

Buying a charged property?

Here is what you should know.



Introduction



In Kenya's real estate transactions, the presence of a charge on land does not bar its sale. As long as ownership can be established through proper due diligence, a property whether charged or not, remains a transferrable interest. A registered charge simply reflects a lender's interest, not a legal prohibition on sale.

It is not uncommon for buyers to hesitate when they learn that the property they intend to purchase is charged. The assumption is often that the process will stall, become entangled in bank bureaucracy, or ultimately fall through. But this need not be the case. If anything, the existence of a charge is a reminder that the asset has value and goot tile, enough to have been considered good security for a loan.

What truly matters in such a transaction is how the interests of all parties are balanced and executed:

- That the chargee is paid and consents to the discharge of their interest;
- That the buyer receives a clean title, free from encumbrances;
- And that the seller, having redeemed their debt, lawfully parts with their interest and receives the net proceeds.

With proper coordination, a sale of charged property can proceed without unnecessary friction. The law provides the framework; what is required is procedural clarity, stakeholder cooperation, and prudent timing.

So how, exactly, does one go about it?



The sale of a charged property is not an act of legal quagmire. It is explicitly contemplated and structured by the law. The Land Act, No. 6 of 2012, provides a clear legal framework within which such transactions occur, affirming that a charge does not suspend the rights of ownership, nor does it preclude the landowner from entering into a transfer agreement. The relationship between seller, buyer, and chargee is governed by key statutory provisions.

- **Section 47: Implied Undertaking to Pay the Secured Interest**

It states that *“In every transfer of land or a lease subject to a charge, there shall be an implied agreement by the transferee with the transferor to pay the interest, where applicable, secured by the charge.”*

This provision acknowledges the legal possibility of transferring charged land. It implies that if a buyer agrees to take land that is subject to a charge, the law presumes an undertaking by that buyer to deal with the secured obligation — unless otherwise discharged at completion. While, in practice, most buyers prefer to take land free of encumbrances, the law allows flexibility where parties agree, and lenders consent, to the assumption of such obligations.



- **Section 80: The Nature of a Charge**

It states that *“Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the chargor to the chargee...”*

This provision establishes a fundamental principle of modern land law in Kenya: a charge does not transfer ownership unlike in mortgages as was before. The chargor (landowner) retains legal and equitable ownership, while the chargee (lender) merely holds a security interest. This confirms that the chargor retains the right to sell, lease, or otherwise deal with the land, subject only to the overriding interest of the chargee.

• Section 85: The Right to Discharge

It states that *"The chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold..."*

This is a critical provision. It provides that as long as the chargor has not defaulted to the point of forced sale, they may discharge the charge at any point by paying off the secured sums and complying with the charge terms. This is the usual route taken in a private sale. The buyer, through their advocate, settles the seller's loan obligations either directly or through a stakeholder mechanism. The charge is then discharged, and the title is freed for transfer.

In effect, the law supports a transactional structure in which:

- The seller redeems the charge using proceeds from the sale,
- The bank discharges its interest,
- And the buyer receives a clean title — all within a lawful, coordinated process.

While the Land Act permits the sale of charged property, the mode of execution will depend on how the parties agree to manage the existing charge. In practice, two main procedures arise:

1. Sale Where the Buyer Assumes the Charge Obligations

This arrangement involves the transfer of the property to the buyer while retaining the existing charge, with the buyer stepping into the shoes of the seller (chargor) and assuming the repayment obligations under the charge. It is less common in residential or small-scale commercial transactions, but not unusual where the buyer is acquiring income-generating or strategic property and is agreeable to taking on the debt.

Legal and Practical Mechanics:

- The buyer and seller execute a sale agreement, clearly stating that the buyer will take subject to the charge.
- The chargee (lender) must consent to the arrangement. This is critical, as no buyer can lawfully assume liability without the lender's approval.
- The lender may require the buyer to meet creditworthiness standards; enter into a novation agreement or a deed of assumption, releasing the seller from personal liability; or a restructuring of the facility under the buyer's name.

Upon execution:

- The buyer is substituted as chargor; The property is transferred into the buyer's name subject to the existing charge, which is not discharged.

Key Considerations:

Section 47 of the Land Act supports this structure by implying that the buyer undertakes to pay the charge unless otherwise agreed.

- The buyer takes on both the title and the liability.
- The seller walks away with whatever payment is agreed upon after adjusting for the debt.
- The transaction may be financially efficient but requires lender cooperation.

2. Sale Where Part of the Purchase Price is Used to Redeem the Property

This is the more common method where the buyer insists on obtaining a clean title free of encumbrances.

Legal and Practical Mechanics:

- The buyer and seller enter into a Sale Agreement.
- The seller applies to the lender for a redemption statement showing the exact amount needed to discharge the loan and obtain a release of the title.

- The parties may proceed in two ways:
 - The buyer pays the redemption amount directly to the lender (either in trust or by stakeholder advocate).
 - Alternatively, the full purchase price is paid to the seller's advocate as a stakeholder, who then disburses the redemption sum to the lender.
- Upon payment, the lender:
 - Executes a Discharge of Charge;
 - Releases the original title and any necessary completion documents.
- The property is then transferred to the buyer, free of the charge.

Key Considerations:

- Section 85 of the Land Act empowers the seller (chargor) to discharge the charge at any time before a statutory sale, provided all amounts and obligations are settled.
- The buyer never becomes liable for the loan — they simply assist in clearing the debt as part of the purchase.

