CM ADVOCATES LLP

Celebrating 5 years of Service & Excellence

CM NEWSLETTER

Instructive, Insightful & Legally Sound

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IN THIS ISSUE

DOES EVERYBODY GET A HOUSE?
THE HOUSING FUND LEVY

YOUR FIRST CERTIFICATE:
WHAT YOU NEED TO KNOW ABOUT THE BIRTH CERTIFICATE

KEEPING IT IN THE FAMILY:
CORPORATE GOVERNANCE AND FAMILY OWNED COMPANIES

TABLE OF CONTENTS

1 **DOES EVERYBODY GET A HOUSE?**
THE HOUSING FUND LEVY

4 **YOUR FIRST CERTIFICATE:**
WHAT YOU NEED TO KNOW ABOUT THE BIRTH CERTIFICATE

7 **TIME AND TIDE WAITS FOR NO MAN:**
EXTENSION AND RENEWAL OF LEASES

11 **KEEPING IT IN THE FAMILY:**
CORPORATE GOVERNANCE AND FAMILY OWNED COMPANIES

15 **ABSOLUTE OR NOT?**
THE DOCTRINE OF INDEFEASIBILITY OF TITLE

18 **PROTECTION OF MINORITIES' RIGHTS:**
TAKE OVERS AND SCHEMES OF ARRANGEMENTS

Celebrating 5 years of Service & Excelelnce

CM Advocates LLP marks a major milestone in its journey. As we turn 5 this June, in line with its vision to be the leading legal solutions provider in the East Africa Community, CM Advocates LLP has by the grace of God expanded its reach to Uganda and Tanzania by opening new offices in Kampala and Dar es Salaam.

We appreciate the opportunity to partner and be of service in ensuring that we add value to you by doing ordinary things in an extraordinary manner. We are most grateful that you have entrusted our firm with what to us continues to be more than just legal briefs. We strive to ensure that we secure for you the best possible outcome for every engagement you have entrusted with us.

As we celebrate this milestone, we are minded to further enhance the quality of service we offer to you. We unreservedly thank you for your continued trust and vote of confidence evinced in your continued business over the past 5 years. You have been, and continue to be invaluably critical to our Firm's growth and successes since inception.

We look forward to and count on your continued support as we commit to refining our value-add to you and your business in the coming years.

I acknowledge the commitment and dedication of the CM Advocates LLP team and I am glad to lead this excellent team of professionals in service and excellence to our clients.

Cyrus Maina

Managing Partner

CM ADVOCATES LLP

Suleiman BASHIR
Editor

EDITORIAL NOTE

We turn 5 this year! The number 5 symbolizes strength and it is our earnest belief that as CM Advocates LLP marks its fifth anniversary we are indeed growing from strength to strength.

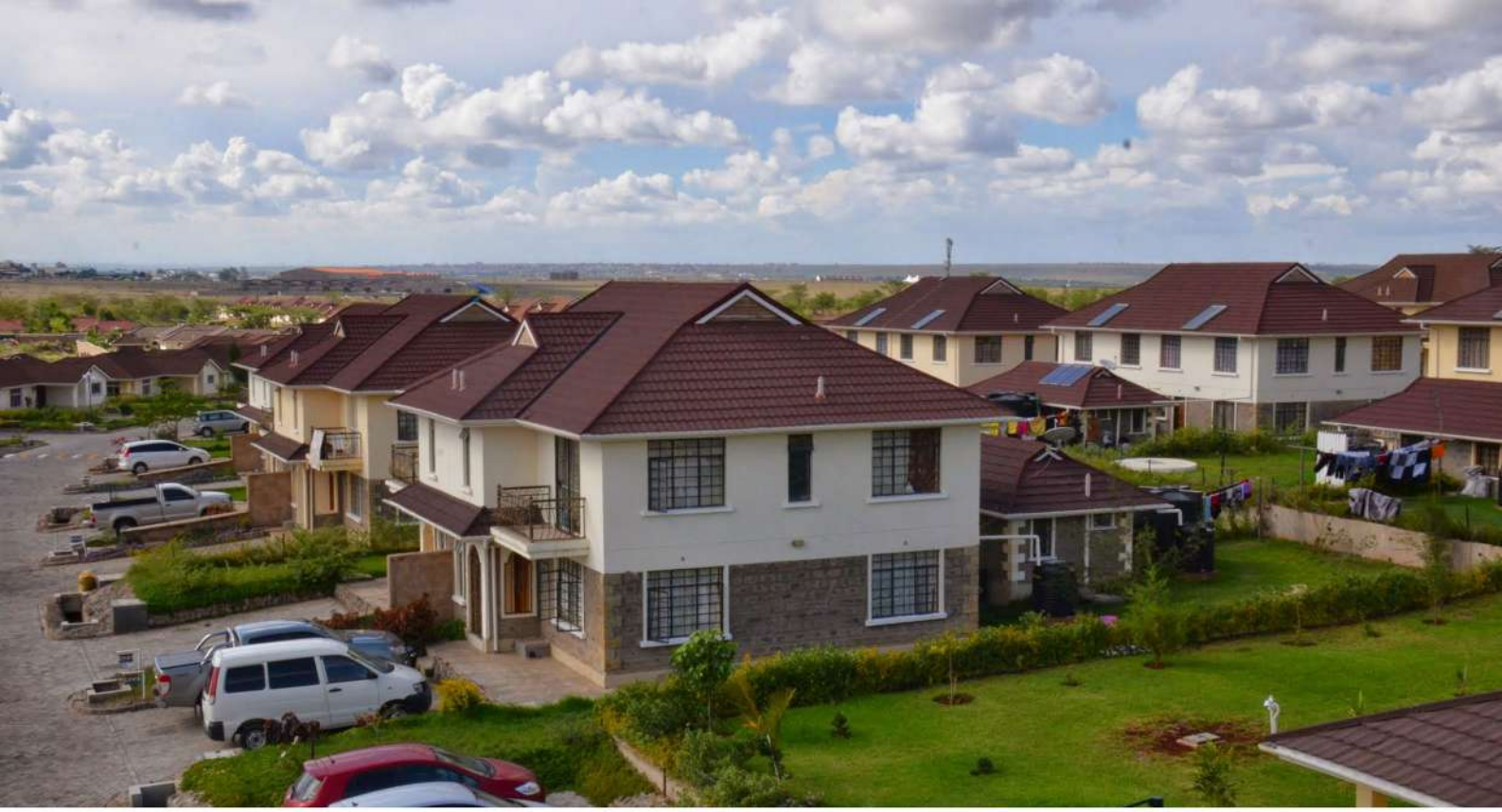
We are grateful for the feedback received on our previous issue and we continuously strive to improve with each subsequent issue. *Asante!*

In this Issue we continue to share with you our take on various legal issues and update you on the latest developments in the Kenyan legal field, particularly touching on issues which we trust you will find both interesting to read and useful for your business needs.

In the pages that follow, we shine the light on the controversial Housing Fund Levy that requires both employers and employees to contribute 1.5% of the employee's monthly basic salary to the Fund. Francis Kakai interrogates the Government's ambitious project of building over one hundred thousand housing units every year through the implementation of the Housing Fund Levy. Furthermore, have you ever thought about where your birth certificate is? It is likely stashed in a filing cabinet along with other important documents or tucked in a safety deposit box, a testament to the significance of what might otherwise be mistaken for a simple piece of paper. Wahu Wambugu outlines various legal issues that are worth noting with respect to birth certificates. In addition, Nancy Mireri writes on the emotive question of the indefeasibility of land title documents, an issue that is a thorn in the flesh of many Kenyans.

All these and much more have been aptly captured in this Issue. We urge you to continue reaching out to us and continue engaging us with respect to the issues covered here as well as regarding matters you would like to read about.

Enjoy!!!



DOES EVERYBODY GET A HOUSE? THE HOUSING FUND LEVY

Francis KAKAI

Francis is a Partner and Head of the Corporate, Charities and Trusts Business Unit. He has over 11 years experience in diverse areas of law specializing in corporate, banking and property law.

The Housing Fund Levy was introduced by an amendment made to the Employment Act which requires a mandatory monthly contribution by both employers and employees to the National Housing Development Fund. The National Housing Development Fund (which seems to be used synonymously with the Housing Fund) is established under the Housing Act and is managed by the National Housing Corporation (NHC). The proceeds of the Housing Fund are to be utilized to, amongst other things, advance loans to persons to purchase affordable houses under approved housing schemes. The Housing Fund Levy was established in support of the housing pillar of the Government's Big Four Agenda to deliver 500,000 affordable houses across the 47 counties.

The Housing Fund Levy has been met with a lot of opposition from both employer and employee organizations as well as the consumer protection lobby groups. These groups have filed various law suits and the implementation of the Housing Fund Levy has been temporarily suspended.

This article looks at the legal provisions regarding the Housing Fund Levy and highlights some of the challenges in its implementation.

Registration and Contributions

The registration into the Housing Fund is mandatory for all employers and employees, except for foreigners working in Kenya. Registration is, however, voluntary for self-employed persons.

The contributions by both the employer and employee are set at 1.5% of the employee's basic salary (excluding allowances and other benefits). The combined contribution of both employer and employee should not exceed KES 5,000 per month. Self-employed persons on the other hand may contribute a minimum of KES 200 per month.

Employers' Obligations

Employers are required to:

(i) register both themselves and their employees as members of the Housing Fund;

(ii) remit both the employer and employee's contributions to the Housing Fund before the 9th day of the following month;

(iii) keep a proper and up-to-date register or record of the earnings and any other particulars as may be required;

(iv) produce the register or records when demanded by an officer of the Fund; and

(v) retain the register or records for such periods as may be specified, but not exceeding 6 years after termination.

Affordable Housing Scheme

There are 4 categories of housing schemes under the Housing Fund. The housing schemes are determined by the monthly income of the member at the date of application for the loan under the Housing Fund.

Monthly Income	Housing Scheme
KES 19,999 or less	Social housing
KES 20,000 and KES 49,999	Low cost housing
KES 50,000 and KES 149,999	Mortgage gap housing
KES 150,000 or more	Middle to high income housing

Benefits under the Housing Scheme

The benefits that a registered member of the Housing Fund will enjoy include:

(i) access a loan facility to purchase a house under the affordable housing scheme at a subsidized interest rate of 7% per annum.

(ii) affordable housing relief deductable against taxable income of up to a maximum of KES 108,000 per annum;

(iii) exemption from stamp duty for first time owners of a houses under the affordable housing scheme.

Where a member is not eligible for any of the categories of the affordable housing schemes, after the expiry of 15 years from the date of making contributions to the Housing Fund or attaining the retirement age, whichever comes earlier, the member may:

(i) transfer his contributions to a pension scheme registered under the Retirement Benefits Act;

(ii) transfer his contributions to a person eligible under the affordable housing scheme;

(iii) transfer his contributions to his spouse or dependent children; or

(iv) receive his contribution in cash, in which case, the cash payment is taxable.

Penalties and fines for non-compliance

An employer or an employee who does not comply with the provisions of the Housing Fund Regulations is liable to imprisonment for a term of 2 years, a fine not exceeding KES 10,000 or both.

Challenges in the implementation of the fund levy

There has been criticism of the implementation of the Housing Fund Levy. Some of the shortcomings identified include the following:

(i) The operationalization of the proposed National Housing Development Fund (NHDF) is not provided for in any legislative provision. Although the Employment Act defines the NHDF as the fund established under the Housing Act, the Housing Act only provides for the Housing Fund under the control of the NHC.

One could therefore argue that the fund contemplated by the amendment to the Employment Act is different from the Housing Fund as established under the Housing Act and the Housing Fund Regulations, 2018. The detailed legislative framework on the operationalization of the NHDF needs to be put in place before the implementation of the affordable housing scheme. It is nonetheless worth noting that the Housing Fund Regulations replicate the amendments made to the Employment Act and therefore compels the remittance of the levy to the Housing Fund.

(ii) The fact that the Housing Fund is mandatory for those in formal employment but voluntary for those in self-employment has been criticised as being discriminatory. The registration for the housing scheme should be made voluntary for both formally employed and self-employed persons. This leviy is a greater burden on persons who are employed due to the unfair administration of the same.

(iii) While contributions to the Housing Fund is mandatory for every employee, not every employee may wish to apply for a loan under the affordable housing scheme. Employees who already own their own houses or are servicing a mortgage and are not interested in the housing scheme are still compelled to contribute to the Housing Fund, imposing an additional burden on persons who will not enjoy the benefits accorded under the scheme.

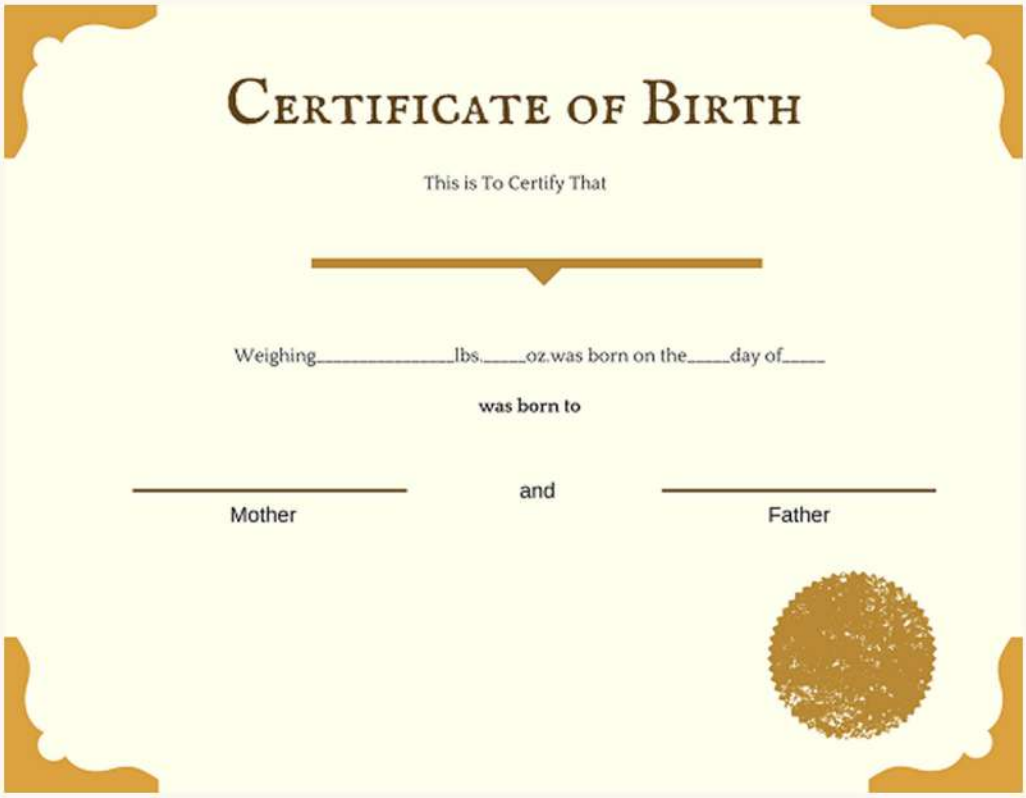
(iv) The Housing Fund Levy has been criticised as being an additional tax burden on the already overtaxed citizenry. The increase in the wage bill for employers will increase the cost of doing business in Kenya.

(v) The criteria for allocation of the houses under the affordable housing scheme has not been clearly determined. The Government's Big Four Agenda intends to deliver 500,000 houses against the contribution of about 3,000,000 members. Not all persons who contribute can benefit from the housing scheme and it is not clear how allocation of the houses will be done with some quarters suggesting allocation will be done by ballot system. This lack of clarity will also leave the process of allocation vulnerable to abuse by corrupt officials

(vi) The issue of corruption in the management of government funds has also tainted the credibility of the Housing Fund. Various government funds have been exposed to corruption in the past where public funds have been lost. There is no assurance that adequate safeguards have been put in place to ensure that the Housing Fund shall not be faced with the same fate and be misappropriated by corrupt individuals.

(vii) The penalty for misappropriation of the Housing Fund is imprisonment for a term of 10 years or a fine of KES 10,000. This fine has been criticised as being too lenient and therefore inadequate to deter corrupt individuals.

In conclusion, for the successful implementation and sustainability of the affordable housing scheme, it is important that the Government ensures that there is public buy-in and that the Housing Fund Levy enjoys support by a majority of Kenyans who are the target beneficiaries of the affordable housing scheme through which the Government seeks to progressively achieve its constitutional mandate to provide accessible and adequate housing to all.



YOUR FIRST CERTIFICATE: WHAT YOU NEED TO KNOW ABOUT THE BIRTH CERTIFICATE

Wahu WAMBUGU

Wahu is a legal assistant attached to the Real Estate, Banking and Finance Business Unit. She has been with the Firm since its inception and is currently pursuing her law degree. She is well versed with matters immigration and registrations of persons.

The birth certificate is one of the documents that can be obtained with the most ease in Kenya at an affordable cost and within a short period. It is an important document as it must be submitted when one is applying for a passport, a national identity card, when registering a child under the National Education Management Information System (NEMIS) as well as in conveyancing transactions when applying for exemption from the payment of stamp duty when transferring property to a family-owned company. This Article will look into the law governing birth certificates and more particularly the various pertinent issues surrounding the same.

Process of procuring a birth certificate

According to the Births and Deaths Registration Act, Cap 149, (the "Act"), the Registrar is required to register a birth and issue a certificate within 6 months of the date of one's birth. This is noted in the Act as current registration and only requires one to provide a birth notification and national identification cards of the child's parent or parents. The Registrar may also register births beyond this period through a second form of registration known as late registration. This second form of registration is quite common where a child is born at home.

In such cases a birth notification would not have been issued and the parents are allowed to register the birth by producing other evidence in lieu of this notification including: a baptismal certificate; a child's immunization clinic card; an employer's letter indicating the date of birth and employment, academic certificates, the applicant's national identity card or passport, or the area chief's acknowledgement letter. In some instances, one may even appear before the Registrar of Births with an elderly person who is well acquainted with them. A person seeking late registration may also provide proof of his parents' identification by producing the parents' birth certificate or extracts from a register maintained by a church or by members of the community. The stated examples are not exhaustive and the Registrar of Births may ask for additional documents to ascertain the identity of the applicant.

It is noteworthy, even if one takes a decade without obtaining a birth certificate and provided that a birth notification had been issued at the time of birth, the applicant only needs to present this notification so as to procure a birth certificate.

Changing one's name on the birth certificate

Changing a name on the birth certificate can only be done when the child is 2 years old and below. Beyond this age, one can only add a name but cannot delete any name from the birth certificate. A change of name may only therefore be done by way of registering a deed poll and the new name will appear on the person's national identity card and passport while the birth certificate remains unaltered. For example, if your name on the birth certificate, national identity card and passport appear as XYZ and by way of deed poll you drop the name Y, it will be deleted on the national identity card and passport but it will not be deleted on the birth certificate or the birth register.

Adding a father's name to the birth certificate

Section 12 of the Act provides that no person shall be entered into the Register of Births as a father unless upon the joint request of both parents, in which case the two parents must swear a statutory declaration and appear in person before the Registrar of Births, or if the mother and the father are married, in which case the parents must produce evidence in support of this fact. It is interesting to note that the constitutionality of this section has been challenged as it is seen as discriminatory and infringing on a child's right to identity especially with respect to children born out of wedlock. In the case of **L.N.W v Attorney General and 3 others (petition No. 484 of 2014)**, the petitioner gave birth to a child out of wedlock and the father to the child directed that his name should not be included in the child's birth certificate. She petitioned the court challenging the constitutionality of section 12 of the Act noting that the section did not take into account the children born out of wedlock as well as single mothers. The judge was persuaded that the provisions of section 12 were inconsistent with the Constitution. The Court held that children born out of wedlock had the right and liberty to add their father's name to their birth certificate and directed the Registrar of Births to put in place mechanisms to facilitate entry of the father's name in the register for children who are born out of wedlock. Unfortunately, this is yet to be done.

Also interesting to note is that where one is past the age of 18 years and the wishes to add the name of a father who is deceased, the birth certificate holder will be required to provide the deceased's death certificate and any other document such as the applicant's national identity card or passport and academic certificates bearing the name of the deceased father. The Registrar shall add the surname to the holder's name on the birth certificate but shall not note the deceased as the father as this can only be done after one swears under oath that he is the child's father. A dead man cannot make an oath.

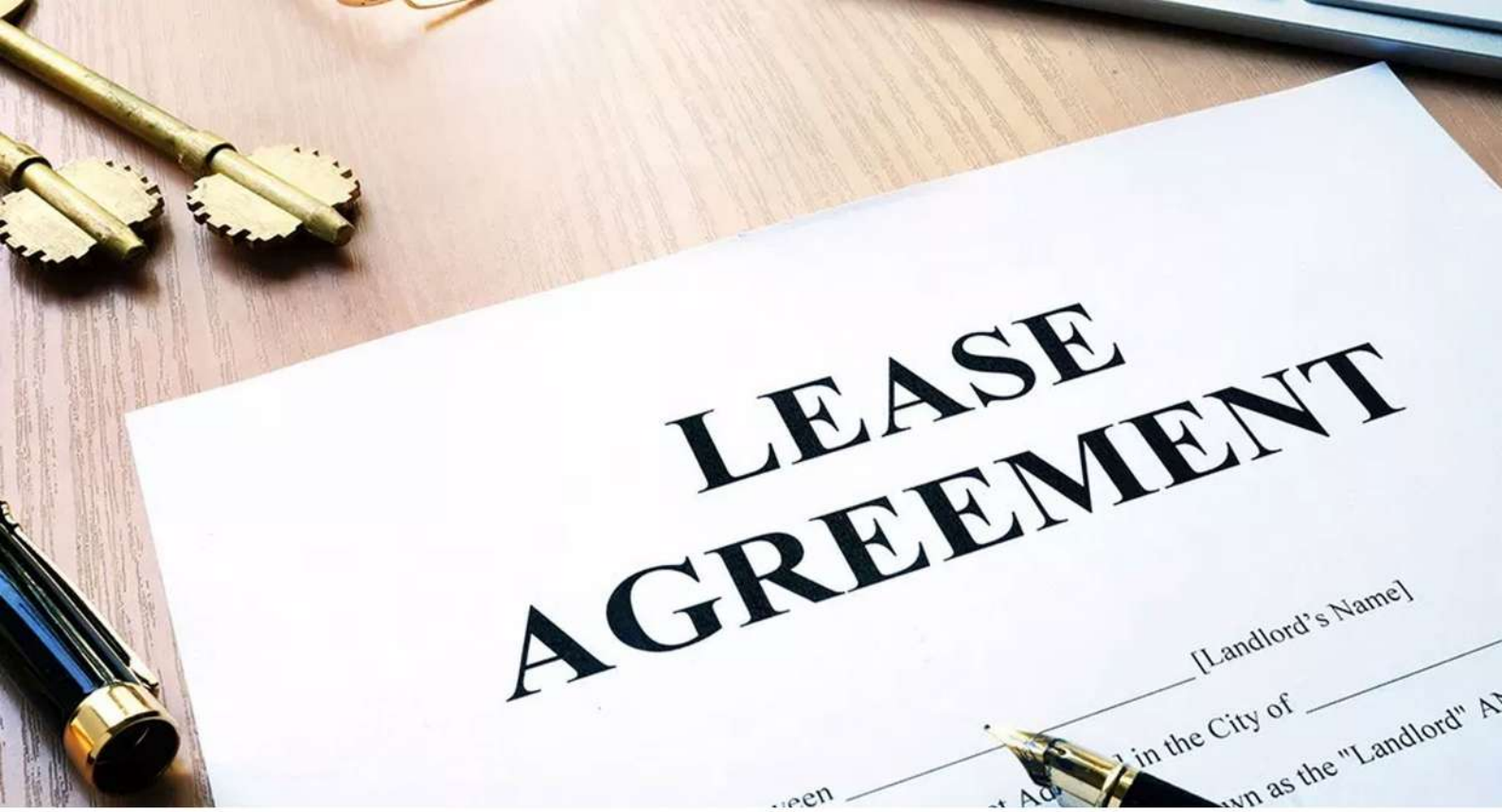
Deleting a father's name from the birth certificate

Although the Act is silent on this, case law suggests that it is not possible to delete the name of a biological father from the Register of Births. This is only possible if there is proof that the person whose name appears on the birth certificate is not the biological father of the child. Upon providing sufficient evidence such as DNA test results, the court may grant such orders authorizing the Registrar of Births to delete the "father's" name. This is informed by the need to protect the child's right to a name and identity even in cases of disagreements between parents or upon separation. In the case of ***FKK & another v. Attorney General & 2 others (2015)*** such an order was granted after a DNA test revealed that the child was not the indicated father's biological child. This principle is upheld even in cases of adoption where the name of the biological father is retained on the Register of Births even though a birth certificate is issued in the name of the adoptive father. This is common a practice across various jurisdictions including Canada and California in the United States of America. One cannot delete the name of a biological father on flimsy grounds.

Registration of births outside Kenya

Section 10A of the Act provides that where a child is born outside Kenya to Kenyan parents such a child shall be considered a Kenyan Citizen by birth and shall be issued with a birth certificate upon providing to the Registrar of Births the original birth certificate issued by the foreign country, the child's passport as issued by the foreign country as well as the national identity cards and passports of both parents. It is also worth noting that even if a child is born to only one Kenyan parent he/she shall still be deemed to be a Kenyan citizen as stipulated by Article 14 (1) of the Constitution. Even in the case where the parents gain citizenship of another country prior to the birth of the child, the child shall still be considered a Kenyan citizen provided that the parents did not renounce their Kenyan citizenship. After obtaining the birth certificate, the child's foreign passport can be endorsed with a stamp showing that he is a Kenyan citizen upon application to the Director of Immigration under section 8 of the Kenya Citizenship and Immigration Act (No. 12 of 2011).

In conclusion, reforms should be made to the Act to provide for the deletion of a father's name from the Register of Births. The relevant departments should also implement the ruling in ***L.N.W v Attorney General and 3 others (petition 484 of 2014)*** and put in place mechanisms that ensure that child's right to have their father's name noted on the birth certificate is not compromised by the need to protect unsuspecting men from being labelled fathers even when they are not. The Registrar should be empowered to take evidence corroborating a mother's claim so as to decide whether or not a mother's claim has merit and that the man's name should be included in the birth certificate. Different jurisdictions such as Coasta Rica have successfully put in place mechanisms that facilitate the addition of a father's name when the child is born out of wedlock while at the same time putting a safeguard to prevent misuse of this right by mothers with malicious intentions. Other than being a source of identity, noting the father's name goes a long way in claiming maintenance and support from a father and this benefits the child in the long run. The Act should be updated to align it with the provisions of the Children's Act (Number 8 of 2001) and the United Nations Convention on the Rights of the Child.



TIME AND TIDE WAITS FOR NO MAN: EXTENSION AND RENEWAL OF LEASES

Olive MUKAMI

Olive is an Associate at the Firm, attached to the Real Estate, Banking and Finance unit specializing in conveyancing.

The extension and renewal of leases is primarily governed by the Land (Extension and Renewal of Leases) Rules, 2017 (the "Rules") which were gazetted vide Legal Notice Number 281 of 2017 as well as the Physical Planning Act, Cap 286.

Renewal of a lease is the process of applying for a fresh lease from the Government prior to or upon the expiry of an existing lease. The application for renewal of a lease can be done either before or upon the expiry of a lease.

In practice, the application is usually lodged 5 years before to the expiry of the lease due to the lengthy processes involved.

Extension of a lease on the other hand is the process of applying for an additional term on an unexpired lease on terms similar to the existing lease although the land rent may be revised pursuant to a valuation on the property. An application for extension of a lease is usually done when the remainder on the term of the lease is less than 45 years.

This is largely informed by the practice in the banking industry to accept leasehold property as security only if the remainder on the term is above 45 years.

Procedure for Extension and Renewal of Leases

At all times during the application process, the National Land Commission NLC acts on behalf of either the national government where the leasehold interest was granted by the national government or the county government where the leasehold interest was granted by the county government.

The Land Act requires the NLC to notify a lessee of the impending expiry of their lease at least 5 years before the lapse of the lease.

Applications for extension or renewal of leases may be made in response to such notification or at any time before such notification where the owner of a leasehold interest in land deems it fit to apply for an extension of lease

In practice, when applying for a renewal or an extension of a lease, a lessor first engages a licensed physical planner for purposes of making an application to the County Government for approval. This aplication is circulated and publicised through annouenements in a newspaper as well as on the subject property. If approved, a Form P.P.A. 2 is issued detailing conditions that must be met before a final approval can be given by the County Government. Once this approval is procured, the lessor submits the P.P.A.2 along with evidence of compliance of the different conditions to the Ministry of Lands after which the final approval is issued.

Factors Considered in the Extension and Renewal of Leases

The following factors are considered before the decision is made to grant or decline applications for extension of the term on a lease or renewal of a lease:

1. Citizenship

The citizenship of the applicant and in the case of a company, the citizenship of the shareholders, must be considered.

a) Kenyan Citizens: the pre-emptive right to offer the lease to the immediate past owner will apply as required by law if the land is not required for a "public purpose." Where the land is required for public purpose then it shall not be offered to the immediate past owner even if they are a Kenyan citizen. Further, a Kenyan citizen is allowed to hold a lease of a period that exceeds 99 years as there is no restriction in law providing otherwise.

b) Non-citizens or companies with non-citizen shareholders: no pre-emptive rights apply and the land will revert to the national government or county government, as the case may be, and thereafter it may be offered to the general public by way of a competitive process. Under the Constitution, foreigners can only hold a lease whose term does not exceed 99 years. When applying for an extension therefore, the Commission must bear in mind this restriction and extend the time applicably.

2. Rent and Rates Clearances.

The Commission must confirm that land rates and rent have been paid on the leasehold property and that the clearance certificates have been obtained.

3. Encumbrances

If there are existing encumbrances on the leasehold title deed for which an extension is being sought, copies of all charges, leases, easements, wayleaves e.t.c. registered against the title should be submitted.

In our view, having encumbrances will not adversely affect the application for extension of the term of a lease but rather is meant to ensure that where there is a valid encumbrance, then that encumbrance is reflected in the new lease to be issued. Where there are no encumbrances, then the lease with the extended term will be issued without inheriting any encumbrances from the previous lease. This consideration will not apply in the case of renewal of a lease as one can only encumber that which he has a proprietary right to. So security should encumber a leasehold property beyond the term indicated on the lease.

4. Compliance with the Terms and Conditions

The Commission will also investigate whether the landowner has complied with the terms and conditions of the existing lease. This would involve submission of evidence showing such compliance e.g. building approvals and plans where the existing lease has a condition requiring the landowner to develop the property e.t.c.

Approval of Applications

When the application is approved, the Commission requires the landowner to re-survey the land in order to re-value the land for determination of the new land rent payable. Once favorable feedback has been received from the Director of Physical Planning and the Director of Surveys and all the considerations are borne in mind, NLC prepares and issues a fresh lease with the extended term in the case of the extension of a lease and a letter of allotment which is followed by a new lease in the case of an extension.

If an application for extension or renewal of lease is declined, reasons must be given to the applicant. The most common reason given especially in case of extension is that the leasehold property is required for a "public purpose".

The Land Act has a broad description of what "public purpose" entails and notes that this includes among other things: transportation such as roads, railways and airports; public buildings such as schools, factories, public housing; public utilities for water, sewerage, electricity, dams; public parks; sports facilities; cemeteries; security and defense installations; settlement of squatters; poor and landless; internally displaced persons e.t.c.

Unfortunately, these justifications are vulnerable to abuse by unscrupulous officials at NLC as the Rules do not provide a mechanism for determining whether a justification is acceptable or not.

Where an application for extension of leases or renewal of leases is declined, an inventory of all developments on the land will be carried out and the landowner will be required to cease any further development of land.

The landowner whose application is declined has the right to appeal the decision to the Independent Appeals Committee. If the applicant is not successful, he can further appeal to the Environment and Land Court.

Challenges faced by a Lessee during Lease extension and renewal

The following are some of the challenges faced by lessees when applying for extension and renewal of a lease:

(i) Lack of a prescribed timeframe for the conclusion of registration process at the Lands office.
(ii) Lack of clarity on institutional mandates for collection of various fees and charges.
(iii) Missing files (Deed files, Green cards and torn registers) at the Lands registry thus making the renewal or extension of lease process tedious.

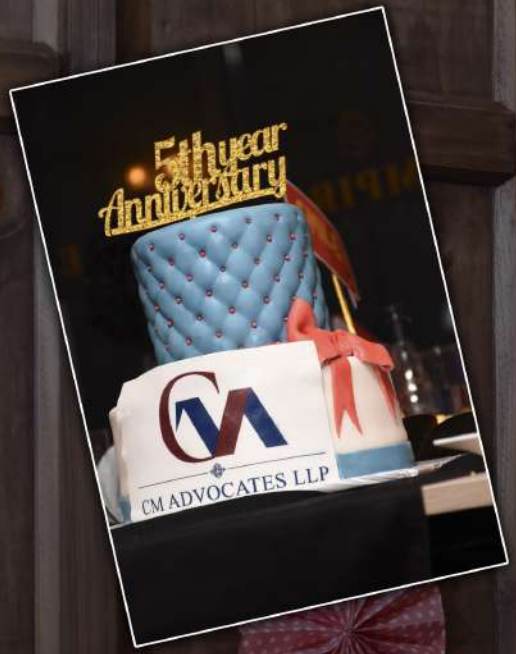
(iv) Unreliability of the records management system with missing records, retrieval difficulties and inadequate file movement tracking system.

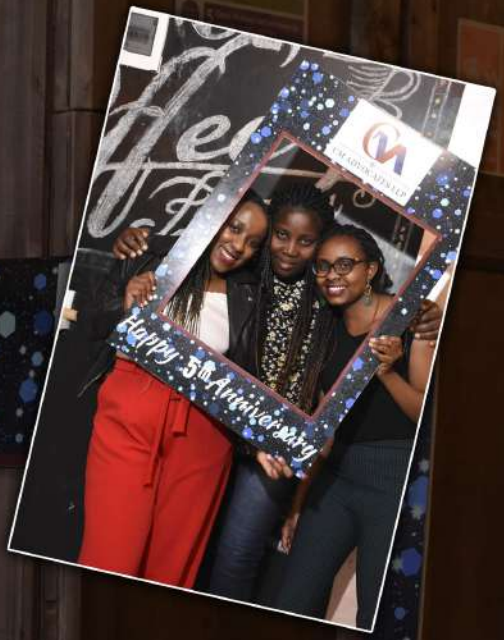
(v) Corrupt officials at the Ministry of Lands who take advantage of unsuspecting lessees.

In conclusion, the Ministry of Lands and the NLC should develop comprehensive guidelines detailing out procedures and processes at each level, criteria, considerations, costs and timelines.

There is also a need to initiate a process of internal capacity building through recruitment, retraining and induction of relevant institutional and professional actors to enhance efficiency in the renewal or extension process. Development of a record management system with capability of tracking file movements and updating records maintained by the Ministry of Lands and Physical Planning, the NLC and County Governments is also necessary. Finally, where reconstruction of a missing correspondence file is called for, a timeline ought to be provided and adhered to so as to prevent unnecessary delays.

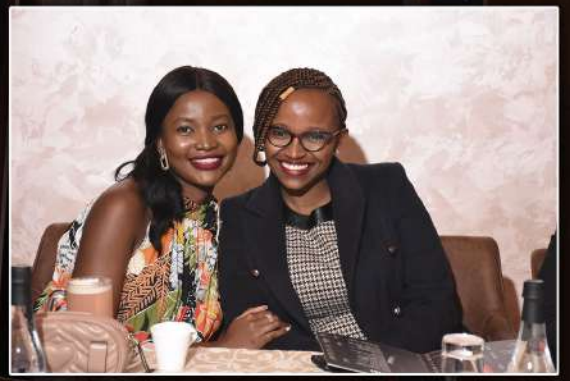
As the lawyer awoke from surgery, he asked,
"Why are all the blinds drawn?" The nurse answered,
"There's a fire across the street,
and we didn't want you to think you had died."

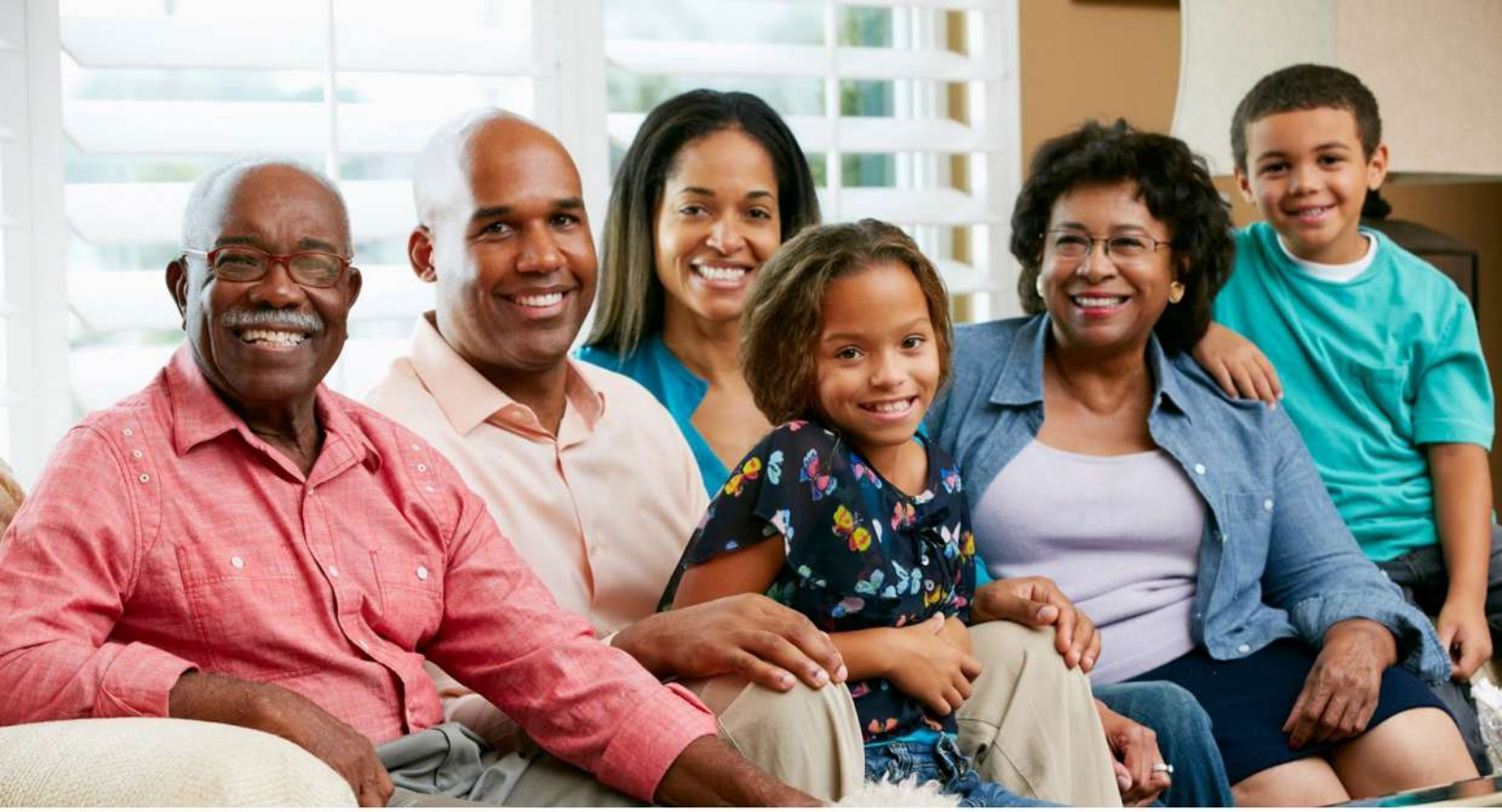




CM@5

CM staff celebrating the 5th Anniversary at Empire Coffee Eatery, Upperhill





KEEPING IT IN THE FAMILY: CORPORATE GOVERNANCE AND FAMILY OWNED COMPANIES

Victorine ROTICH

Victorine is an Associate at the Firm in the Corporate and Commercial Business Unit. She is currently pursuing her masters in Corporate Governance.

Family owned businesses are a common feature in many market economies especially in the eastern world, Africa and in the South Americas. Due to the family-oriented culture which esteem family ties and communal ownership of property in these parts of the world, many successful companies start off and are run as family companies. Across the world, there are many successful family-owned companies including the Carrefour Group, Samsung, Ford Motors Company and the LG Group among others.

Family owned companies are defined as private companies which are primarily owned or controlled by members of the same family.

The face of such a company has a great likeness to the family portrait, with the members of the family being represented in the top management of the company and being heavily involved in the running of its affairs. A company may be classified as "family owned" in the sense of shareholding; "family controlled" in the exercise of voting power; or "family managed" if discussed from the point of view of who oversees the operations and business of the company. The members of the family thus play different roles as owners, policy makers and as employees of the company.

Family owned companies and businesses are quite common in Kenya, be it as small scale businesses such as the local hardware store in your neighborhood run by the same family for generations or big companies such as Tuskys, Kenafric Industries, Makini Schools, Nakumatt and Bidco. Some of these companies have been quite successful and have withstood the test of time. Some, however, have experienced significant challenges some of which shall be highlighted in this article together with potential solutions.

Family owned companies are quite popular because of various reasons including:

(i) They are useful as an estate planning tool as vesting family property in a family–owned company facilitates the protection of assets from misuse and eliminates the ugly scenes witnessed when family wrangles take center stage after the demise of the patriarch or matriarch of a family.

(ii) Family owned property provides an easy access to capital by the members of the family thereby allowing them to pool and utilize the relatively accessible resources;

(iii) The existence of a solid bond between the members of the family enhanced by the trust and familiarity between the members of a family solidifies the sense of identity which motivates and inspires the members of the family to work hard at the business and take ownership of it;

(iv) It allows the perpetuation of a corporate culture constituting of deeply enshrined morals and values. The same can be passed from one generation to the next as family-owned companies also have a strong mentorship culture with children being exposed to the business from a very early age.

Family-owned companies are however vulnerable to various challenges that threaten their existence, resulting in a high percentage of these companies not surviving beyond the third generation. Below are examples of these challenges:

1. **Lack of proper structuring and organizational framework**

   The familiarity and informality within a family will more often than not breed insubordination within a family-owned company. In certain instances, a family member may feel entitled to the point of threatening or bullying employees of the company to do their bidding even though such an action may be contrary to the prevailing management structures and may threaten the system controls and checks entrenched to safeguard the integrity of the company. This exposes the company to impropriety and misuse of funds or resources and threatens the credibility of the company.

2. **Expansion, expertise and involving third parties**

   Because of the strong links of a family-owned company to the members of the family, the pool from which employees can be sourced is quite limited especially when it comes to the recruitment of senior management. This limits the company's access to experts in various fields and in some instances, employment in such a company may be unattractive to potential employees due to a perceived or anticipated preferred treatment of peers who are family members. The hiring of employees from outside the family may also be frowned upon by the members of the family who fear that their positions may be diluted or that the company may be taken over by outsiders. This thinking keeps many companies from expanding by either going public or by inviting non-family members into the company as investors.

WAY FORWARD

The crucial role played by family-owned businesses in the economy cannot be overstated. These businesses provide a way for families to harness resources which are readily available and present an opportunity through which wealth can be accumulated and enhanced over time with the next generation benefitting from and building onto the foundation laid before their time. Below are possible solutions family-owned companies can look into:

1. Involvement of Professionals

Family-owned companies shy away from recruiting professionals outside the family due to the reluctance to invite "outsiders" or the fear of diluting their membership or losing control. Various corporate governance scholars have suggested that involvement of external directors and other professionals enhances market favour for the company. This is because such a board has an element of expertise as well as independence, a crucial corporate governance tenet which sets a company up for success. Having independent directors or even outsiders within management ensures accountability and mitigates the risk of having a "strong-man" at the helm of the company. This allows an exchange of ideas and introduces diversity which in the long run benefits the company.

This is not to disregard the concerns of the members of the family with respect to threatened dilution. There are various ways of mitigating such issues to ensure that the founders or the family maintain a controlling stake. This can be done by creating a special class of shares with specific rights or even having reserved matters on which the family members must vote. Seeking to maintain control should however not be at the expense of the company's growth and well-being.

A compromise must be reached to balance the scales. It is advisable to have an employment policy to establish the roles which are reserved for members of the family and the members' qualifications. The board should put in place different employment policies for both family and non-family employees all the while ensuring that hardworking employees are offered a fair chance to scale up the ladder whether or not they are family members. This will provide clarity and mitigate the "outsiders'" fears regarding their placement and upward mobility within a family-owned company.

2. Separation of Issues

It must be made clear to the shareholders that a general meeting is a meeting to discuss company issues in the family members' capacity as shareholders, that is the ordinary or special business of the company as notified vide the notice calling for the meeting. A shareholders' meeting is therefore not a family meeting and any matter which is not included in the agenda and which pertains to family issues ought not to be discussed in such a venue.

In addition to this precaution, it is prudent to have a family governance structure in place to cater for the issues which are not directly related to the business but which may have a bearing on the business. Having a family constitution as well as family governance institutions are measures which will help the company regulate the relationships and ensure that no fall out within the family threatens the well-being of the business. Such institutions will include an advisory board and a family council or assembly. The mandate of such institutions would be to ensure that, although kept separate, the issues of the family are aired and the family's advice is sought on various matters.

3. Institution of good corporate governance structures

The principles of good corporate governance are useful in putting proper systems in place. Many family-owned companies do not have clear organizational charts or reporting structures. This leaves room for family members to meddle with the running of the business of the company. Conflict within the company can be avoided by putting in place proper channels of communication as well as proper governance policies and structures. Such policies and structures should embody the principles of good corporate governance including transparency, accountability, inclusivity and fairness amongst others.

An example of an appropriate governance structure and policy is the Family Member Shareholding Policy. This policy provides for how shares in the companies may be allotted, held and disposed of so as to avoid any conflict between the members. Many family-owned companies are left at a loss in situations where some members, due to a family quarrel, want to sell their shares and exit from the company. The company is put in an impossible situation as it has to safeguard against dilution by outsiders, worry about liquidity within the company and the shareholders' ability to purchase the shares as well as the real threat that the disgruntled member may sabotage the company if forced to stay. The policy would clearly set out to whom the shares can be sold, the mode of calculating the value of the shares and device a way of ensuring the company's liquidity through establishing a redemption fund to cater for this purpose.

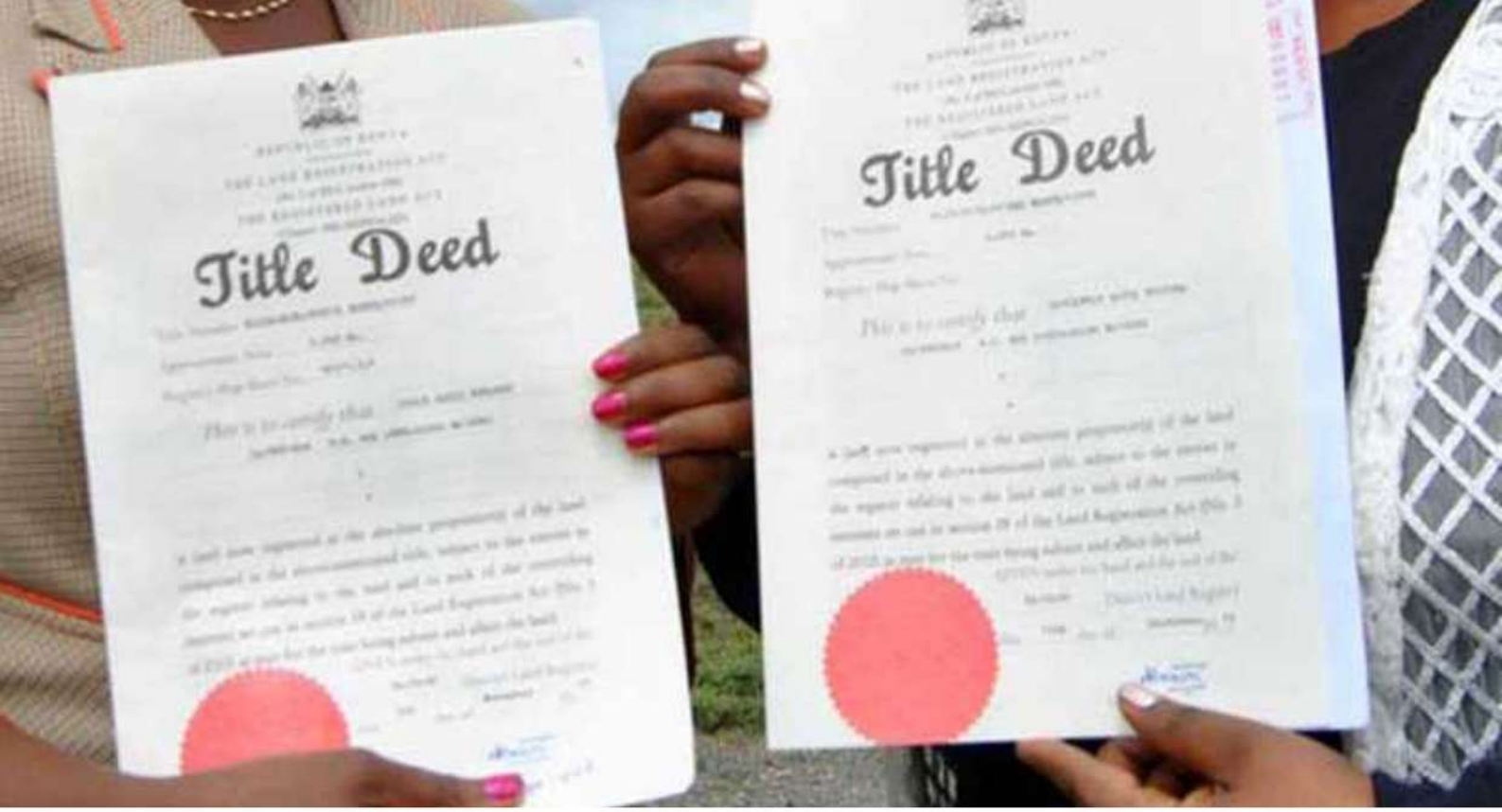
Other structures that can be explored include family assembly meetings and family council meetings. These two examples are indicative of fora where members of the family are allowed to air their grievances and to receive feedback and updates on the business.

As it is almost impossible to completely divorce "shareholder issues" and "family issues" in a family owned company, putting in place such structures ensures that the lines of communication are kept open and all disgruntlements amongst the family members are shared and resolved.

In conclusion, employing good corporate governance practices and entrenching them in a family owned company goes a long way in ensuring the success of a family owned company. To quote the International Finance Corporation (World Bank Group) Family Business Governance Handbook,

> *"Most family owned companies are successful during their infancy stage. In the longer term though, it becomes necessary to set up the right governance structures and mechanisms that will allow for efficient communication ... and a clear definition of the roles and expectations of every person involved in the family business."*

If family owned businesses fail to set up proper and well-functioning structures they run the risk of collapsing and losing all the gains made in previous generations.



ABSOLUTE OR NOT?
THE DOCTRINE OF INDEFEASIBILITY OF TITLE

Nancy MIRERI

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Ownership of land in Kenya is an emotive issue and was a central issue in the country's agitation for independence. Contemporaneously, its value in driving economic growth cannot be gainsaid.

It is not only an important factor of production but also a means of securing financing from financial institutions. Issues surrounding its ownership and any challenges posed thereto are therefore matters of great interest to land owners, purchasers of land and financial institutions.

Indefeasibility of title means that the title cannot be revoked or defeated.

The ownership conferred by title of the one part; and, instance of variation or equivocation thereto of the other, is certainly an important legal concern – which this article addresses itself to.

Legal Reforms in settling the question of land ownership have been long coming, with the Constitution of Kenya 2010 recognizing that the solution lies in an effective legal and institutional framework. The Constitution further guarantees acquisition and ownership of property in any part of Kenya, while safeguarding against arbitrary deprivation or limitation of a person's right to property.

It is against this background that this article succinctly considers the legal regime pre and post-enactment of current consolidated land statutes.

Pre-2012

Prior to the review of the laws and enactment of new land laws in 2012, the doctrine of indefeasibility of title was codified under the Registration of Titles Act (RTA) Cap 281 Laws of Kenya (now repealed). This Act was a product of the 'Torrens' system which protected bonafide purchasers who had acquired property for value without notice of defect in the seller's title. Such title would otherwise be impeachable save for instances of proven fraud or misrepresentation on the purchaser's part.

Section 23 of the RTA provided that the certificate of title issued by the Registrar upon transfer or transmission of land is conclusive evidence that the person named in the certificate is the absolute and indefeasible owner of the property; and, that title shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the registered owner is proved to be a party.

Under the Torrens system the Government as the keeper of the master record of all land and its owners, guarantees indefeasibility of the rights and interests noted in the land register. Section 24 of the RTA went further to guarantee compensation by the Government for damages or loss arising out of an error in registration or registration of a fraudulent instrument.

As set-out by the Privy Council in ***Gibbs v Messer [1891] AC 248*** the doctrine saves purchasers from the expense and trouble of going behind the register, investigating the history of title and satisfying themselves as to validity of title.

Regrettably this provision would in effect deprive an unsuspecting land owner, should a subsequent purchaser establish the prerequisites herein. For instance in ***Dr. Joseph Arap Ngok v Justice Moijo ole Keiwua,*** (Civil Appeal No. Nai. 60 of 1997) it was held:

> *"Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party; such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya, would be placed in jeopardy."*

Post-2012

The Land Registration Act (LRA) 2012 under section 26 seemingly provides for an expanded scope by providing for indefeasibly of title as follows:

(1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

(a) *on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

(b) *where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

The LRA at Section 26(1)(a) mirrors Section 23 of the RTA, but includes an additional consideration at Section 26(1)(b). The Courts may now interfere with the indefeasibility of title if, "acquired illegally, unprocedurally or through a corrupt scheme". Seemingly a safeguard to hitherto exposed landowners.

Both the trial court and the Court of Appeal in ***West End Butchery Limited V Arthi Highway Developers Limited & 6 Others [2012] eKLR*** struck down as invalid titles transferred to bona fide purchasers after having found that there was fraud in the initial transfer from the first owner.

Section 26(1)(b) introduces a new vitiating factor to the doctrine of indefeasibility of title where the title is procured irregularly, unprocedurally and by way of corrupt scheme. The Act does not require one to demonstrate that the title holder is guilty of these proscribed conduct. In ***Elijah Makeri Nyangwara -V- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012*** the court in applying the principle stated thus:

> *"...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."*

The provision of Section 26(1)(b) has therefore fundamentally dawned a paradigm shift in the jurisprudence on indefeasibility of title.

The protection nay immunity availed under Section 26(1)(a) of the LRA (as well as Section 23 of the RTA) is seemingly withdrawn by Section 26(1)(b) LRA (in tandem with the Constitution under Art 40(6))– the burden on the purchaser is now ostensibly higher.

In ***Esther Ndegi Njiru & Another -Vs- Leonard Gatei [2014] eKLR, the court held:***

> *"The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40(6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the Constitution coupled with the provisions of section 26(1) (a) and (b) of the Land Registration Act in my view places a responsibility on purchasers of titled properties to ascertain the status of a property beyond carrying out an official search."*

This places the burden on the purchaser to exercise broader due diligence instead of only relying on search results obtained from the relevant land registry. Purchasers are therefore advised to exercise caution and seek legal advise and representation when purchasing property.

It is worth noting that a recent judgement by the Court of Appeal in the matter of ***Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR, Civil Appeal No. 156 of 2013*** held that a bonafide purchaser is assured of protection notwithstanding that previous dealings might have been marred by fraud so long as the purchaser was not party to and had no notice of the fraud. According to the judges, the law was never intended to punish the innocent as punishing the innocent would break down all the trust and respect for the law and legal system. This judgement upholds the principles of the Torrens System which was codified in the RTA.

PROTECTION OF MINORITIES' RIGHTS: TAKE OVERS AND SCHEMES OF ARRANGEMENT

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Whereas there is no statutory proscription on the subject matter of a scheme, Part XXXIV of the Companies Act, 2015 (hereinafter "the Act") encompasses a court-sanctioned arrangement or compromise made between a company and its creditors or its members, or any class of them. Theoretically, the scope can be anything governing anything a company and its members or creditors agree as amongst themselves.

A scheme of arrangement envisages the reconstruction of a company's share capital with the sanction of the shareholders or creditors and the court.

A takeover offer as prescribed under Part XXIV of the Act involves the acquisition of all the shares in a company under the same terms of the offer in relation to the target shares. Under section 584 of the Act, a takeover offer is one whose intention is to acquire all the shares, of one or more classes, in the company other than those held by the offeror.

Over the years, there has been a shift towards adopting schemes of arrangements over take-over–offers.

While this popularity may be in view of the statutory approval threshold required for each, cognizance must be taken of the intended objectives. A scheme of arrangement, though requiring the court's sanction, must be approved by at least 75% of the target shareholders or creditors whereas a takeover-offer requires a 90% approval threshold to be met.

It may be tempting to argue that the level of minority protection accorded under a scheme of arrangement would be akin to that under a takeover-offer given that the latter may be achieved by a scheme or an offer. As this article propounds, the protection in a target company accorded to minority shareholders in a scheme of arrangement is fairly scrimpy when compared to that in place for minority shareholders in the case of a takeover-offer despite the fact that all the shareholders are bound to sell their shares to the bidder.

Schemes of Arrangement versus Takeover offers

A takeover-offer envisages a contractual relationship between the members of the target and the offeror for the purchase of shares. There is no contractual nexus with the target company during a takeover-offer. There may, undoubtedly, be significant implications on the target's stakeholders as a takeover-offer will ultimately result in both the transfer of shares and control to the offeror.

Public companies are permitted to dilute minority shareholder restrictions on the transfer of shares, whether imposed by their articles, or contractual. This dilution of the minority shareholder's 'pre-bid' defence must be sanctioned by a special resolution at the general meeting in what is referred to as an "opting-in" resolution.

Similarly, it may revoke the opting-in resolution by a further special resolution known as an "opting-out" resolution.

Where circumstances may warrant the preference of a scheme over a takeover offer, for instance in response to an insolvency situation, the contractual nexus is at the initial stage between the bidder and the target's board and not the shareholders. Once a scheme is proposed by the target's board at a general meeting, it requires the approval of at least 75% of the shareholders and subsequent sanction by the High Court. The Court's sanction of a scheme becomes binding on the company and all its creditors and members alike. The order sanctioning the scheme takes effect only when delivered to the Registrar for registration.

A company may also resolve to adopt the hybrid model more commonly referred to as a takeover scheme. It involves the shareholders of the target permitting the cancellation of their shares for a consideration which subsequently creates a reserve utilized to pay for the shares issued to the bidder. When this takeover scheme results in a reduction of capital in what is commonly referred to as a "reduction scheme", the company must endeavor to abide by the rules governing capital reduction. Notably, the cancellation must be sanctioned by the company's special resolution and a subsequent court order approving the reduction. This is viewed from the prism of the need to foster creditor protection. It is arguable that the reduction is "fictitious" as the ensuing credit is utilized in paying for the new shares.

Similarly, a company may cause the transfer of all the shares not owned by the bidder to it in what is referred to as a "transfer scheme". No stamp duty is usually payable in a reduction scheme as it involves no transfer of shares. This tax saving element has led to the preference for schemes rather than takeover-offers.

It is in practice, impracticable to have a hostile scheme of arrangement. This is primarily owing to the fact that a scheme entails initiation by the target's board of directors. A scheme is a corporate action of the target controlled primarily by the target rather than the bidder. In contrast to a takeover offer, there can be no such thing as a hostile scheme of arrangement. A hostile bidder will therefore opt for an offer rather than a scheme.

A scheme of arrangement, once approved, binds all the shareholders of the company, even the dissenting ones. The Court does, however, have the power to make an order for provision to dissenting members before it sanctions the scheme of arrangement or compromise.

By contrast, a takeover must be conditional on acceptances secured by the offeror Only when a 90% acceptance level is attained can the bidder utilize the squeeze-out right to compulsorily acquire the 10% shareholding.

Schemes of Arrangement and Minority Protection

A scheme of arrangement involves the target board's decision, albeit that the decision will be made by the shareholders at a general meeting. A scheme of arrangement envisages the binding of 100% of the shareholders. In theory, scenarios of restricted post-bid rights of exit do not exist. The potential for abuse lies in the process leading to the approval of a scheme which statutorily requires a three-quarters approval threshold.

Two levels of protections may be inferred for minority shareholders. First is the requirement that members of each class meet to deliberate and consider whether to vote to approve the scheme. The approval of at least three quarters of all classes of creditors or members must be obtained.

The second protection accorded is the scrutiny role of the court at the court hearing where the sanction is required.

During this hearing the court may inquire on whether the minorities had all the information they needed to decide on how to vote and if adequate notices were issued.

A court may refuse a sanction of a scheme at this stage if convinced that the minority is being oppressed.

Courts may refuse to sanction a scheme of arrangement if they believe that the majority has not voted in the interests of a given class. Although the court's role is not to usurp the views of those who have properly voted in its favour, it will not automatically confirm it if all the formal elements of the scheme are unmet.

Takeover Offers and Minority Protection

The principal concerns of the protection accorded to minority shareholders are centered on the need to ensure that the choice by shareholders is undistorted and that minority shareholders are not prone to abuse by the majority.

The principle of equality of treatment as entrenched under Section 586(2) of the Act requires that the terms of a takeover offer be the same in relation to all the shares to which that offer relates. This provision is enacted to guard against the mischief that would arise where offerors would "divide and conquer shareholders", skewing the offer in a bid to acquire the shares at the cheapest possible price.

An offeror whose bid has been accepted by at least 90% of the shareholders of the target company has a right to buy out the minority in the remaining 10%. This squeeze-out or "forced sale" procedure under Sec 611 of the Act is designed to protect the rump shareholders as the offeror is obliged to either purchase the shares on the final terms of the offer or give the minority shareholders a choice for the consideration. Without it the minority shareholders may frustrate the sale by refusing to sell their shares even though 90% of the shareholders have accepted the offer to sell.

Similar to the squeeze out procedure is the "sell-out" or "forced purchase" rule prescribed under section 615 of the Act which empowers the last 10% of shareholders to require the offeror to buy them out. Once a bidder has acquired 90% of the shareholding in the company, the rump shareholders can serve a notice on the bidder requiring it to acquire the shares on the final terms of the offer.

A dissenting minority shareholder is empowered under section 618 of the Act to seek a declaratory order that the offeror is not entitled to effect a squeeze out or seek an order requiring fair and reasonable terms of the offer.

The foregoing notwithstanding, the primary remedy available to shareholdes is found in section 780 of the Act which entitles the minority shareholders to seek protection from the court against oppressive conduct or unfair prejudice. The usual remedy, if unfairly prejudicial conduct has occurred, is that the court will order the buy-out of the applicant's shares.

In conclusion, the minority shareholders can effectively be bound by a lower approval threshold in a scheme unlike in a takeover where they cannot be forced to sell their shares unless a 90% approval threshold by the other shareholders has been attained. Concerns have been raised over the lower approval threshold in a scheme of arrangement as opposed to a takeover offer with suggestions being tabled that a scheme should require a higher standard of proof. While courts in other jurisdictions have held the view that whether a company proceeds by way of a takeover or a scheme is a matter of choice, they have consequently rejected the argument that they should insist on a 90% approval of the scheme by the members of the target.

Evidently, the lower threshold in a scheme of arrangement is countered by the need for the court's sanction of the scheme. It is undoubtedly of paramount importance that courts take their role seriously at the sanctioning stage.

A law is valuable, not because it is a law, but because there is right in it.

HENRY WARD BEECHER, Life Thoughts

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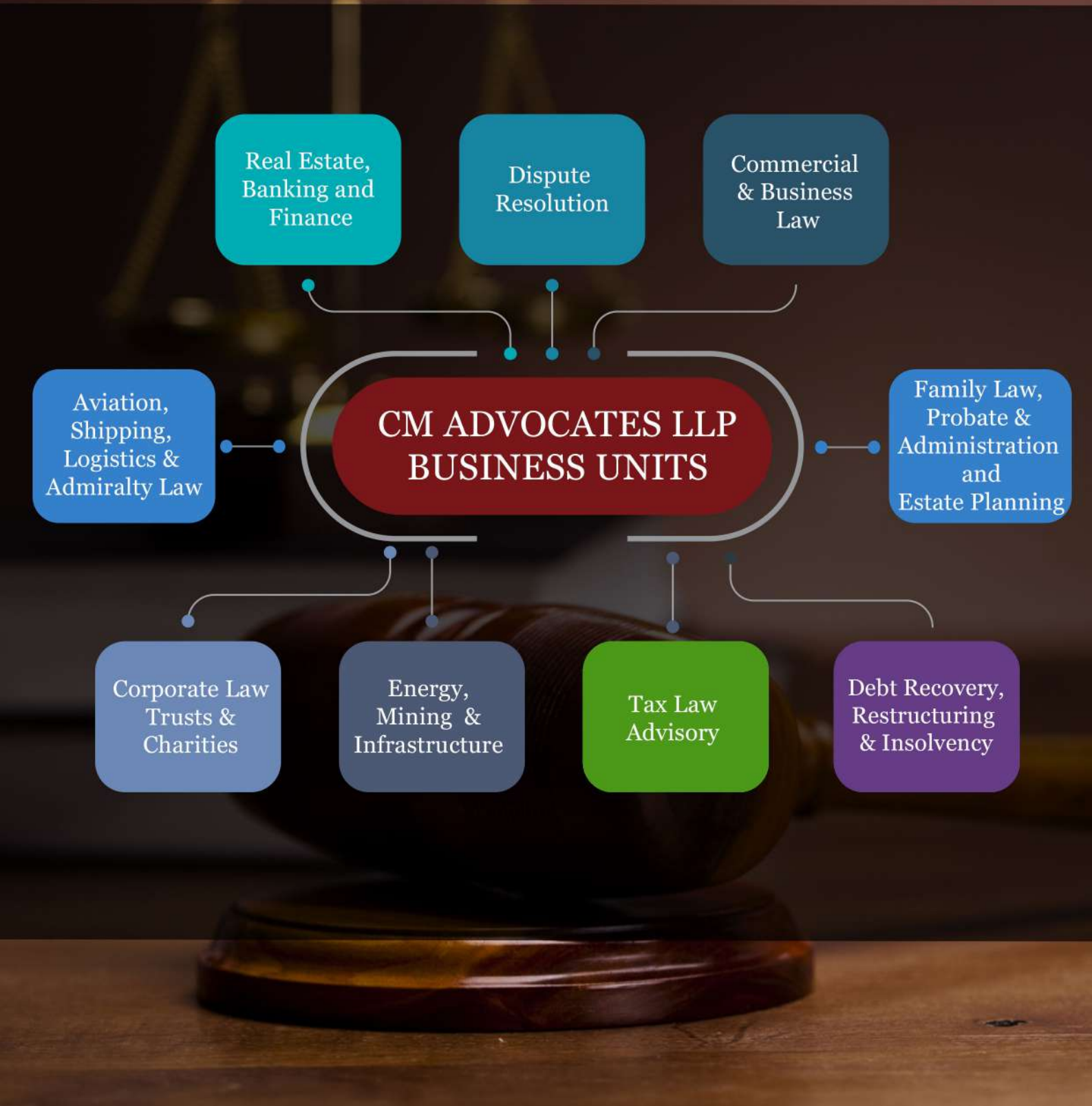

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