

# Real Estate Developers Regulatory Framework, & Cytonn Weekly #08/2023

## Focus of the Week

The performance of Kenya's Real Estate sector has been on a positive trajectory, with the sector's contribution to the country's GDP recording a 5-year Compounded Annual Growth Rate (CAGR) of 6.0% to Kshs 749.7 mn in Q3'2022 from Kshs 560.8 mn in Q3'2017. Additionally, the sector contributed 10.5% to the total GDP in Q3'2022, coming in as the second largest contributor to Kenya's GDP, only behind the Agricultural sector that contributed 14.8%. This impressive performance of the Kenyan Real Estate sector in Q3'2022, surpassing perennial major contributors to GDP such as transport at 10.3%, both financial and insurance and product taxes at 8.9% each, while both manufacturing and trade contributed 8.5% each, points to the increased significance of Real Estate to the economy and paints a positive outlook. However, the lack of proper regulation and oversight over developers and other stakeholders poses significant challenges that could claw back the gains. One pertinent issue is that despite the existence of laws regulating players in the Real Estate sector, there are currently no specific regulations governing Real Estate developers. Without a developer regulatory framework in place, the sector is vulnerable to various risks and uncertainties, including non-compliance, lack of coordination during market turbulence, mismanagement of funds and unethical practices. Therefore, there is urgent need for Kenya to establish a regulatory platform, anchored in law, that addresses the unique needs of Real Estate developers, financiers, and other stakeholders in the sector.

We have previously covered a topical on the **Kenya Real Estate Developers Regulatory Board (REDRB)**, after a committee appointed by the then Principal Secretary of the State Department for Housing and Urban Development recommended the establishment of a developers regulatory Board by October 2020, through an executive order that was subject to the Cabinet's approval. However, that plan was not implemented. Therefore, to address the regulatory gap, this week we will analyze the performance of the Real Estate sector over the years, identifying key challenges faced by developers, financiers and stakeholders during Real Estate development, and highlighting the existing legal frameworks that are regulating the Real Estate sector in Kenya. Additionally, we will provide recommendations on a regulatory framework for developers in the sector by drawing insights from different countries that have successfully developed concrete legal bases for regulating developers and other stakeholders in Real Estate developments. This we shall cover through the following;

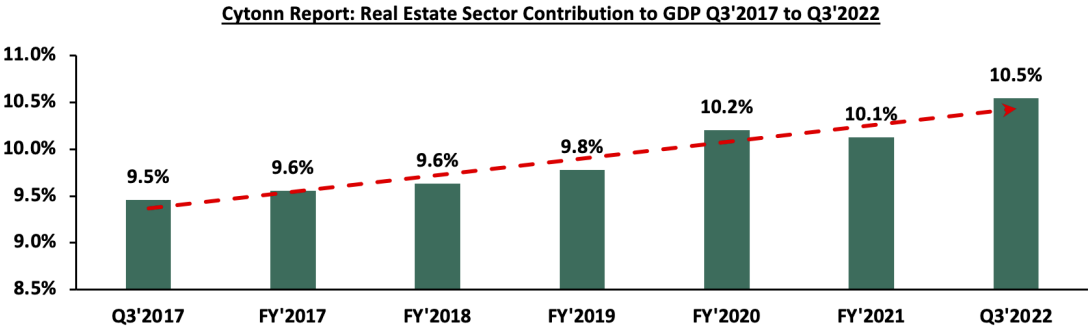
- I. Overview of Kenya's Real Estate Sector,
- II. Real Estate Development Regulatory Framework in Kenya,
- III. Existing Regulatory Gap,
- IV. Case Studies and Lessons Learnt, and,
- V. Recommendations and Conclusion

### **Section I: Overview of Kenya's Real Estate Sector**

Over the past few years, the Kenyan Real Estate sector has been expanding its activities, with its

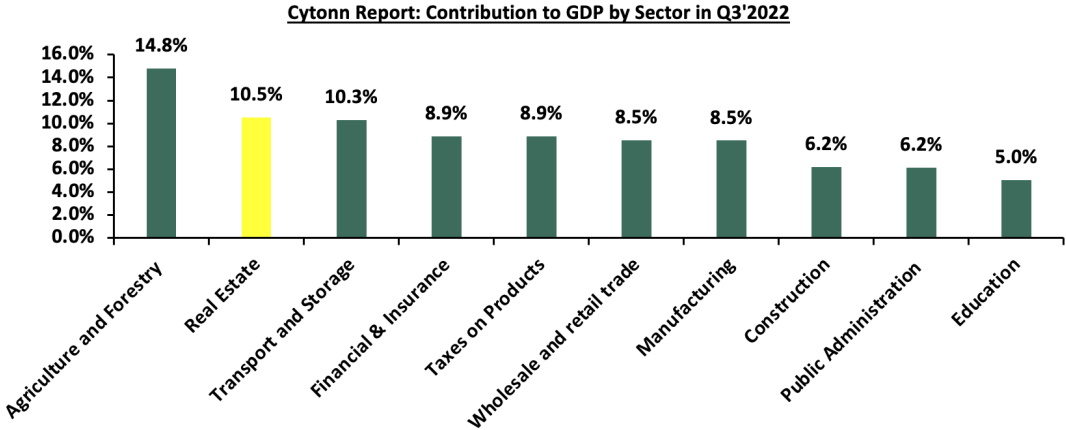
contribution to the country's GDP growing at a positive Compounded Annual Growth Rate (CAGR) of 6.0% to Kshs 749.7 mn in Q3'2022 from Kshs 560.8 mn in Q3'2017. This growth can be attributed to various factors such as; i) rapid population and urbanization rates leading to demand for Real Estate developments, ii) focus by the government and private sector on providing affordable housing, iii) increased mergers and acquisitions in the hospitality sector, iv) provision of long-term, low-interest home loans to potential buyers by the Kenya Mortgage Refinance Company (KMRC), v) increased popularity in Mixed Use Developments (MUDs) over the period due to their convenience, providing a comprehensive living experience for residents while also attracting more investors through combination of residential, commercial, and retail spaces, vi) rapid expansion drive by both local and international retailers boosting the retail sector, vii) efforts by public and private stakeholders in improving infrastructure across the country hence opening up new locations for property developments, and, viii) reopening and expansion of the hospitality sector and improved investor confidence in the sector on the back of economic recovery in the post-COVID-19 and post-election periods.

Additionally, the sector contributed 10.5% to the total GDP in Q3'2022, coming in as the second largest contributor to Kenya's GDP, only behind the Agricultural sector that contributed 14.8%. This impressive performance of the Kenyan Real Estate sector in Q3'2022, surpassing perennial major contributors to GDP such as transport at 10.3%, both financial and insurance and product taxes at 8.9% each, while both manufacturing and trade contributed 8.5% each, points the increased significance of Real Estate to the economy and paints a positive outlook. This also presents lucrative opportunities for investors and developers to take advantage of the increasing demand for housing and other properties. The graph below shows the trend of Real Estate contribution to GDP between Q3'2017 and Q3'2022;



Source: Kenya National Bureau of Statistics (KNBS)

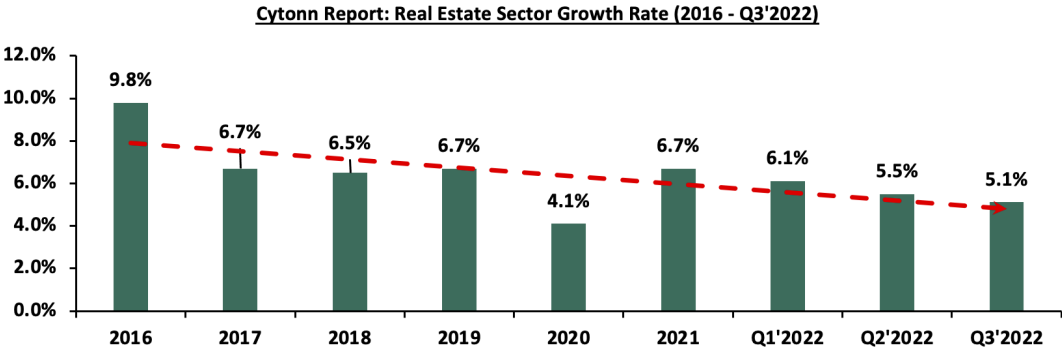
The graph below shows the top sectoral contributors to GDP during Q3'2022, with Real Estate being the #2 contributor;



Source: Kenya National Bureau of Statistics (KNBS)

However, the sector's GDP growth rate over the past 5 years has been lower than the growth rate in

the pre-2017 period owing to several factors such as; i) the 2017 general elections and a further repeat election, ii) political instability occasioned in 2018, iii) entry and prevalence of COVID-19 pandemic in the country in 2020, and, iii) the Russian-Ukraine war that broke out in 2022, causing elevated inflationary pressures and supply chain disruptions, consequently increasing the cost of main construction materials both locally manufactured and those imported from abroad. Nevertheless, in 2021, the sector experienced a significant rebound in activities following the gradual reopening of the economy majorly occasioned by the lifting of health-related restrictions, lockdowns, and bans that were put in place due to the prevalence of COVID-19 pandemic. The full operationalization of many businesses and investments in the sector showcased gradual restoration of activity as the country continued to take steps towards a full economic recovery. Other factors that continue to weigh down on the optimal performance of the sector include; i) an oversupply of 6.7 mn SQFT in the Nairobi Metropolitan Area (NMA) commercial office market, 3.0 mn SQFT in the NMA retail market, and 1.7 mn SQFT oversupply in the overall Kenyan retail market as at 2022, and, ii) difficulty in the access of funding due to expensive financing from banks and subdued alternative sources of financing such as the capital markets. The graph below shows the Real Estate Sector Growth Rate between 2016 and Q3'2022;

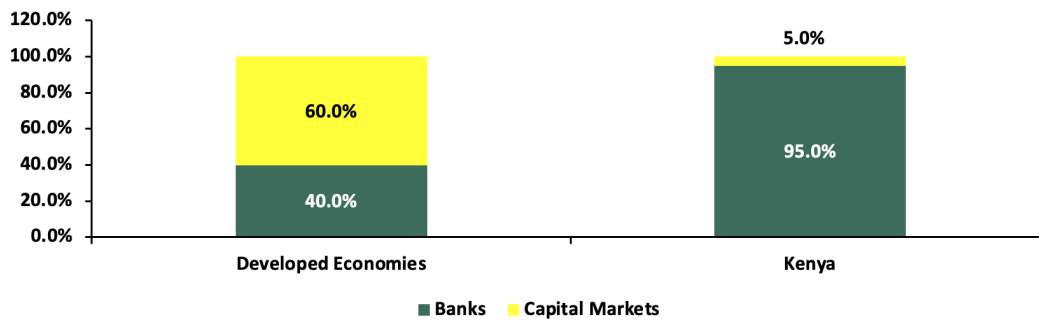


Source: Kenya National Bureau of Statistics (KNBS)

In addition to the aforementioned factors affecting the Kenyan Real Estate sector, there are specific challenges narrowed down to Real Estate developers in the country. These challenges faced by developers and other stakeholders during Real Estate developments have illustrated the need for a regulatory body to address the impediments and oversee the activities of developers in the way of streamlining the Real Estate sector in Kenya. These challenges include;

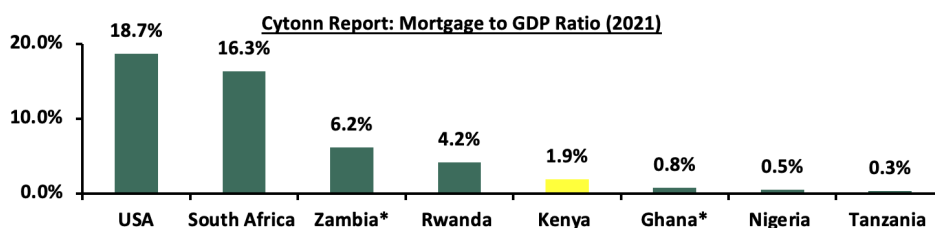
- i. **Difficulty in accessing construction financing:** Limited long-term financing options make it difficult for developers to access funding to start and complete their projects. Banks in Kenya are the primary source of funding for Real Estate developers, providing nearly 95.0% of funding for construction activities as opposed to 40.0% in developed countries. This means that capital markets contribute only 5.0% of Real Estate development funding, compared to 60.0% in developed economies. Additionally, banks and other lenders perceive Real Estate as a high-risk sector, recently driven by a 9.2% increase in gross non-performing loans (NPLs) in the sector to Kshs 75.6 bn in Q3'2022 from Kshs 69.2 bn recorded in Q3'2021. This has made banks to demand more collateral and have tighter lending requirements such as higher interest rates charged on the loans. The situation makes it more difficult for developers to access credit, which could lead to delays or cancellations of projects, forcing them to resort to off-plan financing which has been termed as risky. The graph below shows the comparison of construction financing in Kenya against developed economies;

**Cytonn Report: Construction Financing in Kenya Vs Developed Economies**



Source: World Bank, Capital Markets Authority

- ii. **High total costs of development:** Costs of construction in Kenya are high, due to high energy and transport costs, elevated inflationary pressure on commodities, supply chain disruptions of the key construction materials from overseas markets and raw materials used in local production by manufacturing companies, and high taxes including 16.0% VAT on the contract sum for residential delivery. According to **Integrum**, the average cost of construction is estimated at Kshs 34,650 to Kshs 77,500 per SQM in 2022 depending on various factors such as location of project and type of development up from a range of between Kshs 33,450 to Kshs 72,400 per SQM in 2021. The rising construction cost does not include professional fees, development management costs, land enhancement costs, marketing costs, financing costs and other incidental and acquisition costs that add up to the total cost of development,
- iii. **Inefficiencies in the mortgage / off-take market:** The limited development of the mortgage market in Kenya makes it difficult for developers and investors to sell properties, as homebuyer ability to purchase property is reduced with the inability to access home financing. As such, Kenya’s mortgage to GDP ratio remains depressed at 1.9%, compared to other African countries such as South Africa at 16.3%. Additionally, Kenya Mortgage Refinancing Company (KMRC), the only mortgage refinancing company in the country which officially began its lending in 2021, is yet to stamp its dominance in the mortgage market and increase its attractiveness to more stakeholders in the sector. KMRC only refinanced 1,948 mortgage loans valued at Kshs 5.8 bn in 2022, which was a 278.0% increase from 574 home loans disbursed in 2021 valued at Kshs 1.3 bn. Despite the increase, the numbers remain low at 7.3% of the total number of mortgage loans which stood at 26,723 accounts valued at Kshs 245.1 bn as at 2021. The graph below shows the mortgage to GDP ratio of Kenya compared to other countries as at 2021;



\*(2020)

Source: Centre for Affordable Housing Africa

- iv. **Difficulty in sourcing well located, serviced land:** In order to provide their clients with quality housing products, developers need to construct in areas that are serviced with sufficient roads, water, and electric supply, sewer lines, and utilities. Such land is often located in large urban centres, very expensive and scarce in supply. Additionally, providing such basic infrastructure to support new developments in areas away from the urban centers can be costly and challenging for both National and County governments to implement hence consuming more time for such far-flung areas to be upgraded. Such situations force private developers to dig deeper into their pockets and facilitate such infrastructural

developments and amenities for their projects, increasing overrun hidden costs and bureaucracy in accessing the services,

- v. **Unfavourable bureaucratic processes:** Developers often face challenges navigating the complex bureaucratic processes needed in order to obtain the legal permits and approvals that are necessary for operation in the sector, which creates delays in project delivery and increases costs for developers,
- vi. **Limited innovation in the sector:** The Real Estate sector in Kenya is slow to adopt new technologies and innovation, which impacts competitiveness and ability to attract investment. These innovations are meant to reduce development costs, increase efficiency and thereby drive profit margins. However, employing novel materials and construction technologies has been hindered by the high cost of sourcing equipment, materials, and skilled personnel, as well as the expenses incurred in training, utilization and maintenance of these innovations in the sector. Additionally, as the government continues to increase its tax revenue bases through the Kenya Revenue Authority, such innovations are attracting new avenues for the new taxes imposed on them making them more expensive alternatives for developers,
- vii. **Lack of transparency:** Development practices in Kenya's Real Estate sector lack transparency with limited availability of reliable data and information on market trends, property values, and other key factors thereby increasing information asymmetry among stakeholders. This can make it difficult for developers to make informed decisions about which projects to pursue, where to invest, and how to price their developments. The lack of transparency can also create opportunities for corruption and other forms of fraud, further complicating the development process,
- viii. **Protracted land tenure issues and disputes:** Land tenure issues are a significant challenge for Real Estate developers in Kenya. For instance, in some parts of the country, communal ownership of large tracts of land by pastoralist communities may hinder access to investors who wish to develop the land. This creates a problem for Real Estate developers, as they are unable to proceed with their projects until the government intervenes. Furthermore, legal disputes over land involving objections to title and property ownership can delay or totally prevent development projects, leading to increased costs and lost opportunities for developers. Such disputes handled by the judicial system drag on for years, exacerbating the problem,
- ix. **The presence of knowledge gaps:** While there is existing professional expertise in sector, developing and executing Real Estate projects requires a wide range of skills and knowledge, including in areas such as design, construction, financing, and project management. The expertise is more limited in latest innovation and new technologies incorporated in the construction and Real Estate sectors, particularly in areas that would help reduce the cost of developments. The advancements in technology require ongoing education and training, as well as a willingness to invest in new tools and processes that can improve efficiency and cost-effectiveness in real estate projects. This is often resource and time consuming for most firms, limiting some developers from gaining a competitive edge in the market, and,
- x. **The high non-compliance rate of developments in Kenya:** According to *Status of The Built Environment Report January - December 2022 Report*, 69.8% of the inspected projects by National Construction Authority (NCA) were found to be non-compliant with building codes and regulations. This non-compliance could result from various factors such as lack of adherence to building codes, poor construction practices, and the use of substandard materials and unqualified contractors. Non-compliance leads to costly delays in project completion, hefty fines, and even punitive legal action against the developers.

## **Section II: Real Estate Development Regulatory Framework in Kenya**

Real Estate development is a highly specialized process which entails division of labour and thus, encompasses multiple professionals. Therefore, it is crucial to establish a comprehensive regulatory framework that helps to regulate the activities of professionals involved as well as ensure that they comply with the laws and regulations governing their profession, thus providing high-quality services. Moreover, Real Estate development is subject to land use regulations which are dictated by zoning regulations, environmental considerations, or community planning efforts. Accordingly, the legal and regulatory framework that governs Real Estate development activities in Kenya and built industry professionals is multifaceted. It encompasses various laws and regulations that cover different aspects of land and Real Estate development through overseeing the activities of built professionals and the implementation of land use regulations enforced through zoning ordinances. The following section highlights the relevant laws and regulations pertaining to Real Estate development in Kenya;

#### **i. National Construction Authority (NCA) Act, Cap 486**

Section 3 (1) of the Act **enshrines** the establishment of the National Construction Authority (NCA), which regulates the construction industry in Kenya. The Authority is responsible for overseeing the registration and licensing of contractors, supervising construction projects, and enforcing construction standards and regulations. The **NCA** also regulates the training, certification, subsequent accreditation and registration of construction workers and site supervisors. The Act was assented to on 2<sup>nd</sup> December 2011 and became effective on 8<sup>th</sup> June 2012, following the passing of the National Construction Authority Regulations, which operationalized the Act. However, origins of the body date far back as 1972 when the National Construction Bill was first introduced, and sought to register the National Construction Corporation (NCC), that later failed in 1988. NCA is also responsible for a range of other critical functions aimed at enhancing the construction industry's development and growth. These functions include; i) promoting and stimulating expansion of the construction industry, ii) commissioning research on construction-related matters, iii) providing consultancy and advisory services with respect to the construction industry, iv) promoting and ensuring quality assurance in the industry, v) encourage the standardization and improvement of construction techniques and materials, vi) developing and publishing a code of conduct for industry professionals, vii) establishing and maintaining a construction industry information system, and, viii) assist in the exportation of construction services.

#### **ii. Engineer's Act No. 43 of 2011**

The **Act** which was assented to law on 27<sup>th</sup> January 2012 provides for the regulation of the engineering profession in Kenya through the training, registration and licensing of certified engineers, and development of the practice thereof. The Act however, became effective on 14<sup>th</sup> September 2012, through a special issue of the Kenya Gazette 3, **repealing** the Engineers Registration Act Cap 530 which was enacted in 1969. In section 3 (2), it establishes the **Engineers Board of Kenya (EBK)**, which is a corporate body, created with a mandate of overseeing the registration and licensing of engineers, regulating engineering education and training, and enforcing engineering standards and codes of practice. Main functions of the EBK include; i) to receive, consider and make decisions on applications for registration of engineers, ii) keep and maintain a register of all registered engineers in Kenya, iii) publish the names of all registered and licensed engineers in accordance to the Act, iv) issue licenses to qualified and registered engineers, v) inspect construction sites where engineering works are in progress, vi) monitor professional engineering works, services and goods rendered by professional engineers, vi) establish a code of practice and ethics for engineers, vii) prepare detailed curriculum for registration of engineers and conduct professional examinations for the purposes of registration, and, viii) determine disputes relating to professional conduct or ethics of registered engineers.

#### **iii. Architects and Quantity Surveyors Act, Cap 525**

Section 4 of the Act establishes the **Board of Registration of Architects and Quantity Surveyors (BORAQS)** whose mandate is to regulate the professions of Architecture and Quantity Surveying through training, registration and enhancement of ethical practice. The Board constitutes of five committees namely;

- a. **Architects & Quantity Surveyors Education Board (AQSEB)** - established to execute the scheme and curriculum for professional education, examinations and other activities of matters of continuous training for the registered persons,
- b. **Ethics and Practice Committee(E&P)** which deals with all ethical issues in practice, complaints from other professionals, the construction industry and the public,
- c. **Research and Publication Committee** mandated to monitor the status of the practice of Architecture and Quantity Surveying, identify where industry research is required, and, develop industry-based research policies and framework,
- d. **Welfare Committee** whose mandate is to establish professional's social welfare policy framework and promote the general welfare of its practitioners, and,
- e. **Management Committee** which ensures that the Board delivers in accordance with policies provided primarily by the Act, effective management of the Board in accordance with the strategic plan, and links the secretariat with the specific committees & the Board therein.

#### iv. **Survey Act, Cap 299**

The Act, in section 3, establishes the office of the Director of Surveys and such other officers as may be deemed to be necessary for the purposes of the Act. Section 7 further establishes the **Land Surveyors Board (LSB)** that is chaired by the Director of Surveys, and is responsible for regulating different aspects of the surveying profession in Kenya including professional practicing standards, licensing, and, professional conduct. The core duties of the LSB include; i) to conduct the examination of candidates for admission as licensed surveyors and their licensing thereof, ii) keep a register of all licensed surveyors, iii) oversee disciplinary proceedings brought against licensed surveyors, iv) determine any disputes arisen involving licensed surveyors and the director, or with client in relation to the fees chargeable, and, v) advise the Director on all matters relating to cadastral surveys in connection with the registration of land or of title to land.

#### v. **Valuers Act, Cap 532**

It provides the legal framework for the registration of valuers as well as establishing the **Valuers Registration Board (VRB)**, which is mandated to regulate the activities and conduct of registered valuers in Kenya. The Act; i) mandates the registrar of the Board to keep and maintain a register of all licensed valuers and eventually issue them with a certificate of registration in the prescribed form, ii) outlines the requirements and procedures for registration and deregistration of valuers, iii) establishes and highlights schedule of fees chargeable by registered valuers for professional services rendered, and, iv) determines any hearings relating to valuers professional misconduct. In addition, **Valuers Rules No 32 of 1987** lays down all that constitutes professional misconduct in the valuation profession in Kenya.

#### vi. **Physical Planning Act, Cap 286**

The **Act** establishes the physical planning system in Kenya, and forms the main component of land use regulations in Kenya, along with zoning regulations which vary across county jurisdictions. It establishes the office of Director of Physical Planning who is the chief Government adviser on all matters relating to physical planning, and prepares regional and local physical development plans. The Act also provides for the establishment of planning liaison committees, whose main responsibility is to determine development applications, and determine appeals lodged by persons aggrieved by their decisions. The Act further confers powers to local authorities to control development through enactment of zoning ordinances as well as approving development projects

through permit issuances, and requires that the preparation of land use and subdivision plans in relation to property be done by a registered physical planner and to be approved by the Director. Additionally, the Physical Planning (Building and Development Control) Rules, 1998 govern the construction, planning and development of buildings and structures in the country. These rules are administered by the National Construction Authority (NCA) and the County Governments of Kenya and are designed to ensure that all buildings and structures are structurally sound, and, sustainable.

#### vii. **Environmental Management and Co-ordination Act (EMCA), Cap 387**

The **Act** regulates Real Estate development in Kenya, specifically in relation to environmental issues. It establishes the National Environment Management Authority (NEMA), which is responsible for promoting and enforcing environmental policies and standards in the country. In accordance to EMCA regulations, 2003 Real Estate developers and owners are required to conduct Environmental Impact Assessments (EIAs) before commencing any development projects which generally entail activities out of character with its surrounding, comprise structures of a scale not in keeping with its surrounding and involve major changes in land use. In support of this, the **Second Schedule** of the Act lists all projects that require an EIA to be conducted before project commissioning.

#### **Section III: Existing Regulatory Gap**

The legal frameworks above provide the necessary regulatory oversight to ensure that activities around Real Estate development is done in compliance with standards and regulations, promoting public safety and welfare, protecting the environment, and ensuring the sustainable development of the country. They also establish professional bodies that are responsible for registering and licensing professionals in the built industry, setting standards for their training and certification, and ensuring that they adhere to ethical and professional standards in their practice. However, there is still a gap in the regulatory framework when it comes to the registration and licensing of Real Estate developers, who are the actual drivers and coordinators of development activities. Evidently, the current legal framework under the above Acts covered does not provide for a comprehensive regulatory framework for the regulation of Real Estate developers in Kenya, which makes it difficult to monitor their activities effectively.

As a result, there is a need for enacting legislation / an Act that is Real Estate developers specific, and that will provide for the establishment of a Real Estate Developers Regulatory Board. The Board would be instrumental in enforcing provisions of the Act which would ideally include; i) the registration and licensing of developers in Kenya, ii) development of a code of ethics for developers, iii) consequent enforcement of the developed code of ethics, iv) develop standard practices in the operation of Real Estate developers activities in Kenya such as standardization of sale agreements, trust accounts, disclosure of information among others, v) impose fines and penalties in case of non-compliance, vi) conducting investigation and enforcing disciplinary actions against developers who violate the code of ethics and conduct, vii) determining any disputes that arise in relation to developers, and, viii) regulation, auditing, and monitoring of escrow accounts for development activities, and approval of the banking and financial institutions qualified to manage these accounts.

In addition, the Board can assist in financing through; i) developing approved frameworks for accessing non-bank development finance through structured investment instruments, or, ii) through fostering partnerships and collaboration with other Real Estate stakeholders such as financiers through championing accessibility to financing for developers. Moreover, the Board can; i) commission research on developers related matters, ii) develop training and education programs that would benefit Real Estate developers, iii) champion for legislation geared towards increasing efficiency and optimizing the environment for Real Estate developers, iv) lobby for developers' rights and concerns to be heard, v) provide consultancy and advisory services to the government, and, vi) promote the development and expansion of the profession in general. Such a framework would ensure that developers are duly regulated and operate within laid down laws, promote transparency



and accountability, and ensure that Real Estate development continues to contribute to the overall development goals of the country.

#### **Section IV: Case Studies and Lessons Learnt**

Having looked at the legal framework in Kenya's Real Estate sector and subsequently identifying an existing regulatory gap in regards to developers, we now look at several countries such as India, Jamaica and Malaysia, which have established comprehensive frameworks to oversee development activities. The provisions outlined in these frameworks mandate developers and other parties to conduct themselves in accordance with specific conditions so as to operate in their respective sectors, as follows;

##### **A. India - Real Estate (Regulation and Development) Act**

The **Real Estate (Regulation and Development) Act** is a legislation that was passed by the Indian Parliament in 2016 to regulate and promote transparency in the Real Estate sector of India. The Act provides a comprehensive framework aimed at protecting the interests of parties during Real Estate projects in order to bring accountability and transparency to the sector. Some of the key take-outs from the Act include;

- i. **Establishment of Regulatory Authorities:** The Act mandates the establishment of Real Estate Regulatory Authorities (RERAs) in each state of India to oversee and regulate the Real Estate sector. The regulatory authorities are responsible for enforcing the provisions of the Act, including the registration of projects, the resolution of disputes, and the imposition of penalties for non-compliance,
- ii. **Establishment of an Appellate Tribunal:** The Act establishes an appellate tribunal to hear appeals against orders passed by the regulatory authorities and decide whether to uphold or overturn them. The appellate tribunal is tasked with resolving disputes between buyers and developers by providing a fast and efficient mechanism for resolving disputes,
- iii. **Registration of Real Estate Projects:** The Act makes it mandatory for all Real Estate projects with an area of 500.0 SQM or more to register with the regulatory authority in the subsequent state. The registration process requires developers to provide detailed information about the project, such as the land title, project plan, layout, and completion timeline,
- iv. **Requirement of Trust Accounts:** The Act requires the promoter or developer to deposit 70.0% of the project funds in a separate account held on trust, which can only be used for project construction. The amounts can only be withdrawn after certification by the engineer, architect and chartered accountant in practice. In addition, promoters, developers and builders cannot ask for more than 10.0% of the property's cost as an advance payment before the sale agreement is signed,
- v. **Transparency in Project Advertisements:** To ensure that buyers are not misled by unlawful promoters, the Act mandates developers to sell their apartments depending on a standardized carpet area. According to the Act, carpet area is the total area of the floor that can be used within the walls of the apartment, excluding areas such as open terrace, shafts, and balconies. Promoters must disclose the carpet area, number of units, and facilities to be provided in the development,
- vi. **Standardization of Sale Agreements:** The requires developers to use standard sale agreements that protect the interests of homebuyers. The sale agreement must clearly state the timelines for completion of the project, the penalties for delays, and the amount of interest to be paid to homebuyers in case of default by the developer, and,
- vii. **Penalties for Non-Compliance:** The Act imposes penalties on developers who fail to comply with the regulations. Project promoters or developers that fail to comply with the Act are fined 5.0% of the project cost, while not complying with decisions of the appellate tribunal attracts a penalty of 10.0% of the project cost. In addition, repeated non-compliance can lead to imprisonment.

## B. Jamaica - Real Estate (Dealers and Developers) Act

The Real Estate (Dealers and Developers) Act is a landmark legislation in Jamaica that was first enacted in 1987 and subsequently amended in 1996 and 2010. The Act serves to regulate the activities of Real Estate dealers, salespeople and developers in Jamaica, with the aim of creating a level playing field for all stakeholders, thereby promoting the orderly growth of the Real Estate industry. The following are some of the key take-outs from the Real Estate (Dealers and Developers) Act in Jamaica:

- i. **Establishment of the Real Estate Board:** The Act mandates the creation of the Real Estate Board which oversees the following; i) administration of the provisions of the Act ii) registration of Real Estate dealers, salespeople and developers, iii) establishment of a code of ethics for industry participants, and, iv) enforcement of disciplinary actions against those who violate the code of ethics,
- ii. **Operational Licensing Requirements:** The Act requires all Real Estate dealers, salespeople and developers to be licensed by the Real Estate Board. The licensing process involves a thorough background check, including an assessment of the applicant's financial status, business practices, and qualifications. The license is valid for one year and must be renewed annually. This provision serves as a safeguard against unscrupulous individuals who may engage in fraudulent activities,
- iii. **Disclosure of Information:** During contracting, the Act requires Real Estate dealers, salespeople and developers to disclose certain information to buyers and lessees, such as the title of the property, any liens or encumbrances on the property, and any defects or deficiencies in the property. This information must be provided in writing and must be accurate and up-to-date. This provision helps to ensure that buyers and lessees are fully informed about the property they are purchasing or leasing,
- iv. **Code of Ethics and Standards of Practice:** The Act requires all licensed Real Estate dealers, salespeople and developers to abide by a code of ethics and standards of practice. The code of ethics provides guidelines for the professional conduct of Real Estate professionals, including honesty, fairness, and transparency. The standards of practice set out the procedures and practices that Real Estate professionals must follow in carrying out their duties,
- v. **Standards for Advertising and Marketing:** The Act contains strict regulations on the advertising and marketing of Real Estate properties. Real Estate dealers, salespeople and developers are required to ensure that their advertisements and marketing materials are truthful, accurate, and not misleading. They are also required to include certain specific information in their advertisements, such as the license number of the dealer or developer, and any relevant disclosures. This provision helps to prevent deceptive advertising practices,
- vi. **Requirement of Trust Accounts:** The Act requires Real Estate dealers, salespeople and developers to use trust accounts to hold deposits and other payments made by consumers. The trust accounts must be audited annually by a certified public accountant, and the results of the audit must be submitted to the Real Estate Board. This is intended to protect consumers in the event that a Real Estate dealer or developer goes bankrupt or fails to complete the development, and,
- vii. **Complaints, Dispute Resolution and Disciplinary Action:** The Act provides a mechanism for clients and other parties to lodge complaints against licensed Real Estate professionals. The Real Estate Board is authorized to investigate complaints and take disciplinary action against licensed Real Estate professionals who violate the provisions of the Act. Penalties may include fines, suspension or revocation of licenses, and imprisonment.

## C. Malaysia - Housing Development (Control and Licensing) Act

The Housing Development (Control and Licensing) Act was enacted in Malaysia in 1966 and has been amended several times to provide for the regulation of housing development and to make housing development a controlled activity. The Act aims to regulate the housing development

industry in Malaysia, protect the interests of homebuyers, and ensure the timely completion of housing projects. Some of the key take-outs from the provisions within the Act include;

- i. **Licensing of Housing Developers:** The Ministry of Housing and Local Government (KPKT) must issue an Advertisement Permit and Developer's license (APDL) to the housing developer to carry out development work and to advertise and sell properties and projects. The APDL ensures that developers adhere to regulations and do not mislead potential homebuyers with inaccurate information. This ensures that only credible and financially stable developers are allowed to operate in the market,
- ii. **Establishment of Developer Accounts:** The Act requires developers to set up a Housing Development Account (HDA) for each housing project. Developers channel payments received from buyers into their HDA account for safeguarding and to ensure that the funds are used solely for the purposes of developing the housing project,
- iii. **Establishment of a Housing Tribunal:** The Act provides for the establishment of a housing tribunal to hear disputes between house buyers and housing developers. The housing tribunal has the power to order the refund of deposits, the rectification of defects, and the payment of compensation to aggrieved parties,
- iv. **Requirement of Development Orders:** The Act requires all housing developers to obtain a development order from the relevant local authority before commencing any development project. The development order sets out the conditions and requirements for the project, including the type of development, the number of units, and the provision of infrastructure,
- v. **Standardization of Sale and Purchase Agreements:** The Act mandates the standardization of sale and purchase agreements (SPAs) for housing units. The standard SPA contains all the terms and conditions of the sale, including the purchase price, payment schedule, and the specifications and finishes of the unit. The standard SPA as required by the Act also provides for a 24-month defect liability period after the completion of the housing project,
- vi. **Maintenance and Management of Housing:** The Act requires all housing developers to establish a management corporation to manage and maintain the common areas and facilities of the development. The management corporation is responsible for collecting maintenance fees, carrying out repairs and maintenance, and ensuring the proper functioning of the development, and,
- vii. **Offences and Penalties for Non-Compliance:** The Act provides for a range of offences and penalties for housing developers who violate the provisions required. These include the failure to obtain a license, the non-compliance with the standard sale and purchase agreements formats, and the failure to complete the development on time. The penalties include fines, imprisonment, and the revocation of the developer's license.

## **Section V: Recommendations and Conclusion**

From the regulatory frameworks established in the Real Estate sectors of India, Jamaica, and Malaysia, we offer the following recommendations towards promoting development activities in Kenya's Real Estate sector and ensuring the growth and sustainability of the industry;

- i. **Formulation of an Act of Law Specific to Developers:** The government should fast track formulation an Act of law that specifically addresses the regulation of developers in Kenya's Real Estate sector. The regulatory framework should be comprehensive enough to oversee development activities and transactions among developers, buyers and other stakeholders. This regulatory framework would serve to protect the rights of all parties and promote transparency and fairness in the sector,
- ii. **Establishment of a Developers Regulatory Board:** In July 2020, a committee appointed by the Principal Secretary, State Department for Housing and Urban Development, recommended the **establishment** of a Real Estate Developers Regulatory Board. However, there has been no significant progress made regarding actualizing the proposal. Nevertheless, a dedicated Board

serving to monitor the activities of developers should be part of the regulatory framework, anchored in law,

- iii. **Championing Access to Affordable Financing:** To promote development activities in Kenya's Real Estate sector, developers need to access sustainable financing. This could be accomplished through; i) the development of a dedicated housing finance company for developers, ii) the regulatory Board advocating for bolstering tax incentives to developers, iii) partnerships by financial institutions to invest in the sector, iv) approved financing structures to access capital in both private and public markets, and, v) stakeholders calling for regulations that enable more financing options for developers,
- iv. **Mandatory Registration and Licensing of Developers:** India, Jamaica, and Malaysia have all made it mandatory for Real Estate developers to register with the appropriate regulatory bodies and obtain licenses to operate. This measure in the developer regulatory framework would ensure that only genuine and reliable developers are allowed to operate and helps to prevent fraudulent activities,
- v. **Establishment of a Developer Code of Conduct:** A code of conduct for Real Estate promoters, dealers and developers is necessary to ensure ethical practices in the industry. This code of conduct in the developer regulatory framework should outline expected standards of professional conduct and provide guidelines on what constitutes acceptable development practices in the Real Estate sector,
- vi. **Protection of Buyer Deposits:** The regulatory frameworks of India, Jamaica and Malaysia mandate that development escrow accounts are set up, audited and monitored in each project for the protection homebuyers' investments. Such a provision in the developer regulatory framework would ensure that all amounts contributed towards the project are safe and only released when the developer meets specific milestones,
- vii. **Formulation of Penalties for Non-Compliance:** A regulatory framework overseeing development activities should provide for penalties for non-compliance with the provisions of the law. This measure would ensure that developers comply with the law and maintain high ethical standards in the industry, failure to which they are heavily fined or barred from operating in the sector,
- viii. **Standardization of Contract Agreements:** Standard contract documents such as the sale and purchase agreements with clear and concise provisions would ensure transparency during transactions. This would allow streamlined delivery of requirements outlined in the regulatory framework, such as in Malaysia where developer obligations for the defect liability period are clearly outlined with no room for misinterpretation. Standard agreements may also reduce the time and cost involved in negotiating and preparing agreements for every transaction. However, there is need for a section to add project specific requirements,
- ix. **Establishment of an Investor Compensation Fund:** Developers would be required to contribute a percentage of sales proceeds into an investor compensation fund that would compensate investors for off-plan developments in the event for failure through fraud or negligence, and,
- x. **Provision for a Dispute Resolution Mechanism:** The establishment of a tribunal to hear complaints by parties, such as Malaysia's housing tribunal would be necessary to protect the rights of homebuyers, and also try to expeditiously resolve industry issues prior to heading to court. In addition, the regulatory framework should provide a mechanism for appeal by those not satisfied with the decisions made, such as the appellate Board in India.

In conclusion, the creation of a comprehensive developer regulatory framework, anchored in law, in Kenya's Real Estate sector is essential to ensure sustainable growth and development of the sector. The current legal framework does not provide a comprehensive regulatory basis for the registration and licensing of Real Estate developers in Kenya, leading to challenges in monitoring and regulating their activities effectively. Therefore, it is important to draw from the regulatory frameworks established in the Real Estate sectors of other countries, and formulate an Act specific to developers.

This should outline their roles and responsibilities, standards they must adhere to, and consequences of failure to adhere to these standards. The enactment should provide for a Developers Regulatory Board responsible for monitoring and regulating the activities of developers, ensuring adherence to building codes and standards, and imposing penalties on those who violate the regulations. Such a framework will ensure that developers are licensed and operate within the laid down laws, promote transparency and accountability, and ensure that Real Estate development contributes to the overall development goals of the country. With such a developer regulatory framework in place, the Real Estate sector in Kenya can realize its full potential, offering sustainable development projects that meet the targets of the Affordable Housing Programme (AHP) by the government, which will avail decent housing to all Kenyans.

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