

News Update

From: Walker Kontos
To: Clients
Re: Judgment Declares Titles Issued by the Lands Ministry Illegal.
Date: 17th January, 2017

Analysis

1. In a far reaching judgment delivered on 19th December 2016, the High Court has declared that the registration forms as well as forms of titles including leases, title deeds, grants and certificate of title or of lease, issued by the Cabinet Minister or the Lands Ministry from the year 2013 without the advice or input of the National Land Commission as well as the necessary public participation and/or parliamentary approval and scrutiny, are unconstitutional, null and void.
2. The declaration of invalidity has a potential to cause an unprecedented crisis in the land sector with consequences on vested interest in land. Of immediate concerns are leases and titles issued to developers and which have generated subleases to individual purchasers as well as legal charges to financiers.
3. The Judge having regard to the consequence of the declaration to the entire registration system gave the following directions:
 - a. The declaration of illegality was suspended for 12 months to allow the Cabinet Secretary to comply with the legal requirements to: seek and take into account the advice of the NLC on the impugned forms; subject the impugned forms to public participation; obtain the approval and sanction of parliament as required by law;
 - b. The declaration has been stated not to operate retroactively;
 - c. If the Cabinet Secretary fails to comply with the requirement of the Court within 12 months then all the impugned forms of titles including leases, title deeds, grants and certificate of title or of lease issued by the Cabinet Minister or the Lands Ministry from the year 2013 without the advice or input of the National Land Commission shall on the on the 366th day from the date of the order by the Court become null and void for all purposes.
4. The judgment is contradictory on the issue of retroactivity. Once the judge declared the forms unconstitutional and void, it is debatable whether he could with, the same breath, declare that

the judgment cannot apply retroactively. Another area of likely controversy is whether the Judge had jurisdiction to entertain a matter which is essentially dealing with land matters.

5. Whatever the case, the judgment gives a timeline for the two lead land agencies to finally resolve their disagreement and streamline the title process. We understand that the Cabinet Secretary is in the process of appointing a team which will finalise on the land forms and regulations and this team is likely to offer guidance regarding the rectification of the impugned forms and ancillary matters.

The contents of this article are intended to be of general use only and should not be relied upon without seeking specific advice on any matter. For more information on land law in Kenya please contact [Peter Mwangi](mailto:PeterMwangi@walkerkontos.com) at pmwangi@walkerkontos.com or your usual contact at Walker Kontos.

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