

Can foreigners own property in Kenya?

Foreigners can own property in Kenya in their name. The Constitution (2010), the Lands Act (6/2012) and the Land Registration Act (3/2012), subject to certain limitations, grant the right to any person, either individually or in association with others, to acquire and own land in Kenya. This is important as many foreign investors have been duped into believing that they cannot own land in their own name in Kenya.

In *Hartmann v Mbogo* (Civil Case 222/2007), *Grounstra v Wanje* (Civil Case 284/2007) and many similar cases involving coastal properties, foreigner investors have entered into agreements and arrangements with locals with a view to the locals purchasing properties on their behalf. This is usually based on the alleged representation that a foreigner cannot own land in their own name. Such unnecessary partnerships between locals and foreigners often turn sour and should be avoided.

Before a foreigner purchases property, proper research should be undertaken and qualified professionals should be engaged.

Limitation of property ownership

The limitations of property ownership in Kenya by foreigners can be found in the Constitution and the Land Control Act (Cap 302).

As per Article 65(1) of the Constitution, a “person who is not a citizen may hold land on basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety nine years”. However, on expiry of the leasehold term a renewal of the lease may be sought. Article 65 further provides that any document which purports to confer on a foreign investor an interest in land with a lease of more than 99 years is deemed and regarded as conferring on that foreigner a 99-year lease and no more. This means that foreign investors can purchase leasehold properties for more than 99 years. However, the constitution implies that it will be deemed as conferring only a 99-year leasehold interest on the foreigner.

A company, as per the Constitution and for purposes of property ownership, is regarded as a Kenyan company only if it is wholly owned by one or more Kenyan citizens. Therefore, a company with foreign shareholders is regarded as a foreign company and cannot own freehold land. Moreover, a trust cannot be formed to obviate this requirement. The Constitution was promulgated on August 28 2010. Under Article 8(1) in the Sixth Schedule to the Constitution, any freehold interest in land in Kenya held by a person who is not a Kenyan citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the state will grant a peppercorn rent for 99 years to that individual. This means that from the effective date, any freehold land or absolute proprietorship held by a foreigner is truncated to a 99-year lease with a peppercorn rent. The government has been forced to call for these Real Estate – Kenya Author Mwangi Karume titles and issue foreigners with leasehold titles with a commencement date of August 28 2010.

Agricultural land

Under the Land Control Act transactions affecting agricultural land and other land which may be gazetted by the minister of lands are defined as 'controlled transactions'. Controlled transactions are void in law for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of the transaction.

As per the act, the land control board cannot grant consent to a transaction in which the land is to be disposed of by way of sale, transfer, lease or exchange or partition to a person who is not:

- a Kenyan citizen;
- a private company or cooperative society, all of whose members are Kenyan citizens;
- a group representative incorporated under the Land (Group Representatives) Act; or
- a state corporation as per the State Corporation Act.

The effect of this is that foreign investors and private companies owned by foreigners cannot hold agricultural land in Kenya. However, through a notice in the Kenya Gazette, the president may exempt any person from all or any of the act's provisions. Therefore, foreign investors wishing to acquire agricultural land may apply for such exemption. Further, public companies in which foreigners are members may acquire agricultural land.

Dummy companies and nominees

One of the ways in which foreign investors attempt to circumvent limitations to property ownership is by incorporation of companies whose shareholders are indicated as local in the Companies Registry. The Kenyan shareholders then enter into a declaration of trust with the foreign investors.

The declaration of trust will usually state that local shareholders are the legal but not beneficial owners of the shares in the company. Another approach is to use nominees to enter into property transactions and own property on behalf of foreign investors.

These approaches are void and unenforceable as they go against the Constitution and the law. The Constitution provides that any property held in trust shall be regarded as being held by a Kenyan citizen only if all of the beneficial interests of the trust are held by persons who are Kenyan citizens.

The use of dummy companies and nominees therefore puts investments at risk.