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THE REPORT OF THE SENATE STANDING COMMITTEE ON LAND,
ENVIRONMENT AND NATURAL RESOURCES

ON

PETITION BY THE KENYA PRIVATE SECTOR ALLIANCE (KEPSA)
REGARDING THE LANDS REGISTRY PROCESSES

AUGUST, 2020

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List of Abbreviations/ Synonyms

1. AAK - Architectural Association of Kenya
2. CEMIRIDE - Centre for Minority Rights Development
3. COVID - Corona Virus Disease
4. CS - Cabinet Secretary
5. EAC - East Africa Community
6. EACC - Ethics and Anti-Corruption Commission
7. EARB - Estate Agents Registration Board
8. FAO - Food and Agriculture Organization
9. FAQ's - Frequently Asked Questions
10. ICTA - Information and Communication Technology Authority
11. ISK - The Institution of Surveyors of Kenya
12. KBA - Kenya Bankers Association
13. KEPSA - Kenya Private Sector Alliance
14. KEPSA - Kenya Private Sector Alliance
15. KIP - Kenya Institute of Planners
16. KPDA - Kenya Property Developers Association
17. KRA - Kenya Revenue Authority
18. LIMS - Land Information Management System
19. LSB - Land Surveyors Board
20. LSK - Law Society of Kenya
21. MOLPP - Ministry of Land & Physical Planning
22. NCA - National Construction Authority
23. NLC - National Land Commission
24. ODPP - Office of the Director of Public Prosecution

25. RECONCILE - Resource Conflict Institute

26. TCPAK - Town and County Planners Association of Kenya

27. VRB - Valuers Registration Board

PREFACE

Mr. Speaker sir,

The Standing Committee on Lands, Environment and Natural Resources is established pursuant to standing order 218(3) of the Standing Orders of the Senate. As set out in the Second Schedule, the Committee is mandated to consider all matters relating to lands and settlement, housing, environment, forestry, wildlife, mining, water resource management and development.

Committee Membership

The Committee comprises of the following Members.

1. Sen. Paul Mwangi Githiomi, MP
2. Sen. Philip Mpaayei, MP
3. Sen. Njeru Ndwiga, EGH, MP
4. Sen. Gideon Moi, CBS, MP
5. Sen. (Dr.) Lelegwe Ltumbesi, MP
6. Sen. George Khaniri, MGH, MP
7. Sen. Johnes Mwaruma, MP
8. Sen. (Arch.) Sylvia Kasiga, MP
9. Sen. Issa Juma Boy, MP

Chairperson

Vice-Chairperson

At the sitting of the Senate held on 16th June, 2020 the Honourable Speaker of the Senate, reported to the Senate that a Petition has been submitted through the Clerk, by Ms. Carole Karuga on behalf of the Kenya Private Sector Alliance (KEPSA) regarding the Lands Registry processes.

The salient issues raised in the said Petition are as follows-

- a) That in line with its core mandate to help Kenya be globally competitive in doing business, KEPSA recognizes that clearly defined legislation, high quality land administration system and equal access to property rights is essential for enabling businesses to expand their operations and that, the absence of land ownership protections in a country, leaves investors open to land disputes or property seizures, outcomes which are likely to hinder direct investment relating to land and property development projects;

- b) That, the Ministry of Lands and Physical Planning has been issuing notices on closure of the Central and Nairobi Registries for purposes of conducting audit on all land records in the registries, with the most recent notice having been issued on 12th February, 2020;
- c) That the arbitrary closures will result to an enormous negative impact on the economy with regard to the overall global ranking on the ease of doing business and access to credit in Kenya. Lending institutions are not able to offer credit due to unreliable data from the land registry, court cases filed arising from poorly maintained records or forgeries resulting in delay in transactions and processes that would likely undo the progress made in the country on matters relating to land reforms;
- d) That the audits were being conducted without the involvement of the relevant stakeholders who possess expertise on matters relating to land information management systems;
- e) That the Ministry issued a public notice in April, 2018 in relation to the preparation of online services and online processing of land transactions at the land registry to digitize land registries. The Law Society of Kenya on 5th April, 2018, wrote to the Cabinet Secretary, Ministry of Land and Physical Planning, regarding the legal issues affecting the new online services and requested for suspension of the online services and online processing of land transactions.
- f) That through the intervention of the Courts, it was agreed that the Ministry establishes a task force to develop guidelines for the implementation of an electronic registration and conveyancing system;
- g) That the Ministry of Land constituted a task force on electronic land transactions, registration, conveyancing and other related activities in August, 2018. That the task force presented its report to the Ministry which elaborated among other issues, the recommended guidelines for the implementation of an electronic registration and conveyance system;
- h) That the task force presented its report to the Ministry, but the report was never publicized and that some of the recommendations made were already being implemented despite the report not being publicized. Key among the recommendations

Business Law (Amendment) Bill, 2019 which introduced the electronic system of processing documents;

- i) That Regulations operationalizing the Land Information Management System were published on 28th June, 2019 and submitted to the Clerk of the National Assembly on 1st August, 2019. The regulations were thereafter tabled in the National Assembly and referred to the Committee on Delegated Legislation which tabled its report on 13th November, 2019, recommending for the annulment of the regulations. This report was adopted on 25th November, 2019 in the National Assembly, effectively annulling the regulations.
- j) That following the annulment of the regulations, the Ministry has continued to unlawfully implement the Land Information Management System without the proper statutory backing; and
- k) That the land registry is poorly administered resulting to misplaced records, wrong stamping of documents and delayed transactional periods.

The Petitioner therefore prays that the Senate intervenes in the matter and undertakes an investigation with a view of ensuring that the Ministry of Lands and Physical Planning ceases implementation of the Land Information Management System, pending formulation and establishment of proper guidelines/regulations on the implementation of the same.

Pursuant to the above provisions of the Constitution, the Petition to Parliament (Procedure) Act and the Standing Orders, the Committee is mandated to consider the Petition and respond to the Petitioner within the prescribed period.

To enable a judicious disposal of the Petition, the Committee resolved to conduct an inquiry on the issues raised in the Petition. In this regard the Committee invited the Petitioner to a meeting of the Committee for the Petitioner to elaborate further on the issues raised in the Petition and supply supporting evidence on the issues raised.

The Petitioner, accompanied by members of Land Sector Board of KEPSA, appeared before the Committee on 1st July, 2020 and on 9th July, 2020 at the meeting of the

Committee with the Cabinet, Secretary Ministry of Land and Physical Planning. The Petitioners ranging from various sectors within KEPSA were allowed by the Committee to engage the Cabinet Secretary directly and were able to deliberate on some of the issues in contention.

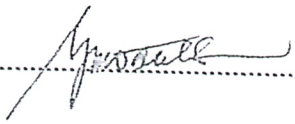
The Committee now submits this Report as its Response to the Petitioner pursuant to section 5(3) of the Petition to Parliament (Procedure) Act and standing order 232 (2) of the Senate Standing Orders.

ACKNOWLEDGEMENT

The Committee thanks the Offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to the Committee in the execution of its mandate. The Committee further extends its appreciation to the parties to the matter; namely, Ms. Carole Karuga, the KEPSA Lands Sector Board and Ms. Farida Karoney, EGH, the Cabinet, Secretary Ministry of Land and Physical Planning for their submissions and contribution to the resolution of this matter.

Mr. Speaker Sir,

It is now my pleasant duty and privilege, on behalf of the Committee, to present this Report of the Standing Committee on Lands, Environment and Natural Resources on the Petition by Kenya Private Sector Alliance (KEPSA) regarding the Lands Registry processes.

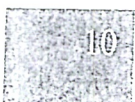
Signed:  Date: 24/08/2020

SEN. MWANGI PAUL GITHIOMI, M.P.
CHAIRPERSON, SENATE STANDING COMMITTEE ON LAND,
ENVIRONMENT AND NATURAL RESOURCES

CHAPTER I

INTRODUCTION

1. At the sitting of the Senate held on 16th June, 2020 the Honourable Speaker of the Senate, reported to the Senate that a Petition has been submitted through the Clerk, by Ms. Carole Karuga on behalf of the Kenya Private Sector Alliance (KEPSA), regarding the Lands Registry processes.
2. The salient issues raised in the Petition are as follows-
 - (a) That, in line with its core mandate to help Kenya be globally competitive in doing business, KEPSA recognizes that clearly defined legislation, high quality land administration system and equal access to property rights is essential for enabling businesses to expand their operations and that, the absence of land ownership protections in a country, leaves investors open to land disputes or property seizures, outcomes which are likely to hinder direct investment relating to land and property development projects;
 - (b) That, the Ministry of Lands and Physical Planning has been issuing notices on closure of the Central and Nairobi Registries for purposes of conducting audit on all land records in the registries, with the most recent notice having been issued on 12th February, 2020;
 - (c) That the arbitrary closures will result to an enormous negative impact on the economy with regard to the overall global ranking on the ease of doing business and access to credit in Kenya. Lending institutions are not able to offer credit due to unreliable data from the land registry, court cases filed arising from poorly maintained records or forgeries resulting in delay in transactions and processes that would likely undo the progress made in the country on matters relating to land reforms;



- (d) That the audits were being conducted without the involvement of the relevant stakeholders who possess expertise on matters relating to land information management systems;
- (e) That the Ministry issued a public notice in April, 2018 in relation to the preparation of online services and online processing of land transactions at the land registry to digitize land registries. The Law Society of Kenya on 5th April, 2018, wrote to the Cabinet Secretary, Ministry of Land and Physical Planning, regarding the legal issues affecting the new online services and requested for suspension of the online services and online processing of land transactions.
- (f) That through the intervention of the Courts, it was agreed that the Ministry establishes a task force to develop guidelines for the implementation of an electronic registration and conveyancing system;
- (g) That the Ministry of Land constituted a task force on electronic land transactions, registration, conveyancing and other related activities in August, 2018. That the task force presented its report to the Ministry which elaborated among other issues, the recommended guidelines for the implementation of an electronic registration and conveyance system;
- (h) That the task force presented its report to the Ministry, but the report was never publicized and that some of the recommendations made were already being implemented despite the report not being publicized. Key among the recommendation was enactment of the Business Law (Amendment) Bill, 2019 which introduced the electronic system of processing documents;
- (i) That Regulations operationalizing the Land Information Management System were published on 28th June, 2019 and submitted to the Clerk of the National Assembly on 1st August, 2019. The regulations were thereafter tabled in the National Assembly and referred to the Committee on Delegated Legislation which tabled its report on 13th November, 2019, recommending for the

annulment of the regulations. This report was adopted on 25th November, 2019 in the National Assembly, effectively annulling the regulations.

- (j) That following the annulment of the regulations, the Ministry has continued to unlawfully implement the Land Information Management System without the proper statutory backing; and
- (k) That the land registry is poorly administered resulting to misplaced records, wrong stamping of documents and delayed transactional periods.

- 3. The Petitioner, therefore, prays that the that the Senate intervenes in the matter and undertakes an investigation with a view of ensuring that the Ministry of Lands and Physical Planning ceases implementation of the Land Information Management System, pending formulation and establishment of proper guidelines/regulations on the implementation of the same.
- 4. Pursuant to standing order 232(1) of the Standing Orders of the Senate, the Petition was committed to the Land, Environment and Natural Resources Committee.

LEGAL BASIS FOR PETITIONS

5. Petitions to the Senate are governed by the Constitution, the Petition to Parliament (Procedure) Act, No. 22 of 2012 and the Senate Standing Orders.
6. Article 37 of the Constitution provides that *every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities* while Article 119(1) of the Constitution provides that *“every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.”*
7. Section 5(2) of the Petition to Parliament (Procedure) Act, provides that *a petition that is tabled in Parliament under this Act shall be considered in accordance with the Standing Orders of the relevant House.* In this regard, standing order 232 of the Senate Standing Orders provides as follows-
 232. *Committal of Petitions*
 - (1) *Every Petition presented or reported pursuant to this Part, shall stand committed to the relevant Standing Committee.*
 - (2) *Whenever a Petition is committed to a Standing Committee, the Committee shall, in not more than sixty calendar days from the time of reading the prayer, respond to the petitioner by way of a report addressed to the petitioner or petitioners and laid on the Table of the Senate and no debate on or in relation to the report shall be allowed, but the Speaker may, allow comments or observations in relation to the Petition for not more than thirty Minutes.*
8. Standing order 233 requires the Clerk to, within fifteen days of tabling of the report on a petition under Standing Order 232 (Committal of Petitions), submit a copy of the report to the petitioner or petitioners.

CHAPTER 2

CONSIDERATION OF THE PETITION

Approach taken by the Committee

2. In considering the Petition, the Committee observed that it would be important to verify the facts alleged by the Petition. The Committee therefore resolved to conduct an inquiry on the issues raised in the Petition.
3. In this regard the Committee invited the Petitioner to a meeting of the Committee for the Petitioner to elaborate further on the issues raised in the Petition and to supply and supporting evidence on the issues raised.
4. The Petitioner appeared before the Committee on 1st July, 2020 and later on during the meeting called by the Committee to interrogate the matter with the Cabinet, Secretary Ministry of Lands and Physical Planning (MoLPP) on 9th July, 2020. The Petitioners ranging from various sectors within KEPSA were allowed by the Committee to engage the Cabinet Secretary directly and were able to deliberate on some of the issues in contention.

Issues for Consideration

Pursuant to a letter Ref: SEN/DCS/LENR/2/2020/ (34) dated 1st July, 2020, the Committee invited the Cabinet Secretary Ministry of Lands and Physical Planning to respond to the Petition by Kenya Private Sector Alliance (KEPSA) on the following issues:

- (1) Closure of the Central and Nairobi Registries;
- (2) Annulment of the Land Registration (Electronic Land Transactions) Regulations, 2019 (the 2019 Regulations) & the continued unlawful implementation of the Land Information Management System (LIMS); and
- (3) Poor administration of land registries countrywide.

1. Closure of the Central and Nairobi Registries

The Petitioner faults the Ministry for arbitrary closure of Central and Nairobi land registries pursuant to a public notice issued on **February 12, 2020, closing the registries from February 24, 2020 to March 13, 2020** for auditing of land records.

The Petitioner alleges that despite the Law Society of Kenya obtaining a court order restraining the Ministry from the implementation of the notice, the Ministry did not comply fully with the order. The Petitioner submitted to the Committee various correspondences sent to the Ministry by Stakeholders in the land sector which the stakeholders identified various challenges occasioned by the closure of the registries.

According to the Petitioner, the closure of the registries negatively affected the economy due to delayed registration of transactions such as expiry of rates certificates, breach of agreements and professional undertakings, compound interest due to failure to complete registration of charges and other documents, interests accruing on developers' loans resulting in massive losses, staff redundancies, and delays in stamping of documents. The Petitioner further raised concerns about the possibility of interference with land records during the audit process.

Concern was also expressed over past closure of registries for purposes of digitization without any tangible results leading to the apprehension that the current process may not yield any tangible results and will perpetuate the unpredictability in land processes in Kenya.

In respect of the digitization process, the Petitioner is also concerned that the Ministry is implementing the recommendations of the report of the Taskforce on Electronic Land Transactions, Registration, Conveyance and other related activities, yet the report has not been made public. A letter from the Law Society of Kenya to the Cabinet Secretary also raised the concern that the title verification and digitization process has been largely

undertaken by staff who lack the training and technical knowhow to enable efficiency and integrity of data.

The Ministry of Lands and Physical Planning responded as follows:

- (a) The Ministry issued the public notice for closure of Central and Nairobi registries **between February 24 and March 13, 2020** to allow for internal audit of land records. This was in response to numerous complaints of missing records (**annexure 1(a) is the public notice on closure**).
- (b) In a subsequent notice, the Ministry clarified that the registries would allow registration of urgent transactions including Court orders, bank charges and discharges (**annexure 1(b) is the public notice on clarification**).
- (c) The Court in Nairobi High Court Petition No. 58 of 2020 issued an order on February 24, 2020 requiring the Ministry to re-open the registries.
- (d) Consequently, the registries were opened and the Ministry received 1313 documents for registration in the period (**annexure 2 is an excerpt of the Presentation Book for the period of closure**).
- (e) The Ministry held a meeting with the Law Society of Kenya on February 28, 2020 to discuss, among other things, the issue of closure of the registries.
- (f) The Ministry also had a meeting with KEPISA on March 9, 2020 where they explained the reason for closure of the registries.
- (g) The audit process was a pre-planned exercise with clearly defined protocols to ensure security of the land records.
- (h) The 2019 report of the taskforce on Electronic Land Transactions, Registration, Conveyancing and Other Related Activities is available on the Ministry's website: www.lands.go.ke.

Observations of the Committee

The Committee agrees with the Petitioners that the Ministry of Lands and Physical

Planning is able to undertake a phased digitization of records so as to ensure business continuity and to limit uncertainty in lands transactions. The Committee therefore urges the Lands Registry to develop a plan for phased digitization of records in the Lands Registries falling within the entire Nairobi Metropolitan Area.

The Committee also notes that the Ministry has made attempts at improving its customer service. The Committee recommends that in respect of all affected registries, the Ministry should set up a mechanism for receiving customer concerns and queries during the period that the Registries will not be operating at full capacity. This may include the establishment of a customer care desk, utilization of social media platforms to address concerns that may be raised by interested parties, and establishment of a customer care email with set timelines for responding to customer concerns.

The Committee observes that there is need for all public institutions to comply with all the COVID-19 containment measures that have been put in place by the Government. The Committee particularly takes note of the concern raised by the Cabinet Secretary on the crowding of Land Registries and the high risk of spread of the virus in the Registry as valid and instead should device ways of dealing with the pandemic and lean towards attaining normalcy and ensure that services delivery is not adversely affected.

The Committee also recommends that the Ministry accedes to the request by the Institute of Surveyors that valuation, survey and title searches be classified as essential services.

The Committee further notes and encourages the MoLPP to hasten the process of digitizing the records at the Registry and the launching of NLEMS and prevails upon the Ministry to adhere to their set deadline of September, 2020 in respect of the Nairobi Registries.

2. Annulment of the Land Registration (Electronic Land Transactions) Regulations,

2019 and the continued unlawful implementation of the Land Information Management System (LIMS)

KEPSA accuses the Ministry of negligence in relation to the annulment of the Land Registration (Electronic Land Transactions) Regulations, 2019 by failing to follow the proper procedure for the approval of the Regulations by the National Assembly as follows:

- a) Failure to submit a regulatory impact statement,
- b) Failure to attach proof that sufficient public participation was conducted, brief statement of all consultations and manner in which the consultations were undertaken, an outline of the results of the consultations and a brief explanation of any changes made to legislation as a result of the consultations.
- c) Failure to adhere to the statutory timelines set to present the Regulations before the National Assembly, seven (7) sitting days within publishing of the Regulations as provided for under the Statutory Instruments Act without demonstrating any reason for the delay.
- d) Unlawful implementation of LIMS without proper statutory backing.

The Ministry of Lands and Physical Planning responded as follows:

That the Taskforce on Electronic Land Transactions, Registration, Conveyancing and other related activities under the Land Registration Act, 2012, the Land Act, 2012 and the Community Land Act, 2016 ('the taskforce') was appointed vide Gazette Notice No. 7859 of August 3, 2018. The taskforce comprised members from: Ministry of Lands & Physical Planning, National Land Commission, Council of Governors, professional bodies (Law Society of Kenya, Kenya Institute of Planners, Institution of Surveyors of Kenya and Town and County Planners Association of Kenya) and Land Development Governance Institute representing civil society organizations.

The taskforce was mandated to study and review the Land Registration Act, 2012, the Land Registration (General) Regulations, 2019 and other land sector related laws with a view to

formulating guidelines for electronic land registration, transactions and conveyancing system. The term of the taskforce ended on February 2, 2019 and taskforce presented to the Cabinet Secretary its report ('the report') and draft guidelines for the electronic registration and conveyancing system.

Consequently, the Land Registration (Electronic Land Transactions) Regulations, 2019 ('the 2019 Regulations') were published on June 28, 2019 and submitted to the Clerk of the National Assembly on August 1, 2019. The 2019 Regulations were tabled before the Committee on Delegated Legislation ('the Committee') on August 6, 2019.

The Committee considered the 2019 Regulations and tabled its report before Parliament on November 13, 2019 recommending annulment of the 2019 Regulations on the following grounds:

- i) The 2019 Regulations were contrary to Article 259 (11) of the Constitution as consultation with the National Land Commission was not adequately demonstrated and neither was it stated in the enabling clause.
- ii) The Ministry failed to demonstrate that it conducted enough public participation in the development of the Regulations contrary to Section 5 & 5A of the Statutory Instruments Act.
- iii) The Ministry failed to submit the 2019 Regulations to the National Assembly within the statutory timeline contemplated by Section 11 (1) of the Statutory Instruments Act.

Parliament adopted the recommendations of the Committee and annulled the 2019 Regulations on November 25, 2019.

Observations of the Committee

The Committee observes that there is need for certainty in land matters and the need to protect legal transactions from the prejudices that may be occasioned by the digitization

process as this is beyond the control of the parties and professionals involved in the transactions.

That the Cabinet Secretary together with the Law Society of Kenya and the other stakeholders should, without delay, jointly develop a framework for ensuring that the sanctity of legal processes is not compromised by the digitization process. The framework should address the concern of priority of legal documents, protection of professional undertakings, matters regarding perfection of securities and any other relevant mitigation measure that will secure the sanctity of land transactions and ensure minimum prejudice to all parties involved.

The Committee notes that the Proposed Joint Framework on Property Registration 2019-2020 contained in the letter dated 26th July, 2020 from the Law Society of Kenya to the Cabinet Secretary for Lands forms a good basis for the development of the proposed framework.

3. As far as the allegations of negligence claimed in the Petition is concerned, the Ministry responded as follows:

A. Failure to submit a regulatory impact statement

The Ministry did not prepare a regulatory impact statement on the proposed 2019 Regulations as required by Statutory Instruments Act, 2013. However, the Ministry is at an advanced stage of formulating new Regulations and has now prepared the regulatory impact statement as required by law.

B. Failure to attach proof of public participation

- i) The Ministry provided records to demonstrate that public participation was undertaken. In their explanatory memorandum submitted to Parliament, the

Ministry provided a statement of all consultations and the manner in which the consultations were undertaken throughout the Country

- ii) The report of the taskforce confirms that public participation was indeed conducted.
- iii) Copies of attendance lists for most of the meetings were made available to Parliament. However, a few copies of these lists were inadvertently missing from the documents presented to Parliament.
- iv) Chapter Four of the report of the taskforce outlines the findings of the public participation meetings which the taskforce took into consideration in formulating the draft guidelines to support electronic land registration.

C. Failure to adhere to the statutory timeline set to present the Regulations

The Regulations were submitted to Parliament on August 1, 2019 when it ought to have been submitted on July 30, 2019.

The delay was not inordinate or intentional. It was an inadvertent oversight in the counting of the sittings of Parliament. Nonetheless, the Committee proceeded to consider the Regulations and made its recommendations on the same.

D. The continued unlawful implementation of the Land Information Management System (LIMS)

- i) In a notice issue on April 4, 2018, the Ministry notified the public that it would commence online land registration through the e-Citizen platform. The move was challenged by the Law Society of Kenya in Nairobi High Court Petition No. 144 of 2018 (LSK vs AG and 3 Others).
- ii) A consent agreement signed between the Ministry and LSK was recorded. The terms of the agreement were that LSK would stay the suit whereas the Ministry would set up a taskforce to develop guidelines for the implementation of an electronic registration and conveyancing system. It was also agreed that the

following processes would continue to be carried out electronically:

- a. Application for an official search
 - b. Payment of the official search
 - c. Payment of stamp duty on the property
 - d. Assessment of land rent
 - e. Payment of land rent
 - f. Registrations for transfer, charge, lease, caution/caveat, court orders and consents and requests for valuation shall run concurrently manually and electronically
- iii) The Taskforce was appointed vide Gazette Notice No. 7859 of August 3, 2018. It developed draft guidelines for electronic land transactions, which became the Land Registration (Electronic Land Transactions) Regulations, 2019 published under Legal Notice No. 101 of 2019. The Regulations were however annulled by Parliament for various reasons earlier indicated in our response.
- iv) The Ministry has continued to provide the online services in accordance with consent agreement between the Ministry and LSK as the process of formulating new Regulations is being undertaken.

Observations of the Committee

The Committee observes that valid concerns were raised by the Petitioners on the Ministry's lack of adherence to the statutory framework on statutory instruments which led to the annulment of the Land Registration (Electronic Land Transaction) Regulations 2019.

The Committee notes with concern that land matters are matters that affect counties and therefore failure to table the Regulations in the Senate constitutes a grave breach of the Constitution that will once again render the Regulations unconstitutional.

4. Poor administration of land registries countrywide

KEPSA raised several areas of concerns on the administration of the land registries as follows:

- a) Due to inadequate and poorly trained staff at the land registries, there have been cases of erroneous stamping of instruments.
- b) There has been unprecedented rise in the number of cases of misplacement of records at the Land Registry due to lack of file tracking system at the registries and automation of the Presentation Book.
- c) There is a huge challenge in getting access to Registrars resulting in inefficient and slow resolution of issues and long transactional periods
- d) There are instances where the Registrar requires the production of court proceedings in order to recognize court orders leading to delays in some transactions which have already been settled in court.

The petition alleges that the Ministry has not been willing to work towards efficient and effective land administration.

The Ministry of Lands and Physical Planning responded as follows:

a) Inadequate and poorly trained staff at the land registries, there has been cases of erroneous stamping of instruments

- i. The Ministry employs qualified and competent personnel in all cadres. However, for some technical departments like registration the Ministry has an inadequate staff compliment.
- ii. This is being addressed by the recruitment of additional technical staff including 100 land registrars to improve service delivery. (Annexure 3(a) and 3(b) are Public Service Commission advertisements of vacancies in the Ministry).
- iii. All the 61 land registries countrywide are headed by Chief Land Registration Officers. The Ministry has adequately trained professionals who are able to assess stamp duty and other Government fees. The Ministry hardly receives complaints of erroneous

embossment of documents.

- iv. The Petitioner is invited to take advantage of the appeal process set out in the land statutes in case of such complaints.

b) Lack of file tracking system at the registries and automation of the Presentation Book (A-Book)

- i. Besides the manual file tracking system in the Ministry's registries, the Ministry has developed a digital file tracking system for Nairobi and Central land registries to make access to files easier.
- ii. They have developed an online booking system at the Nairobi and Central Registries. Upon presentation of documents for registration, the documents are booked online and a tracking number is auto-generated and forwarded to the customer by way of SMS.
- iii. The Ministry is in the process of digitizing land records and processes. Automation of the A-Book is part of the digitization programme. This system will have both internal and external interfaces. The internal interface will only be accessible to officers of the Ministry. The external interface will be meant for access by customers.
They are working on the protocols for customer access in the system. The same will be replicated across the country.

c) Challenges in getting access to Registrars resulting in inefficient and slow resolution of issues and long transactional periods

- i. The Ministry has established customer care desks in all their registries. The Registrars are part of the staff of the Ministry serving at the customer care desks and the banking hall counters.
- ii. They have created a special counter (Counter 9) for clients who would wish to be attended to by a Registrar.

d) There are instances where the Registrar requires the production of court proceedings in order to recognize court orders leading to delays in some transactions, which have already been settled in court

- i. Section 14 of the Land Registration Act, 2012 allows a Registrar to call for any information from any person in the discharge of their functions. This is part of the due diligence process on the part of a Registrar in the discharge of functions under the Act as the orders are not directly presented to them by the courts.
- ii. They have had cases where fake orders have been presented for registration and this is why the Registrars seek to authenticate or verify these orders before acting on them.

e) Lack of effort towards efficient and effective land administration

The Ministry has made significant and deliberate efforts to enhance efficiency, effectiveness, transparency and accountability in land administration and management:

- i. The Government has embarked on a programme of digitization of land records and automation of land registration processes and related transactions.
- ii. The Ministry has initiated legal reforms to support electronic land registration through the Business Laws (Amendment) Act, 2020. This will significantly transform end-to-end service delivery.
- iii. Some of the business transformation reforms adopted by the Ministry involve re-engineering of the property registration processes, which has seen the registration steps reduced from 9 to 5. This will reduce the number of days for registration of property from 73 to 12.
- iv. The Business Laws (Amendment) Act, 2020, removed the requirement for consents, land rates and land rent clearance certificates as pre-requisites for registration.

v. Registration and Search fees have been waived.

The Ministry has set up a stakeholder-engagement team to coordinate regular meetings with stakeholders. This offers opportunity for feedback on the Ministry's activities and programmes. The table below shows the stakeholders engaged on the development of NLIMS:

NO.	STAKEHOLDER	DATE
1.	National Land Commission (NLC)	3 rd June 2020
2.	Ministry of Lands & Physical Planning – All Technical Departments	16 th June 2020
3.	Kenya Private Sector Alliance (KEPSA), Kenya Property Developers Association (KPDA)	17 th June 2020
4.	The Institution of Surveyors of Kenya (ISK) and Land Surveyors Board (LSB)	18 th June 2020
5.	Kenya Institute of Planners (KIP), Town and County Planners Association of Kenya (TCPAK), Architectural Association of Kenya (AAK)	19 th June 2020
6.	Law Society of Kenya (LSK), Kenya Bankers Association (KBA)	22 nd June 2020
7.	Food and Agriculture Organization (FAO), FIDA-Kenya, Resource Conflict Institute (RECONCILE), Centre for Minority Rights Development (CEMIRIDE)	23 rd June 2020
8.	Estate Agents Registration Board (EARB), National Construction Authority (NCA), Valuers Registration Board (VRB)	24 th June 2020
9.	The National Treasury, Ministry of EAC and Regional Development, Ministry of Transport, Judiciary, Office of the Director of Public Prosecution (ODPP), Information and	2 nd July 2020

Communication Technology Authority (ICTA), Ethics and Anti-Corruption Commission (EACC) and Kenya Revenue Authority (KRA)	
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- vi. The Ministry has been conducting land clinics to sensitize the public on land issues. These clinics have been very instrumental in addressing long-standing issues.
- vii. They have constructed and operationalized additional land registries in Ruiru, Kiritiri, Tigania West and Marimanti.
- viii. They have a service charter that is displayed in all their offices. The document is also available on their website. The service charter has provided uniform requirements (documents, cost) and timelines for registration to apply in all their registries.

They have a functional Customer Care Desk where public concerns are addressed. They have revamped the Customer Care Desk to provide for a toll-free number that enables their clients to receive automated responses on Frequently Asked Questions (FAQs). Piloting has been initiated.

Observations of the Committee

The Committee makes the following observations on each of the concerns raised noting that the concerns were raised by the Petitioners and the Law Society of Kenya had earlier requested the intervention of the Ministry via letters shared with the Committee citing very good proposals that the Ministry of Lands and Physical Planning should consider.

- a) Due to inadequate and poorly trained staff at the land registries, there have been cases of erroneous stamping of instruments.

The Committee observes that the Ministry should look into fraud cases that occur within its offices and that regular supervision is done to ensure professionalism is maintained in the Ministry. Well trained and experienced officers should be posted at the critical departments within the Ministry to

minimize errors.

- b) There has been unprecedented rise in the number of cases of misplacement of records at the Land Registry due to lack of file tracking system at the registries and automation of the Presentation Book.

The Committee observes that the Ministry should consider setting up a lost/misplaced documents office in all the registries to ensure tracking of lost documents is done and files retrieved and an approvals for reconstruction of files desk with enhanced staff be created. Further, automation of these documents would go a long way in quickly establishing a credible filing system to minimize loss of records.

- c) There is a huge challenge in getting access to Registrars resulting in inefficient and slow resolution of issues and long transactional periods

The Committee observes that to curb poor service delivery at the registries the Ministry should consider setting up service desks to be manned by the registrars in order to address urgent and sensitive matters.

- d) There are instances where the Registrar requires the production of court proceedings in order to recognize court orders leading to delays in some transactions which have already been settled in court.

The Committee observes that the Ministry and in particular the Cabinet Secretary should ensure that the rule of law is observed and court orders are respected without the need to be prompted to do so. This would endeavor to make work easy of persons seeking to be assisted by the Ministry.

CHAPTER 5

COMMITTEE OBSERVATIONS

(1) Closure of the Central and Nairobi Registries-

On the question of closure of the Central and Nairobi Registries the Committee observes that there is a possibility of the MoLPP undertaking a phased digitization of the records so as to ensure business continuity and to limit uncertainty in lands transactions. The Committee therefore urges that the Lands Registry develops a plan for phased digitization of records in the Lands Registries falling within the entire Nairobi Metropolitan Area (Kiambu, Machakos, Murang'a and Kajiado).

The MoLPP should set up a mechanism for receiving customer concerns and queries during the period that the Registries will not be operating at full capacity. This may include the establishment of a customer care desk, utilization of social media platforms to address concerns that may be raised by interested parties, and establishment of a customer care email with set timelines for responding to customer concerns.

The Committee observes that there is need for all public institutions to comply with all the COVID-19 containment measures that have been put in place by the Government. The Committee particularly takes note of the concern raised by the Cabinet Secretary on the crowding of Land Registries and the high risk of spread of the virus in the Registry as valid and instead should device ways of dealing with the pandemic and lean towards attaining normalcy and ensure that services delivery is not adversely affected.

The Committee further notes and encourages the MoLPP to fasten the process of digitizing the records at the Registry and the launching of NLIMS and prevails upon the Ministry to stick to their set deadline of September, 2020.

(2) Annulment of the Land Registration (Electronic Land Transactions) Regulations, 2019 (the 2019 Regulations) and the continued unlawful implementation of the Land Information Management System (LIMS)

On the question of Annulment of the Land Registration (Electronic Land Transactions) Regulations, 2019 (the 2019 Regulations) and the continued unlawful implementation of the Land Information Management System (LIMS), the Committee observes that there is need for certainty in land matters and the need to protect legal transactions from the prejudices that may be occasioned by the digitization process as this is beyond the control of the parties and professionals involved in the transactions.

The Committee appreciates the concerns raised by the Petitioners on the Ministry's lack of adherence to the statutory framework on statutory instruments which led to the annulment of the Land Registration (Electronic Land Transaction) Regulations 2019.

The Committee notes with concern that Land matters are matters that affect counties and therefore failure to table the Regulations in the Senate constitutes a grave breach of the Constitution that will once again render the Regulations unconstitutional.

(3) Poor Administration of Land Registries Countrywide

On the question of poor administration of land registries countrywide, the Committee notes the concerns raised by the Petitioners on erroneous stamping of instruments, rise in cases of misplacement of records at the land Registry and hiccups owing to access of registers as a grave matter that ought to be addressed centrally by the MoLPP.

The Committee observes that the Ministry should look into fraud cases that occur within its office, and that regular supervision is done to ensure professionalism is maintained in the Ministry. Well trained and experienced officers should be posted at the critical departments within the Ministry to minimize errors. The Ministry should also consider setting up a lost/misplaced documents office in all the registries to ensure tracking of lost documents is

done and files retrieved and an 'approvals for reconstruction of files' desk with enhanced staff be created. Further, automation of documents would go a long way in quickly establishing a credible filing system to minimize loss of records. The Cabinet Secretary should ensure that the rule of law is observed and court orders are respected without the need to be prompted to do so.

CHAPTER 6

COMMITTEE RECOMMENDATIONS

The Committee having investigated the matter in accordance with its mandate under the standing order 223 of the Senate Standing Orders recommends as follows-

(1) Closure of Land Registries

1. On the issue of closure of the Lands Registry for purposes of digitization of records, the Committee therefore recommends that the Lands Registry develops a plan for phased digitization of records in the Lands Registries falling within entire Nairobi Metropolitan Area.
2. The plan should –
 - (a) ensure that no Land Registry is fully closed at any one time;
 - (b) be published and publicized to all stakeholders and Members of the public at least fourteen (14) days before the commencement of the phased digitization in the respective registries; and
 - (c) ensure predictability in the operations of the Registries by setting clear timelines for the phased digitization process.
3. The Cabinet Secretary, MoLPP should ensure that the notice for commencement of the digitization process advises stakeholders and the public on how the Registry is to continue its operations during the digitization period.
4. Where the MoLPP anticipates any delays in the phased digitization process, such delays should be brought to the attention of the stakeholders in good time.
5. The MoLPP should set up a mechanism for receiving customer concerns and queries

during the period that the Registries will not be operating at full capacity. This may include the establishment of a customer care desk, utilization of social media platforms to address concerns that may be raised by interested parties, and establishment of a customer care email with set timelines for responding to customer concerns.

(2) Closure of the Registries during the COVID-19 situation in Kenya

6. The Committee therefore recommends that the MoLPP, in collaboration with the Ministry of Health develops protocols specifically tailored for operation of the Lands Registry during the COVID 19 situation so as to protect members of the public and the officers working within the Registries.
7. The Committee also recommends that the Ministry accedes to the request by the Institute of Surveyors that valuation, survey and title searches be classified as essential services.

(3) Legal implication of delays occasioned by the digitization process

8. The Committee recommends that the Cabinet Secretary in conjunction with the relevant County Governments waive all penalties and fees that will be caused by delays in the Lands Registries as a result of the digitization process.
9. The Committee recommends that the Cabinet Secretary together with the Law Society of Kenya and the other stakeholders should, without delay, jointly develop a framework for ensuring that the sanctity of legal processes is not compromised by the digitization process. The framework should address the concern of priority of legal documents, protection of professional undertakings, matters regarding perfection of securities and any other relevant mitigation measure that will secure the sanctity of land transactions and ensure minimum prejudice to all parties involved.

10. The Committee notes that the Proposed Joint Framework on Property Registration 2019-2020 contained in the letter dated 26th July, 2020 from the Law Society of Kenya to the Cabinet Secretary for Lands forms a good basis for the development of the proposed framework.

(4) Stakeholder Engagement

11. The Committee agrees with the Petitioners that there is need for qualitative stakeholder engagement in matters that have an implication on land matters.

12. The Committee therefore recommends that-

(a) the Ministry develops guidelines for stakeholder engagement in its processes within three (3) months of the tabling of this Report;

(b) that all notices issued by the Ministry should allow for reasonable participation by stakeholders;

(c) feedback on stakeholder submissions should be issued to stakeholders;

(d) the final product of the audit of records at the Lands Registries should be shared with stakeholders; and

(e) decisions of the Ministry should not be arbitrary, unilateral and haphazard but should take into account the effect of such decisions on the stakeholders and mitigation measures should be put in place before such decisions are taken.

(5) The Land Registration (Electronic Land Transaction) Regulations 2019

13. The Committee recommends that the Ministry urgently address the matters that led to the annulment of the Regulations so as to ensure that the Regulations are in place prior to the launching of the electronic platform.

14. The Committee therefore urges the Ministry to ensure that the Regulations once published, are tabled in both Houses of Parliament within seven (7) sitting days as

stipulated in the Statutory Instruments Act.

(6) Administration of Land Registries Countrywide

15. The Committee recommends that the Ministry should strengthen reporting channels and continuously monitor the performance of its officers at the Central and Nairobi Land registries as well as the Counties to ensure that they operate optimally and ensure they serve all citizens diligently.

Further, the Committee prevails upon the MoLPP to immediately commence disciplinary action against officers who demonstrate negligence and are involved in the deliberate misplacement of records at the Lands Registry and refers cases of corruption for investigations to the relevant agencies.

APPENDICES

ANNEX I: MINUTES OF THE MEETINGS

MINUTES OF THE 21ST SITTING OF THE SENATE STANDING COMMITTEE
ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON
WEDNESDAY, 1ST JULY, 2020 VIA ZOOM ONLINE PLATFORM AT 10.00 AM.

MEMBERS

1. Sen. Mwangi Paul Githiomi, MP
2. Sen. Philip Mpaayei, MP
3. Sen. Ndwiga Peter Njeru, EGH, MP
4. Sen. George Khaniri, MGH, MP
5. Sen. Mwaruma Johnes, MP
6. Sen. (Dr.) Lelegwe Ltumbesi, MP

PRESENT

- Chairperson
- Vice Chairperson
- Member
- Member
- Member
- Member

1. Sen. Gideon Moi, CBS, MP
2. Sen. Sylvia Kasanga, MP
3. Sen. Boy Issa Juma, MP

ABSENT WITH APOLOGY

- Member
- Member
- Member

IN ATTENDANCE

1. Hon. Shakeel Shabir

PETITIONERS

- MP, Kisumu East Constituency

KEPSA

1. Mr. Tyson Mwendwa
2. Ms. Emily Njeru
3. Dr. Mwenda Makathimo
4. Ms. Joyner Okonjo
5. Mr. Jesse Kihoro
6. Ms. Judy
7. Mr. Eric Nyadimo
8. Ms. Martha Cheruto
9. Mr. Lenise Wanakai
10. Mr. Gikonyo Gitonga
11. Mr. Robert Koech
12. Mr. Peter S. Kariuki
13. Mr. Charles Wamae
14. Mr. Charles Wamae
15. Ms. Wanjiru Mathenge
16. Ms. Carole Karuga
17. Mr. Abraham Samoei
18. Ms. Irene Keino

- KEPSA-ISK
- LDGI
- KEPSA Consultant (Policy Advisory)
- ISK

- Chair/ KEPSA Land & Physical Sector Board

19. Mr. Mageka Mageka
20. Mr. John Kabuye
21. Ms. Janeirene Maina
22. Mr. Allen Gichuhi
23. Mr. Eric Nyadimo
24. Ms. Carol Wanjeri
25. Mr. Maina Kiambigi
26. Ms. Irene Kiwool
27. Mr. Peter S. Kariuki
28. Ms. Cynthia Wakio
29. Mr. Mairura Omwenga
30. Mr. Apollo Kiarri
31. Mr. Maina Kiambigi
32. Mr. Stanley Maina-
33. Mr. Apollo Kiarri
34. Mr. Peter Thairu
35. Mr. Robert Koech
36. Ms. Hellen Wanjohi
37. Ms. Emily Njeru

- KPDA (Membership)
- Chair, Town and County Planners Association

-KIP Wanjiku - KEPSA
-KEPSA-ISK

SECRETARIAT

- Clerk Assistant
- Legal Counsel
- Audio Recording
- Media Relations Officer

MINUTE SEN/SCLNR/116/2020: PRELIMINARIES

The meeting was called to order at 10.30 am by the Chairperson followed by a word of prayer.

MINUTE SEN/SCLNR/117/2020: ADOPTION OF AGENDA

The agenda of the meeting was adopted after being proposed by Sen. George Khaniri, MGH, M.P. and seconded by Sen. Mwaruma Johnes, M.P. as follows –

1. Preliminaries
2. Adoption of the agenda;
3. Confirmation of Minutes of Previous Sittings;
4. Petition on the alleged environmental degradation and irregular dumping at a landfill in Kajulu, Kisumu East Constituency.

- Meeting the Petitioner, Hon. Shakeel A. Shabbir, MP
- 5. Petition on behalf of the Kenya Private Sector Alliance (KEPSA) regarding the Lands Registry processes;
- Meeting the Petitioner, Ms. Carole Karuga, MBS, HSC,
- 6. Any other Business;
- 7. Date of the next meeting;
- 8. Adjournment.

MINUTE SEN/SCLNR/118/2020: PETITION ON THE ALLEGED ENVIRONMENTAL DEGRADATION AND IRREGULAR DUMPING AT A LANDFILL IN KAJULU, KISUMU EAST CONSTITUENCY.

- Meeting the Petitioner, Hon. Shakeel A. Shabbir, MP
- The Petitioner took the Committee through his presentation as tabled. *(Copy attached)*
- The Committee resolved as follows:

- Invitation be done to the CS, Environment and Forestry and NEMA,
- Invitation be done to KCAA
- Conduct a site visit to Kisumu County

MINUTE SEN/SCLNR/119/2020: PETITION ON BEHALF OF THE KENYA PRIVATE SECTOR ALLIANCE (KEPSA) REGARDING THE LANDS REGISTRY PROCESSES;

- Meeting the Petitioner, Ms. Carole Karuga, MBS, HSC,

KEPSA is the apex body of the private sector in Kenya to drive economic development through year on year improvements in the business environment by addressing cross cutting business issues, driving investments and addressing socio-economic issues with partners. It brings together business associations, corporate bodies, SMEs and start-ups to speak in one voice, working closely with Government and other stakeholders through structured public – private dialogue platforms and other engagement mechanisms.

In line with KEPSA's core mandate to conduct high-level advocacy on cross-cutting policy-related issues that help Kenya be globally competitive in doing business, KEPSA takes cognizance of the fact that clearly defined legislation, a high-quality land administration system and equal access to property rights is essential for enabling businesses to expand their operations. If a country does not put in place adequate land ownership protections and leave investors open to land disputes or property seizures,

stakeholders would be dis-inclined to put money into land and property development projects.

Further, pursuant to Article 119 & 37 of the Constitution of Kenya; The Petition to Parliament (Procedure) Act; Standing Orders No 225 & 226 of The Senate Standing Orders; The Land Registration Act, Act No. 3 Of 2012; The Land Registration (Electronic Land Transactions) Regulations 2019; Legal Notice No. 101 Of 2019; and The Statutory Instruments Act, Act No. 23 Of 2013:

We humbly table this petition on the following issues:

- A. Closure of the Central and Nairobi Registries;
- B. Annulment of the Land Registration (Electronic Land Transactions) Regulations 2019 ("the Regulations") & the continued unlawful implementation of the Land Information Management System (LIMS); and
- C. Poor administration of Land Registries Countrywide.

CLOSURE OF THE CENTRAL AND NAIROBI REGISTRIES

On the 12th February 2020 the Ministry of Lands and Physical Planning published a public notice in the newspapers dubbed, "TEMPORARY CLOSURE OF NAIROBI AND CENTRAL REGISTRIES (AT ARDHI HOUSE) FOR AUDITING RECORDS" to the effect that from Monday February 24th 2020 till Friday March 13th 2020 the Nairobi and Central Registries, including the Records Registries and Banking Hall will be closed to the public in order for them to conduct an audit of all land records in Nairobi City County.

Whilst the Law Society of Kenya moved to court and obtained interim orders against implementation of said notice, there is no full compliance with the court orders as the Registry is not running normal operations.

Our concerns are as follows:

A. Economic Impact of the Closure of the Registries

- i. It may affect our overall ranking in the global ease of doing business index as the property acquisition regime is a key component of ease of doing business.
- ii. It will have an impact on access to credit as financial institutions will not be able to advance credit based on unreliable data from the Central and Nairobi registries. This uncertainty will also mean financiers take longer to make lending decisions.

- iii. If the records are not properly maintained or interfered with leading to forgeries and irregular acquisition of land, more court matters will be filed in the already over-burdened Environment and Land Court for determination. This will tie up a lot of assets in litigation for several years.

The closure of the registries will not only have an enormous impact on the economy due to the many transactions and processes that will be delayed, but if done in an arbitrary manner it will undo the profound progress we have made in this country on matters land reforms whose ripple effect will be far reaching as enumerated above.

B. Arbitrary manner of Conducting the Audits

The audits are being done without involving the relevant stakeholders with key expertise on matters Land Information Management Systems. It should be an elaborate process that is all inclusive involving digitization of both the cadaster and the land registers(s). Consultation and prior planning are key here.

Our East African Community member states- Uganda, Rwanda, Tanzania and Ghana (West Africa) have used members of the ISK to develop their Land Information Management Systems, which not only speaks to the competence of our local professionals but also points to the need to have this exercise done in a manner that incorporates the key stakeholders. Should Kenya lag behind on matters digitization, we will equally lag behind when it comes to investor confidence if we rely on a manual system or adopt a digital system that is interference prone.

Particulars of arbitrariness of the process include:

- i. The Ministry of Lands & Physical Planning constituted a task force on electronic land transactions, registration, conveyancing and other related activities in August 2018. The Report was subsequently handed over to the Ministry in February 2019 and has never been made public despite the Taskforce having spent PUBLIC resources to engage stakeholders in the sector that would guide the development of a Land Information Management System, which would solve the current issues faced by the manual system.
- ii. There is rife concern among some of our BMOs and partners that part of the recommendations that stakeholders made to the Taskforce are already being implemented yet the Taskforce Report has never been made public. A good example is the Business Laws (Amendment) Bill 2019, which seeks to introduce the use of electronic signatures, electronic documents, filing of documents either in physical or electronic form in the lands Registry. It also calls for maintenance of the Principal and Coast registries in both physical and electronic form.

- iii. Land registries are central to land administration in Kenya and are created and administered by the Cabinet Secretary in accordance with section 7 of the Land Registration Act (Act No. 3 of 2012). We are concerned that certain government agencies such as the National Youth Service (NYS) and the Defence Forces are being used in the management and administration of land records, contrary to law.

ANNULMENT OF THE LAND REGISTRATION (ELECTRONIC LAND TRANSACTIONS) REGULATIONS 2019 & THE CONTINUED UNLAWFUL IMPLEMENTATION OF THE LAND INFORMATION MANAGEMENT SYSTEM (LIMS)

The Ministry of Land and physical Planning ("the Ministry") issued a public notice on 4th April 2018 in relation to preparation of online services and online processing of land transactions at the lands registry to digitize the lands registry. The online services commenced on 3rd April 2018 through the Lands Information Management System (LIMS) which is accessible through the Government Service Portal www.ecitizen.go.ke.

On 5th April 2018, the Law Society of Kenya ("LSK"), who are members of KEPSA, wrote to the Cabinet Secretary for the Ministry ("the CS or Cabinet Secretary") regarding legal issues affecting the new online services and requested immediate suspension of the online services and online processing of land transactions. Key among the issues was the illegality of the e-conveyancing platform as it contravened other laws such as the Law of Contract Act, the Evidence Act and the Land Acts.

LSK further challenged the Ministry's move via Nairobi High Court Petition 144 of 2018, LSK v AG & 3 Others, resulting in a consent agreement signed between the Ministry and LSK. The terms of the aforesaid agreement were that LSK would stay the suit whereas the Ministry would come up with a taskforce to develop guidelines for the implementation of an electronic registration and conveyancing system.

Consequently, a Taskforce on Electronic Land Transactions, Registration, Conveyancing and other related activities under the Land Registration Act, 2012, the Land Act, 2012 and the Community Land Act, 2016 ("the Taskforce") was appointed via Gazette Notice No. 7859 of 2018 on 3rd August 2018. The Taskforce constituted among others, two LSK representatives, and was mandated to study and review the Land Registration Act, 2012 and the Land Registration (General) Regulations, 2017 and land sector related laws with a view to formulate guidelines for electronic registration transactions and conveyancing system; perform any other task as may be assigned by the Cabinet Secretary; and submit the draft guidelines and final report to the Cabinet secretary within two (2) months of its

formation. The mandate of the Taskforce was extended on 3rd December 2016 by a further two (2) months to 2nd February 2019 via Gazette No. 12622 of 2018.

The Taskforce conducted extensive public consultations between 2nd and 11th October 2018 in Mombasa, Nakuru, Uasin Gishu, Nairobi, Embu, Kakamega, Kisumu, Machakos, Garissa, Nyeri, Kisii and Marsabit counties. The said consultations were carried out with the National Land Commission, the Council of Governors, the Law Society of Kenya, the Institution of Surveyors of Kenya, the Kenya Institute of Planners, the Town and County Planners Association of Kenya, the Kenya Property Developers Association, the Kenya Bankers Association and the Land Development Governance Institute.

On the culmination of the Taskforce's mandate, it published a Report ("the Taskforce Report") and presented it to the Cabinet Secretary. Specifically, the Taskforce Report *inter alia* recommended guidelines for the implementation of an electronic registration and conveyancing system which formed the basis of the Regulations.

The Regulations were then published on the 28th June 2019, submitted to the clerk of the National Assembly on 1st August 2019 and tabled before Parliament on 6th August 2019.

Following the tabling of the said regulations, the Committee on Delegated Legislation ("the Committee") began an analysis of the Regulations culminating in the Report on the consideration of the Land Registration (Electronic Land Transactions) Regulations, November 2019 ("the Committee Report") tabled before Parliament on 13th November 2019 recommending annulment of the Regulations. Parliament then adopted the Report in entirety and annulled the Regulations on 25th November 2019.

Notably, the key reasons for the annulment of the Regulations in the Report were:

- a. The Regulations were contrary to Article 259 (11) of the Constitution as consultation with the National Land Commission was not adequately demonstrated and neither was it stated in the enabling clause.
- b. The Regulations making authority, the Ministry in this case, failed to demonstrate that it conducted enough public participation in the development of the Regulations contrary to section 5 & 5A of the Statutory Instruments Act.
- c. The regulation making authority failed to submit a regulatory impact assessment as required by section 6, 7 & 8 of the Statutory Instruments Act.
- d. The Regulations were not submitted to the National Assembly within the statutory timeline contemplated by section 11(1) of the Statutory Instruments Act

The Committee further considered the following in reaching its decision:

- e. The Regulations failed to provide prescribed forms under Regulation 5.
- f. The Regulations gave the Chief Registrar very broad powers under the following provisions:
 - i. Regulation 6 gives the Chief Registrar power to approve or refuse to approve a person as a user. The Committee suggested that the provision should have included circumstances that lead to approval or otherwise.
 - ii. Further Regulation 6 (5) allows the Chief Land Registrar to impose additional conditions for approval as a user without providing the parameters of such conditions.
- g. Regulation 10 providing for constitution of a committee to hear and determine appeals against the Chief Registrar was impractical as there are currently more than 10 Million users thus tedious to compose a committee within 14 days of receipt of each appeal. The Committee suggested creation of a permanent appeal's body.
- h. Regulation 15 required that payment is done through the existing government payment platforms. However, there are no express government payment platforms.

Particulars of the Ministry's negligence in relation to the annulment of the Regulations and unlawful implementation of LIMS

The Ministry failed to follow the proper procedure for the approval of the Regulations by the National Assembly as more specifically detailed in the subsequent paragraphs.

On failure to submit a regulatory Impact assessment

The Ministry failed to present before Parliament, the Taskforce Report that provided in its chapter two, the review of the legal framework and the necessary changes needed to ensure synchrony between the Regulations and the existent legal framework.

Notably, the contents of the legal analysis of the Taskforce Report are similar to the most contents of a regulatory impact statement, a requirement that the Ministry did not comply with resulting in the annulment of the Regulations.

On the Explanatory memorandum

The Ministry submitted an explanatory memorandum but failed to attach the proof that sufficient public participation was conducted, a brief statement of all the consultations and the manner in which consultations were undertaken, an outline of the results of the consultations and a brief explanation of any changes made to legislation as a result of the

consultations. Resultantly, the Committee quotes failure to demonstrate enough public consultations as one of the reasons for annulment of the Regulations.

On the statutory timeline for presenting of the Regulations

The Ministry was negligent in failing to adhere to the statutory timeline set to present the Regulations before National Assembly, 7 sitting days within publishing of the Regulations, as provided under the Statutory Instruments Act without demonstrating any reason for the delay. Notably, the Committee annulled the Regulations due to the said Ministry's failure to adhere to statutory timelines.

On unlawful implementation of the LIMS

Following the annulment of the Regulations, the Ministry continues to unlawfully implement LIMS without the proper statutory backing.

POOR ADMINISTRATION OF LAND REGISTRIES COUNTRYWIDE

Land registries are central to land administration in Kenya and are created and administered by the Cabinet Secretary in accordance with Section 7 of the Land Registration Act (Act No. 3 of 2012). However, the Land Registry is poorly administered resulting in the challenges elaborated below:

Due to inadequate and poorly trained staff at the Lands Registry There is an unprecedented rise in the number of cases of misplacement of records at the Lands Registry due to lack of a file tracking system at the Lands Registry and automation of the A-Book.

Due to inadequate and poorly trained staff at the Lands Registry to ensure instruments are stamped with the correct value of stamp duty, there are some cases where wrong stamp duty values are embossed on instruments.

There is an unprecedented rise in the number of cases of misplacement of records at the Lands Registry due to lack of a file tracking system at the Lands Registry and automation of the A-Book.

There is a huge challenge in getting access to Registrars resulting in inefficient and slow resolution of issues and long transactional periods.

There are instances where the Land Registrar requires the production of court proceedings in order to recognize court orders leading to delays in some transactions which have already been settled by the Court.

Despite, all the efforts and constant engagement by LSK who are members of KEPSA, there seems to be unwillingness on the part of the Cabinet Secretary to work towards efficient and effective land administration and land administration processes.

THAT

The issues in respect to which this petition is submitted are not pending in any court of law or constitutional or legal body, save for:

1. Constitutional Petition No. 58 of 2020 against the closure of the registries, which orders are not being complied with.
2. Law Society of Kenya's Petition to the National Assembly received in January 2020 touching on Issues Number 2 and 3 raised above.

HEREFORE your humble Petitioners pray THAT: -

2. This petition be dealt with immediately in view of the urgency and the gravity of the issues raised.
3. The Senate investigate the conduct of the Ministry of Lands & Physical Planning in relation to the issues submitted.

The Committee resolved as follows:

- Invitation be done to the CS, Lands and Physical Planning,
- Invitation be done to the KEPSA as well.

MINUTE SEN/SCLENR/120/2020: ANY OTHER BUSINESS;

The was no other business discussed.

MINUTE SEN/SCLENR/121/2020: DATE OF NEXT MEETING;

The time being 1.00 pm the meeting was adjourned. The next meeting was scheduled for Tuesday, 7th July, 2020 at 10.00 am via zoom platform.

Signed: _____

Date: 4/68/2020

SEN. MWANGI PAUL GITHIOMI, MP

CHAIRPERSON

STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL
RESOURCES

MINUTES OF THE 23RD SITTING OF THE SENATE STANDING COMMITTEE
ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON
WEDNESDAY, 8TH JULY, 2020 VIA ZOOM ONLINE PLATFORM AT 10.00 AM.

MEMBERS

1. Sen. Mwangi Paul Githiomi, MP
2. Sen. Philip Mpaayei, MP
3. Sen. George Khaniri, MGH, MP
4. Sen. (Dr.) Lelegwe Ltumbesi, MP
5. Sen. Gideon Moi, CBS, MP
6. Sen. Mwaruma Johnes, MP
7. Sen. Sylvia Kasanga, MP
8. Sen. Boy Issa Juma, MP

PRESENT

- Chairperson
- Vice Chairperson
- Member
- Member
- Member
- Member
- Member
- Member

ABSENT WITH APOLOGY

- Member

IN ATTENDANCE

MINISTRY OF LANDS AND
PHYSICAL PLANNING

1. Ms. Farida Kareney

- CS, Lands and Physical Planning

2. (Other officers from the Ministry who accompanied the CS)

PETITIONERS

2. Mr. Tyson Mwendwa
3. Ms. Emily Njeru
4. Dr. Mwenda Makathimo
5. Ms. Joyner Okonjo
6. Mr. Jesse Kihoro
7. Ms. Judy
8. Mr. Eric Nyadimo
9. Ms. Martha Cheruto
10. Mr. Lenise Wanakai
11. Mr. Gikonyo Gitonga
12. Mr. Robert Koech
13. Mr. Peter S. Kariuki
14. Mr. Charles Wamae
15. Ms. Wanjiru Mathenge
16. Mr. Abraham Samoei
17. Ms. Irene Keino
18. Mr. Mageka Mageka

- KEPSA-ISK
- LDGI
- KEPSA Consultant (Policy Advisory)
- ISK

- Chair/ KEPSA Land & Physical Sector Board

19. Mr. John Kabuye
20. Ms. Janeirene Maina
21. Mr. Allen Gichuhi
22. Mr. Eric Nyadimo
23. Ms. Carol Wanjeri
24. Mr. Maina Kiambigi
25. Ms. Irene Kiwool
26. Mr. Peter S. Kariuki
27. Ms. Cynthia Wakio
28. Mr. Mairura Omwenga
29. Mr. Apollo Kiarrii
30. Mr. Maina Kiambigi
31. Mr. Stanley Maina-
32. Mr. Apollo Kiarrii
33. Mr. Peter Thairu
34. Mr. Robert Koech
35. Ms. Hellen Wanjohi
36. Ms. Emily Njeru

- KPDA (Membership)
- Chair, Town and County Planners Association

-KIP - KEPSA
-KEPSA-ISK

SECRETARIAT

1. Mr. Victor Bett
2. Ms. Judy Ndegwa
3. Mr. John Nganga

- Clerk Assistant
- Legal Counsel
- Audio Recording

MINUTE SEN/SCLENR/128/2020: PRELIMINARIES

The meeting was called to order at 10.30 am by the Chairperson followed by a word of prayer.

MINUTE SEN/SCLENR/129/2020: ADOPTION OF AGENDA

The agenda of the meeting was adopted after being proposed by Sen. George Khaniri, MGH, M.P. and seconded by Sen. (Dr.) Lelegwe Ltumbesi, M.P. as follows –

1. Preliminaries
2. Adoption of the agenda,
3. Confirmation of Minutes of Previous Sittings;
4. Petition by the Kenya Private Sector Alliance (KEPSA) regarding the Lands Registry processes;

- Meeting the Cabinet Secretary, Lands and Physical Planning

5. Any other Business;
6. Date of the next meeting;
7. Adjournment.

MINUTE SEN/SCLNR/130/2020: PETITION BY THE KENYA PRIVATE SECTOR ALLIANCE (KEPSA) REGARDING THE LANDS REGISTRY PROCESSES;

- Meeting the Cabinet Secretary, Lands and Physical Planning

The Cabinet Secretary presented as follows:

A. Closure of the Central and Nairobi Registries

Honourable Chair,

KEPSA has accused the Ministry of arbitrary closure of Central and Nairobi land registries pursuant to a public notice issued on February 12, 2020, closing the registries from February 24, 2020 to March 13, 2020 for auditing of land records. KEPSA alleges that despite the Law Society of Kenya obtaining an order of court against the implementation of the notice, the Ministry did not comply fully with the order. According to KEPSA, the closure of the registries negatively affected the economy due to delayed registration of transactions. KEPSA has raised concerns about the possibility of interference with land records during the audit process.

From the petition, KEPSA is also concerned that the Ministry is implementing the recommendations of the report of the Taskforce on Electronic Land Transactions, Registration, Conveyancing and Other Related Activities, yet the report has not been made public.

Honourable Chair, we wish to respond as follows:

- (a) The Ministry issued the public notice for closure of Central and Nairobi registries between February 24 to March 13, 2020 to allow for internal audit of land records. This was in response to numerous complaints of missing records (annexure 1(a) is the public notice on closure)
- (b) In a subsequent notice, the Ministry clarified that the registries would allow registration of urgent transactions including Court orders, bank charges and discharges (annexure 1(b) is the public notice on clarification)
- (c) The court in Nairobi High Court Petition No. 58 of 2020 issued an order on February 24, 2020 requiring the Ministry to re-open the registries

- (d) Consequently, the registries were opened and the Ministry received 1313 documents for registration in the period (annexure 2 is an excerpt of the Presentation Book for the period of closure)
- (e) We held a meeting with the Law Society of Kenya on February 28, 2020 to discuss, among other things, the issue of closure of the registries
- (f) We also had a meeting with KEPSA on March 9, 2020 where we explained the reason for closure of the registries
- (g) The audit process was a pre-planned exercise with clearly defined protocols to ensure security of the land records
- (h) The 2019 report of the taskforce on Electronic Land Transactions, Registration, Conveyancing and Other Related Activities is available on the Ministry's website: www.lands.go.ke

B. Annulment of the Land Registration (Electronic Land Transactions) Regulations, 2019 and the continued unlawful implementation of the Land Information Management System (LIMS)

Honourable Chair, the Petition accuses the Ministry of negligence in relation to the annulment of the Land Registration (Electronic Land Transactions) Regulations, 2019 by failing to follow the proper procedure for the approval of the Regulations by the National Assembly as follows:

- a) Failure to submit a regulatory impact statement
- b) Failure to attach proof that sufficient public participation was conducted, brief statement of all consultations and manner in which the consultations were undertaken, an outline of the results of the consultations and a brief explanation of any changes made to legislation as a result of the consultations
- c) Failure to adhere to the statutory timelines set to present the Regulations before the National Assembly, seven (7) sitting days within publishing of the Regulations as provided for under the Statutory Instruments Act without demonstrating any reason for the delay
- d) Unlawful implementation of LIMS without proper statutory backing

Honourable Chair, we wish to respond as follows:

The Taskforce on Electronic Land Transactions, Registration, Conveyancing and other related activities under the Land Registration Act, 2012, the Land Act, 2012 and the Community Land Act, 2016 ('the taskforce') was appointed vide Gazette Notice No. 7859

of August 3, 2018. The taskforce comprised members from Ministry of Lands & Physical Planning, National Land Commission, Council of Governors, professional bodies (Law Society of Kenya, Kenya Institute of Planners, Institution of Surveyors of Kenya and Town and County Planners Association of Kenya) and Land Development Governance Institute representing civil society organizations.

The taskforce was mandated to study and review the Land Registration Act, 2012, the Land Registration (General) Regulations, 2019 and other land sector related laws with a view to formulating guidelines for electronic land registration, transactions and conveyancing system. The term of the taskforce ended on February 2, 2019 and taskforce presented to the Cabinet Secretary its report ('the report') and draft guidelines for the electronic registration and conveyancing system.

Consequently, the Land Registration (Electronic Land Transactions) Regulations, 2019 ('the 2019 Regulations') were published on June 28, 2019 and submitted to the Clerk of the National Assembly on August 1, 2019. The 2019 Regulations were tabled before the Committee on Delegated Legislation ('the Committee') on August 6, 2019.

The Committee considered the 2019 Regulations and tabled its report before Parliament on November 13, 2019 recommending annulment of the 2019 Regulations on the following grounds:

- i) The 2019 Regulations were contrary to Article 259 (11) of the Constitution as consultation with the National Land Commission was not adequately demonstrated and neither was it stated in the enabling clause
- ii) The Ministry failed to demonstrate that it conducted enough public participation in the development of the Regulations contrary to Section 5 & 5A of the Statutory Instruments Act
- iii) The Ministry failed to submit the 2019 Regulations to the National Assembly within the statutory timeline contemplated by Section 11 (1) of the Statutory Instruments Act.

Parliament adopted the recommendations of the Committee and annulled the 2019 Regulations on November 25, 2019.

As far as the allegation of negligence claimed in the Petition is concerned, we wish to respond as follows:

a) **Failure to submit a regulatory impact statement**

The Ministry did not prepare a regulatory impact statement on the proposed 2019 Regulations as required by Statutory Instruments Act, 2013. However, the Ministry is at an

advanced stage of formulating new Regulations and has now prepared the regulatory impact statement as required by law.

b) Failure to attach proof of public participation

- v) The Ministry provided records to demonstrate that public participation was undertaken. In our explanatory memorandum submitted to Parliament, the Ministry provided a statement of all consultations and the manner in which the consultations were undertaken throughout the Country
- vi) The report of the taskforce confirms that public participation was indeed conducted
- vii) Copies of attendance lists for most of the meetings were made available to Parliament. However, a few copies of these lists were inadvertently missing from the documents presented to Parliament
- viii) Chapter Four of the report of the taskforce outlines the findings of the public participation meetings which the taskforce took into consideration in formulating the draft guidelines to support electronic land registration

c) Failure to adhere to the statutory timeline set to present the Regulations

The Regulations were submitted to Parliament on August 1, 2019 when it ought to have been submitted on July 30, 2019.

The delay was not inordinate or intentional. It was an inadvertent oversight in the counting of the sittings of Parliament. Nonetheless, the Committee proceeded to consider the Regulations and made its recommendations on the same.

d) The continued unlawful implementation of the Land Information Management System (LIMS)

- i) In a notice issue on April 4, 2018, the Ministry notified the public that it would commence online land registration through the e-Citizen platform. The move was challenged by the Law Society of Kenya in Nairobi High Court Petition No. 144 of 2018 (LSK vs AG and 3 Others).
- ii) A consent agreement signed between the Ministry and LSK was recorded. The terms of the agreement were that LSK would stay the suit whereas the Ministry would set up a taskforce to develop guidelines for the implementation of an electronic registration and conveyancing system. It was also agreed that the following processes would continue to be carried out electronically:

- a. Application for an official search
 - b. Payment of the official search
 - c. Payment of stamp duty on the property
 - d. Assessment of land rent
 - e. Payment of land rent
 - f. Registrations for transfer, charge, lease, caution/caveat, court orders and consents and requests for valuation shall run concurrently manually and electronically
- iii) The Taskforce was appointed vide Gazette Notice No. 7859 of August 3, 2018. It developed draft guidelines for electronic land transactions, which became the Land Registration (Electronic Land Transactions) Regulations, 2019 published under Legal Notice No. 101 of 2019. The Regulations were however annulled by Parliament for various reasons earlier indicated in our response
- iv) The Ministry has continued to provide the online services in accordance with consent agreement between the Ministry and LSK as the process of formulating new Regulations is being undertaken.

C. Poor administration of land registries countrywide

Honourable Chair,

The Petition has raised several areas of concerns on the administration of the land registries as follows:

- a) Due to inadequate and poorly trained staff at the land registries, there have been cases of erroneous stamping of instruments
- b) There has been unprecedented rise in the number of cases of misplacement of records at the Land Registry due to lack of file tracking system at the registries and automation of the Presentation Book
- c) There is a huge challenge in getting access to Registrars resulting in inefficient and slow resolution of issues and long transactional periods
- d) There are instances where the Registrar requires the production of court proceedings in order to recognise court orders leading to delays in some transactions which have already been settled in court

The petition alleges that the Ministry has not been willing to work towards efficient and effective land administration

Honourable Chair, we wish to respond as follows:

a) Inadequate and poorly trained staff at the land registries, there have been cases of erroneous stamping of instruments

- i. The Ministry employs qualified and competent personnel in all cadres. However, for some technical departments like registration we have an inadequate staff compliment.
- ii. This is being addressed by the recruitment of additional technical staff including 100 land registrars to improve service delivery. (Annexure 3(a) and 3(b) are Public Service Commission advertisements of vacancies in the Ministry)
- iii. All the 61 land registries countrywide are headed by Chief Land Registration Officers. We have adequately trained professionals who are able to assess stamp duty and other Government fees. We hardly receive complaints of erroneous embossment of documents.
- iv. The Petitioner is invited to take advantage of the appeal process set out in the land statutes in case of such complaints.

b) Lack of file tracking system at the registries and automation of the Presentation Book (A-Book)

- i. Besides the manual file tracking system in our registries, we have developed a digital file tracking system for Nairobi and Central land registries to make access to files easier.
- ii. We have developed an online booking system at the Nairobi and Central Registries. Upon presentation of documents for registration, the documents are booked online and a tracking number is auto-generated and forwarded to the customer by way of SMS.
- iii. The Ministry is in the process of digitizing land records and processes. Automation of the A-Book is part of the digitisation programme. This system will have both internal and external interfaces. The internal interface will only be accessible to officers of the Ministry. The external interface will be meant for access by our customers.

We are working on the protocols for customer access in the system. The same will be replicated across the country

c) Challenges in getting access to Registrars resulting in inefficient and slow resolution of issues and long transactional periods

- i. The Ministry has established customer care desks in all our registries. The Registrars are part of the staff of the Ministry serving at the customer care desks and the banking hall counters.
- ii. We have created a special counter (Counter 9) for clients who would wish to be attended to by a Registrar.

d) There are instances where the Registrar requires the production of court proceedings in order to recognise court orders leading to delays in some transactions, which have already been settled in court

- i. Section 14 of the Land Registration Act, 2012 allows a Registrar to call for any information from any person in the discharge of their functions. This is part of the due diligence process on the part of a Registrar in the discharge of functions under the Act as the orders are not directly presented to them by the courts
- ii. We have had cases where fake orders have been presented for registration and this is why the Registrars seek to authenticate or verify these orders before acting on them

e) Lack of effort towards efficient and effective land administration

The Ministry has made significant and deliberate efforts to enhance efficiency, effectiveness, transparency and accountability in land administration and management:

- i. The Government has embarked on a programme of digitisation of land records and automation of land registration processes and related transactions.
- ii. We have initiated legal reforms to support electronic land registration through the Business Laws (Amendment) Act, 2020. This will significantly transform end-to-end service delivery
- iii. Some of the business transformation reforms adopted by the Ministry involve re-engineering of the property registration processes, which has seen the registration steps reduced from 9 to 5. This will reduce the number of days for registration of property from 73 to 12
- iv. The Business Laws (Amendment) Act, 2020, removed the requirement for consents, land rates and land rent clearance certificates as pre-requisites for registration
- v. Registration and Search fees have been waived