

22<sup>nd</sup> February 2023

The Clerk of the Senate  
The Senate  
Parliament Buildings  
Nairobi

**RE: FURTHER NOTES TO OUR PREVIOUS MEMORANDUM ON THE REAL ESTATE REGULATION BILL, 2023**

The Board wishes to bring to the attention of the committee, the following additional comments;

**1. Definition of an Estate Agent**

- a) The Estate Agents Act Cap 533 defines the practice of an estate agent under Sec 2(1) as follows:-

*The doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, of any of the following acts—*

- a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or*
- b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;*

*Section 2(2) Clarifies the definition of a practicing estate agent if such a person ..” or a partnership of which he is a member-*

- a) receives payment for acts done by way of practice as an estate agent by him, or by a partner of his, or by an employee of his or of his partnership or by a person acting on his behalf; or*
- b) holds himself or itself out as being prepared, in return for payment, to undertake the doing by such person of acts by way of practice as an estate agent.*  
*The payment excludes salary payment.*

This is totally different from the definition adopted in the Real Estate Regulatory Bill as follows;

- b) The Real Estate Regulation Bill defines the Real Estate Agent under Sec 2(b) as follow:-

*A person who sells, offers for sale or offers for rent a piece of land, building or any part of a building.*

**Comments**

1. Estate agency as a profession involves much more than just selling and letting of land and buildings ( brokerage).

2. It includes property management, facilities management, feasibility studies, negotiating terms of sale, mortgage, charge etc.
3. Does this imply that land dealing companies that sell land or offers for sale are estate agents?
4. The Estate Agents Act is clear that an estate agent is a person who sells on behalf of others for a fee in other words a practitioner.

We maintain that Real estate agency is a profession that goes beyond merely selling and letting of properties and should not be diluted.

## 2. Functions of the Board

- a) The Estate Agents Act Cap 533 Sec 4 gives the following functions of the board:-

*The Board shall be charged with the responsibility of registering estate agents and of ensuring that the competence and conduct of practising estate agents are of a standard sufficiently high to ensure the protection of the public, and for that purpose may exercise the powers conferred, and shall perform the duties imposed, upon the Board by the provisions of this Act.*

- b) The Real Estate Regulations Bill under Sec 5 (1) (a) gives the following functions of the board:

- a) *Advise the National and county governments on the regulation and development of the real estate sector;*
- b) *Regulate real estate agents and real estate projects;*
- c) *Register real estate agents and real estate projects;*
- d) *Licence real estate agents;*
- e) *Maintain a public database with information on real estate agents and real estate projects registered under this Act with such details as may be prescribed;*
- i) *Maintain a public database with information on real estate agents and real estate projects whose registration has been denied or revoked with such details as may be prescribed;*
- f) *Prescribe standard fees and charges to be levied by real estate agents and developers;*
- g) *Ensure developers, real estate agents and purchasers comply with this Act and the rules and regulations made under it;*
- i) *Ensure compliance of the orders or directions made in exercise of its powers under this Act; and*
- j) *Perform such other functions as may be necessary to carry out the provisions of this Act.*

## Comments

- We note that whereas the Bill is enacted to among other things regulate and register real estate agents, land companies and developers, Sec 5 (c) and (d) gives the board functions of only registering and regulating estate agents and estate projects. Land companies and developers have been left out.

Does it therefore assume that land companies and developers will automatically become estate agents upon enactment of this bill?

- Sec 5 (1) (g) gives the board the mandate to prescribe standard fees and charges to be levied by real estate agents and developers, it doesn't either list the charges or prescribe the proposed standard fees. On the other hand, the estate agent Act Cap 533 outlines the standard

fees thereof.

## **IF ENACTED THE BILL WILL ONLY BRING CHAOS TO THE ESTATE AGENCY PROFESSION**

- Under the new bill, it is not a function of the board to ensure the competence and conduct of practising estate agents are of a standard sufficiently high to ensure the protection of the public.

### **2. Conditions and qualifications for registration as an estate agent**

a) Sec 13 of the Real Estate Agents Act provides as follows:-

*Subject to this Act, a person who is a citizen of Kenya shall be entitled, on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register if he is—*

- A full member of the Institution of Surveyors of Kenya in the chapters of Valuation and Estate Management Surveyors, Building Surveyors and Land Management Surveyors; or*
- A corporate member of the Royal Institution of Chartered Surveyors (in the General Practice or Land Agency or Agriculture sections) and he is qualified to be or is a full member of the Institution of Surveyors of Kenya in the chapters of Valuation and Estate Management Surveyors, Building Surveyors and Land Management Surveyors;*
- The holder of a degree, diploma or licence from any university or college or school which is recognized for the time being by the Board; or*
- A person who—*
  - is the holder of a degree, diploma or licence of a university or college or school or a member of an institution the membership of which is recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training for practice as an estate agent; and*
  - has had, to the satisfaction of the Board, practical post-qualification experience in such practice of not less than two years of which not less than six months has been in Kenya; or*
- A person who is not qualified under paragraphs (a), (b), (c) or (d) but is of good character and satisfies the Board that he has not been convicted (whether in Kenya or elsewhere) of an offence involving fraud or dishonesty.*

b) Sec 25 of the Real Estate Regulations bill provides that:

- A person who wishes to be registered as a real estate agent under this Act shall apply to the Board in the prescribed form and upon payment of the prescribed fee.*
- A person qualifies for registration as a real estate agent if such person is—*
  - is a citizen of Kenya; and*
  - has a degree in real estate or equivalent from a university recognized in Kenya.*

### **Comments**

- Does it mean that one will not register as an estate agent unless he/she has a degree in real estate or equivalent from a university recognized in Kenya.

Many registered estate agents (about 500) do not have degree qualifications and will not qualify to practice as estate agents. What will happen to them and where will they go? What happens to the people they employ.

In contrast, The Estate Agents Registration Board has proposed the “Estate Agents Categorization Rules”, whose draft is currently with the Cabinet Secretary. The regulation when approved will allow players at different levels to register as estate agents. It will also provide for growth among the different categories with a basic entry point. This will open up the registration and regularization of many persons acting as brokers, caretakers, property agents, managers and marketers. We estimate the numbers will be in excess of 15,000 persons which will not only bring order to the industry but also serve the Kenya Kwanza Government’s strategy of creating jobs for the youth. Currently we have close to 3000 registered members.

- We note that the bill offers no proposal for qualification of developers. This is a major anomaly given that they are the major focus of the bill.

#### **4. Removal and reinstatement of a name on the register.**

- Whereas the Estate Agents Act Cap 533 has elaborate processes of removal and reinstatement of a member to the register, Sec 17 (3) of the Real Estate Regulation Bill does not give grounds for removal except if ordered by the board of directors.
- The process of reinstatement of a member to the register is missing from the Estate Agents Regulations bill. Does it therefore mean that a member can NEVER be reinstated after being removed from the register?

This again goes to demonstrate the narrowness of the Bill.

#### **5. Membership of the board**

a) Under the Estate Agents Act, membership of the board is as follows:-

*The Board shall consist of nine members appointed by the Minister as follows—*

- A chairman, who shall be a full member of any of the following chapters of the Institution of Surveyors of Kenya namely Valuation and Estate Management, Building Surveyors and Land Management;*
- Two public officers who are full members of any of the chapters of the Institution of Surveyors of Kenya referred to in paragraph (a);*
- Two persons who are full members of any of the chapters of the Institution Surveyors of Kenya referred to in paragraph (a) appointed by the Minister from the names of persons recommended by the institution who are in private practice;*
- Three persons appointed to represent the general public;*
- One person who shall be an advocate appointed to represent the legal profession nominated by the Attorney-General.*

b) Sec 6 of the Real Estate Regulation Bill proposes the following board:

- A Chairperson appointed by the Cabinet Secretary;*
- The Principal Secretary responsible for matters relating to land or a designated*

*representative;*

- (c) *The Principal Secretary responsible for matters relating to housing or a designated representative;*
- (d) *The Principal Secretary responsible for the National Treasury or a designated representative;*
- (e) *One man and one woman nominated by the Council of County Governors;*
- (f) *One person nominated by the association representing the largest number of purchasers of land in Kenya;*
- (g) *One person nominated by the association representing the largest number of developers in Kenya;*
- (h) *One person nominated by the association representing the largest number of real estate agents in Kenya; and*
- (i) *The Registrar appointed in accordance with section 15 who shall be an ex officio member of the Board.*

## **Comments**

- **HERE WE SEE A DELIBERATE EFFORT BY PROPONENTS OF THIS BILL TO WATER DOWN AND OBLITERATE THE PROFESSION OF ESTATE AGENCY AS WE KNOW IT TODAY.**

It is clear that the proponents of the bill do not respect professionalism. A profession cannot be regulated by laymen. All professional regulatory boards worldwide are regulated by professionals. Just to demonstrate this, the following is the composition of the BORAQ's that a 100% comprises of registered architects and quantity surveyors and Kenya Medical and Practitioner's Board and the Dentists Council that is represented by medical practitioners except for an accountant and a representative of human rights;

"a chairperson who shall be appointed by the President and who shall — (i) be a specialist medical or dental practitioner of good standing; and (ii) have at least ten years' experience, five of which shall be in a managerial position; (b) the Director General for Health or a designated representative; (c) four persons appointed by the Cabinet Secretary, nominated as follows— (i) one person who shall be a representative of universities in Kenya which have the power to grant a qualification which is registerable under this Act; (ii) one person who shall be a representative of the Kenya Medical Association; (iii) one person who shall be a representative of Kenya Dental Association; and (iv) one person who shall be a representative of oral health practitioners; (d) three persons appointed by the Cabinet Secretary, as follows— (i) one person who shall be nominated by Kenya National Commission on Human Rights; (ii) one person who shall be a representative of the private sector in health; and (iii) one person with knowledge and expertise in finance or audit;"

It seems that some stakeholders in the property industry (suspected to be land dealing companies) want to force recognition and relevance at the expense of the profession and should not be allowed to happen. Their intention is not to improve the situation but to muddle the affairs of professionals for personal and selfish gain in a poor attempt to legalize their activities, some of them quite illegal.

In our opinion representation under Sec 6 (f), (g) and (h) is vague and prone to abuse. It is also our opinion that getting a Board that fully represents estate agents and developers is difficult because of different interests i.e. difference between professionalism and the business of investing in real estate.

## **5. Real Estate Professionals – Training and Practice**

Several local universities are offering Degree in Real Estate, previously known as B.A. Land Economics. In total, the universities produce over 300 graduates every year in real estate. Some of the Universities are also offering post graduate studies in the area. Some of the universities offering the courses are University of Nairobi, Technical University of Kenya, Kenyatta University, Jomo Kenyatta University of Agriculture and Technology and Mount Kenya University. The areas of coverage include land economics, property and agency laws, land administration, real estate agency, property and facilities management, real estate financing, building construction and building systems, asset management, branding and marketing, land registration processes and land management, building technology, planning- urban and rural, infrastructure development among others.

These graduates are employed by private sector as property managers, facility managers, property valuers among others. The government and other government agencies like National Housing Corporation and NSSF employs the graduates in their land management departments, estates departments and valuation. The EARB is currently working on developing a curriculum and an accreditation regulations that will help to standardize training in real estate. It will also help in rolling out the training in the TVETs targeting young people for certificate and diploma courses. This will help to train the personnel required to among others manage our real estate more so in the Affordable Housing program.

We would urge this committee to help in the growth and the development of the real estate profession by rejecting the real Estate Regulation Bill and retaining the Estate Agents Act Cap. 533 when it comes to regulation of the professionals.

## **6. Code of Code of Conduct**

Professionals are guided by professional ethics, investors are guided by business and financial principals. It is unclear how the proposed bill will reign on professionals and the investors in terms of conduct. Section 24 (1) provides consequences of conviction for professional misconduct for real estate agents and developers. We envision difficulties in developing a uniform code of conduct for the two given their diverse interests.

## **7. Regulation of Land Buying Companies And Investors In Built Environment**

The Real Estate Regulations bill 2023, seeks to among others register and regulate land companies and developers. We have several legislations in the real estate sector that tends to regulate mainly the construction industry e.g. the NCA, NEMA, the Building Code, The Physical planning Act, The Sectional Properties Act, The Survey Act, the County Government Act in matters of development control etc. The only area that does not seem regulated is trading or selling uncompleted developments popularly known as off plan. These includes sale of land/plots on scheme plans before the finalization of planning, subdivision and issuance of titles. This has created a lacuna where “developers” collect money from purchasers to finance the projects and then sell back to them at a profit. It has also created a situation where unscrupulous entities and individuals companies that have been posing as land dealing companies only to disappear with the buyers’ money. These are illegal, criminal activities that are tantamount to fraud and outright theft and should be treated as such. Nobody should be allowed to sell a property that they do not own and fully possessed or developed. Trading with

buyers' money for profit should be outlawed. Allowing them to access 75% of the purchasers' deposits to finalize private projects is tantamount to legalizing their illegal activities.

While we agree that there should be regulations to deal with genuine investors, members should not be misled to perpetuate illegality. The Committee could also explore the possibility of imposing safeguards by improving already existing legislation to deter criminal activities.

### **Conclusion**

The Estate Agents Act Cap 533 of the Laws of Kenya is far more superior to and thorough compared to the proposed Real Estate Regulations Bill 2023 in so far as registration and regulation of estate agents is concerned.

The role played by professionals in real estate should be respected, enhanced and protected. The Estate Agents Act should be retained as is and allow the Ministry to finalize the process of review.

The proposed Estate Agents Regulations Bill 2023 seems to be designed to serve the interests of a small clique of businesses people dealing with off plan sales and should therefore not be allowed to interfere with the professionals registered under the Estate Agents Act Cap 533 of the laws of Kenya, currently close to 3000 members.

There may be no need to introduce another law. The safeguards required can be incorporated in existing legislation. At the bare minimum, the regulation of practitioners in real estate should not be confused with regulation for entities or persons involved in the business of developing land for profit and in the event that there is need to regulate them, this should be by a separate legislation or enhancement of existing legislations.

**EUNICE MACHARIA**

CHAIRPERSON

ESTATE AGENTS REGISTRATION BOARD