

LEGAL PITFALLS IN SECTIONAL PROPERTY DEVELOPMENTS:

Avoiding Compliance Failures and Misrepresentation In Kenya

INTRODUCTION

Regulatory compliance stands in as an important factor determining the success and sustainability of ventures in sectional property development in Kenya. The range of policies and statutory regulations is wider than ever before. This position was affirmed in in a landmark decision in ***Rehman v Luhar (ELC Case No. 10 of 2016)*** by the Environment and Land court in Mombasa on the 28th of September 2022.

The judgement highlights some of the stringent statutory standards and guidelines under the Sectional Properties Act that real estate professionals must navigate to ensure their projects meet the legal requirements.

The legal and commercial risks tied to non-compliance, unauthorized construction and misleading marketing in sectional property developments are intensifying. A single deviation from approved plans or failure to establish governance structures can lead to demolition orders, court injunctions, and irreversible financial loss.

For developers, construction managers, real estate professionals, and local or international investors, understanding the obligations under the Sectional Properties Act, 2020, the Land Act, 2012, and related frameworks is critical for legally secure and commercially viable projects.

This writing will assist you understand the legal pitfalls in Sectional Property development and the significance of regulatory and statutory compliance in Kenya.

CASE SNAPSHOT: REHMAN V LUHAR

In this precedent-setting case, Mr. Rehman purchased three apartments in a nine-unit development in Nyali. The developer, Mr. Luhar, subsequently constructed a rooftop unit without approvals from NEMA, the NCA, or the consent of other unit owners.

The developer argued that the apartment owners' interest was limited to the apartments they had purchased and did not extend to ownership of the land as no management company was created to own the common areas and hold reversionary interest. The developer further argued that the subleases did not prevent him from constructing the additional unit.

DECISION

In making its decision the court stated that the purpose of the Sectional ownership is that a person may purchase a unit within a building without necessarily owning the land upon which the development is located and that one does not need to own the land upon which a development is situated because the ownership of the individual unit is sufficient for the purpose of having a shelter.

As such, the purchaser of the unit cannot use the unit without also having access and rights to the

common areas where he/she has a right to be consulted, informed and participate in decision making regarding any additional developments not in the initial sectional plan. Hence, a developer cannot be heard to say that the interest of a purchaser of a sectional unit is only restricted to the particular unit and not to the common areas.

The court further held that, the Sectional Properties Act contemplated that there be a management company in charge of all the areas not covered by the individual units and that the developer is to make any alteration to the original plan, he/she must seek the consensus of the purchasers as they stand to be directly affected.

The court held that construction of the additional unit was illegal for lack of consent from the apartment owners and the requisite approvals- such as that of the National Construction Authority (NCA) and the National Environmental Management Authority (NEMA).

The court also observed that while the subleases did not restrict the developer from constructing additional units, they also did not have a provision permitting the developer to construct additional units.

IMPLICATIONS OF THE JUDGEMENT

a) **Supremacy of the Sectional Properties Act:** - The court applied the 2020 Act even though the title was issued under repealed law, affirming its role in governing all sectional schemes.
b) **Lack of Disclosure & Plan Alteration:** -Failure to update the sectional plan violated Section 43, compromising buyer transparency.
c) **Procedural compliance & Regulatory Breaches:** it is important for all developers and land owners to comply with the regulatory framework of development under Sectional Properties Act and that any construction that commences without seek the necessary approval will be in breach of statutory environmental and planning laws. -
d) **No Management Corporation** - The omission violated Sections 17–21 of the Act, creating a governance vacuum for common property.

WHAT THE LAW REQUIRES FROM DEVELOPERS

a) Approved sectional plans registered at the Lands Registry
b) Mandatory management corporations to administer common property
c) Environmental and planning approvals (NEMA, NCA, County Government) before construction
d) Full and accurate disclosure of project features, plans, and by-laws
e) Buyer protection through enforceable titles, by-laws, and governance documents

MISREPRESENTATION IN REAL ESTATE: A SERIOUS LIABILITY

a) Kenyan law classifies misrepresentation as:

i) Innocent – false but unintentional; buyer may rescind
ii) Negligent – due to lack of due diligence; opens liability for damages
iii) Fraudulent – deliberate deception; can lead to civil and criminal sanctions

b) Advertising features not supported by approvals—e.g. rooftop units, pools, parking structures—may amount to legal misrepresentation with severe consequences.

PRACTICAL TIPS FOR DEVELOPERS & PROJECT MANAGERS

a) Obtain all approvals before ground-breaking
b) Register sectional plans and set up the management corporation early
c) Disclose accurate project details in all marketing materials
d) Regularly update legal documents and consult legal advisors on plan variations
e) Protect buyers' rights with transparent contracts and compliant governance structures

HOW CM ADVOCATES LLP SUPPORTS YOUR REAL ESTATE SUCCESS

(a) As a full-service real estate law firm, CM Advocates LLP offers strategic legal advisory throughout your project's lifecycle—ensuring compliance, unlocking capital, and shielding you from liability. We serve developers, contractors, financiers, and investors across residential, commercial, mixed-use, and joint venture developments.

(i) Sectional Properties & Compliance Advisory
- Registration and conversion of sectional plans
- Setup of management corporations and by-laws
- Correction of title defects and regularization of unapproved units

(ii) Development Structuring & Approvals
- Land acquisition and title perfection
- Planning, zoning, change of user, and NEMA/NCA permits
- Structuring tax-efficient projects and SPVs for off-plan sales

(iii) Joint Ventures & Real Estate Finance
- Structuring of developer-landowner JVs and financing arrangements
- Formation of SPVs and investor protection mechanisms
- Risk allocation, exit strategies, and dispute prevention

(iv) Dispute Management & Resolution
- Representation before ELC, Tribunals, Courts, and regulatory bodies
- Handling of construction, title, and misrepresentation disputes
- Mediation and arbitration to resolve disputes efficiently

(v) Foreign Buyer & Investor Services
- Regulatory support for foreign and diaspora investors
- Due diligence, contract negotiation, and succession structuring
- Advisory on tax, immigration, and real estate holding vehicles

(b) Whether you are developing high-rise apartments, student housing, retail parks, or holiday homes, our team ensures your project is legally compliant, commercially secure, and investment-ready.

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