LEGAL, POLICY AND INSTITUTIONAL REVIEW OF THE AFFORDABLE HOUSING SECTOR IN KENYA

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This document has been developed to bring stakeholders together to engage on the most critical areas for regulatory reform in the housing value chain. The report is not prescriptive but rather a best attempt at assessing the vast library of laws, policies and regulations that apply to the housing value chain in Kenya. It is hoped that the report will serve as a baseline for further dialogue in the industry, particularly in prioritizing what regulatory reforms are most required and coming together to support these reforms.

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LIST OF ABBREVIATIONS

ADP	Annual Development Plan
AHP	Affordable Housing Programme
BORAQS	Board of Registration of Architects and Quantity Surveyors
CA	Communications Authority of Kenya
CAK	Competition Authority of Kenya
CDT	Commissioner of Domestic Taxes
CECM	County Executive Committee Member
CGT	Capital Gains Tax
CGV	Chief Government Valuer
CIDP	County Integrated Development Plan
CLF	Central Liquidity Fund
CoG	Council of Governors
CPD	Continuous Professional Development
CPI	Consumer Price Index
CPLUDP	County Physical and Land Use Development Plan
CPLUPC	County Physical and Land Use Planning Consultative Forum
DGF	Deposit Guarantee Fund
DGPP	Director General of Physical Planning
e-DAMS	Electronic Development Application Management System
EBK	Engineers Board of Kenya
EIA	Environmental Impact Assessment
EPRA	Energy and Petroleum Regulatory Authority
FRC	Financial Reporting Centre
GDP	Gross Domestic Product
GIS	Geographic Information System
IPDU	Integrated Project Delivery Unit
JV	Joint Venture
KenInvest	Kenya Investment Authority
KENSUP	Kenya Slum Upgrading Programme
KISIP	Kenya Informal Settlements Improvement Programme
KFS	Kenya Forest Service
KMRC	Kenya Mortgage Refinance Company
KNBS	Kenya National Bureau of Statistics
KRA	Kenya Revenue Authority
KRB	Kenya Roads Board
LPLUDP	Local Physical and Land Use Development Plan
LSK	Law Society of Kenya
MLoPP	Ministry of Lands and Physical Planning (under previous regime, changed in October 2022 to Ministry of Lands, Public Works, Housing and Urban Development)
MTIHUDPW	Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (under previous regime, changed in October 2022 to Ministry of Roads and Transport)
NCA	National Construction Authority
NEAP	National Environmental Action Plan
NEMA	National Environment Management Authority
NHC	National Housing Corporation

NHDF	National Housing Development Fund
NIFCA	Nairobi International Financial Centre Authority
NLIMS	National Land Information Management System
NPLUDP	National Physical and Land Use Development Plan
PDP	Physical Development Plan
PPPS	Public-Private Partnerships
REITS	Real Estate Investment Trusts
RIT	Rental Income Tax
SACCO	Savings and Credit Cooperative Society
SASRA	SACCO Societies Regulatory Authority
SDHUD	State Department of Housing and Urban Development
SDPW	State Department of Public Works
SPVs	Special Purpose Vehicles
SEA	Strategic Environmental Assessment
UFAA	Unclaimed Financial Assets Authority
UFATF	Unclaimed Financial Assets Trust Fund
VAT	Value Added Tax
WMC	Waste Management Council

LIST OF LAWS (STATUTES, POLICIES AND REGULATIONS) REVIEWED

1. Advocates (Remuneration) (Amendment) Order, 2014
2. Architect and Quantity Surveyor Act, 1933 (Cap 525)
3. Architects and Quantity Surveyors By-Laws, 1959
4. Auctioneers Act No. 5 of 1996
5. Auctioneers Practice Rules 2009
6. Auctioneer Rules, 1997
7. Banking Act, 1989 (Cap 488)
8. Banking Circular No. 2 of 2021
9. Building Societies Act, 1956 (Cap 489)
10. Business Law (Amendment) Act No. 1 of 2020
11. Buy Kenya-Build Kenya Strategy 2017
12. Capital Markets (Real Estate Investment Trusts) (Collective Investment Schemes) Regulations 2013
13. Central Bank of Kenya Act 1966 (Cap 491)
14. Central Bank of Kenya (Mortgage Refinance Companies) Regulations, 2019
15. Civil Servants (Housing Scheme Fund) Regulations, 2004
16. Climate Change Act, No. 11 of 2016
17. Community Land Act. No. 27 of 2016
18. Community Land Regulations, 2017
19. Competition Act, No. 12 of 2010
20. Constitution of Kenya 2010
21. County Governments Act, No. 17 of 2012
22. County Spatial Planning Guidelines, 2018
23. Distress for Rent Act, 1938 (Cap 293)
24. Draft Construction Industry Policy, 2018
25. Draft National Building Code, 2022
26. Draft National Cooperative Development Policy 2019
27. Draft National Land Surveying and Mapping Policy 2021
28. Draft National Retirement Benefits Policy 2022
29. Draft National Tax Policy 2022
30. Energy Act No. 1 of 2019
31. Energy (Appliances' Energy Performance and Labeling) Regulations 2016
32. Energy (Energy Management) Regulations 2012
33. Engineering Rules, 2019
34. Engineering Technology Act, No. 23 of 2016
35. Engineers (Scale of Fees for Professional Engineering Services) Rules, 2022
36. Engineers Act, No. 43 of 2011
37. Environment Action Plan Preparation Guidelines 2016-2022
38. Environment and Land Court Act No. 19 of 2011
39. Environmental (Impact Assessment and Audit) Regulations, 2003
40. Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009
41. Environmental Management and Co-ordination (Water Quality) Regulations, 2006
42. Environmental Management and Coordination Act, No. 8 of 1999
43. Estate Agents Act, 1984 (Cap 533)

44. Executive Order No. 1 of 2022-The President: Organization of the Government of the Republic of Kenya
45. Export Processing Zones Act, Cap 517
46. Finance Act, No. 22 of 2022
47. Forest Conservation and Management Act, No. 34 of 2016
48. Forests (Harvesting) Rules, 2009
49. Guarantee (House Purchase) Act, 1967 (Cap 462)
50. Guidelines for Extension and Renewal of Leases of Public Land
51. Housing Act, 1953 Cap 117
52. Housing Bill, 2021
53. Housing Scheme Fund Regulations, 2018 (Legal Notice No. 238 of 2018)
54. Idle Land Taxation Policy 2018
55. Income Tax Act, 1974 (Cap 470)
56. Investment Promotion Act, No. 6 of 2004
57. Kenya Affordable Housing Programme Development Framework Guidelines, 2018
58. Kenya Deposit Insurance Act, No. 10 of 2012
59. Kenya National Climate Change Response Strategy 2010
60. Kenya National Energy Efficiency and Conservation Strategy 2020
61. Kenya National Spatial Plan (2015-2045)
62. Land Act, No. 6 of 2012
63. Land Control Act (Cap 302), 1967
64. Land Control Bill, 2022
65. Land Registration (General) Regulations, 2017
66. Land Registration (Registration Units) Order, 2017
67. Land Registration Act, No. 3 of 2012
68. Land Value (Amendment Act) 2019
69. Landlord and Tenant Bill, No. 3 of 2021
70. Licensed Surveyors Code of Professional Conduct 1997
71. Local Government (Adoptive By Laws) Building Order, 1968 and The Local Government (Adoptive By-Laws) (Grade II Building) Order 1968 or "National Building Code 1968"
72. Matrimonial Property Act, No. 49 of 2013
73. Microfinance Act, No. 19 of 2006
74. Mining Act, No. 12 of 2016
75. Mortgages (Special Provisions) Act, 1968 (Cap 304)
76. Nairobi City County Community and Neighbourhood Associations Engagement No. 4 of 2016
77. Nairobi City County Finance Act, No. 8 of 2015
78. Nairobi City County Regularization of Development Act No. 3 of 2015
79. Nairobi City Development Ordinances and Zones
80. Nairobi Integrated Urban Development Master Plan (2014-2030)
81. National Climate Change Action Plan 2018-2022
82. National Construction Authority (Defects Liability) Regulations, 2020 (Not operational)
83. National Construction Authority Act, No. 41 of 2011
84. National Construction Authority Regulations, 2014
85. National Land Commission (Amendment) Bill, 2022
86. National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017
87. National Land Commission Act, No. 5 of 2012

88. National Rating Bill, 2022
89. National Land Use Policy Implementation Monitoring and Oversight Tool, 2022
90. National Risk Disaster Management Bill 2021
91. National Urban Development Policy 2016
92. NCA Code of Conduct for the Construction Industry, 2020
93. Persons with Disabilities Act, No. 14 of 2003
94. Physical and Land Use Planning (Building) Regulations, 2021
95. Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, 2019
96. Physical and Land Use Planning (County Physical and Land Use Development Plan) Regulations, 2021
97. Physical and Land Use Planning (Development Permission and Control) (General) Regulations, 2021
98. Physical and Land Use Planning (Institutions) Regulations, 2021
99. Physical and Land Use Planning (Liaison Committees) Regulations, 2021
100. Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations, 2021
101. Physical and Land Use Planning (National Physical and Land Use Development Plan) Regulations, 2021
102. Physical and Land use Planning (Planning fees), Regulation 2021
103. Physical and Land Use Planning Act, No. 13 of 2019
104. Physical Planners Registration Act, No. 3 of 1996
105. Physical Planning Handbook 2008
106. Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009
107. Public Finance Management Act, No. 18 of 2012
108. Public Health (Drainage and Latrine) Rules, 1948
109. Public Health Act, 1921 (Cap 242)
110. Public Private Partnerships Act, No. 14 of 2021
111. Rating Act, 1963 (Cap 267)
112. Regulation of Wages (General) Order, 1982
113. Rent Restriction Act, 1959 (Cap 296)
114. Sectional Properties Act, No. 21 of 2020
115. Sectional Properties Regulations, 2021
116. Sessional Paper No. 3 of 2012 on Population Policy for National Development
117. Sessional Paper No. 1 of 2013 National Building Maintenance Policy for Kenya
118. Sessional Paper No. 02 of 2016 on National Slum Upgrading and Prevention Policy
119. Sessional Paper No. 3 of 2016 on National Housing Policy
120. Sessional Paper No. 1 of 2017 on National Land Use Policy
121. Sessional Paper No. 10 of 2014 on The National Environment Policy
122. Sessional Paper No. 3 of 2009, the National Land Policy
123. Special Economic Zones Act, No. 16 of 2015
124. Stamp Duty (Valuation of Immovable Property) Regulations 2020
125. Stamp Duty Act, 1958 (Cap 480)
126. Standards Act, 1974 (Cap 496)
127. Survey Act No. 25 of 1961 (Cap 299)
128. Survey (Electronic Cadastre Transactions) Regulations, 2020
129. Survey Regulations, 1994

130. Sustainable Waste Management Act 2022
131. Unclaimed Financial Assets Act, No. 40 of 2011
132. Urban Areas and Cities Act, No. 13 of 2011
133. Valuation for Rating Act, 1956 (Cap 266)
134. Value Added Tax Act, No. 35 of 2013
135. Valuers Act, 1985 (Cap 532)
136. Valuers Bill 2022
137. Water Act No. 43 of 2016
138. Water Harvesting and Storage Regulations 2021
139. Water Resources Regulations 2021
140. Water Services Regulations 2021

LIST OF CASES REVIEWED

1. *African Gas Oil Company Ltd –vs- Attorney General and 3 Others* (2016) eKLR
2. *Barclays Bank (K) Limited v William Mwangi Nguruki* [2014] eKLR
3. *Base Titanium Limited v County Government of Mombasa & another* (Petition 22 of 2018) [2021] KESC 33 (KLR)
4. *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR
5. *Charles Murunga & 5 others v James Chege & another [2021] eKLR*
6. *David Gitome Kuhiguka vs Equity Bank Limited* [2013] eKLR
7. *David Ngugi Ngaari v Kenya Commercial Bank Limited* [2015] eKLR
8. *Depar Limited v County Executive Committee Member for Lands, Physical Planning, Housing and Urbanization & another* [2021] eKLR
9. *Desires Derive Ltd v Britam Life Assurance Co (K) Ltd* (2016) eKLR
10. *East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another* [2017] eKLR
11. *Elisabeth Kurer Heier & another v County Government of Kilifi & 4 others* [2020] eKLR
12. *Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties)* [2022] eKLR
13. *Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & another* (2015) eKLR
14. *Florence Njeri Karanja vs Molyn Credit Limited* [2014] eKLR
15. *Innercity Properties Limited v Housing Finance & another; Josephine Mukuhi & another (Interested Parties)* (2020) eKLR
16. *Jitendraray Nathwani & another v Hitesh Devendra Makwana & 3 others* [2020] eKLR
17. *Justus Ogada Agalo v Managing Director Kenya Railways Corporation* [2016] eKLR
18. *Kenya Bankers Association v Kenya Revenue Authority* [2018] eKLR
19. *Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)* [2019] eKLR
20. *Kenya Revenue Authority v Kenya Bankers Associations* [2020] eKLR, Civil Appeal 213 of 2018
21. *Kilimani Project Foundation v B Concept Limited t/a B Club Nairobi & 7 others* [2019] eKLR
22. *Kimwele v Kenya Bankers Association of Kenya & 12 others* (Commercial Case E237 of 2020) [2022] KEHC 458 (KLR) (Commercial and Tax) (31 May 2022) (Judgment)
23. *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others, Civil Appeal No. 287 of 2016*
24. *Law Society of Kenya v Service & 5 others; Migot-Adholla & another (Interested Party)* (Environment & Land Petition E029 of 2022) [2022] KEELC 3962 [KLR] (Environment & Land Petition E029 of 2022) [2022] KEELC 3962 [KLR]
25. *Laxmishanker Kanji Vyas v Firdaus Salim & another* [2014] eKLR
26. *Malindi Law Society & 12 others v Attorney General & 2 others,* Consolidated Petition Numbers 19 & 291 of 2016 [2021] KEHC 168 (KLR)
27. *Malindi Law Society v Attorney General & 4 others, Constitutional Petition No. 3 of 2016*
28. *Mapis Investment (K) Limited vs Kenya Railways Corporation (2006) KLR*
29. *Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (Petition 3 of 2018) [2021] KESC 34 (KLR)

30. *Mugure & 2 Others v Higher Education Loans Board* (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Civ) 19 August 2022) (Judgment)
31. *Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR*
32. *National Land Commission v Attorney General & Others, Advisory Opinion Reference 2 of 2014*
33. *Nightshade Properties Ltd v National Land Commission & 3 others* [2021] eKLR
34. *Ocra Realtors Ltd v Abdulghani Kipkemboi Komen & 2 others* [2019] eKLR
35. *Patrick Musimba –vs- National Land Commission & 4 Others (2016) eKLR*
36. *Ravaspaul Kyalo Mutisya v National Land Commission* [2022] eKLR
37. *Registered Trustees of Jamie Masjid Ahl-Sunnait- Wal-Jamait Nairobi v Nairobi City County & 2 others [2015] eKLR*
38. *Registered Trustees of Jamie Masjid Ahl-Sunnait- Wal-Jamait Nairobi v Nairobi City County & 2 others [2015] eKLR*
39. *Republic v County Government of Nairobi; Kilimani Project Foundations & 21 others (Interested Parties) Ex Parte Cytonn Investment Partners Sixteen LLP [2020] eKLR*
40. *Republic v National Construction Authority & 2 others; Joint Building and Construction Council (Exparte)* (Judicial Review Application E1120 of 2020) [2022] KEHC 333 (KLR)
41. *Republic -vs- National Land Commission Ex parte Holborn Properties Ltd* [2016] eKLR
42. *Samwel D. Omwenga Angwenyi v National Land Commission & 2 others* [2019] eKLR
43. *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, Petition 65 of 2010
44. *South C Fruit Shop Limited v Housing Finance Company of Kenya Limited* [2013] eKLR
45. *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR
46. *Wibeso Investments Limited & another v Tamarind Meadows Limited & 5 others* [2020] eKLR
47. *Willow Park Limited v Jamii Bora Bank Limited & another* [2019] eKLR
48. *Yusuf Abdi Ali Co Ltd v Family Bank Limited* [2015] eKLR

1. EXECUTIVE SUMMARY

Access to adequate and affordable housing is considered a human right globally. Article 43 of the Constitution of Kenya under the Bill of Rights provides that every person has the right to accessible and adequate housing. Accordingly, the State is obligated to take steps towards achieving this socio-economic right to its citizens, either directly or by encouraging delivery by the private sector to the wider market. In particular, the 2017–2022 government administration promoted the role of affordable housing within its Big Four Agenda (consisting of Affordable Housing, Manufacturing, Food Security and Affordable Health care).

While there has been some progress in delivering housing units by the Government both directly and by the private sector within this context of reforms, there have been challenges largely arising from some failures in policy, legal and institutional design. A key challenge is the length, breadth and complexity of the housing value chain. Accordingly, it became imperative to assess the policy, legal and institutional framework governing affordable housing in Kenya to assess gaps and key opportunities.

This policy, legal and institutional review serves two central aims: *First*, is to provide a lay of the land on the policy, legal and institutional frameworks governing housing in Kenya; and *second*, is to assess the effectiveness of the policy, legal and institutional framework in achieving the constitutional imperative of access to decent housing, with a view to identifying gaps and opportunities for improvement.

The **structure** of this report is as follows: The overall housing value chain and institutional framework are described in Sections 2 and 3. Section 4 then sets out the overall policy framework, structured in terms of the housing value chain. The sections which follow provide brief summaries of the laws in respect of each value chain link and identify gaps and propose recommendations. Thereafter, annexes for each value chain link detail some of the substantive provisions of each of the laws reviewed.

Overall Findings

The study unearthed a multiplicity of policies, laws and institutions/agencies, charged with different functions, in each link of the housing value chain. These unnecessarily lengthen and complicate the housing delivery process and increase costs and risks, thereby deterring investment in housing. Broadly, there is a need for better coordination and simplification amongst the various national and county government departments to enable faster and more cost-effective approvals for housing related activities. **The change in the scope of 2 key ministries in October 2022, is likely to help the coordination for all functions to deliver housing. Previously, the State Department of Housing and State Department for Public Works were housed under the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works. These national government functions have now been moved to the Ministry of Lands, which should help the coordination along the value chain to deliver housing more effectively.**

There is also a critical need to provide support to and implement current policies and laws that remain unimplemented. These include: the National Housing Policy 2016; the National Land Use Policy 2017; the Urban Areas and Cities Act 2011; the Affordable Housing Programme Development Framework Guidelines 2018; and the Public Private Partnerships Act 2021, the National Slum Upgrading and Prevention Policy 2016, among others.

Within the context of the housing reform that the government has been seeking, there are a few Bills currently in Parliament (Housing Bill 2021, Landlord and Tenant Bill 2021, National Rating Bill 2022, National Disaster Risk Management Bill 2021, Valuers Bill 2022, National Land Commission (Amendment) Bill 2022) which require finalization and promulgation. Some of these will need to be reintroduced, since they are considered to have expired following the end of the term of the 13th Parliament. To deal with this regulatory backlog, it is critical that the Bills are reviewed with adequate stakeholder contribution and passed in the next (13th) Parliament.

Further, gaps identified in the regulatory and institutional framework suggest the following:

- There is a need to integrate public transport and other climate resilient measures with the objectives of the affordable housing agenda. This is currently not provided for in the policy, legislative and institutional framework.
- While both public and private land is available for housing, capital to invest in infrastructure and construction has been limited (as seen by the limited refinancing of units to the Kenya Mortgage Refinance Corporation). A key hurdle is the high interest rates payable on government paper which sets a high benchmark for returns required for investment in housing, which inherently has more risk. This suggests that housing objectives must be accommodated also in Kenya's wider economic policy.
- There is a critical need to streamline and operationalize the supply and demand side incentives which are provided in law, but which have proven difficult to implement. This is needed to enable the delivery of housing at prices that are affordable to the target market; and a need more generally to align the national tax policy with the potential of housing to drive economic growth.
- There is a need to streamline the mortgage and foreclosure laws to facilitate the realization of underlying collateral in the event of a default.
- More direct and enforceable consumer protection measures are required to protect household investment into housing and particularly in off-plan housing. Further, incentives to promote savings for housing are currently missing from the regulatory framework.
- The regulatory and institutional framework already creates multiple opportunities for data, through the regulatory function that public institutions perform. This data could and should be leveraged beyond the regulatory function to support greater market transparency, which would reduce risk in support of increased investment. A commitment to sharing data as a key enabler to drive patient impact capital to invest in housing is necessary and should be promoted.

High Level Findings / Recommendations by Link of Housing Value Chain

As shown in Section [2], the Housing Value Chain comprises several components. These have been simplified in this review into four separate components of housing delivery:

- Land assembly, land acquisition, title and registration of land tenure
- Physical planning
- Construction and maintenance
- Financing (investment, rental, taxation)

While there are a multitude of interventions identified in this review that require action; the most pressing recommendations identified are:

(i) Fast track the enactment of the Housing Bill 2021 into law;
(ii) Support the adoption of the national Building Code 2022, and continuously improve the Code towards greener and more sustainable housing;
(iii) Simplify the process and costs of approvals to deliver affordable housing;
(iv) Align tax policies with the Affordable Housing Agenda to drive long term investment into housing (this includes transfer of pension assets into housing, encouraging long term savings, operationalising the various tax incentives to support both the demand and supply side etc);
(v) Support the collection and dissemination of data along the housing value chain to allow players make coordinated investment decisions and progressively take more risk.

Each recommendation requires the support of various players, both public and private, and the **next step required is to prioritise which recommendations should be focused on in a logical and phased manner and identify which player(s) will take responsibility to pursue the prioritised recommendations to be implemented.** This will require a series of stakeholder engagement meetings with representation from the multitude of public and private stakeholders along the value chain. The public stakeholders will include parliament, the various national government departments and parastatals and County government departments (as laid out in Figure [3] in Section 3). The private sector stakeholders include the housing demand itself (the people who will rent or own the housing), housing suppliers (developers, contractors and professionals), financiers (banks, equity investors, DFIs), NGOs working to promote the sector, technology and service providers, and research and think tank bodies. The desired output from these consultations would be a **comprehensive strategy on how to evolve the regulatory sector to support the housing sector in Kenya with tangible deliverables for the short term, medium term and long term.** As an underlying principle, **collection and dissemination of data** will play a critical role on the evolution of the sector.

All the recommendations in this document have been structured along the value chain. Figure 1 below summarises the recommendations in terms of action required from (i) enactment of draft legislation (ii) amendment of existing legislation (iii) develop regulations for existing legislation (iv) support implementation of existing policies / regulation and (v) develop Policy.

Best possible judgement has been exercised to place each recommendation in each of the columns below, however, some recommendations can span more than 1 column.

Value chain component	ENACTMENT OF NEW / DRAFT LEGISLATION	REVIEW OF EXISTING LEGISLATION/ PROCESSES	DEVELOP REGULATIONS FOR EXISTING LEGISLATION	SUPPORT IMPLEMENTATION OF EXISTING LEGISLATION	DEVELOP / FINALISE POLICY
Overarching value chain	**Housing Bill 2021**- Enact into law, and then operationalise. Harmonize all the existing and new regulatory frameworks and bodies, to ensure smooth delivery of housing and reduce duplication of costs and time. Promote creation of data banks to enhance market transparency. Integrate protection for consumers during construction and upon occupation. Streamline envisaged functions of Director General proposed in Bill.				
Land assembly, land acquisition, title, and registration of land tenure		**Sectional Properties Regulations 2021**- Provide clarity on the exemptions on what is meant by 'mixed use development' in terms of minimum acreage and diversity. **Sectional Properties Act 2020**- Extend the current statutory timeline of 2 years for title conversion. **Land Act No.6 of 2012**- Simplify foreclosure procedures to promote mortgage lending **Sessional Paper No. 3 of 2009 on National Land Policy**- The Policy is outdated and due for review, especially to align it with the 2010 Constitution.	**Sectional Properties Act 2020**- Provide guidelines or procedures for applying for exemptions from converting long term leases to sectional titles. **Land Registration Act No. 3 of 2012**- Provide for the required guidelines/procedures to support geo-referencing and title migration.	**Land Registration Act No. 3 of 2012**- Review the design and capacity of ArdhiSasa platform, to enable its functionality with speed and ease; support surveying of land parcels and digitization of land registries in all counties. **Land Act No. 6 of 2012**- Establish and Operationalize the Land Acquisition Tribunal **Land Registration Act No. 3 of 2012**- Expedite land title conversion processes Support development of land value indexes as provided for in **Land Value (Amendment Index) 2019**.	**The Land Sector Gender Policy; Kenya National Spatial Data Infrastructure Policy; and the National Land Surveying and Mapping Policy** all exist but need to be finalized and operationalized. Finalisation of the draft **Idle Land Taxation Policy.** Consider the development of **a land banking policy, a law on minimum and maximum acreages of private land** and guidelines/regulations on penalties for compliance.

Value chain component	ENACTMENT OF NEW / DRAFT LEGISLATION	REVIEW OF EXISTING LEGISLATION/ PROCESSES	DEVELOP REGULATIONS FOR EXISTING LEGISLATION	SUPPORT IMPLEMENTATION OF EXISTING LEGISLATION	DEVELOP / FINALISE POLICY
Physical planning		**Various County Development Ordinances and Zoning Guidelines and other county zoning laws**- Review of county planning frameworks leading to new zoning laws and guidelines to accommodate new planning priorities and intentions **Physical and Land Use Planning (Building) Regulations, 2021**- Cater for other forms of disability and reduce the requirements for wheelchair access which may not be feasible to be provided by every private developer. Reconsider use of public space (footpaths) for provision of parking which is a private use benefiting a small section of society. Integrate flexibility on parking requirements within developments to prmote affordability **Physical Planning Handbook 2008**- Review and update Handbook to ensure it aligns with the current legal and institutional framework	**Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, 2019**- Develop framework to enable developers to obtain approvals from Cabinet Secretary for large intercounty affordable housing projects. **Urban Areas and Cities Act 2011**- Develop an implementation framework to allow for the delivery of cross-city and cross-municipality services to overcome local infrastructure challenges	**Sessional Paper No. 1 of 2017 on National Land Use Policy**- Implement in favour of the affordable housing sector. **Kenya National Spatial Plan (2015 – 2045)** -Promote the implementation of recommendations of the National Spatial Plan. **National Land Use Policy Implementation Monitoring and Oversight Tool**- The NLC requires support in deploying the monitoring and oversight tool, with respect to urban development	

Value chain component	ENACTMENT OF NEW / DRAFT LEGISLATION	REVIEW OF EXISTING LEGISLATION/ PROCESSES	DEVELOP REGULATIONS FOR EXISTING LEGISLATION	SUPPORT IMPLEMENTATION OF EXISTING LEGISLATION	DEVELOP / FINALISE POLICY
Construction and maintenance	**National Building Code 2022**- Fast track finalization and adoption with option for regular reviews, to continuously move Code to greener, healthier, and more affordable buildings. Review the parking requirement, adjust it in response to demographic, geographic and management.	Review ALL current statutory costs and processes (whether in this Act or separately) to promote efficiencies of time and cost.	**Defects Liability Regulations 2020** - Review of appropriate building regulation, drawing on international experience, in support of driving the finalisation and adoption of the existing Regulations. Ensure that the regulations cover all building types.	**Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009**- Implement permissible noise levels for residential areas.	Develop building maintenance manuals, together with a dissemination programme to sensitize stakeholders on national and international maintenance standards and guidelines.
	Draft Construction Industry Policy- Pursue finalization and adoption to guide the construction industry	**Develop a One Stop Shop Framework**-Consolidate all statutory approvals and host them in a single location to ease the speed and cost of delivery **Public Health Act, 1921**- Review and modernize the Act to incorporate intentions for and commitments to energy efficiency, and healthy and green buildings.	**Energy Act No. 1 of 2019-** formulate regulations to provide for various matters such as: energy efficiency and conservation building codes; energy efficiency standards for specific technologies and buildings; and energy consumption norms and standards for designated consumers.		Prepare standards for alternative building/construction materials
	Draft appropriate and enabling legislation / regulations that protect consumers from poor construction quality (which will support the flow of finance into housing).	Support use of **licensed professionals** by encouragingcompetition as opposed to mandated scale fees.			
		Forests (Harvesting) Rules, 2009 and the 2018 moratorium on logging by the Ministry of Environment and Forestry Promote longer term sustainable forestry frameworks			

Value chain component	ENACTMENT OF NEW / DRAFT LEGISLATION	REVIEW OF EXISTING LEGISLATION/ PROCESSES	DEVELOP REGULATIONS FOR EXISTING LEGISLATION	SUPPORT IMPLEMENTATION OF EXISTING LEGISLATION	DEVELOP / FINALISE POLICY
		to support affordable housing and green buildings			
Financing (investment, rental, taxation)	**National Rating Bill 2022-** Fast track adoption. **Landlord and Tenant Bill 2021**- Fast track the bill and rethink the overall theme of rent control as a regulatory tool.	**Demand and supply side tax incentives**- Simplify access to the various tax incentives provided in law and guidelines **Kenya Affordable Housing Programme Development Framework Guidelines, 2018** Review guidelines to align with current day delivery realities **Retirement Benefits (Mortgage Loans) Regulations, 2020-** Support adequate stakeholder engagement to enable the safe flow of pension assets and resolve issues of taxation for withdrawal of funds and obtaining a mortgage as well as utilising pension funds. Simplify processes for amending Trust Deeds and application for transfer **Review Housing Act 1953 / Housing Scheme Fund Regulations, 2018 (Legal Notice No. 238 of 2018)-** Promote an equitable regulation that encourage savings for housing **Reintroduce incentives for home ownership savings plans**	**Kenya Affordable Housing Programme Development Framework Guidelines, 2018**-Create pools of financing (preferably ring fenced) to support investment in infrastructure and offtake for affordable housing **Income Tax Act, 1970**- Push for publication of regulations that will formally exempt subsidiaries of real estate investment trusts (REITS) from income tax to accord with section 20(1)(c) of the Income Tax Act. Develop and apply standards for **credit assessments of informal workers** who are not salaried. **Sacco Societies Act, no. 14 of 2008**- Development of an Act or regulations to capture some gaps in the law governing the Guarantee Fund such as: documents needed by a member to lodge a claim; whether the compensation paid from the fund will take into account inflation arising as a result of protracted disputes before	**Public Private Partnerships Act 2021** support implementation and sharing of learnings **Sacco Societies Act 2008**,- Operationalise the Deposit Guarantee Fund for the SACCO sub-sector in accordance with the law. Set up the **Central Liquidity Fund** in the Sacco subsector to promote inter-borrowing among Saccos, deal with potential illiquidity challenges as well as become part of the national payment system. **Unclaimed Financial Assets Act 2011 (Amended through Finance Act 2022)**- Promote utilisation of penalty waiver to increase surrendering of unclaimed assets to the Authority. Promote reunification of assets with the beneficiaries by creating awareness and reducing the complexities. Support greater refinancing of mortgages by **KMRC** by studying the blockages currently faced, and collect and disseminate data on demand served and type of supply to understand market dynamics and affordability Support implementation of **tenant purchase schemes** as an alternative to mortgages **Civil Servants (Housing Scheme Fund) Regulations, 2004**- Understand low	**(Draft) National Tax Policy 2022**- Fast track the adoption of this Policy to allow long term investment into housing, track multiplier effect in the medium to long term as the taxable base grows. **National Cooperative Development Policy** (draft from 2019)-Fast track the finalization and adoption of the Policy. **Public Finance Management Act 2012-** Create a register of public funds created for housing and infrastructure and how they are utilised and impact created **Income Tax Act 1970-** Consider pooling Capital Gains Tax revenue from housing in a ring-fenced fund to invest in infrastructure or fund offtake finance for affordable housing.

Value chain component	ENACTMENT OF NEW / DRAFT LEGISLATION	REVIEW OF EXISTING LEGISLATION/ PROCESSES	DEVELOP REGULATIONS FOR EXISTING LEGISLATION	SUPPORT IMPLEMENTATION OF EXISTING LEGISLATION	DEVELOP / FINALISE POLICY
			settlement/compensation; a gap on how to manage the funds in the Fund; create awareness on the Fund once established.	disbursement (1,321 loans over more than 15 years) and demand segmentation	Develop a **tax register and the monitoring and evaluation framework**.

Figure 1: High level summary of recommendations to align regulatory sector to unlock affordable housing

The recommendations summarized above are further detailed in the list below per value chain.

Land Assembly and Titling Component:

i) Update some laws and policies that are outdated and in need of revision/updating e.g., Survey Act, Survey Manual, and the National Land Policy 2009;
ii) Operationalize the Land Acquisition Tribunal as envisaged in law, to expedite the resolution of compulsory acquisition disputes thus facilitating land release/supply;
iii) Amend the Sectional Properties Act 2020 to (a) extend timelines to convert long term leases into individual titles by December 2022 which is fast approaching (b) clarify where exemptions are offered (c) provide process for applying for the exemptions;
iv) The Department of Surveys should prepare and publish guidelines/procedures to inform the issuance of a unique prefix number to support geo-referencing of sectional units given that the statutory deadline is fast approaching (December 2022) and geospatial data remains uncoordinated;
v) Fast track/expedite title conversions and migration as required by Land Registration Act 2012 and the Land Registration (Registration Units) Order 2017 which is hampering financing since there is in place a moratorium on dealings/transactions on unmigrated land;
vi) Deal with design and operational challenges of the online national land information system (ArdhiSasa platform) and improve transparency on what areas / titles have been uploaded onto the portal;
vii) Prepare, publish and adopt policy instruments/frameworks on gender in land, spatial data, and land surveying and mapping; and
viii) Fast track the rolling out of land value indexes in many areas to deal with rising land prices arising from land speculation;

Planning Component

i) Support counties, municipalities and towns to develop spatial plans for areas under their jurisdiction to guide physical development as required by Urban Areas and Cities Act as very few are compliant at present;
ii) Establish an electronic/automated One Stop Shop platform to consolidate all approvals and processes as a matter of priority to deal with the current inefficient and slow planning approval system;
iii) Consider establishing cross-city and cross-municipality services through inter-county collaborations to deal with infrastructure challenges;
iv) Align the high housing densities being approved with commensurate public amenities and social infrastructure such as water and sewerage;
v) Reform the overlapping, lengthy, bureaucratic and conflicting institutional frameworks with respect to planning/permitting/approvals which currently has high and multiple permitting fees that increase the duration, create uncertainty of approval timeframe and increases cost of delivery of projects;

vi) Deal with unnecessary minimum parking requirements which increase housing costs due to limitation of land given that many ordinary people do not need parking;
vii) Foster public-private partnerships between county, municipal, town boards with utility companies (both national and international) to provide social infrastructure have not been actualized given the need for such social infrastructure and the financial outlay required;
viii) Update the Physical Planning Handbook 2008, which is based on the Physical Planning Act of 1996 to align with the Constitution 2010 and the Physical and Land Use Planning Act 2019.

Construction and Maintenance Component

i) Focus on provision of trunk/bulk infrastructure in various areas (especially urban areas) to promote development of affordable housing units since currently private developers are forced to incur cost of providing infrastructure services, which costs are passed on to end consumers (home buyers);
ii) Fast track/expedite the completion and adoption of the Draft National Building Code 2022, with more alignment to climate resilient measures including lower parking requirements and allowing use of secondhand materials in construction;
iii) Revise the draft National Building Code 2022 and the Physical Planning (Building) Regulations 2021 to eliminate the disproportionate focus on catering for persons with mobility disabilities to the exclusion of other forms of disability in the building and planning laws, which are set to drive up cost of housing;
iv) Harmonize conflicting/non-harmonious institutional/government objectives. For instance, e.g., the ban on logging of trees in forests has increased the cost of timber thereby undermining the affordable housing agenda;
v) Consider appealing or reviewing through legislation some court decisions which place undue burden on private developers to provide amenities and fulfil constitutional rights that would otherwise be the obligation of the State. This may potentially disincentivize developers and thus restrict housing supply;
vi) Promote the application of, and finance, the Kenya Affordable Housing Programme Development Framework Guidelines, 2018 which are specifically dedicated to achieving the Affordable Housing agenda to have the desired impact;
vii) Deal with significant discretion and opacity in the building code administration system which creates opportunity for corruption; In particular, deal with the skewed compliance against formal developers as against informal developers which discourages the scaling up of formal developers, yet this is required to access formal finance instruments;
viii) Develop a comprehensive framework detailing the needs, standards, and guidelines for green buildings and publish regulations on energy efficiency standards that are key for green buildings as envisaged and required under the law;
ix) Implement and make use of the Public-Private Partnerships Act 2021 which is yet to occur with respect to affordable housing projects;
x) Finalize and adopt construction industry policy to guide the entire sector;
xi) Finalize and introduce the Housing Bill 2021 in the next Parliament to replace the current outdated Housing Act (Cap 117);
xii) Develop, or enact strong consumer protection framework standards/guidelines especially for buyers of off plan properties who need more robust protection in law;

xiii) Provide legal recognition to informal builders and incremental construction processes;
xiv) Develop and publish housing related data/data bank to inform the market and other stakeholders;
xv) Develop and publish standards of alternative construction/building materials and technologies;
xvi) Develop manual for maintenance of buildings and lack of awareness on national and international maintenance standards; and
xvii) Adopt consistent nomenclature/classification in different housing regimes.

Housing Financing, Rental and Taxation frameworks along the entire value chain

i) Adopt a holistic approach of the macroeconomic environment in dealing with public policy issues such as public debt/borrowing. For instance, the lack of construction financing from local banks is partly due to poor offtake and the ease of investing in government paper at attractive and lower risk returns compared to lending to housing;
ii) Work to implement the various demand and supply side tax incentives provided for in law including but not limited to stamp duty exemption for 1st time home buyers, VAT exemption on construction inputs and corporate tax reduction for developers
iii) Expedite the finalization and adoption of the national tax policy 2022 to deal with the unpredictable and uncoordinated taxation environment;
iv) Create ring fenced pools of funds from revenue sources like construction approval levies; the Unclaimed Financial Assets Authority funds etc. to invest into the housing value chain;
v) Adopt mechanisms for alternative credit scoring to provide access to credit for the very large informal sector in Kenya;
vi) Provide incentives for investing in large portfolios of green and truly affordable rental housing as most of urban Kenya rents and in conjunction rethink or consider the place of laws which seek to impose rent controls as they may have the perverse and unintended effect of serving implicit subsidies randomly rather than to deserving tenants;
vii) Promote use of pension assets as collateral that increase access to mortgages by pension members (adoption of 2009 amendments), and reconsider taxation on transfer of pension assets into housing and provide guidelines for allowing a mortgage simultaneously with withdrawal of pension funds into housing (to enable 2020 amendments); simplify processes for applying for usage;
viii) Support sharing of insights from portfolios of mortgages refinanced to KMRC, to enhance understanding of formal demand and supply;
ix) Provide indexation (inflation adjustment) and predictability of rates applied in Capital Gains Tax on real assets, to encourage investment in affordable housing;
x) Provide incentives and legal recognition to small and local property developers who cannot deliver many housing units to enable them to scale or build capacity;
xi) Consider doing away with the setting of minimum professional fees (scale) for relevant professionals such as lawyers, architects and engineers, which is arguably anti-competitive and increases house prices;
xii) Prepare and publish enforcement regulations to enable subsidiaries of Real Estate Investment Trusts (REITS) to benefit from tax exemption in the Income Tax Act 1970; consider allowing structuring of REITS as companies or partnerships;

xiii) Operationalize the SACCO's Deposit Guarantee Fund and deal with the lack of specificity in the Sacco Societies Act (and no regulations) on documents needed to lodge a compensation claim; whether inflation is factored in compensation; and management of money/funds in the Fund as well as non-operationalization of the Central Liquidity Fund for the SACCO sub-sector.

2. HOUSING VALUE CHAIN

The **Housing Value** chain is long and requires coordination and the investment of capital at each link. The components of the value chain comprise land assembly and acquisition; the land requires effective title and registration, infrastructure for services is required, thereafter construction occurs, and the housing units are transferred to offtake (either for sale or rental). The completed housing stock requires ongoing maintenance and the whole value chain needs to function in a coherent social and economic infrastructure fabric and delivered in line with approved spatial plans for that location. Altogether, this is called the built environment.

Each link in the chain incurs costs. This creates a finance moment, when capital is required. Capital can be injected by a variety of public sources (funded from the tax base or sovereign loans / grants from development finance institutions) and private sources (bank financing, capital, pension funds, equity funds, impact funds). Different forms of capital have different return expectations, not all of them financial. Commercial capital requires a return commensurate with its risk – a risk that is created or resolved by the policy and regulatory framework. While the state seeks to support affordable housing, it can do this through the direct provision of capital, in the form of subsidies, insurance or guarantee products, or indirectly through the creation of an enabling environment for both investment and housing delivery. For this reason, the policy, legal and institutional framework for affordable housing and how it functions has a profound impact on the resources available to finance affordable housing delivery.

This is visually illustrated in Figure 1 below.

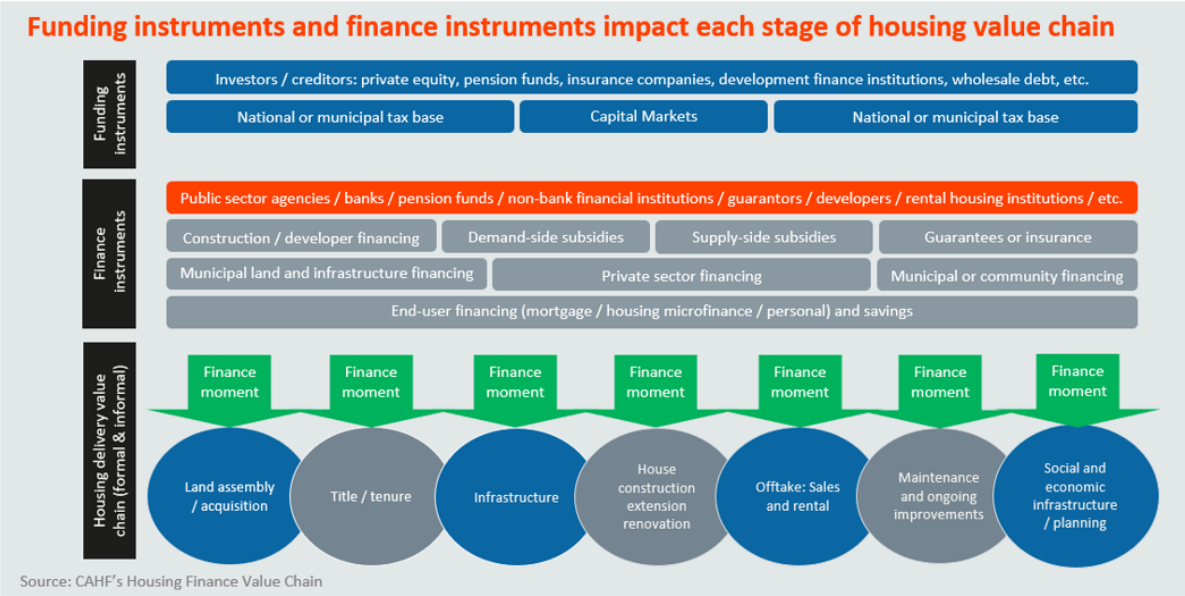

Figure 2: The various components of the Housing Value chain and how finance impacts each stage

Multiple links together comprise the housing delivery value chain. These can be summarized together as four components of housing delivery:

- Land assembly, land acquisition, title and registration of land tenure
- Physical planning

- Construction and maintenance
- Financing (investment, rental, taxation)

Each of these are set out below:

i. Land assembly, Land Acquisition, Title and Registration of Land Tenure

Land in Kenya is broadly divided into three categories: government/public land, private land, and community land. Each type of land is regulated by different institutions.

- The **National Land Commission** is responsible for management of public (government land) including government land, which is leased out to private persons, save for land held, used or occupied by a state organ. Land held, used or occupied by a national State organ is the only category of public land, pursuant to article 62(2) and (3) of the Constitution, that neither vests in the two levels of government nor administered by the National Land Commission on behalf of the said two levels of government.
- The **Ministry of Lands and Physical Planning** deals in private freehold and leasehold land and titling of all land whether public, private or community.
- Community land is governed by the Community Land Act 2016, which has set up the **Community Land Assembly** and **Community Land Management Committee**.

Once land has been assembled or acquired, it must be registered to enable the issuance of title and granting of security of tenure. Again, different laws govern the process of registration for different types of land. The process entails dealing with **various professionals** such as land surveyors for demarcation and lawyers for conducting due diligence and the transfer. With respect to private land, this process can take time as one must deal with a Land Registry within the Ministry of Lands. To facilitate the process, the Ministry launched an online platform in April 2021, known as **ArdhiSasa.** The ArdhiSasa platform has had teething problems, and in the interim, is hindering registration of land transactions in the affected areas.

ii. Physical Planning

Once title is secured, relevant planning approvals need to be secured before construction can begin. According to the Physical and Land Use Planning Act 2019, the property owner must acquire **development permission** from the **relevant County Executive Committee Member** in a particular county government where the land is situated. As part of the application, architectural and structural drawings, a copy of title deed, and other details must be submitted.

Development approvals used to take very long to achieve; however, the Physical and Land Use Planning Act 2019 has put a statutory timeline that a development permission should take a period of 60 days to be issued. The county, however, can provide questions to the application on Day 59, at which point the time frame is renewed. Besides the development permission, other planning approvals are required for situations. These include change of user and extension of user; subdivision approval; renewal of lease; Environmental Impact Assessment licence from National Environment Management Authority where the project has significant environmental impacts; consent of the

National Land Commission if it is a leasehold of public land; consent of the Land Control Board if it is agricultural land; public health permit; among others. Professionals such as engineers and architects are critical at this stage as they draw the required plans and submit the applications for approval on the owner's behalf.

iii. Construction and Maintenance

Once all the planning approvals needed are secured, the site is serviced. Engagement with and approvals from various government agencies are required to identify the infrastructure gap and negotiate what may be provided by government vs by the developer.

The developer is also required to register the project with the National Construction Authority (NCA). The Authority ordinarily inspects the project site upon the owner paying a construction levy, and if satisfied, issues a compliance certificate. Workers at a construction site must all be accredited by the Authority and the owner must comply with all safety regulations at the site. A county executive member responsible for planning may issue an enforcement notice if the owner fails to comply with the development permission earlier issued or proceeds with a development without requisite approval. Construction activities are periodically monitored and inspected by relevant officers from different agencies. Upon completion of the construction, the architect must check the development/houses and issue a certificate of Practical Completion with the county government then certifies it as fit for human habitation by issuing a Certificate of Occupation. Even then, continuous maintenance of the buildings needs to be done.

While all these regulations should ensure that good quality housing is delivered, NCA's own audit in 2015 stated that up to 70% of buildings in Nairobi were unsafe for occupation.[1] Further, the regulations are often used to frustrate delivery of players who seek approvals, with developers citing approvals taking much longer than intended. For instance, a study published in 2017 showed that it takes approximately 430 days to acquire building approvals in Nairobi County, against an estimated period of 169 days provided in the institutions' charters.[2]

iv. Financing (investment, rental, taxation)

Financing is required at every stage of the housing value chain. The government has made significant efforts to stimulate housing with a mandatory tax and demand- and supply-side tax incentives. However, the mandatory tax has since been quashed, and the demand and supply side tax incentives have been difficult to operationalize / scale. The main reason is the difficulty in coordination between different government entities and the conflicting objectives of short-term tax collection required to

[1] https://www.the-star.co.ke/news/2015-01-28-70-per-cent-of-buildings-in-nairobi-unsafe-nca/

2 Irene N Wamuyu, 'Evaluation of Building Approval Processes on Construction Project Delivery (Time and Cost)- A Study of Nairobi City County' (University of Nairobi: Master's Thesis, 2017) http://erepository.uonbi.ac.ke/bitstream/handle/11295/101627/Wamuyu_Evaluation%20Of%20Building%20Approval%20Processes%20On%20Construction%20Project%20Delivery%20%28Time%20And%20Cost%29%20-%20A%20Study%20Of%20Nairobi%20City%20County.pdf?sequence=1&isAllowed=y

meet the government budget, vs long term economic growth, which should result in a larger tax base in the medium to longer term.

For example, changes to the Retirement Benefits Act 1997 and related regulations to allow for transfer of pension assets into housing seek to increase the scope of resources available to households to acquire housing. It is unclear, however, whether a pensioner can use their pension savings and simultaneously take a mortgage. Further, the lump sum withdrawal incurs high taxation which disincentivizes the use of the provision. (See Figure [2]).

The launch of KMRC has also been an important step to provide long term finance (at concessional rates in the beginning) for banks to refinance their mortgage books. However, the uptake has been low largely due to lack of supply within the scope of the criteria that qualify for such support.

Several building blocks need to be in place for mortgage markets to expand including[3]:

- Working property rights and property registration systems that are reliable, transparent and low cost;
- Well-functioning land and housing markets;
- Competitive primary mortgage markets with standard long-term mortgage products whose contracts can be enforced;
- Access to longer-term funding sources to price and manage interest risk; and,
- Insurance or reinsurance entities that can manage default risk

Each of these building blocks are supported by targeted policy and a legislative and administrative framework. As illustrated in the other components, Kenya needs to enhance its regulatory framework and smooth operationalization of these building blocks for mortgage markets to expand.

[3] See Acolin, A and M Hoek Smit (2020) *Cornerstone of Recovery: How housing can help emerging market economies recover from Covid-19*. Prepared for Terwilliger Centre for Innovation in Shelter, October 2020 https://habitat.sv/wp-content/uploads/2017/08/Cornerstone-of-Recovery_Oct.-2020.pdf

3. INSTITUTIONS INVOLVED IN REGULATION OF HOUSING

The Republic of Kenya comprises the national government (including the legislative, executive and judicial arms of government) and 47 county governments/units, which themselves are governed by semi-autonomous governments. The county governments were formed in terms of the 2010 Kenyan constitution, and have devolved functions from the central government, as set out in the County Governments Act of 2012.

Within this overall governance framework, several institutions are involved in the regulation and enablement of housing in Kenya, at the national and county level. These include national government ministries and independent commissions / entities; county governments; the Judiciary (Courts); Regulatory Boards (housed within national ministries); and Professional Associations.

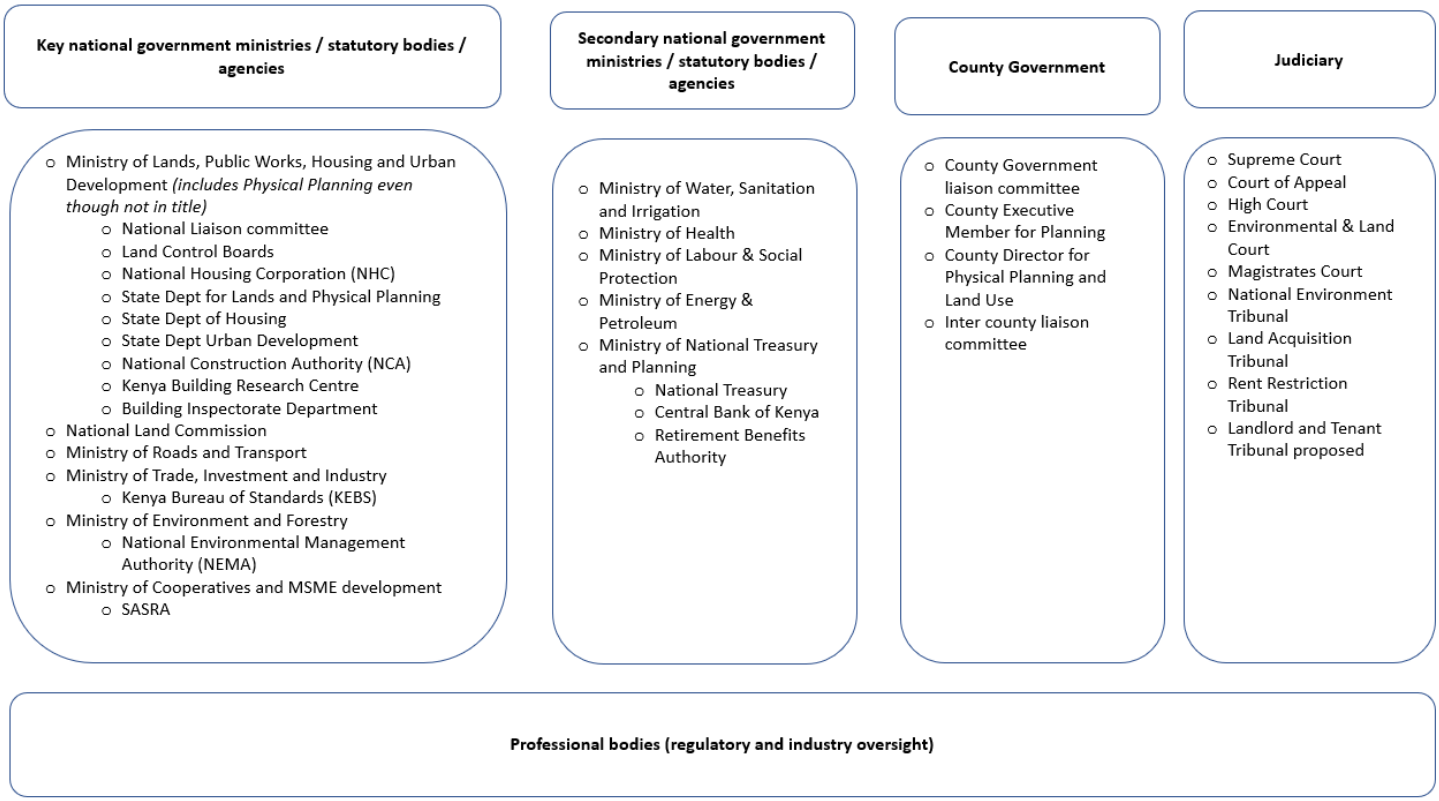

Figure 3: Key institutions involved in the Housing Value Chain, reflecting the reorganization in October 2022.

i. Key National Government Ministries

The key national government ministries and other entities that regulate and enable the affordable housing value chain are:

Through Executive Order No. 1 of 2022-The President: Organization of the Government of the Republic of Kenya, the current administration elected into office in August 2022, reorganized the relevant Government Ministries and Departments into the following:

Ministry of Lands, Public Works, Housing and Urban Development; **Ministry of Trade, Investments and Industry**; **Ministry of Co-operatives and Micro, Small and Medium Enterprises (MSME) Development**; **Ministry of Water, Sanitation and Irrigation**; **Ministry of Environment and Forestry**; **Ministry of Roads and Transport**; **Ministry of Energy and Petroleum**; **The National Treasury and Economic Planning**; **Ministry of Labour and Social Protection**; **Ministry of Mining, Blue Economy and Maritime Affairs** and the **Ministry of Health**.

Notably, the reorganization of Government Ministries *vide* Executive Order No. 1 of 2022 issued in October 2022 which brought the Public Works, Housing and Urban Development dockets, as well as the respective State Departments, into the Ministry of Lands (to now read, **Ministry of Lands, Public Works, Housing and Urban Development) is a very welcome move as it will ensure that all key agencies are under a single ministry thereby ensuring synergy and efficiency**. The dockets of Public Works, Housing and Urban Developments were formerly in the Ministry of Transport and Infrastructure which was separate from the Ministry of Lands and Physical Planning thus complicating efforts at dealing with all issues in the housing value chain.

The above reorganization of Government changed the Ministries and State Departments as they were during the writing of this report (as set out under Executive Order No. 1 of 2020 issued on 14 January 2020) and which are detailed below:

The Ministry of Lands and Physical Planning (the text below describes how the Ministry operated prior to changes in October 2022. From October 2022, it is now functions as the Ministry of Lands, Public Works, Housing and Urban Development)

The Ministry of Lands and Physical Planning (MLoPP) in the previous national government was the main institution enforcing the Land and Physical Planning frameworks in Kenya. The Ministry is headquartered in Nairobi (Ardhi House) but has offices and land registries spread out in various counties around the country. Vide Executive Order No. 1 of 2020, the Ministry of Lands & Physical Planning was vested with the following functions:

- National Lands Policy and Management;
- Physical Planning and Land Use;
- National Spatial Infrastructure
- Registration of Land Transactions;
- Land and Property Valuation Services Administration
- Survey and Mapping;
- Land Information Management Systems; and
- Land Adjudication.

National Lands Commission (NLC)

The National Lands Commission is a distinct and independent Constitutional Commission created under Article 67 of the constitution and the National Land Commission Act of 2012, to ensure the proper management of public land. The National Land Commission also has offices in every county (County Coordinators) who carry out the function of the Commission in the counties.

Functions of the National Land Commission include:

- Management of Public Land on behalf of national and county governments;
- Recommending a national land policy to the national government;
- Advising the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- Initiating investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommending appropriate redress;
- Assessing tax on land and premiums on immovable property in any area designated by law;
- Encouraging the application of traditional dispute resolution mechanisms in land conflicts.

In *National Land Commission v Attorney General & Others*, Advisory Opinion Reference 2 of 2014 (paras 309-315), the Supreme Court delineated the powers of the Ministry of Lands and Physical Planning vis a vis the NLC, following wrangles between the two agencies and upon request for an advisory opinion by the National Land Commission. In rendering its decision, the Supreme Court however, noted the difficulty and near impossibility of allocating discrete functions to either of the agencies as requested by NLC, making the point that "*the vital subject of land-asset governance runs in functional chains, that incorporate different State agencies; and each of them is required to work in co-operation with the others, within the framework of a scheme of checks-and-balances—the ultimate goal being to deliver certain essentials to the people of Kenya*." The Court further held that "*The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The task of registering land title lies with the National Government, and the Ministry has the authority to issue land title on behalf of the said Government*.**"** The Supreme Court went on to add that in its view, the NLC **'**bears a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented' and that accordingly, 'co-operation and consultation with other State organs will be important, in identifying, and defining urgent tasks on the NLC's agenda.'

The NLC has authority to consent to leases of government land or change of user on government leased land. Since a significant portion of privately-owned land in urban areas is on leasehold tenure from government, NLC is involved in providing the necessary consent to transfer or deal in such leasehold interests. The total acreage of public land is estimated at about 10% of total Kenya's land mass.[4]

Article 62(2)(a) and (b) of *the Constitution* provides that other than land held, used or occupied by a national State organ, public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission. This means that there is need to work with the National Land Commission and county governments for the latter to provide land for affordable housing projects. However, land held, used or occupied by national state organs does not vest in the national government or county

4 P Kameri-Mbote, *Kenya Land Governance Assessment Report June 2016* p.19 https://openknowledge.worldbank.org/bitstream/handle/10986/28502/119619-WP-P095390-PUBLIC-7-9-2017-10-9-20-KenyaFinalReport.pdf?sequence=1&isAllowed=y

governments, and the National Land Commission has no role in management of such land as per article 62(2)b and 3 of the Constitution. Accordingly, it would fall upon such national state organs to make decisions on whether they wish to release such land for use in affordable housing.

Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (the text below describes how the Ministry operated prior to changes in October 2022. Post the changes in October 2022, the Ministry is now Ministry of Roads and Transport).
Within the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, seven institutions are relevant to affordable housing:

The State Department of Housing & Urban Development provides policy direction and coordination of all matters related to housing and urban planning and development. Other functions include housing policy management; management of Civil Servants Housing Scheme; and registration of various professionals etc.

The National Housing Corporation (State Corporation overseen by the State Department of Housing and Urban Development) is a statutory corporation charged with implementing government's housing policies and programmes. It also houses the National Housing Development Fund which was established in 1967 (initially named as 'Housing Fund') and financed by parliamentary appropriations, borrowed loans and repayments of interests on loans. The Fund is established to lend or grant money to local authorities (precursor to county governments); to organizations charged with promoting the development of housing; to companies, societies or individuals to enable them acquire land and construct approved dwellings; or to acquire land and construct dwellings for rent or sale to citizens (section 8 of the Housing Act). The NHC is involved in the development of housing on public land for sale or renting to civil servants and other government employees.

The **National Construction Authority** (State Corporation overseen by State Department of Public Works) is a state corporation which regulates, streamlines and builds capacity in the construction industry. It also undertakes project registration for developments and conducts inspections on buildings as well as accredits construction workers.

The State Department of Public Works is charged with the responsibility of planning, designing, construction and maintenance of government assets in the built environment and infrastructure development. It also lays policy for all the built environment (eg green buildings) to be then followed by both private and public developers.

Within the State Department of Public works, the **National Building Inspectorate (NBI)** is mandated to audit buildings for conformity with land registration, planning, zoning, building standards and structural soundness. However, its role and that of the National Construction Authority seem to overlap.

The mandate of the NBI was cited by the Environment and Land Court in ***Homeboyz Entertainment Limited v Secretary, National Building Inspectorate & 2 others*** **[2019] eKLR**, to profile unsafe and dangerous buildings and structures and to demolish such structures; to demolish and remove unlawful encroachments on road reserves, riparian land, wayleaves set aside for power lines, railways, pipelines and sewer lines.

Within the State Department of Public Works, the **Kenya Building Research Centre** is charged with spearheading Building Research Services in Kenya with an aim of reducing the cost of construction. It is undertaking programs and projects on cost effective building materials.
The State Department of Transport and the State Department of Infrastructure coordinates all transport matters nationally. To date, there has been an emphasis on delivering roads to connect parts of Kenya to each other. However, a key area for coordination is emphasizing and aligning improved provision of public transport as a necessary step towards delivering affordable housing.
It is expected that the reorganization of the 2 key ministries under the new government is likely to ease the coordination along the value chain for delivery of affordable housing.

Ministry of Environment and Forestry (unchanged from previous administration)
National Environment Management Authority (NEMA) is a statutory agency responsible for the management of the environment and environmental policy. NEMA is charged with approving and issuing Environmental Impact Assessment Licences, approving qualified persons / companies to undertake EIAs, and enforcing environmental orders.

Ministry of Industrialization, Trade and Enterprise Development (changed to Ministry of Trade, Investments and Industry in October 2022, however, the functions below will still hold)
The Ministry of Industrialization, Trade and Enterprise Development deals in industry and trade. In this broad mandate, the Ministry develops standards, coordinates trade and various enterprises, all of which have an impact on housing in terms of affecting the sourcing and costs of raw materials and construction. The **Kenya Bureau of Standards** which certifies that all materials including those used in construction meet the required standards, is a state agency under the Ministry. In addition, the Ministry hosts the Sacco Societies Regulatory Authority (SASRA) and the Commissioner of Cooperatives, which are the regulators of SACCOs and cooperatives that are key in financing housing.

ii. Secondary National Government Ministries

Ministry of Labour (changed to Ministry of Labour and Social Protection in October 2022)
The Ministry of Labour hosts the Directorate of Occupation Safety and Health Services which ensures compliance with the provisions of the Occupational safety and Health Act 2007 and promote safety and health of workers. The Ministry of Labour also helps to resolve industrial disputes between employers and employees, some of which revolve around housing allowances/provision of housing for workers.

Ministry of Energy (changed to Ministry of Energy and Petroleum in October 2022)
The Ministry of Energy is relevant as it develops and implements energy policy, energy standards and develops/publishes energy regulations which impact on construction cost and are key to achievement of sustainable/green buildings.
Ministry of Devolution (this has been eliminated under the new government in October 2022 and the functions moved to the Office of the Deputy President)
The Ministry of Devolution (which succeeded the previous Ministry of Local Government) is important as it serves as the linkage between county governments (crucial in planning and delivery of housing) and the national government. The Ministry also has statutory roles under the Public Health Act 1921 and the County Government Act 2012. This Ministerial docket has now been abolished vide the Presidential Executive Order No. 1 of 2022 of October 2022.
Ministry of Water, Sanitation and Irrigation (unchanged in October 2022)
The Ministry of Water is charged with development and implementation of water policy. Various relevant statutory agencies such as the Water Resources Authority (which manage all water resources and issue licences for water abstraction) fall under the Ministry.

iii. **County Governments**

The roles and responsibilities of county governments are set out in the County Governments Act of 2012, having been established under article 176 of the 2010 Kenya Constitution. Article 176(2) provides that every county government is required to decentralize its functions and provision of its services as far as is efficient and practicable to do. This means that county governments can establish further agencies and units at a more localized level to ensure that services reach the grassroots. The Constitution delineates the functions of the national government and those of the county government under the Fourth Schedule of the Constitution. The national government is largely concerned with policy making for in the land, land use and housing sectors. The county governments on the other hand are charged with planning, development control and providing necessary facilities within areas of their jurisdiction.

The relationship between national and county governments under article 189 of the Constitution should be one of collaboration and interdependence and one that respects the functional and institutional integrity as well as the constitutional status and institutions of government at either level. There are potential areas of collaboration in the affordable housing sector: For instance, county governments can provide land for affordable housing programme; can provide infrastructure in areas under their jurisdiction, conduct demand analysis of housing for each county, and expedite planning approvals. Provision of land and requisite infrastructure is a responsibility touching on both levels of government. In the past, there have been discussions between the Ministry of Lands in the national government and County Executive Committee Members responsible for land and planning in the counties, and County Attorneys where they have stressed on the need to work together in promoting delivery of housing. The State Department for Housing and the National Land Commission (an independent constitutional commission) have also engaged in capacity building for counties and provided technical support in mapping, engineering surveys, and development of plans in housing to

counties. Additionally, the national government signed Memorandums of Understanding with 24 counties in 2019 for delivery of 2, 000 housing units in each county. About five counties had set aside land for planning and project implementation.

County governments are responsible for **creating and enforcing spatial plans** for the counties' development. These spatial plans are used to guide development within the county and inform development approvals.

The County Executive Member responsible for planning in County Governments, is mandated to **approve development permissions, change and extension of user** and other aspects of **development control**. Counties enforce development control on all land, whether freehold, leasehold or community land.

Counties are mandated to **collect property taxes (rates)** to support the effective management of the county.

County Governments **also hold unregistered community land** in their jurisdiction on behalf of the community until it is registered; and levy other charges for services they provide including cess on roads (tax on movement of goods) and other charges in markets. Article 209(4) of the Constitution empowers county governments to impose charges for services rendered. In this regard, county governments levy various charges through the Finance Act passed annually. The Supreme Court in ***Base Titanium Limited v County Government of Mombasa & another*** **(Petition 22 of 2018) [2021] KESC 33 (KLR)** emphasized that such charges can only be levied for services or amenities rendered by the county government. In this case, the Supreme Court held a 'road service charge' imposed on each truck passing through Mombasa County's jurisdiction as unconstitutional since the county government was not providing any service in return for the charge.

County Governments are **responsible for providing necessary infrastructure** to support delivery of housing.

County governments are required to decentralize their functions and provision of their services to the lowest level to the extent that is efficient and practicable to do so under article 176(2) of the Constitution. Further, section 48 of the County Governments Act 2012 provides that the functions and provision of services of each county government shall be decentralized to— (a) the urban areas and cities within the county established in accordance with the Urban Areas and Cities Act (No. 13 of 2011); (b) the sub-counties equivalent to the constituencies within the county established under Article 89 of the Constitution; (c) the Wards within the county established under Article 89 of the Constitution and section 26; (d) such number of village units in each county as may be determined by the county assembly of the respective county; and (e) such other or further units as a county government may determine. Accordingly, county governments should endeavour to further decentralize their services such as planning approvals to the lowest level to enhance access, based on these legal provisions. For instance, the new administration of Nairobi City County has proposed to create boroughs in the city each with an administrator to devolve services.

The National Government land registries are located across the country within the jurisdiction of the various counties. However, the operations of the land registries are a national function under the Ministry of Lands and Physical Planning.

Similarly, the various courts are located across the country within the jurisdiction of various counties even though they are a national function and are under the Judiciary arm of government.

iv. Judiciary

The **Judiciary** is a critical actor in the housing value chain as it is the only entity mandated to resolve legal disputes that arise over land ownership or any contractual disputes in the entire value chain (including construction, financing or sale).

The Kenyan Judicial system is set out as follows:

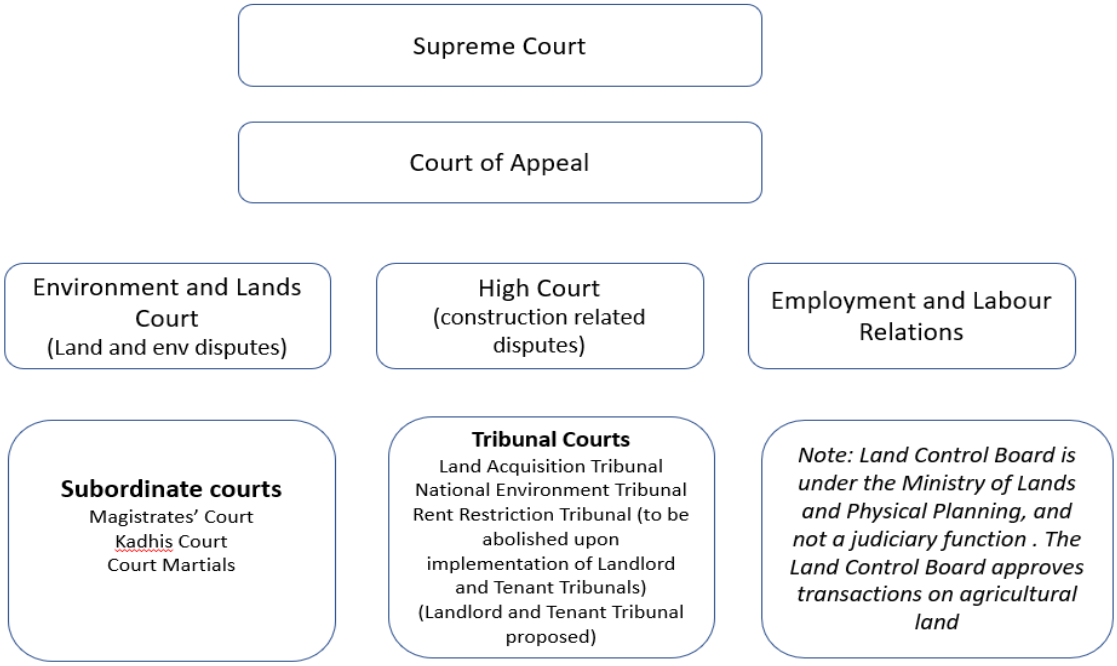

Figure 4: Judiciary institutions in Kenya

The various courts and Control Boards relevant to affordable housing are shown below, in order of hierarchy.

- **Magistrates Court:** These courts are the most accessible and have existed for many decades. They form the first port of call to listen to disputes relating to land and environmental issues. The Magistrates Courts only deal with matters of land valued at less than Kshs. 20 million, however. Matters not resolved here can be taken to the Environmental and Land Court.
- **Land Acquisition Tribunals** were provided in law in 2019 to hear disputes arising from compulsory acquisition of land by government. The Tribunals are however yet to be set up. The Tribunals will have the status of inferior/magistrates courts, with its decisions being appealed at the **Environment and Land Court**.

- **National Environment Tribunals:** These listen to appeals against Environmental Impact Assessment (EIA) decisions made by NEMA, and those made by the Kenya Forest Service and the Kenya Wildlife Service.
- **Environment and Land Court**: These are specialized courts established in 2012, with the status of the High Court, which handle disputes over land and environment. As of July 2022, there were 39 ELC court stations and 51 judges of the Court in various parts of the country. A dispute may be lodged directly at the ELC at first instance, or as an appeal from either the Magistrates Court or other tribunals such as (in principle) the Land Acquisition Tribunal. This court typically deals with land disputes whose value exceeds Kshs. 20 million. However, they also enjoy original jurisdiction and to hear land and environmental disputes at first instance (irrespective of value).
- **High Court**: The High Court is conferred with original jurisdiction to deal with all matters (save for, land and environmental disputes). Accordingly, disputes over contractual matters and other commercial matters would ordinarily be resolved at the High Court, with appeal lying to the Court of Appeal.
- **Court of Appeal:** These listen to appeals from the Environment and Land Courts as well as the High Court. They have registries in 6 locations (Nairobi, Mombasa, Kisumu, Eldoret, Nakuru and Nyeri) though they occasionally hold sittings in other major towns.
- **Supreme Court**: This apex court listens to appeals from the Court of Appeal, but only in disputes where a constitutional issue has been raised, or in matters which have been certified by either the Court of Appeal or the Supreme Court itself, as being of general public importance. The Supreme Court is in Nairobi.

- *Note: The **Land Control Board,** which is mandated to regulate dealings in agricultural land by granting or denying consent to transact in agricultural land is under the Ministry of Lands and Physical Planning and is not part of the Judiciary.*

v. Professional regulatory and advocacy bodies

Regulatory bodies of the various land professionals (domiciled within the Ministry of Lands) are also key institutions. These are: the **Land Surveyors Board** which regulates the practice of licensed surveyors; the **Valuers Registration Board** which regulates the practice of licensed valuers and the **Estate Agents Registration Board** which regulates the practice of licensed estate agents. These regulatory boards have statutory authority and set standards for the respective profession and set qualifications for the professionals to prevent harm to the public.

The functions of these statutory boards include registering approved professionals, issuing licenses to practice, taking disciplinary action over its members, and determining scale fees charged by its members.

In addition, there are private bodies that manage the affairs of the professional members and advocate for the interests of the profession. These bodies act as a link between professionals and

stakeholders in the construction industry, including policymakers, manufacturers, real estate developers and financial institutions.

Key professional associations in the land assembly and titling value chain are the Law Society of Kenya (representing lawyers); and the Institution of Surveyors of Kenya (ISK) which represents Valuers, Land Surveyors, Geomatic Engineers, Registered Estate Agents, Property Managers, Building Surveyors, Land Administration Managers and Facilities Managers. These professional associations are critical as they promote professional ethical performance of services of their members and raise issues affecting members of the public that touch on their duties such as dysfunctionality of systems.

Other secondary institutions comprise private sector organizations and civil society.

Profession	**Statutory Regulatory Board / Ministry Housed in**	**Professional association / advocacy body**
Physical Planners - development of land use and spatial plans	Physical Planners Registration Board / MLoPP	Town and Country Planners Association of Kenya
Land Surveyors and Geospatial Information Management Surveyors – determine geospatial boundaries of land parcels	Land Surveyors Board / MLoPP	Institution of Surveyors of Kenya (Land Surveyors Chapter)
Valuers – determine value of transactions	Valuers Registration Board / MLoPP	Institution of Surveyors of Kenya (Valuers Chapter)
Estate Agents	Estate Agents Registration Board / MLoPP	Institution of Surveyors of Kenya (Estate Agents Chapter)
Civil and Structural Engineers	Engineers Board of Kenya / State Department of Infrastructure under Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works	Institution of Engineers of Kenya Also Institution of Surveyors of Kenya– Engineers Surveyors Chapter
Technical Engineers	Kenya Engineering Technologist Board	
Architects	Board of Architects and Quantity Surveyors	Architects Association of Kenya[5]
Quantity Surveyors	Board of Architects and Quantity Surveyors	Institute of Surveyors of Kenya (QS chapter)
Lawyers	Law Society of Kenya, Advocates Complaints Commission under the Attorney General/State Law Office	Law Society of Kenya

[5] One of the largest industry bodies in the construction sector whose membership is broader than architects and also includes Quantity Surveyors, Town Planners, Engineers, Landscape Architects and Environmental Design Consultants and Construction Project Managers.

Developers and Contractors	National Construction Authority	Kenya Property Developers Association Kenya Association of Building and Civil Engineering Contractors (KABCEC) Joint Building and Construction Council Institution of Construction Project Managers of Kenya

Figure 5: Regulatory and industry bodies overseeing professionals in the housing value chain

In addition, the financial sector players involved in housing are:

Commercial Banks There are 38 licensed Commercial Banks in Kenya. Commercial banks are regulated under the Banking Act (Cap 488) and the Companies Act 2015 given that they are first incorporated as limited liability companies before taking out a banking licence.
Mortgage Finance Banks/Companies There is 1 licensed mortgage finance bank/company i.e. Housing Finance Company of Kenya (HFCK). Mortgage finance companies are regulated by the Central Bank of Kenya under the Banking Act (Cap 488).
Savings and Credits Cooperative Organizations (SACCOs)
There are about 5, 000 SACCOs, with around 440 being specifically housing SACCOs. The main one is the National Union for Housing Cooperatives (NACHU) which began operations in 1987 and is one of the leading affordable housing providers in Kenya. SACCOs are regulated/supervised by the Sacco Societies Regulatory Authority and established pursuant to the Sacco Societies Act 2008 and related regulations, and the Cooperative Societies Act 1997.
Microfinance Banks (14 licensed ones). Microfinance banks are regulated by the Central Bank of Kenya under the Microfinance Act 2006.
Institutional Investors e.g., pension funds, private equity funds
Kenya Mortgage Refinance Company (KMRC) The KMRC is regulated by the Central Bank under the Central Bank (Mortgage Refinance Companies) Regulations, 2019. It is 75% owned by private sector and 25% owned by government.

4. OVERARCHING POLICIES AND CONTEXT

The overall approach to affordable housing in Kenya is set out in the Affordable Housing Programme, launched as a policy as part of the outgoing administration's Big Four Agenda in December 2017. In terms of the Big Four Agenda, the government has committed to promote the role of Affordable Housing together with Manufacturing, Food Security and Affordable Health Care, as the levers for economic growth. Measures for implementing the **Affordable Housing Program (AHP) are set out in the AHP Development Framework Guidelines 2018**.

The AHP includes several supply side, demand side and enabling environment guidelines and incentives to deliver housing. These include:

- Enabling Environment: provide land and bulk infrastructure, provide infrastructure funding, provide tax incentives, standardize designs and processes, create a one stop shop for approvals,
- Supply Side: promote master plans and mega city approach, promote mixed use developments with social infrastructure and amenities, provide offtake financing to developers
- Demand side: Promote tenant purchase schemes, create KMRC for long term mortgage finance at concessional rates initially, create a Boma Yangu Portal to match supply and demand

While the framework was conceived to be holistic and enable the delivery of housing, it has faced significant challenges due to lack of financing as the proposed mandatory National Housing Fund that was expected to finance the developers' offtake was quashed in court, and there continues to be a lack of coordination amongst the various agencies to enable delivery of housing.

The AHP itself sits within the broader context of the Constitution of the Republic of Kenya, and various overarching laws/ policies/regulations that contextualize the Kenyan's government policy on housing are contained in:

- **Constitution of Kenya 2010** - which provides the overall framework and sets out the distribution of functions between the national government and the county government in the Fourth Schedule. Functions relevant to housing that are reposed in the national government under the Fourth Schedule of the Constitution are: housing policy; national public works; general principles of land planning and co-ordination of planning by counties; protection of the environment including energy policy and water protection; energy policy; disaster management; transport and communications; consumer protection; monetary policy and banking; courts; and water resources. Functions relevant to housing that are vested on county governments under the Fourth Schedule are: county planning and development including housing, land survey and mapping, boundaries and fencing and energy regulation/electricity reticulation; county transport including county roads, street lighting, traffic and parking, and public road transport; trade development and regulation including cooperative societies, markets and trading licences (excluding regulation of professions); county public works and services including storm water management systems in built-up areas and water and sanitation services; and firefighting services and disaster management. The Constitution of

Kenya under Bill of Rights (article 43) also provides that every person has the right to accessible and adequate housing. Accordingly, the State is obligated to take steps towards achieving this socio-economic right to its citizens. The High Court, in ***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, Petition 65 of 2010** seemed to adopt the international definition of adequate housing by the United Nations of 'adequate housing' at paragraph 71 as that which has "i) *legal security of tenure to guarantee against forced eviction; ii) Availability of services, materials, facilities and infrastructure; iii) affordability such that housing costs are commensurate with income levels and do not imperil other basic needs; iv) accessibility including to disadvantaged groups v) habitability in terms of being free from rain, dampness, wind, cold or other discomforts; vi) in a location which allows access to employment and other amenities; vii) cultural adequacy than enables the inhabitants to express their cultural identity and their diversity of housing*." Relatedly, in a recent judgment delivered in 2022, the Environment and Land Court in ***Law Society of Kenya v Service & 5 others; Migot-Adholla & another (Interested Party)* (Environment & Land Petition E029 of 2022) [2022] KEELC 3962 [KLR]** quoted the decision of the Supreme Court in *Mitu Bell* (at para 151) with approval which had stated: **"***Where the landless occupied public land and established homes thereon, they acquired not title to the land, but a protectable right to housing over the same. The right to housing over public land crystallized by virtue of a long period of occupation by people who had established homes and raised families on the land. That right derived from the principle of equitable access to land under article 60(1)(a) of the Constitution*." This finding was in relation to an equitable claim of landless people (squatters) who had lived on public land held by a public university and established their homes there since 1984. In such instances, the Supreme Court in ***Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR)** had held that such landless people occupying public land must be allocated such land or be compensated if any eviction is to occur. The Supreme Court in this case held that it is the duty of the state to provide housing to citizens, but this right could only be achieved progressively (para 146). The apex court at paragraph 153 stated: "*The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in informal settlements. The courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth"*." *settlements. The courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth"*."

- **Sessional Paper No. 3 of 2016 on National Housing Policy**: This is the main policy document that articulates the vision, mission and strategic direction of the government with respect to the housing sector in Kenya. It was drafted before the AHP of 2017, but its provisions hold.

- **Housing Act 1953**: provides for establishment of the National Housing Corporation (NHC) and the National Housing Development Fund (NHDF) to be administered by the NHC. The NHC was

vested with powers to make loans or grants from the NHDF to private and public sector players to deliver housing, develop a land bank for housing and encourage research and information dissemination on housing. It is popularly understood that NHC has a land bank valued at approximately $2billion in 2021, however, the total delivery of housing units has been limited (estimated at around 20,000 units since inception). The potential of NHC to utilise its land bank to drive affordable housing is vast and should be explored.

- **Sessional Paper No. 02 of 2016 on National Slum Upgrading and Prevention Policy**-The goal of this Policy is to guide the country towards upgrading existing and preventing emergence of new slums in a coordinated and systematic manner. The overall objective of this policy is to promote, secure and protect dignified livelihoods of the poor living and working in slums by strategically integrating them into the social, political and economic framework in line with the Constitution. There have been efforts in the past geared toward upgrading and improving informal settlements and slums with the support of development partners. Such efforts and programmes include: Kenya Slum Upgrading Programme (KENSUP); Kenya Informal Settlement Improvement Project (KISIP) supported by the World Bank which seeks to provide social and physical infrastructure, promote security of tenure and build capacity in select urban areas; the 'Adopt a Light Movement' which was a collaboration between the private sector and the then Nairobi City Council that sought to install efficient light poles and high masts in select slum areas. These slum upgrading efforts and initiatives have however faced challenges such as: gentrification;[6] insufficient funding to enable scaling; limited capacity and coordination challenges. The policy paper has provided for various recommendations and implementation proposals which would go a long way in dealing with the challenges facing informal settlements and slums. The implementation of these policy proposals however requires significant funding, political goodwill and collaboration among government, private sector and development partners to complement efforts.

- **Sessional Paper No. 3 of 2012 on Population Policy for National Development**- This Sessional Paper provides an overall framework and proposes key policy measures to be undertaken to address critical population management issues. The Policy identifies rapid population growth and a youthful population structure as key issues that will pose challenges in the realization of Vision 2030 and long-term development of the country. High fertility coupled with high unmet need for family planning over a long period of time, has contributed largely to the observed youthful population structure.

  The question of population is essential as it is the one that determines the housing units needed since these people need to be sheltered. The fact that Kenya needs about 250, 000 housing units to be built annually is a testament to the high population growth which is making this necessary. Indeed, the policy notes that the continued high rate of urbanization in general has led to problems such as increased urban poverty and inadequate services, especially among the poor. It notes that the continued strain on the existing urban infrastructure,

[6] Gentrification refers to a process where the character of a poor urban area such as a slum or informal settlement is changed by wealthier people moving in, improving housing, and attracting new businesses, often displacing current inhabitants in the process. As a result of gentrification, intended beneficiaries are unable to benefit from improved habitation.

particularly on housing, transportation, educational and health facilities, and employment has created new challenges.

With respect to housing, the policy provides for: monitoring trends in demand and supply for housing and considering population trends; providing affordable and quality housing to growing population; and to designing medium to long term plans for development of intermediate towns to curb rural–urban migration.

- **Housing Bill 2021**: The Housing Bill of 2021 is a much-needed bill that seeks to bring together all stakeholders required to deliver housing effectively, and its adoption should be fast tracked. Key provisions of the Bill that need attention are detailed below.

Housing Bill 2021	
ISSUE / STATUS	RECOMMENDATION
The Housing Bill as it is currently drafted fails to adequately address consumer protection for home buyers and especially for off plan housing units	The Bill should clearly integrate consumer protection for households both during construction (for example, protection of buyer instalments via an escrow) and upon occupation (for example, by requiring annual audits of service charge freely accessible to owners, occupiers of a housing development).
Sections 21 and 22 of the Housing Bill provide a requirement to create **data banks.** This is much needed and should be promoted as a national priority. As of 2022, it is unknown, how many housing unit approvals, starts and completions there are in any given year in Kenya, and such data would need to be coordinated via the counties.	The Housing Bill needs to be promulgated into law, and then operationalized. Specific focus should be given to the creation of data banks. This is an important area for technical assistance.
Section 6(2)e of the Housing Bill provides for the creation of **industry standards.** This is critical especially with respect to climate resilient housing that meets the needs and capacities of the affordable market so that it is financially feasible to deliver.	The Housing Bill needs to be promulgated into law, and then operationalized. Specific focus should be given to the setting of appropriate industry standards. There is an opportunity for research into this area, to ensure that the standards that are developed do not undermine housing affordability and promote climate resilience.
Section 13 of the Bill allows for the creation of several organizations with overlapping mandates including the Housing Developers Regulatory Board, and a National Secretariat for Human Settlements. A Real Estate Regulatory Board is also proposed under a separate concept note dated July 2020, which also sets out the functions of the National Construction Authority.	With the promulgation of the Bill and its operationalization, there will be a need to harmonize all the existing and new regulatory frameworks and bodies, to ensure smooth delivery of housing rather than duplication of costs and time. It is worth noting that housing is increasingly provided as part of 'mixed use developments' and hence the regulation and standards may be better monitored under a broader 'real estate delivery mandate' with

	certain clauses applicable to housing. This is worth further investigation.
The Bill also has over 30 functions for the Director General of Housing as detailed in the Annex. The focus of the Director General should be limited to ensuring that the key building blocks are in place to enable a functional market.	With a review of the institutions and functions in the Housing Bill, it will be possible to also review and prioritize the functions of the DG to be practically achievable.

The key conclusion from an overarching review of Kenya's housing policy since 1953 points to the need for greater collaboration, transparency and efficiencies to create the enabling environment in which affordable housing can be delivered. While public financing sources are limited, there is significant public land that can be made available for housing. With some projects delivered, the sector will begin to witness economies of scale which will motivate efforts to drive affordability further.

5. LAND ASSEMBLY, LAND ACQUISITION, TITLE AND REGISTRATION OF TENURE

Prior to 2012, the legal framework governing land was overly cumbersome and complex, with five different regimes for dealing in land *viz*, Registered Land Act, Registration of Titles Act, Government Lands Act, Land Titles Act and the Indian Transfer of Property Act. Pursuant to the 2010 Constitution and the enactment of new land laws in 2012, these multiple legal regimes were consolidated into the Land Act of 2012 (substantive law) and the Land Registration Act of 2012 (procedural law) thus simplifying the legal regime. Both 2012 laws cover all transactions on land, *excluding community land,* which is governed by the Community Land Act 2016 and Community Land Regulations 2017. The recognition of Community Land is an important step forward for Kenya which has large land parcels constituting over 60% of total land mass in the country. However, there is limited registration/titling of land under this Act as at present.

Transacting in land continues to face challenges due to the various government departments involved and the room for rent-seeking behaviour. There has been an effort to digitize land transactions with the launch of Ardhi Sasa in April 2021. This is a critical step forward, however, the platform has faced teething problems and is not fully operational. Limited titles in Nairobi have been digitized and the transfer of title has stalled, as a result.

In addition, while the legislation allows for measures to leverage land values for development via effective land banking, idle land taxation, minimum and maximum acreages to be held, and others, these measures have not been enforced.

This component of the Housing Value Chain assesses Kenya's laws/policies/regulations in the land assembly/acquisition and titling processes with a view to identifying progress, challenges and potential areas of improvement in the policy, legal and regulatory regime. This is important given the central place of land in the entire housing value chain, as land constitutes the key site on which human settlements are built.

Twenty-two laws / policies / regulations in the Land Assembly/Titling Component were reviewed in this study. These are summarized in **Annex B** with links to their original source for further reference.

i) Land Act, No. 6 of 2012 (substantive law on land)
ii) Land Registration Act, No. 3 of 2012 (provides for registration processes including all dealings in land such as charges, leases, transfers)
iii) Land Registration (General) Regulations, 2017
iv) Land Registration (Registration Units) Order, 2017
v) Community Land Act 2016 which provides for management and registration of community land
vi) National Land Commission Act 2012 which provides for structure and functions of the Commission;
vii) National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017
viii) National Land Commission (Amendment) Bill, 2022
ix) Community Land Act No. 27 of 2016
x) Community Land Regulations 2017

xi) Sessional Paper No. 3 of 2009, The National Land Policy
xii) Land Control Act (Cap 302) 1967
xiii) Land Control Bill, 2022
xiv) Environment and Land Court Act No 19 of 2011
xv) Survey Act No. 25 of 1961 (Cap 299)
xvi) Sectional Properties Act, No. 21 of 2020
xvii) Sectional Properties Regulations, 2021
xviii) Survey Manual, 1961
xix) Idle Land Taxation Policy 2018 *(only reported to have been developed – but not available for viewing)*
xx) The Draft Land Sector Gender Policy– (not available for viewing);
xxi) Draft Kenya National Spatial Data Infrastructure Policy (not available for viewing);
xxii) Draft National Land Surveying and Mapping Policy.

Overall, the legal and policy framework with respect to land is complex, notwithstanding the consolidating efforts of the Land Act in 2012. This is further complicated by the fact that some legislation has not been operationalized with regulations. A significant constraint is that it fails to engage productively with the notion of land value, and the impact this has on land use choices and affordable housing.

Key gaps in the land assembly and titling value chain that need attention are:

Gap	**Recommendation**
There are no policy instruments or frameworks in place that address issues of gender in land, spatial data, land surveying and mapping. While draft policies are in place, these need to be finalized. Efforts to map geospatial data are hindered by limited resources and capacity, and uncoordinated between different players.	The Land Sector Gender Policy; Kenya National Spatial Data Infrastructure Policy; and the National Land Surveying and Mapping Policy all exist but need to be finalized and operationalized.
The current regulatory framework for land is silent on value. As a result, land values can be distorted by speculative landholders seeking to maximize their advantage. Both the 2010 Constitution and the 2009 National Land policy call for the governance of minimum and maximum acreages of private land, but this has not been developed. While a draft Idle Land Taxation Policy has been developed, it is not yet finalised.	A detailed review of land values and property price dynamics, and measures to leverage these in support of affordable housing (and other developmental objectives) is needed, given the competing pressures, especially in urban areas. From this, it will be possible to consider the development of a land banking policy, a law on minimum and maximum acreages of private land and guidelines/regulations on penalties for compliance, and the appropriate parameters for an Idle Land Taxation Policy.

Policies / laws requiring review or amendment

• Sessional Paper No. 3 of 2009 on National Land Policy	
STATUS / ISSUE	RECOMMENDATION
The 2009 National Land Policy is outdated and due for review, especially to align it with the 2010 Constitution. While the review process is undergoing, it has been slow.	A National Land Policy has important implications for affordable housing given its impact on the availability and price of land. These should be considered in the review.

• Land Act No. 6 of 2012	
STATUS / ISSUE	RECOMMENDATION
While the Land Act of 2012 envisions the establishment of a Land Acquisition Tribunal, this has not yet happened. As a result, the resolution of compulsory acquisition disputes has been stifled, thus restricting release/supply.	Operationalize the Land Acquisition Tribunal
Rising land prices are undermining housing affordability in several areas. Section 107A of the Land Act provides for land value indexes, but these have not been developed in many areas.	The recommended review of Kenyan land values and property price dynamics will create the basis for supporting the development of regulations towards the creation of a national land value index throughout the country.
Sections 90 and 96 of the Land Act set out the foreclosure process (power by lenders to exercise statutory power of sale). This process is inordinately long and cumbersome (foreclosure takes a minimum of 6 months) thus restricting lenders from recovering their monies upon defaults, and thereby militating against lending, especially to what are perceived as higher risk clients.	A full review of the impact of the Land Act and its provisions on the practice of mortgage lending, especially to low-income earners, is necessary. This review should engage lenders on how they manage the risk of foreclosure and seek to simplify and shorten the processes involved.
Section 105 of the Land Act gives courts the power to reopen and rewrite charges relating to matrimonial property, and to provide relief to borrowers based on extraneous factors. This interferes with the sanctity of contracts (freedom of contract) and disincentivizes lending.	A full review of the impact of the Land Act 2012 and its provisions on the practice of mortgage lending, especially to low-income earners, is necessary. This review should reconsider the power given to courts to reopen and rewrite charges relating to matrimonial property and to provide relief to borrowers, so that access to finance is not undermined.

Land Registration Act No. 3 of 2012

Land (Registration Units) Order 2017). National Land Information Management System/ArdhiSasa platform	
STATUS / ISSUE	RECOMMENDATION
Section 6 of the Land Registration Act as well as the Land (Registration Units) Order 2017, has set into motion a new registration regime, involving the digitization and migration of title to the new system. At the same time, a moratorium on dealings / transactions on land not yet migrated has been put in place. As the title digitization process has been delayed, all land transactions have been stalled. This has had a particular impact on the availability of finance.	The land title conversion process must be expedited. At the same time, there is a need to deal with the low / lack of confidence among landowners who are skeptical and wary of the title conversion process and reluctant to apply for title conversions.
The Act presumes the development of guidelines / procedures by the Survey Office to inform the issuance of a unique prefix number to support geo-referencing of sectional units. These have not yet been forthcoming, and the deadline is fast approaching (December 2022)	Provide the required guidelines/procedures to support geo-referencing and title migration.
In keeping with the law's requirement for an electronic land information system, Ardhi Sasa was launched in April 2021. The platform suffers, however, from incomplete digitization, missing records, difficulties in users obtaining consent, and the first in first out principle not being adhered to, making it non-functional.	A review of the intentions, form and function of Ardhi Sasa is needed to address the gaps and ensure it delivers what was envisioned. With the implementation of a digital lands' registry regime, this review and renovation of Ardhi Sasa is particularly urgent.

• Sectional Properties Act 2020 • Sectional Properties Regulations 2021	
STATUS / ISSUE	RECOMMENDATION
The Sectional Properties Act and its accompanying regulations provide for the conversion of long-term leases to sectional titles. The timelines set for this to occur, however, are unfeasible and impractical. The implication of not meeting the deadline is that there may be a legal crisis or stalling of transactions.	The Sectional Properties Act should be amended to extend the current statutory timeline of 2 years for title conversion.
There are some cases in which conversions from long-term leases to sectional titles should be exempted. This is not provided for clearly in the Act.	A review of the Sectional Properties Act 2020 and its regulations should consider potential exemptions to the requirement for conversion from long-term leases to sectional titles.

Absence of a procedure in the Sectional Properties Act or the Regulations applying for exemptions from converting long term leases to sectional titles.	Provide guidelines or procedures for applying for exemptions
No clarity in the exemptions on what is meant by 'mixed use development' in terms of minimum acreage and diversity.	Review the Regulations to provide the needed clarity.

• Survey Act 1961 (Cap 299) • Survey Manual 1961	
STATUS / ISSUE	RECOMMENDATION
Kenya's survey laws/policies are old and outdated. For instance, the methods and approaches stipulated in the existing Survey Manual have been overtaken by significant advancement in technology.	There is an opportunity to improve surveying capacity with currently available and deployed digital solutions both for relevance and efficiency. This should be pursued.

6. PHYSICAL PLANNING

The physical and land use planning component is crucial in the entire gamut of the housing value chain as it stipulates the nature and kinds of housing developments permissible in an area, as well as provides for approvals required in line with the local planning/zoning policies. These planning approvals predate the construction phase and consume a significant amount of time and costs, thus affecting the delivery of housing. Accordingly, there is a need to not only expedite the issuance of these approvals but also to reduce the associated bureaucracy and costs, say through automation and institutional reconfiguration. Most planning approvals are vested on individual county governments with the national government charged with formulating the overall national land use policy and a national spatial plan. However, given the interconnectedness of planning and the need for compatibility of the various land uses which may either be complementary or even conflicting, there are linkages and a critical need for collaboration between national and county governments. This is illustrated by the provision of national, intercounty and county physical and land use consultative forums and development plans.

Nineteen laws, regulations and policies with respect to physical planning were reviewed. These are summarized in **Annex C** with links to their original source for further reference.

(i) Sessional Paper No. 1 of 2017 on National Land Use Policy
(ii) National Land Use Policy Implementation Monitoring & Oversight Tool, 2022
(iii) Kenya National Spatial Plan (2015 - 2045)
(iv) Physical and Land Use Planning Act, No. 13 of 2019
(v) Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, 2019
(vi) Physical and Land Use Planning (Planning fees), Regulation 2021
(vii) Physical and Land Use Planning (National Physical and Land Use Development Plan) Regulations, 2021
(viii) Physical and Land Use Planning (County Physical and Land Use Plan) Regulations, 2021
(ix) Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations, 2021
(x) Physical and Land Use Planning (Institutions) Regulations, 2021
(xi) Physical and Land Use Planning (Building) Regulations, 2021
(xii) Physical and Land Use Planning (Liaison Committees) Regulations, 2021
(xiii) Physical and Land Use Planning (Development Permission and Control) (General) Regulations, 2021
(xiv) County Spatial Planning Guidelines, 2018
(xv) Physical Planning Handbook (2008)
(xvi) Nairobi City Development Ordinances and Zones Guidelines 2004
(xvii) Nairobi Integrated Urban Development Master Plan (2014 - 2030)
(xviii) Nairobi Metropolitan Growth Strategy of 1973
(xix) Master Plan Study of 1948 (for Nairobi)

Gaps in the policy or legislative/institutional framework

GAP	RECOMMENDATION
The Urban Areas and Cities Act 2011 and the County Governments Act 2012, require local spheres of government to develop county spatial plans, town plans, and municipal plans in line with the National Spatial Plan. As of July 2022, only 6 out of the 47 county governments had prepared and were implementing their county spatial plans with the technical assistance of the National Land Commission.[7] While some are still in development, very many towns and municipalities have not prepared these plans, yet they are key to planning and organization of the respective areas. This is largely on account of lack of capacity/expertise and possibly funding.	There is a critical need for county governments, municipalities and towns throughout the country to be supported in developing and expediting their plans to enable orderly physical development. These should all draw from the National Spatial Plan. (The SUED program is an example of supporting municipal towns with spatial plans)
While rezoning and other planning interventions improve land values, there is no mechanism for these to be retained for developmental purposes. As a result, private landlowners benefit from unearned economic rents as land prices escalate. This impacts on both private transactions as well as compulsory acquisition.	A detailed review of land values and property price dynamics, and measures to leverage these in support of affordable housing (and other developmental objectives) is needed, given the competing pressures, especially in urban areas. With this information, it will be possible to reform the planning system to introduce land value capture measures while reducing incentives for land speculation.

Laws/Policies/Regulations requiring review/amendment and enforcement

- Sessional Paper No. 1 of 2017 on National Land Use Policy
- National Land Use Policy Implementation Monitoring and Oversight Tool
- Kenya National Spatial Plan (2015 – 2045)
- Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, 2019

STATUS / ISSUE	RECOMMENDATION / OPPORTUNITY
The Sessional Paper identifies challenges such as the absence of secure land tenure systems, the high cost of land and building materials, low	The Sessional Paper on National Land Use Policy deserves greater attention and should be implemented in favour of the affordable

[7] https://www.kenyanews.go.ke/nlc-urges-counties-to-expedite-spatial-plans/ . Counties which have approved spatial plans are Baringo, Bomet, Kericho, Kilifi, Lamu and Makueni.

levels of income, a shortage of skilled labour, poor infrastructure and inadequate funding, which together result in inadequate shelter. While these challenges are all well noted, and recommendations for each have been developed, they have not been implemented. In particular, the recommendation for investment in infrastructure (safe water, drainage, solid waste disposal etc. especially in urban areas) has not been given attention.	housing sector. This will require attention to dedicated funding and coordination.
In 2022, the NLC created a monitoring and oversight tool to track the implementation of the Policy. The impact of this has not yet been felt.	The NLC requires support in deploying the monitoring and oversight tool, with respect to urban development
The National Spatial Plan seeks to address the disconnect between economic and spatial planning that has led to uncoordinated and unguided development. It establishes a broad physical planning framework that provides physical planning policies to support economic and sectoral planning. While this plan has been in place for seven years, it has largely not been implemented.	There is a need to promote the implementation of recommendations of the National Spatial Plan. This would include ensuring the development of stronger institutional structures to implement plans, and greater private sector participation. Local spatial Plans should better articulate the connection between spatial and economic factors, bringing these into planning initiatives and providing limited budgetary support in this regard.
The provisions of the Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, 2019 allow developers of strategic national and intercounty projects (including affordable housing projects) to seek development permission directly from the Cabinet Secretary of Lands and Physical Planning.	The provision for developers to obtain approvals for large intercounty affordable housing projects from the Cabinet Secretary requires an implementation framework – that is, the administrative procedures that developers must follow to access this opportunity and speed up approvals.

• Physical Planning Handbook 2008	
STATUS / ISSUE	RECOMMENDATION
The Physical Planning Handbook was prepared in 2008 to guide professionals in physical and land use planning. It is however based on the Physical Planning Act 1996. Given the Constitution of Kenya 2010, devolution, and the enactment of the Physical and Land Use	A review and update of the Physical Planning Handbook is critically needed to ensure it aligns with the current legal and institutional framework. Within this, there are opportunities for special attention to key planning challenges, for example, the management of land values,

Planning Act 2019, the handbook is now outdated and in need of review. The Ministry of Lands and Physical Planning has already developed a concept paper to enable this.	and the realization of sustainable human settlements.

• Urban Areas and Cities Act 2011	
STATUS / ISSUE	RECOMMENDATION
Section 33 of the Urban Areas and Cities Act provides for the establishment of public-private partnerships between county, municipal, and town boards with utility companies (both national and international) to deliver social infrastructure. Such PPPs have not, however, been actualized. This is an area for improvement given the need for such social infrastructure and the financial outlay required.	There is an opportunity for technical assistance to be provided in support of PPP development as envisioned in the Urban Areas and Cities Act.
Section 33(2) of the Urban Areas and Cities Act provides for cross-city and cross-municipality services to overcome local infrastructure challenges. While the law allows for the joint financing of cross-city and cross-municipality services, the legal and administrative mechanisms to give effect to this provision do not yet exist.	There is a need to develop an implementation framework to allow for the delivery of cross-city and cross-municipality services. This may help deal with the infrastructure challenges and promote housing development in urban areas.
Physical and Land Use Planning (Building) Regulations, 2021	
STATUS / ISSUE	**RECOMMENDATION**
While the Physical and Land Use Planning (Building) Regulations, 2021, provide for 5% green space, the draft National Building Code is unclear. According to the judgment in ***Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties)* 2022] eKLR –** green space in smaller developments may not be feasible and county should provide adequate green space in their urban plans.	Research in support of a debate around the scope and form of 'green space' is necessary so that the requirement can be realized within the scope of affordability constraints. What constitutes 'too small' for the green space requirement, will need to be defined. The opportunity of using footpaths might also be considered. This will enable an approach whereby the county takes responsibility for green space more broadly, when it is impossible at a development level.
Use of footpaths to provide parking for residents and visitors allowed in Draft Building Code 2022.	Reconsider the use of public space (footpaths) for provision of parking, which is a private use benefiting a small section of society. This clause in the Draft National Building Code 2022 also contravenes the clause in the Physical and Land Use Planning (Building) Regulations, 2021 which requires preservation of foot paths for pedestrians and cyclists.

Nairobi City Development Ordinances and Zoning Guidelines and other county zoning laws	
STATUS / ISSUE	**RECOMMENDATION**
County zoning laws are largely outdated and unresponsive to current patterns of development such that developments get approved as 'exceptions' to the existing plans. For example, extremely high densities are being allowed without approved zoning plans to support the densities. This runs the risk of creating infrastructure backlogs. Further, there is a high prevalence of poor uses adjacent to each other (e.g., industrial uses near housing or entertainment joints/bars) which leads to noise and effluent pollution. There have been complaints around noise pollution in residential areas mainly from bars and restaurants, with little to no enforcement from county governments. It has fallen on courts to deal with these issues (***Elisabeth Kurer Heier & another v County Government of Kilifi & 4 others*** **[2020] eKLR)**	There is a critical need for county planning frameworks to engage with actual patterns of urban development, so that they can be productively shaped and managed. This would require a review of development as currently happens and then an interrogation of current zoning laws and guidelines to identify points of conflict. New, inclusionary and sustainable zoning laws and guidelines will likely need to be developed. County governments should ensure stringent implementation of noise pollution laws, especially in urban areas.
County zoning laws pay limited or no attention to more recent efforts to ensure urban resilience, (public transport, green space e.t.c), or the ongoing process of informal urban expansion.	As above – a review of county planning frameworks should lead to new zoning laws and guidelines to accommodate new planning priorities and intentions.

7. CONSTRUCTION AND MAINTENANCE

The policy and regulatory framework on construction and maintenance is found in multiple and scattered legal regimes with several implementing agencies, thereby creating overlaps and challenges in implementation. The sector is typified by many agencies that make it burdensome and expensive for actors/developers to comply. The process of acquiring construction permits from the respective agencies including occupation certificate is tedious and takes approximately 159 days and costs 2.8% of the property value.[8] The multiplicity of approvals required from a wide variety of regulatory bodies in order to proceed with a development are outlined in the table below. These complicate the delivery process, adding time and costs.

Approval Process	**Purpose**	**Relevant Agency & Ministry if any**	**National Level or County Level**	Average Time Taken
Development Permission	To allow for any kind of development	Respective County Executive Member responsible for land use and physical planning	County Level	Max. 60 days
Change of User & Extension of Use	To allow for conversion of use of land from one use to another e.g., commercial to residential or extension of use or from single to multiple dwelling	Respective County Government's Department of Physical Planning	County Level	Between 30-60 days
Consent of land Leased from Government	Proprietor/lessee required to obtain consent before dealing in the land (lease, transfer or charge)	National Land Commission	County Level	
Architectural Drawings Approval	To approve architectural designs before construction commences	Respective County Executive Member	County Level	Up to 45 days
Structural Drawings Approval	To approve structural designs before construction commences	Respective County Executive Member	County Level	
Environmental Impact Assessment (EIA) licence	To manage/mitigate any adverse environmental impacts of a particular project	National Environment Management Authority (NEMA)	National – however offices for NEMA are found in different counties	Issued within **45-90 days**. NEMA advises applicants to apply for EIA license at least three months prior to the date they intend to commence a project to allow for sufficient

[8] World Bank. Programs. Economic Profile Kenya. Doing Business 2020. Comparing Business Regulations in 190 Economies.https://www.doingbusiness.org/content/dam/doingBusiness/country/k/kenya/KEN.pdf (Accessed 23 August 2022). Pg. 11

Approval Process	Purpose	Relevant Agency & Ministry if any	National Level or County Level	Average Time Taken
				time for the EIA review process.
Project Registration Certificate	To ensure that all projects are registered for purposes of inspection. Once application for registration of proposed project is made, there is usually a site inspection to check for compliance of the construction site against the approved plans and the NEMA clearance.	National Construction Authority (NCA)	National – however offices for NCA are found in different counties	7 days for issuance of compliance certificate. Provisional compliance certificate is usually issued for 90 days, if no violations happen, final certificate is then issued.
Borehole Drilling Permit	To ensure that all boreholes that are drilled are documented, are viable and have no adverse environmental impacts in an area	Water Resources Authority (WRA) under Ministry of Water	Both national and county level (WRA formerly WARMA) has offices at the devolved level	
Borehole Abstraction Permit	To enable abstraction of water from a borehole for a particular use, following drilling	Water Resources Authority (WRA) under Ministry of Water	Both national and county level (WRA formerly WARMA) has offices at the devolved level	
Certificate of Practical Completion	To certify that a building has been completed.	Qualified and registered Architect		
Certificate of Occupation	Issued to certify that a building is complete and fit for human habitation/occupation	County Government (County Executive Member for Planning)		
Public Health Permit	To ascertain that the building complies with public health laws and standards	Directorate of Occupational Safety and Health Services under Ministry of Labour		
Fire and Health Safety Occupation Certificate				
KEBS Certificate for installed equipment				
Workplace Registration	To ensure the occupational safety of all workers within a construction site	Directorate of Occupational Safety and Health Services under Ministry of Labour		
Certificate of Compliance of Installed Equipment		Directorate of Occupational Safety and Health Services under Ministry of Labour		

Approval Process	Purpose	Relevant Agency & Ministry if any	National Level or County Level	Average Time Taken
Land Rent Clearance Certificate	To confirm payment of land rent for leasehold property from government	National Land Commission		45 days
Land Rates Clearance Certificate	To confirm payment of land/property rates to the respective county government for rateable properties (mostly those in municipalities)	County Government (Department of Finance)		
Land Control Board Consent	Consent with respect to agricultural land before dealing with it; to protect agricultural land	Land Control Board under Ministry of Lands	County and local level	
Certificate of Construction Materials	To certify that construction materials are fit for use in construction	Kenya Bureau of Standards (KEBS) under Ministry of Industrialization, Trade and Enterprise Development	National level	
Signboard Permit; Excavation Permit; Hoarding Permit	To permit the putting up of signboards, undertaking of excavations	County Government (County Executive Member responsible for Physical Planning)		
Water Connection & Sewer Connection	To allow for water and sewerage connection	Relevant county water service provider (County Water and Sewerage Company)	County level	
Electric Power Connection		Kenya Power & Lighting Company under Ministry of Energy		
Development adjacent to Railway Line-Consent	Need consent to put up development	Kenya Railways Company under the Ministry of Transport		
Development adjacent or near an airport-Consent	Need consent to put up development	Kenya Airports Authority from the Ministry of Transport		
Development near a wildlife area-Consent	Need consent to put up development	Kenya Wildlife Service under the Ministry of Environment		
Development near a forest-Consent	Need consent to put up development	Kenya Forest Service (KFS) under the Ministry of Environment		

Figure 6: List of approvals required for housing delivery are still significant – need to collaborate under a one stop shop

While there have been real efforts towards transformation in terms of the institutional configuration and the development of some legislation relevant to construction and maintenance, transformation

has been slow. The activities of the various state agencies remain largely fragmented and uncoordinated. Further, the policy and regulatory framework has not kept up with technological and other developments in the construction process. For instance, despite changes in building materials and technologies and the need to adopt sustainable/green buildings, the relevant laws (such as the Building Code and Public Health Act) are yet to be updated. While a draft National Building Code exists, it has not yet been finalized and has gaps in terms of what the sector requires.

Twenty-four laws, regulations and policies with respect to the Construction and Maintenance component were reviewed for this study. These are summarized in **Annex D** with links to their original source for further reference.

(i) Physical and Land Use Planning (Building) Regulations, 2021
(ii) National Construction Authority Act, No. 41 of 2011
(iii) National Construction Authority Regulations, 2014
(iv) NCA Code of Conduct for the Construction Industry, 2020
(v) Sessional Paper No. 1 of 2013, National Building Maintenance Policy for Kenya
(vi) National Construction Authority (Defects Liability) Regulations, 2020 – which is not yet operational
(vii) Draft Construction Industry Policy
(viii) Standards Act, 1974 which governs material standards
(ix) Buy Kenya, Build Kenya Strategy of 2017.
(x) Sustainable Waste Management Act No. 31 of 2022
(xi) National Risk Disaster Management Bill 2021
(xii) National Climate Change Response Strategy, 2010
(xiii) Forest Conservation and Management Act No. 34 of 2016
(xiv) Forests (Harvesting) Rules 2000
(xv) Mining Act No. 12 of 2016
(xvi) Climate Change Act no. 11 of 2016
(xvii) Water Act No. 43 of 2016
(xviii) Environmental Management and Coordination Act, No. 8 of 1999
(xix) Environmental (Impact Assessment and Audit Regulations), 2003
(xx) Environmental Management and Co-ordination (Water Quality) Regulations, 2006
(xxi) Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009
(xxii) Energy Act No. 1 of 2019
(xxiii) Public Health Act, 1921 (Cap 242)
(xxiv) Public Health (Drainage and Latrine) Rules 1948

In addition, the study reviewed ten laws, regulations and policies that govern professionals within the housing value chain. These are also summarized in **Annex D** with links to their original source for further reference.

(i) Competition Act No. 12 or 2010,
(ii) Advocates (Renumeration) (Amendment) Order, 2014
(iii) Architects and Surveyor Act, 1933 (Cap 525)
(iv) Architects and Quantity Surveyors By-Laws, 1959

(v) Engineering Rules, 2019 (vi) Engineering Technology Act, No. 23 of 2016
(vi) Engineers (Scale of Fees for Professional Engineering Services) Rules, 2022
(vii) Engineers Act, No. 43 of 2011
(viii) Licensed Surveyors Code of Professional Conduct 1997.
(ix) Valuers Act 1985
(x) Valuers Bill 2022

Key gaps identified in the Construction and Maintenance component that require attention are:

GAP IDENTIFIED	RECOMMENDATION
The construction sector lacks a comprehensive and integrated framework within which to operate due to the many pieces of legislation scattered in many statutes. The scattered nature of the legislation makes it difficult for property developers to understand and comply with the requirements and creates further ambiguities that make effective legal enforcement difficult, while also encouraging corruption. For example: • Multiple institutions for approval/permitting; • Uncertainty/delays in approvals; • High submission costs; • Improper checks by the approving institution personnel; • Unqualified/lack of commitment from approving personnel and inspectors. A draft Construction Industry Policy is currently being promoted by the Council of Governors.	A full review of the institutional, policy and regulatory framework governing residential construction and maintenance is necessary. Ultimately, this should feed into the draft Construction Policy and lead to the adoption of a comprehensive and integrated framework (preferably one single legislation and entity/institution) to govern the sector/value chain. Such a framework should include: • clear lines of responsibility to promote accountability; • the incremental roll-out of functional electronic permitting system in county governments. Focus on the current teething problems and design challenges in the electronic permitting systems; • the use of technology to more effectively track the approval process;
While the State Department for Housing (as well as county governments) implemented a One Stop Shop framework in 2017, to consolidate all approvals and processes required in law, this is yet to be achieved.	The intentions for a One-Stop-Shop were welcome and are clearly needed. There is a need to consolidate the approval institutions and host them in a single location in order to make it possible for building approvals and site visits to be done jointly. This rationalized organization structure should give way to only one fee being charged to a developer covering all the aspects of the various approvals and inspection.
There is currently no attention to consumer protection for home buyers, especially in off-plan developments. There have been cases of off plan house purchasers losing their money	A full review of the consumer protection issues that confront consumers and undermine access to finance is necessary. From this, it will be possible to develop and enact robust legal

GAP IDENTIFIED	RECOMMENDATION
(deposits) after developers are unable/refuse to complete their development as contracted; do a poor-quality job or charge the property to obtain financing for construction thus exposing consumers/buyers	provisions to protect consumers/buyers of off plan developments
The Kenya Bureau of Standards (KEBS) has not yet prepared standards for alternative building and construction materials. This has slowed the uptake of ABMT (Alternative Building Materials and Technologies), as developers are unable to demonstrate their acceptability.	There is an urgent need for the Kenya Bureau of Standards (KEBS) to prepare standards for alternative building/construction materials. Specific attention should be given to their contribution towards reducing costs and improving affordability.
Whilst there is in place a National Maintenance Policy, there is no maintenance manual for buildings to guide the maintenance of residential units. Developers and building managers therefore fail to attend to this critical issue, undermining building longevity and setting residents up for significant refurbishment costs. This also undermines access to finance, as lenders don't trust that buildings will last for the term of the loan.	The issue of building maintenance needs to be taken on as a priority by the building industry. Attention to this could involve the development of building maintenance manuals, together with a dissemination programme to sensitize stakeholders on national and international maintenance standards and guidelines.
The Defects Liability Regulations 2020 were quashed by Court due to lack of public participation in the preparation. No subsequent effort has been made to address the issue. Currently the regulations are focused on commercial rather than on residential buildings. While this is a consumer protection issue, it also has an impact on access to finance as lenders cannot trust that developers will take responsibility for building quality. In other countries, a five-year warranty has become standard.	It is important to place responsibility on developers to deliver good quality buildings, and to ensure that the regulations cover all building types. A review of appropriate building regulations, drawing on international experience, should be undertaken, in support of the finalization and adoption of the existing Defects Liability Regulations 2020. The regulations should consider adequate time for defects to be observed (for example, providing 12 months for a patent defect from certificate of occupation provided by county to developer, may not cover a long duration for a home buyer who may purchase the unit several months after construction completion and move in several months thereafter. An after-sales and occupation timeframe should be considered.
Kenya's construction industry is not transparent. Information asymmetries undermine each player at different stages in the housing delivery value chain. There is nothing in the framework governing construction and maintenance that seeks to promote transparency and access to information in the market.	By including market transparency as a value in key legislation, and by providing for the collection and sharing of data in the public domain, government can leverage the regulatory process in favour of investment in affordable housing. A concept note setting out the scope of information that might be accessed through regulatory processes could be developed to feed into the finalisation of the

GAP IDENTIFIED	RECOMMENDATION
	Housing Bill 2021, to then be implemented by the relevant State Department.
The nomenclature/classification on different housing regimes in laws is inconsistent and poorly aligned with the evolution of policy. For instance, there is no consistent, legal definition of what is meant by social housing, affordable housing, low-cost housing or adequate housing in law, yet these are all terms used in regulations to assert actions.	Clear and consistent definitions of relevant nomenclature are needed. Specifically, definitions for social housing, affordable housing, adequate housing and low-cost housing should be provided in law.
The policy and regulatory framework for construction and maintenance does not recognize the very active participation of informal builders and the incidence of incremental construction. This means that such activity cannot be regulated, and that it can also not access finance.	Explicit attention needs to be given to the role and practice of informal builders and incremental construction. A full review of the so-called informal sector in Kenya is necessary as a basis from which to draft appropriate and enabling regulations that protect consumers from poor construction quality and support the flow of finance.
Capacity constraints undermine an efficient and quality construction process. On the supply side, developers, building contractors and construction workers require focused training to ensure quality within the scope of end user affordability. On the regulatory side, regulators need to engage with the evolving nature of residential construction insofar as it includes new methods, technologies and players (some informal), and serves new target markets.	A wide-scale assessment of human resource capacity in the building industry, both in the public and private sectors, is critically needed. This would inform staffing plans in county building authorities and recruitment of more personnel to aid in expediting approval and inspection processes, as well as the training plans of the National Construction Authority and Competency Based Training Assessment for building contractors and construction workers. Specific training in the legal and regulatory framework is also necessary to ensure that members of staff for the various institutions, as well as developers and contractors, are each aware of their responsibilities.
There is no mechanism to ensure oversight over other acts (e.g., Water Act 2016, Standards Act 1981, Environmental Management and Coordination Act 1999, Energy Act 2019) in the residential construction sector.	Need to streamline oversight of all other sectoral laws that are relevant to the housing sector

The key recommendations for amending / reviewing and enforcement of existing laws are:

BUILDING CODE AND STANDARDS

- Local Government (Adoptive By Laws) Building Order 1968 & the Local Government (Adoptive By Laws) (Grade II Building) Order 1968 (Building Code of 1968)
- Draft National Building Code (2022)
- Physical and Land Use Planning (Building) Regulations, 2021
- Standards Act, 1981

ISSUE	RECOMMENDATION
At present, there is no comprehensive framework detailing the needs, standards, and guidelines for green buildings, neither for new construction nor for the refurbishment of existing buildings. This undermines Kenya's intention for green, but also financiers' ability to emphasize green building in their credit and investment strategies. Green is addressed in the draft National Building Code 2022, but this has not yet been promulgated as it is still undergoing stakeholder validation.	While the fast-track implementation of the National Building Code 2022 is critical, special attention should be given to its focus on the promotion of green, healthy and affordable buildings, both new and refurbished. There other green building guidelines and standards being developed by non-governmental sector players such as Kenya Green Building Society, the International Monetary Fund's Excellence in Design for Greater Efficiencies (EDGE) and the Architectural Association of Kenya (Safari Green Building Index)
Minimum parking requirements as set out in draft National Building Code 2022 unnecessarily increase housing costs due to limitation of land.	In line with Kenya's broader strategy for public transport, as well as high land costs, it is necessary to review the parking requirement, adjust it in response to demographic, geographic and management factors. This is especially the case in high density areas meant for affordable housing.
The Regulations overly focus on catering for persons with mobility disabilities to the exclusion of other forms of disability; In addition, while the requirement to cater for persons with disability is noble, it also has the effect of increasing the costs of modification of buildings	Review the regulations to cater for other forms of disability and reduce the requirements for wheelchair access which may not be feasible to be provided by every private developer
Use of secondhand materials in construction is prohibited in the National Building Code 2022. This fails to recognize that some secondhand materials may be well suited for reuse – a practice which would also be counted as green.	Reconsider the prohibition of use of second-hand materials in construction and develop a policy which accommodates a more cost-effective and nuanced approach.
The draft National Building Code 2022 recognizes architects and engineers but fails to accommodate the growing array of professionals in the construction sector.	The professionalization of the building industry is something that requires attention by the building industry itself. The draft National Building Code 2022 should also be reviewed to

	recognize and provide for a wide array of professionals to include emerging professionals such as landscapers and project managers.

APPROVALS, INSPECTIONS, AND FEES

- National Construction Authority Regulations 2014
- National Construction Authority Act 2011
- Draft Construction Industry Policy, 2018 – promoted by the Council of Governors
- Standards Act 1981

ISSUE	RECOMMENDATION
High and multiple permitting fees	A full review of currently applicable approval statutory costs/charges/fees is necessary to establish inefficiencies and overlaps. This would enable the creation of a single, consolidated and affordable fee. Specific attention should be given to the potential for exemptions when a housing project is categorized as affordable housing. This might especially be considered in terms of the NCA construction levy and the EIA fees by NEMA.
Overlapping, lengthy, bureaucratic and conflicting institutional frameworks with respect to construction/permitting/approvals. Currently, the mandate of conducting building inspections appears to be with both NCA and National Building Inspectorate which is a department within the State Department of Public Works, which lends to confusion. In this context, buildings continue to be developed without effective, accountable inspection and building quality issues persist, undermining health and safety and the opportunity for finance. There is significant discretion and opacity in the building code administration system which creates opportunity for corruption.	Focused attention must be given to the building inspections process and how this addresses health and safety issues, while also enabling access to finance. An efficient and effective building inspection process is needed. Such a review might consider entrenching the inspection powers within NCA which is historically charged with this function and removing the function from the National Building Inspectorate department in SDPW. A key area of attention must be law enforcement, in which inspectors act against unapproved or non-compliant buildings.
Lengthy, complex and bureaucratic processes in the planning and construction value chain and agencies which heighten regulatory and compliance burden.	Simplify the processes by having a centralized agency to deal with all these requirements, or at least have an electronic platform which expedites these processes.

For instance, the Ministry of Health overseas all public health issues and occupational health and safety in the industry. In addition, there are other institutions involved such as NEMA, National Construction Authority (NCA), Kenya Power, Water Resource Authority, and Kenya Bureau of Standards (KEBS). The activities of these agencies remain largely fragmented and uncoordinated.	

ENVIRONMENTAL AND HEALTH LAWS/ POLICIES/ REGULATIONS REVIEWED

- Environmental Management and Coordination Act, No. 8 of 1999
- Environmental (Impact Assessment and Audit Regulations), 2003
- Environmental Management and Co-ordination (Water Quality) Regulations, 2006
- Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009
- Climate Change Act no. 11 of 2016
- Water Act No. 43 of 2016
- Energy Act No. 1 of 2019
- Public Health Act, 1921 (Cap)
- Forest Conservation and Management Act No. 34 of 2016
- Forests (Harvesting) Rules 2000
- Mining Act No. 12 of 2016

ISSUE	RECOMMENDATION
Public Health Act, 1921 (Cap) is due for modernization and revision to promote the health of building occupants. Fines in the Act of 200/- for non-compliance are no longer a deterrent.	A full review of the Public Health Act, 1921 is necessary to incorporate more recent intentions for and commitments to energy efficiency, and healthy and green buildings. This would lead to a legislative amendment which modernizes the Act in line with current Public Health issues. It is also important that the incentive and disincentive framework of fines is reviewed to ensure effective compliance.
The regulatory framework does not address energy efficiency standards that are key for green buildings as envisaged and required under the Act. This is slowing efforts at greening buildings in this respect.	Cabinet Secretary should formulate regulations to provide for various matters such as: energy efficiency and conservation building codes; energy efficiency standards for specific technologies and buildings; and energy consumption norms and standards for designated consumers. Also develop regulations to specify the norms for processes and energy consumption standards for any equipment and appliances which consume, generate, transmit or supply

	energy as required under section 190 of the Energy Act 2019 to effectively promote green buildings by ensuring energy conservation in buildings (houses).
The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 Provisions are not implemented in residential areas by county governments and NEMA (Standards & Enforcement Review Committee) The function of dealing with noise pollution is devolved to county governments (which also issue licences for bars), though NEMA provides technical assistance. Residents have had to rely on the courts to force the hand of county governments into regulating or cancelling licences of noise polluters such as bars (***Kilimani Project Foundation v B Concept Limited t/a B Club Nairobi & 7 others*** **[2019] eKLR;**	Implement permissible noise levels contained in the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 for residential areas.
Various supply chain regulations have conflicting institutional objectives. For example, the ban on tree logging in forests, as set out in the Forests (Harvesting) Rules, 2009 and the 2018 moratorium on logging by the Ministry of Environment and Forestry has served to increase the cost of timber. Similarly, the Mining Act has a levy of 2% on construction materials that are mined in Kenya, increasing the cost of locally produced building materials.	Undertake a review of the regulatory framework of supply chains for affordable housing, to identify areas of conflict with the affordable housing agenda. Where conflict is identified, develop and implement measures to support competing objectives. For example, sustainable forestry practices should be encouraged which will benefit both housing affordability and limit environmental impact compared to building with non-renewable materials. With respect to the mining levy, consideration could be given to apply the funds from these levies for investment into delivery of infrastructure of other financing for affordable housing, or to exempt some materials from these levies to bring down the cost of affordable housing.

Kenya Affordable Housing Programme Development Framework Guidelines, 2018	
ISSUE / STATUS	RECOMMENDATION
The Guidelines are specifically dedicated to affordable housing agenda, are quite progressive but are yet to be implemented for various reasons.	Undertake a full feasibility review of the Kenya AHP guidelines and identify key blockages. Focused engagement with private sector players and their experience in accessing incentives and working under the guidelines will provide insights into the potential for revision. Specific consideration should be given to financing, and

	appropriate tax incentives to lower the cost of supply and enable projects to be delivered at viable prices.
The guidelines provide for a full 2 years after completion before the government is required to pay for the completed units. This risk is too high to bear for private sector developers	In undertaking the feasibility review, give special attention to risk and funding flows that enable investment by the private sector.

PROFESSIONALS AND FEES

- Competition Act 2010
- Engineers (Scale of Fees for Professional Engineers) Rules 2022
- Engineers Act 2011
- Architects Act & Quantity Surveyors Act
- Advocates Renumeration Order 2014
- Valuers Act 1985
- Valuers Bill 2022

ISSUE	RECOMMENDATION
Professional fees are calculated based on a fixed fee scale per unit. This raises the cost of delivering affordable housing, especially insofar as it fails to engage with the shift to large scale similar unit developments where technical input is replicated. The Competition Authority of Kenya has ruled in this direction, but this has not been realized in the fee structure.	An impact assessment of the current fees structure as is being charged by key professionals in the construction sector such as lawyers, engineers, architects, valuers is required to provide the Competition Authority of Kenya with the evidence needed to grant exemptions in support of affordable housing.
There have been alleged instances of price fixing by players in the construction sector such as cement and steel makers. These concerted and collusive practices increase construction costs thus raising house prices.	Address competition concerns potential concerted practices/collusive behaviour among stakeholders in the sectors particularly manufacturers of construction materials which hurt consumers and increase construction costs.

8. HOUSING INVESTMENT, FINANCE & TAXATION

Financing is required at every point of the housing value chain and affects both the supply and demand (affordability) of housing units. At the first instance, municipal financing is required to fund bulk infrastructure for housing units. Thereafter, financing on the supply side ensures that developers can supply houses to the market, whether for ownership or rental. Retail financing on the demand side enables prospective house buyers to afford the housing units put on the market, by amortizing the cost over a period of years, with the loan being secured by the value of the property. The regulatory framework overseeing financing along the value chain seeks to enable the breadth of financial arrangements, including purely private investment, purely public investment, and investment through public private partnerships.

Kenya's financial sector comprises 38 commercial banks, one licensed mortgage finance bank, one mortgage Refinance Company, and about 440 housing specific SACCOs which interact with several housing cooperatives, the largest of which is the National Cooperative Housing Union, or NACHU. Fourteen licensed microfinance banks provide other capital that is often used for housing, though not always explicitly tracked. Institutional investors including pension funds and private equity funds, provide the funding for housing, together with the capital markets.

Most recently in 2018, under new regulations to promote housing as part of the Big Four Agenda, the law sought to establish a mandatory contribution towards the **National Housing Development Fund** (which itself was established in 1953). This amendment required employers and employees alike to contribute 3% of an employee's salary, which after time, could be drawn by the employee to purchase their home. This intervention sought to promote the supply of housing by addressing the demand-side constraint of inadequate financing among prospective home buyers and de-risking the sector with this guarantee of offtake. Objections to the 2018 regulations were raised in the courts, however and the regulations were nullified/quashed by the court. As a result, the NHDF is not operational and this anticipated source of finance in support of housing supply does not exist.

The government has also set up the **Kenya Mortgage Refinance Company** which provides loans to commercial banks and SACCOs to re-finance mortgage loans that these institutions have extended to home buyers. Uptake of KMRC financing has been low, largely due to a lack of suitable supply in the defined criteria, specifically for loans funded by World Bank financing[1]. These criteria were originally set at a maximum household income of Kshs. 150,000/= per month, and a home value of KShs. 4 million in Nairobi and Kshs. 3 million in the rest of the country. As of September 2022, the price limits for KMRC financed loans supported by World Bank financing increased to KShs. 6 million in Nairobi and Kshs. 5 million outside Nairobi, reflecting the market realities of available housing stock[2]**.** It is worth noting that a Kshs. 6 million (USD 50,000) house is affordable only to an estimated 17% of urban Kenyans[3] While the 'cheapest newly built house', as identified by CAHF in their 2021 Yearbook as costing KShs. 1.1m (USD 10,000), would be affordable to about 79% of the urban population, very few of these units are built.

The various measures implemented notwithstanding, there is still inadequate financing for affordable housing on both the demand and supply sides. This inadequacy is in terms of both the quantum of finance available, and the target of what is available – on the demand side, few products can accommodate informal sector workers, while on the supply side, construction finance favours

established companies, with little available for small scale contractors. While these product developments are, of course, the prerogative of lenders, the policy and regulatory framework in which they function is critical. Some of the key barriers to innovation and scale are highlighted in this review.

A further component of the housing finance framework relates to taxation. The activity of housing is an important source of revenue for the state, and taxation exists at each stage of housing delivery. This supports the national balance sheet and enables the government's investments. Towards its affordable housing objectives, the government has introduced tax incentives such as stamp duty exemptions on transactions and value added tax exemptions on construction inputs in a bid to attract investment in the sector and reduce housing costs. These incentives have not borne fruit as intended, however. A KPDA study is currently investigating the constraints.

Across the breadth of legislative guidance summarized in this review, Kenya's housing finance sector is however constrained by a wider macroeconomic context. For instance, heavy domestic borrowing by government at attractive interest rates has crowded out credit to individuals and the private sector. As the government contemplates measures to improve financial sector functioning for housing, it should address this key issue and improve the investment context for affordable housing. This would involve promoting efficiency, transparency and data sharing in the housing value chain to attract impact capital while introducing measures to de-risk such investments.

Thirty-two laws, regulations and policies that influence the Financing (Investment, Rental and Taxation) framework for housing were reviewed for this study. These are summarized in **Annex F** with links to their original source for further reference:

i. (Draft) National Tax Policy 2022
ii. Public Finance Management Act 2012
iii. Public Private Partnerships Act 2021
iv. Civil Servants (Housing Scheme Fund) Regulations 2004
v. Housing Scheme Fund Regulations, 2018
vi. Retirement Benefits Act, No. 3 of 1997
vii. Retirement Benefits (Mortgage Loans) Regulations, 2009
viii. Retirement Benefits (Mortgage Loans) Regulations, 2020
ix. Capital Markets (Real Estate Investment Trusts (Collective Investment Schemes) Regulations, 2013)
x. Income Tax Act, 1970
xi. Unclaimed Financial Assets Act 2011
xii. Amended through Finance Act 2022
xiii. Sacco Societies Act, No. 14 of 2008
xiv. Sacco Societies (Deposit-Taking Sacco Business) Regulations 2010
xv. Sacco Societies (Non-Deposit Taking Business) Regulations 2020
xvi. Sacco Societies (Amendment) Bill, 2021
xvii. Draft Sacco Societies (Specified Non-Deposit Taking Business) (Levy) Order 2022
xviii. Cooperative Societies Act, No. 12 of 1997
xix. National Cooperative Development Policy (draft from 2019)
xx. Building Societies were created to support the delivery of housing
xxi. Building Societies Act, 1956 (Cap 489)
xxii. Guarantee (House Purchase) Act, 1967 (Cap 462)

xxiii. Finance Act 2019 amendment to Income Tax Act
xxiv. Value Added Tax Act No. 35 of 2013
xxv. Finance Act 2022
xxvi. Finance Act 2016
xxvii. Income Tax Act 1970
xxviii. Distress for Rent Act 1938
xxix. Rent Restriction Act 1959
xxx. Landlord and Tenant Bill 2021
xxxi. Valuation for Rating Act
xxxii. National Rating Bill 2022

8.1 Capital Markets and Wholesale Finance (Equity and Debt)

Various mechanisms exist to channel funding into housing finance. A key intervention established in regulations published in 2013 is the potential for residential Real Estate Investment Trusts or REITs. Further opportunities exist for pension funds to invest in housing. These are explored below.

8.1.1 National Housing Development Fund

The National Housing Development Fund (NHDF) is established under section 7 of the Housing Act 1953 and is under the control of the National Housing Corporation (NHC) which is a state corporation under the Ministry responsible for housing. The National Housing Development Fund is meant to play a pivotal role as a catalyst to increased supply of affordable housing by private developers (via the Offtake Agreement), and as a bridge to the demand of affordable housing by low- and middle-income Kenyans. The Fund seeks to provide developers with Offtake Agreements to purchase qualifying affordable housing units. The NHC is allowed under section 8 of the Housing Act make loans from the Fund to any company, society or individual person to enable acquisition of land and construction of approved dwellings; making loans to organizations established for promoting the development of housing; acquire and maintain any land or building or estate; construct dwellings, carry out approved schemes and provide services for such schemes.

In its quest to increase the amount of funds available in the Fund to support housing supply and demand, the Government introduced and promulgated the Housing Fund Regulations 2018 which was mandating all employers to remit 1.5% of their employees' salary to the Fund, with employees contributing a similar amount through checkoff. However, employers and employees through their organized unions moved to court to challenge these regulations for, among others, lack of public participation. Eventually, these regulations were declared illegal thus frustrating enhancement of the Fund. At present, the Fund comprises of Parliamentary appropriations and interest repayments on loans issued. There were draft regulations developed in 2020 which sought to provide for voluntary contribution by members at a minimum of Kshs. 200 per month.

8.1.2 Kenya Mortgage Refinance Company

The Kenya Mortgage Refinance Company (KMRC) is a mortgage refinance company established pursuant to the Central Bank (Mortgage Refinance Companies) Regulations 2019. It is regulated and supervised by the Central Bank of Kenya. The company is a joint venture between the National Treasury and lenders like banks, saccos, and development finance institutions such as the World Bank and the African Development Bank. The mission of KMRC is increase accessibility and affordability of housing loans in Kenya by providing long term financing to primary mortgage lenders. The mission aligns with the mandate of the KMRC which is to provide long-term funding to primary mortgage lenders (banks, SACCOs, microfinance banks) for onward lending as home loans to Kenyans.

The mortgage refinance firm was formally licensed in September 2020 to derisk access to home loans for workers earning up to Sh150,000 a month. The KMRC offers two market products: affordable housing loans and market housing loans. Under the affordable housing loans segment, KMRC extends loans to primary mortgage lenders to re-finance mortgage loans capped at KES 6 million in Nairobi metropolitan area (Nairobi, Kiambu, Machakos & Kajiado) and KES 5 million elsewhere to individual borrowers whose monthly household income is not more than KES 150,000 with a repayment period of up to 20 years. On the other hand, under the market housing loans segment, KMRC extends loans to Primary Mortgage Lenders to re-finance mortgage loans above the Affordable Housing loans threshold.

In 2021, KMRC enabled issuance of 574 home loans by primary mortgage lenders priced at an average interest rate of 9.5 percent, at an average mortgage size at Sh2.34 million.

8.1.3 Real Estate Investment Trusts (REITS)

Capital Markets (Real Estate Investment Trusts (Collective Investment Schemes) Regulations, 2013) Income Tax Act, 1970
CONTEXT: • Real Estate Investment Trusts (REITS) refer to collective investment vehicles through which investors (both retail and institutional) pool funds to invest in real estate assets. These trusts are usually professionally managed and are regulated by the Capital Markets Authority. REITS do not hold assets directly. These assets are held by SPVs as they are then able to be traded more cost effectively. • The Income Tax Act exempts real estate investment trusts from income tax except for the payment of withholding tax on interest income and dividends as a resident person as specified in the Third Schedule of the Act. • There are 2 forms of REITS provided for in Kenya, I-REITS (Income REITS) and D-REITS (Development REITS). I-REITS can be issued on a restricted or unrestricted (i.e. publicly listed) basis. D-REITS, which carry significant development risk, must be issued on a restricted basis and have a minimum investment of Kshs 5 million. • The I-REIT can be offered on an unrestricted basis, with no minimum investment amount.

- There are limitations when REIT issuances are on a restricted basis (i.e. typically when they are unlisted). For restricted offers, REITS are only available to professional investors, who are required to invest a minimum of Kshs 5 million (Regulation 27(1)b).

- Insurance companies are not allowed to invest in REITS under section 50 of the Insurance Act Cap 487.

ISSUE / STATUS	RECOMMENDATION
Through REITS, investors or persons who would otherwise never have acquired a real estate in their investment portfolio due to the huge capital outlay needed to acquire real estate or those who would not wish to bother with managing real estate are able to indirectly invest and own real estate and accrue associated benefits. However, despite the attractiveness of REITS and the regulations enabling it to have been in force since 2013, there have only been two REITS since-being Acorn I-REIT and D-REIT and Fahari I-REIT. While the regulations governing REITS are very good for issuance of new REITS, they are not as clear for the subsequent growth and expansion.	REITs offer an important opportunity to stimulate investment in affordable housing – however, this needs to be explicitly reviewed so that constraints to this particular asset class can be addressed. With this review, it will become more possible to provide clarity and regulations for supplementary offers by existing REITS as without these in place, it can take inordinately long to do so.
REITS are currently affected by high fees, particularly Trustee fees.	Encourage competition in the Trustee field to drive down costs.
The law is currently silent on whether subsidiaries of Real Estate Investment Trusts (REITS) can benefit from tax exemption in the Income Tax Act 1970. However, the KRA has allowed this exemption on a case-by-case basis.	Push for publication of regulations that will formally exempt subsidiaries of real estate investment trusts (REITS) from income tax to accord with section 20(1)(c) of the Income Tax Act. Accordingly, these regulations need to be fast-tracked to enable REITS to take advantage of this tax incentive.
Presently, REITS can only be constituted as a trust for them to obtain the approval of the Capital Markets Authority (CMA).	Review the potential to allow structuring of REITS as partnerships and companies (as done in other markets like UK), and not only Trusts.

Unclaimed Financial Assets Act 2011
(As amended through Finance Act 2022)

The Unclaimed Financial Assets Authority (UFAA) is sitting on approximately Kshs. 50 billion of assets and can currently only invest in treasury bonds[4].	
ISSUE / STATUS	RECOMMENDATION
The law provided for a high penalty for late surrendering of unclaimed assets, which explained why up to Shs. 240 billion had not been surrendered. This was recently changed in June 2022 via the Finance Act 2022 to allow the Cabinet Secretary to waive these penalties.	Promote the utilisation of this waiver to increase the surrendering of unclaimed assets to the UFAA.
Reunification of the unclaimed assets held by the Authority with the intended beneficiaries has been dismal due to complex processes, thereby robbing intended beneficiaries of the necessary capital that would be deployed in purchasing or acquiring housing (from the demand side).	Take measures to promote reunification of assets with the beneficiaries by creating awareness and reducing the complexities associated with claiming for the assets.
Further, the unclaimed assets/cash is simply invested in government securities by the Authority.	The assets held by the Authority (UFAA) can be lent to property developers (solving the financing challenge on the supply side) to enhance housing through a review of the law to allow for this.

Public Finance Management Act, 2012	
ISSUE / STATUS	RECOMMENDATION
This requires that any public fund created by a public entity must be anchored into this Act	Create a register of public funds created for housing and infrastructure and how they are utilized, and impact created.

8.1.4 Public Private Partnerships

Public Private Partnerships Act 2021	
Efforts to use the PPP structure to enable affordable housing have been challenging to date, as the provision of housing for sale is about 'asset delivery', whereas the PPP framework is about 'service delivery.' For this reason, PPPs are more suitable to projects where income streams are created (including rental housing).	
ISSUE / STATUS	RECOMMENDATION

Given the relatively new state of this law (passed in December 2021 repealing the 2013 Act), it has not been utilized in affordable housing, yet it holds significant promise. The 2021 Act: expands the scope of arrangements that qualify as PPPs and expands the scope of procurement methods available for PPPs by introducing direct procurement as one of the methods; allows government bodies to contribute land in the form of Special Purpose Vehicles**,** simplifies procedural elements on conduct of feasibility studies, tender evaluations, contract negotiations and approvals of applications; reduces the number of oversight approvals required from the PPP Committee in the course of project development; delegates various operational latitudes of guiding and championing project development for the Committee to the newly-established Directorate; and provides timelines on key project processes and stages. These provisions should be taken advantage of by property developers.	The PPP framework and legislation requires a publicity campaign to create awareness among affordable housing property developers. This could be an area for focus by the KPDA, to assist its members exploit the potential of the legislations in forging public-private arrangements in affordable housing. In this regard, the KPDA should also explore the application of the legislation specifically to promoting rental housing projects which are more suitable to PPP structures.

8.2 Retail Finance

Kenyan banks are highly liquid and the key policy issue to consider is the ease with which banks can invest in government bonds and bills at low risk, rather than pursue investment in riskier products like housing. The figure below shows the high rate of investment from the top 8 banks into government bills and bonds. There is need to create an inducive policy environment to encourage the banking sector to lend to the housing sector – which will require collaboration amongst the banks and increased sharing of data, to reduce the risk.

Banks' investment in government Treasury Bills and Bonds as at December 2021

Bank Name	Assets KES Mn' (A)	KES invested in T-Bills or T-bonds Mn' (B)	% (B/A)
KCB Bank Kenya	826,395	185,667	22%
Equity Bank Kenya	877,415	228,486	26%
Cooperative Bank	540,386	160,410	30%
Absa Kenya	428,745	132,168	31%
Standard Chartered	334,872	95,596	29%
NCBA Bank	546,733	196,051	36%
Diamond Trust Bank	326,378	124,310	38%
Stanbic Bank	319,198	59,127	19%

High % of bank balance sheets are invested in government bills and bonds, which provide attractive returns with no risk, and are administratively easier than lending to private enterprises.

Figure : Top 8 Banks investment in government bills and bonds as at December 2021: Source, Banks Annual Reports

The need for a stable macroeconomic environment is also illustrated by the case of Housing Finance Bank, which was able to launch a 7-year bond when the interest rate environment and exchange rate environment was stable in 2010. However, since 2010, Housing Finance Company of Kenya has struggled to replicate this access to finance due to more volatile conditions[5].

Construction finance is constantly raised as a gap in the housing value chain. The current metrics to obtain construction finance from banks is usually capped to approximately 60-70% of the hard construction cost, leaving the developer to fund the land cost, professional fees, and balance 30-40% of hard cost either through the developer's own equity or pre-sales to buyers. The pre-sales are not protected as explained in [27. Off plan Housing Developments under Annex F].

If one bank has provided construction finance, it is difficult for other banks to provide mortgage finance to off takers until the land security is fully cleared. The only exception is where the individual housing units have clean title which can be charged. These fundamental collateral issues are important to enable a functioning mortgage market.

8.2.1 Banks

Banking Act 1989 (Cap 488)

Commercial banks are regulated under the Banking Act 1989, Cap 488. Section 3 of the Act makes it illegal to carry on banking business without a valid licence from the Central Bank of Kenya, as provided for under section 4 of the Act. Section 7 provides that a bank must maintain minimum capital requirements as set out in the Second Schedule of the Act at all times. Under the Second Schedule, there are stipulations of the core capital that must be maintained to guard against losses by consumers, preventing collapse of bank arising from undercapitalization, and promoting

depositors'/investors' confidence. The core capital is also critical in determining how much a bank can lend to borrowers given that the Act pegs the lending ability of a bank as a percentage of core capital held. Particularly high capital requirements, however, can also potentially increase the cost of funding as a result of holding higher core capital. These minimum capital requirements may be amended by the Cabinet Secretary for Treasury, subject to approval of the National Assembly.

In addition, to reduce potential overexposure of a bank, there is enshrined in the Act the single obligor rule under which a bank is not permitted to lend more than 25 percent of its core capital to any one borrower or any number of related borrowers.

The Act places a limitation on the increase of banking charges without the prior approval of the Minister (Cabinet Secretary for Treasury) under section 44. There is in fact a long-running legal battle between banks and customers over the alleged increase in bank charges without the approval of the Minister.

Section 44A of the Banking Act introduced what has since been called the *in-duplum* rule in May 2007 by providing that no institution may recover from a debtor an amount of interest exceeding the principal amount when the loan becomes non-performing. The only exception to limitation of interest is with respect to an award made by a court (through a court order). In August 2022, the High Court in ***Mugure & 2 Others v Higher Education Loans Board*** **(Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Civ) 19 August 2022) (Judgment)** at paragraphs 24 and 25 expanded the application of the *in duplum* rule to other institutions other than banks as to cover all money lenders. This finding was a departure from a 2016 High Court decision in ***Desires Derive Ltd v Britam Life Assurance Co (K) Ltd*** **(2016) eKLR** which held that the in-duplum rule is only applicable to banks. The *in duplum* rule is captured in other jurisdictions such as South Africa in the National Credit Act No. 34 of 2005 where it applies to all money lending transaction, over and beyond banks. Such a statutory amendment to reflect this position and the recent decision in *Mugure*, may be appropriate for purposes of consumer protection.[1] Further, the *in duplum* rule was said to apply retrospectively in Kenya by the Court of Appeal in ***Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)*** **[2019] eKLR**.

At present, there is no regulation or cap on the interest rates that may be charged on a loan by banks. This is the case following the repeal of section 33B of the banking Act (introduced through the Banking (Amendment) Act 2016 passed on 14 September 2016) providing the Central Bank of Kenya with powers to impose interest rate ceilings. The said section had provided that banks and financial institutions shall set the maximum interest rate chargeable for a credit facility at no more than 4 percent above the Central Bank rate and published by the Central Bank of Kenya. This provision had the effect of causing credit rationing as banks and financial institutions shied away from lending to risky borrowers.[2] The law imposing a cap on interest rate chargeable was challenged in the High Court in ***Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)*** **[2019] eKLR** where the petitioner argued that the said law was discriminatory against banks and financial institutions as it did not apply to microfinance banks, insurance companies, mortgage finance companies and those dealing in Islamic banking and that the law interfered with the mandate of Central Bank in formulating monetary policy. In its judgment, the High Court quashed the said statutory provision for unconstitutionality for being 'vague, ambiguous, imprecise and indefinite' and for being discriminatory against banks and financial institutions. The Court however suspended the implementation of the judgment for a period of 12 months (one year) to allow the National Assembly

to consider making amendments to the statutory provision. Accordingly, Parliament repealed the interest cap law in November 2019, reverting to a regime where interest rates are contractually negotiated and agreed between lenders and borrowers.

Another important issue is with respect to the interest on a court award that may be levied against a bank or financial institution in favour of a borrower arising from a wrongful exercise of statutory power of sale. There have been incidences where banks and financial institutions have been slapped with hefty awards by courts for wrongful exercise of statutory power of sale, especially where matters are litigated in court for a long time.[3] An interesting decision was however issued by the High Court, though not against a bank or a financial institution, in ***Justus Ogada Agalo v Managing Director Kenya Railways Corporation* [2016] eKLR**. This decision relied on section 4(4) of the Limitation of Actions Act to hold that the imposition of interest on a decretal sum is limited to a period of six years.[4] Arguably, doubts may be raised as to whether this is the correct interpretation of the said provision, which seems to only provide a bar on timelines within which one can claim interest arising from a court award. The other relevant issue is on the applicable rate of interest that may be awarded by court as against a party or a financial institution. Courts usually issue an award with interest at either court rates (usually interpreted as 'simple interest'), commercial rates or compound interest rate. Section 26 of the Civil Procedure Act gives a trial court the discretion to award interest at rates it deems reasonable and just. The Court of Appeal in ***Barclays Bank (K) Limited v William Mwangi Nguruki* [2014] eKLR** stated that interest rate at court rates is calculated on a simple interest and not on compounded basis. On the other hand, the High Court in ***Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & another* (2015) eKLR** explained the circumstances under which a court could award simple interest and compound interest. At paragraph 11, the court stated: " *I should state again that our law on award of interest, does not provide for the method of calculating the interest awarded by the court… An(d) critical analysis of the law and the judicial decisions on this subject in Kenya, there is no prohibition to interest on the principal sum being calculated as compound interest. However, I would state that courts have always proceeded on a presumption that interest awarded by the court should be simple interest unless otherwise ordered by the court. To me the ''unless'' aspect which is pronounced in the decisions I have encountered portend that a court may order interest to be compounded where circumstances allow. It is, therefore, permitted in law to order a post-judgment equitable relief that interest to be calculated on a compound basis where fairness concerns dictate it. The compounded interest acts as recompense to the Plaintiff."*

8.2.2 Mortgage Banks

Section 15 of the Banking Act, 1989 (Cap 488) provides that mortgage finance companies shall make loans for the purpose of acquisition, construction, improvement, development, alteration, or adaptation of a particular purpose of land in Kenya. The repayment of such loans is secured by first mortgage or charge over land with or without additional security or personal or other guarantees. Under section 15(2), a mortgage finance company may grant other types of credit facilities against securities other than land and may also engage in other prudent investment activities.

8.2.3 Building Societies

Building Societies	
Building Societies were created to support the delivery of housing Building Societies Act, 1956 (Cap 489) Guarantee (House Purchase) Act, 1967 (Cap 462)	
STATUS / ISSUE	
The role of building societies has diminished over time and are not currently operational. Family Building Society, Equity Building Society and Housing Finance have all evolved into banks, focusing on broader banking - not just housing.	Consider the relevance of Building Societies and these laws.
Guarantee (House Purchase) Act, 1967 (Cap 462) Section 3 of the Act allows government to guarantee the repayment of excess advances made or to be made by a building society to citizens of Kenya for the purpose of enabling them to purchase houses within its area of jurisdiction.	Consider repealing this Act, which is not relevant given the diminishing role of building societies.

8.2.4 SACCOs

SACCO subsector
CONTEXT Despite SACCOs overtaking commercial banks and mortgage providers in provision of mortgage and housing construction loans,[5] now accounting for over 100 000 loans of home finance loans in Kenya, they have limited governance and administrative capacity to deal. According to a survey by the Sacco Societies Regulatory Authority (SASRA), 36% of outstanding credit in 2016 was for land and housing.[6] The limited governance was largely responsible for collapse of some SACCOs and the associated loss of funds mostly belonging to low-income households.[7] A typical SACCO loan product for housing is to provide up to 3 x a member's deposits as a loan, which is co-guaranteed by other members. The loans may also be secured by collateral or shares. The innovation in the KMRC is certain large SACCOs are included as shareholders who will benefit from the concessional financing to on lend to their members. The relevant acts and regulations are: • Sacco Societies Act, no. 14 of 2008 • Sacco Societies (Deposit-Taking Sacco Business) Regulations 2010 • Sacco Societies (Non-Deposit Taking Business) Regulations 2020 • Sacco Societies (Amendment) Bill, 2021 • Draft Sacco Societies (Specified Non-Deposit Taking Business) (Levy) Order 2022 • Cooperative Societies Act, No. 12 of 1997

• National Cooperative Development Policy (draft from 2019)	
ISSUE	*RECOMMENDATION*
Despite the inclusion of the need for a Deposit Guarantee Fund in the Sacco Societies Act 2008, it has never been operationalized thereby putting at risk members' deposits. There is a lack of specificity in the Act (and no regulations) on documents needed to lodge a compensation claim; whether inflation is factored in compensation; and management of money/funds in the Fund. Illiquidity problems in SACCOs limiting inter-SACCO borrowing.	Operationalize the Deposit Guarantee Fund for the SACCO sub-sector in accordance with the law. There is need for the Act or regulations to be developed to capture some gaps in the law such as: documents needed by a member to lodge a claim; whether the compensation paid from the Fund will consider inflation arising as a result of protracted disputes before settlement/compensation; a gap on how to manage the funds in the Fund; create awareness on the Fund once established. Fast-track the setting up of the Central Liquidity Fund in the Sacco subsector to promote inter-borrowing among Saccos and deal with potential illiquidity challenges as well as become part of the national payment system.
There lacks a policy to govern the cooperative movement/societies	Fast track the finalization and adoption of the draft National Cooperative Policy
The powers vested on the Commissioner of Cooperatives in the Cooperative Societies Act 1997 appear excessive as they seem to interfere with cooperative principles of "autonomy and independence" by giving the Commissioner powers of control. These risks slowing the growth of the cooperative movement.	Review the powers of the Commissioner of Cooperatives with a view to upholding the principles of "autonomy and independence".

8.2.5 Mortgage lending

Mortgage lending in Kenya is primarily done through commercial banks and SACCOs. SACCOs are now able to provide more mortgages of longer tenures courtesy of the refinancing they obtain from Kenya Mortgage Refinance Company (KMRC). According to the Central Bank of Kenya's 2021 bank supervision annual report, outstanding mortgages totaled Sh245.1 billion as of December 2021. The number of mortgage accounts stood at 26, 723 still indicating the low uptake of mortgages in Kenya. In 2021, the average interest rate for a mortgage stood at 11.3 percent compared to 10.9 percent in 2020. However, KMRC offers funds to banks and other financial institutions at five percent interest, which allows them to on-lend their customers long-term mortgages at single-digit, stable interest rates (currently at about 9.5%).

8.2.6 Pension-backed lending

(Please also refer to Section 8.4.2.6 for discussion on taxation issues that arise on transfer of pension assets into housing).

CONTEXT:

The capital under pension schemes in Kenya equaled Kshs. 1.5 trillion as at December 2021. There have been various efforts to enable pension members to utilize their pension contributions towards housing. However, the uptake of this has been slow, demonstrating the difficulties in unlocking the flow of financing into formal housing, despite strong government efforts to pursue the same.

The relevant laws and regulations are:

- Retirement Benefits Act, No. 3 of 1997
- Retirement Benefits (Mortgage Loans) Regulations, 2009
- Retirement Benefits (Mortgage Loans) Regulations, 2020

The National Retirement Benefits Policy 2022 is currently being developed and has not been reviewed.

ISSUE / STATUS	RECOMMENDATION
The 2009 Regulations allowed a pension member to assign up to 60% of their savings as collateral for a mortgage, without withdrawing any funds. While this is the preferred option for pension funds (as it will not reduce the available pension funds for members to be supported in their retirement and does not reduce affect their liquidity or provide shocks to their investments), the uptake of this product has been low. Some hypotheses are the banks in Kenya continued to use the home collateral as the primary source of collateral and did not reduce the interest rate upon receiving additional collateral. ((Lack of supply of affordable housing is also thought to be a contributory factor.))	A review of the pension-backed mortgage market would be useful, to understand and quantify the barriers to uptake. As part of this, the review should study why similar provisions have successfully supported significant home ownership in markets like Canada and South Africa but failed to do so in Kenya.
The 2020 Regulations also allow for members to access the lower of 40% or Shs. 7 million of their pension savings (both employee and employer portions), plus 100% of additional voluntary contributions made by the employee into housing. The amount withdrawn cannot exceed the value of the building / house. Taxes are applicable upon withdrawal as per Table [x] below, similarly to when a member leaves the employer and accesses his / her benefits.	Support adequate stakeholder engagement/create awareness to enable the safe flow of pension assets and resolve issues of taxation for withdrawal of funds and obtaining a mortgage as well as utilising pension funds. This is a clear example of how one initiative of government (to promote the uptake of housing) is undermined by the difficulty of implementation of the provisions enacted.

Pension administrators voiced concerns about these regulations that they could result in sudden and significant withdrawal of pension assets, and lead to substantial disruptions in the capital markets and liquidity challenges for most pension funds. In addition, it may lead to inadequate retirement benefits for the members. Despite these concerns, there has been limited transfer of pension assets into housing in the last 2 years since the regulations were passed as it took time for pension schemes to obtain RBA approvals to amend the scheme's trust deeds and rules to accommodate these regulations. There is also lack of clarity on whether a pension member can utilise savings for housing and simultaneously take a loan for the balance portion, and what taxes would be applied on the transfer of pension assets.	
Long and tedious processes and procedures in application for a house among prospective homeowners is discouraging uptake Concerns by pension funds and trustees about the possibility of bleeding the amounts saved by retirees through withdrawals Caveats/limitations/encumbrances placed on the title that limit the disposal of the house once purchased is also discouraging uptake.	Simplify processes and procedures/reduce bureaucracy associated with application for housing.
The deadline for amending trust deeds for the 2020 Regulations was 14th September 2021, and it is not clear how many schemes have been able to amend their trust deeds.	Support retirement benefit schemes / scheme trustees to update / amend trust deeds and rules in a standardised manner that can enable safe transfer of pensions into housing.

8.2.7 Microfinance

Microfinance institutions are licensed, regulated and supervised by the Central Bank of Kenya under the Microfinance Act 2006. Microfinance loans are mostly issued to support the incremental building and home improvement process of low-income households. For instance, Kenya Women Finance Trust (KWFT) microfinance bank has been lending to low-income women to build and improve their homes in rural areas. The bank disburses loans in tranches or phases as construction of homes continues for a total of Shs 1 million repayable in a maximum period of three years.

Some of the licensed microfinance banks are set out in this list. However, over the last six years, microfinance banks have consistently posted losses (with only four of them recording profits), largely on account of low uptake of loans and high levels of loan defaults.

8.2.8 Special lending to Government Employees

The **Employment Act, No. 11 of 2007** (provides the legal basis for provision of actual housing to employees, or payment of housing allowances in *lieu* of housing. This is currently provided at 15% of gross salary per section 4 of the **Regulations of Wages (General) Order, 1982**.

Civil Servants (Housing Scheme Fund) Regulations, 2004

Operationalized in 2004, the regulations indicated a shift in government policy from directly providing subsidized housing to civil servants, (which accommodated approximately 12% of civil servants), to encouraging civil servants to purchase housing delivered by the market, via loans provided by the Civil Servants Housing Scheme Fund. Since inception, the scheme has facilitated more than 3,000 civil servants to access housing. This has been achieved through housing finance loans or sale of houses constructed through the Scheme.[1]	
STATUS / ISSUE	RECOMMENDATION
Civil Servants (Housing Scheme Fund) Regulations, 2004 The Civil Servants Housing Scheme Fund is an important resource, but with a very low rate of disbursement. Between 2015 and 30 June 2021, the Fund gave Ksh 6.2 billion in loans to purchase or build homes to 1, 321 civil servants.[2] Loans provided under the Fund range between Ksh. 4-10 million based on seniority and affordability of the employee. The loan term is greater of 20 years or the duration before which the civil servant retires. The interest rate is currently pegged at 5% per annum on a monthly reducing balance with applicants being facilitated up to a maximum of 90% of the price upon making a down payment of 10%.[3]	A full review of the Civil Servants Housing Scheme Fund is warranted given the potential impact on housing affordability for civil servants, and the low levels of uptake. In addition, a detailed segmentation of the demand side of civil servants, highlighting housing needs, affordability, borrowing capacity, etc. should be undertaken to ensure that the Scheme is able to reach its stated target. Explore low disbursement of loans (1,321 loans over more than 15 years)[4]
The composition of the Management Committee of the Civil Servant Housing Scheme Fund is currently top-heavy and not broadly represented by civil servants who are the key actors	Consider reassessing the composition of the Scheme Management Committee of the Civil Servant Housing Scheme Fund as set out in the Regulations to ensure that they represent the civil servants and is not unnecessarily top-heavy.

[1] https://housingandurban.go.ke/the-civil-servants-housing-scheme-fund-cshsf/

[2] https://www.businessdailyafrica.com/bd/economy/civil-servants-take-sh6-2bn-home-loans-in-state-scheme-3909014

[3] https://housingandurban.go.ke/the-civil-servants-housing-scheme-fund-cshsf/

[4] The Civil Servants Housing Scheme Fund (CHSSF) was established in 2004 https://housingandurban.go.ke/the-civil-servants-housing-scheme-fund-cshsf/

[1] Notably, section 38(8) of the Tax Procedures Act 2015 and section 16(4) of the Rating Act (Cap 267) already embody the *in duplum* rule with respect to tax liability claims and property rates claims.

[2] Central Bank of Kenya, 'The Impact of Interest Rate Capping on the Kenyan Economy: Highlights' March 2018 <https://www.centralbank.go.ke/wp-content/uploads/2018/03/Summary-of-the-study-on-Interest-rate-Caps_February-2018.pdf>

[3] See e.g. Sam Kiplagat, 'Family awarded Sh1.2bn against HF in botched home auction' <https://www.businessdailyafrica.com/bd/news/family-awarded-sh1-2bn-against-hf-in-botched-home-auction-2271850 > Also see, Sam Kiplagat, 'Sh2.5bn Runda home dispute against HF goes back to court' <https://www.businessdailyafrica.com/bd/economy/sh2-5bn-runda-home-dispute-against-hf-goes-back-to-court-2485214 >

[4] The Court stated "…He is also entitled to interest on that decretal sum (judgment sum and costs) together with interest at 14% per annum up to a period of six (6) years as Section 4(4) of the Limitation of Actions Act makes it clear that no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due. Accordingly, I direct that an order of mandamus do issue compelling the respondent to pay the decretal sum together with interest at 14% per annum from the date of the judgment up to a period of six years but no more."

[5] Davina Wood, "The Role of Savings and Credit Cooperative Organisations in Kenya's Housing Finance Sector" (*Urbanet*June 11, 2019) <https://www.urbanet.info/savings-and-credit-cooperative-organisations-in-kenya/> accessed November 6, 2021.

[6] SASRA, The SACCO Supervision Annual Report The annual statutory report on the operations and performance of Deposit-Taking SACCO Societies (DT-SACCOs) in Kenya

[7] Thursday March 07 2019, "Gakuyo Faces DCI Probe over Sh1bn Ekeza Sacco Scandal" (*Business Daily* December 21, 2020) <https://www.businessdailyafrica.com/economy/Gakuyo-faces-DCI-probe-Ekeza-scandal/3946234-5014560-cdj3urz/index.html> accessed November 6, 2021.

1. Housing Scheme Fund Regulations, 2018 (Legal Notice No. 238 of 2018) The Regulations sought to mandate all employers to register with the Housing Fund and contribute to the Fund; Establishes a Fund to promote an affordable housing scheme. These regulations were however quashed by the court for lack of public participation.	
STATUS / ISSUE	RECOMMENDATION

Regulation 3(2) provides that an affordable housing scheme is differentiated into various schemes viz: social housing (designated for monthly income earners earning up to Ksh 19, 999); low-cost housing (designated for those earning between Ksh 20, 000 to Ksh 49, 999), mortgage gap housing (for those earning between Ksh 50, 000 to Ksh 149, 999), and middle to high income housing (for those earning Ksh 150, 000 and above).	Consider whether another category of middle to high income housing (above KShs. 150,000 to say 300,000/=) is required to enable purchase of formal housing due to lower concessional financing compared to the lower income bands, to enable unlocking of KMRC?
Employers and employees were to each contribute 1.5% making a total of 3% of monthly gross pay (capped at Ksh. 166, 000 per month) to individual accounts known as Housing Fund Credit accounts. The Regulations were however quashed by the court and therefore their implementation derailed.	While housing funds are a critical way to collect the necessary funding to invest into housing, the lack of stakeholder engagement and mandatory nature of the laws meant that this well-meaning regulation was quashed. Questions not addressed in the regulations were what would happen to the funds if the contributor did not utilize it for housing, would a suitable interest rate be paid on this 'forced savings', would there be equity in the allocation of housing etc. Support greater stakeholder engagement for equitable regulations that encourage savings for housing.

8.3 Financial regulation of rental markets

8.3.1 Landlord and Tenant Relations

Distress for Rent Act 1938 Rent Restriction Act 1959 Landlord and Tenant Bill 2021	
STATUS / ISSUE	**RECOMMENDATION**
The 1938 and 1959 acts are outdated and in need of reform. There is a Landlord and Tenant Bill 2021 seeking to repeal and replace these laws.	Update the said laws through amendment or total review. For those under review, fast track the process.
In the main, the laws seek to control the rents payable by tenants thereby placing restrictions on freedom of contracting between landlords and tenants. While this may be in the public interest, it may constrain housing supply for this	Rethink the overall theme of rent control as a regulatory tool. Other specific recommendations on the Landlord and Tenant Bill 2021 are:

segment of the population. Rent controls may also serve implicit subsidies randomly rather than to deserving tenants.	-Supporting the creation of positive credit histories for tenants who pay their rent diligently to enable them access credit for their economic empowerment. -Providing a modest flat tax of say, 3%, on gross rents for units rented for less than KShs. 15,000 per month gross. This figure can be indexed and the flat tax made applicable no matter the size landlord's portfolio in this income bracket– only then will institutions be incentivized to invest and develop massive housing units needed to cater for those living in informal settlements. -strictly specify timelines for determination (reduce from current 3 months with possible extension to a flat 45 days with predefined days for each step); · Integrate digital platforms to log and track dispute resolutions and the determined market rents (which would become an invaluable market making mechanism), · Promote equitable risk sharing mechanisms by tying period before landlord can evict tenant to be tied to deposit held by landlord, reduce period for which landlord must safeguard tenants good and housing unit in case of death or abandonment by tenant · Ensure rent ceiling to which units will be applicable be determined with public consultation and reviewed every 5 years

8.4Taxation

Kenya's taxation system regime covers income tax, value added tax, customs and excise duty. The income tax is paid by individuals as Pay As You Earn (PAYE) through an automatic checkoff by the employer who remits the PAYE to the Kenya Revenue Authority. Companies pay corporate tax on their profits at the end of the year as income tax. Individuals and partnerships also file their annual returns for all profits made on their income for the financial year. Kenya employs a progressive approach to taxation whereby those who earn more pay more taxes in a graduated scale of taxation. This accords with the philosophy undergirding taxation that those most able to pay should pay more.

In the context of housing, developers must pay income tax on the profits made such as through corporation tax where they have incorporated as companies. Developers also pay value added tax for any supplies that count as construction inputs and may also be required to pay VAT on sales made. Imports made that go into development of housing may also be liable to customs duties. In line with

the philosophy of taxation creating incentives or disincentives and thus dictating investment behaviour and consumption, Kenya has introduced various tax incentives both on the supply and demand sides of housing to encourage uptake.

8.4.1 Tax Policy

(Draft) National Tax Policy 2022	
STATUS / ISSUE	**RECOMMENDATION**
The draft National Tax Policy 2022 is excellent and promises to offer a more predictable tax environment. This should result in a better enabling environment for investment into housing.	Fast track the adoption of this Policy to allow long term investment into housing.
Various tax incentives are provided in law pursuit of national objectives; however, their application is limited due to the structuring of the incentive.	Support the development of such a register and the monitoring and evaluation framework.

8.4.2 Tax incentives on the demand side

8.4.2.1 Income tax	
ISSUE / STATUS	**RECOMMENDATION**
Finance Act 2019: Tax relief with respect to affordable housing was introduced vide the Finance Act 2019 which amended Head A of the Third Schedule to the Income Tax Act. The effect of the amendment was to allow buyers of affordable housing units to obtain a tax relief of up to 15% of gross contributions capped to a maximum of Ksh 108, 000 annually or Ksh 9, 000 monthly. Employers are allowed to reduce the Pay As You Earn (PAYE) tax that is otherwise payable to the Kenya Revenue Authority by 15% of gross contributions-which will be deemed as Affordable Housing Relief	Promote voluntary contributions to the National Housing Development Fund to take advantage of this relief.
8.4.2.2 Stamp duty	
Absence of mechanisms or guidelines on who is a first-time home buyer to benefit from stamp duty exemption on transfer.	Review the law to use another criterion for determining who is to benefit from the stamp duty exemption (for example, for a defined number of years allow all housing units delivered for less than Kshs. 5 million to be

First time home buyers have not been able to enjoy the stamp duty exemption provided in law since it has been difficult to identify them.	exempt from stamp duty, thereby kickstarting supply); or alternatively, enact mechanisms for identifying a first-time home buyer.
The Act exempts documents including registration documents relating to a building society from paying stamp duty. Notably however, the exemption does not extend to mortgage or to the release or discharge of a mortgage, which are far much more significant	Extend the stamp duty exemption to mortgage and release or discharge of mortgages issued by building societies.
8.4.2.3 Mortgage relief	
An increase of deductible interest on Mortgage to Kshs.300, 000 p.a. (25,000 p.m) from Kshs.150,000 (12,500 p.m) (Finance Act, 2016). This reduces amount of tax to be paid and supports homeownership.	Increase awareness of this relief and ease access to mortgages to enjoy this incentive. (To inform SACCO borrowers who take personal loans to fund housing, that they are not benefitting from this relief).
8.4.2.4 Savings	
The law previously provided for tax Relief of up to Kshs. 96,000 annually (or Kshs. 8,000 monthly) for savings towards housing. However, this was scrapped in effective January 2021, partly due to the low uptake of the product.	Promoting Savings are a critical route to promoting home ownership and mechanisms to incentivize this should be done. A home ownership savings plan has just received approval to be listed on the stock exchange by the CMA and it would be helpful to share learnings of such products for market development.[9]

8.2.4.5 Taxation on transfer of pension contribution into housing

1. For monies that are in the unregistered pot (i.e. non tax exempt pot) – Member does not pay tax since it was taxed at payroll
2. For monies that are in the registered pot (i.e. tax exempt pot) – Member pays tax as per the tables below depending on their age and service to the employer:

If the member is below 50 years old and has been in the service of the employer for less than 15 years, below tax rules apply:

Value Of Lump Sum (Sliding Scale)	Rate of Tax
1st KShs 288,000	10%
Next KShs 100,000	25%
Above K Shs 388,000	30%

If member is above 50 years old or has been in the service of the employer for more than 15 years, below tax rules apply:

Value Of Lump Sum (Sliding Scale)	Rate of Tax
1st KShs 400,000	10%
Next KShs 400,000	15%
Next KShs 400,000	20%
Next KShs 400,000	25%
Above K Shs 1,600,000	30%

Table 2: Taxation on transfer of pension assets into housing

8.4.3 Rates

Valuation for Rating Act National Rating Bill 2022	
ISSUE / STATUS	**RECOMMENDATION**
The Rating Act needs reform due as it was enacted several years ago. The Rating Act also suffers from various deficiencies: i. Inefficient administration of the system of land valuation in terms of enhancing	Fast track adoption of National Rating Bill 2022 which contains various solutions to the enumerated challenges.

coverage of properties, enhancing assessment, collection and enforcement; for instance, there is low number of properties currently assessed for taxation (only about 50%), which calls for complete coverage of all rateable properties and taxable land transactions as well as devising of enforcement mechanisms to pursue tax evaders; ii. Unclear process of assessment of land values to the affected; iii. Outdated valuation rolls which need updating and proper maintenance; iv. Unjustified and non-transparent exemptions to payment of property taxes which require minimization of opportunities for discretionary tax exemptions to reduce associated corruption; v. Inaccessibility of valuation rolls requiring making them available; vi. County Authorities have vii. taken a largely passive role in enforcement, relying almost exclusively on the rate clearance certificates yet the clearance certificate option relies on taxpayer initiative to clear outstanding debt.	
National Rating Bill 2022 a) The Bill seeks to harmonise legislation relating to property taxes by bringing together the Rating Act and the Valuation for Rating Act into one law b) Helps provide guidance to county governments in preparing their respective rating legislation in their capacities as rating authorities and thus ensure proper planning and harmonisation across the country (section 3 and 4). c) Helps update the rating laws to conform the Constitution 2010 now that the laws were old and modelled on the former local authorities (municipal and county councils) being the rating authorities. d) Promotes the adoption of technology in conducting valuations for purposes of rating as	Section 9 of the Bill provides that a rating authority may adopt of the following forms of rating: a) annual rental value rate; (b) unimproved site value rate; (c) a site value rate in combination with an improvement rate. The rating based on site value rate including improvements made thereon, while useful in increasing own revenues for county governments, may work to disincentivize developments/improvements on land on the part of landowners; Section 38 of the Bill which creates the National Rating Tribunal may include representation of Kenya Property Developers Association in its composition of members. Not sure whether the representation of Chambers of Commerce suffices for private sector developers;

well as rating itself-Section 6 of the Bill provides that rating authority (county governments) shall identify or create an appropriate technological system for preparation and implementation of the roll. e) Under sections 20 and 21 of the Bill, it appears that the county governments are at liberty to appoint a valuer so long as they 7 years' experience and are registered with the Valuers Registration Board which means there is now room for use of private sector valuers. Section 24 of the Bill however still retains provision for county governments to request the Chief Government Valuer of the national government to undertake valuation on their behalf. This will cure the current practice where County Governments have relied on the Ministry of Lands/government valuers to produce valuation rolls, with only a few using private sector Valuers.	Section 39 on quorum of the Tribunal of five members-May this delay determination of disputes especially where they are not all available. Consider having 3 members as quorum; Section 41(1) of the Bill gives an inordinately long time to determine objections lodged at the Tribunal of not more than 6 months. This period ought to be reduced; Under section 42(1) e allows the Tribunal to assess the applicable rates on its own on application of an interested person or on its own motion-essentially taking this otherwise executive role. There is need for a provision providing for devolvement of the Tribunal in each county (rating authority jurisdiction) to ensure the fast resolution of disputes; Section 52(2) of the Bill does not make sense to the extent that it provides that the Bill will take supremacy over the Rating Act and Valuation for Rating Act and any other relevant county legislation in case of conflict, before the Bill begins commencement. Before commencement, a law is of no legal effect; Section 8(1) f of the Bill considers an occupier of a rateable property who under section 8(2) has an obligation to pay rates when they fall due as well as provide accurate and sufficient information on the rateable property for purposes of valuation upon request-yet an occupier may neither be a legal nor beneficial owner and thus have no identifiable interest beyond occupying the property. An "occupier" within the meaning of the Bill is defined in section 2 as "a person in actual occupation, whether or not that person has a right to occupy the property". Further, the proviso to section 8(2) provides that where the registered proprietor of the rateable property is absent, the occupier of the property will pay the rates as they fall due.

8.4.4 Tax Incentives on the supply side (to reduce the cost of housing)

Value Added Tax Act No. 35 of 2013 Finance Act 2022 Finance Act 2016 Income Tax Act 1970	
ISSUE / STATUS	RECOMMENDATION
VAT exemption for purchase of local and importation of goods for the construction of Houses under AHP-Finance Act 2019, which can lead to	Simplify access to VAT exemption on inputs as this can reduce construction costs by up to 9%.[10]
Reduction in corporation tax to 15% for construction of at least one hundred (100) residential housing in a year of income, subject to approval by the Cabinet Secretary responsible for Housing. (The Statute Law (Miscellaneous Amendments) Act, 2017). Difficulty in obtaining these incentives as current wording requires 100 units to be delivered in a single year, which is difficult with the length of time required for approvals and offtake.	Consider amending the provisions to allow delivery over a longer period, at least till efficiencies in delivery are achieved as this can reduce sale price by as much as 4%[11].
Reduced customs tariffs on imported inputs for construction of houses under the affordable housing scheme. For instance, Import Declaration Fee (IDF) has been reduced from two per cent to 1.5 per cent.	Promote uptake of this incentive
National Environmental management Authority (NEMA) and the National Construction Authority (NCA) levies of 0.1 per cent and 0.05 per cent of the cost of construction respectively, were temporarily scrapped but have been reinstated.	Consider waivers for these fees to reduce costs of affordable housing as part of a one approval fee.
Thin capitalization laws provide for a restriction of interest expense deduction when computing taxable income where a foreign controlled company has a debt-to-equity ratio exceeding 3:1. There is no interest restriction for companies undertaking AH projects	Promote uptake of this incentive
The use of CGT taxation revenue contributes to the wider government kitty.	Consider pooling CGT revenue from housing in a ring-fenced fund to invest in infrastructure or fund offtake finance for affordable housing.
The law amended the Income Tax Act and increased the Capital Gains Tax on the total gain	Creating a long-term national tax policy that encourages investment in affordable housing is likely to provide a multiplier effect in the

realized upon disposal of real property from 5% in 2020 (introduced in 2015) to 15% in 2021. While CGT is an important and more equitable source of taxation, the unpredictably of increasing the rate triple fold in one year can discourage investment into housing.	medium to long term as the taxable base will grow.
The law governing the CGT relationship does not provide for indexation (inflation adjustment) when computing capital gains tax payable upon sale/disposal of a property thereby distorting property prices.	Review the law to provide for indexation (inflation adjustment/adjusting the original price of property upwards for purposes of tax to mitigate inflationary distortions) when calculating capital gains tax to consider the inflation that has affected property prices and discount the same.

8.4.5 Residential Rental Income Tax

Residential Rental Income tax (Introduced via Finance Act 2015 / Section 6A of the Income Tax Act and amended in 2020)	
ISSUE / STATUS	RECOMMENDATION
This provides a flat tax of 10% on gross rental income, without deduction of any expenses, up to annual income of Kshs. 15 million. Beyond Kshs. 15 million, landlords are required to pay 30% tax on net rent (after deduction of expenses). This is a simpler tax mechanism to encourage payment on residential rental tax.	Since 80% of urban Kenyans (92% in Nairobi) rent their homes, consider a favourable flat tax to incentivize investment in affordable housing. For example, a flat tax as low as 3% on gross rent, for units renting for less than Kshs. 15,000/- per month, with no cap on portfolio size would be a key incentive for investment in this sector and allow an overhaul of the mushrooming informal settlements.

[1] Higher home values are permissible with the African Development Bank financing, which is also not subject to the family income restrictions.

[2] Verbal comment at KMRC IFC Edge Half Day Workshop, 14th September 2022. See also www.kmrc.co.ke/our_services/affordable-housing-loans/

[3] As calculated by the CAHF Housing Affordability Dashboard. Affordability is calculated on a $50 000 mortgage loan with a 10% deposit, at an 11% interest rate, over 25 years. See https://housingfinanceafrica.org/documents/calculating-mortgage-and-housing-affordability-in-africa/

[4] https://www.businessdailyafrica.com/bd/economy/unclaimed-assets-agency-eyes-sh240bn-with-seizure-powers-3867830

[5] https://housingfinanceafrica.org/documents/case-study-7-the-transformation-of-the-housing-finance-company-of-kenya/

[6] https://www.businessdailyafrica.com/bd/economy/civil-servants-take-sh6-2bn-home-loans-in-state-scheme-3909014

[7] https://housingandurban.go.ke/the-civil-servants-housing-scheme-fund-cshsf/

[8] The Civil Servants Housing Scheme Fund (CHSSF) was established in 2004 https://housingandurban.go.ke/the-civil-servants-housing-scheme-fund-cshsf/

[9] https://www.businessdailyafrica.com/bd/markets/capital-markets/cma-licenses-kweli-capital-s-housing-umbrella-fund-3949026

[10] KPDA Research displayed at KPDA conferences

[11] KPDA Research displayed at KPDA conferences.

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ANNEX A: LAWS / POLICIES / REGULATIONS GOVERNING THE BREADTH OF THE HOUSING VALUE CHAIN

1. *Constitution of Kenya 2010*

- This is the supreme law of Kenya that supersedes all other laws and serves as the overall governance charter.

- Chapter 5 of the Constitution is on land and environment. Article 60 enumerates principles of land policy and provides that land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. Article 43 of the Constitution provides for the right to accessible and decent housing for all.

- Article 65 provides for land owning by non-citizens by providing that foreigners can only have leasehold interest in land of no more than 99 years. The earlier leases of more than 99 years were automatically reduced to 99 years.

- Article 66 is the constitutional basis for land use planning. The relevant article provides that the State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.

- Article 67 establishes the National Land Commission whose one of the functions is monitoring and having oversight responsibilities over land use planning throughout the country.

- Article 69(1)f provides that the State shall establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

- Article 209(3) provides that a county may impose property taxes. This is the basis for county governments levying rates on property (property taxes).

- The Fourth Schedule of the Constitution provides for distribution of functions between the national government and county governments. Functions of the national government include: housing policy (section 20); General principles of land planning and the co-ordination of planning by the counties (section 21); disaster management (section 24). Functions of the county government include: county planning and development including land survey and mapping and housing (section 8 of Part 2); county public works including storm water management systems in built-up areas and water and sanitation services (section 11).

2. *Housing Act, 1953 Cap 117*

- Section 3 of the Act provides for establishment of the National Housing Corporation (NHC) which under section 7 controls the National Housing Development Fund.
- The statute seeks to provide for loans and grants of public money for the construction of dwellings, to establish the National Housing Development Fund and a housing board.

- Section 7 of the Act establishes a National Housing Development Fund (NHDF) to be under the control of the National Housing Corporation (NHC), which Housing Fund is to play a pivotal role as a catalyst to increased supply of affordable housing by private developers (via the Offtake Agreement), and as a bridge to the demand of affordable housing by low- and middle-income Kenyans. The Fund is to provide developers with Offtake Agreements to purchase qualifying affordable housing units.

- Section 8 allows the NHC to make loans from the Fund to any company, society or individual person to enable acquisition of land and construction of approved dwellings; making loans to organizations established for promoting the development of housing; acquire and maintain any land or building or estate; construct dwellings, carry out approved schemes and provide services for such schemes.

- Section 9 allows for the NHC to guarantee issuance of loans to a company, society or individual person so long as such person enters into an agreement with the NHC to reimburse any money which it is called upon to pay under the guarantee; and security being provided for the due performance of such agreement.

- Under section 10 of the Act, one of the functions of the NHC includes: operating a housing finance institution with powers to borrow funds from the government, overseas agencies, trust funds, pension funds and any other institution or persons and to collect deposits and savings from the public to be applied towards financing of residential housing development.

- The NHC also has powers to: undertake and encourage research and experiment in housing related matters and undertake and encourage the collection and dissemination of information concerning housing and related matters.

- Section 14 states that any local authority may, out of the loans or grants made to it from the National Housing Development Fund acquire land, construct approved dwellings and carry out schemes within its area of jurisdiction.

- Section 22 provides that the Minister for Local Government (Cabinet Secretary for Devolution) may, upon application by NHC, declare any by-law or resolution made by a local authority as inapplicable to the dwellings where it is consistent with conditions of approval specified by NHC in respect of any dwelling.

- Section 23 provides that the Minister may by written notice require a local authority to make provision for housing for persons where the Minister is of the view that the needs of persons ordinarily employed within an area following a local inquiry by a public officer appointed for that purpose.

- Given that the NHC has a huge land bank yet it has developed relatively few housing units, more attention should be devoted to increasing its capacity to deliver more houses, or

alternatively to release the land to private developers say through public private partnership arrangements.

3. Housing Bill, 2021

- This Bill is yet to be introduced in Parliament. It seeks to revise and replace the current Housing Act, Cap 117. It needs to be fast tracked.
- Sections 21 and 22 of the Bill require the government to maintain a database/data bank of low-income individuals living in urban areas in order to identify persons qualifying for "low cost" houses. It is a powerful tool of developing the housing market by providing the necessary aggregated housing data that will help inform developers and thus promote housing supply to the target markets.

- It also regulates the development of guidelines to promote the construction of low-cost houses using appropriate building technology; and provides incentives to investors in the housing and construction industry who invest in low-cost houses.

- The creation of an alternative Dispute Resolution Mechanism via the proposed Tribunal (Section IV), has significant merit. However, there needs to be further thought towards: Potential overlap between the Tribunal set up under the Landlord and Tenant Bill 2021 and the Tribunal under the Housing Bill, may lead to confusion in implementation and jurisdictional overlaps; Timelines for dispute resolution by any Tribunal should be prescribed in law to avoid long drawn out processes which discourage participation and encourage parties to circumvent the framework; Creation of a consumer protection framework is important, and should cover both the development and management phases of housing.

- The functions of the Director General of Housing listed in Section 6 are currently too many (36 in number) creating potential confusion and conflict, as well as challenges in implementation. These functions need to be whittled down to at most 10 as well as to be reconciled with the functions currently being undertaken by the 5 departments/divisions within the State Department for Housing to enable easy implementation.

- The **definitions** of the Bill with respect to "adequate housing", "affordable housing," and "low-cost housing" need clarification. The Bill defines 'affordable housing' as 'housing that is adequate and costs not more than 30% of household income per month to rent or acquire'. This would mean that a family earning KES 1 million a month, would find a house costing KES 300,000/= per month "affordable". Any definition of 'affordable housing' should not be tied to a flat percentage rate. There is significant research indicating that lower income households are unable to dedicate 30% of their income on housing, given other responsibilities (food, healthcare, transport), and therefore spend a lower % of their income on housing. The definition of household income spent on housing should also be clarified as being 'after tax income', as this is typically silent in the law and leads to a mismatch between demand affordability and supply expectations of affordability. The Bill defines "low-cost housing" as 'a house that is functional, adequate and affordable to a person who earns a low income'; and further defines "low income" as 'the meaning as provided for in the consumer price index guide of Kenya National Bureau of Statistics'. Benchmark low-income tiers for 2021 should be provided as a guide to understand the applicability of the law.

4. Sessional Paper No. 3 of 2016 on National Housing Policy

- This is the main policy document governing the entire housing sector in Kenya, which lays the strategic vision and direction for the government with the aim of achieving progressive realization of the right to accessible and adequate housing and reasonable standards of sanitation. It replaced Sessional Paper No. 3 of 2004 on National Housing Policy.
- The policy document attributes the shortage of housing to: high population growth rate, rapid urbanization, widespread poverty, escalating costs of providing housing and cumbersome approval processes.
- Accordingly, the policy sets out the following objectives: "Enabling the low income households to access housing, basic services and infrastructure necessary for a healthy living environment especially in urban and peri-urban areas; Encouraging integrated, participatory approaches to slum upgrading and improvement, including income generating activities that effectively combat poverty; Creating a National Social Housing Development Fund to be financed through budgetary allocations and financial support from development partners and other sources for rental social housing and related infrastructure, and other low cost housing programmes; Establishing a framework that enables the National Social Housing Development Fund to support research and slum upgrading; Promoting and funding of collaborative research on the development of low cost building materials and construction technologies; Contributing to the harmonization of existing laws governing urban development factors that interact with housing delivery especially housing infrastructure to facilitate more cost effective housing development; and Facilitating increased investment by the private sector in the production of housing for low and middle-income urban dwellers."
- The policy document is anchored on four core pillars: first is the policy targets; the second being main housing inputs in seeking ways of accessing and managing these inputs including land, infrastructure, technologies and finances; the third is estates management and maintenance to ensure the lifespan of the housing stock; and the fourth is the legislative and institutional framework and the specific roles of various stakeholders. The policy in fact calls for a comprehensive review of the current Housing Act (Cap 117) to strengthen the role of the Ministry in regulating housing development.
- The policy further calls on: county governments to formulate 5-yearly housing plans that ensure enough new homes are built and which plans must be audited regularly to assess performance with these plans being funded by grants from the County Infrastructure Fund (CIF), National Social Housing Development Fund and National Housing Corporation; National and County Governments as well as relevant agencies to initiate and execute several housing programmes; establish a National Social Housing Development Fund to provide social housing as well as related to guide the Fund, anchored in the Public Finance Management Act, 2012 in the interim and to eventually be anchored in a comprehensive Housing Bill to be enacted; Promote appropriate and effective public private partnerships for investment in housing; Foster active participation of all stakeholders including civil society institutions, community based organizations and individuals in the provision of sustainable housing; encourage multigenerational mortgages as a way of extending repayment period; Channeling a percentage of capital gains tax into a fund to support social housing with the Government leveraging on sovereign bonds to boost the fund; encourage Government-backed or approved private–run schemes to develop tenant purchase schemes to help people who cannot afford

to purchase their own home in the open market; County Governments to prioritize provision of social housing through provision of infrastructure and availing serviced land with security of tenure and through setting aside suitable public land, compulsory acquisition, recovery of grabbed public land that is kept idle for speculative purposes and ensuring commensurate penalties are imposed on idle land; A certain percentage of all housing development projects shall be required to comprise social housing; redevelopment of old or dilapidated urban housing estates; Where justified, requiring leaseholds in urban areas whose lease period expire to avail them for social housing or the previous holder seeking extension being required to pay a percentage of the value thereof and such payment being applied in provision of social housing; Undertaking proper urban zoning to ensure that social housing is developed near the Central Business District; developing a framework for tapping cheaper housing funds from the cooperative sector which will enable current saving and credit societies to develop special products for housing financing that may be repaid over a period of up to 7 years, up from the current 3-4 years; empower existing and potential housing cooperatives through provision of clear guidelines as well as develop various housing cooperative financing models on communal ownership and management; and promote savings for housing as a national priority.

- In terms of the institutional framework, the policy document notes the following challenges that have affected the housing sector over the years: a) the current institutional arrangement for housing planning, development and management is fragmented, inconsistent and characterized by overlapping of roles and lines of accountability; b) The portfolio of housing has over the years, been moved from one ministry to another and sometimes paired with portfolios that are not compatible with housing delivery resulting in creation of an environment that is not conducive for effective performance; c) The roles of the stakeholders, have in the past, not been clearly defined. For example, the role of National Housing Corporation has been changing since its establishment; d) the defunct local governments were not able to mobilize resources from developers for service provision in all residential areas with stakeholders such as the private sector, professionals, NGOs, CBOs, cooperatives, communities and international organizations not being sufficiently mobilized and organized to play their role in harnessing resources for housing development; e) the huge potential of the co-operative movement in mobilizing resources has not been fully exploited; f) Professionals in the building industry being an impediment to the development of affordable shelter due to their insistence on rather complex designs and costly specifications of construction materials and techniques. Further, professional fees are based on cost and therefore do not augur well with specifying alternative and affordable building materials and techniques.

5. Kenya Affordable Housing Programme Development Framework Guidelines, 2018

- The Guidelines were issued in 2018 and seek to provide qualitative guidance on the key components of the Affordable Housing Programme. These guidelines provide instruction on how the vision and policies of the Government of Kenya, through the State Department for Housing and Urban Development, will be implemented and how progress will be monitored and reviewed.

- They provide for a preferred project structure for the Affordable Housing Programme as set out by the State Department of Housing. They comprise contractual arrangements consisting

of: a commitment agreement that the successful developer, private investor or contractor shall provide pending negotiations and signing of Project Agreement; Development Framework Agreement which is a head of terms, and which works as an interim agreement for urgent works to commence pending negotiations and execution of final agreement; Project Agreement which governs the relationship between the Government and the developer, private investor, or contractor, and sets out in detail the terms and conditions for the development and delivery of each Project; Offtake Agreement which is issued by the Government in favour of the developer, private investor or contractor as an undertaking for the purchase on behalf of the Government of the completed housing units within a specified period from the date of construction completion; Letter of Support that may be issued by the Government through the National Treasury in appropriate circumstances, in favour of a developer, private investor or contractor and its financiers to demonstrate that the Government is supportive of the project and to provide that the Government will ensure that the developer will not be wound up so long as it has outstanding obligations.

- The Guidelines also provide for cooperation models through Joint Ventures (JV), land swaps between national and county governments with private landowners. They also provide for a housing development strategy of a development split whereby a developer is allowed to split/set aside at a ratio of 70:30% in favour of affordable housing with a portion of housing units being sold to achieve a commercial return.

- In terms of development considerations, the Guidelines provide for a development timeline/specified period of time to be agreed upon within which the developer must deliver the housing units; government to provide off site infrastructure to facilitate development; Government to facilitate a schedule of approvals and No Objection certificates that it will obtain on behalf of a developer subject to submission of all documentation and payment of applicable fees; standardization of various design elements of housing units; approaching industry players to achieve efficiencies through economies of scale in construction including in purchase of bulk materials from key suppliers; encouragement of use of local materials and locally sourced services.

- The Guidelines further provided for establishment of the Integrated Project Delivery Unit under the State Department for Housing as the Government implementation entity for all urban developments and serve as a coordination and alignment mechanism.

- They provide useful one stop shop guidance to various stakeholders in the housing value chain on the applicable rules, institutional framework and incentives in the housing sector.

- They provide for process of engagement with landowner for both publicly owned land as well as for privately owned land so long as the developer wants to build under the Affordable Housing Programme (AHP).

- They further provide for the various construction permits required and the responsible agencies.

- In effect, the Guidelines ensure that there be a procurement process for strategic partners (including developers and financiers) that will respond to the financing and time challenges, create transparency and certainty of project materialization, and allow the AHP projects to be completed in earnest.

- Further, they set out a criterion for identifying potential strategic partners for undertaking projects including allowing for specially permitted procurement.

- The Guidelines also provide that information will be gathered on household characteristics such as income, disposable income, and tenure to ascertain the income brackets of the population (target) and therefore determine affordability issues.

- They also provide that the State Department for Housing will seek to secure delegated authorities from all respective stakeholders and service providers, so as it would effectively be a 'One-Stop-Shop' for the required permits and design approvals under the Affordable Housing Programme. Accordingly, and where applicable, the developer, private investor or contractor will be submitting all required drawings, documents, and reports to the State Department team for review, approval and onward submission to the respective approving authority for their issuance of the required permits and approvals.
- While these Guidelines provide a comprehensive framework for partnership between government and private sector for delivery of affordable housing, the implementation has been challenged. Some key challenges have been (i) lack of mandatory housing tax to enable government to enter into offtake agreements (ii) very long period for confirmation of delivery (gov had up to xxx[24] months following construction completion to advise if the developer meets the specified criteria, and hence developer carries all risk – providing milestone based payments during construction can enable delivery more effectively (iii) pricing structure for affordable units where land and finance was contributed by private sector which has been found to be higher than the required KES 50,000 per square meter, especially where land is on peri-urban locations and cross subsidization is not as feasible as inner city locations

ANNEX B: LAWS / POLICIES / REGULATIONS GOVERNING LAND ASSEMBLY / ACQUISITION / TITLE / TENURE

1. Land Act, No. 6 of 2012

- This Act aims to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land-based resources. This Act is also relevant for the housing financing value chain since land or properties are frequently charged to secure financing with lenders given the right to exercise statutory power of sale in case of default.

- Section 7 lists various ways through which land may be acquired/assembled including: allocation, compulsory acquisition, prescription, land adjudication process, transmissions, transfers, settlement programs, and long-term leases.

- Section 12(3) empowers the National Land Commission to set aside public land for investment purposes upon the request of either the national or county government and the Commission must ensure that such investments benefit local communities and local economies. This means that public land may be allocated for housing as an investment purpose.
- However, under section 12(7), public land cannot be allocated unless it has been planned, surveyed, serviced and guidelines for its development prepared.

- Section 12A (which was introduced through 2016 amendments to the Land Act) created a new definition of 'controlled land' for which no transaction by a non-citizen could occur without prior approval of the Cabinet Secretary. Controlled land, in addition to agricultural land, includes: 'land within a zone of twenty-five kilometres from the inland national boundary of Kenya; and that within the first and second row from high water mark of the Indian Ocean.' However, this section of the law was recently declared unconstitutional in ***Malindi Law Society & 12 others v Attorney General & 2 others,* Consolidated Petition Numbers 19 & 291 of 2016 [2021] KEHC 168 (KLR)**, which means the legal provision is of no legal effect at present. The effect of the decision is to relieve non-citizen landowners at the coastal strip/beach plots of the regulatory burden of consulting and obtaining the sanction of the Cabinet Secretary (arguably an arduous task) before dealing in the land (either disposing, charging or leasing).

- Under section 13, lessees to whom public land is allocated through a lease enjoy a **pre-emptive right** to renewal/extension of lease upon application, with the National Land Commission required to write to such lessees five years to the expiry of a leasehold tenure to enable such lessees the opportunity to renew if they so wish. This provision is especially important for purposes of enhancing security of tenure and incentivizing property investments especially in urban areas where land is largely held under leasehold. It also helps prevent incidences of lessees losing their property rights as happened a few years ago in

Nairobi. There has since been prepared Guidelines for Extension and Renewal of Leases of Public Land.[9]

- Section 25a of the Act provides that buildings on public land (even those erected by a lessee) in the case of a lease of more than 30 years shall pass to the national or county government without payment of compensation upon termination of the lease, **unless otherwise provided in the lease agreement.** This may create a disincentive for investors/lessees of public land from putting up significant investments especially where a lease is not renewed given the threat of expropriation. For leases below 30-year term, the buildings thereon may be removed by lessee within 3 months of termination unless the National Land Commission elects to purchase the said buildings upon professional valuation.

- Section 29 imposes a late payment interest/penalty for unpaid rents for leased public land at the rate of two percent per month on the amount due.
- Under section 31, a lease may be forfeited upon application in court by government if rent or royalties otherwise payable under a lessee remain unpaid for a period of 12 months after becoming due or if the lessee breaches any express or implied covenant of the lease.
- Section 34 allows the government to resurvey the boundaries or leased public land or subdivide it, without making any compensation, even though such land may be subject to continuing interests, cautions or caveats upon serving a notice to holders of any interests in the land.
- Section 85 of the Act provides for the right of a borrower/charger to be discharged from a charge on their land upon payment of the sums borrowed. Section 89 prohibits any law entitling a chargee/lender from preventing a borrower from redeeming their property/land.

- Section 90 stipulates the conditions/steps to be followed before a lender/chargee can exercise its statutory power of sale/foreclosure in the event of a default of payment or failure to observe a covenant by a borrower. i) Where a borrower is in default for **1 month**, the lender may serve a written notice to the borrower requiring payment of the amount due. This notice must contain the following information: nature and extent of default; amount that must be paid to regularize/rectify the default and the time (being **no less than 3 months**) within which the payment must be made; where the default is non-observance of a covenant of the charge, the thing that must be done/not done and the time within which the same must be done/not done (**being not less than 2 months**); the consequence that if the default is not rectified within the time stipulated that the lender will proceed to exercise any of the remedies available to it; the right of the borrower to apply for relief in court against any of the remedies exercised by the lender. ii) Where the borrower does not make good the default within **90 days** after service of the notice, the lender shall serve to the borrower another notice to sell in the prescribed form and shall not proceed to sell the land until after **40 days** following service of the notice (**section 96 of the Act**); iii) Where the borrower does not rectify the default upon the lapse of the 40 days' notice, the lender is then at liberty to instruct an auctioneer to sell the land. The Auctioneer is however required under **Rule 15 (d) of the Auctioneers Rules** to

[9] These guidelines were developed following the appointment of a Taskforce to Investigate the Processing of Extension and Renewal of Leases since 2010 vide Gazette Notice No. 1812 of 16th February 2017.

issue a Notification of Sale/Redemption Notice to the borrower of no less than **45 days** before auctioning the property **(**See, ***David Ngugi Ngaari v Kenya Commercial Bank Limited*** **[2015] eKLR).**

Overall, there is an elaborate process with various steps (**of at least 175 days/nearly 6 months**) from default by a borrower to exercise of any potential statutory power of sale by a lender, with the borrower still at liberty to challenge any such sale-section 103 (See, ***East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another*** **[2017] eKLR)** . The foreclosure process is rather slow and in favour of borrowers as opposed to sellers, potentially restricting extension of credit using land as security/collateral. Courts have strictly applied/interpreted this provision and invalidated any sale that did not strictly accord with these procedures-see ***Yusuf Abdi Ali Co Ltd v Family Bank Limited*** **[2015] eKLR; *Florence Njeri Karanja vs Molyn Credit Limited*** **[2014] eKLR.**

- Section 97 of the Act provides that a lender exercising a power of sale owes a duty of care to the borrower to obtain the best price reasonably obtainable of the property and must conduct a forced sale valuation of the land (no more than 6 months old-section 98(5)) **(**See**, *David Gitome Kuhiguka vs Equity Bank Limited*** **[2013] eKLR)**. Where the land is sold at **75 percent below the price at which comparable land** is selling in the open market, a rebuttable presumption that this duty of care has been breached arises. This provision was meant to check against instances of sale of charged land at throwaway prices thus disadvantaging borrowers. Where this duty of care is breached by the lender, the borrower can hold the lender liable. In case the sold land fetches a higher price than the debt owed by the borrower, the lender is under an obligation to turn over the balance of the sum accrued from the sale to the borrower (section 101). While this provision seeks to protect borrowers, it can complicate efforts at debt recovery especially during times of depressed markets (as was the case in the COVID-19 pandemic when auctioneers had trouble getting buyers of properties being auctioned given the high prices).

- Section 99 of the Act protects purchasers of land/property that is the subject of statutory power of sale even though such sale later turns out to have been improper or irregular. The party prejudiced by the improper sale has a remedy in seeking damages against the party who engaged in the irregular sale. This provision is important in that it provides some comfort to prospective homeowners who may purchase houses in the auction market or through private treaty following a loan default by another homeowner.

- Section 103 of the Act still gives a borrower to challenge/apply for relief against a seller's right/power to sell even where such right has crystallized and gives the court power to: cancel, vary, suspend or postpone an order for any period the court thinks reasonable; extend the period for compliance by the borrower over and above the statutory timelines provided; or substitute a different remedy to the one sought by a lender. Some of the factors that the court takes into consideration in deciding whether to provide relief to a borrower include: whether the borrower will be rendered landless or homeless; whether the borrower will have alternative means of providing for themselves and their dependants; and whether it is necessary at all to sell the land. These provisions in effect mean that a lender may well be

prevented from exercising their rightful power of sale owing to other extraneous factors including the financial position of the borrower.

- Section 105 of the Act gives the court power to reopen a charge relating to a matrimonial home and revise the terms of such charge in the interests of doing justice between the parties. This is arguably contrary to the doctrine of freedom of contract, and means that financial institutions may be shy at extending credit on the strength of matrimonial homes as security/collateral. There is already requirement for written and informed spousal consent relating to charging of a matrimonial home (utilized by spouses as a family home) under section 12(1) & (5) of the **Matrimonial Property Act 2013**, and therefore does not appear need for extra protections as provided here. Under section 106, the court gives regards to various factors in deciding whether to reopen the charge including: age, gender, experience, understanding of commercial transaction and health of the borrower when the charge was created; financial standing and resources of the borrower relative to those of the lender at the time of creation of charge; degree to which borrower was under financial pressure at the time of making of charge; interest rates prevailing at the time of creation of charge and during continuation of the charge; and degree of risk accepted by the lender having regard to the value of the charged land and financial standing of the borrower.

- Part VIII (section 107-) provides for compulsory acquisition of private or community land into public land for a public purpose/use, which may include housing. These provisions of the Land Act repealed and replaced the Land Acquisition Act Cap 295 Laws of Kenya which provided for compulsory acquisition under section 3. The right of the state to compulsorily acquire land is also circumscribed to ensure there is no violation of private property without adequate compensation. This can indirectly spur demand for housing as prospective buyers are assured of the sanctity of title. The High Court (five judge bench) in ***Patrick Musimba –vs- National Land Commission & 4 Others (2016) eKLR*** explained/summarized the process of compulsory acquisition of land. Where the process is not strictly adhered to, the entire compulsory acquisition process is nullified.

- The process of compulsory acquisition as outlined by the Court (paragraphs 85-95) is as follows: i) the National Land Commission is prompted by the national or county government (or agencies of either government) through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution; ii) National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land; iii) As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. During such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose; iv) National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage; v)

Upon completion of the inquiry, the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission; vi) The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made (though payment may be deferred if there is a dispute as to the amount payable), even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be, with both the proprietor and the land registrar being duly notified.

- Section 107A of the Act, introduced through the Land Value (Amendment Act) 2019, created a land value index in the entire country which will give an indication of the valuation of land in each geographical area to guide compensation for infrastructure projects, curb land speculation and establish land banks. The land value index will also determine valuation of land for purposes of calculating stamp duty and taxation of private land. The land value index is to be prepared by the Cabinet Secretary in consultation with county governments and approved by the National Assembly and the Senate. It was required that the land value index be prepared **within 6 months** of the commencement of the Act (was on 19th August, 2019) which effectively means by 19th February 2020.

- While the land value index has been prepared for a few counties, it is yet to be undertaken in many counties including in most urban areas. The Ministry developed value zone maps for Mombasa, Kericho, Bomet, Kisumu, Narok and Nakuru, and has collected data for five counties (Kajiado, Kiambu, Nakuru (Larger Nakuru), Machakos and Meru) with inspection of the data currently ongoing. The Ministry is currently collecting data in 17 counties.[10] In other words, a national land value index is yet to be completed.[11] This is an issue that needs urgent fast tracking, implementation and support.

- Courts have held that given the exigencies of the moment and need to deliver on public projects, the government can take over private/community land compulsory acquired before making compensation where there is a dispute as to the amount payable or to whom amount is to be paid as the dispute is resolved (section 120(2)- ***African Gas Oil Company Ltd –vs- Attorney General and 3 Others (2016) eKLR*** para 26***; Nightshade Properties Ltd v National Land Commission & 3 others [2021] eKLR*** **(**paragraph 144)**.**

- Section 107B provides that where government intends to compulsorily acquire public land leased to a private individual and the lessee of such public land is in breach of any term of condition of grant of lease, the land shall revert to the national or county government. However, where the lessee has complied with all conditions of the grant, compensation

[10] <https://lands.go.ke/case-studies/national-land-value-index/ >
[11] MOLPP, Strategic Plan p. 25.

payable will depend on value of developments or improvements on the land and costs incurred; and value of the land based on the unexpired term of the lease calculated based on a land value index.

- Section 132 exempts compulsory acquisition transactions from payment of stamp duty.

- Section 133A (introduced through the 2019 amendment) provides for creation of the Land Acquisition Tribunal which under section 133C has jurisdiction to hear and determine appeals from decision of the National Land Commission relating to compulsory acquisition as well as those relating to creation of wayleaves/easements and public rights of way. This was in a bid to expedite such disputes (disputes must be resolved within 60 days unless time is extended) and fast track the release of land and reduce the workload of the Environment and Land Court where disputes are currently lodged. Notably however, this Tribunal is yet to be operationalized as the structures have not been set up and members of the Tribunal appointed by the Judicial Service Commission, Cabinet Secretary and Attorney General (see ***Ravaspaul Kyalo Mutisya v National Land Commission* [2022] eKLR**, paras 15 & 16).

- Section 134 of the Land Act 2012 provides that the national government shall implement settlement programmes to provide access to land for shelter. This offers an opportunity for national government to set aside land from its public land inventory as a settlement scheme, on which to build houses particularly for low-income households. Settlement schemes are normally established to provide land to squatters and displaced persons. There have been many settlement schemes established in Kenya since the colonial period, with most of them being established in the 1980s (post-independence period). At present, there are about 530 official settlement schemes.

- Section 135 of the Act sets up a Land Settlement Fund to provide source of financing for acquisition of land to settle the landless.

- Section 152G provides mandatory procedures to be followed during an eviction (including from a house by a landlord/owner) and demolitions by government including: identification of those taking part in evictions/demolitions; presentation of formal authorizations for the action; government officials present; carried out in a manner that respects the dignity, right to life and security of the people; include special measures to protect the vulnerable; give affected persons the first priority to demolish and salvage their property; respect principles of necessity and proportionality in the use of force, among others. These safeguards are critical in further securing property rights and increasing confidence among prospective buyers especially considering recent inhumane evictions and demolitions.

- Section 158 provides that any corrupt transactions relating to grant of public land or issuance of a certificate of title to land shall be illegal from inception, void and of no legal effect. This means that such title can be invalidated by court without any compensation. Significantly, such will be the case where: any party to the transaction is convicted of corruption in relation to the transaction and there is no further chance of appeal; any public official is interdicted or

retired in the public interest on grounds that the person has engaged in corrupt actions that related to the transaction; or where a court of competent jurisdiction so declares. Any person occupying land as a result of such transactions shall be liable to forfeiting the said land to government without compensation. The import of this provision is that due diligence must be given by investors/purchasers to land transactions to ensure that the same are not tainted with corruption.

- Section 159 provides for the Cabinet Secretary to prepare/publish guidelines on penalties for non-compliance with the minimum and maximum acreage of land that may be held by an individual, pursuant to article 66(1) and 60(1) of the Constitution. This was meant to ensure that there is not much idle land being held for speculation by individuals and not being put into productive use. Implementation of this provision, while politically contentious, can help reduce incidences of land speculation, unproductivity of land/idle land, and release the said land for use/housing. Notably, these guidelines on minimum and maximum acreages as well as for penalties for non-compliance have never been published/prepared.

2. Land Registration Act, No. 3 of 2012

- This law was passed to provide for a simplified property registration regime and effectively revised, consolidated and rationalized the registration of titles to land as well as give effect to the principles of a devolved government. The Ministry of Lands (through the office of the Chief Land Registrar and assisted by other Land Registrars in the various land registries across the country/in counties), is the one charged with land registration and issuance of title deeds.

- This was a departure from a registration regime that had earlier been described as a highly centralized, complex and exceedingly bureaucratic. By way of context, the former regime was characterized by different property registration regimes i.e. Government Lands Act of 1915 (Cap 280) which provided for registration of government land; the Registration of Titles Act of 1920 (Cap 281) which sought to address problems in the deeds system in the Government Land Act and was administered from the Central Land Registry in Nairobi/covered most land in Nairobi; Land Titles Act of 1908 (Cap 282) with a registry at Mombasa and which provided for registration of land at the Coast; the Registered Lands Act of 1963 (Cap 300) under which most land in rural areas was registered and the Indian Transfer of Property Act 1882 which was the procedural law governing transfers/transactions. Each of these statutes had its own register making the entire land registration cumbersome and complex.

- As a result, the Land Registration Act 2012 sought to create a single unitary regime for land registration. To operationalize this, there is a requirement for conversion/migration of all title deeds to the new system, which process entails cancellation of old titles and their replacement with new titles under the new regime. This process is currently ongoing, though it has been slow and at risk of falling foul of provisions of the law given the anticipated deadline of December 2022. The steps to be followed in converting a title deed are detailed here.

- Section 6 provides that the Cabinet Secretary in consultation with the National Land Commission and county governments is to constitute an area or areas of land to be a land registration unit. It envisages a conversion process where there is established registration

units divided into registration sections/blocks. Parcels in each registration section/block are to be numbered consecutively. Regulations have since been published to operationalize this provision, to wit, the Land Registration (Registration Units) Order 2017.

- Section 7 requires the establishment of a land registry in each land registration unit. The Cabinet Secretary for Lands set up 61 land registration units and designated corresponding Land Registries throughout the country following revocation of the 1981 Registered Land (Districts) Order (Legal Notice No 124/1981). There are efforts to set up more land registries in various land registration units across the country.

- The conversion of titles into the single unitary registration regime and issuance of new title deeds will reduce land administration costs as it will use a uniform and easy to use Registry Index Map (cadastral map) and be under a single law. Further, landowners will now be able to deal with land registries close to them (location of the land) unlike currently where a land registry of a particular piece of land may be far away from its location.

- While title conversion is necessary and urgent, it faces some challenges: The *first* challenge is the monumental task of converting all the issued title deeds (in excess of 11 million currently) in the country. There are capacity concerns within the Ministry of Lands which is mandated with this function. The *second* is the lack of or low confidence among landowners with the conversion process given the high levels of fraud that have been associated with land registries in the past is stunting progress.
- Section 9 provides that the Land Registrar shall maintain the register in a secure, accessible and reliable format including electronic files. This is the legal basis for electronic land register and electronic conveyancing. The current National Land Information Management System (ArdhiSasa platform) suffers from incomplete digitization, missing records, difficulties in users obtaining consent, and the first in first out principle not being adhered to. In addition, there is need to complete title migration first to align the title with the requirements of the land register in the platform.

- Section 26 provides for the doctrine of sanctity of title where it states that a certificate of title issued upon registration shall be taken by all courts as *prima facie* evidence that the person named as the proprietor is the absolute and indefeasible owner subject to the interests registered thereon and the title shall not be subject to challenge except: on ground of fraud or misrepresentation to which the proprietor is proved to be a party; and where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

- Section 28 provides for what are known as 'overriding interests' referring to interests on land that may affect land even if they are not noted on the land register. These interests include: trusts including customary trusts; rights of way, water and profits subsisting at the time of first registration; natural rights of water, air, light and support; rights of compulsory acquisition, search, entry and user conferred by any other law; rights acquired through prescription/limitation of actions; charges for unpaid rates and other funds; electric supply lines, telephone and telegraph lines and poles, pipelines, canals, weirs, dams made in pursuance of a law; and any other rights provided under any other written law. The import of

this provision is that interests in the nature mentioned herein can attach on any land even though the same is not indicated on the title document/land register, effectively burdening/encumbering the said land. This is certainly an issue to consider among prospective purchasers of land to minimize disputes and encumbrances.

- Section 36(4) imposes a penalty of an amount equal to the registration fee of any interest where an instrument for registration of interest in land is presented later than three months from the date of the instrument. Section 36(5) provides that instruments have priority depending on the order to which they are presented for registration irrespective of the date of such instruments and notwithstanding that the actual entry in the land register may be delayed. This provision speaks to the need to present instruments for registration as soon as possible for both proprietors and chargees/lenders who have an interest in land.

- Section 37 provides for transfers in land by a proprietor to another by filing an instrument and registration of the transferee as proprietor.

- Section 44 provides for execution of instruments in a disposition in land (including transfer, lease or charge) by providing that the same shall consist of a person appending their personal signature or affixing their thumbprint or other mark as evidence of personal acceptance of that instrument. Through amendments to the law made in 2020, there was introduced a section 44(3A) which now allows for electronic form of execution by providing that an instrument processed and executed electronically by persons consenting to it by way of an advanced electronic signature or an electronic signature shall be deemed to be a validly executed document.

- Section 45 provides for verification of execution of instruments by providing that a person executing an instrument shall appear before a Registrar/public officer/prescribed person alongside a credible witness who will attest to their identity unless the person is so known to the Registrar/public officer/prescribed person, who will ascertain that the executor of the instrument freely and voluntarily executes the instrument and complete a certificate to that effect. What this provision means is that there is still an insistence on physical presence for verification purposes even though the law has been amended to allow for electronic execution. It is necessary therefore that even electronic verification be provided for.

- Notably, section 45(3) provides that the Registrar may exempt the verification exercise where: the Registrar considers that the verification cannot be obtained or can be obtained only with difficulty and is satisfied the document is properly executed; if the Registrar knows the document has been properly executed and records the reason for dispensing with the appearance of the parties; and is the instrument has been electronically processed and executed by the parties consenting to it.

- Section 50 and 51 provide that a court may prohibit prejudicial dispositions in land that are meant to defeat the claims of a creditor through disposing with land that is to act as security or collateral.

- Section 56 provides for the right of a proprietor to charge their property/land for money or money's worth, with a charge being registered as an encumbrance. Section 56(4) provides that no charge may be registered unless a land rent clearance certificate and consent to charge has been presented to the Registrar in case of leasehold interest. Land that is a sublease where the lease is by law subject to the full payment of rent by the head lessor is exempt as is a unit in a condominium. The latter is now likely to change considering the Sectional Properties Act 2020 which gives a certificate of title to each sectional unit.

- Part VII of the Act provides for restraints on disposition of land, namely inhibitions, cautions and restrictions, which taken together serve to restrain/prevent transactions in land. They are useful tools for proprietors and other persons interested in a particular parcel of land to prevent dealings in a disputed land until a dispute is finally resolved. These tools can therefore be positive or negative in nature depending on who is affected, and generally, may stunt or delay a housing development as injunctive orders can be made by a court/Registrar preventing further developments until such restraint is lifted.

- Section 81(1) provides for the right to indemnity by the state/guarantee of title where a person suffers damage by reason of rectification of title by Registrar or any error in a copy or extract from the register certified under the law, so long as such person is not engaged in any fraud or negligence leading to such damage. Where a person is party to fraud or is negligent, no indemnity would accrue as stated by the court in ***Wibeso Investments Limited & another v Tamarind Meadows Limited & 5 others* [2020] eKLR,** paras 140-145. This is an encapsulation of the Torrens system of land registration which Kenya adheres to and which embodies the three principles: "*the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy*"**.**

3. Idle Land Taxation Policy 2018

- The Ministry of Lands sought to introduce the Idle land Taxation Policy 2018 which would in effect have introduced property taxes on idle land.[12] The policy had incentives to promote use and productivity of land while discouraging hoarding of land for speculation purposes through a package of disincentives, thereby leading to increase in land prices which in turn leads to escalation of house/property prices.

- The Policy was however not progressed, since it was not introduced to Parliament (National Assembly and Senate). There is need to revisit this.

[12] <https://nation.africa/kenya/news/idle-land-to-be-taxed-in-new-ministry-bill-32026 >

4. Community Land Act. No. 27 of 2016

- The statute was passed to provide for recognition, protection and recognition of community land (owned by community as a whole). It repealed the Land (Group Representatives) Act of 1968 (Cap 287) and the Trust Land Act of 1938 (Cap 288).

- Community land comprises around 60 percent of the total land mass in Kenya, which is subject to conversion to public land and can potentially also be used for housing. Most of community land is found in Northern Kenya, Kenyan Coast, the South Rift (e.g., Narok).

- The Ministry has since designated Community Land Registrars and undertook public education awareness in 24 counties. Some community land has since been registered under this regime in Laikipia and Samburu counties with some work ongoing in Kajiado County.

- The Community Land Act requires registration and titling of all community land to help avert incidences of illegal alienation of community land by private individuals. This is an ongoing process with only a very small portion of the said land already registered.

- The Act permits a county government or national government to identify and set aside special purpose areas within a community's area for the promotion or upgrading of public interest. These areas could be potentially earmarked for housing.

- Further, the law provides that any community land used communally for public purpose will be vested in the national or county government, not in the community; which provision has the effect of converting community land into public land available for public housing projects.

- The Act also provides that communities may reach agreements with investors to use their lands. In the event of the land being shown to be community land, the county government is to hold due compensation on behalf of the community, handing this over only at the time of formal entitlement. This potentially means that community land especially one in or adjoining urban areas can be leased or sold out to investors who may put up housing developments.

- However, there seems to be quite a high threshold for conversion of community land into private land as it requires the approval of 2/3 of the community assembly in a special meeting convened for that purpose.

- Section 29 allows a registered community to reserve special purpose areas including settlement areas and for urban development.

- There have also been published the Community Land Regulations, 2017 to operationalize the Act.

5. *Sessional Paper No. 3 of 2009, the National Land Policy*

- Paragraph 120 acknowledges that large tracts of land remain unutilized and provides for various principles including provision of appropriate incentives and sanctions to ensure landowners use their land productively and sustainably.

- Paragraph 177 requires the Government to establish land banks and make land available for investment and development including procuring the land through purchase and donations. This land is then to be used for redistribution, restitution and settlement. Despite this provision, there is currently no land bank yet for purposes of national development programmes.

- Paragraph 211 provides for dealing with the challenge of informal settlements by providing: Government to facilitate the regularization of existing squatter settlements found on public and community land for purposes of upgrading and development; develop a slum upgrading and resettlement programme under specified flexible tenure systems; establish a legal framework for transferring unutilised land and land belonging to absentee landowners to squatters and those living in informal settlements.

- Overall, the National Land Policy 2009 was due for review in 2019 (after ten years) though this is yet to be completed. While the review process was initiated by the Ministry, it needs to be fast tracked to take account of developments that have occurred in the last decade and inform future legislative developments. Support may be accorded on this front.

- The development of a Land Sector Gender Policy is also in progress, and support can be accorded as well.

6. *National Land Commission Act, No. 5 of 2012*

- Section 5 lists various functions of the Commission that are relevant to affordable housing including: managing public land on behalf of national and county governments; recommending a national land policy to the national government; advising national government on a comprehensive programme for registration of title in land throughout Kenya; assessing tax on land and premiums on immovable property in any area designated by law; initiating investigations into present or historical land injustices and recommending appropriate redress; monitoring and exercising oversight over land use planning; alienating public land on behalf of and with the consent of national and county governments; monitoring registration of all rights and interests in land.

- Section 14 of the Act provides that within 5 years of commencement of the Act (that is by 2nd May 2017), the Commission either on its own motion or upon a complaint shall review all grants or dispositions of public land to establish their propriety or legality. This provision was included considering past instances of grabbing and illegal alienation of public land to private tenure as detailed in the Ndung'u Land Commission of Inquiry Report. Some of this erstwhile public land has since transacted in the market changing ownership to several private

individuals who have invested massively including in setting up housing developments. Indeed, the court in ***Republic -vs- National Land Commission Ex parte Holborn Properties Ltd [2016] eKLR*** has since held that the National Land Commission has power to review legality or propriety of titles that are privately held where such titles were initially public land and were converted to private holdings.

- The Courts have however held that whereas the Commission may investigate and decide as to the legality or otherwise of a grant/disposition of public land, it has no legal authority to revoke/cancel such titles, which is the mandate of the Land Registrar under the Ministry of Lands (See, ***Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR*****,** para 35). The Commission can only recommend revocation of title.

- Importantly however, there is some comfort that may be derived from section 14(7) of the Act which provides that no revocation of title (where it has been found it was illegally or irregularly acquired) shall be effected against a *bonafide* purchaser for value without notice of a defect in the title (See, ***Samwel D. Omwenga Angwenyi v National Land Commission & 2 others* [2019] eKLR****,** para 26**)**. This means that purchasers of land tainted with illegality who had no knowledge of the defect or the illegality (*bonafide* purchasers) may be protected from their titles being revoked. The Court of Appeal in ***Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR** para 24, explained the elements of who a *bonafide* purchaser for value without notice is as one who: holds certificate of title; purchased the property in good faith; had no knowledge of fraud; purchased for valuable consideration; sellers had apparent valid title; purchased without any notice of fraud; was not party to fraud.

- This protection, however, does not extend to others who knew or ought to have known of such a defect. This provision is the reason behind the practice of due diligence and checking whether any transaction relating to land concerns land listed in the Ndung'u Land report or otherwise adversely mentioned.

- Section 15(11) provides that the provisions empowering the Commission to investigate and determine claims of historical land injustices would stand repealed after ten years (that is by May 2022), which means that no more claims would be processed, providing finality to the disputes. There is, however, currently a Bill in Parliament seeking to extend this timeline.

7. National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017

- The Regulations provide procedures and modes of resolving historical land injustices (those that took place between 15th June 1895 when Kenya became a British protectorate and 27th August 2010 when Kenya promulgated the Constitution of Kenya 2010).

- Clause 7 provides that a person may lodge a claim through the prescribed form, a letter, a memorandum or even oral submission to the National Land Commission.

- Under clause 9, the Commission can place a restriction on any land that is subject to a historical injustice claim, which means that such land would not be available for any

transactions including transfer or housing development until the claims are resolved. This is important especially given the history of illegal land alienations in Kenya's past which means that otherwise clean title could be challenged.

- Clause 26 requires the Commission to issue its decision within 21 days of completing its investigations. Such decision containing the recommendations of the Commission is to be forwarded to respective concerned authorities for action.

- Significantly, the decisions of the Commission can and have indeed been challenged in the Environment and Land Court, within 28 days of publication of such decision. Also questioned is the binding nature of such decisions, with courts holding that such decision is only a recommendation though a weighty one.

- Unless and until all historical land injustice claims are determined conclusively (including exhausting all avenues of appeals), there may not be full comfort to property developers and would be homeowners, especially relating to land potentially tainted by historical land injustices/violations.

8. National Land Commission (Amendment) Bill, 2022

- The purpose of the amendment Bill is to amend the NLC Act 2012 to allow the National Land Commission to continue reviewing grants and dispositions of public land to establish their legality and propriety as well as continue admitting and processing historical injustices over and beyond the time limitations set out under the current law.

- At present, the National Land Commission has no legal mandate to undertake these functions as the time afforded to it has lapsed/expired, yet many claims remain unresolved. The authority of the NLC to undertake these claims is set to expire in May 2022 (being ten years following the enactment of the law as per section 15(11) of the Act).

- The effect of these proposed amendments is that there may not be closure on possible challenge to certainty of title to land since the window for legal challenge will once more be opened/extended.

9. Land Control Act (Cap 302), 1967

- This law was initially passed in December 1967 for the purpose of controlling transactions relating to agricultural land.

- It provides that the Minister (Cabinet Secretary) may apply the Act to any area and shall establish a land control board for various areas.

- Section 6 lists the various transactions affecting agricultural land that are affected by the law and which have obtain the approval/consent of the Land Control Board of the respective area. These transactions are: sale, transfer, lease, mortgage, exchange, partition, subdivision or

disposal/dealing in any agricultural land in a land control area; issue, sale, transfer, mortgage or any disposal or dealing in any share of a private company or cooperative society which owns agricultural land situate in a land control area; and division of any agricultural land into two or more parcels to be held under separate titles. The only exceptions to these provisions are: transmission of land by virtue of a will or intestacy unless the transmission results into subdivisions, and a transaction to which the government is a party.

- Section 8 provides that application for the Land Control Board consent is to be made within 6 months of the making of a sale agreement though the Court may extend this period where there are good reasons for so doing.

- Under section 9 of the Act, the land control board may refuse consent in any case where the land or share in the land is to be disposed of to a non-Kenyan citizen, private company or cooperative society owned by non-Kenyan citizens, a state corporation or group representatives; where the terms and conditions of the transaction including the price of the land are markedly unfair or disadvantageous to one of the parties; and where the transaction involves subdivision that will result into reduced productivity of the land.

- Refusal of consent by the land control board voids any transaction that is made without such approval and upon any time set for appealing against the decision. This time can however be extended upon application.

- The land control boards are decentralized and are in nearly each locality where the members of the boards normally sit on a monthly basis.

- Section 24 of the Act however affords the President unlimited powers to exempt any land or share in land from any or all provisions of the Act. This is a carryover of the imperial powers that the Presidency exercised under the former land law regimes. The Act also refers to 'Minister' and 'Provincial Land Control Boards' which is a nomenclature used in the former constitutional regime. This speaks to the need to update and modernize the law. In this regard, there is a Land Control Bill 2022 currently in Parliament (see below).

- In summary, while the law seeks to prevent cases of wanton conversion of agricultural land into other uses including construction as well as sale and subdivisions (as has largely happened even in areas adjoining urban areas), the law also adds to costs and time taken in approving of transactions.

10. Land Control Bill, 2022

- The Bill seeks to repeal and replace the current Land Control Act (Cap 302) to align it within the Constitution of Kenya 2010 and other applicable laws.

- Substantively, the Bill seeks to establish Land Control Committees in every constituency to replace the Land Control Boards. The Committees will review each proposed transaction/disposition affecting agricultural land and either approve it or disapprove. It also

establishes the Land Control Appeals Committee to adjudicate on appeals from the Committee within 30 days of their lodging.

- Given that a significant amount of land in prime areas including in the suburbs and outskirts of major urban centres comprises agricultural land, it follows that this law will impact on the availability of such land for housing. By seeking to limit subdivisions of such land for sale in order to ensure good security, there may be less land available for housing which will affect prices.

- At the same time, the enforcement of the law may have the opposite effect of lowering prices since it will reduce purchase of huge tracts of land by real estate companies for speculation, subdivisions of such pieces of land and subsequent sale to individuals for putting up of houses.

11. Environment and Land Court Act No. 19 of 2011

- This statute was enacted to give establish a superior court (Environment and Land Court) to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers. The law thus effectively replaced Gazette Notice No. 301 of 2007 through which the Judiciary had established an Environment and Land Court Division as a division of the High Court in Nairobi and Mombasa only.

- The statute also repealed the Land Disputes Tribunal Act, No. 18 of 1990 which created Land Disputes Tribunal in every registrable district, which Tribunals adjudicated over land disputes, before their abolishment.

- This law was passed to create specialized courts dedicated to adjudicating over land and environmental disputes, owing to the huge backlog of land disputes which constituted most civil disputes (thereby hindering release of land for development) as well as the need to have specialized judges well versed in matters of land and environment dealing with such disputes.

- The establishment and operationalization of the courts in 2012 has led to more recruitment of judges for the court and resolution of many land disputes so far, though there is still a backlog. The establishment of these courts, their decentralization and recruitment of more judicial officers has been associated with more cases/disputes being lodged with them.

- Accordingly, there is need for more investment through establishment of more courts in various counties and hiring of more judges and personnel by the Judiciary. As of July 2022, there were 51 ELC judges, and 39 ELC court stations in 36 counties. About 78% of the courts had a Case Clearance Rate of 100% in the 2021/2022 financial year ended June 2022. There were however about 4, 406 land and environmental disputes that had been in the court system for over three years.

- Given the establishment of the Environment and Land Court (which has the same status as the High Court), there was uncertainty as to whether the magistrates' courts (which are

inferior courts and spread throughout the country) had jurisdiction to hear and determine environment and land disputes. The High Court in ***Malindi Law Society v Attorney General & 4 others, Constitutional Petition No. 3 of 2016*** held that the magistrates' courts had no such jurisdiction. If this decision were to stand, it would have meant more clogging of the Environment and Land Court and a slower process of resolving such disputes (especially given the relatively few numbers of these courts compared to magistrates' courts). However, the Court of Appeal in ***Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others, Civil Appeal No. 287 of 2016*** reversed this finding and held that magistrates' courts could hear environment and land disputes as courts of first instance.

12. Survey Act No. 25 of 1961 (Cap 299)

- The statute makes provision for surveying of land and geographical names as well as licensing of land surveyors. It also provides for establishment of the Land Surveyors' Board for regulating practice in the survey profession. The law repealed the previous Survey Act, 1951 (No. 22 of 1951).

- The Act was amended through the Business Law (Amendment) Act No. 1 of 2020 to allow for electronic signatures and electronic processing of document and plans as well as imprinting of security features on such documents which bear an imprint of the seal of the Survey of Kenya. The adoption of electronic processes away from the traditionally manual (paper-based processes) served to expedite the processes of surveying, which are a prerequisite to allocation/alienation and titling of land.

- Sections 36 and 37 of the Act which forbid unqualified persons from practicing as surveyors place a very low penalty for the offence of Kenya Shillings Three Thousand or a jail term of no more than 6 months. This penalty (especially the monetary fine) is so inordinately low that it can barely deter unqualified persons/quacks from purporting to practice. The figure was set in 1969 and needs to be revised to reflect the new realities.

- Overall, there are other provisions that refer to old regimes/laws that have since been repealed, reflecting the need to modernize the Act through some amendments/repeal.

- There are other Regulations prepared under the Act that seek to operationalize the provisions of the statute. These are: Survey Regulations, 1994; the Licensed Surveyors Code of Professional Conduct 1997 which among others, set a code of conduct and scale of fees to be charged by licensed surveyors; and the Survey (Electronic Cadastre Transactions) Regulations, 2020 which require the Director of Survey to maintain an electronic cadastre which will be a module of the National Land Information System. The cadastre can be accessed electronically by users by signing up to the system and carrying out transactions.

- The issue of an electronic cadastre and a functional National Land Information System are important given that the Kenyan cadastre is largely incomplete comprising of a patchwork of maps of varying positional qualities that cannot be readily integrated to ensure a nation-wide coverage. This hampers land registration and titling efforts. In actual sense, while the

regulatory framework now provides for an electronic cadastre and electronic lodging of cadastral surveys for approval, this is yet to be fully operationalized to expedite these processes and support land registration efforts. While Ardhi Sasa was launched in early 2021, there have been complaints about the usability of the system.

- Relatedly, the Kenya National Spatial Data Infrastructure Policy (KNSDI) is lacking (not yet formulated or implemented) yet it is necessary to guide county governments in handling geospatial data. A properly functional KNSDI would ensure the integration of and access to spatial datasets held and maintained by different national and sectoral agencies. The Cabinet Secretary responsible for lands is empowered with coordinating the management of the KNSDI under section 6 c of the Land Act 2012.

13. Land Registration (General) Regulations, 2017

- Provides for the various Forms (in the schedules) to be used in registering and transfer of land/property.

- Regulation 90 allows for electronic dispositions-this is likely to speed up transactions thereby reducing cost and time, and potentially lead to reduced house prices to end consumers.

14. Land Registration (Registration Units) Order, 2017

- These Regulations provide for the process of converting old titles and registers to new titles and registers required under the new laws (title migration/conversion). The process has begun but has been stalling as all titles to be migrated have not always been gazetted. Notably however, the various gazette notices continue to be issued. It would be helpful to have more transparency showing a cumulative register with a map of which areas are being converted.

15. Sectional Properties Act, No. 21 of 2020

- This statute repealed the earlier Sectional Properties Act, 1987. It seeks to provide for 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.

- The Act applies to both freehold and leasehold property where the unexpired residue term of lease is not less than 21 years; where there is intention to confer ownership; and there are two or more units described in the sectional plan.

- Substantive changes introduced by the Sectional Properties Act 2020 are:

i) Sectional properties are now to be issued with a certificate of title or certificate of lease (as the case may be, depending on the nature of interest) and the title shall include the proportionate share in the common property.

ii) The Act now applies for long-term leases that are not less than 21 years whereas the 1987 Act applied to leases not less than 45 years.

iii) Long term subleases intended to confer ownership (21 years and above) registered before the coming into force of the Act must conform to the new Act within a period of 2 years from 28 December 2020 (which means by 28 December 2022).

iv) The Act has introduced an internal dispute resolution committee to resolve disputes among sectional unit owners relating to enforcement of by-laws. The 1987 Act required such disputes to be referred to a Tribunal set up under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, which took longer time to resolve.

v) The new Act allows for one to challenge the decision of the internal dispute resolution committee at the Environment and Land Court. The repealed Act did not allow for any appeal to court from the decision of the Tribunal, save for an error of law.

vi) The Act requires sectional plans to geo-reference sectional units with management corporations also allowed to employ technology.

vii) The Act allows a property developer to charge a security deposit at will if a purchaser of a unit opts to rent a unit prior to receiving their sectional title. The repealed Act had placed a cap on rental security deposit to only one month.

viii) The Act has abolished various provisions relating to purchase agreements that were contained which included: rescission of the purchase agreement, mandatory contents of such agreement and protection of purchaser regarding proceeds of sale handled by a developer.

ix) The new Act provides for automatic dissolution of management corporations upon termination of sectional property status of the development.

x) The Act provides for termination of sectional property status to include substantial or total damage to the building and compulsory acquisition of the building. The Act has removed the earlier requirement for an application to court by a unit owner/charge/purchaser or corporation for such termination.

xi) The Act has removed the mandatory requirement for a management corporation to appoint an institutional manager to manage the units, the common property and property of the corporation, with the powers and duties of the corporation to be exercised by the board of the corporation.

- Section 13(2) of the Act which provides for conversion of all long-term leases (21 years and above) that intend to confer ownership to conform to the Sectional Properties Act will likely hinder obtaining financing on the strength of long-term leases as collateral given the uncertainties associated with meeting the deadline of December 2022. At present, sectional units are not recognized by the survey office by being put on the cadaster which means that the 2-year deadline expiring on 28 December 2022 will hardly be complied with. Given that this is a statutory provision, the moratorium/deadline can only be extended through a statutory amendment in Parliament. This needs to be dealt with as a matter of urgency to avoid negative impact on financing, especially since most land in urban areas is held under leasehold terms.

- Relatedly, while section 54(5) and the regulations require the Survey Office to issue a unique prefix number to support geo-referencing, the Survey Office is yet to formulate procedure/guidelines to inform this, despite the deadline for the process being 28 December

2022. These concerns are stalling the perfection of securities with negative impact on financing.

- SPA currently has no application in phased developments or mixed-use developments where a developer wishes to retain reversionary interest or vest it in a management company i.e no intention to confer ownership. This does not seem to be captured in the law.

16. Sectional Properties Regulations, 2021

- These regulations were gazetted on 26 November 2021 and came into force on 10 December 2021 and seek to aid the implementation of the Sectional Properties Act 2020. They effectively repealed the Sectional Properties Regulations 1991.

- The Regulations have also provided for the various Forms to be used in transactions relating to sectional units in the Schedules.

- While the 1991 regulations recognized registration under multiple legal regimes/statutes, the 2021 Regulations anchor registration of sectional titles under the Sectional Properties Act 2020, effectively simplifying the process and dealing with the uncertainty and duplicity that typified the former legal regime.

- The Regulations refer to the Land Act 2012 and the Land Registration Act 2012 as opposed to the 1991 Regulations which referred to the Registered Land Act (now repealed). The new regulations have also updated the terms/changed the nomenclature used: for instance, they use 'cadastral maps' instead of registry index map; 'georeferenced plans requiring coordinates' instead of fixed boundaries. The Regulations also refer to 'freehold' tenure instead of the formerly confusing absolute proprietorship and 'title deeds' replaced certificates of title or certificate of lease.

- Significantly, the new Regulations have decentralized ownership of sectional units as evident through the introduction of rent apportionment forms for use by a rating authority (county governments) to apportion rent, rates, or taxes payable by each unit which then accompany the registration of sectional plans. Accordingly, unit owners can exercise more control over their units and reduce frustration or hindrance by sellers/vendors or management company in dealing with one's unit.

- The Regulations now provide that a corporation (established to manage the common areas in a sectional property) will form an internal dispute resolution committee on a need basis to determine disputes among unit owners thereby affording a fast and affordable dispute resolution forum as well as giving the owners more control over the process and outcome. This contrasts with the prior regime whereby disputes among unit owners were resolved at the Tribunal which took inordinately long (given the intermittent nature of sittings of the Tribunal and vacancies in its membership). Once all sectional units have been sold and reversionary interest reverts to the management company/corporation, only the corporation

can lodge a suit in court for any violations following a resolution by shareholders (See, ***Jitendraray Nathwani & another v Hitesh Devendra Makwana & 3 others* [2020] eKLR**)

- The Regulations allow property developers, management companies and individual owners to convert long-term leases to sectional units unlike the 1991 regulations which did not allow for this.

- The Regulations empower owners to indirectly enforce corporation's by-laws against non-unit owner tenants. This is especially important given the difficulties that management companies had to contend with in enforcement of terms including nuisance and collection of service charge charges from tenants owing to the privity of contract doctrine.

- Relatedly, the Regulations also provide specific notification forms by a corporation to a unit owner where a tenant breaches the by-laws; they also provide a right to a corporation to refer the dispute to the internal dispute resolution committee; and provides for a form of notice issued to a tenant to vacate premises where the dispute resolution committee so decides.

- The 2021 Regulations adopt technology by allowing electronic submission of application forms and plans, which enables developers and landowners to file their sectional plans/title documents through the online Ardhi Sasa platform-which saves on time and costs, allows users to access digital land information and facilitate land registration and administration. This contrasts with the 1991 regulations which required unit owners to physically register their titles at the various land registries.

- While the 2021 Regulations maintain co-ownership rights by entrenching incidental rights such as the right to quiet possession and duty not to use neighbouring premises in a manner that renders other premises unfit for purpose, they also require obtaining of consent of an affected unit owner where the sub-division of a unit or consolidation of a unit is likely to affect an owner's incidental rights. This means that unit owners' rights are better protected.

- Following stakeholder concerns about the difficulties in implementation of the Act, the Regulations (Regulation 22) now provide **useful exemptions** to converting long-term leases to sectional titles where: it is expressly provided by agreement that the reversionary interest belongs to the developer, lessor or management company as the legal owner and not as trustee; and in case of large mixed-use developments or phased developments where it is agreed that the reversion shall be retained by the developer; and in case of projects of strategic national importance, substantial transactions and special economic zones which by their nature render it impracticable to relinquish the reversionary interest.

- Importantly however, the **Regulations still do not provide for the process/procedure of applying for these exemptions**. There is also need to introduce these exemptions in the principal statute (Sectional Properties Act 2020) which cannot be as easily changed and given that this is a substantive provision. There is also need to provide further clarification in the exemptions on what is meant by a 'mixed use development' in terms of minimum acreage and diversity.

- In addition, given the time that has since lapsed (nearly a year) since the commencement of the Act and the publication of the Regulations, (the 2-year timeline provided for in the Act within which long term leases must be converted to sectional titles), there may be need for amendment of the substantive Act to extend the timelines or allow the Ministry to extend the timelines.

- There are also expected challenges in conversion of long-term leases of charged properties where only a portion of sectional units have been sold. This is because there will be need for the developer and unit buyers issued with long term leases to cooperate, following issuance of a partial discharge. Where the unit buyers may have charged their units with financial institutions, this creates another challenge. What is more, even in cases of complete transfer of all sectional units, there is still need to ensure there are no gaps in the accuracy of data in this transition (conversion) given that securities are usually noted against individual leases rather than the Head Title. This certainly calls for a phased approach whereby a gazette notice is issued indicating parcels that will be converted including records of management companies for consents to charge.

ANNEX C: LAWS / POLICIES / REGULATIONS GOVERNING PHYSICAL PLANNING

1.Sessional Paper No. 1 of 2017 on National Land Use Policy

- The National Land Use Policy was adopted in October 2017 and seeks to provide for the optimal use of land given that there are many competing and sometimes conflicting land uses.

- The Policy notes that not much has been achieved in the development of adequate shelter mainly attributable to low levels of income among most of the population, high cost of land, high cost of building materials, shortage of skilled manpower, and inadequate funding in the housing sector. It further states that majority of urban dwellers face challenges in terms of absence of secure land tenure system, water and sanitation and poor infrastructure. The challenges of poor planning, shortfall in supply of housing, poor integration of provision of infrastructure and services in human settlements, inadequate public participation in and awareness of land use issues and unsustainable use of local construction materials continue to affect human settlements.

- The Policy provides that there is need for development that takes into cognizance the provision of basic infrastructure and services given that most urban areas are not adequately provided with infrastructure such as safe water, sanitation, drainage, solid waste disposal services, and transportation infrastructure.

- There has however been slow paced implementation of the Policy (potentially because of limited funding) which has hampered optimal and sustainable use of land.

- NLC created a monitoring and evaluation tool for this National Land Use Policy.

2.National Land Use Policy Implementation Monitoring and Oversight Tool 2022

The National Land Use Policy Implementation Monitoring and Oversight Tool 2022 was developed and recently launched by the National Land Commission to aid in its discharge of its constitutional responsibility of overseeing land use planning throughout the country. The Tool shall help the Commission to monitor, oversee and guide reporting on performance of various public, private, communities and non-state actors in performing their obligations as outlined in the National Land Use Policy 2017.

3. Kenya National Spatial Plan (2015-2045)

- The National Spatial Plan was developed by the Ministry of Lands and Physical Planning as part of Vision 2030 project which defines the general trend and direction of spatial development for the country. It seeks to address the disconnect between economic and spatial planning that has led to uncoordinated and unguided development by establishing a broad physical planning framework that provides physical planning policies to support economic and sectoral planning. The Plan is therefore important as it determines the kind of developments including residential settlements that may be put up and in which zones or areas.

- The Plan notes various urban challenges such as skewed spatial distribution of urban centres, urban sprawl and informality in peri-urban fringe, lack of functional/role specialization, informal settlements, inadequate and inefficient transport and infrastructure, inefficient governance structures and urban poverty.

4. *Physical and Land Use Planning Act, No. 13 of 2019*

- This is the principal statute that regulates both physical planning and land use planning. It provides for zoning requirements, institutional framework on planning, preparation of local, regional and national spatial plans and other development control aspects including change of user, among others.

- This statute repealed the Physical Planning Act 1996 which in turn had replaced Kenya's first physical planning legislation, the Land Planning Act of 1968 which sought to control development in urban areas through requiring preparation of town plans.

- Part II of the Act provides for various institutions in the physical and land use planning sector. These comprise of: **National Physical and Land Use Planning Consultative Forum** which is the forum for consultation on the national physical and land use development plan; recognizes the National Land Commission which oversees land use planning in the country; the Cabinet Secretary who formulates policy on land use planning and coordinates planning; Director General of Physical and Land Use Planning at the national level and a County Director of Physical and Land Use Planning at the county level; a County Physical and Land Use Planning Consultative Forum for counties; County Executive Committee Member responsible for land use planning who formulates policy at the county level.

- Part III of the Act provides for various physical and land use development plans that need to be developed. They are the National Physical and Land Use Development Plan (NPLUDP), Inter-County Physical and Land Use Development Plan, County Physical and Land Use Development Plan (CPLUDP), and Local Physical and Land Use Development Plan (LPLUDP). These plans form the basis for physical and sector development in their areas of operation or provide a framework for use and development of such land.

- Section 52 empowers a county government to declare an area as a Special Planning Area either on its own motion or upon the request of the national government if such area: has unique development, natural resource, environmental potential or challenges; has been identified as suitable for intensive and specialized development activity; the development of that area might have significant effect beyond that area's immediate locality; the development of that area raises significant urban design and environmental challenges; or the declaration is meant to guide the implementation of strategic national projects; or guide the management of internationally shared resources. Accordingly, a county government that intends a particular residential area to be used in putting up huge affordable housing developments can declare such an area as a special planning area under this provision. Such an area would have a Special Area Plan that addresses a variety of issues including:

infrastructure needs of the area, proposed zones in the area and proposed conditions for development. Such an area would therefore likely benefit from more attention and resources from government such as provision of trunk infrastructure and expedited development permissions. The Mukuru Special Area Zone is an example of this[13].

- Part IV contains provisions relating to development control whose objectives are the optimal use of land and orderly physical development, among other objectives.

- Section 56 provides that it is the **county governments that have the power within their areas of jurisdiction to undertake development control**. This entails to: prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area; control or prohibit the subdivision of land; consider and approve all development applications and grant all development permissions; formulate by-laws to regulate zoning in respect of use and density of development; consider and determine development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas; ensure the proper execution and implementation of approved physical and land use development plans; and reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical and land use development plans.

- Section 57 provides that a person shall not carry out development within a county without a development permission granted by the respective county executive committee member.

- Under section 58, application for development permission is made in a prescribed form and upon payment of the prescribed fees as detailed in the Regulations. The application must detail the proposed use of the land, the population density the land will be subjected to, and the portion of the land the applicant shall provide for easements because of the development.

- Section 58(6) is to the effect that where an applicant does not receive any written response from the county executive committee member within **60 days/2 months**, such permission shall be deemed to have been given. This is an important provision in terms of expediting the approvals/development permission as has been the case in the past.

- There however needs to be put mechanisms to make this feasible and practicable, both in terms of automating applications as well as enhancing the capacity of staff in terms of numbers and skills especially at the county level. There were attempts to automate development approval processes in the counties, which project was led by the Architectural Association of Kenya, county governments and the International Finance Corporation (IFC). The electronic permitting system known as the Electronic Development Application Management System (e- DAMS) was launched in Nairobi County and has since been adopted in at least six other counties — Mombasa, Kiambu, Machakos, Kisumu, Kajiado and Kilifi. The

[13] https://www.muungano.net/mukuru-spa

e-DAMS provides an opportunity to collect data on development applications to understand the supply of housing across different counties, and standardizing the fields used by various counties can be helpful to enable such data collection to support effective policy and investment.

- However, the project has stalled and approval process remains slow and lengthy.[14] The electronic construction permit system was suspended by the Nairobi Metropolitan Service (NMS) in 2020 following concerns over fraud sparking protests among professionals.[15] This is an issue that needs to be fast tracked and expedited. Relatedly, there is need to ensure that the approval process for all permits is a one-stop shop and automated to reduce on the time spent, reduce opportunities for corruption and reduce bureaucracy.

- Section 59 provides that all plans, documents and particulars provided in the application for development permission must be prepared by relevant qualified, registered and licensed professionals. These are usually registered architects and structural engineers. In practice however, most of this documentation is usually done by unqualified persons but then signed by a qualified professional for submission in a bid to evade the high fees that would be charged if qualified and registered professionals were to draw/prepare them. This can occasion challenges in terms of competence. Accordingly, consideration may be given to revision of scale fees.

- Section 61 of the Act provides that in determining an application for development permission a county executive committee member will: be bound by the relevant approved national, county, local, city, urban, town and special areas plans; take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought; take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought; take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease.

- Section 61(3) provides that an applicant aggrieved by the decision of the county executive committee member in an application for development permission may appeal within 14 days to the County Physical and Land Use Planning Liaison Committee and the Committee shall determine the appeal within 14 days. A final appeal lies from the Liaison Committee to the Environment and Land Court, which is already operational throughout the country.

- Section 63 of the Act empowers county executive committee members in each county government to levy a development fee against an applicant for development permission. Each county government is required to publish Regulations in a Gazette Notice detailing the applicable rates or fee, circumstances where such fee may be levied and waived. Where a

[14] <https://www.pd.co.ke/news/city-electronic-building-permit-system-fails-to-deliver-architects-say-94999/ >
[15] <https://www.the-star.co.ke/counties/nairobi/2020-05-17-nms-caves-in-to-pressure-and-restores-e-construction-application-system/ >

development fee is waived, the county executive committee member may require the applicant to develop infrastructure in relation to the property in question for general use by residents of the area.

- Section 64 provides that where a development permission is granted and the applicant does not commence the proposed project **within 3 years**, such permission shall lapse. However, the development permission can be extended by another one year upon application.

- Section 65 provides that a county executive member may impose a fine or conditions on an applicant who fails to complete building works **within 5 years** as may be detailed in published regulations.

- Section 67 creates an offence for failing to adhere to development permission by imposing a jail term of no less than five years or a fine of no less than Ksh 1 million or both in case of conviction.

- Section 69 allows the Cabinet Secretary to develop regulations prescribing for projects that may be described as strategic national or inter-county projects and to approve development permissions for such projects. The Cabinet Secretary also offers public guidance to any public institution proposing a project of strategic national importance. The Cabinet Secretary promulgated the Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, 2019 pursuant to this provision. Affordable housing say on public land or being done by a public institution such as the National Housing Corporation (NHC) can be a strategic national or inter-county project.

- Part V of the Act provides for enforcement provisions. Section 72 provides that a county executive member may serve an enforcement notice on any person including an owner, occupier, agent or developer if they are of the view that there has been commencement of developments without the requisite development permission, or a condition of the said permission has not been complied with. Such enforcement notice specifies: the development alleged to have been carried out, the measures that must be taken to regularize and within which period, and require the demolition, alteration or discontinuance of works or use of land which is in violation within a specified period. A person aggrieved by such enforcement notice is permitted to challenge such decision at the County Physical and Land Use Planning Liaison Committee within 14 days of service, with the Committee required to dispose of the appeal within 30 days. A final appeal also lies at the Environment and Land Court on matters of law only, which decision must also be delivered within 30 days.

- Part VI (sections 73-89) establishes the **Physical and Land Use Planning Liaison Committees** both at the national level and at the county level, which have been constituted across all counties. These Committees advice on broad physical and land use planning strategies, policies and standards as well as hear and determine appeals from the respective national or county governments' planning authorities.

- Section 90 of the Act empowers the Cabinet Secretary to make regulations for giving effect to the Act and specifically those relating to: forms to be used and fees to be charged under this Act; the norms, guidelines and standards for delivery of physical and land use planning services across the country; guidelines for operations of Inter-County Physical and Land Use Planning Committees; procedures for the conduct of Physical and Land Use Planning Liaison Committees; and procedure and process of handling applications for development permission.
  These published Regulations are as detailed below:

5. *Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, 2019*

- These Regulations apply to state agencies implementing projects of national significance under special licence or declarations.

  In particular, regulation 2 defines 'projects of strategic national importance' to mean projects that are conceived, designed and implemented in furtherance of the Kenya Vision 2030, the Big Four Agenda, Medium Term Plan and other national strategic objectives that arise out of the residual functions of the National Government and include programme activities or initiatives that have implications in terms of the obligatory demands on the State in terms of international conventions and treaties ratified by Kenya. This is especially important given that affordable housing forms part of the Big Four Agenda. In addition, article 43 of the Constitution provides that decent and affordable housing as one functions or obligations of the State. This means that the State can declare affordable housing as one of strategic national projects which would benefit from the provisions of these Regulations. Projects in special planning areas as decreed by county governments are also considered as strategic projects under Regulation 5.

- Regulation 6 and the First Schedule to the Regulations provides for the criteria of determining strategic national and inter-county projects. Section 10 of the First Schedule provides for housing projects and particularly affordable housing, institutional housing, public housing and emergency housing that is on public land held by the national government. Section 13 provides for land use programmes including land banking, land reservation, land acquisition and purchases and land titling as strategic projects.

- Accordingly, developers and other stakeholders engaged in affordable housing can take advantage of these Regulations to seek development permissions from the Cabinet Secretary as permitted under the Act irrespective of where the developments are located, instead of seeking the same from county governments hence potentially expediting the process.

6. *Physical and Land use Planning (Planning fees), Regulation 2021*

- These Regulations regulates the charging of amounts payable for services offered by a planning authority (planning fees). They replaced the Physical Planning (Planning and endorsement fees) Regulations, 1998.

- Regulation 4 provides that planning authorities shall charge fees for: inspection of sites, vetting of applications for change of use and extension of use, subdivision, application for development permission, issuance of certificate of occupation, and issuance of certificates of compliance, among others.

- The fees/amounts chargeable for the different services are set out in **Table 1 of the Schedule** to the Regulations.

7. *Physical and Land Use Planning (National Physical and Land Use Development Plan) Regulations, 2021*
8. *Physical and Land Use Planning (County Physical and Land Use Development Plan) Regulations, 2021*

- These Regulations govern the preparation of county physical and land use development plans by respective departments within the various county governments.

9. *Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations, 2021*

- These Regulations apply to all local physical and land use development plans that are prepared by various county governments (County Executive Committee Member responsible for land use planning).

- A Physical Development Plan (PDP) is made up of a survey of an area, maps and a description indicating the way land may be used by classifying the area for residential, commercial, industrial and other uses. It is a plan for an urban area.

- The Plan is initiated by the County Executive Committee Member who may outsource the services and is subjected to public participation and comments as well as from various county agencies and Director General of Physical Planning (DGPP). The plan is then commented on by the County Physical and Land Use Planning Consultative Forum (CPLUPC) and then approved by the county assembly.

- Involvement of members of the public and other stakeholders as well as the feedback mechanism, including provision of an appellate mechanism to challenge the inclusion or non-inclusion of comments is useful as it means that various stakeholders have a say in the Plan which guides the kind of developments that may be permitted in an area.

10. *Physical and Land Use Planning (Institutions) Regulations, 2021*

- They provide guidelines and procedures for physical and land use planning institutions established by the Act such as the National, Inter-County and County Physical and Land Use Planning Consultative Forums.

11. *Physical and Land Use Planning (Building) Regulations, 2021*

- The purpose of these Regulations is to provide for the procedures, standards and forms for carrying out development control applications and processes, and the regulation of physical planning and land use in respect of buildings.

- Part II of the Regulations provide for building plans that must be submitted to the planning authorities before an applicant may obtain a development permission for erecting or altering a building.

- Regulation 5(2) provides that an application for a housing estate shall provide for a **tree cover of at least five per cent of the total land area** of the housing estate intended to be developed.

- Regulation 18(2) provides that every building shall be provided with adequate access to persons living with disabilities. The Regulations however seem to overly focus on mobility disabilities to the exclusion of other forms of disabilities such as sight and hearing. In addition, the significant responsibility placed on the private sector may serve to distort property markets and lead to increase in costs of housing.
-
- Regulation 25 provides that **every building shall provide adequate access to persons with disability, and at least one parking space for every five hundred square metres or one per cent of the available car parking spaces whichever is higher**, shall be reserved for persons with disabilities, and the parking should be accessible through a lift or a wheel chair access ramp.

- Regulation 26 provides that **buildings shall not discriminate against pedestrians and cyclists and that every building shall have footpaths that are well-maintained and connected and bicycle parking for bicycles**. Further, a developer may be required to provide access for pedestrian access of not less than two metres wide through the development and may be compensated with additional floor area above the permitted building height.

- Regulation 27 stipulates that **no developments shall be permitted where there is no provision of soft and hard infrastructure** save where the developer makes provisions for such infrastructural services.

12. *Physical and Land Use Planning (Liaison Committees) Regulations, 2021*

- These Regulations were passed to enable the constitution of National and County Physical and Land Use Liaison Committees whose functions under section 78 of the Act include to: hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county; hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county; advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and to hear appeals with respect to enforcement notices.

- Some counties experienced delays in establishing their liaison committees partly as a result of the regulations having not been passed. The Act at section 93 had however contemplated this situation by providing that disputes would be heard by the Environment and Land Court until such committees have been set up and as held by the court in the case of Nyeri county in ***Depar Limited v County Executive Committee Member for Lands, Physical Planning, Housing and Urbanization & another*** **[2021] eKLR,** paras 15 and 16.

13. *The Physical and Land Use Planning (Development Permission and Control) (General) Regulations, 2021*

- The Regulations were published vide Legal Notice No. 253 of 2021 in November 2021. These Regulations replaced the Physical Planning (Building and Development Control) Rules, 1998 and the Physical Planning (Application for development permission) Regulations, 1998.
- The object of the Regulations is to provide for the procedures and standards for development control and the regulation of physical planning and land use.
- Part II of the Regulations provide for the process and procedure for change and extension of user.
- Part III provides for extension of lease and renewal of leases.
- Part IV details the subdivision and amalgamation process and procedures.
- Part V contains provisions on the utilization, standards and management of easements, wayleaves and riparian reserves.[16]
- Part VI provides the procedure and requirements for submission of development applications while Part VII provides for processing of such development applications.
- Part VIII provides for performance conditions, monitoring and inspections.
- The Regulations also provide for the various Forms that are used in the various processes as set out in the Schedules.

14. *County Spatial Planning Guidelines, 2018*

- The Ministry of Lands and Council of Governors (CoG) developed the Guidelines to guide county governments in legislating on planning (development of County Spatial Plans) and to enhance the capacity of counties in planning. The Guidelines are applicable throughout the country in provision of spatial planning services and are a tool for organizing the planning system in all counties, and for preparation and implementation of plans.

- The Guidelines were made pursuant to Sections 21 and 22 of Part I of the Fourth Schedule to the Constitution which charge the national government with the responsibility of formulating

[16] Section 14 c states: for the Indian Ocean, a riparian reserve of three hundred metres as measured from the highest water mark shall be maintained; - it would therefore appear that most of the hotels along the beach front are in breach of this regulation. Whether it is the right riparian reserve should be benchmarked against other jurisdictions. For example, the riparian in Mauritius is much smaller.

general principles of land use planning and coordination of planning by counties as well as capacity building.

- The Guidelines will help county governments in complying with the functions charged under section 8 of Part II of the Fourth Schedule of the Constitution of county planning and development.

15. Nairobi City Development Ordinances and Zones Guidelines 2004

- These are the zoning guidelines for Nairobi City County. It provides for guidelines in up to 24 zones in Nairobi.

- It covers all areas of Nairobi City County (and some neighbouring areas in adjacent counties) and provides for what zones they are in. Each zone has its own delineated acceptable plot size and ground coverage ratio of buildings-dependent on the acceptable population density, land use and infrastructure in the area.

- These guidelines are very relevant as they determine the kind of housing developments that are acceptable in any particular area and which will be granted approval.

- Given the changes over time since their development as well as the increase in population in Nairobi (nearing 5 million people), there is now urgent need to review the guidelines or undertake rezoning to free more land and relax building restrictions.

- Nairobi City county government is currently seeking to rezone areas within its jurisdiction by relaxing the existing restrictions and allowing for more buildings and high-rise buildings, in a bid to accommodate the increasing population. This is bound to open exclusive and high-end estates by making them high-density zones with high rise buildings. While this is likely to lower the price of houses in these estates thereby promoting their affordability, the same will also result into an escalation of land prices in those areas given that such land will have more commercial value by virtue of being able to accommodate more houses than is currently the case.

- The move towards rezoning the capital and move away from the current Nairobi County Development Ordinance and Guidelines, and accord with the Nairobi Integrated Urban Development Master Plan developed in 2014, must however consider the existing infrastructure such as improving sewerage systems, storm water drainage, upgrading water infrastructure, and building and extending new roads to deal with traffic to ensure that the changes will accommodate the increased population. In addition, the rezoning must be broad-based and engage members of the public in an extensive stakeholder consultation not only because it is a constitutional imperative, but because the same involves extensive changes to the estate, affects the value of prices of land and houses/estates. Recent attempts to change

zoning and land use in high end estates has already been met with opposition from resident associations, with some moving to court to block various efforts and developments.[17]

16. *Nairobi Integrated Urban Development Master Plan (2014-2030)*

- The master plan is the current development blueprint for Nairobi City County that guides urban planning and development of infrastructure. It incorporates all existing master plans of various infrastructure including urban transport, sewage, power, telecommunication and solid waste management. The Plan further provides for different land uses in Nairobi to include: residential, commercial, industrial, institutional, recreational, transportation, agricultural and public utilities. The residential use is further divided into four categories: high income (low density); middle income (medium density); low income (high density); and informal settlements.

- The Plan is the first major plan since the Nairobi Metropolitan Growth Strategy of 1973. There was a Rezoning Policy of 1979. The first was the Master Plan Study of 1948.

- The current Plan was developed in view of the failure of the old plans and the need to create a livable city which overcome the identified challenges such as insufficient infrastructure, low supply of low- and middle-income housing, and inadequate coordination between relevant organizations, uncontrolled urban development and transport problems.

- The Plan notes that the 'existing regulation in the development ordinance should be revised to change land use. The revision should convert some of non-residential land use to residential use, and also to increase plot ratio in order to promote higher population density and accommodate the future population.'[18] It consequently seeks to alter the land use zoning and plot ratios in areas earmarked for development to allow developers to build office blocks in high-end estates and also proposes to demolish old estates in Eastlands to create way for construction of high-rise buildings that can accommodate more people.

17. *Physical Planning Handbook 2008*

- This is a handbook or guidance developed with the objective of operationalizing the Physical Planning Act 1996 (Cap 286) (Now repealed) and to develop a comprehensive land use planning guidelines and standards. It is a tool that is a useful guide for professionals (planners) in the land use and physical planning space as it details the processes and procedures to be followed when obtaining the various development permissions and approvals. The handbook also contains gazetted rules and regulations applicable in the sector.

- However, the current handbook has now been overtaken by events to a significant extent given the changed regulatory regime. In particular, the Constitution of Kenya 2010 introduced devolution (county governments in place of the earlier local authorities/governments) which

[17] Peter Leftie, 'Tribunal blocks new houses in Lavington over pollution' (Daily Nation, December 16, 2016) <https://nation.africa/kenya/counties/nairobi/Tribunal-stops-developer-from-building-houses-in-Lavington/1954174-3488916-view-asAMP-10a5tdl/index.html > accessed 20 June 2022.

[18] Page 11.

were charged with physical planning. The Physical and Land Use Planning Act 2019 also repealed the Physical Planning Act 1996, upon which the handbook is largely based.

- The handbook refers to many old statutes which have since been repealed and/or amended. There has also been a litany of regulations ever since, which means that the handbook needs to be updated to reflect the new changes and thus continue being a useful tool for professionals and stakeholders in the planning sector.

- The Ministry of Lands and Physical Planning developed a Concept Paper for the Formulation of the Physical and Land Use Planning Handbook in July 2020 to inform preparation of an updated handbook.

18. *Sessional Paper No. 10 of 2014 on The National Environment Policy*

- The purpose of the policy is to provide a framework for an integrated approach to planning and sustainable management of Kenya's environment and natural resources.

- One of the policy statements under the land section is the promotion of high rise building as an efficient land utilisation practice.

- Under the section on human settlements, the policy recognises the need to ensure people live in healthy, dignified conditions with easy access to amenities and provides for various policy statements in this regard including to: Develop and implement an Integrated Housing Policy and Housing Master Plan that takes into account environmental considerations; Develop and enforce integrated land use planning at all levels; and develop and promote a policy on eco-settlement centres including informal settlements.

19. *Urban Areas and Cities Act, No. 13 of 2011*

- The Act provides for classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents.

- County governments are bound to comply with the National Urban Development Policy in implementing provisions of the Act.

- Section 5 provides the criteria for classifying an area as a city. This criterion is further detailed in the First Schedule to the Act. Employing this criteria, Nakuru town was granted a charter as a city. This is bound to lead to improved infrastructure.

- Section 9 provides the criteria for conferring a town a municipal status by a county governor. On the other hand, section 10 sets out the criteria for eligibility for grant of a town status.

- Part III of the Act provides for governance and management of urban areas and cities. This includes the principles for governance as well as the governance structures such as municipal and city boards, city or municipal managers, town administrators.

- Section 22 provides for citizen fora whereby residents of a city, municipality or a town may deliberate and make proposals to a relevant body on provision of services; proposed national policies and legislation; proposed issues for inclusion in county policies; proposed development plans of county and national government and any other matter of concern to them. A board is obliged to make recommendations on the manner of implementation of issues raised at such a citizen forum with a manager reporting on the decision made in respect of each representation or petition. This provision for citizen participation is crucial as it enables direct input of citizens into physical planning and development of their localities. Further details on citizen participation are set out in the Second Schedule to the Act.

- Part IV of the Act relates to delivery of services which delivery is vested on a board on behalf of the county government.

- Under section 32, a city or municipal board may establish operational sectors and service delivery entities with the approval of the county executive committee for carrying out of functions and delivery of services within its area of jurisdiction.
- Under section 33, such boards may **enter partnership with a utility company** either within or outside the county or internationally for the **provision of social infrastructural services**, in consultation with county governor and with the approval of the county assembly. For efficient service delivery, cities and municipalities may jointly provide **cross-city and cross-municipality services and may, in that regard jointly finance the services.** A board may, where it is of the opinion that a private sector entity is best able to provide a service, and with the approval of the county assembly, **contract a private entity** for purposes of delivering the services within its area of jurisdiction. This is an area that needs to be taken advantage of in many urban areas/towns given the lack of social infrastructure to enable proper housing. Section 35 provides a safeguard by allowing residents to raise objections to any such partnership or joint venture.

- Section 36 provides that every city or municipality shall operate within the framework of integrated development planning which shall give effect to the development of urban areas and cities. The integrated city or urban development plan shall also be the basis for preparation of environmental management plans; the preparation of valuation rolls for property taxation; provision of physical and social infrastructure and transportation; preparation of annual strategic plans for a city or municipality; disaster preparedness and response; overall delivery of service including provision of water, electricity, health, telecommunications and solid waste management; and the preparation of a geographic information system for a city or municipality; and basis for development control. Such plans bind, guide and inform all planning development and decisions and ensure comprehensive inclusion of all functions.

- Section 36(3) provides that a county government shall initiate an urban planning process for every settlement with a population of at least two thousand residents. It is not entirely clear whether county governments have engaged in this process.

- Section 37 requires these plans to be aligned to the development plans and strategies of the county governments.

- Section 38 provides that every city or urban area shall prepare an integrated city or urban area development plan in accordance with the Third Schedule to the Act. The contents of such plans are further articulated under section 40 of the Act. It is not clear that the various urban areas in the country have prepared these plans, which form the basis for orderly physical developments including housing.

- Section 41 requires the municipal/city manager or the town administrator to submit to the executive committee, a copy of the integrated development plan as adopted by the board or committee within twenty-one days of the adoption or amendment. The submitted plan should be accompanied by a summary of the process of its formulation plan provided under this Part; and a statement that the process has been complied with, together with any explanations that may be necessary to clarify the statement. The county executive committee must within 30 days of receipt consider the plan and make recommendations and submit the said plan to the county assembly for approval.

- Section 42 requires the city or municipal board to review its integrated development plan every year to assess its performance and amend where necessary.

20. Physical Planners Registration Act, No. 3 of 1996

- This statute seeks to provide for registration of physical planners.

- Section 3 establishes the Physical Planners Registration Board which is responsible for regulating the activities and conduct of registered physical planners. The Board also sets and conducts examinations for purposes of registration of members; verifies qualifications and eligibility of persons seeking registration; and enquires into professional misconduct of members and institutes disciplinary action.

- Sections 6, 7 and 8 provide for issuance of certificate of registration for registered planners and publication of a register containing the members.

21. *Export Processing Zones Act, 1990 (Cap 517*)

- The purpose of the Act is to provide for the establishment of export processing zones and the Export Processing Zones Authority; to provide for the promotion and facilitation of export-oriented investments and the development of enabling environment for such investment.
- Section 9(2) of the Act provides that the Export Processing Zones Authority may act as a "one-stop" centre through which the export processing zone enterprises can channel all their applications for permits and facilities not handled directly by the Authority; and process

building plans and issue relevant approvals in consultation with the Ministry responsible for physical planning and other relevant authorities. This is likely to expedite the processes for planning approvals especially if affordable housing units are being put up by an export processing zone enterprise.

22. Investment Promotion Act, No. 6 of 2004

- The purpose of the law is to promote and facilitate investment by assisting investors in obtaining the licences necessary to invest and by providing other assistance and incentives and for related purposes.
- The Act provides for establishment of the Kenya Investment Authority (KenInvest) which is a critical agency whose mission is promote and facilitate domestic and foreign investment in Kenya by advocating for a conducive investment climate, providing accurate information and offering quality services for a prosperous Nation. Importantly, the Authority has provided for crucial information on the investment climate in Kenya including setting out key procedures, regulations and requirements for investing in different areas of the economy on its website.
- Section 4 of the Act and Part III of The Second Schedule provides for licences to which a holder of an investment certificate may be entitled to as including: development permission and certificate of compliance in line with the physical planning law. This means that holders of investment certificate by the Kenya Investment Authority may enjoy expedited approvals by being issued with development permissions and certificates of compliance. The Authority is also in charge of determining the investment criteria and investment thresholds for the businesses in the special economic zone and maintains records of the enterprises and residents operating in each zone.

23. Special Economic Zones Act, No. 16 of 2015

- The law seeks to provide for the establishment of special economic zones; promotion and facilitation of global and local investors; the development and management of enabling environment for such investments.

24. Nairobi City County Regularization of Development Act No. 3 of 2015

- The law seeks to bring all unauthorised developments under the umbrella of planning framework and to provide basic facilities and infrastructure to residents of concerned areas in the County; provides for regularisation of unauthorised developments commenced or completed before the date of commencement of the Act; provides for regularisation of unauthorised developments that fall within the required set-off specified in any law governing buildings; and provides for appointment of a regularisation advisory committee.

25. Nairobi City County Community and Neighbourhood Associations Engagement No. 4 of 2016

- The purpose of the law is to give statutory recognition to community and neighbourhood initiatives to complement county government efforts in delivering essential services such as security, waste management, water and sanitation, among others.
- Section 6 of the Act provides for recognition agreements between neighbourhood associations and county governments for various functions including: mobilization of members to pay rates and other fees to the county government; monitor compliance with

county planning regulations and zoning requirements in respect of the neighbourhood. Under section 7 these associations may consult with county government in delineation of zones.

ANNEX D: LAWS GOVERNING CONSTRUCTION AND MAINTENANCE

1.*Local Government (Adoptive ByLaws) Building Order, 1968 and The Local Government (Adoptive By-Laws) (Grade II Building) Order 1968* *or "National Building* Code 1968"

- The Local Government (Adoptive By-Laws) Building Order, 1968, popularly known as the National Building Code, was promulgated in the year 1968 vide Legal Notice No. 15 of 1968 following the enactment of the Local Government Act (now repealed) and provides the minimum building standards required of developers to ensure safety and appropriateness of buildings.

- The Code also gives specifications for *inter alia* siting buildings, foundations, building materials to be used and specifications on walls and foundations.

- This Code was preceded by the first by-laws introduced in 1926 during the colonial administration and which applied to the then Nairobi Town Council. The by-laws were revised in 1948 to become the Nairobi Council Building by-laws that also covered zoning and town planning requirements.

- The 1968 Building Code was and still is a replica of the then British Building Regulations and was based on the British Standard Codes of Practice as set out under sections 32, 35 and 36 of the Code.

- The Code was given its enforcement powers by the Local Government Act (now repealed), largely being enforced by local authorities (the precursor to county governments).

- However, following the repeal of the Local Government Act in 2012 and the enactment of the County Government Act (pursuant to the devolved form of governance introduced by the Constitution of Kenya 2010), there arose a regulatory vacuum (lack of legal clarity) on the enforceability of the Code. There does not appear to be guidelines as to where the Building Code is anchored upon. This notwithstanding, the Code has remained the reference point for building professionals, at least in an informal sense.

- Given this lack of legal clarity, the need to modernize the Code (given it is over 50 years old), recent changes that have occurred in building technologies and materials, sustainability imperatives among other considerations. The 1968 Code adopted from Britain is obsolete considering new building trends and complex construction technologies. A draft National Building Code 2022 is currently undergoing stakeholder validation and may soon come into force.

- The Code does not provide for or recognize new technologies and trends including energy efficiency, decommissioning of condemned or substandard buildings and environmental concerns.

- The Code also lacks provisions on building maintenance which has been cited as a cause of building failures.

2. *Draft National Building Code, 2022*

- This Code was made by the Cabinet Secretary in consultation with the National Construction Authority Board as provided for under section 42(2) (aa) of the NCA Act 2011. It seeks to repeal and replace the 1968 Building Code which is now considered obsolete as it does not consider developments that have occurred in the construction industry including green buildings, new cheaper and stronger construction materials and new construction technologies, among others. The purpose of the Code is to promote order and safety in construction works, and the health and safety of persons in or about construction works. The National Construction Authority will be the enforcer of the Code.

- The Code is meant to be effective **one year** after publication. As of May 2022, the Code was undergoing stakeholder consultation before approval and subsequent tabling in Parliament for ratification/approval.

- Section 5 of the Code provides that a person shall not engage in construction works without complying with the Code. Also, one who owns or occupies a building shall comply with the Code. It further provides that a person who intends to undertake any construction works shall obtain: (a) a **development permission** in accordance with the Physical and Land Use Planning Act, 2019; No. 8 of 1999; (b) an **environmental impact assessment licence** issued in accordance with the Environmental Management and Coordination Act, 1999; (c) a **compliance certificate** issued in accordance with the Act; and (d) any other applicable approval.
- Section 6 states that preparation of the design and supervision of the works in a building shall only be undertaken by a registered and licensed professional including a physical planner, architect, engineer, land surveyor, building surveyor and quantity surveyor duly registered under the relevant law.

- Part II provides for siting and space about buildings that are acceptable. Section 7 provides that an owner engaging in construction works shall comply with the conditions as may be imposed by the approving authority regarding the siting, size, height, shape and appearance of the building to safeguard, maintain or impose the dignity or preserve the amenity and general appearance of a road, square, public place. Section 9 provides that an owner engaging in construction works on a plot shall ensure that the plot has at least one access from a road. Further, an owner shall develop and maintain the frontage of the building and a building shall not have a frontage abutting on to a road of a width of less than 10m. An owner must not erect a building on a plot with a frontage to a road that is a sanitary lane or passage. Section 14 provides that a plot in which a residential building is constructed shall have an open space at the rear, or partly rear and at the side, of the building and a building shall not be erected within 1.5m of the rear boundary and at least 1.5m from the side boundary which space shall be counted as part of the open space. Section 20 provides where a building contains more than one dwelling and is designed to have an internal courtyard or open space, there shall be in the courtyard or open space, an area free from obstruction of at least 35m2 which has a dimension of at least 4.5m.

- Part III provides for parking spaces or requirements. Section 46 provides that there shall be 1 parking space off the road for residents; and 1 parking space off the road for visitors.

- Part IV contains provisions on preparation of construction sites including preparation of plot, cleaning of construction site, facilities at a construction site such as: (a) sanitary facilities for the use of the personnel on the site; (b) for the disposal of drainage into a public drain or sewer where a drain or sewer exists on or near a site; and (c) changing rooms for the use of the construction workers on the plot. It provides that before the erection, alteration, scaffolding or demolition of a building, the owner of the plot on which the building is located shall erect a fence, hoarding or barricade, to prevent the public from entering the plot and to protect the public from the activities on the plot.

- Part V provides for building materials and used material. It provides that a person shall not use or permit to be used, in any construction works, any material which is not— (a) of a suitable nature and quality for the purpose for which it is used; (b) adequately mixed or prepared for the functions for which it is designed; or (c) applied, used or fixed in such a manner as to adequately perform the functions for which it was designed. It provides that all materials shall conform to the standards and codes of practice developed under the Standards Act (Cap 496). Section 61 of the Code prohibits the use of second-hand materials in construction. This ought to be reconsidered given the limited resources and the need to be environmentally conscious.

- Part VI provides for elements of structural design of buildings including structural materials, design and requirements. The Code provides that every building, structural element or component of a building and an incidental structure shall be designed to be safe and serviceable, and the design shall have adequate structural resistance, serviceability, durability and reliability.

- Part VII provides for acceptable spaces within buildings including space requirements for room or space within a building, plan dimensions, room height, protection of opening, distance from staircase, swimming pool, among others. A room or space within a building shall have the dimensions that will ensure that the room or space is fit for the purpose for which it is intended. A habitable room shall be a dwelling room which has a minimum superficial area of 7.0m2 for a single room occupancy and a minimum internal dimension of 2.1m. (3) The number of persons to be accommodated in a habitable room shall be determined based on 3.5m2 per person. (4) A residential building, and a part of a residential building which is intended to be separately let for dwelling purposes, shall have a kitchen and sanitary facility.

- Part VIII provides requirements for floors, construction of floor, and timber floor. It provides that floors be strong enough to safely support its own weight and any load to which it is likely to be subjected; and have a fire resistance appropriate to its use and where required, be non-combustible.

- Part IX speaks of walls including structural strength and stability, roof fixing, wall dimensions, fire resistance and columns and piers in walls among others.

Part X provides for lighting and ventilation including artificial lighting and ventilation, windows, natural lighting, energy efficiency and thermal comfort, among others. It provides that a room shall have a means of lighting and ventilation which shall enable the room to be used for the purpose for which the room is designed without detriment to the health or safety or causing nuisance. A residential building shall have a means of ventilation and shall have windows that are positioned to directly open to the external air. All roof spaces shall be adequately ventilated. Section 161 provides that an owner designing a building may conform to the sustainable design strategies derived from independent green building certification organizations.

- Part XI contains provisions on glazing and cladding by providing that materials used in glazing building shall be secure and durable and fixed in such a manner to ensure its capacity can sustain wind loads and not allow penetration of water to interiors of a building.

- Part XII provides for staircases, lifts and escalators. The Code provides that a building which exceeds one storey in height shall have at least one staircase to access the upper floors. The main staircase of a building which exceeds four storeys in height, shall be continued to the roof of the building unless a staircase for use as a fire escape is provided. Where an owner installs an escalator in a building, the owner shall ensure that a staircase is also constructed in the building. A building comprising at least six storeys above ground level shall have at least one passenger lift. (This is a revision from previous regulations that allowed five stories above ground without a lift).

- Part XIII provides for roofing and stipulates that roofing structure design shall be prepared by a civil engineer or an architect. A roof must be constructed in a way that it is durable and waterproof, capable of resisting any force it is likely to be subjected to, prevents accumulation of rainwater on the surface and provides adequate height.
- Part XIV provides for water management, water services, drainage, water disposal and storm water drainage. It requires provision of rainwater harvesting in all construction works as well as drainage installation.

- Part XV speaks to electrical installations.

- Part XVI contains provisions on landscaping design considerations. It provides that an owner must provide for a landscaped area whose design shall be prepared by an architect.

- Part XVII provides for inspection and maintenance including periodic inspection of buildings. It requires the inspection of a building to be conducted every five years following completion of such building.

- Part XVIII provides for a non-water borne waste disposal. It provides that a person shall not construct a pit latrine in an urban area unless approved by the approving authority.

- Part XIX provides for refuse disposal by providing that every building shall have an approved means of refuse storage and disposal with the area designated for such disposal located in such a way that it can be accessed from a road for the purpose of removing the refuse.

- Part XX contains for provisions in buildings to cater for persons living with disabilities. It provides that a building shall be designed in a manner that facilitates access to the building, and to the use of its facilities, by a person living with a disability. It provides that access for a person living with a disability shall be provided from a point on the plot boundary to at least one entrance, and such access shall not have a step, kerb (other than a dropped kerb), steep ramp, door or doorway which would impede the passage of a wheelchair, or other form of barrier which would prevent access by a person living with a disability. It requires for provision of a ramp where there is a change in the level other than when the change in the level is served by a lift.

- Part XXI contains provisions on fire safety and fire installations. It provides that a building shall be designed, constructed and equipped in a manner that ensures that in case of a fire: protection of occupants as well as their safe evacuation is assured; the spread and intensity of fire is minimized; sufficient stability is retained to ensure it does not affect other buildings.

- Part XXII provides for demolition of buildings.

- Part XXIII provides for disaster risk management on construction sites. There must be firefighting equipment at a construction site, as well as a suitable and sufficient safe access to a place of construction works or another place provided for the safe use of a person while at the construction works.

- Part XXIV provides for access roads, *cul-de sacs* and other private roads. A private road or cul-de-sac shall be accessible from an existing road or another new road and shall have a footpath of a width of at least 2 metres on either side. It further provides that all roads shall have a safe cyclist lane and designated parking spaces and footpaths must be protected to prevent vehicles from entering there. It provides that they shall have channels, drains and sewers for the carriage of rainwater and surface water to a storm water drain.

- While there are many progressive provisions in the Code, a departure from the current outdated Code, there are also areas that the new Code can improve upon.

  For instance, there is need to revise the provision prohibiting the use of second-hand materials in construction given environmental imperatives (need for green buildings) as well as limited resources.

- The Code should also recognize and provide for a wide array of professionals in the sector beyond architects and engineers to include emerging professionals such as landscapers and project managers.

- County governments also seem to lack the capacity to implement the Code. Accordingly, there is need for more capacity building on the part of counties both in terms of additional staff, training of staff and additional technical resources. Consideration can be given to leveraging resources from private sector to strengthen the capacity for plan reviews and inspections and implementing the Code.

3. *National Construction Authority Act, No. 41 of 2011*

- The Act provides for the establishment and powers of the National Construction Authority (NCA), established under section 3 of the Act, which is the authority in charge of overseeing and coordinating the construction industry (section 5) and supervising all construction works in Kenya.

- Other statutory functions of the NCA under section 5(2) are to: promote and stimulate the development, improvement and expansion of the construction industry; advise and make recommendations to the Minister on matters affecting or connected with the construction industry; undertake or commission research into any matter relating to the construction industry; prescribe the qualifications or other attributes required for registration as a contractor under this Act; assist in the exportation of construction services connected to the construction industry; provide consultancy and advisory services with respect to the construction industry; promote and ensure quality assurance in the construction industry; enforce the prescribed Building Code in the construction industry; encourage the standardization and improvement of construction techniques and materials; initiate and maintain a construction industry information system; provide, promote, review and co-ordinate training programmes organized by public and private accredited training centers for skilled construction workers and construction site supervisors; accredit and register contractors and regulate their professional undertakings; accredit and certify skilled construction workers and construction site supervisors; and develop and publish a code of conduct for the construction industry.

- Section 6 of the Act confers various powers on the NCA including imposing fees or any other charges as it deems fit in respect of any of its functions or powers; and facilitating, or promoting the establishment or expansion of, companies, corporations or other bodies to carry on any activities related to construction either under the control or partial control of the Authority or independently, both with the approval of the Minister.

- Section 15 of the Act provides for registration of contractors (both local and foreign ones) by prohibiting any person from carrying on the business of a contractor without being registered with the NCA Board under sections 17 and 18. It is an offence to carry on such business without registration. Importantly, contractors interested in undertaking works under select specialist subclasses such as electrical installations and telecommunication cabling also require licenses from the Communications Authority of Kenya (CA) and Energy and Petroleum Regulatory Authority (EPRA). The Registrar of NCA keeps and publishes the list of registered contractors for public information under section 19.

- There are 8 categories/classes of contractors (NCA 1-8) depending on the complexity and value of a project to carry out classes of works set out in the Third Schedule to the Act. The classification and licensing is usually dependent on meeting the set evaluation criteria for contractors.

- A contractor is defined under section 16 to mean a person who for a valuable consideration undertakes the construction, installation or erection, for any other person, of any structure situated below, on or above the ground, or other work connected therewith, or the execution, for any other person, of any alteration or otherwise to any structure or other work connected therewith and undertakes to supply the materials or the labour necessary for the work. The Act, however, allows the NCA board to set a cost below which a person involved will not be deemed to be a contractor. Where the work undertaken comprises of a residential house for private use which does not require a structural design, the person involved is not deemed as a contractor.

- Section 22 allows the NCA board to institute an inquiry into the conduct of a contractor either on its own initiative or upon lodging of a complaint on allegations of unprofessional conduct.

- Section 23A of the Act provides that NCA shall undertake mandatory inspections at any time on sites under construction. In performing this role, NCA employs investigating officers appointed by the board under section 23 and who have power, at all reasonable times, to enter any construction site where construction works are being carried out and make such enquiry or inspection as may be necessary. The investigating officers may require production of certain records, or put questions concerning the registration of any contract, the accreditation and certification of the skilled construction workers and construction site supervisors or the payment of levy. Such officers have powers to suspend all or any part of the works in respect of which the provisions of the Act have not been complied with until the time of such compliance. This provision was introduced through amendments to the Act in 2020.

- Section 31 of the Act provides that the Minister may through a notice in the Gazette impose a construction levy on construction work carried out by registered contractors, which levy shall not be in an amount exceeding an equivalent of **0.5% of the value of any contract value whose value exceeds five million shillings**. Pursuant to the power to impose fees and charges, there was introduced a construction levy charged at the flat rate of 0.5% of contract value for projects whose value is above five million shillings that were commenced after 6th June 2014. The levy was later scrapped effective 1 January 2017 to lower construction costs and promote affordable housing agenda.[19] However, NCA is now planning to reinstate the levy once more, following a decline in revenues to fund its operations.[20]

[19] Business Daily, 'Cabinet scraps all construction levies to ease home costs' (Business Daily, November 22, 2016) <https://www.businessdailyafrica.com/bd/economy/cabinet-scraps-all-construction-levies-to-ease-home-costs-2132086 >

[20] Brian Ngugi, 'Construction regulator backs return of building levy' (Business Daily, June 09, 2022) <https://www.businessdailyafrica.com/bd/economy/construction-regulator-backs-return-of-building-levy-3842710 >

- Section 42 generally empowers the Minister to make regulations to govern various issues including: the Building Code in the construction industry; the manner of conducting mandatory inspections by the Authority; the fees and charges to be paid in respect of any matter; and the manner and forms of accreditation and certification of contractors, skilled construction workers and construction site supervisors; among other issues.

4. *National Construction Authority Regulations, 2014*

- The Regulations were published in the Gazette Notice on 6 June 2014 vide Legal Notice No. 74 of 2014.

- Part II of the Regulations provide details on the process of registration of contractors. Regulation 5 provides that a person who qualifies for registration shall be issued with a Certificate for Registration issued by NCA.

- Regulation 6 provides that exempts skilled construction workers or construction site supervisors carrying out construction works specified in the proviso to section 16(1) of the Act from registration as a contractor.

- Under regulation 9, foreign contractors are only limited to category one (NCA 1) which are issued to contractors with the largest capacity and who can perform contracts of unlimited value. The other 7 categories (NCA 2-8) are restricted to local contractors.

- Regulation 17 requires all construction works, contracts or projects in both the public and private sector to be registered with the NCA, within 30 days of award of tender for such construction. The NCA is required to register the project, if all is in order, within 30 days of such application for registration. Within 30 days of registration of the project, the owner of the construction works must submit to NCA information relating to issuance of a completion certificate; whether the contract is renewed, or the contract period is extended; whether the contract is terminated or cancelled and whether all payments to the contractor have been settled. Under Regulation 17(8), where there has been initiated arbitration or legal proceedings in relation to construction works the owner must notify the NCA within 30 days of commencement of such proceedings.

- Regulation 18 requires the owner to appoint any representative who is to act as a contact person with NCA for purposes of liaising with NCA on the construction works and inform the NCA whenever such persons cease from acting.

- Part V provides for accreditation and certification of construction workers. Regulation 19 requires the NCA to accredit and certify all construction workers and construction site supervisors that meet the stipulations under regulation 22, which accreditation is valid for 3 years subject to renewal.

- Regulation 25 mirrors section 31 of the Act by imposing a construction levy. Under regulation 26, every owner of a construction project which has a value of above 5 million shillings is required to notify the NCA in a prescribed form for purposes of payment of the levy. The NCA then notifies the owner of the amount of levy payable within 14 days, which levy must be paid before commencement of contract works. A levy remaining unpaid for 3 months is recoverable summarily as a civil debt and entitles the NCA to suspend, cancel or revoke the registration of a contractor.

- Part VII of the regulations provides for enforcement following a complaint or a violation of the Act, regulations or the Code of Conduct. The NCA conducts its own investigations and takes appropriate actions.

5. *NCA Code of Conduct for the Construction Industry, 2020*

- The Code was published vide Gazette Notice No. 2767 of 2020.

- The Code of Conduct provides for general principles, the scope of application, what is deemed as acceptable conduct by parties, general unacceptable conduct, enforcement of the code of conduct, monitoring and evaluation, and review of the code.

- In terms of application, the Code of Conduct binds the regulator, construction consultants, contractors, sub-contractors and their employers and employees, construction site supervisors, skilled construction workers, agents, tenderers and suppliers.

6. *National Construction Authority (Defects Liability) Regulations, 2020* (Not operational)

- The Regulations were published in April 2020 vide Legal Notice No. 64 of 2020.

- The Regulations would ideally form part of the maintenance value chain as they sought to impose responsibility and liability on contractor and all the other professionals (such as engineers, architects) involved in a project in case of defects in the building within the Defects Liability Period. The Defects Liability Period commences upon issuance of a Certificate of Completion by the relevant county government. A patent defects liability period, where a patent defect is one that can be identified upon reasonable inspection during the construction period commences from issuance of certificate of completion for at least 12 months. A latent defects liability period, where a latent defect is a structural flaw that is hidden or not readily detectible during the defects liability period, is a minimum of 6 years following completion of the patents defects liability period.

- These defects liability periods set by the Regulations are at odds with standard form construction contracts in the industry in Kenya which leave the issue to contracting parties to agree. An example of a common standard form construction contract is the Agreement and

Conditions of Contract for Building Works of 1999 (the 'Joint Building Council' (JBC) '1999') published by the Joint Building Council of Kenya in 1999 (The Green Book). Accordingly, the Regulations would require a review of the standard construction contacts, sale agreements, leases and provision of warranties for purchasers. Buyers would be able to maintain a legal action against contractors and professionals involved, even following the exit of the seller/developer. The inclusion of professionals in the joint liability would also increase the costs of construction as they would have to take this risk into consideration and potentially seek to increase their professional indemnity cover in anticipation of such material risks.

- Notably however, the Regulations were only meant to cover commercial buildings, which are defined as premises occupied wholly or partially for trade, business or for rendering services for money or its worth. This means that residential buildings/houses, which form the domain of affordable housing, are not covered or included and thus not affected.

- Further, various stakeholders had raised concerns that they had not been consulted in the development of the Regulations. Accordingly, the stakeholders moved to court challenging the publication of the Regulations, and the Regulations were recently quashed in April 2022 by the High Court in ***Republic v National Construction Authority & 2 others; Joint Building and Construction Council (Exparte)*** **(Judicial Review Application E1120 of 2020) [2022] KEHC 333 (KLR)** for lack of consultation with the NCA Board and consideration of all submitted views and the fact that the Regulations were not tabled in parliament for approval as required by the Act. Accordingly, they are currently of no legal effect.

- There is need to foster the relationship between the NCA and the county governments to ensure a seamless process. Also need to harmonize the inspection process.

- There are capacity challenges on the part of NCA in terms of skilled workforce to ensure supervision and enforcement.

7. Standards Act, 1974 (Cap 496)

- The statute seeks to promote the standardisation of the specification of commodities, to provide for the standardisation of commodities and codes of practice; to establish the Kenya Bureau of Standards and define its functions and provide for its management and control and other related matters.
- Section 9 of the Act provides that the National Standards Council may prescribe any specification or code of practice prepared by the Kenya Bureau of Standards as a Kenyan standard. Once declared and placed in the Gazette by the Minister, no person is allowed to manufacture or sell any commodity, method or procedure to which the relevant specification or code of practice relates unless it complies with the code or specification. The set standards are usually enforced through market surveillance and product certification. This provision is particularly relevant in the construction sector given that many construction inputs and materials such as stones, steel, cement, glass as well as construction technologies are often prescribed standards that then must be adhered to. This has implications on what construction materials may be employed, and these also have cost implications.

- In regard to the above, the Kenya Bureau of Standards (KEBS) recently developed standards for major construction materials including: 'cement (KS EAS 18-1), steel for the reinforcement of concrete (KS EAS 412-1,2&3), Structural steel for construction (KS 572), Natural Aggregates for Concrete (KS 95), Natural Building Stones (KS 965), Stabilized Soil blocks (1070), Concrete Masonry Units (KS 625), Concrete (KS 594), Factory Made Products of Expanded Polystyrene (EPS)-KS 2620, Clay Roofing Tiles (KS 431), Concrete Roofing Tiles (KS 444), Burnt Clay Bricks (KS 300), among others.'[21]

- KEBS has also developed product, service and technological standards for the construction industry particularly targeting the SMEs and local innovations and manufacturing for continuous conformity assessment (through Quality Assurance, Market Surveillance, Imports and Testing). The standards developed in support of SMEs include: KS 2913: 2020 Plastic composite paving blocks –Specification, KS 2928:2021 Plastic composite roofing tiles – Specification and KS 2620:2019 Structural and thermal products for Building – Factory made products of expanded polystyrene (EPS)-Specification.[22]

- KEBS recently raised an alarm over the use of substandard roofing materials.[23]

- KEBS is currently involved in the process of preparing standards for alternative building/construction materials, which are key for affordable housing given their relative lower costs compared to traditional materials. This needs to be expedited.

- Section 14 of the Act provides for powers of inspectors appointed by the Minister including entering upon any premises to examine the commodities to ascertain whether they comply with the standardization set and take appropriate action including destruction.

8. *Buy Kenya-Build Kenya Strategy 2017*

- The Strategy aims to promote and enhance the competitiveness and consumption of Kenya's own products and services in both absolute figures and as a proportion of the gross domestic product (GDP).

- The Strategy promotes and encourages granting of preferential treatment of locally produced goods and services by the public and private sector as well as the citizens. Where Kenyan products are not competitively priced, this can lead to increased construction costs that are then passed on to end consumers in the form of higher house prices.

[21] Joseph Muia, 'KEBS announces new standards for major construction materials' (Citizen Digital, April 01, 2022) <https://www.citizen.digital/business/kebs-announces-new-standards-for-major-construction-materials-n295635 >
[22] <https://www.kenyaengineer.co.ke/kebs-develops-standards-for-major-construction-materials/ >
[23] <https://www.kenyaengineer.co.ke/kebs-raises-alarm-over-substandard-roofing-products/ >

9. *Sessional Paper No. 1 of 2013 National Building Maintenance Policy for Kenya*

- The Policy document was formulated to ensure the proper maintenance of buildings. Maintenance works have been defined to include 'inspection, testing, planning, organizing, servicing classification to serviceability, repair, refurbishment, re-building, rehabilitation, reclamation, renewal adaptation and setting standards.'

- The policy acknowledges that maintenance of buildings and related infrastructure has been a neglected area in Kenya with maintenance works being done in an *ad hoc* fashion typified by few or no record keeping, low prioritization and low budgeting. This has resulted in sick buildings that are dilapidated and unhealthy, unhealthy and unsafe, decaying built environment and frequent hazards related to buildings.

- It also identified the lack of a comprehensive integrated management framework that sets quantifiable and measurable standards; uncoordinated building maintenance decisions within institutions; lack of building maintenance policy and culture, existence of multiple out dated and conflicting legislations and regulations; relevant legislation being domiciled in different institutions that are given responsibility to ensure compliance; some institutions being unaware of their responsibility and lacking in capacity to enforce compliance; and inadequate maintenance resources such as national building stock, human, financial and tools to carry out, monitor and evaluate maintenance works.

- Accordingly, the policy calls for: establishment of a comprehensive maintenance manual framework for existing and new buildings; development and review of maintenance building manuals for all buildings; development of a dissemination programme to sensitize stakeholders on national and international maintenance standards and guidelines; clarification of division of labour and decentralize maintenance information at the National and County Governments; formulation of maintenance plans, review, harmonization and enactment of maintenance legislation as well as set standards and guidelines for execution of maintenance work; harmonization and centralization of data on building maintenance works.

- In the legal, policy and institutional framework, the Policy provides for the following policy statements: a) Formulate a National Building Maintenance Policy by codifying the many existing policies. b) Review, harmonize, coordinate and consolidate existing fragmented institutional policies. c) Review, harmonize and repeal/ enact legislation on building maintenance to ensure conformity with constitution. d) Establish a body corporate with powers to formulate standards, implement and regularly review policies, legislations and regulations. e) Review and harmonize existing regulations to ensure conformity with emerging technologies and global trends.

- In particular, the laws should provide a time scale for inspection of sanitation, building fabric, services and repair works and define maintenance roles of both parties with clear Dispute Resolution mechanisms.

10. *National Risk Disaster Management Bill 2021*

- The Bill (which is currently in Parliament) seeks to provide a legal framework for managing disaster risks premised on seeking first to respond effectively and in a timely manner to

disasters or disaster risk, to prevent adverse effects of disaster and recover the livelihood of affected communities.

- It seeks to establish an Intergovernmental Council on Disaster Risk Management and a National Disaster Risk Management Authority to ensure coordination of disaster issues at both the national and county level. Also seeks to establish County Disaster Risk Management Committees in each county given the shared nature of the function of disaster management.
- The significance of this Bill is that it fills in a gap that was there as there was no legal framework at the national level on disaster risk management resulting in an uncoordinated and fragmented approach to disaster management whenever disasters occur, including collapse of buildings. This may spur increased demand and supply for housing given the comfort offered to developers and prospective home buyers.

11. *Kenya National Climate Change Response Strategy 2010*

- The Strategy recommends increasing the resilience of urban areas; provides that land use practices should be informed by flood and landslide risk assessments; and further provides that building structures should be designed to withstand strong winds and high temperatures.

12. *Sustainable Waste Management Act 2022*

- This Act was assented into law on 7 July 2022.

- The purpose of the Act is to establish a legal and institutional framework for the sustainable management of waste to ensure the realisation of the constitutional provision on the right to a clean and health environment.

- The Act sets out rights and responsibilities for residents and property owners with respect to solid waste management, and is therefore relevant to both developers, homeowners and landlords.

- The law establishes a Waste Management Council (WMC) under section 6 which will be supported by a management secretariat.

- Section 8 provides that NEMA shall develop standards and guidelines on sustainable waste management and enforce waste management legislation in consultation with county governments, among others.

- Section 9 provides that county governments shall be responsible for implementing the devolved function of waste management and ensure county legislation is in conformity with the Act within one year of coming into operation of the Act. This is an area where county governments will need support in developing their legislation to align with the Act. Other functions of county governments are: to provide central collection centres for materials that can be recycled; establish waste management infrastructure to promote source segregation,

collection, reuse and set up for materials recovery; and maintain data on waste management activities and share the information with NEMA.

- Section 13 imposes the extended producer responsibility by providing that an entity engaged in the production or importation of products and packaging shall bear extended producer responsibility over the products or packaging for the purpose of reducing environmental impacts of the products or packaging. This responsibility includes/entails the design of environmentally friendly products and recyclable products, physical collection and management of waste, and financial contributions to a collective scheme.

- This law which imposes additional waste management responsibilities on developers or management companies may have an impact on housing since the costs of segregating waste and related statutory duties will be passed on to homeowners in the form of service charges.

- It is proposed that segregation should be simplified into 'organic' which can be collected in green bags, and 'dry / non-organic' which can be collected in black bags. This can be standardized across the country and easily scale up efficient waste collection. The only other waste can be medical / hazardous waste, which can be standardised into red bags.

- Overall, there is also need for more aggressive timelines within the Bill within which various institutions are to be set up or regulations/guidelines formulated, especially considering the urgency of the issue. Recycling Facilities are currently at full capacity which means that more players will begin to participate in recycling once this Bill takes effect. For instance, the period of setting up the Waste Management Council can be reduced from the current one year to around 3 or 6 months; the timeline for preparing model guidelines for counties should be within 3 months with counties required to adopt the guidelines within 1 year.

- There is also need to harmonize timelines within the Bill (Clause 10 of the Bill) gives the Cabinet Secretary two years to develop regulations and policies for operationalization of the Act whereas other entities such as NEMA are required to develop their action plans within a year under clause 8(2)); and Clause 11 gives county governments two years after coming into force of the Act to develop county legislation-this needs to be reduced to one year; relatedly clause 17(a) provides that each county government shall enact a county sustainable waste management legislation within a year.

- The provision imposing a duty on private entities of setting up a waste management plan and annual monitoring plan may be unduly burdensome and unnecessarily increase compliance costs thereby disincentivizing investment. In addition, the same may be superfluous and not make economic sense especially for small entities which do not have much waste footprint. Accordingly, there is need to have a threshold of say organizations/entities with more than a maximum defined people daily (suggested more than 1, 000 people only to have to adhere to this obligation).

13. *Forest Conservation and Management Act, No. 34 of 2016*

- This statute was passed in 2016 to repeal and replace the Forests Act No. 3 of 2005 and the Timber Act (Cap 386). It seeks to give effect to Article 69 of the Constitution regarding forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country.

- The Act applies to all forests whether located on public, community or private lands as per section 3 of the Act.

- The Kenya Forest Service (KFS) established under section 7 is empowered with among others, receiving applications for licences and permits in relation to forest resources including wood and timber that is a key construction material.

- Section 37(2) of the Act provides that every county government shall cause **housing estate developers within its jurisdiction to make provision for the establishment of green zones at the rate of at least five percent of the total land area of any housing estate intended to be developed**. This provision means that developers may have to set aside land and incur more costs in creating such green zones equivalent to at least 5 percent of total area under housing development. It is not however apparent that county governments have been demanding this of developers yet as only a few of them have been providing for green zones.

- Under section 46, the Kenya Forest Service must grant consent for quarrying activities or operations including of construction material within a forest area and only in areas where there are no rare or endangered species, forest does not have any cultural importance or contain sacred trees, where an independent Environmental Impact Assessment or audit has been done, and the forest is not an important water catchment area.

- Section 56(2) provides that the Kenya Forest Service may issue authorisations for forestry activities in form of a permit or even a timber licence. Under section 60, no importation or exportation of forest products may be done except with a permit from the Service.

- Section 64 provides for a list of prohibited activities within a public forest that may not be done without a licence which include felling, cutting, taking, burning, injuring or removing any forest produce.
- Section 71 empowers the Cabinet Secretary to formulate Regulations to give effect to the Act including those for: controlling the harvesting, collection, sale of and disposal of forest produce including timber grading and marking; regulating the felling, working and removal of forest produce in areas where trees may be felled or removed; and prescribing the amount of royalties or fees payable under the Act generally or cases. In this regard, there have been published the Forests (Fees and Charges) Rules, 2012 which detail the fees payable for dealing in different kinds of forest produce including different varieties of trees.

14. *Forests (Harvesting) Rules, 2009*

- These Rules were published vide Legal Notice No. 185 of 2009 and apply to commercial harvesting of timber in state forests, provisional forests, registered private forests, and local authority forests.
- Regulation 4 provides that no person may harvest timber in a state forest, provisional forest, a local authority forest or a registered private forest without a valid license except where: the tree has reached the final felling age; for purpose of selection thinning; for sanitary harvesting to remove the sick or dead ones; or reconstruction harvesting to cut down on non-productive ones.
- Regulation 8 even provides for the stump height and top diameter that is accepted before harvesting for both indigenous stock and cultivated plantation.
- The effect of these Rules is to increase the cost of timber by limiting its availability due to restrictions on felling and who can fell trees in forests, yet timber is a crucial construction material.
- Further and in this regard, the Ministry of Environment issued a **moratorium or a ban on logging** in all public and community forests in February 2018 to improve on the tree cover and reach the desired 10% as required by the Constitution.[24] This moratorium is still in place after it was extended and continues to limit supply of timber thereby increasing its cost.[25]
- Recent data indicates that while the ban on logging has helped improve tree coverage in the country, it has had consequences particularly on the construction sector. A study by Kenya Forestry Research Institute (KEFRI) shows that since the ban, **the price of timber increased by 22.7 percent** even though the construction and building industry in Kenya consuming in excess of 8 million cubic metres of timber every year.[26]
- Accordingly, there is need for a review of current licensing of forest logging as well as consideration to be given to lifting the moratorium on logging.
- There is also need to attract private sector players by expediting the approval of the concession policy and subsidiary legislation which will guide concession management framework. In addition, incentive mechanisms should be availed to promote private sector and farmers' investment in commercial tree growing to reduce pressure on public forests and readily provide more timber that may be used in the construction and building industry.
- Additionally, there appears to be competing and potentially conflicting policy objectives where the Government seeks to promote affordable housing agenda while adhering to the constitutional dictate of increasing forest cover. Attention should be devoted into how the two policy objectives can be harmonized through promoting sustainable forestry, instead of total ban on logging.

[24] <http://www.environment.go.ke/wp-content/uploads/2018/11/4048264.pdf > The Government banned timber harvesting in 1999 up to 2012 and then imposed a second moratorium in 2018 to date. There was a partial lifting of the ban on logging in 2021 to allow for harvesting of mature trees.

[25] Barnabas Bii, 'State at a crossroads as logging ban takes a toll on businesses' (Business Daily, August 11, 2021) <https://www.businessdailyafrica.com/bd/data-hub/state-at-a-crossroads-as-logging-toll-on-businesses-3507206 >

[26] J Kagombe, J Kiprop, D Langat, J Cheboiwo, L Wekesa, P Ongugo, MT Mbuvi & N Leley, *Socio-Economic Impact of Forest Harvesting Moratorium in Kenya Technical Report* (KEFRI: Nairobi, June 2020) <https://mahb.stanford.edu/wp-content/uploads/2021/08/FinalReportonSocieconomicImpactsofTimberMoratorium-JUNE2020.pdf >

15. Public Health Act, 1921 (Cap 242)

- Part IX of the Act contains provisions dealing with sanitation and housing.

- Section 115 and 166 of the Act prohibits any nuisance or conditions injurious or dangerous to health on premises owned or occupied by people. The local authority (now, county governments) are charged with taking all lawful, necessary and reasonably practical measures to maintain the areas in clean and sanitary condition and prevent any danger or injury.

- Section 117 of the Act provides that it is the duty of the health authority to prevent or remedy danger to health from unsuitable dwellings. This includes preventing erection or occupation of unhealthy dwellings, erection of dwellings on unhealthy sites or on sites of insufficient extent or overcrowding and to take proceedings against anyone who violates the same. In a sense therefore, the health authorities have authority to prevent construction or occupation of houses if they do not meet the health criteria set out.

- Under section 118 of the Act, the nuisance that must not be there in dwellings or premises is defined to include: vessel, railway carriage or conveyance that is dangerous or injurious to health; dirty or verminous dwelling that are dangerous to health or likely to spread infectious disease; stream, pool, sewer and other bodies that are so foul or in a state or constructed in such a way that they are offensive or injurious to health; any well or water source whether public or private which is polluted or unsafe for human consumption; any dwelling or premises which is so overcrowded as to be injurious or dangerous to the health of the inmates, or is dilapidated or defective in lighting or ventilation, or is not provided with or is so situated that it cannot be provided with sanitary accommodation to the satisfaction of the medical officer of health; any public or other building which is so situated, constructed, used or kept as to be unsafe, or injurious or dangerous to health; any occupied dwelling for which such a proper, sufficient and wholesome water supply is not available within a reasonable distance as under the circumstances it is possible to obtain; among others.

- Section 120 of the Act provides for the procedure in case an owner of a building fails to comply with a health notice issued by a medical officer. Such owner may be issued with summons to appear before a magistrate who may make orders accordingly. Section 120(3) of the Act imposes a fine of no more than Ksh. 200 including costs incurred for the hearing. The fine of Ksh. 200 appears too low as to act as an effective deterrent and is certainly a function of the fact that this law was passed over 100 years ago (in 1921).

- Under section 122 of the Act, the court may order health authority to execute certain works where the owner of the building cannot be found or is not known with the costs of such works being a charge on the property causing the nuisance.

- Section 123 of the Act empowers health authority or any of its officers/medical officer/sanitary inspector on the order of a magistrate or any police officer above the rank of Inspector to enter any building or premises for purposes of examining for any nuisance at all reasonable times.

- Under section 124 of the Act, a court may order an owner of a building to demolish a dwelling or building where it is of the view that a nuisance exists and such dwelling is so dilapidated or so defectively constructed in a manner that alterations or repairs are not likely to make the dwelling fit for human habitation or remove the nuisance.

- Section 125 of the Act gives power to the Medical Department to collect, investigate and publish facts as to any overcrowding or bad or insufficient housing in the various districts (now counties, possibly); to inquire into the best methods of dealing with any overcrowding or bad housing so ascertained to exist; and to make or publish recommendations as may be necessary in respect of the result of any such investigation or inquiry.

- Under section 126 of the Act, the Minister may on the advice of the board make rules and confer powers on local authorities, magistrates and owners as to: inspection of buildings; the construction of buildings, provision of proper lighting and ventilation and prevention of overcrowding; periodical cleansing and treatment of dwellings; and the subdivision and general lay-out of land intended to be used as building sites, the level construction, number, direction and the width of streets and thoroughfares, the limitation of the number of dwellings or other buildings to be erected on such land, the proportion of any building site which may be built upon and the establishment of zones within which different limitations shall apply and of zones within which may be prohibited the establishment or conduct of occupations or trades likely to cause nuisance or annoyance to persons residing in the neighbourhood.

- Section 126A of the Act provides that every municipal council and urban and area council may if so required by the Minister for local government (now Cabinet Secretary for Devolution), make bylaws for: controlling the construction of buildings, and the materials to be used in the construction of buildings; controlling the space about buildings, the lighting and ventilation of buildings and the dimensions of rooms intended for human habitation; controlling the height of buildings, and the height of chimneys (not being separate buildings) above the roof of the buildings of which they form part; prohibiting the erection or use of temporary or movable buildings, whether standing on wheels or otherwise, and for prohibiting or restricting the use of tents or similar buildings for business or dwelling purposes; for requiring and regulating adequate provision for the escape of the occupants of any building in the event of an outbreak of fire; preventing the occupation of a new or altered building until a certificate of the fitness thereof for occupation or habitation has been issued by such local authority; to compel employers to provide housing for their employees; and to compel owners to repair or demolish unsafe dangerous or dilapidated buildings; for regulating sanitary conveniences in connection with buildings, the drainage of buildings (including the means for conveying refuse water and water from roofs and from yards appurtenant to buildings), the cleansing, drainage and paving of courts, yards and open spaces used in connexion with buildings and cesspools, and other means for the reception or disposal of foul matter in connexion with buildings; regulating excavations of any kind in connexion with buildings; regulating wells, tanks and cisterns for the supply of water for human consumption in connexion with buildings; regulating stoves and other fittings in buildings (not being electric stoves or fittings), in so far as by-laws with respect to such matters are required for the purposes of health and the

prevention of fire; regulating private sewers and communications between drains and sewers and between sewers; regulating the erection and use of scaffolding and hoarding during the construction, demolition, repair, alteration or extension of any building; prohibiting, securing the removal of and regulating projections and obstructions in front of buildings, and projections over streets.

- Section 126B empowers a local authority to relax requirement of building by-laws made thereon where it considers the operation of such by-laws to be unreasonable in relation to any case and subject to the consent of the Minister responsible for local government.

- Under section 126C of the Act, the local authority has power to either pass/approve or reject plans of a building depending on whether they are in conformity to by-laws and rules or not.

  Under section 126D of the Act, the local authority has power to require removal or alteration of any works where it is of the view that they are not in compliance with the rules, in addition to taking proceedings against the owner for the contravention.

16. Public Health (Drainage and Latrine) Rules, 1948

- Rule 4 empowers the local authority to enforce drainage of undrained buildings by issuing a written notice to the owner requiring them to make a drain or drains emptying into a sewer belonging to the local authority.

- Rule 6 provides that all new buildings must be drained by providing that no building shall be erected unless a drain or drains have been constructed as may be necessary for the effectual drainage of the building.

- Under rule 7, the local authority may give notice to owner of a building requiring them to provide sink, drains or other necessary appliances to a building where the same are necessary.

- Rule 83 provides that all new buildings must be provided with latrine accommodation by providing that no building shall be erected or occupied without proper and sufficient latrine accommodation so situated as to be conveniently accessible to all persons employed or accommodated therein.

17. Mining Act, No. 12 of 2016

- This is an Act of Parliament that applies to minerals and provides for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals**.** It repealed and replaced the Mining Act, 1940 (Cap 306).

- Section 183 of the Act provides that the holder of a mineral right shall pay royalty to the State in respect of the various mineral classes won by virtue of the mineral right. It is the Cabinet Secretary who is empowered to set the applicable rates payable.

- In this regard, the Ministry of Mining started levying a two per cent royalty on construction materials in 2014, thereby increasing the cost of quarry stones, concrete blocks, hardcore, ballast and sand which are considered as minerals or 'mine waste and tailings' under the Act. Cement, which is a key construction material, is made up of lime, silica, alumina, and magnesia-which are included in the First Schedule to the Act as minerals. Consideration can be given to exempting minerals that either form part of construction materials or are used in the manufacture of construction materials from being liable for royalties to reduce the cost of construction materials for affordable housing, or using the levies collected towards investment in infrastructure or other financing for affordable housing.

18. Persons with Disabilities Act, No. 14 of 2003

- The statute provides for the rights and rehabilitation of persons with disabilities to achieve equalization of opportunities for persons with disabilities.
- Section 21 of the Act provides that persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility. This provision implies that in construction of residential houses, there is an implied obligation to ensure that such houses are barrier-free and facilitate the mobility of persons with physical disabilities.
- There are other stringent requirements that must consider persons with disabilities but they focus on public buildings (or those which ordinarily admit members of the public)-which largely ousts residential houses.

19. Climate Change Act, No. 11 of 2016

- This statute was enacted to provide for a regulatory framework for enhanced response to climate change and to provide for mechanism and measures to achieve low carbon climate development.
- Section 3(2) of the Act provides that the Act shall be applied in all sectors of the economy by national and county governments to: mainstream climate change responses into development planning, decision making and implementation; build resilience and enhance adaptive capacity to the impacts of climate change; promote low carbon technologies, improve efficiency and reduce emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development; and mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; among others.
- Section 13 of the Act requires the Cabinet Secretary responsible for climate change to formulate a National Climate Change Action Plan, which Action Plan shall prescribe measures and mechanisms: to identify strategic areas of national infrastructure requiring climate proofing; to enhance energy conservation, efficiency and use of renewable energy in industrial, commercial, transport, domestic and other uses; for mitigation and adaptation to climate change; to review and recommend duties of public and private bodies on climate change among others.

- Section 13(4) stipulates that the Action Plan shall address all sectors of the economy. In this regard, the Ministry of Environment published the National Climate Change Action Plan 2018-2022 which identified various priority areas that largely reflected the Big Four Agenda of the current administration including affordable housing. One of the priorities in terms of climate actions under the Plan comprises the Health, Sanitation and Human Settlements wherein the Plan calls for climate-resilient solid waste management, and promotion of climate resilient buildings and settlements, including in urban centres, ASALs, and coastal areas.[27] Under the Disaster Risk Management priority area, the Plan urges for reduction of risks that result from climate-related disasters such as droughts and floods to both communities and infrastructure.
- Other policy and regulatory objectives sought to be achieved in the Action Plan by June 2023 that relate to housing include: Development of five county-based waste management plans and regulations that are consistent with the National Waste Solid Management Strategy and other relevant policies; development of a national resettlement policy framework that sets out safeguard mechanisms against involuntary resettlement and forced evictions from homes when land is acquired for development projects; adoption/implementation of alternative approaches to land acquisition, other than compulsory acquisition, where possible; development of a policy for green building and, green building codes and regulations that account for climate information; development of a national framework for waste water management; and enforcement of laws on urban planning and storm water management in urban areas, such as desilting of drainage and, riparian protection.[28] Also, Planning and building control regulations to encourage compact development, mixed use, and reduced provision of parking near MRT stations should be updated and implemented.[29]
- Section 16 of the Act imposes climate change duties on private entities by providing that the National Climate Change Council in consultation with the Cabinet Secretary and other relevant departments may impose such duties. Under this statutory provision, a state agency can impose duties to conform to climate change imperatives even on actors in the construction sector including property developers.
- Section 23 of the Act provides a right of a person to move to the Environment and Land Court to stop, prevent or discontinue a project, or even seek compensation against another person or entity who threatens or has indeed acted in a manner that adversely affects actions towards mitigation and adaptation to climate change. Section 23(3) further adds that in such a legal action, a person need not demonstrate that a person has incurred a loss or injury in order to be successful in the claim. This provision is important as it means that stakeholders in the construction sector would have to be minded to ensure that their actions do not negatively affect climate change mitigation and adaptation actions, lest they expose themselves to legal action with attendant consequences.

20. Water Act No. 43 of 2016

- The Act was enacted to provide for the regulation, management and development of water resources, water and sewerage services. It repealed and replaced the former Water Act 2002.

[27] Pages 48 and 74.
[28] Page 79.
[29] Page 95.

- Under section 8, it is the responsibility of the national government to set up national public water works which are water works designated by the Cabinet Secretary based on the fact that: - the water resource on which they depend on are cross-county in nature; is financed out of the national government's share of national revenue; is intended to serve a function of the national government or a function transferred to the national government with the concurrence of county governments. These national public water works include water storage, water works for bulk distribution and provision of water services, inter-basin water transfer facilities, and reservoirs for impounding surface run-off. The national public water works take precedence over all other water works for the use of water or drainage of land.

- Section 10 requires the Cabinet Secretary to prepare a National Water Resource Strategy shall be to provide the Government's plans and programs for the protection, conservation, control and management of water resources. Some of the details of such a Strategy include existing water resources and their defined riparian areas; and measures for the protection, conservation, control and management of water resources and approved land use for the riparian area. This is particularly important given the recent cases of buildings and houses being pulled down for having been erected on riparian areas and other water resource areas.

- Section 11 establishes the Water Resources Authority (the precursor to Water Resources Management Authority/WARMA) whose functions under section 12 include: receiving water permit applications for water abstraction, water use and recharge and determining, issuing, and varying water permits as well as enforcing the conditions of those permits; collecting water permit fees and water use charges; determining and setting permit and water use fees. Property developers are therefore likely to interact and deal with Water Resources Authority (WRA) by both applying for permits and paying the set fees and charges where they must abstract for ground water such as boreholes in order to provide water to a residential housing development.

- Relatedly, section 23 of the Act allows the WRA to take measures for conservation of ground water including imposing such requirements or prohibit such conduct and activities in relation to ground water conservation area as it may consider necessary. This may have implications on whether a permit for abstraction of ground water is granted or not.

- The Fourth Schedule to the Act concerns abstraction of ground water. Section 2 provides that a person shall not construct or begin to construct a borehole or well without having first given to the Authority notice of his or her intention to do so. Such a person is required to allow the Authority to examine the well at any time and submit records within one month after construction of such well.

- Section 36 of the Act provides that water permit is required for any use of water from a water resource. However, section 37 provides exemptions (where a water permit is not necessary). These exemptions are relevant to affordable housing as they include: abstraction or use of water, without employment of works, from any water resource for domestic purposes by any person having lawful access to the water resource; for abstraction of water in a spring which

is situated wholly within the boundaries of the land owned by any one landholder and does not naturally discharge into a watercourse abutting on or extending beyond the boundaries of that land; or for the storage of water in, or the abstraction of water from a reservoir constructed for the purpose of such storage and which does not constitute a water course for the purposes of the Act. This provision appears to exempt most property developers from seeking water permits so long as they seek abstraction of water for domestic purposes and within the land they have lawful ownership. Section 37(3) envisages the development of regulations to provide clarity on uses of water from a water resource for which a permit is not required.

Section 38 requires any person seeking to construct water works to obtain a permit from the Authority.

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- Under section 40, an application for any permit to the WRA shall be determined within six months of application with any person opposed to the issuance of a permit allowed to challenge the decision at the Water Tribunal within 30 days of such issuance.

- Section 43(2) provides that the use of water for domestic purposes shall take precedence over other uses when the Authority is considering issuance of permits, with the Authority expected to reserve such part of the quantity of water in a water resource that in its opinion is required for domestic purposes.

- Section 94 of the Act provides that even rural areas that are not commercially viable to be supplied with water must be so supplied, and imposes an obligation on county governments to put in place measures to enable this including development of point sources, small scale piped systems and standpipes.

- Section 108 allows the Water Services Regulatory Board to impose a sewerage services levy on all water services within the area of a licensee, to cover a reasonable part of the cost of disposing of the water supplied within those limits.
- The Cabinet Secretary has since promulgated Regulations to give further effect to the statutory provisions. These are: **Water Services Regulations 2021** which revoked the 2012 Regulations; **Water Harvesting and Storage Regulations 2021**; and **Water Resources Regulations 2021** which provides for application and issuance of permits for abstracting from water resources.

21. Environmental Management and Coordination Act, No. 8 of 1999

- The statute seeks to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith.
- Section 3 of the Act provides that every person is entitled to a clean and healthy environment and provides legal standing to any person to challenge an action or State organ where this right is being violated.

Among the functions of the National Environmental Management Authority (NEMA) established under section 9 of the Act is to coordinate various activities taken by different agencies to ensure plans, programmes and projects consider environmental considerations and make recommendations to relevant authorities with respect to land use planning.

Section 37 of the Act requires NEMA to formulate a National Environmental Action Plan (NEAP) every six years and conduct public participation before its adoption and then submitted to the Cabinet Secretary for approval. The Plan, among others, includes: recommendations on appropriate legal and fiscal incentives that may be used to encourage the business community to incorporate environmental requirements into their planning and operational processes; identify and appraise trends in the development of urban and rural settlements, their impacts on the environment, and strategies for the amelioration of their negative impacts; and propose guidelines for the integration of standards of environmental protection into development planning and management.

- Notably, NEMA and the Ministry for Environment have since prepared Environment Action Plan Preparation Guidelines 2016-2022 to guide national and county governments in preparing their own plans.

  Section 40 of the Act also requires various County Environment Committees to prepare County Environmental Action Plan every five years. The purpose of these Plans is to co-ordinate and harmonise the environmental policies, plans, programmes and decisions of the national and county governments in order to minimize the duplication of procedures and functions; and promote consistency in the exercise of functions that may affect the environment; and secure the protection of the environment across the country. Support may be accorded to county governments is in preparing their County Environmental Action Plans.

- Section 57 of the Act provides that the Cabinet Secretary for Finance may provide fiscal incentives for the purpose of inducing or promoting the proper management of the environment and natural resources or the prevention or abatement of environmental degradation. These incentives may include: customs and excise waiver in respect of imported capital goods which prevent or substantially reduce environmental degradation caused by an undertaking; tax rebates to industries or other establishments that invest in plants, equipment and machinery for pollution control, recycling of wastes, water harvesting and conservation, prevention of floods and for using other energy resources as substitutes for hydrocarbons; tax disincentives to deter bad environmental behaviour that leads to depletion of environmental resources or that cause pollution.

- Section 57A of the Act provides that all Plans, Policies and Programmes determined by NEMA to have significant effects on the environment or that are subject to preparation or adoption by an authority at the regional, national, county or local level are subject to a Strategic Environmental Assessment.

- Section 58 of the Act provides that any person being a proponent of a project (**specified in the Second Schedule to the Act**) shall before commencing or even financing a project or causing

the same to be done, submit a project report to NEMA in the prescribed form upon payment of prescribed fee for purposes of conduct of an Environmental Impact Assessment. Notably, it is important to note that projects of the kind set out in the Second Schedule is by no means exhaustive as stated in ***Registered Trustees of Jamie Masjid Ahl-Sunnait- Wal-Jamait Nairobi v Nairobi City County & 2 others [2015] eKLR*** where a court issued an injunction stopping works on construction of a public toilet by Nairobi City County in a land adjoining a mosque in Nairobi Central Business District on grounds that the proponent had not conducted an EIA yet the project would impose a major change in land use of a commercial nature. The real test to whether an EIA is necessary where the same is not listed in the Second Schedule to the Act, is to consider the: characteristics of the intended development; the location of the intended development and characteristics of potential impact; the size of the development as well as cumulation with other neighboring developments; the probability of any environmental impact; and the duration and reversibility of such impacts.

- The project proponent must undertake the environmental impact assessment study and submit a report of the study to NEMA before issuance with an Environmental Impact Assessment (EIA) Licence. NEMA is however afforded powers to dispense with this requirement in particular cases.

- Some of the projects relevant for affordable housing listed in the Second Schedule of the Act (introduced through April 2019 amendments to the Second Schedule vide Legal Notice 31 of 2019) for which an EIA applies are: under the **medium risk projects** category includes urban development including establishment of **multi-dwelling housing developments of not exceeding one hundred units**; transportation including parking facilities and water works. In the **high-risk project category** are: urban development including establishment of new **housing estate developments exceeding one hundred housing units**.

  Section 58(8) of the Act requires the Director-General of NEMA to respond to applications for EIA licence **within 3 months** with section 58(9) providing that any person who does not receive any response within the said period **may begin the undertaking/project**. This provision introduced through amendments to the Act in 2015 was meant to avoid instances of undue delay on projects due to lethargy on the part of NEMA.

- There is a detailed Public Notice on Processing of Environmental Impact Assessment Reports issued by NEMA in March 2020.

- Section 67 affords NEMA with powers to revoke, suspend or cancel an EIA licence it has issued with reasons being given to the licensee in writing, effectively putting a stop to the project.
- Sections 68 and 69 of the Act allow NEMA to carry out environmental audits and monitoring of all activities that are likely to have significant environmental effects.
- Section 71 of the Act provides that the Cabinet Secretary responsible for environment upon the recommendation of NEMA shall establish criteria and procedures for measurement of water quality and recommend to NEMA minimum water quality standards for all waters of Kenya and for different uses including drinking water and recommend measures for treatment

of effluents before being discharged into the sewerage system. This can influence the requirements of construction of houses.

- Section 129(4) of the Act provides that upon lodging of any appeal at the National Environment Tribunal, every activity or project that is being challenged **must stop and await the determination of the dispute** by the Tribunal. Accordingly, the **lodging of a dispute at the Tribunal serves as an automatic stay or injunction on any development,** without necessarily seeking any injunctive orders. This provision can serve to delay or frustrate developers keen on initiating projects and may in fact encourage frivolous appeals to be lodged merely for the purpose of scuttling a development. There ought to be a balance in this regard either in terms of insisting on paying damages to the developer for lost monies if the Tribunal finds the appeal to have been frivolous, or an expedition of determination of such appeals by the Tribunal.

22. Environmental (Impact Assessment and Audit) Regulations, 2003

- These Regulations seek to give further effect to section 58 of the Act and provide details on how an EIA is to be conducted.

- Regulation 7 provides that any proponent of a low risk and medium risk project (which includes multi-dwelling housing development of not more than 100 housing units) shall submit to NEMA a **summary project report of the likely environmental effect of the project**.

- This summary project report specifies: the nature of the project; location of project including proof of land ownership, any environmentally sensitive area to be affected, availability of supportive environmental management infrastructure; and conformity to land use plan or zonation plan; and potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project. NEMA is required to undertake screening and assessment of the project report for completeness within **5 days of receipt**. (NEMA has since issued Guidance Notes for Summary Project Report).

- Following screening, NEMA may then recommend that the project proponent prepares and submits a comprehensive project report where it is of the view that the project may have significant adverse environmental impact or exempt it altogether and grant approval to proceed with the project where it is of a contrary view.

- A project report is usually prepared by an environmental impact assessment expert and submitted by the project proponent in the prescribed form accompanied by the prescribed fees. The fees payable as set in the Fifth Schedule of the Regulations as reviewed/amended by Gazette Notice No. 13211 of 2013 are: (i) Environmental Impact Assessment License fee: **0.1% of the total cost of the project to a minimum of KSh.10, 000 with no upper capping**; (ii) Surrender, transfer or variation of environmental impact assessment license-KSh. 5,000; (iii) Processing and monitoring of Strategic Environmental Assessment (SEA) reports- Kshs. 1,000,000. Applications and payments are usually done online through the E-Citizen licensing

portal with each application accompanied by a certified Bill of Quantities (BQs) indicating the proposed project cost.

- Notably, the EIA fee was scrapped in November 2016 to promote affordable housing agenda by lowering construction costs. However, it has been reinstated effective **1 June 2022**, on the back of dwindling revenues for NEMA.[30]

23. Environmental Management and Co-ordination (Water Quality) Regulations, 2006

- These Regulations were published vide Legal Notice No. 120 of 2006.

- They provide for protection of sources of water for domestic use/ drinking water, water used for industrial purposes, water used for agricultural purposes, water used for recreational purposes, water used for fisheries and wildlife, and water used for any other purposes.

- Relevant in the context of affordable housing includes regulation 4(1) which provides that every person shall refrain from any act which directly or indirectly causes or may cause immediate or subsequent water pollution. Regulation 4(2) provides that no person shall throw or cause to flow into or near a water resource any liquid, solid or gaseous substance or deposit any substance as to cause pollution.

- Under regulation 5, all sources of water for domestic use must comply with the standards set out in the First Schedule to the Regulations. The First Schedule lists quality standards for sources of domestic water including permitted pH levels and maximum allowable levels of various minerals including ammonia, nitrate, suspended solids, fluoride, arsenic, lead, copper, and zinc among others.

- Regulation 6 is to the effect that no person shall discharge any effluent into the aquatic environment without a valid effluent discharge licence.

- Further, under regulation 6(b) no person shall abstract ground water or carry out any activity near lakes, rivers, streams, springs and wells that is likely to have an adverse impact on the environment without an EIA licence. Ground water is defined in the Regulations to mean means the water of underground streams, channels, artesian basins, reservoirs, lakes and other bodies of water in the ground, and includes water in interstices below the water table. This is particularly relevant for housing given that most housing developments rely on borehole water which qualifies to be ground water that is being abstracted.

[30] https://nema.go.ke/index.php?option=com_content&view=category&id=10&Itemid=120#:~:text=13211%20of%202013%20provides%20for,among%20other%20EIA%20processing%20fees.

24. Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009

- These regulations were published vide Legal Notice No. 61 of 2009.
- Regulation 6 provides that no person shall cause noise from any source which exceeds any sound level as set out in the applicable column in the First Schedule to these Regulations. The measurements of the noise are usually measured by the relevant lead agency, in default of which the same is done by NEMA.

- Regulation 11 provides that any person wishing to operate construction equipment or machinery likely to emit noise or excessive vibrations shall carry out the said activity within the levels specified in the First Schedule to the Regulations.

- Regulation 13 provides that no person shall operate construction equipment (including but not limited to any pile driver, steam shovel, pneumatic hammer, derrick or steam or electric hoist) or perform any outside construction or repair work to emit noise in excess of the permissible levels as set out in the Second Schedule to these Regulations.

- Regulation 14 stipulates that where defined work of construction, demolition, mining or quarrying is to be carried out in an area, NEMA may impose requirements on how the work is to be carried out including but not limited to requirements regarding machinery that may be used and the permitted levels of noise. Regulation 14(3) is to the effect that any person carrying out construction, demolition, mining or quarrying work shall ensure that the vibration levels do not exceed 0.5 centimetres per second beyond any source property boundary or 30 metres from any moving source. Under regulation 15, any person intending to carry out construction, demolition, mining or quarrying work shall, during the Environmental Impact Assessment studies- (a) identify natural resources, land uses or activities which may be affected by noise or excessive vibrations from the construction, demolition, mining or quarrying; (b) determine the measures which are needed in the plans and specifications to minimize or eliminate adverse construction, demolition, mining or quarrying noise or vibration impacts; and (c) incorporate the needed abatement measures in the plans and specifications.

25. Energy Act No. 1 of 2019

- The purpose of the Act is to consolidate laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms.

- Section 188 provides that the Energy Petroleum Regulatory Authority (EPRA) shall designate factories and buildings and energy appliances by types, quantities of energy use, or methods of energy utilization for purposes of energy efficiency and conservation. The Authority can give instruction to the owner of such designated building to furnish information on energy

utilization for purposes of inspection and to assure that energy conservation measures are in accordance with the standards, criteria and procedures laid down in regulations.

- There is currently in place the Kenya National Energy Efficiency and Conservation Strategy 2020 which provides an overarching policy framework for energy efficiency and conservation.

- Under section 189, there is an obligation on an owner of a designated factory or building to conserve energy, audit and analyze energy consumption in the building to ensure they comply with the set standards.

- It is the responsibility of the Cabinet Secretary responsible for Energy under section 190 of the Act, upon the recommendation of EPRA, to make regulations to specify the norms for processes and energy consumption standards for any equipment and appliances which consume, generate, transmit or supply energy. Currently, there are only two sets of regulations in force: the Energy (Energy Management) Regulations 2012 which provide for regulation of energy efficiency in designated industrial, institutional and commercial facilities and the Energy (Appliances' Energy Performance and Labeling) Regulations 2016 which call for testing and labelling of specified appliances for minimum energy performance standards.

- The Regulations envisaged under section 190 of the Act will effectively promote green buildings by ensuring energy conservation in buildings (houses). However, they are yet to be formulated or published.

- Under section 193 of the Act, county governments are given a role in ensuring efficient use of energy and its conservation. County governments may with the approval of EPRA, customize (national) energy conservation building codes to suit the local climatic conditions and may make rules to specify and notify energy efficiency and conservation building codes with respect to energy use in buildings; and direct every owner of occupier of a building being a designated consumer to comply with the provisions of the energy conservation building codes, among other roles.

- Further, under section 193(2) of the Act, the Cabinet Secretary is empowered to make regulations to provide for various matters some of which include: energy efficiency and conservation building codes; energy efficiency standards for specific technologies and buildings; and energy consumption norms and standards for designated consumers. These regulations/guidelines are yet to be prepared.

Case Law

i) ***Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties)* [2022] eKLR**

- In this case, the Constitutional division of the High Court in Nairobi allowed a petition against a property developer (of Phenom Park Estate in Lang'ata) and made a declaration that the developer had violated the constitutional rights of children of the house purchasers as well as their right to human dignity and proper sanitation as well as the right to clean and safe water in adequate quantities. As regards the violation of children's rights including the right to dignity had been violated for lack of playgrounds in the estate thereby being forced to complete with motor vehicles in the parking area, which is not in the best interests of the child and therefore a violation of article 53(2) of the Constitution. A site report by Deputy Registrar of the Court had confirmed that there were no play areas in the estate with the available ones having either clothesline, manhole, or electricity torrents hence not fit as playground for children. With respect to provision of clean and safe water in adequate quantities, the court held (para 46) that the petitioners had proved that the water in the borehole was unsafe for human consumption and that the water supplied by Nairobi Sewerage Company was inadequate.
- Notably, the court in fact stated that the petitioners had legal standing to bring a representative suit and even secure an injunction stopping construction with regards to Phase 4 of the housing development that was yet to be complete (even though they were not purchasers of the said houses), holding that article 258 of the Constitution allows one to bring a representative suit even on behalf of prospective purchasers. This is likely to open room for persons without an interest in a housing development to act as proxies in litigation for those with an interest but who fear any reprisals.
- The court consequently directed the developer to install water filtration systems in the housing estate/development and provide a play area for children in the estate separate from the car parking area, within a period of 90 days.
- The court further remarked (at paragraph 48) that the County Government of Nairobi being legally obligated with the proper execution and implementation of approved physical development plans including checking for any breach of approved conditions should visit the estate and find out whether the construction plans are as per the approved plans, and if not so, revoke the approvals.
- This court decision appears to have imposed an obligation to provide playgrounds for children when they build housing units, which will obviously require additional land or building of fewer than optimal housing units to create room for playgrounds. This will certainly result in escalation of housing costs to consider this development. In addition, property developers have now to be wary that the water they provide, among other essential services, are fit and safe for consumption. The court appears to have cast private property developers as duty bearers, much like the state.
- It however seems to be that a key reason for the holding of requiring the developer to provide the playgrounds may have been the fact that the developer had included designated playing areas in its marketing brochures for the off-plan development. This means that developers must be wary of what they provide for in their marketing brochures (even when not included in the executed sale agreement) as courts are likely to require them to honour their part of their promise.

ii) ***Republic v County Government of Nairobi; Kilimani Project Foundations & 21 others (Interested Parties) Ex Parte Cytonn Investment Partners Sixteen LLP [2020] eKLR***

- In this case, the court stated that before a property developer can change architectural plans which it has already presented, it must consult or engage the purchasers in public participation.
- The court refused to quash a cancellation of an approval earlier issued to a developer after finding that the county government had the requisite legal authority to cancel the approvals of the plans for failure to undertake public participation and apply for change of user. In this case, the court remarked that development control is a continuous process that begins in the pre-construction period and continues into the post-construction period.

- In ***Charles Murunga & 5 others v James Chege & another*** **[2021] eKLR,** the court issued a permanent injunction against an individual from constructing houses or erecting structures within Ngei Estate in Lang'ata which did not accord with the original planning of the houses and estate which is for single dwelling houses. In this case, the individual was constructing multi-dwelling houses without obtaining a change of user. The court was of the view that such structures were out of the character of the estate and ordered demolition of the already erected structures at the cost of the defendant.

ANNEX E: LAWS AND POLICIES RELATING TO PROFESSIONALS IN HOUSING

1.*Architect and Quantity Surveyor Act, 1933 (Cap 525)*

- The Act provides for regulation of architects and quantity surveyors, in particular the registration and proof of qualification. It provides for the regulation of persons registered to practice as architects and Quantity Surveyors.

- The law also defines practices amounting to professional misconduct and the punitive measures to be taken against the culprits. It establishes the Board of Registration of Architects and Quantity Surveyors (BORAQS) which is mandated with the duty of maintaining the register of Architects and Quantity Surveyor; the scale of fees to be charged by architects and quantity surveyors for professional advice, services rendered, and work done; prescribing the conditions under which persons registered under this Act may practise as limited liability companies, and for requiring professional indemnity insurance in the case of unlimited companies and private firms; and for issuing instructions and orders conducive to the maintenance and improvement of the status of architects and quantity surveyors in Kenya, among others.

2. *Architects and Quantity Surveyors By-Laws, 1959*

- These were published vide Legal Notices and have been updated over the years.

- The By-Laws, among other things, set out a scale of professional charges for services of architects in various projects in the Fourth Schedule to the Rules. These fees/charges are mainly a percentage of the value of the projects.

- Given that architects are very crucial professionals in the construction phase, the fees they charge is important as it feeds into the final house price.

3. *Competition Act, No. 12 of 2010*

- This Act was passed to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; and to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal.

- The Competition Authority of Kenya (CAK) as the regulator is charged with ensuring there is fair competition in all sectors of the economy including in the construction industry and take appropriate action. Competition influences prices and hence affordability of housing. Under section 9 of the Act, CAK may carry out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers; investigate impediments to competition, among other functions.

- Section 21(3) outlaws any undertaking, or associations of undertakings, from making decisions or engaging in concerted practices which directly or indirectly fix purchase or selling prices or

any other trading conditions in relation to provision of goods and services, as well as minimum resale price maintenance. The CAK has recently announced that it is launching a probe into top steel manufacturers over allegations of price-fixing/concerted practices including informal agreements on pricing-which are contributing to high construction costs and hurting consumers.[31] Steel is a vital component in the construction industry that is used in making products such as roofing sheets, reinforcement bars, steel beams and columns, windows and doors, among others.[32]

- Section 29 of the Act however allows for an exemption for professional associations by providing that a professional association whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market shall apply in writing or in the prescribed manner to the Authority for an exemption **where such exemption is necessary for maintenance of professional standards or the ordinary function of the profession**, having regard to internationally applied norms.

- In the above regard, various professional associations including the Law Society of Kenya (advocates) and other professionals in the building sector have their own fees schedule that they charge for their services, and of which undercharging below the set fees is considered a professional misconduct. The net effect of these rules is to increase the cost of housing given that these fees paid to the professionals are considered in the final pricing, given that they form part of construction costs. However, the setting of minimum fees in the various professions has been justified on grounds it is necessary for maintenance of minimum professional standards by attracting and retaining talent in the profession, as well as being in tandem with internationally applied norms.

- The CAK issued an Advisory in October 2021 raising concerns about the setting of minimum charges or fees by some professional associations[33] without observing the provisions of the Act on exemptions. The CAK however frowned upon the intended floor pricing arguing that 'the envisaged arrangements of setting minimum rates/fees, highlighted in the Media recently, are only meant to extinguish competition among members of the professional associations to the detriment of clients/consumers.'

- Section 59 of the Act also makes it an offence for a person in trade to supply goods that do not comply with the set consumer product safety standard, unsafe goods or those that are permanently banned.

[31] <https://www.businessdailyafrica.com/bd/economy/watchdog-probes-steel-companies-over-price-fixing-3855644 >

[32] Syovata Ndambuki, 'Building with steel: Why it's the go-to construction material for developers' (Daily Nation, May 12, 2022) <https://nation.africa/kenya/life-and-style/dn2/building-with-steel-why-it-s-the-go-to-construction-material-for-developers--3812422 >

[33] These included intended move by engineers vide the proposed Engineers (Scale of Fees for Professional Engineering Services) Rules, 2021 and accountants. See, <https://www.businessdailyafrica.com/bd/economy/treasury-on-the-spot-over-accountants-fees-3540818 > also, <https://www.constructionkenya.com/9883/engineers-minimum-fees/ >

4. *Engineers Act, No. 43 of 2011*

- This statute provides for the training, registration and licensing of engineers, the regulation and development of the practice of engineers. It repealed the Engineers Registration Act (Cap 530).
- This law that regulates engineers is important given that engineers (structural and civil engineers, electrical and mechanical engineers) are critical professionals in the construction sector, both in terms of providing their expertise and advice as well as obtaining the requisite approvals.

- Section 3 establishes the Engineers Board of Kenya (EBK) which under section 6 is empowered with registration of engineers and firms, regulation of engineering professional services, setting of standards, development and practice of engineering.

- Section 7 of the Act also allows the Board to enter and inspect sites where construction, installation, erection, alteration, renovation, maintenance, processing or manufacturing works are in progress for the purpose of verifying that professional engineering services and works are undertaken by registered engineers; and standards and professional ethics and relevant health and safety aspects are observed; and to determine the fees to be charged by professional engineers and firms for professional engineering services rendered from time to time; as well as develop, maintain and enforce the code of ethics for the engineers and regulate the conduct and ethics of engineering profession in general.

- The power of the Board to set fees charged can influence construction costs. Already, there are efforts to set the fees in this regard as recently proposed in the Engineers (Scale of Fees for Professional Engineering Services) Rules, 2022.

- Part III of the Act provides for the process and modalities of registering as an engineer and engineering consulting firms with the Engineers Board of Kenya (EBK).

- Part IV contains provisions relating to licensing and practice as engineers. Section 32 provides that a person shall not engage in the practice of engineering unless they have been issued with a licence.

- Section 34 prohibits unlicensed persons from charging or recovering charges for rendering professional engineering services.

- Section 45 of the Act provides that a licensed engineer commits the offence of professional misconduct if such person: deliberately fails to follow the standards of conduct and practice of the profession; commits gross negligence in the course of their professional duties; knowingly submits a document which is prepared by an unlicensed person; allows another person to practice in their name where such other person is unlicensed, is not in partnership with them, abuses authority or trust, lacks regard or concern for client's needs or rights or shows incompetence or inability to render professional engineering services.

- Section 50(2) provides that a person who is not registered as a professional engineer or firm shall not be entitled to submit engineering plans, surveys, drawings, schemes, proposals, reports, designs or studies to any person or authority in Kenya.

5. *Engineering Rules, 2019*

- These Rules are made to operationalize the Engineers Act 2011. They were published vide Legal Notice No. 18 of 2019.
- They contain further details on the registration process of engineers including the application and registration forms (First Schedule) as well as the fees chargeable in the Third Schedule.
- The Fourth Schedule provides for accreditation of engineering programs. The Fifth Schedule contains rules on Continuous Professional Development (CPD).
- The Sixth Schedule is the Code of Conduct and Ethics for registered engineers.

6. *Engineers (Scale of Fees for Professional Engineering Services) Rules, 2022*

- These Regulations were published vide Legal Notice No. 20 of 2022 on 11 February 2022 and will commence operation/be of legal effect starting 15 August 2022.
- They seek to set **a scale of fees chargeable by registered professional and consulting engineers**. The Engineers Board of Kenya is empowered under section 7 of the Engineers Act 2011 with setting the fees chargeable by engineers.
- The Rules prescribe the minimum fees that may be charged by registered engineers, with charging below the minimum (undercutting) being a professional misconduct under Rules 5 and 39.
- The specific amounts to be charged by registered engineers for different works is set out in the Schedules to the Rules and is largely a percentage of the cost of works/project (in some cases reaching up to 10% of the project cost/cost of works).
- The effect of the Rules will be to escalate construction costs as engineers begin setting higher fees than is currently the case. This is likely to lead to an increase in house prices.

7. *Engineering Technology Act, No. 23 of 2016*

- The Act provides for similar provisions to those of the Engineers Act 2011 but with respect to persons with engineering technology qualifications such as professional engineering technologists and certified engineering technicians.
- The regulation of engineering technologists is important given that they play a role in construction as assistants to engineers given the few numbers of qualified and registered engineers relative to the technologists.

8. *Valuers Act, 1985 (Cap 532)*

- This statute provides for registration of valuers for purposes of valuation of land/property.
- Section 3 establishes the Valuers Registration Board which shall have the responsibility of regulating the activities and conduct of registered valuers.
- Under section 7, the registrar shall issue a certificate of registration for valuers who are registered and keep a register of valuers under section 6.
- Section 21 provides that unregistered persons shall not practice as valuers.
- Section 22 provides that no person shall carry on business as a practicing valuer unless there is a guarantee bond or a policy of insurance entered or issued by an insurance company approved by the Valuers Registration Board. This is a requirement for indemnity on the part of practicing valuers.
- There is currently a Valuers Bill 2022 (currently in Parliament) seeking to repeal and revise the current Act.

ANNEX F: LAWS GOVERNING FINANCING / RENTAL / TAXATION

1. *Retirement Benefits Act, No. 3 of 1997*

- Section 38 of the Act generally provides for restrictions on use of retirement benefit schemes' funds. In particular, the provides that no scheme funds shall be used to make direct or indirect loans to any person; invested with a bank or building society or any other institution with a view to securing loans at a preferential interest rate or any other consideration to the sponsor, manager, trustee or custodian of a scheme. The only permissible investment of scheme funds under the particular provision is government securities or infrastructure bonds issued by public institutions.

- Admittedly, the restriction on investment of scheme funds and their limitation to investment in government securities and infrastructure bonds of public entities is meant to avoid risky investments thereby putting retirement savings/benefits of retirees at risk. Government securities and infrastructure bonds are considered generally safe. However, these restrictions have meant that a substantial part of funds held by retirement benefit schemes are non-utilised or underutilised, yet they could potentially serve as a financing option for housing developers on the one hand, as well as prospective home buyers.

- Despite the above however, Section 38(1) A of the Act was amended, vide the Tax Laws Amendment Act 2020, to provide an exception to the general rule above. The said section now provides that a prescribed proportion of the benefits accruing to a member in a scheme may be assigned and used by the member to secure a mortgage loan or to purchase a residential house from such institutions and on such terms as may be prescribed in regulations to be made by a Minister.

  Pursuant to this provision, there were published the following regulations:

2. *Retirement Benefits (Mortgage Loans) Regulations, 2009*

- Following amendment to section 38 of the Retirement Benefits Act 1997 vide the Finance Act 2007 to allow for use of scheme funds as security for mortgage financed by other institutions, there were gazetted the Retirement Benefits (Mortgage Loans) Regulations 2009 on 11th June 2009 through Legal Notice No. 85 of 2009.

- These Regulations sought to allow members of pension schemes to assign up to 60 percent of their accumulated pension benefits as collateral/security to access mortgage loans for housing. This would provide financing for prospective home buyers to purchase housing units. Before 2009, members of pension schemes were expressly restricted from assigning their benefits under the scheme for whatever purpose or reason.

- Importantly however, members of pension schemes did not utilize this opportunity for the most part, despite being enshrined in law. Stakeholders in the industry considered the 2009 Regulations as inadequate to the extent that they only allowed scheme members to assign a particular portion of their benefits in consideration for the pension scheme providing a guarantee in favour of an authorised financial institution.

- Further, despite the provision that the pension benefits would provide security against the home mortgage, the primary security tended to still be the charge registered against the residential house acquired by the member thereby taking away from the attractiveness of the product.

  Accordingly, in 2020, these Regulations were amended.

3. Retirement Benefits (Mortgage Loans) (Amendments) Regulations, 2020

- The Regulations came into effect on 14 September 2020 vide Legal Notice No. 192 of 2020.

- Clause 14 of the amended Regulations now allow members of pension schemes to utilise up **to 40 percent of their accumulated benefits/savings subject to a maximum of Kshs. 7 million** to purchase residential houses certified as fit for occupation from an institution defined as 'including banks, mortgage or financial institutions, building societies, microfinance institutions, the National Housing Corporation, other institutions approved by the Retirement Benefits Authority or any other entity offering a residential house for sale.'

- As per clause 15 of the Regulations, this facility is only available to pension scheme members before they reach retirement, is unavailable for those that take early retirement and may only be utilised once.

- Notably however, the uptake for the same has been especially low due to lack of awareness of the opportunity, high mortgage interest rates, failure by various pension schemes to fast track the amendment of scheme's trust deed and rules to accommodate and provide for these amended Regulations. Clause 22 of the Regulations required various schemes to amend their scheme rules for compliance within 12 months of date of commencement (that is by **14th September 2021**).

- Accordingly, one of the support that may be accorded to the various retirement benefit schemes/scheme trustees is to update/amend their trust deed and rules (for those that may not have done so) to set out procedures and requirements that their members would follow to take advantage of this opportunity for pension backed mortgages.

- Relatedly, there should be concerted efforts given to creating further awareness among pension scheme members about the changes in the law that now allow them to purchase residential houses using their pension benefits.

- Additionally, the cap on the portion of retirement benefits that may be utilised to purchase a house at 40 percent or Seven Million Kenya Shillings may hinder purchase especially given the relatively high cost of houses particularly in urban areas.).

- Clause 19 provides that a member who wishes to purchase a residential house under the Regulations is to bear transaction costs and taxes relating to the purchase. Tax incentives for houses purchased under the Regulations can promote the use of the facility.

4. Building Societies Act, 1956 (Cap 489)

- Section 22 of the Building Societies Act, Cap 489[34] restricts resource mobilisation capabilities of Building Societies to two-thirds (2/3) of their mortgage portfolio.

- In addition, Section 24 (1 & 2) dictates the type of security that Building Societies may take as collateral to secure their lending while Section 24 (3) restricts the amount of credit that Building Societies may lend to an individual borrower.

- These legal provisions have the overall effect of reducing available financing to housing developers to construct houses thus reducing overall housing supply, even though Building Societies were established for this particular purpose of providing mortgage finance.[35]

5. Banking Act, 1989 (Cap 488)

- The purpose of this statute is to consolidate the law regulating the business of banking in Kenya.

- Section 4 of the Act requires every institution intending to undertake banking business as well as the business of mortgage finance to apply for and obtain a licence from the Central Bank of Kenya.

- Section 10 limits banks from granting any credit facility or guarantee to one single person of an amount in excess of 25% of their core capital. However, the Central Bank may make an exception to this single obligor rule with respect to mortgage finance companies.

- Section 12 (c) of the Banking Act places a restriction on trading and investments of the regulated institutions by providing that such institutions shall not purchase, acquire or hold any interest in land where the total amount of such investment exceeds the prescribed proportion of the core capital, save for where such land is held for the purpose of business or providing housing to its staff.

- Further, under section 14 of the Act, regulated institutions save for mortgage finance companies, cannot make loans or advances for the purchase, improvement or alteration of land such that the aggregate amount of such loans or advances exceed 40% of the institution's total deposit liabilities. This is a limitation against potential overextension by a bank in lending

[34] <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20489 > accessed 22 September 2021.
[35] Gerhard Coetzee, Kamau Kabbucho and Andrew Mnjama, "Understanding the Re-Birth of Equity Building Society in Kenya" (2002) <http://www.microsave.net/files/pdf/Understanding_the_Re_birth_of_Equity_Building_Society_in_Kenya.pdf > accessed October 29, 2021.

in real estate, for prudence purposes. Under section 14(2) however, the Central Bank may permit an institution to exceed this level up to 70% of the total deposits.

- Section 15 provides for mortgage finance companies and provides that they may advance loans for acquisition, improvement, alteration, development or adaptation for a particular purpose of land in Kenya the repayment of which will be secured by a mortgage or charge over land with or without other additional securities.

6. Capital Markets (Real Estate Investment Trusts) (Collective Investment Schemes) Regulations, 2013

- These Regulations provide a framework for creation of Real Estate Investment Trusts (REITs) which in turn enable investors to aggregate diverse sources of funding by converting them into a portfolio that extends beyond the limitations of individual projects, thus dealing with the challenge of financing that affects the housing sector.

- There are 2 forms of REITS provided for in Kenya, I-REITS (Income REITS) and D-REITS (Development REITS). I-REITS can be issued on a restricted or unrestricted (i.e. publicly listed) basis. D-REITS, which carry significant development risk, must be issued on a restricted basis.

- The I-REIT can be offered on an unrestricted basis, with no minimum investment amount.

- There are limitations when REIT issuances are on a restricted basis (i.e. typically when they are unlisted). For restricted offers, REITS are only available to professional investors, who are required to invest a minimum of Kshs 5 million (Regulation 27(1)b).

- Insurance companies are not allowed to invest in REITS under section 50 of the Insurance Act Cap 487.
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- Real Estate Investment Trusts (REITS) refer to collective investment vehicles through which investors (both retail and institutional) pool funds to invest in real estate assets. These trusts are usually professionally managed and are regulated by the Capital Markets Authority.
- Through REITS, investors or persons who would otherwise never have acquired a real estate in their investment portfolio due to the huge capital outlay needed to acquire real estate or those who would not wish to bother with managing real estate are able to indirectly invest and own real estate and accrue associated benefits. However, despite the attractiveness of REITS and the regulations enabling it having been in force since 2013, there have only been two REITS since-being Acorn I-REIT and D-REIT and Fahari I-REIT. The Acorn I-REIT trades on the Unquoted Securities Platform of the Nairobi Securities Exchange (NSE). These REITS have not managed to raise the capital (amounts) they sought to raise. The proposed Fahari D-REIT was unable to attract the minimum number of investors required to qualify it as a REIT. This indicates an underlying problem especially given the general attractiveness of real estate as an investment asset class among Kenyans.
- There is possibly the need to allow flexibility in the structuring of a trust by allowing for other legal forms other than as a trust. Presently, REITS can only be constituted as a trust for them to obtain the approval of the Capital Markets Authority (CMA). Consideration may be given to

allowing REITS being incorporated as partnerships and companies as is the case in other jurisdictions such as the United Kingdom. The unattractiveness of trusts partly arises from the fact they are not as common and unknown/familiar compared to partnerships and companies; and trusts raise concerns among investors who fear losing control whenever they seek to dispose of their interest through a REIT structured as a trust which forces them to apply for a retail manager licence or shying away from disposing their interest.

- In addition, the current limitation of a minimum of Ksh 5 million investment in D-REIT locks out individual investors who may not afford such high amounts or who may wish to diversify their risks across various asset classes. This may explain the failure of D-REITs to attract enough investors and capital as they lock out most individual investors. Already, majority of institutional investors have their own real estate portfolios. Accordingly, consideration should be given to reducing the minimum investment into D-REITS to say Ksh 500, 000 or 1 million.
- Whereas I-REITs are allowed to invest in development property only to a limited extent given that they are trusts meant to generate income from real estate, D-REITs usually hold income generating properties that they have developed. The law however requires REITS to identify either as I-REITs or D-REITs. The law can be amended to allow for and recognize a hybrid of I-REIT and D-REIT to manage the risks by allowing a stable income from I-REIT while allowing a higher return/higher risk arising from D-REITs, up to a particular extent to take care of potential risks.
- Additionally, the current requirement to list a REIT on the NSE before such REIT can be made public is also stifling growth of REITs. In the infancy stages of REITs where stability of income is assured, listing publicly on the NSE tends to erode the value of such REITs and therefore leading to undervaluation of their shares. The law may thus be amended to give a longer lead time before REITs are required to list, to enable REITs obtain a fair and true market valuation when they list.

7. Central Bank of Kenya Act 1966 (Cap 491)

- The law provides for the operation and functions of the Central Bank of Kenya and establishes the currency of Kenya.
- Under section 4 of the Act, the principal objective of the Central Bank is to formulate and implement monetary policy directed to achieving and maintaining stability in the general level of prices, or put differently, to ensure price stability/deal with inflation. In this regard, the Monetary Policy Committee of the Central Bank meets at least once every two months to set the benchmark rate, which signals to commercial banks whether to increase or decrease the interest rates on loans. During periods of inflation, the Central Bank usually raises the rates to avoid overheating of the market and stabilize general prices-this leads to more expensive credit as commercial banks also increase the interest rates they levy on credit/loans.
- Section 4(2) requires the Central Bank to foster the liquidity, solvency and proper functioning of a stable market-based financial system. Ensuring the liquidity and stability of financial institutions is a critical function as it ensures that financial institutions are healthy and able to provide financing to housing on both the supply side as well as the demand side.
- Under section 4(3), the Central Bank is required to, subject to ensuring price stability and financial stability, support the economic policy of the Government including its objectives for

growth and employment. The Cabinet Secretary for Finance may specify the economic policy to be taken by the Government through a notice in writing directed to the Central Bank. Given that the current government seeks to promote affordable housing as an economic policy to create jobs and also provide shelter for her citizens, it would follow that the Central Bank of Kenya is under a legal obligation to support the government through its monetary policy measures, so long as doing so does not interfere with its key objectives of price and financial stability. It is not entirely clear how much the Central Bank of Kenya has been supporting the economic policy of government (of affordable housing) in this regard. This needs to be explored further.

- Other functions of the Central Bank that are relevant for affordable housing are set out at section 4A of the Act and include the power to license and supervise mortgage refinance companies. This is further provided under section 33P of the Act which prohibits any person or entity from engaging in the mortgage refinance business without a licence. Mortgage refinance companies are defined under section 2 of the Act as non-deposit taking companies licensed to undertake the business of providing long term financing to primary mortgage lenders for housing finance and any other activity that the Bank may from time to time prescribe. An example of a mortgage refinance company (which is the only one currently) is the Kenya Mortgage Refinance Company, which was licensed to provide long term funding to banks and SACCOs which then on lend to customers to enable them acquire housing.
- The specific powers of the central bank in regulating mortgage refinance companies are set out under section 33Q of the Act and include: licensing such companies; determining minimum liquidity requirements and permissible investments; determining capital adequacy standards and requirements; supervision of such mortgage refinance companies; revoking or suspending the licence; among other powers. Section 38 of the Act provides that the Central Bank may set minimum reserve requirements (requiring institutions such as commercial banks to keep minimum cash balances on deposit with the Central Bank as reserves against their deposit and other liabilities). By setting minimum capital and liquidity requirements, the central bank effectively determines how much funds are available to mortgage refinance companies and financial institutions (banks and microfinance institutions) to extend as loans/credit in support of affordable housing.
- Under section 36A (2), commercial banks are obliged to disclose any positive or negative information of its customers to licensed credit reference bureaus, where such information is reasonably required for the discharge of the functions of the banks and the licensed credit reference bureaus. This regime of credit information sharing has been further augmented by the **Credit Reference Bureau Regulations 2020** and serves to provide credit scores of customers thus dealing with information asymmetries and promoting responsible lending. However, in practice, there has been preoccupation with sharing half file credit information (largely negative credit information of a customer) with credit reference bureaus leading to blacklisting of borrowers as opposed to full file information (including positive credit information) which would provide a better assessment of a customer.
- Section 57 of the Act empowers the Central Bank to develop and publish regulations, guidelines, circulars and directives to give effect to the provisions of the Act. In particular, the Central Bank may publish regulations on: anti-money laundering and measures for countering financing terrorism; credit information sharing; consumer protection; and permissible and prohibited activities.

8. Central Bank of Kenya (Mortgage Refinance Companies) Regulations, 2019

- The Regulations provide for establishment, licensing and operation of mortgage refinance companies. A mortgage refinance company shall engage in the authorized following activities— (a) refinancing or purchasing of eligible mortgage loans; (b) investment in debt securities issued by the Government of Kenya or any guaranteed debt; (c) providing fully secured long term financing to primary mortgage lenders for financing of eligible mortgages; (d) issuing bonds, notes and other financial instruments for purposes of meeting its objectives; and other activities as may be determined by the Bank from time to time.

- The promulgation of these Regulations allowed for the establishment of the Kenya Mortgage Refinance Company to provide affordable financing to financial institutions (including microfinance institutions and SACCOs) at five percent interest rate for onward lending to prospective homeowners at 7 percent interest rate for a principal maximum mortgage amount of Ksh. 4 million in Nairobi metropolitan area and Ksh 3 million in other areas.

- The purpose of the facility is to provide liquidity to financial institutions by allowing them to refinance illiquid mortgage assets thus enabling mortgages to be issued at longer tenors and with lower rates given the reduced liquidity risks. It is hoped that this will mitigate against the high interest rate of mortgages in Kenya which has resulted into a very low uptake.

- However, for the KMRC to be effective, there is need to put more effort toward the attainment of stable and lower interest rates. There is also need for reduced government domestic borrowing which may crowd out KMRC from accessing the needed funding. In addition, there is need to apply other standards for credit assessments to on board other informal low-income workers who are not salaried.

- Relatedly, the Central Bank of Kenya issued Banking Circular No. 2 of 2021 on 8 June 2021 (effective 1 July 2021) to all commercial banks and mortgage institutions. The Circular amended the risk weighting (capital requirements) for mortgage loans by reviewing the treatment of residential mortgages under the Basel III framework/Accords. Mortgage lending fully secured by residential property located in cities and municipalities (occupied by borrowers or rented) is assigned a risk weight of 35% from the earlier 50%. This relaxation in capital requirements is expected to free more capital/credit to flow in favour of residential mortgages.

9. Estate Agents Act, 1984 (Cap 533)

- The Act was enacted to provide for registration of persons who, by way of business, negotiate for or otherwise act in relation to the selling, purchasing or letting of land and buildings erected thereon (estate agents); and for the regulation and control of the professional conduct of such persons.
- Under section 2 of the Act "**practice as an estate agent"** means the doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any

house, shop or other building forming part thereof, of any of the following acts— (a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or (b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals.

- Indeed, estate agents are almost always employed in all transactions relating to transfer of land and houses, and are therefore key to smoothing of transactions.
- Section 3 of the Act establishes the Estate Agents Registration Board whose responsibility under section 4 is registering estate agents and ensuring that the competence and conduct of practising estate agents are of a standard sufficiently high to ensure the protection of the public. The Act also sets out conditions and qualifications for registration as estate agent.
- Section 18 restricts unregistered persons from practicing as estate agents either individually, in partnership or through a body corporate. The penalty for violating this provision is a fine of Ksh 20, 000 or a jail term of two years or both. This monetary penalty appears too low to act as a disincentive.
- Relatedly, section 19 of the Act requires estate agents to take insurance or indemnify themselves by taking an indemnity bond so as to guarantee compensation of persons who may suffer monetary loss by dealing with them.
- Section 21 and 22 allows the relevant Minister and the Estate Agents Registration Board to prepare a code of conduct and rules of practice that are to govern the practice of estate agents.
- Real estate agents are regularly engaged in the buying, renting and selling of property in Kenya, acting at the behest of either buyers, landlords, tenants, seller or even financiers. There have also been cases of fraud including hiking of rental payments than is the case and outright theft perpetrated by estate agents.[1] Many real estate agents are also individuals who undertake the trade as a part-time job (side hustle) thus becoming difficult to regulate or take enforcement action against as a withdrawal of a licence may not be quite deterrent enough. Consideration may be given into the Ministry and the Board liaising with county governments who have enforcement officers to enhance enforcement. The Board should also leverage on use of technology to have a functional website of registered and licenced estate agents, and also conduct awareness among the public on the need to only engage licensed real estate agents. There may also be need for issuance of different categories of licences for different agents depending on the acitvities they are engaged in-for instance those engaged in renting residential premises could simply be issued with a letting licence, while those involved in other complex transactions may be licensed differently to encourage registration.
- Many estate agents engaged in this practice are also unregistered, which has meant that they operate outside of law as they are not regulated persons/entities-this is partly as a result of low fines provided in law and lack of proper enforcement by the relevant agency, in this case the Estate Agents Registration Board. Any acts done by an unregistered estate agent (including negotiating, or entering into a contract for rent or sale of property on behalf of any party) is illegal. This was the decision of the Court of Appeal in ***Mapis Investment (K) Limited vs Kenya Railways Corporation (2006) KLR*** where the court stated: *"After careful consideration we have decided that it is clear from the evidence before the superior court and the provisions of Section 18 of Cap 533 that, if the contract alleged by Mapis and Mr. Shompa (the director of the appellant company) to exist, did in fact exist, the conduct of Mr. Shompa and the appellant company was in breach of express provisions of the statute and illegal…That being the case it*

*was then a matter of law as to whether the non registration resulted in the illegality of the contract; it is clear that a contract to perform estate agency services can only be legal if entered into with a registered estate agent.***"** A similar finding was made by the Environment and Land Court in ***Ocra Realtors Ltd v Abdulghani Kipkemboi Komen & 2 others*** **[2019] eKLR** where the court stated thus at paras 33 and 34: **"***The agency agreement that the plaintiff and the defendant entered into inter alia allowed the plaintiff to sell and negotiate the terms of sale and thus the plaintiff needed to be registered as an estate agent under the Estate Agent Act, before getting into such activities. A contract such as the one presented in this case is an illegal contract and cannot be enforced… It follows that the contract relied upon by the plaintiff is an illegal contract which cannot be enforced by this court. The plaintiff has claimed capacity to sue as an agent based on the agency agreement that he had with the defendants. Given that this contract is illegal, it follows that the plaintiff cannot derive any strength from it, including the strength to sue on the terms thereof, for such agreement is not worth the paper that it is written on, and is null and void, incapable of vesting any rights upon the plaintiff."*

[1] Harold Ayodo, 'Don't be swindled by estate agents' (The Standard) https://www.standardmedia.co.ke/article/2000061169/dont-be-swindled-by-estate-agents

10. Sacco Societies Act, No. 14 of 2008

- This statute seeks to provide for licensing, regulation, supervision and promotion of Sacco societies and provides for establishment of Sacco societies. Sacco societies play a huge role in financing of housing with estimates indicating that Saccos have approximately an asset base of Ksh 1.3 trillion, hold deposits and savings of about Ksh. 885 billion and a loan portfolio of up to Ksh. 860 billion, according to the SASRA Annual Supervision Report 2020.
- Section 4 establishes the Sacco Societies Regulatory Authority (SASRA) whose functions under section 5 include: licensing, regulating, and supervising Sacco societies.
- Section 23 of the Act forbids any carrying out of deposit-taking Sacco business without a valid licence issued by SASRA and being registered under the Cooperative Societies Act 1997.

- Under part IV of the Act on the governance of Sacco societies, there is provided for minimum capital requirements, minimum liquid assets, limits on loans and credit facilities, some restrictions on insider lending as well as investment by Sacco societies. All these provisions on governance are meant to ensure the healthy functioning and stability of Sacco societies, given their prominent role in the economy.

- Section 55 of the Act establishes the Deposit Guarantee Fund which shall provide protection for members' deposits but not shares, up to Ksh. 100, 000 in respect of each member (section 59). Of note however is that this Fund was never set up, with efforts toward making it

operational recently being undertaken. This is urgent considering recent scandals relating to Sacco societies.[36]

- Relatedly, there are plans to set up a Central Liquidity Fund to enable inter-borrowing among Saccos.

11. Sacco Societies (Deposit-Taking Sacco Business) Regulations 2010

- These Regulations were published on 18 June 2010 vide Legal Notice No. 95 of 2010 for the purpose of providing minimum operational regulations and prudential guidelines required of deposit taking Saccos.

- They provide for licensing requirements for deposit-taking societies with the issued licence lasting one year with requirement for renewal. The authority always retains the power to revoke licence in case of violation of conditions. Part III of the regulations provides for capital adequacy requirements with the Authority demanding more capital in case of increased risks. Part IV provides for liquidity and asset liability management. These entry barriers and requirements placed by SASRA (authority) help promote financial stability and the stability of the SACCOs thereby ensuring they continue to provide necessary liquidity in the market.

- Importantly, deposit-taking Sacco societies may either be withdrawable deposits (Regulation 23) or non-withdrawable deposits (Regulation 22). The non-withdrawable deposits are not vulnerable to runs which characterise banks and therefore face less risks relative to those that have withdrawable deposits.

- Regulation 31 provides a limit on the amount of interest recoverable on a loan from a debtor to an amount equivalent to the principal amount when the loan became delinquent.

- Regulation 32 requires all loans granted by a Sacco society to be fully secured and prohibits the issuance of a loan against a member's shares.

- Whereas part XIII of the Regulations further provides for a Deposit Guarantee Fund in line with section 55 of the Sacco Societies Act, which fund is meant to compensate members of a Sacco up to Ksh. 100, 000 in case of a failure.

- In addition, the amount of Ksh. 100, 000 that can be compensated to a member appears rather low to avoid any runs and to compensate members adequately.

12. Sacco Societies (Non-Deposit Taking Business) Regulations 2020

- These Regulations became effective on 1 January 2021 after publication vide Legal Notice No. 82 of 2020.

- They were a consequence of the findings of a report of the Taskforce on the development of regulations for non-deposit taking Saccos.

[36] https://www.businessdailyafrica.com/bd/economy/gakuyo-faces-dci-probe-over-sh1bn-ekeza-sacco-scandal-2241774

- In the main, the Regulations seek to regulate non-deposit taking SACCOs following concerns that these SACCOs, despite not taking deposits from members of the public, posed risks to the financial system thereby necessitating a monitoring of their operations.

- They expanded the mandate of the regulator, the Sacco Societies Regulatory Authority (SASRA), to also regulate these SACCOs.

- The Regulations seek to improve the governance of large non-deposit taking Saccos in light of recent cases of fraud relating to such institutions.

- It is however noted that there is currently a National Cooperative Development Policy[37] , developed in 2019, that is awaiting adoption. The Policy seeks to bring all the financial institutions under the ambit of the regulator, SASRA, the non-deposit taking SACCOs which were not under the regulator's ambit.[38] This needs to be fast tracked.

- In particular, the Regulations require the said Saccos to provide particularized details to SASRA within 30 days of issuance of a notice requiring such details; the core capital must not be less than 8 percent of the society's balance sheet; submission of a three year business plan and feasibility study; submission of 'fit and proper test form' relating to senior management of Saccos to SASRA; independent onsite inspection by SASRA to assess the institutional infrastructure, risk management policies, internal control systems and Management Information Systems.

- Some of the envisaged legislative and policy changes include: the setting up of a deposit protection scheme (SACCO Deposit Guarantee Fund) for members like those of commercial banks; establishment of the SACCO Fraud Investigation Unit; and prudential supervision of non-deposit taking SACCOs.[39]

13. Sacco Societies (Amendment) Bill, 2021

- The Bill seeks to amend the Sacco Societies Act 2008 to improve the governance of SACCOs which form a critical part of financing for prospective home buyers.

- Clause 3 of the Bill provides that a person who does not meet the requirements of Chapter Six of the Constitution and a Member of Parliament are ineligible to serve as a board member of the Sacco Societies Regulatory Authority.

[37] <https://www.industrialization.go.ke/images/downloads/policies/national-co-operative-development-policy.pdf >
[38] Brian Ngugi, "Kenya: New Law Set to Beef up Sacco Regulators Roles" (*allAfrica.com* March 22, 2021) <https://allafrica.com/stories/202103220421.html> accessed November 6, 2021.
[39] <Microsoft Word - Press Release - 2020 Regulations requiring non-deposit taking SACCOs to be regulated by SASRA take effect.docx (kilimo.go.ke) >

- Clause 4 amends section 20 of the Sacco Societies Act 2008 to require the Authority to submit financial statements to the Auditor General and not Controller of Budget as is currently the case.

- Clause 8 amends section 51 of Bill of the Act to provide that where an Authority determines that a SACCO society has violated applicable rules or acted in a manner detrimental to the interests of members or is undercapitalized, the Authority shall impose financial penalties on the society or its officers as prescribed.

- Overall, the Bill seeks to strengthen and improve the governance of Saccos to ensure their continued sustenance. The Bill was approved by the National Assembly and forwarded to the Senate in March 2022.

14. draft Sacco Societies (Specified Non-Deposit Taking Business) (Levy) Order, 2022

- This Order is currently in draft form undergoing stakeholder validation before it can be approved and gazetted. Section 15 of the Sacco Societies Act 2008 allows SASRA to charge a levy to finance its operations.

- It mainly seeks to reduce the annual levy charged on non-deposit taking SACCO societies holding over Kshs 100 million in deposits (currently standing at 185 in number and holding over 85 billion Kenya Shillings in deposits)[40] from the current 0.165 percent of the deposits to 0.15 percent of deposits by the year 2026, staggered in a fashion where they will be pegged at 0.13 percent in 2024, 0.14 percent in 2025 and rising to 0.15 percent in 2026. In addition, the maximum levy chargeable per SACCO will be capped at Ksh 6 million.

- The levy charged is meant to finance the operations of the regulator (SASRA) to enhance its effectiveness in supervision and regulation of SACCO activities and is permitted by section 15 of the Sacco Societies Act. This arguably, may lead to indirect benefits including better protection of member deposits, enhanced financial stability, and increased market confidence, among others.

15. Cooperative Societies Act, No. 12 of 1997

- This statute is important given that all Sacco societies are first registered as cooperative societies, and then apply to SASRA for a licence to operate a Sacco. Accordingly, Sacco societies are also regulated under the Cooperative Societies Act and specifically are under the Commissioner of Cooperatives who supervises their activities.

- Section 67 of the Sacco Societies Act provides that the Cooperative Societies Act 1997 apply to deposit-taking Sacco society with respect to any matter except where such a matter is provided for in the Sacco Societies Act 2008. Section 4 provides for principles guiding

[40] https://www.businessdailyafrica.com/bd/markets/capital-markets/sasra-cuts-statutory-levy-for-new-saccos-after-industry-talks-3825138

establishment of cooperative societies while section 5 of the Act provides for essentials for registration.

- Sections 43 and 44 respectively restrict giving of loans and borrowing monies from non-members except after a resolution by members and allowance by the society's by-laws.

- Cooperative societies help mobilize capital for prospective home purchases in a market where mortgages from commercial banks represent only a tiny fraction of total funding.

- However, the powers vested in the office of the Commissioner for Cooperative Development appear excessive with the potential of slowing the growth of cooperatives and interfering with cooperative societies' principles on ''autonomy and independence'', democracy of cooperatives and democratic control of cooperatives by their members.

- Further, the Act is yet to be reviewed to conform to the Constitution of Kenya 2010 which devolved some functions such as regulation of cooperatives to the county governments.

16. Employment Act, No. 11 of 2007

- The purpose of the statute is to regulate relations between employers and employees and provide for rights and responsibilities of both parties.

- Section 31(1) of the Act provides for housing rights for employees by providing that an employer shall always and at his own expense provide reasonable housing accommodation for each of its employees either at or near the place of employment or in the alternative, pay such sufficient sum as rent in addition to the wages or salary to enable the employee to obtain reasonable accommodation. This is the legal basis for payment of housing allowance to employees (at least for those who are not provided with housing). The Cabinet Secretary is however empowered to exclude the application of this section to a category of employees.

17. Guarantee (House Purchase) Act, 1967 (Cap 462)

- Section 3 of the Act allows government to guarantee the repayment of excess advances made or to be made by a building society to citizens of Kenya for the purpose of enabling them to purchase houses within its area of jurisdiction.

18. Civil Servants (Housing Scheme Fund) Regulations, 2004

- These Regulations came into force in September 2004 vide Legal Notice No. 94 of 2004. One of the objects of the Regulations is to establish and operationalize a Fund known as the Civil Servant Housing Scheme Fund.

- Before the establishment of the Fund, and particularly before July 2001, the Government of Kenya provided subsidized housing to its employers (civil servants) through provision of government-owned or government-leased housing, or payment of house allowance for those not provided housing by government. This gave rise to challenges around equity with only about 12% benefiting from the scheme while the rest were subject to private market forces.

Accordingly, in July 2001, the government began implementing a new housing policy for civil servants whereby the government began moving away from the responsibility of directly providing housing save for essential civil servants, rather encouraging civil servants to own their own homes. It is this that provided the background for the establishment of the civil servants housing scheme fund.

- The purpose of this Fund under Regulation 4 is to provide loan facilities to civil servants for constructing or purchasing a residential house and to develop housing units for sale and for rental by civil servants.

- Regulation 6 establishes a Scheme Management Committee for the Fund which determines and regulates interest payable by loanees; approves all housing development and financing proposals; develops criteria for beneficiaries of the Fund; among other functions.

- However, the composition of the Scheme Management Committee is top heavy with members comprising of 5 Principal Secretaries, the Attorney General and one officer administering the Fund. There is need for more broad-based representation even among individual civil servants to ensure even the actual and potential beneficiaries of the housing units are represented.

- Regulation 7 provides that a loan granted can only be solely utilised for purchase of a residential house for occupation by the applicant; improvement of a residential house occupied by an applicant; development of a residential house for occupation by the applicant; purchase of land and development of a residential house for occupation by the applicant; and equity release for improvement or development of a residential property. Regulation 7(2) further provides that a loan for developing a house can only be granted to a civil servant who is in possession of a title deed to land on which the development is to be carried out. The exclusion of civil servants who do not have land on which to put up a residential property from the loan scheme for developing a residential house only exacerbates the problem as those are the persons in most need of financial support.

- Regulation 7 further provides that eligible civil servants are those in confirmed employment of more than 12 months' contract with the Cabinet Secretary granted the powers to vary the maximum amount of funds that may be loaned.

- Under regulation 8, the loan funds are only disbursed in phases with the first phase set at 25% of the cost of construction subject to the cost of construction not exceeding the maximum funding possible, or, twice the open market value of the land on which the house is to be built, whichever is lesser. Subsequent disbursements are made based on the rate of completion of the various phases of the development as certified by a registered valuer.

- In addition, under Regulation 9(3B), the loan for development of a house is pegged at 90% of the value of the property but shall not exceed the maximum loan amount set.

- Regulation 11 and 12 provide that the interest rate on the loan is to be at a minimum of 3% and a maximum of 5% per annum on a monthly reducing balance or such other rate as determined by the Committee, with the loan being paid in 20 years or upon the person attaining 60 years (whichever is earlier).

- Under regulation 15, a default on the loan for a period of 3 consecutive months entitles the Committee to repossess the property and sell the same to another civil servant.

- Regulation 17A now provides that the Fund may enter viable financing or development partnership with a person/entity for the purpose of achieving the objects of the Fund.

- Regulation 18 impliedly allows the Committee to appoint a tenant purchase institution or a mortgage finance company to administer the Fund on its behalf.

- At present, loans provided under the Civil Servants Housing Scheme Fund range between Ksh. 4-10 million based on seniority and affordability of the employee. The interest rate is currently pegged at 5% per annum on a monthly reducing balance with applicants being facilitated up to a maximum of 90% of the price upon the making a down payment of 10%.[41]Statistics indicate that the Civil Servants Housing Scheme Fund gave Ksh 6.2 billion in loans to purchase or build homes to 1, 321 civil servants as of 30 June 2021.[42]

19. Housing Scheme Fund Regulations, 2018 (Legal Notice No. 238 of 2018)

- The Regulations sought to mandate all employers to register with the Housing Fund and contribute to the Fund; Establishes a Fund to promote an affordable housing scheme.

- Regulation 3 provides that the Housing Fund established under section 6 of the Housing Act shall be an affordable housing scheme for purposes of section 30A of the Income Tax Act.

- Regulation 3(2) provides that an affordable housing scheme is differentiated into various schemes viz: social housing (designated for monthly income earners earning up to Ksh 19, 999); low-cost housing (designated for those earning between Ksh 20, 000 to Ksh 49, 999), mortgage gap housing (for those earning between Ksh 50, 000 to Ksh 149, 999), and middle to high income housing (for those earning Ksh 150, 000 and above).

- Regulation 4 makes it mandatory for every employer to register with the Housing Fund as a contributing employer and shall register the employees as members of the Housing Fund. Employees are also obligated to register with the Housing Fund as contributing employees unless they are foreigners. Self-employed persons may also choose to register with the Fund.

[41] https://housingandurban.go.ke/the-civil-servants-housing-scheme-fund-cshsf/
[42] https://www.businessdailyafrica.com/bd/economy/civil-servants-take-sh6-2bn-home-loans-in-state-scheme-3909014

- Under Regulation 15 and 16, a person may apply to be granted a loan from the Housing Fund by making an application to the National Housing Corporation (NHC).

- Under regulation 18, loans granted are to attract an interest rate of up to 7% on a reducing balance basis to be retained by the Fund or such other rate as may be determined by the NHC.

- Employers and employees were to each contribute 1.5% making a total of 3% of monthly gross pay (capped at Ksh. 166, 000 per month) to individual accounts known as Housing Fund Credit accounts.

- The Regulations were however quashed by the court and therefore their implementation derailed.

20. Income Tax Act, 1974 (Cap 470)

- The statute seeks to make provision for the charge, assessment and collection of income tax; for the ascertainment of the income to be charged; and for the administrative and general provisions relating thereto.

- Section 3 of the Act is the charging section which requires payment of tax on income including rental income, capital gains tax, and corporate tax.

Residential Rental Income Tax

- Section 6A of the Income Tax Act (introduced through the Finance Act 2015 and which became effective 1st January 2016) provides for a monthly Residential Rental Income Tax.

- The Monthly Rental Income Tax is a final tax charged at a **flat rate of 10% on gross rent received per month**, payable by resident persons (whether individual or company) on rental income earned for the use or occupation of residential property where the rent income is between Ksh 288, 000 to 15 million per annum (equivalent to Ksh 24, 000-1,250,000 per month).

- No expenses, losses or capital deduction allowances are allowed for deduction from the gross rent.

- The rental income must be filed online via iTax on or before the 20th of the following month such as where rent is received by January, the returns for the same must be filed on or before 20th of February.

- Landlords/property owners who earn a rental income below Ksh 288, 000 annually (Ksh 24, 000 monthly) or above Ksh 15 million per year are required to file annual income tax returns and declare the rental income alongside their other incomes for the particular year.

- Once this tax is paid, it is a final tax and therefore landlords are not expected to declare the same in their annual income tax returns.

- Persons exempted from this Monthly Rental Income Tax are: non-residents, landlords earning more than Ksh 15 million annually, and taxpayers who wish to remain in the normal tax regime of filing annual income tax returns on the rental income and who may choose to do so by writing to the Commissioner of Domestic Taxes, KRA.

- On the other hand, the rental income under the normal tax regime is calculated under individual graduated scale or a corporate tax rate of 30% of total rent received for the year. Section 15 of the Income Tax Act however allows for deduction of expenses incurred to generate the said rent.

Capital Gains Tax (CGT)

- Capital Gains Tax was reintroduced in Kenya on 1st January 2015 (through the Finance Act 2014 which amended the Eighth Schedule of the Income Tax Act), following its abolition 30 years before (in 1985).

- Sections 3(2)f, 34(1)j, Paragraph 2 of the Eighth Schedule of the Income Tax Act (Cap 470) provides for imposition of Capital Gains Tax (CGT) as a final tax **levied at 15% of the net gain**[43] arising from proceeds for transfer of property including land and buildings. The net gain is obtained by deducting the acquisition cost (initial buying price) and related incidental costs of the transaction from the total sale proceeds. Some of the allowable expenses (incidental costs) that are deducted from the sale proceeds for purposes of calculating the net gain for purposes of CGT are: loan or mortgage interest; legal fees; costs of enhancements; valuation costs and advertising costs.

- The Capital Gains Tax is due on or before the transfer of the property but no later than the 20th day of the month after transfer. The payment is initiated online via iTax.

- The process of payment of CGT is done through presentation of a completed CGT 1 form by the taxpayer/seller to KRA accompanied by a copy of sale/transfer agreement, proof of incidental costs related to the acquisition and transfer of the property, copy of title deed or ownership document for the property, report from a registered valuer for property transactions between related parties, and any other document that the Commissioner of Taxes may require.

- There are some transactions that are however exempt from payment of CGT. These include: transfer of assets between spouses or to immediate family, transfer of property only for the purpose of securing a debt or loan, transfer by a personal representative to a beneficiary under the law of succession, transfer of assets between former spouses upon divorce or judicial separation, transfer of assets to a company where spouses or spouse and immediate family have full shareholding, and a private residence if individual owner has occupied such residence continuously for the three-year period immediately prior to the particular transfer.

[43] This CGT rate of 15% of net gain became effective 1 July 2022 following the enactment of the Finance Act 2022 which increased it from the prevailing rate of 5%.

- The Kenya Revenue Authority (KRA) in September 2019, introduced additional requirement to the process of property transfer by requiring verification and approval of all transactions declared as exempt from Capital Gains Tax.

- The effect of introduction of iTax (online) payment of CGT was that the I-Tax system would not permit the payment of Stamp Duty on a transfer unless and until the CGT was also paid. In effect therefore, and as a matter of practice, there was a requirement on a property purchaser to present an approved CGT acknowledgement slip as proof of payment of CGT or exemption (if any) before one could make payment for stamp duty to enable transfer of their property.

- Notably, CGT payment is an obligation of the seller, whereas stamp duty payment is an obligation of a buyer/purchaser. In effect therefore, a purchaser would have been held hostage by failure by the seller to honour their obligation of paying CGT and therefore delay the transfer process.

- Upon legal challenge, the High Court in ***Kenya Bankers Association v Kenya Revenue Authority* [2018] eKLR** made a declaration that the requirement by KRA for simultaneous payment of both stamp duty and CGT by a charge pursuant to statutory power of sale was illegal and made an order compelling KRA to allow payment of stamp duty on an instrument of transfer without requiring payment of CGT or an acknowledgement number for payment of CGT.

- This decision was affirmed on appeal in ***Kenya Revenue Authority v Kenya Bankers Associations* [2020] eKLR, Civil Appeal 213 of 2018,** where the Court of Appeal held that to require a purchaser to pay CGT first without ascertaining whether there is in fact a capital gain is unreasonable and unfair. The court also held that a bank as a chargee is under no obligation to pay capital gains tax when exercising a statutory power of sale since it is not a proprietor of the charged land but rather only has proprietary rights over the charge. The appellate court was of the view that even in executing a transfer following exercise of statutory power of sale, the chargee/bank is usually but a nominee and never the owner/proprietor of the property as to be liable to pay stamp duty.

- Following the Court of Appeal decision, KRA published a Notice dated 23rd March 2020 dispensing with the requirement to present a CGT Acknowledgement Slip before processing of stamp duty payment.

- Another consequence of this directive is that CGT can now be paid after transfer/registration of property transfer, but on or before the 20th day of the month after that when the transfer has been completed.

- Section 20(1)c of the Income Tax Act exempts real estate investment trusts from income tax except for the payment of withholding tax on interest income and dividends as a resident person as specified in the Third Schedule of the Act.

- Importantly however, the Kenya Revenue Authority is yet to publish regulations that will formally exempt subsidiaries of real estate investment trusts (REITS) from income tax to accord with the said section 20(1)(c) of the Income Tax Act despite the move to exempt the operating units of the REITS starting three years ago. Accordingly, these regulations need to be fast-tracked to enable REITS take advantage of this tax incentive.

- Section 20(1)d of the Income Tax Act, introduced in November 2019 vide the Finance Act No. 23 of 2019, to exempt investee companies of Real Estate Investment Trusts (REITS) from income tax.

- The above tax exemptions are incentives designed to encourage the growth of real estate investment funds which allow the public to gain exposure to the property market without requiring large cash investments. The funds issue units which trade like stocks and break down ownership of the underlying assets to enable minimum investments of a few thousand shillings.

- Section 30A of the Act (introduced through amendments in 2018) provides for an affordable housing relief for a year of income to residential individuals eligible for and who have applied for or are awaiting allocation of a house or those saving for a purchase under the affordable housing scheme. The effect of the tax relief is to reduce the amount of tax otherwise payable by a purchaser, and therefore serves to avail more disposable income for the taxpayer/purchaser thereby increasing demand.

- This tax relief is however only granted once. Under section 3 of the Third Schedule under (Head A-Resident Personal Relief), the affordable housing relief is set at 15% of the employee's contribution but shall not exceed Ksh. 108, 000 per year.

- Section 59 of the Act empowers the Commissioner of Domestic Taxes to issue a notice to an occupier of premises to furnish the Commissioner with a return containing the name and address of owner or lessor of the premises; and a full and true statement of the rent of any consideration payable for the said occupation. These powers certainly help the revenue authority in assessing the tax to be assessed against the owner/lessor of the premises especially where they are under declaring or failing to remit taxes.

- Some of the exemptions to payment of income tax stipulated under Part 1 of the Act include: income of the National Housing Development Fund (section 57); and of the amount withdrawn from the National Housing Development Fund to purchase a house by a contributor who is a first-time homeowner (section 59).

21. Finance Act, No. 22 of 2022

- The Finance Act, No. 22 of 2022 which was assented into law on 21 June 2022 **amended the Income Tax Act and tripled the rate of CGT to 15 percent of the net gain from 5 percent**, in a bid to boost revenue collection. This will certainly make it unattractive to investors thereby reducing potential supply of available affordable houses in the market, largely due to

reduction of potential returns. However, the rate of 5% has been retained for firms or companies that are certified with the newly launched Nairobi International Financial Centre Authority (NIFCA) who will have invested 5 billion Kenys Shillings prior to 1 January 2023 and held the investment for at least 5 years before the disposal/transfer.

- There is **also no provision for indexation (inflation adjustment/adjusting the original price of property upwards for purposes of tax to mitigate inflationary distortions**)-whereby the law considers the inflation that has affected property prices and discount the same. This is important given that a substantial part of the capital gains usually targeted by the tax are a result of inflation and related decrease in value of money as opposed to being an actual gain by a property owner.

- Notably, the indexation has also not been included in the Finance Act 2022 and despite lobbying for the same by various stakeholders, has been rejected by the relevant Departmental Committee of the National Assembly which **has proposed the CGT at 10%** from the current 5%.[44] Instead an increase in the CGT rate has been favoured largely owing to its non-complicated manner and ease of collection.

- An overall recommendation regarding the taxation environment is **the need for a national tax policy**[45] that will provide for a predictable tax environment and attract investments. This will also help avoid instances of changing tax policies every year through the Finance Bill, which destabilises the investment environment. Notably, Treasury has recently released a draft **National Tax Policy 2022** (in July 2022) which is currently undergoing stakeholder validation.

- The Act has also introduced an exemption from stamp duty on instruments executed in favour of a mortgage refinance company. This is meant to reduce transaction costs in relation to mortgage refinance companies.

- The Finance Act has also amended section 7 and 8 of the Miscellanous Fees and Levies Act, 2016 which clarifies that import declaration fee and railway development fee will be applicable at the rate of 1.5% of the custom value of construction inputs of houses under the affordable housing scheme upon recommendation to the Commissioner by the Cabinet Secretary for housing.

22. Public Finance Management Act, No. 18 of 2012

- The statute provides for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies.

[44] See, Report of the Departmental Committee on Finance and National Planning on the consideration of the Finance Bill (National Assembly Bill No. 22 of 2022) at para 36 on page 18.
[45] This view is also shared by the Departmental Committee on Finance and National Planning of the National Assembly in its report above (p. 7).

- The Act provides that a public Fund (funded from the Exchequer) can only be established under the National Treasury-this certainly affects the setting up of Funds to support housing. Under section 12(g), it is the responsibility of the National Treasury to develop policy for the establishment, management, operation and winding up of public funds.

- Section 77 of the Act further empowers the Cabinet Secretary responsible for finance to waive or vary a tax, fee or charge imposed by national government and its entity in accordance with the criteria laid down provided the same is authorized by law. This power may therefore be employed in waiving or varying fees and charges that may influence house prices.

23. *Unclaimed Financial Assets Act, No. 40 of 2011*

This statute was enacted to provide for reporting and dealing with unclaimed financial assets; to establish the Unclaimed Financial Assets Authority (UFAA) and the Unclaimed Financial Assets Trust Fund (UFATF). The law caters for instances where a person dies, and their beneficiaries or dependants cannot be found to claim the property-whether in cash, shares, or other properties-as to form part of the estate of the deceased for succession purposes.

- At present, Unclaimed Financial Assets Authority was holding unclaimed assets worth about 54.8 billion Kenya Shillings-comprising of Ksh 23. 1 billion Kenya Shillings in cash and stocks/shares worth about 30 billion Kenya Shillings-as of December 2021.[46] It is estimated that there are assets worth up to 241 billion Kenya Shillings that are yet to be surrendered to the Unclaimed Financial Assets Authority.[47] This money and assets are largely held by banks, insurance companies, mobile money phone wallets, SACCOs, utility companies and law firms. The Authority is required to make efforts towards reuniting these assets with the beneficiaries/dependants of the deceased where they can be found; and where the same cannot be found, the assets devolve to the state (*bona vacantia*).

  The reunification of the unclaimed assets held by the Authority with the intended beneficiaries has been dismal. This robs intended beneficiaries of the necessary capital that would be deployed in purchasing or acquiring housing (from the demand side). On the other hand, the unclaimed assets/cash is simply invested in government securities by the Authority-yet it can be lent to developers to enhance housing supply if the law were to be changed to allow for this. In addition, the surrendering of unclaimed assets to the Authority by various companies and institutions has also been slow, explaining the huge amount of unsurrendered assets.

- Notably however, there have been some reforms towards promoting surrendering of unclaimed assets to the Authority. The Finance Act 2022 has amended section 33 of the Act which imposed a fine of between Ksh 7, 000-50, 000 per day a report on idle assets is withheld or the duty is not performed; and a fine of 25% of the value of the asset for failure to surrender

[46] <https://www.businessdailyafrica.com/bd/economy/unclaimed-assets-agency-eyes-sh240bn-with-seizure-powers-3867830 >
[47] ibid.

it to the Authority. The amendment which has introduced section 33A now provides for waivers on penalties that would otherwise have been imposed on an entity for not surrendering the assets in time. The amended law now establishes a Voluntary Unclaimed Financial Assets Disclosure Programme-which shall run for 12 months from 1 July 2022-under which holders of assets will be granted relief of penalties and interest on unclaimed assets where they disclose, report and surrender them to the Authority within the set timeline.

24. *Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009*

This Act of Parliament provides for the offence of money laundering and introduces measures for combating the offence; and provides for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime.

- Section 3 provides that a person who engages in money laundering commits an offence while section 4 creates an offence where any person uses, acquires or has possession of property that they know or ought to know that forms part of proceeds of crime. Section 5 provides that a person who willfully fails to comply with a reporting obligation commits an offence.

- Through the 2021 amendments to the Act, there was added "advocates, notaries and other independent legal professionals who are sole practitioners, partners or employees within professional firms" to the existing classes of businesses and professions namely: real estate agencies; casinos; accountants who are sole practitioners, partners or employees within professional firms; non-governmental organizations; and such other business or profession in which the risk of money laundering exists as the Cabinet Secretary may, on the advice of the Financial Reporting Centre, declare as part of **designated non-financial businesses or professions.** In addition, section 18(3) of the Act provides that the High Court may order an advocate to disclose information available to him in respect of any transaction or dealing relating to the matter under investigation, upon an application made in relation to an investigation.

- What this means is that lawyers and real estate agencies, which are usually contracted by parties in real estate transactions to facilitate the sale and purchase as well as lease and charging of properties including holding funds as stakeholder (in an escrow account) pending the finalization of transaction, are under a legal obligation to report to the Financial Reporting Centre in case of suspicious transactions. Prior to this change in the law in 2021, lawyers were exempt from reporting. This legal development may reduce instances of money laundering through real estate, which is partly responsible for high house prices.

25. ***Kenya Deposit Insurance Act, No. 10 of 2012***

- This Act provides for the establishment of a deposit insurance system and for the receivership and liquidation of deposit taking institutions, to provide for the establishment of the Kenya Deposit Insurance Corporation.
- Section 20 of the Act establishes the Deposit Insurance Fund from which funds shall be used to meet payments in respect of insured deposits. All institutions licensed by the Central Bank

are members of the Fund and make contributions. The Fund is meant to reduce instances of bank runs to protect depositors' interests and thus ensures financial stability.

26. Mortgages (Special Provisions) Act, 1968 (Cap 304)

- This statute was passed to enable mortgage finance companies to obtain possession more easily of property in respect of which they are able as mortgagees to exercise their power of sale or appoint receivers.
- Section 3 of the Act provides that where immovable property is mortgaged to a company and the company as a mortgagee has power to sell the property or appoint a receiver and there has been a breach of the agreement by the mortgagor and further the property is in the occupation of the mortgagor or of some other person who is not an approved tenant, then the company may institute a suit in the High Court in accordance with this Act for the possession of the property. Upon filing the suit, the company shall file an affidavit verifying the plaint and testifying that the specified conditions exist in relation to the property and giving full particulars concerning them. The mortgagor, who is usually the defendant, may file an affidavit contesting the conditions if so.
- Section 5 of the Act further provides that at any time after the expiry of 21 days after service of summons on the defendant, the company may apply to the Court for a decree for possession of the mortgaged property, and on such application the Court shall read the affidavits filed and shall pass a decree for possession accordingly, unless it is satisfied on such reading that the specified conditions do not exist, or that there is reasonable doubt whether they exist, in which case the Court shall grant leave to defend, either unconditionally or on such terms as to giving security or time of trial or otherwise as the Court may think fit.
- Under section 5(3) of the Act, the net consequence of grant of decree of possession is to confer on the company (mortgagee) the sole right to possession of the mortgaged property, and, upon its being registered under the law under which the title to the property is registered, it shall have the effect of determining every lease, tenancy agreement and licence to occupy, whether registered or not, which is then subsisting in respect of the property (other than the lease (if any) under which the property is held by the mortgagor. Section 7 of the Act provides that the Act shall have effect notwithstanding the terms of a lease or tenancy agreement, and notwithstanding any other written law.
- The Court of Appeal in ***South C Fruit Shop Limited v Housing Finance Company of Kenya Limited* [2013] eKLR** stated thus of the Act: "*Section 5 (3) of the Mortgage (Special Provisions) Act sets out the rights that are conferred upon the decree holder. In particular, the company shall have the right to exclusive possession of the property in question, and the decree shall have the effect of determining every tenancy which subsists at the time. This right shall however accrue upon registration of the decree against the title of the property*."
- The implication of this statute is to expedite the process of taking possession on part of mortgagees (financiers), pending sale or appointment of receiver in case of loan defaults. It is however not entirely clear whether this Act is still in force, as there are not many cases that have been litigated since the enactment of new land laws in 2012 which in fact removed the word 'mortgage' from its lexicon. However, there is no explicit mention of the law having been repealed. Accordingly, it may be said to be in effect.

27. ***Auctioneers Act No. 5 of 1996***

- In ***Kimwele v Kenya Bankers Association of Kenya & 12 others*** **(Commercial Case E237 of 2020) [2022] KEHC 458 (KLR) (Commercial and Tax) (31 May 2022) (Judgment),** the plaintiff representing the interests of auctioneers moved to the High Court complaining about the misapplication of the Auctioneers Act 1996 by banks and their agents by illegally issuing instructions, repossessing, advertising and selling loan securities without the involvement of auctioneers (Plaintiff's members), prescribed an illegal fees schedule and encouraging undercutting. Banks and their agents had been engaging other persons other than auctioneers to save on costs given that auctioneers could charge up to 2 percent of the value of the property being auctioned. The court held that licenced auctioneers should continue to conduct auctioneering business under the Land Act, 2012 any other written law unless otherwise excluded, noting that person who authorizes or permits an unlicenced person to carry out auctioneering business risks the having that transaction declared void for contravening statutory provisions (paras 16 and 17). The court however did not grant the various orders sought holding that they were general in nature and only served to restate the law in force.

28. ***Auctioneers Practice Rules 2009***

- These rules apply to and bind all auctioneers by requiring every practicing auctioneer to sign, subscribe and bind themselves to them upon registration. Under these practice rules, no auctioneer should either directly or indirectly undercut the fees set out in the Auctioneers Fee Schedule. The Rules also prohibit sharing of costs or profits with any other person who is not an auctioneer or other fully qualified agent. An auctioneer employed by an unqualified person must not execute instructions within the scope of their licence or render services to their employer for which the employer charges fees and retains such fees. Auctioneers are also obligated to ensure that they attain the best value for goods sold at auctions. The Auctioneers Licensing Board issues licences to practicing auctioneers on an annual basis and arranges mandatory continuous professional development sessions.

29. ***Auctioneer Rules, 1997***

- Part II of the Rules provide for licensing and identification. Rule 3 provides for application and issuance of a licence to an auctioneer and the issuance of an identification card to auctioneers by the Auctioneers Licensing Board.
- Part III provides for the manner of attachment and sale of property in an auction under warrants of court or under letters of instruction from third parties including distress for rent and repossession unless otherwise provided or ordered by court. An auctioneer is required to keep a register of warrants and letters of instruction issued to them. Under Rule 10, an auctioneer may apply to court for an order that the property subject of an auction be valued by an independent valuer, at any time prior to auction. With respect to sale of immovable property, rule 15 requires an auctioneer to record the court warrant or letter of instruction in the register; prepared a notification of sale in the statutory form indicating the value of the property to be sold; locate the property and serve the notification of sale on the registered owner or adult member of the family and where the recipient refuses to sign such notification the auctioneer should sign a certificate to such effect; give in writing to the owner of the property a notice of no less than 45 days within which the owner must redeem the property;

upon expiry of the notice period without payment arrange for the sale of the property not earlier than 14 days after the first newspaper advertisement. This means that upon receipt of instructions from a bank or financial institution, an auctioneer takes **at least 2 months** before they can auction a property.

- The advertisement of auction or sale must contain: date, time and place of proposed sale; conditions of sale or where the same may be obtained; time for viewing the property to be sold; in case of movable property, an accurate description of the goods to be sold and a statement as to whether or not they are to be sold subject to a reserve price; in case of immovable property all the information required to be contained in the court warrant or letter of instruction except the amount to be recovered and the exact amount of any reserve price. Except otherwise ordered by court, a advertisement by an auctioneer of a sale by auction of any property, movable or immovable, is by way of an advertisement in a newspaper.
- Part IV of the rules on maintenance of accounts requires auctioneers to maintain a client account into which to pay all clients' money and maintain proper books of accounts. Part V of the Rules providing for disciplinary mechanisms against a professional auctioneer engaged in misconduct. The Fourth Schedule sets out the auctioneers' fee schedule. With respect to sale of immovable property (frequently used as collateral for loans in favour of banks/financial institutions), an auctioneer fee of 10% is charged for up to Ksh 600, 000 realized in case of sale; fee of 5% for sales between Ksh 600, 001 to Ksh 3, 000, 000 and a fee of 2% for any amount above Ksh 3, 000, 000.

30. Rent Restriction Act, 1959 (Cap 296)

- The statute makes provision for restricting increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house.

- Sections 9 and 10 of the Rent Restriction Act, Cap 296 restrict rent increases without a reassessment and approval of the Rent Restriction Tribunal for dwelling houses that have a monthly rent figure of Ksh. 2,500 and below as of 1st January 1981. The rent control/cap has not been changed or reviewed for four decades. Accordingly, the envisaged changes in the form of the new Landlord and Tenant Bill 2021 are timely.

- The restriction of rent for only rental houses whose monthly rent is Ksh. 2,500 and below is however low in modern day and has since been overtaken by events.[48] These are known as protected or controlled tenancies.

- Section 2 of the Rent Restriction Act, Cap 296[49] restricts the increase of rent in relation to dwelling houses whose monthly rent is below Ksh. 2,500 as well as the legal right to possession and the exaction of premiums and fixes standard rents in relation to some dwelling houses.[50]

[48] Rent Restriction Act, section 2(1)c as read with section 9.
[49] <http://extwprlegs1.fao.org/docs/pdf/ken62996.pdf >
[50] Rent Restriction Act, Section 2(1)c, 9, 10.

- This law was enacted to protect low-income households from exploitation by landlords through unjustified rent hikes, and therefore serves as a cushion to low-income earners. The Act only allows a rent increase by the landlord by giving notice to the tenant when the rates payable by the landlord to the government over the dwelling premises increase during the letting period.[51]

- Further, the Act prohibits levying of distress for rent over such dwelling houses without leave of the Rent Restriction Tribunal.[52]

- To repeal and modernize the Rent Restriction Act and other related laws, there is currently a government-sponsored Bill in Parliament known as the Landlord and Tenant Bill 2021[53] which seeks to peg rent increases by landlords to the annual inflation rate as measured by the Consumer Price Index.

- Overall, rent controls have the effect of restricting the ability of landlords to increase rents to existing tenants. While this may serve to promote affordability of housing for tenants in current occupation at least for the time the rent controls remain in place, it may potentially serve to reduce the quality of housing as landlords cease to improve or maintain the housing units and even potentially attempt to make the houses unconducive for habitation to force tenants to leave.

- Even more fundamentally, it may have the effect of reducing housing supply as developers, landlords and prospective landlords shy away from investing in housing units due to the reduced profit margins. In the main therefore, rent control regulations may have the perverse and unintended effect of disincentivising investment in the housing sector especially at the lower end of the market segment.

- What is more, rent controls provide an incentive to tenants to remain in occupation of rented houses rather than leave, which effectively works against the necessary mobility that is key to economic productivity and which may even harm such households, and effectively limiting upward mobility of low-income households to better housing.

- The wisdom and utility of rent controls in general was questioned by the High Court in Mombasa in ***Laxmishanker Kanji Vyas v Firdaus Salim & another*** **[2014] eKLR** where the court, in referring to a judgment of the Supreme Court of India, stated that restriction on rent increases no longer appeared to be a reasonable restriction and that such legal provisions had become unreasonable, arbitrary and discriminatory. The court, however, only remarked that the matter ought to be addressed through legislative intervention rather than judicial intervention.

[51] Section 11.
[52] Section 16.
[53] <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2021/TheLandlordandTenantBill_2021.pdf >

31. Landlord and Tenant Bill 2021

- The Bill seeks to repeal the Rent Restriction Act (Cap 296), the Distress for Rent Act (Cap 293), and the Landlord, Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) and generally to consolidate the laws relating to renting of residential and business premises, regulate the landlord-tenant relationship and establish Tribunals for adjudication of disputes.

- PART IV of the Bill provides for general matters relating to tenancies including fair rent, permitted increase of rent, notice of termination and the right to assign or sublet rental premises. The Part also provides for the alteration of terms and conditions in a tenancy, reference to a tribunal and the decision of a tribunal. It further provides for keeping of a statement of rent paid, the keeping of a record of the payment of rent and condition of statutory tenancy.

- More particularly, Section 17 of the Bill establishes a Landlord and Tenant Tribunal which may determine the rent payable where the same cannot be agreed mutually between parties, by referring to lettings of similar status or the market rent of the premises. There is therefore entrenched an element of rent control by a tribunal, effectively interfering in a free market economy.

- Section 18 obligates a landlord to issue a 90 day written notice to a tenant before increasing rent and such increase shall only upon if: there has been carried out or undertaking to carry out capital expenditure on the premises or provides additional service; and taken into account the inflationary trends which inflation shall be based on the percentage change from year to year in the Consumer Price Index (CPI) for prices of goods and services as reported monthly by the Kenya National Bureau of Statistics (KNBS), averaged over the twelve-month period that ends at the end of December of the previous calendar year, rounded to the first decimal point.
- Section 20 provides that rent increase may only be done after 12 months for residential premises and after 24 months in case of commercial premises.

- Section 21 is to the effect that a landlord shall decrease rent payable commensurate with any decrease in the services offered to the tenant.

- The Bill was in the Senate awaiting passage before the term of Parliament expired.

32. Stamp Duty Act, 1958 (Cap 480)

- The purpose of the Act is to make provision for the charging, assessment and collection of income tax; for ascertainment of income to be charged and provides for administrative and general provisions.

- Section 5 of the Act provides that every instrument specified in the Schedule to the Act (except those exempted) however executed which relates to property situate in Kenya shall be

chargeable with the stamp duty specified. However, stamp duty is not charged twice where one moves a mortgage or Islamic property finance arrangement from one bank to another.

- Section 30A provides for affordable housing relief for a year of income to residential individuals eligible and who are allocated a house or those saving for a purchase under an affordable housing scheme.

- Section 96A of the Act (introduced through the Finance Act 2015) exempts payment of stamp duty on transfers relating to Real Estate Investment Trusts (REITS) that are authorized under the Capital Markets Act where it is shown to the collector of taxes that the effect is to convey or transfer a beneficial interest in property from one trustee to another trustee or to an additional trustee; or the effect is to convey a beneficial interest in property from a person/persons of the transfer of units in the real estate investment trust. Such an instrument only need be stamped with a particular stamp denoting that it is not chargeable with any duty.

- Section 96A (4) provides that exemption of stamp duty for transactions whose effect is to convey a beneficial interest in property from a person/person of the transfer of units in the real estate investment trust will only apply to instruments executed before 31 December 2022.

- Section 96B of the Act also exempts payment of stamp duty on transfer of title relating to *Sukuk*[54] arrangement if: at the beginning of the arrangement, the title shall be transferred from the original owner of the asset to the entity representing the interests of the *Sukuk* holders; and during or at the end of the arrangement, the title shall be transferred back to the original owner of the asset from the entity representing the interests of the *Sukuk* holders.

- Section 97 of the Act further exempts documents including registration documents relating to a building society from paying stamp duty. Notably however, the exemption does not extend to mortgage or to the release or discharge of a mortgage, which are far much more significant.

- Section 106 of the Act empowers the Minister (Cabinet Secretary responsible for Finance) with the power to exempt certain instruments from payment of stamp duty if the same is in public interest.

- Section 117(1) l of the Act exempts first time home buyers under the affordable housing scheme from payment of stamp duty. However, there are no mechanisms/published guidelines of determining who is a first-time home buyer with the consequence that this incentive has not been utilised. The main difficulty has been problems with establishing who a first-time home buyer is.

[54] Sukuk is a *Sharia* law compliant bond. It denotes a financial product whose terms and structures comply with sharia (Islamic law), with the intention of creating returns similar to those of conventional fixed-income instruments like bonds.

- Section 117(1) o exempts payment of stamp duty on transfer of a house constructed under an affordable housing scheme from the developer to the National Housing Corporation (NHC).

33. Stamp Duty (Valuation of Immovable Property) Regulations 2020

- The Regulations now permit valuation of immovable property by a private valuer appointed by the Chief Government Valuer pursuant to section 10A of the Stamp Duty Act (Cap. 480, Laws of Kenya). This appointment is on application in writing by the private valuer to the Chief Government Valuer.

- This is a departure from the previous period where valuation of property for purposes of stamp duty payment could only be done by government valuers thereby delaying the property transfer process given their few numbers relative to the huge number of transactions.

- In summary, these Regulations are likely to ease valuation and stamping processes and therefore ensure quick turnaround for property transfers.

34. Value Added Tax Act, No. 35 of 2013

- The purpose of the Act is to review and update the law relating to value added tax; to provide for the imposition of value added tax on supplies made in or imported into Kenya.

- Section 5 of the Act is the charging section which gives power to KRA to charge value added tax on supplies.

- First Schedule Section A, Clause 109 which exempts from VAT, goods imported or purchased locally for the direct and exclusive use in the construction of houses under an affordable housing scheme approved by the Cabinet Secretary on the recommendation of the Cabinet Secretary responsible for matters relating to housing.

- Section B Clause 33 exempts transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset backed securities.

- The net effect of exemption of value added tax on construction inputs for affordable housing units, usually charged at 16 percent of the total price, will lead to reduced construction costs thereby leading to more affordable prices for housing units under the affordable house segment. This is partly because of suppliers are unable to claim credits for VAT they pay on inputs used in production on account of the VAT exemption. Such credit can only be claimed if the construction inputs were zero-rated rather than exempt from VAT.

35. *Public Private Partnerships Act, No. 14 of 2021*

- The law which became effective in December 2021 provides for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships; to streamline the regulatory framework for public private partnerships. It repealed the Public Private Partnerships Act, 2013.

- In particular, the Act provides timelines on key project processes and stages to improve the environment; reduces the number of oversight approvals required from the PPP Committee in the course of project development; delegates various operational latitudes of guiding and championing project development for the Committee to the newly-established Directorate; expands the scope of arrangements that qualify as PPPs and expands the scope of procurement methods available for PPPs by introducing direct procurement as one of the methods; simplifies procedural elements on conduct of feasibility studies, tender evaluations, contract negotiations and approvals of applications.
- Overall, the Act is expected to expedite project development. In this regard, it may incentivize more private developers to participate in the affordable housing supply chain in collaboration with the national and county government

Related to Rating

36. *County Governments Act, No. 17 of 2012*

- The Act provides for county governments' powers, functions and responsibilities to deliver services.
- Part XI of the Act provides for county planning.

- Section 103 sets out objectives of county planning to include: ensuring harmony between national, county and sub-county spatial planning requirements; facilitating the development of a well-balanced system of settlements and ensuring productive use of scarce land, water and other resources for economic, social, ecological and other functions across a county; maintaining a viable system of green and open spaces for a functioning eco-system; harmonizing the development of county communication system, infrastructure and related services; and developing urban and rural areas as integrated areas of economic and social activity.

- Section 104 places the obligation to plan on the county by providing that a county government shall plan for the county and no public funds shall be appropriated outside a planning framework developed by the county executive committee and approved by the county assembly. This is the basis for preparation of Annual Development Plans (ADP) and County Integrated Development Plans (CIDPs) by county governments. Further, the law provide that the county planning framework shall integrate economic, physical, social, environmental and spatial planning.

- Section 104(3) is to the effect that the county government shall designate county departments, cities and urban areas, sub-counties and Wards as planning authorities of the county. This means they can be vested with giving the requisite approvals and imposing development restrictions in line with the plans of the area. County plans are binding on all sub-county units for developmental activities within a County.

- Section 107 sets out the types of county plans that must be in place as well as their purposes. It provides that each county shall have: county integrated development plan; county sectoral plans; county spatial plan; and cities and urban areas plans as provided for under the Urban Areas and Cities Act.

- The county spatial plan under section 110, is a ten-year county GIS based database system spatial plan which contains strategies and policies that: indicate desired patterns of land use within the county; address the spatial construction or reconstruction of the county; provide strategic guidance in respect of the location and nature of development within the county; and identify programs and projects for the development of land within the county.

- Section 111 provides that each city and municipality shall have: city or municipal land use plans; city or municipal building and zoning plans; city or urban area building and zoning plans; location of recreational areas and public facilities. These city or municipal plans provide for functions and principles of land use and building plans; location of various types of infrastructure within the city or municipality; and development control in the city or municipality within the national housing and building code framework. They are binding on all public and private entities operating within the area of jurisdiction. They are subject to review every 5 years and must be approved by county assemblies.

- Under section 114 of the Act, county assembly may approve or reject development of nationally significant development projects within counties.
- Part XII provides for delivery of county public services. Section 116 provides that a county government and its agencies shall have an obligation to deliver services within its designated area of jurisdiction.

- Section 118 allows for setting up of a county shared services platform aligned to national policies and which enables a county government to enter into an agreement with the national government, another county or an agency of the national government, to provide or receive any service that each county participating in the agreement is empowered to provide or receive within its own jurisdiction.

37. *Valuation for Rating Act, 1956 (Cap 266)*

This Act of Parliament empowers local authorities (local governments) to value land for the purpose of rating. Under section 1, the Act applies to any area of a local authority in respect of which any rate on the valuation of land, other than a rate on the annual value of agricultural land, in the area has been imposed by or under any law.Section 3 provides that every local

authority shall from time to time, but at least once in every ten years or such longer period as the Minister may approve, cause a valuation to be made of every rateable property within the area of the local authority in respect of which a rate on the value of land is, or is to be imposed, and the values to be entered in a valuation roll. Notably however, this revision of valuation rolls has not been done for a long time thereby denying county governments (local authorities) the necessary revenue.Under section 4, the local authority has power to amend the valuation roll in case of any new rateable property, any property omitted from the valuation roll, or property which has materially increased or decreased in value, or any rateable property which is subdivided or consolidated and cause the preparation of a supplementary valuation roll. Sections 12 and 13 speak of valuation courts set up by the local authority to hear objections as to any valuations of particular land for purposes of rating. However, there are no valuation courts set up. The nomenclature used in the Act such as town clerks and local authorities is overtaken by events with the onset of devolution and needs updating.

38. Rating Act, 1963 (Cap 267)

- The Act provides for imposition of rates on land and buildings in Kenya and amend the law relating to valuation and rating in Kenya.
- Section 3 imposes on local authorities (county council, municipal council or town council) the duty to levy rates. The nomenclature speaks to institutional structure that has since been changed by the obtaining legal regime, indicating the need to update the Act.

- Section 4 provides for the forms of rating that the authority may adopt to include: area rate; agricultural rental value rate; a site value rate or a site value rate in combination with an improvement rate. No two methods of rating shall be applied in the same area. Further, the Minister must approve the form of rating adopted in an area before the same is imposed.

- Section 5 provides for alternative methods of area rating that may be adopted by an authority.

- Section 8 empowers the authority to levy a supplemental rate for any financial year if it thinks necessary to meet the requirements of the authority so long as in cases of site value rate or improvement rate no such rates shall exceed 4% per annum of value of land without the consent of the Minister. This provision, however, affords an opportunity to a county government/local authority to increase rates.

- Section 9 stipulates that a rating authority may levy a special rate in any part of the locality which is liable to be separately rated in respect of any expenses to be incurred in the financial year and which the Minister has declared to be special expenses.

- Section 12 requires the rating authority to adopt methods of rating which ensure equitable distribution of rates over all parts of the respective area of the local authority.

- Section 13 also provides that the rating authority in areas of urban, area and local councils may levy a rate to meet the expenses of the council.

- Section 15 provides that upon a rating authority giving a notice for payment of rate (which are due on the first day of January in each financial year), it shall be the duty of every person liable to pay such rate to pay the amount of such rate at the offices of the rating authority or at any place whether within or without the area of the rating authority to any person authorized by the rating authority to collect such rate on or before such day, failing which proceedings may be taken against them.

- Section 15(2) allows the rating to offer a **discount of no more than 5% on the rate payable** or such other discount as the rating authority may with the approval of the Minister decide, on any person who pays applicable rate on or before the due date. This provision is meant to enhance compliance in paying of rates.

- Section 15(3) states that the rating authority shall charge simple interest at the rate of **three per centum** *per mensem* or at such other rate as the Minister shall by notice in the *Gazette* prescribe on any sum remaining unpaid after the day on which the same was payable and for the purposes of this subsection a part of a month shall be counted as one month, but in no way shall the interest exceed the principal amount owed (*in duplum* rule).

- Section 17 also provides for the enforcement mechanism for any unpaid rates which have become due including court action. The provision, however, refers to subordinates of the first class and the Supreme Court (the earlier ones which were abolished) and therefore needs updating.

- Under section 18, a rating authority can recover the applicable rates that remain unpaid from a tenant or occupier of the property in issue by requiring such tenant or occupier to pay the applicable rent direct to the rating authority to offset the unpaid rates.

- Section 19 provides that the rate chargeable on property shall be a charge on the land against which the rate is levied and may be registered as charge against the title of the land by the registrar upon notification, and such charge shall take precedence in law. This means that unpaid rates can encumber land/property and make it impossible for any transactions to be effected on the property.

  Section 20(2) reads that where the rateable owner is absent from Kenya any person receiving the rent or being in charge or control of such land shall be liable for such rate.

- Section 22(2) provides that a rating authority may reduce or remit the payment of any rate levied on land with the approval of the Minister.

- With respect to government/public land and community land, section 23 provides that the rating authority shall charge an annual contribution in lieu of rates as set out in law.

- Section 25 refers to the subordinate court of the first class as the one with jurisdiction to hear disputes to recover rates. This cadre of courts, however, is no longer in place. This speaks to the need to revise the Act.

39. *National Rating Bill, 2022*

- This Bill which is currently pending in Parliament following the First Reading, seeks to repeal and replace both the Valuation for Rating Act as well as the Rating Act. It provides a comprehensive framework for imposition of rates on land and buildings by county governments; provides for valuation of rateable property; to provide for appointment and powers of valuers; and provides for establishment and functions of the National Rating Tribunal.

- One of the innovations is in section 3 of the Bill which lists the objects of the Bill in enhancing use of appropriate technology in undertaking valuation for rating and rating related purposes. The use of technology is likely to expedite these processes. Section 6 provides that each county government shall establish or employ appropriate technological system in the preparation and implementation of the valuation roll or supplementary valuation roll.

- Section 12(2) provides that a county government shall consider the different categories of properties for purposes of payment of rates including residential properties. The category of property, whether residential, commercial or agricultural may therefore affect the amount of rates levied by a county government. This can be employed by counties in incentivizing a particular land use, say residential, by reducing the rates payable by a landowner relative to other uses.

- Section 17 allows a property owner to apply, to a county government before the payment of the rate becomes due or within 14 days of such payment becoming due, for remission of such rates on rateable property. Section 17(5) provides that where no response is received within 60 days of such application, it will be deemed that such remission has been accepted.

- Section 22 now allows for appointment of a private valuer (in private practice) to prepare a valuation roll. This is expected to expedite these processes far from the current practice of relying on the government valuers who are few and may be overworked.

- Section 37 establishes the National Rating Tribunal to hear and determine all disputes related to rating. Section 40 requires the Tribunal to determine a dispute within 60 days.

- The Bill also modernizes the rating laws by providing for up-to-date nomenclature which also recognizes the current devolved regime and governance structure.

- In terms of how the Bill will relate with the national government and the county governments, the Bill (if it becomes law) is simply to provide a guide to all county governments (which are the rating authorities) on how to go about imposing rates. At present, different county governments include modalities in charging and assessment of property rates in their annual Finance Bills/Acts.

Related to Landlord and Tenant

40. Distress for Rent Act, 1938 (Cap 293)

- The Act makes provision for distress of a tenant for unpaid rent which in effect means that a landlord is entitled to enter their tenanted property and seize goods found at the property until rent is paid and even sell such goods if rent is not paid to settle the rent arrears.

- Section 3 provides that any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case. This effectively enables a landlord or their authorised agent to act against a defaulting tenant by distressing their premises and/or goods to secure payment. Section 3(2) however provides that distress for rent shall not be done between sunset and sunrise or on Sunday. This is on account of humanitarian grounds.

  Section 4 provides that where goods have been distrained and the defaulting tenant fails to pay the unpaid rent alongside the costs of the distress within 14 days of being served with the notice and the distress, the person distraining may lawfully sell such goods or the best price obtainable to satisfy the unpaid rent and hand over any surplus, if any, to the owner/tenant. Under section 4(2), the owner/tenant may request within 7 days of the distress that the goods be sold under a public auction and the same shall be done with the surplus, if any, handed over to them. Under section 14(4), the period of 14 days may be extended by another 15 days if the tenant/owner of goods makes a request in writing to the landlord or person levying the distress and provides security for the additional costs that may be occasioned by extension of time.

- Section 5 provides that distress for rent may be done even following end of the lease, so long as the same is done within 6 months of such end of lease and during the possession of the tenant from whom the arrears became due.

- Section 9 allows the landlord to instruct an auctioneer to seize goods that have been fraudulently removed from premises by a defaulting tenant for the purpose of defeating levying for distress.

- Section 14 of the Act provides that if a tenant gives notice to a landlord of intention to quit premises held at a time mentioned in the notice and fails to deliver up possession as set out in the notice, the tenant shall pay double the rent payable for the period they continue in possession.

- Section 15 excuses any unlawful act done by a distrainer or their agent after levying distress from invalidating the said distress though the tenant can recover damages for any damage caused by the unlawful acts.

- Section 16 sets out the articles that are exempt from being distrained. They include: things in actual use or occupation of the person distrained upon at the time of the distress; property of the government; things of a perishable nature, or such as cannot be restored again in the same state and condition that they were before being taken or must necessarily be damaged by removal or severance; animals *ferae naturae*; wearing apparel and bedding of the persons whose goods and chattels are being distrained upon and the tools and implements of his trade to the total value of one hundred shillings, among others.

41. Rent Restriction Act, 1959 (Cap 296)

- The Act makes provision for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling houses.

- Sections 2(1)c, 9 and 10 of the Rent Restriction Act restrict the increase of rent in relation to dwelling houses whose monthly rent is below **Ksh 2, 500** as well as the legal right to possession and the exaction of premiums and fixes standard rents in relation to some dwelling houses.

- This law was enacted to protect low-income households from exploitation by landlords through unjustified rent hikes, and therefore serves as a cushion to low-income earners. However, this figure of Ksh 2, 500 is now too low, with the law having been enacted half a decade ago, with the consequence that most vulnerable persons are no longer protected. The law needs updating and revision.

- Under section 5, the Rent Restriction Tribunal has powers to: assess the standard rent of any premises either on the application of any person interested or of its own motion; to fix in the case of any premises, at its discretion and in accordance with the requirements of justice, the date from which the standard rent is payable; to fix the amount of water, light, conservancy, sweeper, watchman, or other service charge in addition to the standard rent where the rent chargeable in respect of any premises includes such charges; to apportion payment of the rent of premises among tenants sharing the occupation thereof and that of rent payable in respect of different premises included in one composite tenancy; to make an order for the recovery of possession of premises whether in the occupation of a tenant or of any other person and/or an order for the recovery of arrears of rent, mesne profits and service charges; to make orders permitting landlords (subject to the provisions of any written law) to excise vacant land out of premises where such a course is, in the opinion of the tribunal, desirable in the public interest for the purpose of enabling additional buildings to be erected; to permit the levy of distress for rent; to impose any conditions in any order it makes; to order the landlord to carry out such repairs within such time as the tribunal may stipulate, and, if the landlord fails to comply with the order, and upon application by notice of motion by the tenant, to authorize the tenant to execute the repairs and to deduct the cost thereof from the rent; to apportion charges for such as water, light, conservancy, sweeper or watchman in any premises occupied

by tenants who enjoy such services in common; to reduce the standard or recoverable rent of premises where the tribunal is satisfied that the landlord has failed to carry out such repairs to, or maintenance of, the premises as he has a duty to carry out either by agreement or under the Act upon application by a tenant; to order a refund of any sum paid by a tenant on account of rent, being a sum irrecoverable by the landlord under the Act so long as the application is made within two years of the refundable amount being due or in case of more than one payment, within two years from the date of last payment; to reopen any proceedings in which it has given any decision, determined any question, or made any order, and to revoke, vary or amend such decision, determination or order, other than an order for the recovery of possession of premises or for the ejectment of a tenant therefrom which has been executed so long and there is no pending appeal.

- Under section 6, the Tribunal also has powers to summon a landlord or tenant for purpose of investigating a complaint or a dispute.

- Section 7 imposes a fine of Ksh 2, 000 or imprisonment for no more than 6 months for failure to comply with a lawful order of the Tribunal.
- Section 11 of the Act only allows a rent increase by the landlord by giving notice to the tenant when the rates payable by the landlord to the government over the dwelling premises increase during the letting period.

- Further, section 16 of the Act prohibits levying of distress for rent over such dwelling houses without leave of the Rent Restriction Tribunal.

- Section 17 prohibits any charging of a premium, sum, fine or money consideration as a condition for the grant or renewal of a lease or tenancy.

- Section 20 requires a landlord of any premises to supply a statement as to the standard rent payable if requested by the Tribunal or the tenant.

- Section 21 requires a landlord (of premises not exceeding Ksh 2, 500 in rent) to keep or cause to be kept a rent book and provide the tenant with a copy of the same. The rent book contains a record of the parties to the tenancy, the premises, the standard rent and the rent payable, and of all payments of rent made and should be signed by the landlord or their agent.

- To repeal and modernize the Rent Restriction Act and other related laws, there is currently a government-sponsored Bill in Parliament known as the Landlord and Tenant Bill 2021, which seeks to peg rent increases by landlords to the annual inflation rate as measured by the Consumer Price Index.

- In the main, this law appears quite controlling with overbearing powers given to the Rent Restriction Tribunal to determine every issue, potentially interfering with the operation of rental markets especially at this lower end of the property market segment.

42. Landlord and Tenant Bill, No. 3 of 2021

- The Bill seeks to repeal and replace the Distress for Rent Act (Cap 293), the Rent Restriction Act (Cap 296) and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301).

- The Bill attempts to introduce a legal framework which balances the interests of landlords and tenants in a free market economy by ensuring that landlords earn reasonable income from their investment in housing and protects the tenant. The Bill consolidates the laws relating to the renting of business and residential premises and seeks to regulate the relationship between the landlord and tenant.

- Part II of the Bill provides for the establishment, composition and jurisdiction of the Landlord and Tenant Tribunal. Under Section 17, the Tribunal may determine rents payable where the same cannot be agreed mutually between parties, by referring to lettings of similar status or the market rent of the premises.

- Section 18 obligates a landlord to issue a 90 day written notice to a tenant before increasing rent and such increase shall only upon if: there has been carried out or undertaking to carry out capital expenditure on the premises or provides additional service; and taken into account the inflationary trends which inflation shall be based on the percentage change from year to year in the Consumer Price Index for prices of goods and services as reported monthly by the Kenya National Bureau of Statistics, averaged over the twelve-month period that ends at the end of December of the previous calendar year, rounded to the first decimal point. Rent increases are also limited to a period of 12 months for residential premises and 24 months for business premises.

- Overall, rent controls have the effect of restricting the ability of landlords to increase rents to existing tenants. While this may serve to promote affordability of housing for tenants in current occupation at least for the time the rent controls remain in place, it may potentially serve to reduce the quality of housing as landlords cease to improve or maintain the housing units and even potentially attempt to make the houses unconducive for habitation to force tenants to leave. Even more fundamentally, it may have the effect of reducing housing supply as developers, landlords and prospective landlords shy away from investing in housing units due to the reduced profit margins.

- In the main therefore, rent control regulations may have the perverse and unintended effect of disincentivising investment in the housing sector especially at the lower end of the market segment. What is more, rent controls provide an incentive to tenants to remain in occupation of rented houses rather than leave, which effectively works against the necessary mobility that is key to economic productivity and which may even harm such households, and effectively limiting upward mobility of low-income households to better housing.

- Proposals for improving the Bill include: strictly specify timelines for determination (reduce from current 3 months with possible extension to a flat 45 days with predefined days for each step); integrate digital platforms to log and track dispute resolutions and the determined

market rents (which would become an invaluable market making mechanism); promote equitable risk sharing mechanisms by tying period before landlord can evict tenant to be tied to deposit held by landlord, reduce period for which landlord must safeguard tenants goods and the housing unit in case of death or abandonment by tenant; and ensure rent ceiling to which units will be applicable be determined with public consultation and reviewed every 5 years.

ANNEX G: OFF-PLAN HOUSING DEVELOPMENTS

- The law on off plan housing developments (which are now common given their fair prices relative to completed units) is rather scattered and to be found in the general principles of the law of contract. There is no single codified law that speaks to the concerns of off plan housing developments, with the consequence that various purchasers of such units have been left to deal with consequences especially where developers do not complete their units, complete units of poor workmanship or those different from what was contracted for or take loan financing with the property/land as collateral/security. In such instances, courts have relied on the principles of the law of contract such as privity of contract doctrine that prevents third parties such as purchasers from suing on a contract between a developer and financier claiming their interests in a property, as well as the principle of *nemo dat quod non habet* (which simply says that one can never give a better title than they have). This means that where title is found to be defective, it follows that even that claimed by the purchaser would be a defective one.

- The following cases determined by the courts illustrate the difficulties facing off plan housing developments, which have shattered confidence especially among purchasers and developers.

i) *Willow Park Limited v Jamii Bora Bank Limited & another* [2019] eKLR

- The court found in favour of a bank which had extended loans to a developer to build housing units and registered a charge against the said property/housing development. Purchasers of the off-plan developments who had paid deposits and monies to the developer in consideration of the housing units were held not to have a superior claim to the bank which was a secured creditor (para 65). As such, the off plan purchasers were prevented from stopping the intended sale/auction of the property by the bank for default of the loan by the developer, with the court stating at para 76 that: "*It is true of the off - plan claimants...that the contracts entered into between them and the Developer appear to be confined to these parties, and prima facie, any rights or obligations arising therefore could not in the circumstances of this case be transposed upon the Bank. The certainty of financial transactions between banks and borrowers would be severely compromised if any and every kind of third party or debtor, who transacted with the borrower howsoever, were allowed to defeat the chargee's statutory rights, especially in the realization of a security in the event of default by the borrower*."

- The court also (paras 62 and 63) took issue with the failure by the off-plan purchasers to produce evidence of any registrable interest on the property such as a caution or caveat (which the Bank would have noted when extending credit to the developer) and their failure to conduct due diligence by undertaking a search to ascertain the status of the property even as they continued to make payments to the developer. The import of this finding is that off plan purchasers may be wary of venturing and especially where a developer is relying on bank financing and where the housing development being put up is listed as security/collateral-this may depress demand for off plan houses which happen to be more affordable. On the other

hand, the finding gives some comfort to financial institutions in that they can rely on the housing units as security in the event of default-essentially increasing financing for off plan housing developments.

ii) *Innercity Properties Limited v Housing Finance & another; Josephine Mukuhi & another (Interested Parties)* (2020) eKLR

- In a related case of loan default by a developer who had sold off plan housing developments in **Innercity Properties Limited v Housing Finance & another; Josephine Mukuhi & another (Interested Parties) (2020) eKLR** at para 41, the High Court refused to grant an injunction against an intended sale of the property by a bank. The court was emphatic that the seller/developer ought to have obtained the consent of the bank/financier in order to sell the units to the purchasers given that as a chargee the bank had an interest in the property and the purchaser must show they had obtained the consent of the bank to purchase the units or they had paid some money to the bank if there is to be a legal claim against the bank. This means that developers of off plan developments ought to inform would be purchasers of their financing model where the same is financed by credit and the property the subject of the sale is charged as security.

iii) ***Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties) 2022] eKLR***

Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties) 2022] eKLR	
ISSUE	**RECOMMENDATION**
This High Court decision can improve the quality of housing delivered, but will also raise the cost of housing due to the high cost incurred by developers to provide green space or improve water quality. If applied across the industry, it would be fair as it will be considered in the densities possible, and hence market land cost. However, currently it is applied in a very ad hoc manner.	Clear requirements for developments of different sizes, so that developers can objectively define a feasible land cost (knowing how much they will need to invest in infrastructure). Definition of clear responsibilities for county governments on provision of public space to support housing populations from developments that are too small to provide separate playing areas etc.
Additionally, the judgment illustrated the danger of property developers exaggerating or making promises in their marketing brochures or advertisements that they do not keep for their off plan developments as they will be held to provide for the same by courts.	No recommendation – this is a fair promotion of consumer protection