-Africanism and believe that Africa is one market. Lawyers should seek opportunities to expand their practice into as many African countries and diverse markets as possible. By doing so, they can leverage the vast opportunities available across the continent and contribute to its growth and development.





# Contributor

**Cyrus Maina** is the Managing Partner at CM Advocates LLP. He holds an LLB from the University of Nairobi and a Diploma in Law from the Kenya School of Law. Admitted to the Bar in 2006, Cyrus is also a Certified Public Accountant (CPA (K)) and a Certified Public Secretary (CPS (K)). With over 17 years of experience in property law, banking securities, capital markets, corporate law, and more, he has been instrumental in the firm's growth and success. As Managing Partner, he oversees strategy implementation and professional development across branches in Nairobi, Mombasa, Dar es Salaam, Kampala, Kigali, and Lagos. Under his leadership, CM Advocates has expanded its service offerings to over 20 practice areas listed below:

- Anti-Bribery & Anti-Corruption
- Energy, Mining & Extractive Industries
- Asset Tracing & Recovery
- Wealth & Private Clients
- Aviation Law
- Forensics & Investigations, Risk & Compliance
- Capital Markets
- IP & TMT (Telecommunications, Media & Technology)
- Charities & Not-for-profit Organizations
- Multilateral Organizations, Foreign Embassies & Consulates
- Commercial / Business Law
- Non-compete, Non-solicit & Trade Secrets
- Construction & Infrastructure
- Private Equity & Venture Capital
- Corporate Law
- Real Estate, Banking & Finance
- Cyber Security, Privacy & Data Protection
- Regulated Professional's Legal Advisory
- Debt Recovery, Restructuring & Insolvency
- Shipping, Logistics & Admiralty Law
- Dispute Resolution
- Tax Law Advisory
- Immigration & Global Mobility

His strategic vision and innovative approach have positioned CM Advocates as a leading law firm in the East, West and Central Africa.

**IN CONVERSATION WITH:**

**CYRUS MAINA**

Founder

Managing Partner

*CM Advocates*





# DISTRESS FOR RENT IN KENYA; UNDERSTANDING THE RIGHTS OF LANDLORDS AND TENANTS

## COMPILED BY:



**Diana NDERITU**  
Senior Associate  
CM Advocates  
dnderitu@cmadvocates.com



**Mercy KIRUI**  
Associate Advocate  
CM Advocates  
mkirui@cmpropertydigest.com



**Joan MAINA**  
Advocate and Assistant Editor  
CM Property Digest  
jmaina@cmpropertydigest.com

### Introduction

Distress for Rent is a legal remedy available to landlords in Kenya to recover unpaid rent from defaulting tenants. Landlords are permitted to seize and sell a Tenant's goods to satisfy the rent arrears. Understanding the rights and obligations of both landlords and tenants is crucial to navigating this often contentious process.

### Legal Framework

In Kenya, the procedure for distress for rent is primarily governed by the Distress for Rent Act Cap 293, Auctioneers Act, Cap 526 and supplemented by common law principles. The Act outlines the conditions under which landlords can exercise their right to distress and the procedures they must follow to ensure the process is lawful.

### Conditions for Distress

For a landlord to lawfully exercise distress for rent, three pre-conditions must be met:

**1.** The Tenant must be in arrears as distress cannot be carried out if the Tenant is current with their rent

payments;

**2.** The Landlord must provide notice to the tenant before proceeding with distress. This notice period allows the Tenant to settle their arrears or make alternative arrangements. In the absence of such notice, the distress for rent may be considered irregular; and

**3.** As per section 3 of the Act, no distress shall be levied between sunset and sunrise or on any Sunday. The distress must be conducted during daytime hours. Nighttime distress is considered illegal and can render the process void.

Levying of distress for rent is conducted by an Auctioneer who is duly licensed and certified to carry out business by the Auctioneers Licensing Board of Kenya.

The Landlord is prohibited from levying distress on certain commodities, for example, things of perishable nature, animals, property of the Government, things in actual use or occupation at the time of distress, things delivered to a person exercising their public trade and goods and chattels



in the possession of the law. While the Act prohibits goods of a perishable nature, it does permit the Auctioneer to seize any crops that may have been harvested and if, in a storage space, shall retain them in that space pending payment by the Tenant of the rent arrears as per the notice, failure to which the Landlord can sell the crops for the best price obtained.

### **Illegal –vs- Irregular distress**

Illegal distress is wrongful and considered null and void. Halsbury's Laws of England as quoted in the *C.Y.O Owayo V George Hannington Zephania Aduda T/A Aduda Auctioneers & Another [2007]* eklr expounds on illegal distress stating:

An illegal distress is one which is wrongful at the very outset, that is to say, either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise, a distress levied or proceeded with contrary to the law of Distress.

Illegal distress often translates to trespass. In *Interoven Store Co. Ltd. vs. Hibbard and Another (1936)* Hilbery J. stated:

"An illegal distress has always been a trespass and an action would always lie. And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damages sustained, but a right to recover substantial damages even though that is no proof of actual loss."

Where the Tenant had sublet the premises ([with the Landlord's permission](#)), the goods of the sub-tenant shall not be distressed. A Landlord who has been notified that the goods belong to the sub-tenant may request the sub-tenant to issue a declaration clarifying the ownership of the goods. The sub-tenant and the Landlord can then agree that the rent due to the immediate Tenant in default, can be paid directly to the Landlord until the rent arrears are settled. If the Landlord violates the sub-tenant's declaration and disposes of the sub-tenant's goods, the distress shall be deemed illegal and the sub-tenant can file a suit for the recovery of goods and damages.

Irregular distress on the other hand is anchored on the procedure. Section 15 of the Distress for Rent Act states

that if a Landlord seizes property for rent that is genuinely owed, and any irregularity or unlawful act is afterwards done by the party distraining, the distress itself shall not therefore be deemed to be unlawful. The Tenant can remedy the situation by seeking special damages.

### **Procedure for Distress**

The procedure for distress for rent involves several key steps:

1. **Appointment of an Auctioneer:** The Landlord must appoint a licensed Auctioneer to carry out the distress.

2. **Inventory of Goods:** The Auctioneer will create an inventory of the Tenant's goods to be seized. This list should be detailed and accurate to avoid disputes.

3. **Notice of Distress:** The Auctioneer provides a notice of distress to the tenant, outlining the arrears amount and the intent to seize goods.

4. **Seizure and Sale:** If the Tenant does not settle the arrears and costs incurred for the distress, or provide sufficient security to the auctioneer to recover the seized goods, the auctioneer will seize the listed goods. Once goods are seized, the aggrieved Tenant shall, within fourteen (14) days, pay the accrued rent and auctioneer's fees. Failure to which, the seized goods are sold at a public auction to recover the owed rent. If any surplus of sale proceeds is received, the Landlord can remit the same to the Tenant/owner of the goods. However, prior to the lapse of the Fourteen (14) days the Tenant can request (in writing) for an extension of not more than Fifteen (15) days provided they also give security for any other costs that can be incurred by the extension.

### **Tenant's Rights**

Tenants are afforded several rights under the Distress for Rent Act to protect their interests:

1. **Right to Dispute Distress:** Tenants can oppose the Landlord's right to distress by filing a dispute at the tribunal. The tribunal can hear and determine the dispute, potentially making orders for restoration if the distress was unlawful.

2. **Response to Notice for Distress:** Tenants can respond to the Notice for Distress by requesting that the goods and chattels be auctioned publicly. Any surplus, after deducting the rent owed and distress costs, should be released to the Tenant.

3. **Request for Valuation:** Tenants can request a valuation of their goods to ascertain the best price for which the goods and chattels can be sold. The surplus, after deducting the rent owed, distress costs, and valuation

costs should be released to the Tenant or owner of the goods.

**4. Protection against Illegal Distress:** If distress is carried out unlawfully—for example, if there is no rent arrear or if the distress occurs outside lawful hours—Tenants can sue for damages. This ensures Landlords adhere to legal procedures, preventing unjust deprivation of Tenant property.

**5. Compensation for Irregular Distress:** If any irregularity or unlawful act is committed during the distress process by the Landlord or their agents, the distress itself shall not be deemed unlawful. However, the aggrieved Tenant can seek compensation by filing a suit for special damages.

**6. Protection of Spouse's or Partner's Goods:** Goods that legally belong to the defaulting Tenant's spouse or partner, or in which they have a legal and beneficial interest, are protected from distress action.

### Landlord's Rights

Landlords possess specific rights concerning rental properties, including:

**1. Recovery of Rent Arrears:** Landlords have the right to recover unpaid rent through the distress for rent process, offering a more convenient and efficient resolution mechanism compared to lengthy court proceedings.

**2. Retention of Seized Goods:** Through the distress process, Landlords can retain the Tenant's seized possessions until the overdue rent is paid. If the arrears remain unsettled, the Landlord is entitled to sell these goods to recover the debt.

**3. Cost Recovery:** The expenses incurred during the distress process, such as Auctioneer fees and valuation fees, shall be payable by the Tenant. This ensures that Landlords are not financially disadvantaged by the costs involved in recovering unpaid rent.

**4. Levying Distress Post-Lease Termination:** Even if the lease term has expired or been terminated, a Landlord is permitted to levy distress for rent owed as long as this action is initiated within six (6) months from the lease's expiration or termination date.

**5. Demanding Double Rent for Overstaying Tenants:** If a Tenant notifies the Landlord of their intent to leave the premises but does not do so after the notice expires, the Landlord can demand double the rent. If the Tenant fails to pay, the Landlord can levy distress for the owed rent.

**6. Addressing Fraudulent Removal of Goods:** The Act addresses instances where a defaulting Tenant seeks to

move their goods out of the premises to defraud the Landlord. If a Tenant attempts to remove or move their goods to another location to avoid seizure, the Landlord or their authorized representative can locate and sell the goods. Any person found to have willingly helped the Tenant remove or store the goods shall be liable to pay the Landlord double the value of the goods, or the Landlord can recover this sum through a civil suit.

### Challenges and Controversies

Despite its utility, distress for rent is often contentious. Tenants may perceive it as heavy-handed, particularly if they feel the arrears are due to extenuating circumstances like loss of income. Additionally, the process can strain landlord-tenant relationships, making future interactions difficult.

Where the Tenant's goods include livestock or crops, it may be difficult for a Landlord to liquidate the same with ease to recover arrears owed.

It may also be time for the Act to be amended to reflect the realities of today. Particularly, Schedule 2 should be amended to reflect the true values with which fees can be graded and scaled. More importantly, with due acknowledgement of its origins, perhaps it is time the Act was amended to align with our Kenyan legislature, paying homage to our local currency and not rooted on the foreign land from which these laws were borrowed.

### Conclusion

Distress for rent remains a vital yet contentious legal remedy in Kenya's landlord-tenant landscape. The Distress for Rent Act, alongside the Auctioneers Act, provides a structured framework for landlords to recover unpaid rent while outlining the procedural safeguards to protect tenants from unjust actions. Understanding the distinction between illegal and irregular distress is crucial for both parties to navigate this complex process without falling into legal pitfalls. Despite its utility, the practice can strain relationships and may seem harsh, especially under extenuating circumstances. There are calls for legislative amendments to reflect current economic realities and simplify the process, ensuring fair treatment for both Landlords and Tenants. As the real estate sector evolves, balancing the interests of Landlords in recovering dues with the rights of Tenants to fair treatment remains an ongoing challenge. Legal practitioners, Landlords, and Tenants must stay informed and compliant with the evolving legal standards to mitigate conflicts and foster harmonious rental relationships.



## DUTIES OF THE MANAGEMENT CORPORATION

### COMPILED BY:



**Grace KIMUNYA**  
*Senior Associate*  
*CM Advocates LLP*  
[gkimunya@cmadvocates.com](mailto:gkimunya@cmadvocates.com)



**Eileen CHEPKORIR**  
*Trainee Associate*  
*CM Advocates LLP*  
[echepkorir@cmadvocates.com](mailto:echepkorir@cmadvocates.com)

### Introduction

The Sectional Properties Act, 2020 (the Act) extends to both Freehold and Leasehold titles with a minimum residual term of 21 years of interest in land, to replace subleases with sectional titles conferring ownership of **apartments, flats, maisonettes, town houses or offices.**

With this enactment, section 17 of the Act provides that on the registration of a sectional plan, a Corporation shall be constituted under the name "**The Owners, Sectional Plan No. (the number to be specified being the number given to the plan on registration)**". The Corporations are a creation of the Act and are not subject to the restrictions and requirements under the Companies Act, 2015.

A Corporation is automatically registered upon the registration of a sectional plan which consists of the owners of units in the parcels to which the sectional plan relates.

This article seeks to dissect the duties of the management

corporation to understand better its importance in achieving the objectives set out in the Act.

### Analysis of the duties

It is important to note that the Corporation does not have the power to carry on any trading activities and the duties are limited to those provided in the Act and the by-laws.

The Act mandates the Corporation to do all things to ensure the common areas are well managed and may engage the services of a property manager or any other person to this end.

The duties of the management Corporation as under the Act include;

1. Carrying out any duties imposed on it by the by-laws;
2. Unless by unanimous resolution all the proprietors otherwise resolve, insure and keep insured buildings and other improvements on the parcel against fire;
3. Effect such other insurance as it is required by law to



effect or as it may consider expedient;

4. Pay the premiums in respect of any policies of insurance affected by it;
5. Keep the common property in a state of good repair;
6. Comply with any notice or order duly served on it by the county government or public body requiring repairs to, or work to be performed in respect of, the land or any building or improvements thereon;
7. Control, manage, and administer the common property and do all things reasonably necessary for the enforcement of the by-laws;
8. Do all things reasonably necessary for the enforcement of any lease or licence under which the land is held;
9. Do all things reasonably necessary for the enforcement of any contract of insurance entered into by it under this section;
10. Constitute an internal dispute resolution committee on a need basis; and
11. Do all other things to ensure the property is well managed including engaging the services of a property manager or any other persons they deem necessary.

The Act further provides that the Corporation shall:

1. Establish and maintain a fund for administrative expenses sufficient, in the opinion of the Corporation, for the control, management, and administration of the common property, the payment of any insurance premiums, and the discharge of any other obligation of the Corporation;
2. Determine from time to time the amounts to be paid for the purposes aforesaid; and
3. Raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective units.

It is important to note that the duties stated above are not exhaustive. The Act highlights and gives room for the Corporation to formulate by-laws that can supplement the duties expressly provided for in the Act.

It is also worth noting that the Corporation is not liable for the parcel of any rates, rent, charge or tax levied by a rating authority, the owner of a unit shall be liable for such payments on the unit.

### Termination of the Sectional Property

It is provided that upon termination of the sectional status of a building due to; a unanimous decision by the members of the Corporation, due to substantial damage to the building or as a result of compulsory acquisition under Article 40 (3) of the Constitution of Kenya, the Corporation is expected to file with the Registrar a notice of termination of the sectional status in Form SP-21 found in the

Regulations (Legal Notice 236 of 2021).

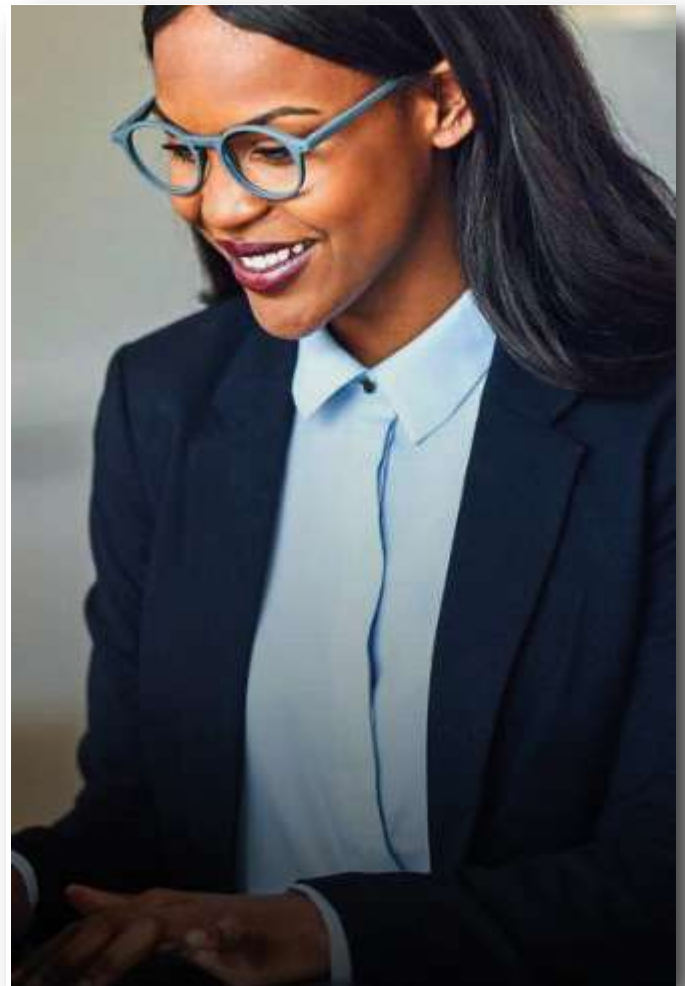
### Winding up of Management Companies

Where a management company has been in operation, Regulation 21 of the Act provides that a management company in respect of long-term leases that are the subject of conversion shall transfer all its assets and liabilities to the Corporation registered under the Act, within one year from the date of registration of the corporation. The management company will then be wound up by the Insolvency Act.

### Conclusion

The enactment of the Act, was a step in the right direction in the creation of Corporations, providing for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common and to provide for the use and management of the units and common property.

Creation of Corporations under the Act therefore plays a vital role in the running and maintenance of sectional units and in ensuring the objectives of the Act and the by-laws are met.





# GET YOUR COPY NOW!!



SCAN TO GET YOUR COPY







## CAUTIONS, INHIBITIONS AND RESTRICTIONS

### COMPILED BY:



**Eileen CHEPKORIR**  
*Trainee Associate*  
*CM Advocates LLP*  
*[echepkorir@cmadvocates.com](mailto:echepkorir@cmadvocates.com)*

### Introduction

Cautions, restrictions, and inhibitions are critical legal mechanisms within Kenyan land law, categorized under the broader concept of rights in alieno solo. These rights allow individuals to enjoy certain legal interests in or over another person's land. Essentially, they provide a framework for protecting various interests and ensuring that land transactions are conducted transparently and fairly.

Rights in alieno solo encompass a range of legal entitlements that one person holds over the land owned by another. These rights serve to protect interests, manage disputes, and regulate the use and transfer of property. They are vital for maintaining the integrity and stability of land ownership and usage in Kenya.

### A. Cautions

A caution is a formal notice registered against a piece of land to indicate that a third party has a claim or interest in the property. This mechanism is used to prevent any dealings with the land that might prejudice the cautioner's

interest. When a caution is lodged, it serves as a warning to anyone intending to transact with the property, signalling that there is an existing claim that needs to be resolved before any further dealings can occur.

Specifically, a caution is a notice entered in the land register to the effect that no action of a specified nature about the land may be taken without first informing the person who gave the notice. The caution forbids the registration, disposition, and making of entries or actions as set out in the caution. It is usually supported by a statutory declaration justifying the basis of the caution.

Under Section 71 of the Land Registration Act (LRA), a caution may be lodged by a person who:

- Claims a right to obtain an interest in the land, lease, or charge, which is capable of creation by an instrument registrable under the Act;
  - Is entitled to a license; or
  - Has presented a bankruptcy petition against the proprietor of the registered land, lease, or charge.
- The effect of lodging such a caution is to forbid the



registration of dispositions over that land or property and the making of entries affecting that land, lease, or charge.

### **Procedure for lodging a caution**

A caution must be lodged in the prescribed form (i.e. Form LRA 67) and the Registrar may require an affidavit to accompany it. The Registrar then gives written notice to the registered proprietor after having registered the caution.

Withdrawal of the caution can be done by the cautioner themselves, or removal effected by the Court or Registrar. Any interested party may apply for the caution to be removed and the Registrar shall serve a written notice on the cautioner, notifying him or her of the time of expiry of their caution.

- If no objection is raised to the expiry of the caution by the cautioner, the same will be removed
- If the cautioner wants to object, he shall notify the Registrar in writing within the time given in the notice. After hearing the parties, the Registrar will make such orders about the caution as he deems fit and will provide for costs. The Registrar may refuse a further caution from the same person about the same matter as in a previous caution.

Under Section 75 of the Land Registration Act, the punishment for wrongful cautions is liability in an action for damages.

### **B. Restrictions**

Restrictions are conditions or limitations imposed on the use, transfer, or development of land, registered to ensure compliance with specific legal requirements or to protect the interests of particular parties. A restriction is a registered interest in land that restrains the building on, use of, or other enjoyment of that land for the benefit of the land's owner or a neighbouring parcel of land. This restraint is applicable when such needs arise pending the occurrence of an event or the making of a further order. Restrictions can be placed by authorities, such as local governments or regulatory bodies, to enforce zoning laws, environmental regulations, or planning policies. Additionally, individuals or entities with vested interests in the land, such as lenders or neighbouring property owners, may impose restrictions to safeguard their rights.

Under Section 76 of the Land Registration Act (LRA), a restriction on the title is placed by the Registrar to prevent fraud or improper dealings over the land. For the prevention of any fraud or improper dealing or any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease, or charge, make an order (restriction) prohibiting or restricting dealing with any particular land, lease, or charge. Any person interested in the land, lease, or charge in question may make an application to the Registrar for a restriction.

These restrictions play a crucial role in protecting the integrity of land transactions and ensuring that all dealings are conducted fairly and transparently. By imposing these limitations, the legal framework aims to prevent unauthorized or inappropriate actions that could harm the interests of legitimate stakeholders.

### **C. Inhibitions**

Inhibitions are court orders that prohibit the registration of any transactions or dealings with a specific parcel of land, lease, or charge for a particular time, until the occurrence of a particular event, or generally until a further order is made. These orders are issued to prevent actions that could affect the outcome of ongoing legal proceedings or disputes.

An inhibition ensures that any instrument inconsistent with the inhibition is not registered. This mechanism is crucial in safeguarding the interests of parties involved in litigation, ensuring that the status quo is maintained until the matter is resolved. For example, during a legal dispute over land ownership, an inhibition can be placed to prevent any transfer or alteration of the land's status that might prejudice the rights of the disputing parties.

One of the significant aspects of an inhibition is that no notice is required to be given to the proprietor before its registration. This immediate effect provides a powerful tool for preventing fraudulent or unauthorized transactions during the pendency of a legal dispute. By inhibiting dealings, the legal system can protect the interests of parties who might otherwise be disadvantaged by rapid or clandestine transactions.

Understanding inhibitions is essential for anyone involved in land transactions or property disputes in Kenya. These orders ensure that land dealings are conducted with full transparency and fairness, protecting the rights of all interested parties until a final resolution is achieved.

### **Conclusion**

Cautions, restrictions, and inhibitions are indispensable elements of Kenyan land law, providing robust mechanisms to protect interests, prevent fraud, and ensure fair dealings in land transactions. These legal instruments maintain the stability and integrity of land ownership and use in Kenya. By understanding and appropriately utilizing these mechanisms, individuals and entities can navigate the complexities of land law more effectively, ensuring their rights are protected and legal requirements are met.



## FROM SHELTER TO SUSTAINABILITY ENHANCING ESG IN KENYA'S AFFORDABLE HOUSING PLANS

### COMPILED BY:



**Stella ORENGO**  
*Director*  
*Bio-Climate Solutions*  
[director@bioclimatesolutions.com](mailto:director@bioclimatesolutions.com)

### Introduction

Kenya's affordable housing crisis, fuelled by a rapidly growing population and a surge in rural-to-urban migration, demands urgent attention. Housing, a fundamental socio-economic right enshrined in the Constitution, is at the forefront of national priorities.

The government's role is pivotal, particularly in light of Sustainable Development Goal (SDG) 11, which aims to build inclusive, safe, resilient, and sustainable cities. A core target of this goal is to ensure everyone has access to adequate, safe, and affordable housing by 2030, necessitating a sharp focus on reducing urban slums where the most vulnerable populations reside.

### Governance aspect: Pillars of Fair and Transparent Practices

Implementing affordable housing schemes is a complex challenge that requires integrating Environmental, Social, and Governance (ESG) perspectives. Governance and accountability are vital to the success of these projects, guiding discussions in courts and parliament. Establishing

clear guidelines and regulations ensures transparency, accountability, and ethical conduct, preventing corruption, discrimination, and favouritism. Robust monitoring, evaluation, and feedback mechanisms are essential to assess the effectiveness of housing initiatives, promoting continuous improvement.

Independent oversight bodies can significantly enhance transparency and accountability. Empowered to audit and review housing projects, these bodies ensure compliance with established standards. Public participation in governance processes is equally crucial, fostering trust and community buy-in. Platforms for residents to voice concerns and provide input on housing projects lead to more inclusive and responsive governance.

Leveraging technology, such as blockchain for transparent record-keeping and smart contracts for fair resource distribution, mitigates corruption and mismanagement risks. Collaboration between government agencies, private developers, and civil society organizations is essential to create a governance framework prioritizing fairness, transparency, and accountability at every stage of housing

development. This comprehensive approach enhances the integrity of affordable housing schemes and ensures they meet the diverse needs of Kenya's urban populations.

### **Environmental Sustainability in Affordable Housing**

Environmental sustainability is a cornerstone of affordable housing schemes. Incorporating green building practices—such as energy-efficient designs, renewable energy sources, and sustainable materials—alongside water-saving technologies, waste management systems, and green spaces, promotes environmental conservation. Minimizing the ecological impact of construction activities protects natural habitats and ecosystems.

Innovative construction techniques, like prefabricated and modular homes, significantly reduce waste and lower the carbon footprint. These methods save time and resources and promote using recycled and eco-friendly materials, ensuring alignment with sustainability goals.

Urban planning and design are also crucial. Mixed-use developments integrating residential, commercial, and recreational spaces reduce the need for extensive commuting, lowering emissions. Efficient public transportation systems and promoting non-motorized transport options, such as cycling and walking, further enhance sustainability.

Community involvement in environmental initiatives is key. Educating residents about sustainable living practices, such as energy conservation, waste reduction, and water-saving measures, fosters a culture of sustainability. Community gardens and green roofs enhance urban biodiversity and provide residents with green spaces, improving overall well-being.

By embedding these environmental strategies into affordable housing policies and practices, Kenya can lead in creating housing solutions that are affordable, inclusive, and environmentally responsible, ensuring a healthier and more sustainable future for all.

### **Social Aspect: Addressing Diverse Needs in Housing**

Integrating ESG considerations into affordable housing policies and practices enables stakeholders to create sustainable, inclusive, and resilient communities. ESG is not merely a checkbox exercise; it is crucial to the socio-economic significance of housing. While environmental and governance aspects often take centre stage, the social dimension is equally vital in affordable housing discussions.

Social responsibility in housing involves fostering inclusivity for diverse demographics, including low-income

families, single-parent households, and vulnerable populations. Prioritizing community engagement and participation ensures residents' voices are heard and their needs addressed. Promoting affordability and accessibility in terms of housing costs, location, transportation, and access to essential services and amenities is critical.

### **Cultural Sensitivity and Inclusivity in Housing Solutions**

Investors in affordable housing projects must consider factors beyond mere provision. Affordability varies among demographics, necessitating tailored governmental schemes based on real, data-driven insights into intended beneficiaries. For low-income individuals, housing solutions must address cost and accessibility to essential amenities, preventing additional expenses that undermine affordability.

Gender considerations are crucial, particularly for households headed by women. Affordable housing initiatives must ensure equal opportunities for property acquisition for both women and men. Privacy is another key concern, as seen in cases where families in police quarters share single units. Ensuring privacy within housing setups is vital for dignified living conditions.

Additionally, cultural differences must be acknowledged and respected. Understanding and incorporating unique cultural backgrounds into housing development schemes can create solutions resonating with specific needs and preferences.

### **Conclusion**

Sustainable and inclusive affordable housing initiatives are imperative to addressing Kenya's housing deficit. Integrating ESG principles into housing policies and practices is not just about meeting regulatory requirements; it is about fostering resilient and inclusive communities. By prioritising environmental sustainability, ensuring transparent and accountable governance, and addressing diverse social needs, we can create housing solutions that enhance the quality of life for all Kenyans. Embracing cultural sensitivities and ensuring privacy and dignity in living conditions further empower communities, making housing a cornerstone of sustainable development and social equity in Kenya. Through such holistic and inclusive approaches, we can achieve the Sustainable Development Goals and ensure that adequate, safe, and affordable housing is a reality for everyone.





CM ADVOCATES LLP



A Decade Of Legal Innovation

**10** *Years*  
ANNIVERSARY

# ABOUT US

*The Wealth and Private Clients department at CM Advocates LLP boasts a dedicated team equipped with the requisite resources, skills, and expertise in estate planning, wealth management, and trust administration. Our strength lies in delivering personalised, compassionate and effective legal services, drawing from extensive experience in structuring, amending, and incorporating various trust forms.*

*For inquiries regarding trust establishment, amendment, or related matters, please reach out to us at [privatewealthlawyers@cmadvocates.com](mailto:privatewealthlawyers@cmadvocates.com) or [law@cmadvocates.com](mailto:law@cmadvocates.com)*



I&M Bank House, 7th Floor  
2nd Ngong' Avenue Off Ngong' Road  
Upperhill, Community  
P.O BOX 22588-00505, Nairobi, Kenya  
Email: [law@cmadvocates.com](mailto:law@cmadvocates.com)

# UNDERSTANDING TRUST LAW IN KENYA: A GUIDE TO FAMILY TRUSTS

## COMPILED BY:



**Shalma NYAMBURA**  
*Associate Advocate*  
*CM Advocates LLP*  
*snyambura@cmadvocates.com*

## Background

The concept of “*family trusts*” was formally recognized in Kenyan law with the enactment of the Trustee (Perpetual Succession) (Amendment) Act, 2021, which took effect on 23rd December 2021. This legislative milestone underscored the importance of family trusts as essential instruments for estate planning and the establishment of lasting family legacies. Since its introduction, there has been a concerted effort to refine and update various trust laws within the country. These amendments have been geared towards optimizing the regulatory framework that governs family trusts, ensuring they are both effective and adaptable to the needs of modern estate planning. This proactive approach by the Kenyan government illustrates a steadfast commitment to enhancing estate planning infrastructure, particularly through family trusts. This commitment serves not only to support individuals and families in their efforts towards multiplying and safeguarding their assets but also in fostering a stable future for future generations.

## Introduction

Family trusts are exceptional estate planning tools that are created by a **Settlor/ Founder** by transferring his or her assets to the trust and placing them under the control of the **Trustees** for the benefit of their named **Beneficiaries**.

It offers a robust legal framework for managing, growing, and transferring personal or family assets across multiple generations, both during the lifetime of the founder and after their passing. For example, if the founder wishes to bequeath their estate to their children, the Trust Deed can specify the methods and conditions for this transfer. The trust deed can provide either broad or detailed instructions to the trustees, including stipulations on when and how beneficiaries can access their portion of the trust fund or income—such as reaching a certain age, completing tertiary education, or getting married. Additionally, family trusts can outline preferences for managing the founder’s affairs should they become incapacitated due to old age or mental illness.

## What are the Key Components of a Family Trust?

### a) Trust Deed/Document:

This is the formal legal agreement that establishes the trust and outlines the terms and conditions under which the trustees will manage or administer the trust assets on behalf of the beneficiaries.

### b) Settlor/Grantor/Founder:

The individual who establishes the trust. Once the founder transfers his or her assets to the trust he or she relinquishes control over the assets to the trustees, as they become property of the trust. It is noteworthy that the founder can also be a trustee of his or her trust. Additionally, a family trust can have multiple founders, for example, a husband and a wife can be the founders of one family trust.

### c) Trustee(s):

These are the individuals or entities, such as a corporate trustee, responsible for managing the trust's assets as well as the overall administration of the trust.

### d) Trust Beneficiaries:

Individuals who receive benefits, income, or assets from the trust. They must be identified and specified in the Trust Deed.

### e) Funding the Trust:

This process involves transferring assets to the trust, which includes establishing a trust bank account and depositing funds into it.

### f) Trust Fund:

These are the assets that are transferred to the trust. They are managed by the trustees for the benefit of the named beneficiaries.

### g) Enforcer:

Introduced in the Trustee (Perpetual Succession) (Amendment) Act, 2021, the enforcer has a separate role from that of the trustees. An enforcer is an independent individual appointed by the founder or the beneficiaries to oversee the administration of the trust by the trustees. The enforcer's duties include enforcing the trust's terms, monitoring its implementation, addressing any breaches by the trustees, and possibly initiating legal actions if necessary. While not mandatory, including an enforcer in the Trust Deed is advisable to ensure proper governance.

## What are the different types of family trusts?

Family trusts are versatile instruments that can be structured to meet your family's unique needs. A family trust can take any of the following forms:

### a) Revocable Trust

This type of trust offers flexibility as it can be altered or terminated by the founder at any point. For those who may wish to change their estate plan as circumstances change, a revocable trust is ideal. However, it is important to consult your estate planning lawyer before setting up a revocable trust as it may not be ideal in all types of situations.

The trust deed must specify whether the trust is revocable as the law provides that a trust is considered irrevocable unless it is explicitly indicated as revocable.

### b) Irrevocable Trust:

Once established, an irrevocable trust cannot be terminated and can only be amended as provided in the trust deed. This rigidity is beneficial for robust asset protection, shielding the estate from potential claims by creditors and matrimonial property disputes. Irrevocable trusts are ideal for individuals looking to safeguard their legacy across multiple generations, as they provide stability by preventing easy modifications to the trust's provisions throughout its duration.

### c) Living Trusts

A living trust is established by the founder during his or her lifetime. It takes effect during the founder's lifetime and remains in effect after he or she passes away. Living trusts allow founders to manage their estate actively and make adjustments as needed while they are still alive.

A key advantage of living trusts is their ability to bypass the probate or administration court process necessary for the succession of personal property, which can be costly and time-consuming. By avoiding court, the privacy of the estate is also preserved, as probate and administration court proceedings are public.

A living trust can either be revocable or irrevocable.

### d) Testamentary trust

This is a trust arrangement that is set up in a Will and only comes into effect after the Will is confirmed through the probate court process. Also known as trusts under a Will, testamentary trusts are established and incorporated by the executors as designated in the Will. Depending on the terms of the Will, a testamentary trust can either be revocable or irrevocable.



## Registration and Incorporation of Family Trusts

Once the Trust Deed and the requisite prescribed form TR1 are signed by the founder and trustees, the trust is registered at the Companies Registry in line with recent amendments to the Trustee (Perpetual Succession) Act.

After incorporation, a family trust gains several capabilities:

- a) It becomes a corporate entity recognised by its name on the certificate of incorporation;
- b) acquires a common seal, enhancing its ability to operate as a corporate body;
- c) It possesses the legal capacity to own and manage property in its name, which includes the right to convey, transfer, assign, charge, or lease any property; and
- d) It can initiate and defend legal actions in its name.

### What are the advantages of Setting up a Family Trust?

The advantages of a family trust, inter alia, include:

#### 1. Asset Protection

A family trust serves as a robust shield for your family's assets protecting family wealth from claims from creditors or 3rd parties. Additionally, in the event one of the beneficiaries gets divorced, a family trust can protect the generational wealth as the trust fund will not be accessible to the divorced spouse in a matrimonial property dispute.

#### 2. Avoidance of Probate

Establishing a family trust enables the family to bypass the often costly and lengthy probate processes required for Wills. Furthermore, trusts are less susceptible to contest by the beneficiaries as compared to Wills.

#### 3. Privacy

Family trusts operate privately unlike the probate process for Wills or the administration process for persons who pass away without an estate plan, which are both public processes. This privacy prevents the public disclosure of assets, beneficiary details, and other sensitive information, offering discretion and security to the family members involved.

#### 4. Discretionary trusts

Family trusts can be structured as discretionary trusts, where trustees are empowered to determine the timing and amount of distributions. This flexibility helps in managing the risk of imprudent spending by beneficiaries

and aids in the long-term preservation of family wealth.

#### 5. Role of the Enforcer

The role of an enforcer, a position independent of the trustees, ensures adherence to the trust's terms and prevents potential abuses of power. The enforcer can intervene to address issues with trustees, including their removal and replacement if necessary, thereby minimizing the need for costly litigation.

#### 6. Perpetual Duration

Family trusts can be created to last perpetually, allowing for the continuous management and protection of assets across multiple generations. This perpetual nature ensures that family wealth is preserved and can grow over the long term, serving the needs of future descendants according to the original intentions of the founder of the trust.

#### 7. Centralized Family Governance

Trusts can serve as a central point for managing family assets, providing a structured way to handle various financial aspects and decisions, fostering unity and a shared purpose within the family.

## Conclusion

The revised trust laws in Kenya mark a transformative phase in the realm of estate planning. By simplifying the establishment and operation of family trusts, these laws have opened a pathway for families to secure their wealth across generations with efficiency and flexibility.

As Kenya continues to evolve its legal frameworks to support more sophisticated financial planning tools, families, estate planners, and legal advisors need to stay informed and leverage these tools to their fullest potential.

This ensures not only the protection of assets but also the harmonious transfer of wealth that aligns with the founders' wishes, without the typical legal entanglements and family wrangles.

Thus, family trusts in Kenya represent not just a legal necessity but a strategic, prudent choice for anyone looking to establish a lasting legacy while ensuring the welfare of future generations. As we look forward, the role of family trusts is set to become even more pivotal in shaping the landscape of family wealth management in Kenya.



## RECENT TAX CHANGES AFFECTING THE REAL ESTATE SECTOR

### COMPILED BY:



**Tabitha MUCHIRI**  
*Tax Associate*  
*CM Advocates LLP*  
[tmuchiri@cmadvocates.com](mailto:tmuchiri@cmadvocates.com)

### Introduction

Recent tax changes in Kenya have significantly impacted the real estate and land transaction landscape. These changes aim to stimulate the housing sector, enhance tax compliance, and ensure more efficient tax processes. Key developments include a tax rebate for large-scale residential construction, modifications to the Capital Gains Tax regime, the implementation of an electronic tax invoice management system for developers, new withholding tax requirements, and the introduction of the Affordable Housing Levy.

#### A. Tax Rebate

In a significant move to boost the housing sector, the Kenyan government introduced a tax rebate for companies involved in large-scale residential construction. According to Paragraph 2 (Head B) of the Third Schedule to the Income Tax Act, companies that construct a minimum of 100 residential units annually may be eligible for a 15% corporate tax rate for that income year. This tax incentive,

commonly referred to as the Tax Rebate, is contingent upon the recommendation and approval by the Cabinet Secretary responsible for Housing and the final approval by the Cabinet Secretary of National Treasury.

This initiative is designed to encourage the construction of residential units, thereby addressing the housing deficit in the country. By lowering the tax burden on developers, the government aims to make it more financially viable for companies to invest in large-scale housing projects. This measure is expected to stimulate growth in the real estate sector, increase housing supply, and ultimately contribute to the economic development of Kenya.

The feasibility of this tax rebate as a tool to stimulate the housing sector hinges on several factors. The financial viability of constructing at least 100 residential units annually is a substantial undertaking that requires significant capital investment. Developers must have access to adequate financing and resources to embark on such large-scale projects. Additionally, the approval process involving recommendations from two Cabinet

Secretaries adds a layer of bureaucracy that could potentially delay project initiation and completion.

While the tax rebate provides a clear financial incentive, the real estate market's responsiveness depends on the broader economic environment, including interest rates, access to credit, and overall economic stability. Developers need assurance that their investments will yield returns within a reasonable timeframe, considering the upfront costs and potential market fluctuations.

Challenges to the successful implementation of this initiative include ensuring timely approvals, addressing potential bottlenecks in the construction supply chain, and managing the administrative complexities associated with the tax rebate. Developers may also face challenges related to land acquisition, regulatory compliance, and the availability of skilled labour.

## **B. Changes to the Capital Gains Tax Regime**

The Finance Act, 2023, introduced several pivotal changes to the Capital Gains Tax (CGT) regime, significantly impacting Kenya's real estate and land transactions.

### **i. Inclusion of Partnership-Owned Property:**

One of the notable changes is the inclusion of gains on the transfer of property situated in Kenya that is owned by partnerships under the CGT ambit. Previously, partnerships might have had certain advantages in structuring property ownership to minimise tax liabilities. With this change, any gains realised from the sale or transfer of such properties by partnerships will be subject to CGT, aligning the tax treatment of partnership-owned properties with those owned by individuals and corporations. This amendment aims to close loopholes and ensure a uniform tax application across different ownership structures.

### **ii. Notification Requirement for Ownership Changes:**

The Act introduces a new requirement for notifying the Commissioner of Kenya Revenue Authority (KRA) in cases of significant changes in company ownership. Specifically, when there is a direct or indirect change of at least 20% in the ownership of a company, the person transferring the shares must notify the Commissioner in writing. This requirement is designed to enhance transparency and facilitate the tracking of substantial ownership changes that may affect the underlying property holdings. By doing so, it ensures that any resultant capital gains are properly reported and taxed, thereby improving compliance and revenue collection.

### **iii. Tax on Subsequent Transfers:**

The Finance Act also introduced a provision targeting properties transferred in non-taxable transactions, which are subsequently transferred in taxable transactions within five years. In such cases, the adjusted cost base for calculating CGT in the subsequent transfer will be based on the adjusted cost from the initial transfer. This provision aims to prevent tax avoidance strategies where properties are transferred through non-taxable transactions to reset the cost base, thereby minimising taxable gains in future transactions. By maintaining the original cost base, the government ensures that capital gains accrued over time are accurately captured and taxed appropriately.

### **iv. Exemption Limitation for Internal Reorganizations:**

Another significant change is the limitation of the CGT exemption for internal reorganizations. Under the new rules, this exemption is now only available to groups that have existed for at least 24 months and where no transfer to a third party occurs. This change is intended to prevent companies from using short-term reorganizations as a means to circumvent CGT. By restricting the exemption to long-established groups and genuine internal restructurings, the Act aims to ensure that only legitimate reorganizations benefit from tax relief, thereby protecting the integrity of the tax system.

### **v. Clarification on CGT Payment Due Date:**

Finally, the Finance Act clarified the due date for CGT payment. Under the new provision, the CGT must be paid at the earliest of two events: the receipt of the full purchase price by the vendor or the registration of the transfer. This clarification aligns the tax payment with the actual transaction process, ensuring that the tax liability is settled promptly when the vendor either receives the proceeds from the sale or completes the formal transfer of the property. This measure is intended to streamline tax administration and reduce the risk of delayed payments, enhancing the efficiency of tax collection.

These comprehensive changes to the Capital Gains Tax regime underscore the government's commitment to improving tax compliance, increasing revenue collection, and providing clearer guidelines for property transactions. While these changes aim to create a more transparent and equitable tax system, their feasibility and effectiveness will depend on several factors.

The success of these measures will rely heavily on the efficiency and effectiveness of the Kenya Revenue



Authority (KRA) in implementing and enforcing the new regulations. Adequate training and resources will be essential to ensure that the KRA can handle the increased workload and complexities arising from the new CGT provisions. Additionally, taxpayers must be well-informed about their new obligations to foster compliance.

Challenges may arise in the form of resistance from taxpayers who are accustomed to the previous, less stringent regulations. There may also be difficulties in accurately tracking indirect ownership changes and ensuring that all relevant transactions are reported. Moreover, the administrative burden on businesses, especially small and medium enterprises, could increase as they navigate the new requirements.

### **C. e-TIMS for real estate developers**

The Finance Act, 2023, has introduced a significant amendment to the Income Tax Act, emphasizing the importance of the electronic tax invoice management system (e-TIMS) for real estate developers. The amendment, encapsulated in the newly added paragraph (c) to Section 16 of the Income Tax Act, has profound implications for how real estate transactions are documented and reported for tax purposes.

Section 16 of the Income Tax Act deals with expenses that are deemed ineligible in determining one's income tax liability. The new paragraph (c) stipulates that "any expenditure or loss where the invoices of the transactions are not generated from an electronic tax invoice management system" will be considered ineligible unless the transactions are exempted by the Tax Procedures Act. This means that, regardless of whether the invoices are issued by agents or property owners, adherence to e-TIMS compliance is mandatory.

This amendment underscores the government's commitment to enhancing transparency and accountability in financial transactions within the real estate sector. By mandating the use of e-TIMS, the government aims to curb tax evasion and ensure that all transactions are accurately recorded and reported. This system allows for real-time tracking of invoices, thereby improving the efficiency and accuracy of tax collection.

For real estate developers, this means that all invoices related to property transactions must be generated through the e-TIMS. Failure to comply with this requirement will result in the disallowance of the associated expenses or losses when calculating income tax liability. This can have a significant impact on the financial statements of property developers and agents, as non-compliance could lead to higher tax liabilities due to

the exclusion of certain expenditures.

The implementation of e-TIMS is expected to bring several benefits, including improved tax compliance, reduced opportunities for fraud, and enhanced transparency in the real estate market. However, it also presents several challenges. Real estate developers and agents will need to invest in compatible electronic invoicing systems and ensure their staff are adequately trained to use these systems.

Moreover, the success of this initiative will largely depend on the effectiveness of the Kenya Revenue Authority (KRA) in enforcing the new regulations and providing the necessary support to taxpayers. Continuous engagement with stakeholders, including training and awareness programs, will be crucial to facilitate a smooth transition to e-TIMS.

### **D. Recent changes as per the Finance Act 2023**

The Finance Act, 2023, has introduced several significant changes impacting Kenya's real estate and land transactions. These amendments aim to streamline tax processes, reduce tax burdens, and ensure better compliance. Key changes include adjustments to the Monthly Rental Income (MRI) tax, new withholding tax requirements, and the reintroduction of withholding tax on marketing services.

#### **i. Monthly Rental Income (MRI) Rate Reduction:**

The Finance Act, 2023, has reduced the Monthly Rental Income (MRI) tax rate from the previous rate to a more favourable 7.5% per month. This change is particularly advantageous for residential property owners as it lowers their tax burden, allowing them to retain a larger portion of their rental income. The reduction in the MRI rate is expected to encourage compliance among property owners and possibly attract more investments in the residential rental market, contributing to the overall growth of the sector.

#### **ii. Withholding Tax on Rental Income:**

Another significant amendment is the introduction of a withholding tax requirement for persons receiving rental income on behalf of property owners. Under the new regulations, such intermediaries must withhold and remit 7.5% of the gross rental amount within five days of receipt. This measure is designed to improve tax compliance by ensuring that rental income is accurately reported and taxed at the source. By placing the responsibility on intermediaries, the government aims to reduce instances of tax evasion and enhance the efficiency of tax collection.

### iii. Withholding Tax on Marketing and Advertising Services:

The Finance Act, 2023, has reintroduced withholding tax (WHT) on sales promotion, marketing, and advertising services provided by residents. The rate is set at 5% of the service fee, regardless of the amount. This reintroduction aims to capture a broader range of taxable services and ensure that service providers contribute their fair share of taxes.

By targeting marketing and advertising services, the government seeks to tap into revenue streams from sectors that have seen substantial growth and increased spending in recent years.

These changes brought about by the Finance Act, 2023, reflect the government's efforts to create a more equitable and efficient tax system. While the reduction in the MRI rate provides relief to residential property owners, the new withholding tax requirements on rental income and marketing services aim to enhance tax compliance and broaden the tax base.

However, the implementation of these changes will not be without challenges. Property owners and intermediaries will need to familiarize themselves with the new regulations and ensure timely compliance to avoid penalties. Similarly, service providers in the marketing and advertising sectors will need to account for the new withholding tax in their pricing and financial planning.

### E. Affordable Housing Levy

The Affordable Housing Act, which was assented to by the President on 19th March 2024, marks a significant step towards realizing the right to accessible and adequate housing as enshrined in Article 43 of the Constitution of Kenya. This Act introduces the Affordable Housing Levy (AHL), a new financial obligation aimed at supporting the government's affordable housing initiatives.

The Affordable Housing Levy is set at a rate of 1.5% on the gross salary of an employee, with a matching contribution from the employer. This means that both employees and employers are required to contribute to the AHL, effectively making it a 3% total contribution towards the affordable housing fund.

The levy applies not only to salaries but also to the gross income of individuals whose income is not categorized under gross salary but falls within the scope of taxable earnings.

A recent notice from the Kenya Revenue Authority (KRA) dated 6th May 2024 has further clarified the scope of

AHL, extending its applicability to rental income. This clarification means that landlords are now required to pay AHL at a rate of 1.5% of their gross rental income, calculated before any expenses are deducted. This extension of AHL to rental income introduces a new layer of compliance for landlords and small business owners in the real estate sector.

The introduction of AHL necessitates careful attention to compliance requirements. The levy is due by the 9th day of the subsequent month, and failure to remit the levy on time attracts a penalty of 3% for each month the AHL remains unpaid. This penalty is recoverable as a civil debt, underscoring the importance of timely and accurate remittance to avoid financial penalties and legal complications.

For landlords and employers, this means instituting strong systems to ensure that the AHL is calculated correctly and remitted promptly. This might involve updating payroll systems, training staff on the new requirements, and maintaining accurate records of all transactions subject to AHL.

The Affordable Housing Levy aims to generate funds to support the development of affordable housing, aligning with the government's broader agenda of providing adequate housing for all citizens. While the levy introduces additional financial and administrative responsibilities for employers and landlords, its successful implementation is expected to contribute significantly to addressing the housing deficit in Kenya.

### Conclusion

The recent tax changes in Kenya represent a comprehensive effort to reform the real estate and land transaction sectors. By introducing incentives like the tax rebate for large-scale residential construction, modifying the Capital Gains Tax regime, implementing an electronic tax invoice management system, and introducing new withholding tax requirements and the Affordable Housing Levy, the government aims to stimulate growth, improve compliance, and address the housing deficit.

While these measures hold promise for enhancing transparency and economic development, their success will depend on effective implementation, stakeholder engagement, and overcoming the practical challenges faced by developers, property owners, and other stakeholders in the real estate sector.





**THE PROPERTY  
BOUTIQUE**

YOUR ONE-STOP SHOP FOR PROPERTY SOLUTIONS

# PRIME

## LAND KAJIADO

### For Sale



Located in Tinga, Oletepesi, approximately 100m off Magadi Road.



Water & Electricity available for connection



Ready Title Deeds

**50 X 100 PLOTS  
KES:  
280,000/-**

**100 X 100**

**KES: 500,000/-**

**5 ACRES**

**KES: 5 MILLION**

**The Property Boutique Ltd**

I&M Bank House, 5th Floor,  
2nd Ngong Avenue  
P.O. Box 22588 - 00505,  
Nairobi, Kenya

CALL NOW FOR MORE INFO:



**+254 796 452 092**

**+254 707 690 539**

**SCAN ME**

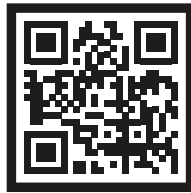


info@propertyboutique.co.ke  
WWW.PROPERTYBOUTIQUE.CO.KE





*A legal education magazine*  
**Relevant. Digestible. Actionable**



[www.cmpropertydigest.com](http://www.cmpropertydigest.com)

## Disclaimer:

*This magazine is for general information only and does not constitute legal advice. Please consult with an advocate for your unique situation. We disclaim any legal liability for any loss or damage of any kind incurred as a result of reliance, wholly or partly, on any information provided in this magazine.*

*If you have any questions, do not hesitate to reach out to the following key contacts:*



**Nisaa SAYED**  
Advocate and Author's Editor  
CM Property Digest  
+254 734 545 150  
[nsayed@cmpropertydigest.com](mailto:nsayed@cmpropertydigest.com)



**Joan MAINA**  
Advocate and Author's Editor  
CM Property Digest  
+254 719 811 400  
[jmaina@cmpropertydigest.com](mailto:jmaina@cmpropertydigest.com)



CM ADVOCATES LLP

## A Decade Of Legal Innovation

# 10 Years ANNIVERSARY



#### Head Office, Nairobi:

I&M Bank House, 7th Floor  
2nd Ngong Avenue  
P.O. Box 22588 - 00505 | Nairobi, Kenya  
Tel: +254 20 221 0978 | +254 20 221 1077  
Cell: +254 716 209 673  
Email: law@cmadvocates.com

#### Mombasa Office:

Links Plaza 4th Floor  
Links Road, Nyali  
P.O. Box 90056 - 80100 | Mombasa, Kenya  
Tel: +254 41 447 0758 | +254 41 447 0548  
Cell: +254 746 995 283  
Email: mombasaooffice@cmadvocates.com

#### Diani Office:

Aga Khan Building,  
Ground Floor, Diani  
P.O. Box 90056 - 80100 | Mombasa, Kenya  
Tel: +254 772 246 208  
Email: dianioffice@cmadvocates.com

#### Uganda Office:

Plot 30, Lugogo Bypass  
Regency Plaza, Level 3, Office 4  
P.O. Box 104597 | Kampala, Uganda  
Tel: +256 774 690749  
Email: Kla@cmadvocates.com

#### Tanzania Office:

Plot No. 89, Block 45B, Office No. 302-2,  
3rd Floor, Victoria Noble Centre, Bagamoyo Road  
P.O. Box 77044 | Dar es Salaam, Tanzania  
Tel: +255 713 411 721 | +255 654 702 304  
+255 682 495 603  
Email: law@cymbellattorneys.com

#### Rwanda Office:

Kigali Heights Building,  
West Wing, Third Floor  
P.O. Box 493 | Kigali, Rwanda  
Tel: +250 252 580 152  
Email: law@cmadvocates.rw

#### Nigeria Office:

Plot 5, Yesuf Abiodun Way,  
Off Ozumba Mbadiwe Way,  
Oniru, Victoria Island  
P.O. Box 105102 | Lagos State, Nigeria  
Tel: +234 803 603 3651  
Email: law@cmadvocatesnigeria.com

#### Zambia Office:

Plot 6755, 1st Floor, Elalah House,  
Chainama Road, Olympia  
Off Katima Mulilo Road,  
Lusaka, Zambia  
Tel: +260 955 195 454  
Email: info@mbplegal.co.zm