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Legal Insights



M'pulla House, Arboretum Drive, Off State House Road

+254 722 513 991, +254 733 773 955

musyimilaw@musyimilaw.com

www.musyimilaw.com



MusyimiCo



[musyimi-company-advocates](https://www.linkedin.com/company/musyimi-company-advocates)



[musyimi_company](https://twitter.com/musyimi_company)

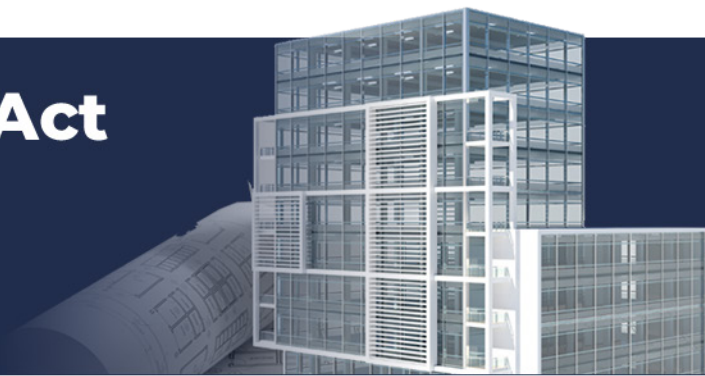


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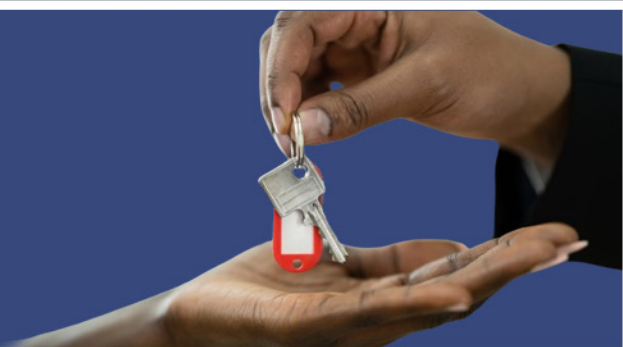
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Proprietary rights are so important that the Constitution recognizes them as a fundamental human right and directs the state to defend them.



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The concept of sectional property optimizes the use of land as a resource by encouraging vertical development of land.



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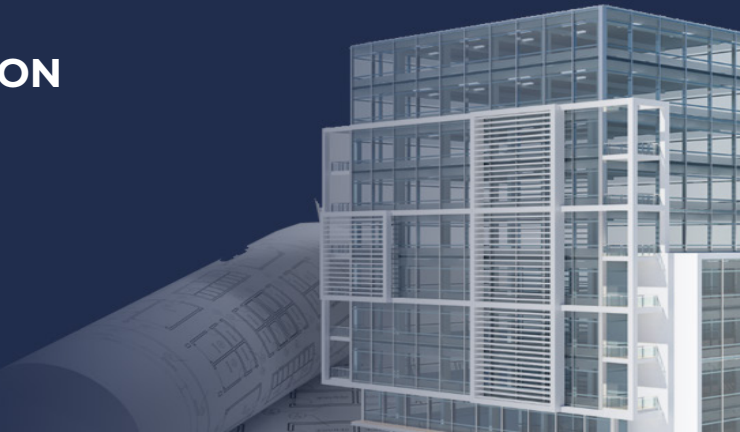
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01 SECTIONAL PROPERTIES ACT

REFLECTION ON ITS IMPLEMENTATION

The Constitution of Kenya defines land to include the air space above the surface. The concept of sectional property optimizes the use of land as a resource by encouraging vertical development of land.



A sectional unit means a space within a building described in a sectional plan by reference to floors, walls, and ceilings within the building and includes its proportionate share in the common property. This means that one can individually own a single unit within a larger property development such as an apartment building or a townhouse complex. In 2020, the Sectional Properties Act came into force repealing the Sectional Properties Act of 1987. The shift served mainly to simplify the process of acquiring sectional property in Kenya.

1.1. Comparison of the Sectional Properties Act, 2020 with the 1987 Act

- The 2020 Act applies to leasehold properties with unexpired residue terms of not less than 21 years whereas the threshold under the Repealed Act was 45 years.

- The owners under the repealed Act were issued with Leases/Sublease as the evidence of ownership whereas the current Act provides for the issuing of Certificates of Title or Lease.
- The obligation to pay land rates and rent is on the unit owners and not the management authority as was the case under the repealed Act.
- The Management Corporation is now governed by the Act and not by the Companies Act as it was previously.

1.2. Preparation and Registration of Sectional plans and units

- An existing structure may be designated a building containing a unit or divided into two or more units by the registration of sectional plan prepared by a surveyor, from a building plan that has been approved by a county government.
- A surveyor shall prepare a sectional plan if they

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receive proof of ownership of the parcel which the sectional plan shall apply.

- The common property comprised in a registered sectional plan shall be held by the owners of all the units as tenants in common in shares proportional to the unit.

2. The effect of the Sectional Properties Act, 2020 on long-term leases

Section 13 of the Act provides that all long-term sub-leases that intended to confer ownership that were registered before its commencement shall be reviewed to conform to Section 54(5) of the Land Registration Act within a period of two years of the commencement of the Act. Section 54 (5) provides that the Registrar shall register long-term leases and issue certificates of lease having the effect of conferring ownership, if the property comprised is properly geo-referenced and approved by the statutory body responsible for the survey of land. This means that all developments with units have to be geo-referenced by a licensed surveyor to facilitate the preparation of a sectional plan and registration.

To allow for this transition, the Act gave a two-year grace period ending on December 2022 to allow compliance. The Ministry added that long-term leases supported by architectural drawings would no longer be registered by the Lands Registry with effect from 10th May 2021.

3. Transition period – Ministry Memorandum

During the transition, a question arose concerning the developments that are caught in between the two regimes with respect to the implementation of the Sectional Properties Act 2020. These are the projects which had partially registered units or long-term leases. Many developers, having been caught up in this situation, did not know what steps to take.

On 2nd August 2023, the Ministry of Lands issued a memorandum on transitional measures on registration of long-term leases. This provides guidance to such developers. The memorandum provides that applications for registration of such long-term leases are to be made subject to the conditions set out below.

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3.1 Partially registered Apartments

In relation to new applications for registration of long-term leases in developments where some leases have been registered although some properties have not been geo-referenced the Registrar shall proceed with the registration provided that:

- The registered proprietor of the mother title does a letter of undertaking when making the application stating that geo-referencing shall be completed within six months from the date the undertaking is given.
- A licensed surveyor must also do a letter supporting the undertaking stating that their services have been procured to carry out the geo-referencing.
- Upon receipt, the Registrar confirms that the long-term lease proposed is from the same development in which some long-term leases have already been registered. After approval of the application, the same is registered on Ardhisasa or manually where it is not captured in the system
- Where the mother title has been gazetted for conversion and the developer wishes to register a long-term lease, the long-term lease shall be registered after conversion.

3.2 Fully registered Apartments under the old regime

Where there is an application for a dealing over long-term leases in projects with fully registered units/long-term leases that are yet to comply with the geo-referencing requirement, the Registrar shall proceed to register the transaction provided that-

- Upon receiving the application for the dealing, the Registrar shall forward the property details to the Survey Department for geo-referencing and determining the cost to be borne by each unit owner prior to the registration of any subsequent transactions.
- A lien shall then be registered by the Registrar over each of the registered leases to secure payment of the geo-referencing costs determined by the survey department. After the lien is registered, the costs must be paid before allowing any subsequent dealings with the long-term lease.
- The register of the long-term leases shall be updated to note the new sectional title numbers for each lease and notices sent to the registered proprietors.

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4. Procedure for obtaining a Sectional Property Certificate of Title/Lease

For new developments, the process of obtaining a sectional title is quite straightforward and can be summarized as follows.

A surveyor is required to prepare a sectional plan from the building plan that was approved by the County Government. The developer must present to the surveyor proof of ownership before the sectional plan is prepared. The plan is then presented to the Registrar for registration. It is also accompanied by an application for registration by the corporation and a list of the persons who are the owners of the units in the parcel which shall be updated from time to time on need basis.

Upon receipt, the Registrar closes the register of the parcel on which the units are built and proceeds to open separate registers for each unit described in the sectional plan presented. The mother title is surrendered and each unit of the sectional property is issued with a certificate of title if the property is freehold or a certificate of lease if the property is leasehold and shall include its proportionate share in the common property.

Where the developer had ready purchasers at the time of obtaining the sectional titles, transfer and registration can be done simultaneously and the resultant sectional title obtained will be in the purchaser's name. In the event the developer has no purchaser, the sectional title obtained will be in the developer's name and will be transferred when there is a purchaser.

The developer is also required to deliver the following completion documents to the purchaser; the purchase agreement, the by-laws of the Management Corporation, the management agreement if any, the recreational agreement where applicable, the lease or title of the parcel on which the unit is located or the certificate of title or the certificate of lease in respect of the unit, any charge that affects the title to the unit and the sectional plan.

5. Off Plan Sales – Sectional Properties

There are instances where a developer and purchaser can agree on the sale of a unit that is proposed or in the process of construction. This is where the development is off plan. In this case, the parties enter into an agreement without the sectional unit being in existence, it is merely proposed. The sale agreement ought to recog

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nize that the section plan will be prepared and registered in due course. The sale agreement should also capture the anticipated practical completion date which is the date the developers expect that the building will have been completed.

On completion of the sectional units, the developer then goes ahead to register the proposed sectional plan to obtain sectional titles for the units. In this instance, registration and transfer occur simultaneously meaning that the resultant sectional titles will be in the purchaser's name. The Management Corporation is also registered.

The developer then hands to the purchaser all completion documents concerning the sectional unit. After the sectional plan is registered, the Registrar submits it to the county government for apportionment of rates within 21 days.

6. Conclusion

In conclusion, the Sectional Properties Act of 2020 has been enacted to (a) allow for issuance of sectional titles; (b) streamline the division of structures into units that are to be owned by individual persons & common property to be owned by them as tenants in common; and (c) to provide for the

use and management of the units. Although the Act has simplified the various procedures involved in the sale and purchase of sectional units, vendors and purchasers must be keen in such transactions to ensure compliance with the law, transfer of good title and appropriate management of their properties.



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Commercial Leases - A legal agreement between a lessor/landlord and a lessee/tenant for the use of a commercial property. These properties include office buildings, retail spaces, warehouses, shops, and other types of properties.

Commercial Leases in Kenya are expected to be in writing and often have a fixed term duration of more than five (5) years. They also generally do not contain termination clauses though some landlords do issue “Side Letters” to tenants wherein they commit to favorably consider termination notices. They are structured in this way to eliminate the risk of creating controlled tenancies and thereby falling under the jurisdiction of the Business Premises Rent Tribunal.

The Land Act primarily governs Kenyan commercial leasing contracts. The Land Registration Act and the Landlord (Shops, Hotels & Catering Establishments) are additional pieces of legislation to take into account.

It is tempting to sign a commercial lease before reading through the same thor-

oughly. You may not read a contract thoroughly for several reasons. For instance, you may be in a rush to close a deal or secure a lucrative contract. However, you must view signing a commercial contract as a serious engagement. That requires reading through the lease yourself (or with the assistance of lawyer) for business protection and to protect against various potential legal risks.

Key clauses to look for in a commercial lease as a lessee/tenant/tenant’s advocate.

Description of the premises

The commercial lease clause identifies the space the tenant will occupy. This might be straightforward if the lease is for an entire building or property. However, if the tenant is only renting a

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portion of the property, this clause should describe the premises in detail. For example, if the property has developments and improvements, the same should be stated. Moreover, the property dimension should be described.

Term

The lease term defines the entire period your lease is considered active, and how long the tenant is responsible for the space, even if the business were to close or relocate. The term clause also dictates when other terms of the lease, such as payment of rent, will go into effect. There are different types of leases as stated in the Land Act, they include; -

Periodic Lease -Which is deemed to be for the period by reference to which rent is payable.

Short Term Leases -These are leases of two (2) years or less without an option for renewal.

Long Term Leases -These are used to grant title to apartment units or Maisonettes although this practice will be phased out by the Sectional Properties Act, 2020.

Rent/Premium

This section describes the rent obligations. It is important to make sure the rent is what is discussed with the Landlord. During the lease term, the Tenant shall pay to the Landlord fixed rent at the rate of a certain amount whether it's payable monthly, quarterly, or yearly, this is particularly key, because in the event the tenancy agreement lacks a termination clause, the notice period will be pegged on when rent is payable. In most commercial leases rents are set to increase over time. How often, and by how much they increase is specified in a lease contract's rent escalation clause. Rent escalations are essential for commercial landlords, since, if rents did not increase, landlords would not be able to keep pace with inflation. In practice, this means they likely be unable to continue renting their properties due to an increase in maintenance and operating costs.

Sometimes rent escalation clauses can be negotiated with landlords directly on a tenant-by-tenant basis.

Landlord and Tenant obligations

Landlord/Lessor's obligations include;

1. To give quiet and peaceful possession to the Tenant/Lessee;

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2. To ensure that the premises are fit for habitation;
3. Not to derogate from the grant/lease as given to the Tenant/Lessee. For example, the Landlord/Lessor shouldn't let out the same property to another tenant during the life of the tenancy.
4. Repair. The lessor is generally bound to repair the roof, main walls, drains, common passages, and installations.
5. To ensure the property is fit for purpose. Where it can no longer be used for the purpose intended, one may terminate by giving notice.
6. To pay all rates, taxes due, and outgoings except to the extent otherwise specified in the agreement.

Tenant/Lessee's obligations include;

1. To pay agreed rent on time and in the manner specified.
2. To use the leased land with prudence and diligence.
3. Not to interfere with normal enjoyment of other tenants/lessees.
4. To yield up (return) to the Lessor/Landlord the land and buildings in the same condition as they were when the term began. Exemptions for deterioration caused by reasonable wear and tear or natural di-

sasters and acts of God.

5. To keep all buildings, comprise in a reasonable state of repair.

Improvements and alterations clause

This section of the lease details the alterations and improvements that will be made to the property prior to the tenant's move in. It also specifies who will bear the cost of the changes financially. The right of the tenant to make future changes to the space and the procedure for doing so are described in the alterations clause. In most contracts it allows both parties to select an architect or prescribe the costs so that it can be negotiated by both parties.

Dispute resolution clause

If your business and the landlord get into a dispute, how will it be resolved? Is there a required period of negotiation? Do the parties need to submit the dispute to mediation (usually cheaper than court) or can the parties sue each other immediately? Are rent obligations suspended during a major dispute? Can you withhold a portion of the rent that reflects the cost of the disputed issue? The most beneficial plan to take is to review the Lease Agreement's dispute resolution procedures and think about negotiating for more effective techniques like mediation

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Additional Matters

Due Diligence

Due diligence should be undertaken to confirm ownership of the land and whether the land has any encumbrances. It is advisable where it includes buildings, to undertake a structural survey and have a status report of the condition of the property.

This can be done by obtaining a copy of the title and conducting a search, obtaining details of identification and KRA PIN certificate, and verifying the documents, if the landlord is a company obtain CR 12 and confirm the details of the director.

Controlled Tenancy

A controlled tenancy is a type of commercial lease that comes about under the operation of the provisions of the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act, (Cap 301, Laws of Kenya). It has either not been reduced to writing or has been reduced into writing but is for less than 5 years or contains provision for termination, otherwise than for breach of covenant, within five years since its commencement.

Lease, License and their differences

Lease

The features of a lease are as follows:

- (a) It Grants a tenant exclusive possession to the tenant for a specific period.
- (b) It lease creates interest in the land making the lessee an estate holder.
- (c) Leases can often be transferred or sublet to another party subject to the terms of the lease agreement.
- (d) Termination of a lease requires a notice which should follow specific terms of the lease agreement.

License

The features of a license are as follows

- (a) It grants a tenant mere permission to use the landlord's property for a period of time.
- (b) The permission to use the property is without exclusivity.
- (c) License are often more flexible in terms of duration and can be for a short or undefined periods.
- (d) Licenses are generally non transferrable and cannot be assigned to another party without the licensor's consent.

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(e) Licensees have fewer legal protections and remedies as opposed to lessees

(f) Licenses are terminated more easily and generally have shorter notice period.

Distinction

The main feature that distinguishes a lease from a license is the right to exclusive possession over the property. While a lease grants a tenant exclusive possession, a license grants a tenant mere permission to use the landlord's property for a period of time. It follows then, a tenant under a lease enjoys more rights as compared to a tenant under a license agreement. Leases and Licences are distinct legal arrangements in the realm of commercial agreements, each offering different rights and responsibilities to the parties involved. Leases create a landlord-tenant relationship, granting exclusive possession and control for a fixed term, while Licences, on the other hand, are revocable permissions for temporary and non-exclusive use of the property.

Understanding these differences is crucial for both property owners and users to make informed decisions about their real

estate arrangements.

Conclusion

The aforementioned clauses are among the most important ones that a lessee or tenant should look for in a commercial lease to prevent disagreements that might occur when a commercial lease has flaws. To prevent any potential disputes, it would be wise to include them in an agreement and seek proper legal advice for interpretation of the provisions of the agreement so as to ensure that your interests as a landlord or a tenant are fully protected under the law.



03 TESTATE SUCCESSION

Testate succession refers to distribution of property in a will



In *the Estate of Julius Mimano Cause No 417 of 2019* , it was stated that where a Will exists, then the probate court will attempt to distribute the property according to the Will. Distribution of property under a Will can only take place after the death of the person who owns the property and had authored a will (“the Testator”).

1.2. Types of Wills

- (a) Under Kenyan law, a Will can either be written or oral.
- (b) According to section 9 of the Law of Succession Act an oral will is only valid if it is made in the presence of two witnesses and 3 months before the death of the Testator. It also provides that oral wills can only be valid if they do not contradict existing written wills.
- (c) Written wills are valid if the testator has signed or affixed his/ her mark to the will.

The written will must be attested by two or more competent witnesses who must have seen the Testator append his signature on the Will and who ought to sign the will in the presence of the Testator.

1.3. Requirements of a Valid Will

In addition to the matters detailed above (Clause 1.2) the following are requirements for a valid will in Kenya:

- (a) That the person making the will (the testator) shall be of sound mind and not under coercion or undue influence
- (b) That the person making the will (testator) shall be of 18 years and above.
- (c) That the two witnesses shall be of 18 years and above, shall be independent (not beneficiaries under the Will) and shall be of sound mind. In the case of *Banks V. Goodfellow* , the court elaborated on the test of testamentary capacity and broke it down into four elements

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1. The testator understands the nature of making a will and its effects. This is to mean that the testator is aware that the will is meant to dispose his assets after his death.
2. The Testator has an understanding of the extent of the property they intend to dispose.
3. The Testator must be able to understand and appreciate the claim to which they should give effect. They must know the person who will claim their property.
4. The Testator should not have any disorder of the mind that perverts their sense of right or prevents the exercise of their natural faculties in disposing of their property by will.

1.1. Contents of a Will

The following are the key contents of a Will:

- a) Identification and appointment of the Executors.
- b) Beneficiaries of the Will, Property to be distributed and how that property is distributed amongst the Beneficiaries.

- c) Liabilities including any charges attached to the testator's assets and the manner of settlement prior the distribution.
- d) Burial of the testator which includes how and where the testator will be buried. Cremation is also an option that may be provided for in the Will.
- e) General obligations of the Executor (s) such as adherence of the law while administering the property, safeguarding of the assets and appointment of advocates for the Estate. Specific obligations depend on the circumstances and could include holding the assets in trust for a beneficiary before they attain the age of majority.
- f) General clause which highlights what will happen if a beneficiary happens to die before the will takes effects.
- g) Residuary clause which highlights who will receive the remaining estate that was not disposed by the will
- h) Signature of the two independent witnesses and the testator.

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1.2. Revocation Of A Will

A will would be revoked (cancelled) by any of the following

- a) Making of another will that supersedes the previous will.
- b) Destruction of the original will and all its copies.
- c) Remarriage of the testator.

1.3. Codicil

The Black's Law Dictionary defines a codicil to mean a supplement or addition to a will, not necessarily disposing of the entire estate but modifying, explaining or otherwise qualifying the will in some way. When admitted to probate the codicil becomes part of the will.

1.4. Process Of Proving A Will In Kenya Succession Process In Courts

a) Application for grant of probate lodged in court together with the original will of the deceased death certificate and ID's of the executors. This application would be made by the person(s) named as the Executor(s) in the Will. Person(s) other than the executor may also apply provided they can demonstrate special circumstances such as death of executor(s).

b) The court upon application gazettes the intention to issue a grant of probate. If the same is not challenged within 30 days of application, the court then issues grant of probate to the Executor(s).

c) After six months from the issuance of the grant of probate, the Executor(s) can then apply for confirmation of grant (authority to distribute). The six - month period is to allow the Executor(s) to consolidate the estate (assets and liabilities of the deceased).

1.5. Duties Of An Executor

- a) Identification and collection of the assets of the estate
- b) Safeguarding and investment of the assets pending distribution to the beneficiaries.
- c) Payment of debts and liabilities owed by the estate
- d) Filing of appropriate tax returns for the deceased and the estate.
- e) Distribution of assets to the beneficiaries in accordance with the provision of the will.

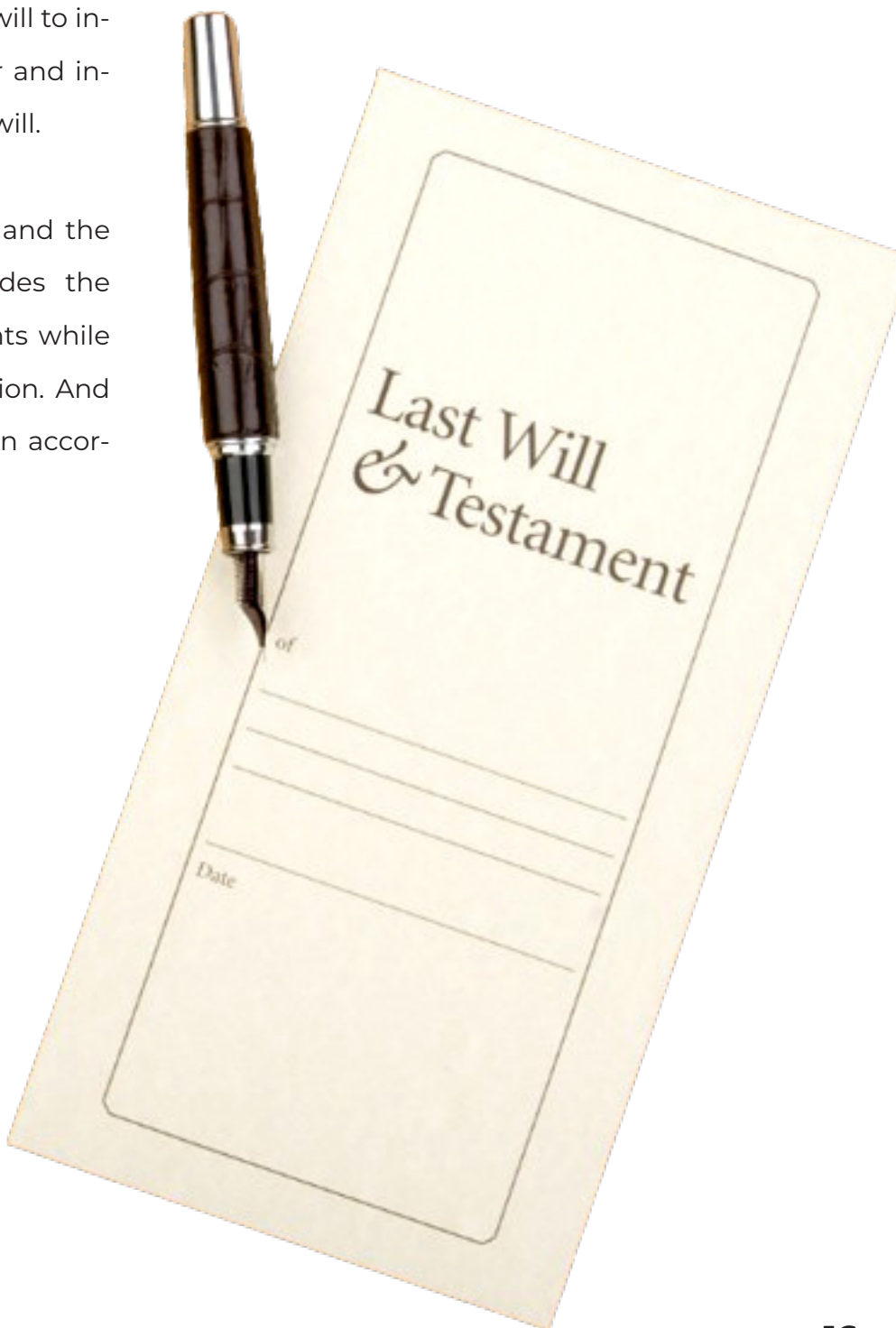
03 TESTATE SUCCESSION



1.6. Conclusion

This article highlights key features of testate succession that include: the definition and types of a wills that is oral and written wills. The requirements of a valid will to include the capacity of the testator and independent witnesses to sign the will.

The article also defines a codicil and the will making process that includes the court process and its requirements while applying for grant of administration. And finally the duties of an executor in accordance with the Succession Act.



Musyimi & Company

Advocates, Notaries Public
& Commissioners for Oaths

M'pulla House, Arboretum Drive, Off State House Road

+254 722 513 991, +254 733 773 955

musyimilaw@musyimilaw.com

www.musyimilaw.com



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