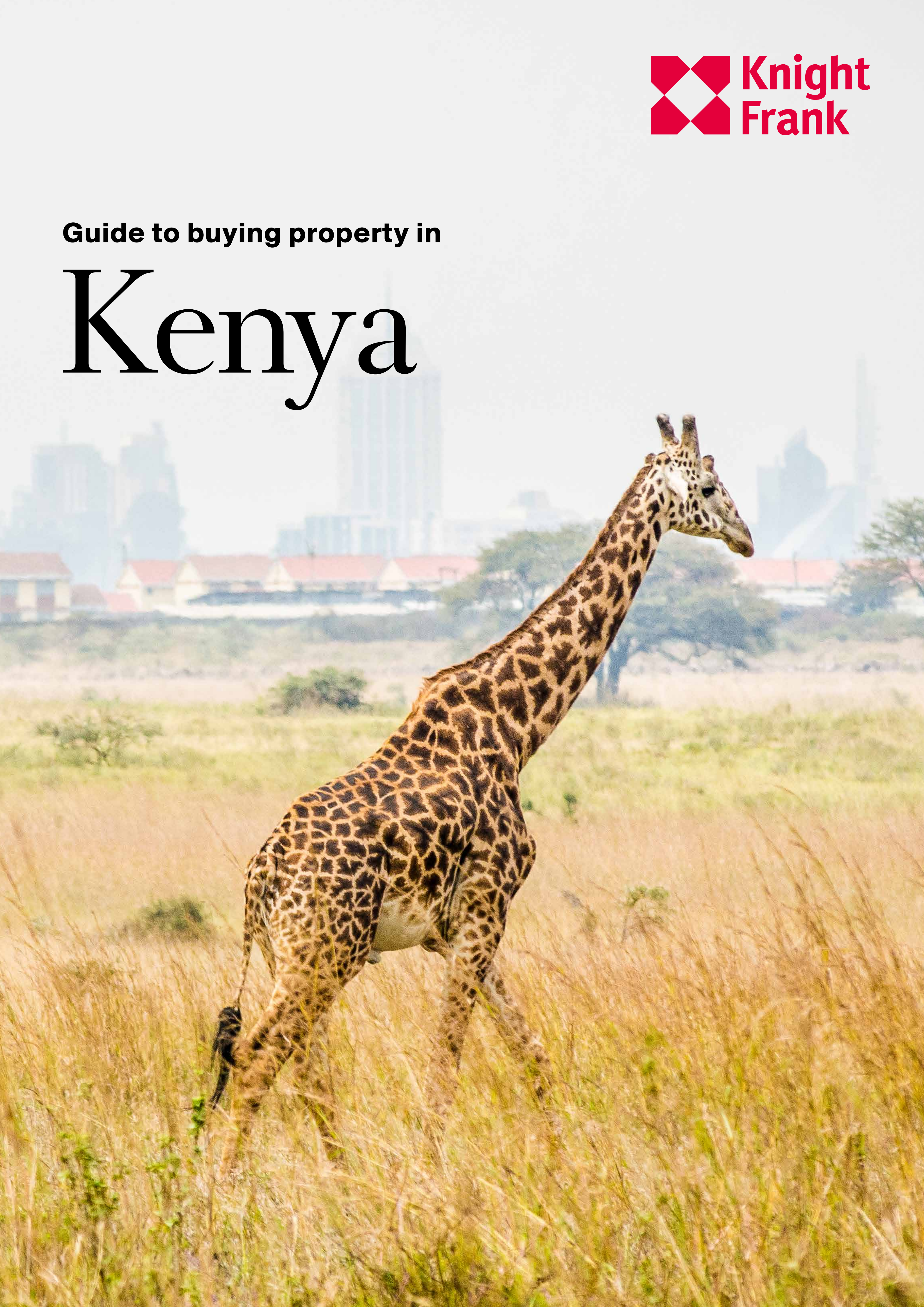
Guide to buying property in

Kenya



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THE PURCHASE OF REAL ESTATE IN KENYA

Buying property in Kenya should be relatively straight forward. However, there are pitfalls and we would always recommend that you instruct the services of a reputable agent and advocate in order to receive appropriate legal advice and representation throughout the sales process. It is imperative that the purchaser should avoid making any payment directly to the vendor or their agent(s). Such monies are better channeled through their advocates so that they can take the requisite precautions to protect those funds.

This document has been compiled as a guide for potential purchasers of property in Kenya. It does not seek to provide or replace the legal advice that the purchaser should obtain, nor is it intended to have any contractual effect.

REAL ESTATE AGENCY IN KENYA – THE LEGAL POSITION

Estate agency

Kenya, like most other countries in the world, has a code of practice and legal obligations for estate agents, buyers and sellers of property. The real estate industry in Kenya is governed by the Estate Agents Act Cap. 533 of the Laws of Kenya. The Act provides for the registration of persons who, by way of business, negotiate for or otherwise act in relation to the selling, purchasing or letting of land and buildings erected thereon; for the regulation and control of the professional conduct of such persons and their remunerations. Besides regulating real estate operations, it also protects members of the public from exploitation/fraud.

All estate agents operating in Kenya must be properly qualified and officially registered with the Estate Agents Registration Board which issues an annually renewable practising certificate. Estate agents are also required to have proper professional indemnity insurance cover in order to operate a real estate business.

The agent normally acts as an independent professional, whose role is to match a willing purchaser with a seller, but can only be remunerated by one party. The law restricts an agent to only receive commission from the appointing authority which can be either the vendor of the property or the buyer instructing the agent to acquire property for them.

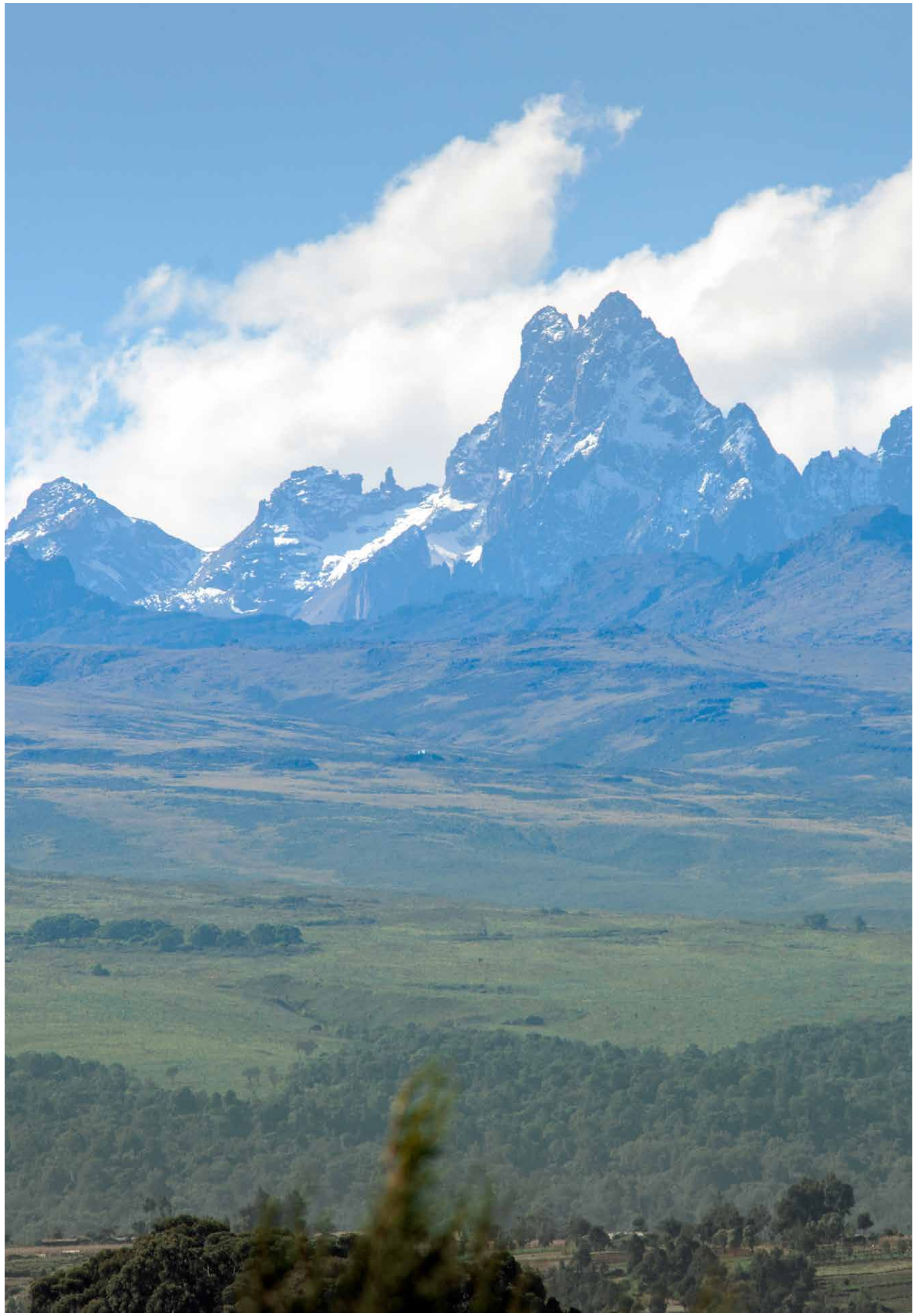
Agents are not under any obligation to carry out any due diligence on the property that they are promoting. Their obligation under the law is solely to inform the parties of relevant issues/problems that they are aware of and are material to the purchase of the property. It is therefore up to the purchasers to satisfy themselves through their professional advisors/advocates, of good title by securing up-to-date official title deeds and local authority searches, confirmation of beacons and acreage, planning permissions, building regulations, listed building consents, rights of way etc.

The law provides that agents must be paid the agreed service fee/commission if they successfully introduce a buyer to the seller or acquire a property for the buyer. The fees, together with any unpaid previously agreed expenses become due and payable to the agent on signing of the binding sale agreement, but the fee is normally paid upon confirmation of the sale completion or on a pro-rata basis for off-plan sales.

If the seller or buyer withdraws from the transaction once the sale agreement has been signed without providing any justifiable reason of what led them to rescind/terminate the deal, then the agent still remains entitled to a percentage of the agreed commission fee. The basis for this claim is centred on the fact that the agent will have performed their duty as per the agreed terms of contract between them and hence should not be penalised for the seller or buyer's default. Therefore, the agent reserves the right to waive this payment in exceptional unforeseen circumstances such as serious accident or an Act of God.

Types of land tenure in Kenya

The two main forms of property tenure are freehold and leasehold interest. For the purpose of evidence of ownership, the government issues buyers with a Certificate of Title for freehold and a Certificate of lease for leasehold titles as a primary evidence of property ownership.



Foreigners' purchasing regulations
Just like Kenyan citizens, foreigners are permitted to buy commercial and residential properties/land located within a town or municipality without any restrictions whatsoever, provided that they comply with the laid down procedures. The only restrictions are on owning agricultural land, freehold titles and first row beach plots along the Kenyan Coast.

Article 65 of the Kenyan Constitution limits foreigners to holding only leasehold titles for a maximum of 99 years but permits future renewals on condition that the subject property held under that title is economically active and it is not required for public use purposes. This therefore means that if a foreigner purchases a property held under a freehold title, it will revert to leasehold. The restriction also applies to companies that are not wholly owned by citizens or property held in trust whose beneficiary is not a citizen.

The Land Control Act Cap 302 of the Laws of Kenya regulates transactions on agricultural land. Foreigners or privately owned companies whose shareholders are not all Kenyan citizens are not permitted to buy/own agricultural land as stipulated in Section 9 (c). However, such transactions can be exempted by the President based on the provisions of Section 24. Such exemptions are normally done through a publication in the Kenya Gazette hence foreign investors wishing to acquire agricultural land may apply for such exemption.

PURCHASING PROCESS

The standard transaction period for the sale of property in Kenya has become 90 days effective from the date of signing the sale agreement – through to completion. Although, parties can mutually agree on any closure period that suits them.

The purchaser begins with identifying a suitable property for purchase. One needs to enlist the services of a reputable real estate agency/firm to assist them in identifying a suitable property. Then the buyer should endeavor to visit the site and satisfy themselves that it meets the desired criteria including its physical location and boundaries.

Once the property has been identified, the buyer makes a formal expression of interest/offer subject to contract detailing their offer price, terms of payment and advocate details. If the offer is accepted by the seller, then the agent prepares a Letter of Offer (LOO) confirming the salient details of the agreed transaction. This is then signed and acts to formally instruct the legal teams of both parties.

After an offer has been accepted, buyers should conduct due diligence on the property. In addition to conducting an official search on the title at the Lands offices, they also need to engage a licensed surveyor to ascertain that the land size and boundaries indicated on the deed plan match what is on the ground. All registered land is subject to certain overriding interests which may subsist without their being noted on the register. This may include but are not limited to; spousal rights over matrimonial property, trusts, rights of way, rights of water, etc. Due diligence will also need to be done in this regard. The documents ordinarily required from the buyer as part of the vendors due diligence would, amongst others, include copies of their Personal Identification Documents (ID/Passport copies) and PIN Certificate. In the event of a Company purchase, the Certificate of Incorporation and PIN Certificate would form part of the ID documents.

If the due diligence is successful, buyers then instruct their advocates to proceed to contract stage. The procedure may vary slightly depending on whether one is buying a completed property (ready for occupation), land or an off-plan property. In the former, after paying the deposit, the transaction is completed within a defined closure period, normally 90 days, from date of signing the sale agreement. In the latter, after paying the requisite deposit, buyers normally pay a percentage of the purchase price in equal instalments until the project is completed. Therefore, the main difference between buying the former and the latter is the payment terms.

Buyers are required to sign the Letter of Offer as a sign of assurance to transact. Some Letters of Offer demand that buyers pay a requisite down payment/deposit of at least 10% of the purchase price immediately on signing it. Other Letters of Offer simply seek to establish the buyer's commitment to the deal by way of a signed agreement regarding the basic terms of sale. In this case, the deposit is held by the seller's advocates as stakeholders pending completion of the transaction in accordance with the terms of the sale agreement. Alternatively, the buyer and seller can mutually agree to open a joint escrow account mandating both their advocates to oversee the purchase funds until completion of the sale.

Normally the turnaround period for signing the Letter of Offer is between 7 to 14 days from the date of issue. However, it is important to note that in Kenya, Letters of Offer are always subject to contract and not treated as a legally binding contract but rather a pact that in principle, both parties have accepted to deal at an agreed price. The transaction only becomes legally binding after signing the sale agreement. Therefore after signing the Letter of Offer, either party can withdraw from the deal without suffering a financial loss or being subjected to litigation.

After the Letter of Offer is signed, the buyer and seller proceed to instruct their respective advocates to engage on the transaction. Once the sale agreement is signed by both parties, the deal becomes legally binding and enforceable under the law of contract. Buyers will normally then forfeit a percentage, or all, of the deposit if they default or are refunded the said deposit if the seller is unable to complete the transaction. It is important that every instrument effecting a disposition in land is executed by each of the parties consenting to it. Execution under the relevant Kenyan law consists of the person appending his/her signature or affixing his/her thumbprint or other mark as evidence of personal acceptance of the instrument. Execution by a corporate body, association or any other organisation should be done in the presence of an Advocate of the High Court of Kenya, a magistrate, a judge or a notary public.

Execution of a sale agreement outside Kenya is permitted, however, the same should be endorsed on it or have attached to it a certificate in the prescribed form, completed by a judge, magistrate, notary public, commissioner for oaths if the instrument is executed in the Commonwealth or any other person or class of persons as the cabinet secretary for Lands may prescribe if executed in a foreign country outside the Commonwealth.

On the completion date, buyers are required to pay the full balance of the purchase price in exchange for the completion documents from the seller. Similarly, buyers opting for mortgage funding on the balance of purchase price, must provide an irrevocable undertaking/bank guarantee issued by their bank's advocate and further supported by an undertaking from their own advocate to the seller's advocate.

Once the buyer's advocates are in receipt of the completion documents, they make arrangements for the property to be assessed for stamp duty by a government Valuer and subsequently stamping of transfer documents. Thereafter, they proceed to lodge the property for registration in favour of the buyer. After the registration process, the seller's advocate is legally permitted to release the full proceeds of the sale to the seller. Consequently, the buyer is officially handed over possession of the property and becomes the new legal owner.

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a Transfer by the seller is taken by all courts as prima facie (at first appearance) evidence that the person named as the proprietor of the land is the absolute and indefeasible owner. It is also possible to purchase land in Kenya without being in the country. One can assign a lawyer to go through the whole process on the buyer's behalf through a power of attorney.

PROPERTY TRANSACTIONAL COSTS

Buyers will incur certain transactional costs when buying either residential or commercial property in Kenya.

BUYING RESIDENTIAL PROPERTY

Stamp Duty/Land Tax:
This levy is centered on the property value and the State relies on the amount returned by the Government Valuer or the purchase price agreed upon; whichever is higher.

- 4% for land/property within a municipality
- 2% for agricultural land or property outside a municipality
- 1% if a property is registered as a company and transfer is by way of shares rather than title

Legal fees: Each party pays for their own legal fees based on a percentage of the purchase price on a scale stipulated in the Advocates Remuneration Amendment Order, 2014. The only exception which appears to be a common practice, is where buyers are required to pay legal fees for both parties when buying an apartment. The argument for this is based on the fact that the seller's lawyer is the one who does registration for all the leases on behalf of the buyer.

Agency fees: The agent is paid by the party who instructs them; either by the seller who instructs the agent to market their property or the buyer who instructs the agent for a property acquisition. The fee is on a scale capped at a maximum of 3% of the property's value.

Registration and disbursement fees: Buyers are generally responsible for the cost of registration of titles in their name(s) together with other disbursement costs as may be advised by the seller's advocate.

BUYING COMMERCIAL PROPERTY

Stamp Duty/Land Tax:
- 4% of the purchase price
- 1% if a property is registered as a company and transfer is by way of shares rather than title

VAT: VAT is payable on the acquisition of trading commercial property. The current prevailing rate is 16% of the purchase price. This is in addition to paying the Stamp Duty.

Legal fees: Each party pays their own advocates. This is a percentage of the purchase price on a scale stipulated in the Advocates Remuneration Amendment Order, 2014.

Agency fees: The agent is paid by the party who instruct them; either by the seller who instructs the agent to market their property or the buyer who instructs the agent for a property acquisition. The fee is on a scale capped at a maximum of 3% of the property's value.

Registration and disbursement fees: Buyers are generally responsible for the cost of registration of titles in their name(s) together with other disbursement costs as may be advised by the seller's advocate.

KNIGHT FRANK COVERAGE IN KENYA

Our central offices are located at Lion Place, Waiyaki Way, in the Westlands district of Nairobi. We have a satellite office at The Hub Mall in the Karen suburb of Nairobi, as well as at City Mall in Nyali, within Mombasa County. The Mombasa satellite office covers the Kenyan coastline from south to north. Knight Frank Kenya lists properties in the high-end market sector in Nairobi and the coastal strip. We also list select properties in upcountry locations e.g. Naivasha, Nanyuki, Maasai Mara etc.

Within our global network we try to offer our clients the most comprehensive and dedicated service possible. Through our growing network of local and international offices, working alongside Knight Frank in London, we will endeavor to find you the right property. Once a suitable property has been identified and terms have been agreed with the local agent (thereby fulfilling the obligations of the agent according to Kenyan law) we will also offer to help with the following at no extra cost:

- Recommend suitable legal, survey, planning and tax advisory firms that can assist you with due diligence, general advice and assist you with completing the transaction. Please note that none of our agents are qualified to give you legal, survey, planning or tax advice, although they are happy to share with you their years of experience.
- Prepare a Letter of Intent to pass to the legal teams outlining the terms of the transaction and the professionals involved.

At all times during the purchase process, we are available to provide effective communication between the parties involved.

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ACKNOWLEDGEMENT

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