

**A CRITIQUE OF THE REGULATORY FRAMEWORK FOR ESTATE  
AGENTS BUSINESS IN KENYA**

**BY**

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FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL. M) OF THE  
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**DECLARATION**

**I, JOHN KARIUKI NJUGUNA**

Do hereby declare that this is my original work and has not been submitted and is not currently being submitted for any award in any other University and all the sources of information used have been duly acknowledged.



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**JOHN KARIUKI NJUGUNA**

This paper has been submitted for examination with my approval as University supervisor.



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**DR KARIUKI MUIGUA**

DATED THIS 18<sup>th</sup> OF October 2018

**UNIVERSITY OF NAIROBI**



## TABLE OF CONTENTS

### **Chapter One-Introduction to the Study**

1.1 Background.....	2
1.2 Statement of the Problem .....	4
1.3 Research Questions.....	5
1.4 Research Objectives.....	6
1.5 Hypothesis .....	6
1.6 Literature Review.....	6
1.7 Theoretical Framework .....	13
1.7.1The Agency Theory.....	14
1.7.2The Regulatory Theory .....	15
1.8 Research Methodology.....	15
1.9 Limitation of the Study .....	15
1.10 Justification of the Study .....	16
1.11 Chapter Breakdown.....	16
1.11.1 Chapter One .....	16
1.11.3 Chapter Three.....	17
1.11.4 Chapter Four .....	17

### **Chapter Two-Regulatory Framework Governing Estate Agency Business in Kenya**

2.1 Introduction .....	18
2.3 The Legislative Framework.....	21

2.4 The Institutional Framework .....	22
2.5 Effectiveness of the Regulatory Regime Governing Estate Agency Business in Kenya..	25
2.6 Challenges in the Regulation of Estate Agency Business in Kenya.....	30

**Chapter Three- Regulatory Framework Governing Estate agency Business in United Kingdom and South Africa**

3.1 Introduction .....	37
3.2.1 The Legislative Framework.....	38
3.2.2 The Estate Agents Act, 1979 .....	39
3.2.7. The Consumer Protection from Unfair Trading Regulations, 2008.....	42
3.2.8. The Consumers, Estate Agents and Redress Act, 2007 (CEARA, 2007) .....	43
3.3 The Institutional Framework .....	44
3.4.1 The Legislative Framework.....	49
3.5 The Institutional Framework. ....	53
3.6 Comparison of the Legislative and Institutional Framework Governing Estate Agency Business in the United Kingdom and South Africa with Kenya.....	54

**Chapter Four- Conclusion and Recommendations**

4.1 Conclusion.....	59
4.2 Recommendations.....	61
4. 2.1 Short term proposals.....	61
4.2.2. Long term proposals;.....	64

## **DEDICATION**

To all those who work hard to see a better Kenya.

## **ACKNOWLEDGMENT**

Glory and Honour to the Almighty God for the strength and patience. Special thanks to my supervisor Dr Kariuki Muigua for the patience and all the words of encouragement.

## ABBREVIATIONS AND ACRONYMS.

ARELLO	Association of Real Estate License Law Officials
CEARA	Consumers, Estate Agents and Redress Act
CPRs	Consumer Protection from Unfair Trading Regulations
EAAB	Estate Agents Affairs Board
EARB	Estate Agents Regulatory Board
EU	European Union
GLA	Government Lands Act
LCA	Land Control Act
ITPA	India Transfer of Property Act
ISCO	International Standard Classification of Occupation
ODPP	Office of the Director of Public Prosecution
RLA	Registered Land ACT
RTA	Registration of Properties Act
SA	South Africa
UK	United Kingdom

## CHAPTER ONE

### 1.0 INTRODUCTION TO THE STUDY

#### 1.1 Background

English real estate law (or Estate Law' as it was known back then) was imported, through colonization, into the earlier forms of laws in the United States, Canada, Australia and New Zealand. Many of these States, or their territories, have since modified this historical law to varying degrees.<sup>1</sup> The concept of developing an informal association of local real estate agents originated in the United States in the 1980s, and by the turn of the century about 15 Real Estate Boards had been established. Organized Real Estate in Canada on the other hand began as early as 1888 in the growing community of Vancouver.<sup>2</sup>

According to the International Standard Classification of Occupations (ISCO)<sup>3</sup>, real estate agents and property managers arrange the sale, purchase, rental and lease of real property, usually on behalf of clients and on a commission basis. Tasks obtained by real estate professionals usually include obtaining information about properties to be sold or leased, the circumstances of their owner and the needs of prospective buyers or tenants, showing properties to be sold or leased to prospective buyers or tenants, and explaining terms of sale or conditions of rent or lease, facilitating negotiations with tenants and owners on rents and fees, drawing up leasing and sale agreements and estimating costs, arranging signing of lease agreements and transfer or property rights, collecting rent and bond monies on behalf of owners

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<sup>1</sup> Lawrence Koech, 'The Effect of Real Estate Development on the Growth of Estate Agents in Nakuru Municipality' (Master's degree in Business Administration Research Project, Kenyatta University, 2013). Pg 1

<sup>2</sup> *ibid.* p. 2.

<sup>3</sup> International Standard Classification of Occupations: ISCO-08 International Labour Office Geneva: ILO 2012

and inspecting properties before, during and after tenancies, ensuring the availability of workers to perform maintenance of the properties.<sup>4</sup>

The process of looking for a house can be tedious, tasking and frustrating especially if one is dealing with a quack. The real estate industry in Kenya has for many years been infested by people masquerading as professional registered estate agents and these are cankerworms that feed on the flesh of this country's currently blooming real estate industry and spoil the name and goodwill that the professional agents sweat to rightfully enjoy.<sup>5</sup> Factors responsible for incursion into real estate agency in Kenya include the following; property boom; shortages of qualified personnel; belief that registered agents are expensive; lack of strict supervision by Kenya's Estate Agents Registration Board; and inefficiency on the part of professional property agents.<sup>6</sup>

The regulation of estate agents is not a fairly recent concept in Kenya. According to Dr. Fred Matiangi, the then acting Cabinet Secretary in the Ministry of Land, Housing and Urban Development, once asserted thus:

'There has been a lot of self-regulation among estate agents, and it is time order and sanity were established to reduce fraud.'<sup>7</sup>

Professionals in the property sector insist that more than half of the real estate agents in the country are trading illegally, as they are not adequately trained, thus lowering the standards.<sup>8</sup>

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<sup>4</sup> European Union, 'Mutual Evaluation of Regulated Professions: Overview of the Regulatory Framework in the Real Estate Sector' Report Based on Information Transmitted by Member States and on the Meeting of 6 June, 2014, <<http://ec.europa.eu/DocsRoom/documents/15486/attachments/1/translation/en/renditions/native>> assessed 4 February 2017

<sup>5</sup> Realestate.Org, 'Non-Professionals in the Real Estate Industry in Kenya' <<http://www.realestate.co.ke/non-professionals-in-the-real-estate-industry-in-kenya/>> accessed 4 March 2017.

<sup>6</sup> *ibid.* para. 6.

<sup>7</sup> Milly Wambui, 'Rogue Agents put on Notice' <<http://www.kenyahomeguide.com/1310/rogue-property-agents-to-be-kicked-out-of-kenya/>> accessed 24 February 2017.

<sup>8</sup> Njoki Chege, 'Quacks Invasion into Real Estate' Standard Newspaper (17<sup>th</sup> May 2012), <<http://www.standardmedia.co.ke/business/article/2000058308/quacks-invasion-into-real-estate>> accessed 6 March 2017.



They further argue that the Estate Agents Act of Kenya clearly stipulates who should practice estate agency, but the misfortune lies in the fact that this Act is not followed to the letter, making the industry porous and open to quacks who have introduced several malpractices into the industry.<sup>9</sup>

From the limited literature and reports, it is evident that the real estate sector in Kenya suffers immense inadequacies in terms of regulation. The real estate sector continues to grow with increasing populations. The demand for real estate agents continues to soar and hence the market continues to expand. With the increased numbers, regulation of the sector has become impeded and thereby leaving the real estate sector and agency business prone to quacks and conmen operating the business.

It is against this background that this study examines the regulatory regime governing real estate agents and the real estate agency business in Kenya, critically analysing the efficiency or otherwise of the said laws and whether there is need for reforms.

## **1.2 Statement of the Problem**

The growth of the real estate industry has been one of the key players in economic growth in the country.<sup>10</sup> Some of the key players in the industry are the estate agents. They provide a link between sellers and buyers, landlord and tenants and other crucial services related to the real estate business. A lot of people rely on them for important information on properties whenever they wish to invest in real estate. It is because of the special place they occupy in the real estate business that informs the need to regulate them.

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<sup>9</sup> *ibid*

<sup>10</sup> Samuel Ngumo Kingori, *The Effect of Real Estate Development on Economic Growth in Kenya* (Master's degree in Business Administration Research Project, University of Nairobi, 2017)



The object of regulating activities of estate agents is to ensure and promote integrity, honesty, transparency and professionalism in the real estate industry and to regulate the activities of real estate agents and thereby protecting clients' interests. In Kenya the task of regulating estate agents is vested on the Estate Agents Regulatory Board (EARB).<sup>11</sup> However, the EARB seems to be having challenges in effectively regulating the industry. The growth of real estate business has seen an increase in the number of real estate agents and business in Kenya which has rendered the existing regulatory regime ineffective in the regulation of the sector. This has called for an urgent need for a review of the existing regulatory and institutional framework for better and efficient regulation. This study therefore critically examines the regulatory framework governing the real estate agency business in Kenya with a view to establishing the shortcomings that exist.

### **1.3 Research Questions**

This study addresses the following questions:

- 1) What is the present institutional and legislative framework regulating real estate agents and business in Kenya and is it efficient in regulating the sector?
- 2) Are there best practices in other jurisdictions in terms of the institutional and legislative framework regulating real estate agents and business that can be a model for emulation by the Kenyan Government?
- 3) What are some of the reforms that if adopted would improve the institutional and legislative framework regulating real estate agents and business in Kenya?

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<sup>11</sup> Estate Agents Act, section 4

#### **1.4 Research Objectives**

The primary objective of this study is to examine and evaluate the effectiveness of the regulatory regime governing real estate agents and business in Kenya. Other specific objectives of the study include:

- 1) To examine the present institutional and legislative framework regulating real estate agents and business in Kenya and its efficiency in regulating the sector.
- 2) To investigate whether there are best practices in other jurisdictions in terms of the institutional and legislative framework regulating real estate agents and business that can be a model for emulation by the Kenyan Government.
- 3) To make proposals for reforms that if adopted would improve the institutional and legislative framework regulating real estate agents and business in Kenya.

#### **1.5 Hypothesis**

The study is hinged on one key hypothesis namely that;

- 1) The current regulatory regime governing real estate agents and business is inadequate and there is need for reforms in order to improve the same.

#### **1.6 Literature Review**

Limited literature exists in regard to real estate agents in Kenya but much has been written in regard to real estate agents and business in general.

Oakley in his analysis of the law of real property observes that in early law, property was deemed 'real' if the Courts would restore to a disposed owner the thing itself, the 'res' and not merely give compensation for the loss. Accordingly, that a distinction was consequently made between real property, which could be specifically recovered, and personal property which was

not thus recoverable. In the author's view, the classification of property as realty or personality might have been expected to be that of nature between immoveable and moveable property, in other words, between land and chattels.<sup>12</sup> The author defines an estate as an interest in land of defined duration and he notes that there are two types of estates namely; freehold and estates less than freehold.<sup>13</sup> The author examines the concept of land law and estates while tracing the origins of land law regulation.<sup>14</sup> The author's analysis is important to this study as it expounds on the concept of land and real estate. The author does not however give an analysis on the regulation of estate agency as this study does.

According to Charles et al, although limiting their analysis to a discussion of land law in the United Kingdom, they give an important analysis on real property law. In their view, although the content of the law of real property is increasingly statutory, it is, however, in no sense a statutory code.<sup>15</sup> The authors contend that it is still essential to have an understanding of the substratum of common law and equitable principles upon which the statutory framework has been overlaid, together with some grasp of the way in which the subject has developed historically.<sup>16</sup> From the authors' perspective, whatever the tenure, the land might be held for different periods of time. It might be granted for life (for so long as the tenant lived), in tail (for so long as the tenant or any of his descendants lived), or in fee simple (for so long as the tenant or any of his heirs, whether descendants or not, were alive). Each of these interests, the authors contend, was known as an estate, a word derived from status.<sup>17</sup> The authors further observe that there are two fundamental doctrines in the law of real property namely; doctrine of tenures: all

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<sup>12</sup> A.K Oakley, *A Manual of the Law of Real Property*, 8<sup>th</sup> edn., (Sweet and Maxwell Ltd, London, 2002) 17.

<sup>13</sup> *ibid.* p. 31.

<sup>14</sup> *Ibid.* p. 73.

<sup>15</sup> Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property*, 8<sup>th</sup> edn., (Sweet and Maxwell Ltd, London, 2012)1.

<sup>16</sup> *ibid.* p. 2.

<sup>17</sup> *ibid.* p.23.

land is held of the Crown, either directly or indirectly, in one or other of the various tenures; and the doctrine of estates: land held in tenure is also held for an estate that is to say, for some period of time.<sup>18</sup> The authors however do not examine the legislative and institutional framework governing estate agents and agency business.

In his analysis of theories of property, Stephen opines that the idea of property involves a constellation of elements, collectives, and opposites, a specification of standard incidents of ownership and other related but less powerful interests; and a catalogue of things (tangible and intangible) that are the subjects of these incidents. He also contends that property also includes less powerful collections of incidents that do not rise to the level of ownership for example, an easement of which involves primarily a claim-right and a privilege to use the land of another and secondarily a power to compel enforcement of that claim-right and privilege.<sup>19</sup> The author gives a broad analysis of the concept of property and points out that the idea of property rights is narrower than that of property and that easements, bailments, franchises, and some licenses involve limited property rights.<sup>20</sup> The author's insights are quite relevant to the present study as they broaden the understanding of the concept of property and the underlying principles and theories. The author's discussion does not however examine estate agency business.

Calvin in his analysis of property law in general, underscores the role of brokers and estate agents. He opines that brokers are ubiquitous. According to him, very few transfers of houses occur without the involvement of one or more brokers, and many transfers of commercial real estate involve a broker.<sup>21</sup> Accordingly, that in the typical arrangement, a seller hires a broker (the listing agent) to sell the property on terms and for a commission specified in the listing

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<sup>18</sup> *ibid.* p. 24.

<sup>19</sup> Stephen R. Munzer, *A Theory of Property*, (Cambridge University Press, Cambridge, 1990) 23.

<sup>20</sup> *ibid.* p. 24.

<sup>21</sup> Calvin Massey, *Property: Keyed to Dukeminier/Krier*, 9<sup>th</sup> edn., (ASPEN Publishers, New York 2002) 150



agreement.<sup>22</sup> Furthermore, that brokers' commission is earned, in most States, when the broker has produced a buyer ready, willing and able to purchase on the terms of the listing agreement or other terms agreeable to the seller.<sup>23</sup> The author's insights underscore some of the roles played by estate agents some of which are a subject of discussion in the present paper. The author does not however offer a comparative analysis of the various regulatory regimes governing the estate agency business as this study does.

According to Abayomi et al, although limiting their analysis to the regulation of real estate agency practice in Malaysia, their views are quite insightful to this study. They trace the origins of real estate agency business. They note that the real estate agency was introduced by the British during the colonial era, although before then, there were middlemen in land transactions.<sup>24</sup> Accordingly, that estate agency grew from the old auctioneers who were chattlemen attracted by the exciting prospects of selling large estates.<sup>25</sup> To the authors, these auctioneers were mainly lawyers who had easy access to the available properties in the market and kept the list of estates sale and prospective purchasers.<sup>26</sup> In addition, that these real estate practices became visibly lucrative during England's industrial Revolution of the nineteenth century.<sup>27</sup> Additionally, new lands were explored and built upon or bought and developed and the property market widened and grew exponentially. Notwithstanding, more self-styled estate agents also emerged, and over time, the real estate business became marred by incompetence and wholesome behaviours.<sup>28</sup> The authors allude to the challenges that emerged then, which are similar to the current challenges in the real estate agency business. They opine that due to

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<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

<sup>24</sup> Abayomi Ibiyemi, Olayinka Ogungbemi and Rotimi Awodiran, 'Regulation of Real Estate Agency Practice in Malaysia: An Investigation for Nigeria' (2014), 1 (10), *International Journal of Humanities Social Sciences and Education*, 65.

<sup>25</sup> *ibid*

<sup>26</sup> *ibid*

<sup>27</sup> *ibid*.

<sup>28</sup> *Ibid*.

lack of control over the self-styled estate agents, there were many victims of obtaining and fraud.<sup>29</sup> The authors' arguments highlight on the current underlying challenge that forms the gist of the present paper namely; the question of regulation of estate agents and the various malpractices in the sector. In as much as the authors do not examine the various regulatory regimes in regard to the estate agency business in Kenya, their discussion builds up on the historical foundation of estate agency business and highlights on the regulation in Nigeria and Malaysia, which may offer lessons for emulation by the Kenyan Government.

On their part, Patrick and Stephen opine that increasingly, there is a pressing need for effective regulation of residential real estate brokerage services and that consumer spending on, distrust for, and complaints about these services is significant and growing.<sup>30</sup> Moreover, required disclosures to home buyers and sellers are not being enforced and traditional brokers are restricting service options and prices offered by non-traditional brokers.<sup>31</sup> In their view, there is growing need for effective, independent regulation of residential real estate brokerage services, for many reasons, first, there are an increasing number of licensed real estate, second, a large number of consumers utilize these services and pay substantial commissions, third, consumers trust the advice of real estate brokers much less than that of most other service professionals.<sup>32</sup> The authors' analysis is however only limited to a discussion of the regulatory environment of real estate brokers in the United States and it does not offer a comparative analysis of the same with other jurisdictions. The authors' work however highlights on the practice in the United States which offers an important example of a jurisdiction that the Kenyan Government can borrow from.

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<sup>29</sup> *ibid.*

<sup>30</sup> Patrick Woodland and Stephen Brobeck, 'State Real Estate Regulation: Industry Dominance and its Consumer Costs' (2006), Consumer Federation of America Paper, <[http://www.consumerfed.org/pdfs/CFA\\_Real\\_Estate\\_Commissioner\\_Report.pdf](http://www.consumerfed.org/pdfs/CFA_Real_Estate_Commissioner_Report.pdf)> accessed 16 February 2017

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

Dawn observes that brokers earn fees or commissions by bringing purchasers and sellers together in essence serving as a catalyst in the sale transactions.<sup>33</sup> In his opinion, the author contends further that although a broker's primary role is that of a sales agent, a broker may perform a variety of other functions in a transaction.<sup>34</sup> The author additionally argues that there are instances where purchasers of property may institute proceedings against brokers for misrepresentation, among others, as the circumstances may demand. According to him, in an action for misrepresentation, a broker has a duty to refrain from fraudulently inducing a prospective purchaser to enter into a transaction.<sup>35</sup> Furthermore, that a real estate broker acting as an agent for the seller has a duty to faithfully and honestly represent the seller.<sup>36</sup> The author concludes that real estate brokers are professionals who facilitate residential real estate transactions by bringing the purchases and seller together.<sup>37</sup> That a more effective and equitable remedy in broker liability in instances of misrepresentation is a legislative determination of the rights and responsibilities of the parties i.e. where a broker owes a duty of good faith, but not a duty of inspection, to a purchaser.<sup>38</sup>

Hassan, although limiting his discussion to the role of real estate agents on housing prices and rents in Iran, provides insightful views relevant to this study. He contends that the growth in residential property prices and rents are spurred by the increased number of real estate agents and their speculations in the real estate market.<sup>39</sup> That commission are some of the motivations for real estate agents to push housing prices and rents up because they can receive greater

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<sup>33</sup> Dawn K. McGee, 'Potential Liability for Misrepresentations in Residential Real Estate Transactions: Let the Broker Beware' (1987) 16 (1), *Fordham Urban Law Journal* 127.

<sup>34</sup> *ibid.* p. 133.

<sup>35</sup> *ibid.* p. 140.

<sup>36</sup> *ibid.* p. 141.

<sup>37</sup> *ibid.* p. 153.

<sup>38</sup> *ibid.* p. 154.

<sup>39</sup> Hassan Gholipour Fereidouni, 'The Role of Real Estate Agents on Housing Prices and Rents: The Iranian Experience' (2012), 5 (2), *International Journal of Housing Markets and Analysis* 136.



commission fee with higher property prices and rents.<sup>40</sup> According to the author, the direct relation between commission fee and housing prices and rents is one of the main motivations of real estate agents to push prices and rents up. In that regard, the author suggests that policy makers need to make fixed commission fees for all types of property transactions regardless of property prices and rents.<sup>41</sup>

Barbara on her part presents the argument that real estate agents are entrepreneurs and independent contractors and that real estate is not a commodity.<sup>42</sup> She points out that each home has its own unique features and location thus each requires a different marketing presentation.<sup>43</sup> A home is the largest purchase that a person will likely make in their lifetime, and a transaction that most people will only undertake a few times. Since so much is riding on this one transaction, it only makes sense to retain a professional who has the expertise to bring the sale or purchase to a successful close.<sup>44</sup>

Muteti on his part wrote about the role of estate agents in Kenya.<sup>45</sup> His work was done prior to the enactment of the Estate agents Act. He argues on the need to have an Act of parliament to bring order to the business of estate agency business. Though the Act was finally passed his work offers a historical view on the evolution of the regulatory framework in Kenya.

Gachie on his part argues that the factors that contribute to the extent of poor management system, which trigger the proliferation of non-professionals include; social environment, societal values, working environment and personal values.<sup>46</sup> Societal values and the social

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<sup>40</sup> Hassan Gholipour Fereidouni, 'The Role of Real Estate Agents on Housing Prices and Rents: The Iranian Experience' (2012), 5 (2), *International Journal of Housing Markets and Analysis* 136.

<sup>41</sup> *ibid.* p. 142.

<sup>42</sup> Barbara Nichols, 'A Response to 'A Critical Assessment of the Traditional Residential Real Estate Broker Commission Rate Structure' (Abridged) by Mark S. Nadel' (2008), 6 (8), *Cornell Real Estate Review*.

<sup>43</sup> *ibid*

<sup>44</sup> *ibid*

<sup>45</sup> Nzilani Muteti, 'Role of estate agents in Kenyan society' (Bachelor's Degree in law Dissertation, University of Nairobi, 1987).

<sup>46</sup> Gachie Kins Karogi 'An Appraisal of Ethics in Property Management Practice in Kenya Case Study: City of Nairobi' (Bachelor's Degree in Real Estate Research Project, University of Nairobi, 2013)



environment set standards in ethics that both the individual agent and the firm at large need to put into consideration or as well disregard.<sup>47</sup> His study is insightful in finding out why professional in real estate engage in malpractices. His analysis is however limited to property management and not the business of estate agency in general

Based on the foregoing literature, it is evident that various jurisdictions have enacted their own regulatory regimes in regard to real estate agents and the agency business in the real estate. All the authors share a common view that indeed estate agents are important parties in the real estate sector and hence there is need for some form of regulation by the State. The present study shares similar views and seeks to contribute to the highlighted literature.

### **1.7 Theoretical Framework**

This study is premised on the agency and the regulatory theory.

Regulation that is ineffective in meeting its objectives can be just as harmful to Government, business and consumers through unintended consequences, as no regulation or over-regulation. Further, regulatory systems are not created in a vacuum, rather, they are embedded within legal systems.<sup>48</sup> Regulatory systems are a subspecies of law embedded within the more general institution of law and with the rise of the regulatory State and the dramatic change in the structure of Government, law in the form of self-contained regulatory systems has become the dominant form of public law.<sup>49</sup>

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<sup>47</sup> *ibid*

<sup>48</sup> Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015), 38 (1) UNSWLawJl 392.

<sup>49</sup> *Ibid.*

### 1.7.1 The Agency Theory

The theory of agency is applicable to many different professional and business relationships.<sup>50</sup> Agency has the following components namely; a freely given, consensual agreement between two parties, one party is the principal who can control the conduct (within legal parameters) of the agent; the other party is the agent who can affect the principal's legal relations with others; and the agent owes the principal a fiduciary duty.<sup>51</sup>

Agency theory derives from the idea that the agent is acting on behalf of the principal and the idea rests on the assumption that the agent, in terms of the set objectives, and according to his/her preferences and possibilities- performs action that, in his/her opinion, lead him/her to achieve the most preferred result by the principal.<sup>52</sup> Institutional economics considers agency theory as one of the most important tools used to analyse organisations and behaviour of the actors and the theory focuses on the problem of determining the conditions and developing the most efficient contract in a situation where there is a relationship between an agent and a principal.<sup>53</sup>

There are two concepts of agency theory that is relevant in association with real estate investment vehicles namely; adverse selection (or hidden information) and moral hazards (or hidden action).<sup>54</sup> Accordingly, adverse selection can occur if information asymmetries exist before a contract is closed, for example, when agents misrepresent abilities and claim to provide outcomes they know they cannot achieve.<sup>55</sup>

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<sup>50</sup> H. Glenn Boggs, 'Agency Law and Real Estate Brokerage' (1992), 3 (1), University of Miami Business Law Review 5.

<sup>51</sup> Ibid.

<sup>52</sup> Joanna Wgrzyn, 'An Insight into Behaviour of Real Estate Manager in the Context of Agency Theory' (2015), 4 (94), *Swiat Nieruchomosci I*.

<sup>53</sup> Ibid.

<sup>54</sup> Wendy Ghartey Sam, 'Real Estate Investment Vehicles and Agency Theory' (2007), Master of Science Thesis, No. 384 KTH Architecture and the Built Environment, <<http://www.kth.se/polopoly-fs/11136541/Menu/general/column-content/attachment/384.pdf>> accessed on 17 February 2017.

<sup>55</sup> Ibid.

### **1.7.2 The Regulatory Theory**

Regulatory theory argues over the necessity for regulation. The positive theories of regulation examine the reason and need for regulation, whilst the normative theories of regulation will generally include transparency, predictability and credibility for the regulatory system.<sup>56</sup> The concept of occupational licensing correlates to regulation theory and the Government is generally interested in overcoming information asymmetries. Academic research has identified two basic schools of thought emerging from regulatory policy, as the positive theories of regulation and the normative theories of regulation. The positive theories will include an examination of 'why regulation occurs' and 'group theory that describes the roles of stakeholder interest in regulation'. So with regards to real estate licensing regulation, the property owners, tenants, and purchasers would represent the stakeholders.<sup>57</sup>

### **1.8 Research Methodology**

This study relied on desk top research with focus mainly being given to books, reports, working papers, journal articles and various published and unpublished materials touching on this area of study. The study also examined various legislation and judicial authorities touching on the field of study. Finally the study focuses on comparative analysis of the situation in Kenya with practice in the United Kingdom (UK) and in the Republic of South Africa.

### **1.9 Limitation of the Study**

Whereas real estate is broad as a subject of discussion, this study is only focused and limited to a discussion on the regulatory framework governing real estate agents. Additionally, the

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<sup>56</sup> Hera Antoniadis, 'Regulatory Theory and Protection of the Principal: White Collar Crime Fraud in Occupational Licensing for Property Agents' (2011) Referred Conference Paper at the Pacific Rim Real Estate Society Conference Held in Queensland, Gold Coast, <[http://www.prrs.net/papers/Antoniadis\\_White\\_Collar\\_Crime\\_Fraud\\_in\\_Occupational\\_Licensing.pdf](http://www.prrs.net/papers/Antoniadis_White_Collar_Crime_Fraud_in_Occupational_Licensing.pdf)> accessed 6 February, 2017.

<sup>57</sup> Ibid.

study is limited to an examination of jurisdictions chosen out of the author's bias and the same may not be a representation of the best practices in the wider international community in regard to the regulation of estate agents.

### **1.10 Justification of the Study**

The findings of this study are quite useful as they may help in the formulation of policies and regulations pertaining to real estate agents and business in Kenya.

The study further seeks to contribute to the existing literature in regard to real estate agency and real estate agency business.

### **1.11 Chapter Breakdown**

#### **1.11.1 Chapter One**

The first chapter introduces the study and contains the background of the study; the statement of the problem being addressed; the research questions to be answered; the objectives of the study; a review of the existing literature in this field of study; limitations of the study, the theoretical framework; justification of the study and the methodology employed in the study.

#### **1.11.2 Chapter Two**

The second chapter of the study traces the history of regulation of estate agents business in Kenya, focusing on the period before the enactment of the Estate Agents Act in 1984 and post the enactment of the Act. It compares the regulation of estate agents between the two periods pointing out progress made so far. It further evaluates the regulatory regime currently in place including the legislative framework and the institutions tasked with implementing the laws. The chapter concludes by critically examining the challenges faced by the institutions in regulating the conduct of estate agents in Kenya.



### **1.11.3 Chapter Three**

The third chapter examines the practice in the UK and in South Africa in terms of the institutional and legislative framework governing real estate agents and business. It discusses the various mechanisms employed in these countries that is different from what is being implemented in Kenya. There is a comparison made with the Kenyan set up including professional qualifications for estate agents, requirements for licencing and consumer protection. The chapter concludes by identifying models and practices that the Kenya could borrow, while acknowledging the different political and social economic circumstances prevailing within the studied jurisdictions.

### **1.11.4 Chapter Four**

The fourth chapter contains a critical analysis of the findings of the study. It gives a comparison of the estate agency practice in Kenya with that of United Kingdom and South Africa. The chapter also contains the conclusion and various proposals, both short-term and long-term, on reforming the regulatory framework for real estate agents and business in Kenya.

## CHAPTER TWO

### 2.0 THE REGULATORY REGIME GOVERNING ESTATE AGENTS BUSINESS IN KENYA

#### 2.1 Introduction

This chapter looks at the history of the regulatory regime in Kenya focusing on the period before the enactment of the Estate Agents Act and the period after the enactment, it evaluates the regulatory regime governing real estate agents and business in Kenya. It identifies the effectiveness and the shortcomings in the regulations and discusses what the players in the industry perceive to be the problem.

#### 2.2 Historical background

##### 2.2.1. Situation before the Estate Agents Act.

The business of estate agents was at independence dominated by firms composed of persons who were mainly white and Asians.<sup>58</sup> The business was therefore conducted by a few people in a close knit cycle of friends and relatives. It was mainly driven by trust and one could only deal with properties by referral by people they trust.<sup>59</sup> There was no form of regulation and the parties mainly applied common law. With the growth in population and the rural urban migration, indigenous persons started venturing into the business. This growth also brought with it many challenges which included; uncertainty as to the applicable law, lack of clear definition of who is an estate agent, malpractices by persons calling themselves agents and lack of regulation.<sup>60</sup>

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<sup>58</sup> Nzilani Muteti, Role of Estate Agents in Kenyan Society ((Bachelor's Degree in Law Dissertation, University of Nairobi 1987).

<sup>59</sup> *ibid*

<sup>60</sup> *ibid*

In 1972 parliament published the Estate Agents and Valuers Bill but the same was later withdrawn to allow further consultations.<sup>61</sup> This was the first attempt made to formalize the regulation of the estate agents business. At this point in time there was a lot of confusion as to what laws were applicable. One of the leading agent at that time was quoted saying that they are not agents but brokers.<sup>62</sup> This was aimed to avoiding the application of the common law and bring themselves under the Court Brokers Act<sup>63</sup> which they thought favoured them.

Among the various legislations which were being used at that time included;

- a) Registration of business names Act. This enabled the agents to formalise their businesses.
- b) The Advocates Remuneration Order (ARO), despite the fact that agents were not advocates, they would refer to the ARO to determine commission payable.
- c) The Law of Contract Act. The Act deals with general contracts in Kenya.
- d) Various statutes dealing with land tenure systems at that time. They included the India Transfer of Property Act (ITPA), Registration of Property Act (RTA), Registered Land ACT (RLA), Land Control Act (LCA), and Government Lands Act (GLA) among others. These statutes offered general guidelines on various instruments to be prepared in respect to the land which is the subject of the transaction.
- e) Architects and Quantity Surveyors Act. It provided for registration of persons to operate as Quantity surveyors. Some of them would operate as estate agents in the course of their business.
- f) Auctioneers Act 1963(now repealed). It authorized auctioneers to carry out the work of selling properties on behalf of owners not necessarily by way of a public auction.

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid

As can be clearly seen, none of the Laws mentioned above dealt with professional conduct of the people carrying on the business of estate agents. In 1984 parliament finally passed the Estate Agents Act. This presented the first comprehensive law dealing with regulation of estate agents.

### **2.2.2 Situation under the Estate Agents Act.**

The Estate Agents Act was passed in order to bring order in the estate agency industry. This was achieved by defining who an estate agent is and giving a detailed description of the work of an estate agent. The Act is referred to as;<sup>64</sup>

An Act of Parliament to provide 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 for connected purposes.

It describes the practice of estate agency as;<sup>65</sup>

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.

From the above excerpt it is clear that parliament had a clear mission to regulate the practice of estate agency in order to bring to an end the confusion that prevailed prior to the enactment of the Act. Since the Act came into force it is now mandatory to have a licence from the EARB before engaging in the business as an estate agent. The EARB as will be discussed

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<sup>64</sup> Estate agents Act, Short title

<sup>65</sup> Estate Agents Act, section 2



later in depth has the overall mandate to regulate the industry. It grants the licences, keeps a register and can de-register an agent accused of malpractices.

### **2.3 The Legislative Framework**

The legislative framework comprises the Constitution, the Estate Agents Act and the Land Act.

#### **2.3.1 The Constitution**

The Constitution of Kenya, being the supreme law of the land<sup>66</sup>, is the main statutory instrument from which all authority and power flows. Article 46 of the Constitution makes provisions in regard to consumer rights. It stipulates that;

- 1) Consumers have the right-
  - a) To goods and services of reasonable quality;
  - b) To the information necessary for them to gain full benefit from goods and services;
  - c) To the protection of their health, safety, and economic interest; and
  - d) To compensation for loss or injury arising from defects in goods or services.

Just like goods, estate agency services fall within the ambit of services protected under the Constitution. It therefore follows that every person is entitled to services of reasonable quality and every person is as well entitled to information necessary for them to gain full benefit from such services. The Constitution thus extends consumer rights to services which include estate agency services. The provision of better and reasonable estate agency services in Kenya is therefore a constitutional guarantee that is to be protected.

#### **2.3.2 The Estate Agents Act**

The Estate Agents Act, Chapter 533 of the Laws of Kenya is the parent legislation governing estate agency business in Kenya. The Act, as amended in 2012, was established as an Act of

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<sup>66</sup> The Constitution of Kenya, Article 2

Parliament to provide 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 for connected purposes.<sup>67</sup>

Whereas the Act was enacted long ago, the same was amended in the year 2012 in order to align it with the developments that have so far taken place over the period.

### **2.3.3 The Land Act**

The Land Act, 2012 was enacted as an Act of Parliament to give effect to Article 68 of the Constitution. The aim was to revise, consolidate and rationalize land laws, to provide for the sustainable administration and management of land based resources and for connected purposes.<sup>68</sup> The Act was therefore enacted to deal with matters for instance transactions in land among others.

Under the said Act, Section 38 is to the effect that any contract and/or dealings pertaining to land must be in writing, signed by the parties thereto and the signatures of each party to such agreements and/or dealings must be attested to by a witness who was present when the contract and/or dealing was signed by each party. By implication it also means that any land and/or property dealings entered into by estate agents and customers must as well be in writing.

### **2.4 The Institutional Framework**

Various institutions, as shall be seen shortly, have been put in place to oversee the implementation of the Estate Agents Act and the Regulation of estate business in Kenya.

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<sup>67</sup> Supra note 64

<sup>68</sup> The Land Act , 2012 Short Title

#### **2.4.1 The Estate Agents Registration Board**

The Act under Section 3 establishes the Estate Agents Registration Board. This is established as a body corporate with perpetual succession and a common seal; capable of suing and being sued; and capable for and in connection with the carrying out of the purposes of the Act, of acquiring, holding and disposing of moveable and immoveable property. Among the functions of the Board include the responsibility of registering estate agents and of ensuring that the competence and conduct of practicing estate agents are of a standard sufficiently high to ensure the protection of the public.<sup>69</sup>

The Board is to be headed by a Registrar.<sup>70</sup>

#### **2.4.2 The Judiciary.**

The judicial arm of the government has continued to play a supportive role in the regulation of the estate agency business in Kenya. Through the exercise of judicial authority, the judiciary has adjudicated over disputes in this industry and it has made judicial pronouncements and interpretations of the laws pertaining to the estate agency business in Kenya. For instance in the case of *Francis Ben Njuguna T/A Propensity & Consultants vs Stanley M. Githunguri and Another*<sup>71</sup>, the court was confronted with a situation in which the an application had been filed seeking to have the suit struck out on the grounds that the court lacked the jurisdiction to hear and determine the matter. The bone of contention was that the Plaintiff in the matter was not a registered estate agent, and had not been so during the relevant period in the suit being the years 2007, 2008 and 2009. On that basis, the Applicant urged the Court to dismiss the suit as incompetent since the Plaintiff could not sustain a claim under the Estate Agent Act. While

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<sup>69</sup> Estate Agents Act, Section 4.

<sup>70</sup> Estate Agents Act, Section 6.

<sup>71</sup>Francis Ben Njuguna T/A Propensity & Consultants vs Stanley M. Githunguri and Another, NRB H.C.C.C. No. 129 of 2010.(unreported)

dismissing the Application and exercising jurisdiction, the Court took the view that the question of whether the Plaintiff was a registered estate agent was in contention and the same was still alive to determination in the full trial and hence the Application to strike out the suit was premature in the circumstances.

Similarly, in the case of *Samuel Wangai Mugo vs Estate Agents Registration Board*<sup>72</sup>, the Appellant had challenged the decision by the Estate Agents Board to deny him registration as an estate agent. In its decision, the Court of Appeal after interpreting Sections 13 and 14, concerning registration of estate agents, noted thus;

[24] It is clear from the wording of these provisions of the law that there is no obligation on the respondent to give reasons for a decision it makes with regard to an application for registration as an estate agent.

[27] We concur with the holding of the learned Judge that there is no duty imposed upon the Board by statute (*Cap 533*) to inform the appellant of its reasons for rejecting his application.

[28] In this instant appeal, the reasons sought by the appellant were manifested in the Board's replying affidavit and canvassed at trial. The reasons were that the appellant's good conduct was in question since he had been conducting business as an estate agent without being registered, which is an offence under *Cap 533*; and that as the appellant was a registered auctioneer there was bound to be a conflict of interest if the appellant was registered as an estate agent. It is evident from the record before the Court that the appellant did not deny practising as an estate agent without a licence.

The courts thus continue to play a major role in regard to the interpretation and enforcement of the Regulations governing estate agency business in Kenya. The only challenge is that there are no specialised courts to deal with estate agents matters. Another issue is that with the serious backlog we have in our courts system, cases take long to be decided and this may discourage aggrieved persons from seeking redress there.

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<sup>72</sup> Samuel Wangai Mugo vs Estate Agents Registration Board Civil Appeal No. 247 of 2004 (unreported).



#### **2.4.4 The Kenya Police and the Office of the Director of Public Prosecutions**

The Kenya police, as law enforcement agencies have as well assisted in enforcing the laws pertaining to the estate agency business in Kenya. Through arrests and investigations pertaining to alleged offences, the police have contributed immensely towards the implementation and enforcement of the estate agency laws and regulations in Kenya.

The office of the Director of Public Prosecutions on the other hand is charged with the mandate of instituting criminal proceedings against any person before any court other than a court martial whenever criminal offences have been committed.<sup>73</sup> These two institutions have a role to play in regard to the enforcement of the Estate Agents Act which creates various offences. For instance under Section 25 it is an offence for any person to make fraudulent or causes or permits to be made any false or incorrect entries in the register; or knowingly and wilfully makes any statement, oral or written, which is false in any material particular or which is misleading with a view to gaining any advantage or privilege under this Act, whether for himself or for any other person. Such person shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding three years or to both.

#### **2.5 Effectiveness of the Regulatory Regime Governing Estate Agency Business in Kenya**

The Estate Agency Act makes provisions for the various aspects pertaining to the estate agency business in Kenya. For instance;

##### **2.5.1 Registration of Estate Agents**

Under the Act, the Registrar is under an obligation to keep and maintain a register in which names of every person accepted by the Board for registration are to be entered showing-

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<sup>73</sup> The Constitution of Kenya, Article 157 (6)

- (a) The date of the entry in the register;
- (b) The address of the person registered;
- (c) The qualifications of the person; and
- (d) Such other particulars as the Board may from time to time direct.<sup>74</sup>

Where the name of a person is entered in the register, the Registrar is to issue such a person with a certificate of registration. Such a certificate is valid and remains in force for a period of one year and it is to be renewed annually, if a party so wishes, upon payment of the prescribed fees.<sup>75</sup>

The Act stipulates that the Registrar shall cause to be published in the Gazette, at the beginning of each year, a list containing the names, addresses and qualifications of all registered estate agents then remaining on the register.<sup>76</sup> Such publication is prima facie evidence that the persons named therein are registered estate agents and any deletion from the register of the name of any person notified by the publication is prima facie evidence that the person is not registered.<sup>77</sup>

The Act further outlines the qualifications to be met for one to be registered as an estate agent in Kenya. It provides thus;<sup>78</sup>

Any 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 the Act and to have his name entered in the register if he is-

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<sup>74</sup> Estate Agents Act, Section 7.

<sup>75</sup> Estate Agents Act, Section 8.

<sup>76</sup> Estate Agents Act, Section 9.

<sup>77</sup> Estate Agents Act, Section 10.

<sup>78</sup> Estate Agents Act, Section 13

- (a) A full member of the Institution of Surveyors of Kenya in the chapter of Valuation and Estate Management Surveyors, Building Surveyors and Land Management Surveyors;  
or
- (b) 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;
- (c) 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
- (d) A person who-
  - (i) 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
  - (ii) 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
- (e) 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.<sup>79</sup>

The Act further imposes an additional burden on an applicant who intends to be registered, it stipulates that the Board may require an applicant to satisfy it that his professional and general conduct has been such that, in the opinion of the Board, he is a fit and proper person to be

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<sup>79</sup> *ibid.*

registered under the Act and the Board may direct the Registrar to postpone the registration of an applicant until it is so satisfied.

### **2.5.2 Restriction on Practice**

The Act imposes certain restrictions on persons undertaking the estate agency business in Kenya. For example;

#### **2.5.2.1 Unregistered Persons not to Practice as Estate Agents**

Under the Act, no person is to practice as an estate agent unless he is registered, no partnership is to practice as estate agents unless all the partners are registered to conduct such business; and no body corporate is to practice unless all the directors thereof whose duties include the doing of acts by way of such practice are registered estate agents.<sup>80</sup> This makes registration a mandatory requirement for any person who wishes to engage in the business of estate agency in Kenya.

#### **2.5.2.2 Requirement to have Indemnity**

The Act imposes a requirement that every person practicing as an estate agent must be indemnified. The Act provides that;<sup>81</sup> no person shall practice as an estate agent unless there is in force in relation to his practice an indemnity bond or policy of insurance entered into or issued by an insurance company approved by the Board, so expressed as to guarantee that compensation shall be payable, up to the required limit, to persons suffering monetary or other property loss through the dishonest or professional misconduct of the person so practising. The Act imposes various limits for such as follows;<sup>82</sup>

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<sup>80</sup> Estate Agents Act, Section 18.

<sup>81</sup> Estate Agents Act, Section 19

<sup>82</sup> *ibid*



- (a) In the case of a business carried on by a single individual, a sum of two hundred thousand shillings;
- (b) In the case of a business carried on by two or more individuals, the sum specified in paragraph (a) multiplied by the number of such individuals;
- (c) In the case of business carried on by a body corporate, the sum specified in paragraph (a) multiplied by the number of directors whose duties include the doing of acts by way of practice as estate agents.

### **2.5.2.3 Code of Conduct**

Under the Act, the Board is expected, with the approval of the Minister for the time being responsible for matters relating to Land, publish a statement specifying acts or omissions which, if done or made by a practicing estate agent in his capacity as such would, in the opinion of the Board, be contrary to the public interest or amount to professional misconduct by the person so practicing. The anticipated Statement is to serve as a guide to practicing estate agents.<sup>83</sup>

The Act further grants the Minister the powers, after consultation with the Board, to make rules prescribing the charges which may be made for services rendered by way of practice as an estate agent; relating to the keeping of accounts by practicing estate agents and to the opening of separate bank accounts for money held on behalf of clients; setting out the occasions on which a practising estate agent is required to account for interest on the money so held and the manner of such accounting; providing for the methods, whether by check, by accounts or auditors or otherwise, by which it can be ascertained that the rules are being complied with by

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<sup>83</sup> Estate Agents Act, Section 21.

practicing estate agents; and providing for the conduct of the business of the Board and the procedure to be followed by the Board at an inquiry under the Act among others.<sup>84</sup>

#### **2.5.2.4 Disciplinary Procedure Against Estate Agents**

Pursuant to Section 23 of the Act, an inquiry into any act or omission contrary to public interest or the professional misconduct of a registered estate agent may be instituted by the Board either on its own initiative or upon receipt of a written complaint addressed to the Board by or on behalf of any other person alleging such act, omission or professional misconduct against the estate agent. Additionally, where the Board is of the opinion that an inquiry may be instituted it shall as soon as practicable proceed to hold the inquiry.

On the sanctions to be imposed, the Act provides that if a registered estate agent is convicted of an offence under the Act or is after due inquiry found to have been guilty of an act or omission contrary to the public interest or amounting to professional misconduct, the Board may-<sup>85</sup>

- a) Direct that during such period as the Board may specify, his registration under the Act be suspended;
- b) Caution the person and may also order that such caution shall be entered on the register;
- c) Impose a fine not exceeding five thousand shillings upon that person;
- d) Order that the name of the person shall be deleted from the register.

#### **2.6 Challenges in the Regulation of Estate Agency Business in Kenya**

Whereas the Estate Agent Act is comprehensive on the various aspects of the regulation of estate agency business in Kenya, it still falls short in other aspects. For instance, the Act is

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<sup>84</sup> Estate Agents Act, Section 22.

<sup>85</sup> Estate Agents Act, Section 24

silent on the role to be played by the County Governments following the new system of Governance that was introduced following the promulgation of the Constitution, 2010. It will be noted that under Part 2 of the Fourth Schedule to the Constitution, specifically under Section 8, among the functions and powers of County Governments includes county planning and development, including;

- (a) Statistics;
- (b) Land survey and mapping;
- (c) Boundaries and fencing;
- (d) Housing; and
- (e) Electricity and gas reticulation and energy regulation.

Whereas the functions touching on land planning and housing policy seems to be a shared responsibility between the National and County Governments, the Estate Agents Act does not make provisions or in any way anticipates any roles to be played by the County Governments in regard to the regulation of the estate agency business in Kenya. The role of County Governments cannot be ignored in regard to the estate agency business as the County Governments are better placed to enforce and implement the Act at the County levels.

The Act is silent on the question of how the Board is to operate within the 47 counties in Kenya. The Act merely provides that the Board is to operate and keep a register and conduct its activities as outlined under the Act. The Act however does not foresee a scenario whereby persons may as well wish to engage in estate agency business in other counties other than Nairobi. This omission presents a logistical challenge for instance in regard to a person situated in remote parts of the country and who would wish to register and engage in estate agency business.

Similarly, the Act does not make express provisions in regard to the code of conduct to be adhered to by estate agents. It merely gives the Minister in charge of land matters the powers to formulate such rules and regulations concerning the code of conduct to be adhered to. It could have been quite effective if the Act could have direct provisions stipulating the code of conduct to be adhered to by estate agents. The mere fact that such a code is to be enacted through rules does not give the contemplated code of conduct the weight and importance that could have been derived from the same in the event that the same could have been clearly outlined in the Act in question.

A research done in Nairobi reported that;<sup>86</sup>

80% of the population indicated that the Board has not been aggressive enough in its quest to control the practice of estate agency. The respondents indicated that the Board has not publicized itself to the public hence many people start practicing without even understanding the requirements for such. Also according to the respondents, the Board has not fully utilized the provisions in the Act to reign in on quacks even when they know where these quacks practice/operate. In addition, the Board has never sought the cooperation of the police in prosecuting offenders. Further, the respondents indicated that the reason why the Board has been lax in regulating the practice of estate agency is because it does not have legal rights to prosecute and thus limited to take any meaningful action on quacks.

Perhaps one of the weakest link in the regulation of the estate agents business is the provisions of section 13(1) (e) of the Act which provides that a person is entitled to be registered as an estate even if they don't possess the requisite qualifications "... but is of good character and

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<sup>86</sup>Sharon Eden Loko, 'The Role of Professional Estate Agency in Creating Efficiency and Transparency in the Kenyan Real Estate Market' (Bachelor's Degree in Real Estate Research Project, University of Nairobi, 2013).



satisfies the Board that he has not been convicted (whether in Kenya or elsewhere) of an offence involving fraud or dishonesty".<sup>87</sup> It is argued that this provision has led to admission into the profession of quacks who has lowered the standard of practice. This has negatively affected the profession of estate agency by opening the practice to all and sundry; even non-professionals feel they have a right to be registered<sup>88</sup>

According to the University of Nairobi Land Economics scholar Prof Paul Syagga, the Estate Agents Act, which was enacted in 1984, clearly stipulates who should practice estate agency and the rules that govern this industry.<sup>89</sup> He says the problem is that the Act is not being followed and quacks are being allowed to practice.<sup>90</sup>

According to Gachie "A source of unethical behavior in property management is the need to make more profits from the property being managed. Some property managers will request for funds to do renovations or maintenance functions on the property but instead of using the funds optimally, they may pocket a greater portion of this after carrying out sub-standard renovations and maintenance."<sup>91</sup> He further states that estate agents firms faces the problems of a competitive market leading to temptations to engage in unethical practices to stay afloat. Other problems are self-inflicted as the owners of the firms exert too much pressure to employees to meet targets that they are forced to engage in unethical practices.<sup>92</sup> He recommends that professional ethics should be observed at all times.

A research done by Gitau Wainaina found that most of the people dealing with real estate have not embraced the use of technology in their work. This is further complicated by the fact

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<sup>87</sup> Estate Agents Act, Section 13(1) (e).

<sup>88</sup> Supra note 16.

<sup>89</sup> Njoki Chege, 'Quacks Invasion into Real Estate' Standard Newspaper (17<sup>th</sup> May 2012), <<http://www.standardmedia.co.ke/business/article/2000058308/quacks-invasion-into-real-estate>> accessed 6 March 2017.

<sup>90</sup> Ibid

<sup>91</sup> Gachie Kins Karogi "An Appraisal of Ethics in Property Management Practice in Kenya Case Study: City of Nairobi" (Bachelor's Degree in Real Estate Research Project, University of Nairobi, 2013)

<sup>92</sup> Ibid

that our land management system is basically manual. He recommends that real estate firms should invest more in new technologies to enable them compete in the ever changing world.<sup>93</sup>The use of technology may also help keep a data of all property transactions making it easier to identify fraudulent practices.

The Board itself has identified what it perceives to be its major shortcomings which include;<sup>94</sup>

- i. Inadequate regulation of the practice resulting in many persons and firms operating without licenses. This has led to low membership some of which have arrears in subscription.
- ii. Lack of a strong secretariat to undertake the operational activities of the Board.
- iii. Lack of adequate financial resources to undertake the Board functions.
- iv. Inadequate record keeping of the operations of the Board.
- v. Lack of standing committees in the Board.
- vi. Lack of a mechanism/system for following up members with arrears in subscriptions and take appropriate action.
- vii. Inadequate operational policies and procedures.
- viii. Lack of awareness creation initiatives among the public on the existence and functions of the Board.
- ix. Inadequate linkages/partnerships with other stakeholders.

Perhaps additional institutions or sub-committees could be introduced so as to operate within different County Governments. Interestingly, the Act does not clearly outline the functions of the Registrar. It merely charges the Registrar with the responsibility of keeping the register of

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<sup>93</sup> Samuel Wainaina Gitau, "The Application of Information Technology in Real Estate Firms in Kenya" (Master's Degree in Valuation and Property Management research Project, University of Nairobi, 2014)

<sup>94</sup> Estate Agents Registration Board Strategic Plan 2013-2017 pg. 7  
<http://estateagentsboard.or.ke/EARB%20Strategic%20plan%202013-2017.pdf> accessed on 17 February 2017

estate agents, making amendments therein and gazetting it. No other roles are clearly specified under the Act.

## 2.7 Conclusion

Despite the few aforementioned shortcomings in the Act, it may still be argued that the Act has promoted better regulation of estate agency business in Kenya. It has attempted to bring sanity and order. The registration of estate agents has brought transparency and professionalism so that when one engages the services of an agent, it is easy for one to exercise due diligence and verify whether such an agent is registered. The publication and gazettelement of the list of registered estate agents further contributes to the transparency and promotion of the consumer rights. In addition, the requirement for having indemnity has also instilled confidence upon clients' so that it is possible to hold a registered estate agent accountable in case one incurs unforeseen loss. The challenge however is how to bring in the unregistered agents within the operation of the Act and at the same time ensure that only qualified professionals are registered to practice.

The regulation of estate agency business in Kenya continues to grow and develop with time. With the introduction of a devolved system of governance, there is need to align the Act with this new development. The need for change has been acknowledged by the Cabinet Secretary of Lands and Physical Planning. The then Cabinet Secretary Mr. Jacob Kaimenyi once asserted thus;

There is an urgent need for an updated law to regulate real estate agencies to help curb loss of millions of shillings by unsuspecting members of the public.

The social, political and economic circumstances today are different from those which existed when the Act was enacted. Stakeholders should take cognisance of this and come up with proposals that will adequately address the current challenges.<sup>95</sup>

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<sup>95</sup> Joseph K. Mwangi and Carmeline Awuor, 'Estate Agents Act under Review to Lock out Bogus Property Brokers- Kaimenyi' <<http://www.ardhi.go.ke/?p=290>> accessed 20 May 2017



There is thus need for change. For instance the Government may introduce new institutions to work together with the Estate Agents Registration Board both at the national and the County levels in order to maximize the operations of the Board and the implementation of the Act. The next chapter shall continue the discussion by analysing and examining the best practices in regard to the regulation of estate agency businesses in other jurisdictions.

## CHAPTER THREE

### 3.0 REGULATION OF ESTATE AGENCY BUSINESS IN THE UNITED KINGDOM AND SOUTH AFRICA.

#### 3.1 Introduction

The third chapter examines the practice in the United Kingdom and South Africa in terms of the institutional and legislative framework governing real estate agents and business while comparing the same with Kenya. This is intended at identifying models and practices that the Kenyan Government could borrow from the studied jurisdictions. The choice of South Africa and the United Kingdom (UK) was informed by the fact that the two jurisdictions share the common law system. South Africa however employs both the common law and Roman system of law. The commonality of the common law system of law shared by the three jurisdictions makes the two countries favourable. Historically Kenyan legislations have borrowed heavily from the UK and as such the UK offers a suitable model for emulation. It is thus important to examine whether there have been any key changes in the legislation and institutional framework governing estate agency business in that region since we enacted our laws.

It should be noted that The Gross Domestic Product(GDP) per capita in the United Kingdom was last recorded at 42514.49 US dollars in 2017 while in Kenya was last recorded at 1169.34 US dollars.<sup>96</sup>The country's literacy level is higher than both Kenya and SA. The real estate business has been practiced for many centuries and is therefore more developed than in Kenya. Despite this the real estate business is characterised by complains about dishonest agents, lack of accountability and outright fraud.<sup>97</sup> SA on the other hand has a higher GDP than Kenya at 7525 US dollars but suffers similar challenges with Kenya in terms of the social economic

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<sup>96</sup> Trading Economics report <https://tradingeconomics.com/united-kingdom/gdp-per-capita> accessed on 13/09/18

<sup>97</sup> *Mail online* <https://www.dailymail.co.uk/news/article-1366624/Complaints-estate-agents-reach-record-high.html> accessed on 13 September 2018

realities. It is one of the most unequal society in the world with the minority white controlling the economy with the majority black people being poor, illiterate and living in informal settlements.<sup>98</sup> Despite this the real estate business is well organised to the levels achieved in developed countries.<sup>99</sup>

The two jurisdictions selected offers a unique opportunity to learn from two different regimes in terms of political and social economic set ups but both being celebrated as successful.

### **3.2 Regulation of Estate Agency Business in the United Kingdom**

Real estate business in the UK started in ancient times.<sup>100</sup> It has thus been going on for a long time. For this reason the estate agency business has also evolved making it more sophisticated compared to Kenya. The agents firms are well structured and their roles clearly defined.<sup>101</sup> The courts have also interpreted the laws over a long period of time giving them more clarity.<sup>102</sup> Issues like consumer protection are given prominence and as will be discussed below, there is a specific body that deals with consumer protection and another one that deals with standards.

#### **3.2.1 The Legislative Framework**

The business of estate agency in UK is regulated by the Estate Agents Act (EAA), 1979 chapter 38 of the UK laws. Other relevant pieces of legislation include The Consumers, Estate Agents and Redress Act, 2007 (CEARA, 2007) and The Consumer Protection from Unfair Trading Regulations, 2008 established under the EAA.

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<sup>98</sup> Xavier Greenwood, "South Africa is the most unequal country in the world", *The Independent newspaper*, 12<sup>th</sup> May 2018. <https://www.independent.co.uk/news/world/africa/south-africa-unequal-country-poverty-legacy-apartheid-world-bank-a8288986.html> accessed on 13 September 2018

<sup>99</sup> Justlanded.org, 'Estate Agents: All You Need to Know to Deal with Estate Agents' <<http://www.justlanded.com/english/South-Africa/South-Africa-Guide/Property/Estate-Agents>> accessed 7 March 2017

<sup>100</sup> Property Natter - a short history of estate agency <https://www.estateagenttoday.co.uk/features/2017/8/property-natter--a-short-history-of-estate-agency>

<sup>101</sup> *ibid*

<sup>102</sup> *ibid*

### 3.2.2 The Estate Agents Act, 1979

The Estate Agents Act (EAA), 1979, is the governing law pertaining to estate agents in the United Kingdom. The Act defines estate agency work in the following terms namely;

Things done by any person in the course of a business (including a business in which he is employed) pursuant to instructions received from another person (the client) who wishes to dispose of or acquire an interest in land-<sup>103</sup>

- (a) For the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or as the case may be, dispose of such an interest; and
- (b) After such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest.

Section 3 gives the Director General the powers to make an order prohibiting a person from conducting the business of estate agency. It stipulates that the power of the Director General of Fair Trading to make an order under this Section with respect to any person shall not be exercisable unless the Director is satisfied that the person-

- (a) Has been convicted of-
  - (i) An offence involving fraud or other dishonesty or violence; or
  - (ii) An offence under any provision of the Act other than Sections 10 (6), 22 (3) or 23 (1); or
  - (iii) Any other offence which, at the time it was committed, was specified for the purpose of this Section by an order made by the Secretary of State ; or
- (b) Has committed discrimination in the cause of agency work; or

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<sup>103</sup> Estate Agents Act, 1979, Section 1



- (c) Has failed to comply with any obligation imposed on him under any of Sections 15 and 18 to 21 below; or
- (d) Has engaged in a practice which, in relation to estate agency work, has been declared undesirable by an order made by the Secretary of State.

The order may however be revoked and varied upon application by an aggrieved person.<sup>104</sup>

Any person aggrieved may appeal against the decision to the Secretary of State.<sup>105</sup>

### **3.2.3 Registration of Estate Agents**

Under the EAA, the Director is to establish and maintain a register on which there shall be entered particulars of every such order made.<sup>106</sup>

### **3.2.4 Enforcement of the Act**

Under the Act, a duly authorised officer of an enforcement authority, at all reasonable hours and on production, if required, of his credentials may-

- a) If he has reasonable cause to suspect that an offence has been committed under this Act, in order to ascertain whether it has been committed, enter any place (other than premises used only as dwelling).
- b) If he has reasonable cause to suspect that an offence has been committed under this Act in order to ascertain whether it has been committed, require any person-
  - i) Carrying on, or employed in connection with a business to produce any books or documents relating to it; or
  - ii) Having control of any information to a business recorded otherwise than in a legible form, to provide a document containing a legible reproduction of the whole or any part of the information;

And take copies of, or of any entry in, the books or documents.<sup>107</sup>

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<sup>104</sup> Estate Agents Act, 1979, Section 6

<sup>105</sup> Estate Agents Act, 1979, Section 7

<sup>106</sup> Estate Agents Act, 1979, Section 8

<sup>107</sup> Estate Agents Act, 1979, Section 11

### **3.2.5 Clients' Money**

Clients' money received by any person in course of estate agency in England, Wales or Northern Ireland is held by him on trust for the person who is entitled to call for it to be paid over to him or to be paid on his direction or to have it otherwise credited to him; or if it is received by him as stakeholder, is held by him on trust for the person who became so entitled on the occurrence of the event against which the money is held.<sup>108</sup>

Every person who receives clients' money in the course of estate agency work shall, without delay, pay the money into a client account maintained by him or by a person in whose employment he is.<sup>109</sup> The said account is a current or deposit which is with an institution authorised for the purpose, is in the name of a person who is or has been engaged in estate agency work and contains in its title the word 'client'.<sup>110</sup>

### **3.2.6 Insurance cover for clients' money**

A person may not accept clients' money in the course of estate agency work unless there are in force authorised arrangements under which, in the event of his failing to account for such money to the person entitled to it, his liability will be made good by another.<sup>111</sup>

If on an application made to him in that behalf, the Director considers that a person engaged in estate agency work may, without loss of adequate protection to consumers, be exempted from all or any of the aforementioned requirements, he may issue to that person a certificate of exemption.<sup>112</sup>

Before any person, the client, enters into any contract with the agent under which the later will engage in estate agency work on behalf of the client, the agent shall give the client particulars

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<sup>108</sup> Estate Agents Act, 1979, Section 13.

<sup>109</sup> Estate Agents Act, 1979, Section 14

<sup>110</sup> *ibid.*

<sup>111</sup> Estate Agents Act, 1979, Section 16.

<sup>112</sup> Estate Agents Act, 1979, Section 17.

of the circumstances in which the client will become liable to pay remuneration to the agent, particulars of the circumstances in which the client will become liable to pay remuneration to the agent for carrying work; amount of agent's remuneration if that amount is not ascertainable at the time the information is given, particulars of the manner in which the remainder will be calculated; particulars of any payments which do not form part of the agent's remuneration for carrying out estate agency work.<sup>113</sup>

A person who is engaged in estate agency work and has a personal interest in any land shall not enter into negotiations with any other person with respect to the acquisition or disposal by that person of any interest in that land until the agent has disclosed interest in it.<sup>114</sup> An estate agent has a personal interest in land if<sup>115</sup>

- a) He has a beneficial interest in the land or in the proceeds of sale of any interest in it; or
- b) He knows or might reasonably be expected to know that any of the following persons has such a beneficial interest, namely;
  - i) His employer or principal; or
  - ii) Any employee or agent of his;
  - iii) Any associate of his or any person mentioned above.

The Act prohibits any person adjudged bankrupt from engaging in estate agency work.<sup>116</sup>

### **3.2.7. The Consumer Protection from Unfair Trading Regulations, 2008**

The Consumer Protection from Unfair Trading Regulations (CPRs) provides consumer protection from unfair or misleading trading practices, misleading omissions and aggressive sales tactics.<sup>117</sup> A practice undertaken by an estate agent will be unfair if it distorts, or is likely to distort, the economic behaviour of the average consumer in their transactional decision

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<sup>113</sup> Estate Agents Act, 1979, Section 18.

<sup>114</sup> Estate Agents Act, 1979, Section 21

<sup>115</sup> *ibid*

<sup>116</sup> Estate Agents Act, 1979, Section 23.

<sup>117</sup> The Consumer Protection from Unfair Trading Regulations 2008 Section 3

making. This means that estate agents have to use care when using general descriptions relating to location, environment, photographs, measurements, parking and pricing.<sup>118</sup> The CPRs only covers description used in sale of property to consumers. In respect of the sale of commercial property, similar provisions exist in the Marketing Protection from Misleading Regulations, 2008. These govern misleading practices when dealing with other businesses for example when liaising with other estate agents about marketing the same property or when marketing a property to business customers. The Regulations ban misleading advertising which is advertising that deceives (or is likely to deceive) other traders and either is likely to affect their economic behaviour or injure a competitor.<sup>119</sup> These Regulations were established to protect consumers from unfair trading. Regulation 4 thereof is to the effect that the promotion of any unfair commercial practice by a code owner in a code of conduct is prohibited. On the other hand, under Regulation 19 it is the duty of every authority to enforce the Regulations. Where the enforcement authority is a local weights and measures authority the duty referred to above shall apply to it.

### **3.2.8. The Consumers, Estate Agents and Redress Act, 2007 (CEARA, 2007)**

This places an obligation on estate agents to belong to an approved redress scheme. The object of the Act is stated as; an Act to make provision for the establishment of the National Consumer Council and its functions; to make provision for the abolition of other consumer bodies; to make provision about the handling of consumer complaints by certain providers; to make provision requiring certain providers to be members of redress schemes in respect of consumer complaints; to amend the Estate Agents Act, 1979; to make provisions about the cancellation of certain contracts concluded away from business premises; and for connected purposes.<sup>120</sup>

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<sup>118</sup> *ibid*

<sup>119</sup> The Consumer Protection from Unfair Trading Regulations 2008 Section 5

<sup>120</sup> The Consumers, Estate Agents and Redress Act, 2007 short title



Section 53 thereof makes provision for redress schemes dealing with complaints about estate agents.

Under Section 54, a person engaged in estate agency work shall keep records and ensure they are safe for at least 6 years.

Section 57 reinforces the powers of entry and inspection under Section 11 of the EAA.

Section 58 which is titled 'failure to provide information' provides that;

- a) If on an application made by a duly authorised officer of an enforcement authority it appears to the court that a person (the defaulter) has failed to do something that he is required to do by virtue of Section 9 (1) or 11 (1A) (b) the court may make an Order under this Section namely;
  - a) To do the thing that it appears he failed to do within such period as may be specified in the Order;
  - b) Otherwise to take such steps to remedy the consequences of the failure as may be so specified.

There are three redress schemes in the UK. All estate agents who deal with residential property must belong to one of the schemes. One can refer a complaint to the relevant Ombudsman depending on which scheme the estate agent is signed to.<sup>121</sup>

### **3.3 The Institutional Framework**

In the UK there are several institutions which work together to regulate the business of estate agents. They include; The Director General, Secretary of State, The National Trading Standards Agency Team, The National Consumer Council and various enforcement authorities in respective countries forming the UK.

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<sup>121</sup> Powys, 'Ombudsman Redress Schemes' <http://www.powys.gov.uk/en/licensing-trading-standards-estate-agency-team/ombudsman-redress-schemes/> accessed 4 July 2017

### 3.3.1 The Director General

The duties of the Director include;<sup>122</sup>

- a) Generally to superintend the working and enforcement of the EAA;
- b) Where necessary or expedient, himself to take steps to enforce the EAA.

Further to the foregoing, it is the duty of the Director, so far as appears to him to be practicable and having regard both to the national interest and the interests of persons engaged in estate agency work and of consumers, to keep under review and from time to time advise the Secretary of State about social and commercial developments in the United Kingdom and elsewhere relating to the carrying on of estate agency work and related activities; and the working and enforcement of the EAA.<sup>123</sup>

Additionally, the Director is charged with the mandate to disseminate in such form and manner as he considers appropriate, of such information and advice as it may appear to him expedient to give the public about the operation of the EAA.<sup>124</sup>

### 3.3.2 Secretary of State

Before making any order or regulations under any provision of the EAA, the Secretary of State is to consult the Director, such bodies representative of persons carrying on estate agency work, such bodies representative of consumers and such other person as he thinks fit.<sup>125</sup> Any power of the Secretary of State to make orders or regulations under the EAA;

- a) May be so exercised as to make different provision in relation to different cases or classes of cases and to exclude certain classes or classes of case; and

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<sup>122</sup> Estate Agents Act, 1979, Section 3

<sup>123</sup> Estate Agents Act, 1979, Section 25(2)

<sup>124</sup> Estate Agents Act, 1979, Section 25(3)

<sup>125</sup> Estate Agents Act, 1979, Section 30

- b) Includes power to make such supplementary incidental and transitional provisions as he thinks fit.<sup>126</sup>

The Secretary of State may by regulations made by statutory instrument make provision for ensuring that persons engaged in estate agency work satisfy minimum standards of competency.<sup>127</sup>

The regulations may prescribe professional or academic qualifications which shall also be taken to be evidence of competence, designate any body of persons as a body which may itself specify professional qualifications the holding of which is to be taken as evidence of competence; make provision for and in connection with the establishment of a body having power to examine and inquire into the competence of persons engaged or professing to engage in estate agency work; and delegate to a body established as aforesaid powers of the Secretary of State with respect to the matters referred to above.<sup>128</sup>

After the day appointed for the coming into force of the foregoing, no individual, member of partnership, body corporate or unincorporated association may engage in estate agency work unless such have attained the required standards of competence.<sup>129</sup>

### **3.3.3 The National Trading Standards Agency Team**

Since 1<sup>st</sup> April, 2014, the National Trading Standards Estate Agency Team (NTSEAT) headed by Powys County Council has been responsible for regulating estate agents across the United Kingdom.<sup>130</sup> It took over this enforcement role from the Office of Fair Trading (OFT). Powys County Council is delivering this new team on behalf of the National Trading Standards Board

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<sup>126</sup> *ibid.*

<sup>127</sup> Estate Agents Act, 1979, Section 22.

<sup>128</sup> *Ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> Loraine Conway, *Are Estate Agents Regulated?* No. CPB6900 10 May, 2017, Briefing Paper 6.

on a three year contract.<sup>131</sup> The mandate of the NTSEA is to assess whether or not an individual or business in any part of the UK is fit to carry out estate agency work within the terms of the EAA 1979. In addition, since 1<sup>st</sup> April, 2014 it has also;

- Maintained a public register on banning or warning orders;
- Approved and monitored consumer redress schemes; and
- Provided specific advice and guidance to businesses and consumers about their rights and obligations under EAA 1979.<sup>132</sup>

### **3.3.4 The National Consumer Council**

Section 1 of the Consumers, Estate Agents and Redress Act establishes the National Consumer Council. The functions include to;

- a) Provide advice and information about consumer matters;
- b) Make proposals to such persons about consumer matters;
- c) Represent the views of consumers on consumer matters to such persons.<sup>133</sup>

In addition, the Council may obtain and keep under review;

- a) Information about consumer matters;
- b) Information about views of consumers on consumer matters; and
- c) Information of such other description as may be prescribed by the Secretary of State.<sup>134</sup>

Also the Council may facilitate the dissemination to consumers of advice and information;

- a) About the Council and its functions;
- b) About consumer matters; and
- c) About such other matters as may be prescribed by the Secretary of State.<sup>135</sup>

Further to the foregoing, the Council may investigate;

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<sup>131</sup> *ibid*

<sup>132</sup> *ibid*

<sup>133</sup> Consumers, Estate Agents and Redress Act, Section 8.

<sup>134</sup> Consumers Estate Agents and Redress Act, Section 9.

<sup>135</sup> Consumers Estate Agents and Redress Act, Section 10.



- a) A complaint made by or on behalf of a consumer which appears to the Council to raise one or more issues of general relevance;
- b) Any matter which appears to the Council to be; or to be related to a problem which affects or may affect consumers generally or consumers of a particular description.<sup>136</sup>

The Secretary of State may by Order require regulated providers to be members of redress scheme which is approved by their relevant regulator or administered by the Secretary of State ( or a person appointed by the Secretary of State) and designated by the Secretary of State in relation to them.<sup>137</sup>

### **3.3.5 Enforcement Authorities**

The enforcement authorities include; the Director, in Great Britain, a local weights and measures authority and in Northern Ireland, the Department of Commerce for Northern-Ireland.<sup>138</sup> Where a Local Weights and Measures Authority in England and Wales propose to institute proceedings for an offence under the Act, it shall as between the authority and the Director, be the duty of the authority to give the Director notice of the intended proceedings together with a summary of the facts on which the charges are to be founded, and postpone the institution of the proceedings until either 28 days have expired since the notice was given; or the Director has notified them of receipt of the notice and summary.<sup>139</sup>

### **3.4. Regulation of Estate Agency Business in South Africa**

There are around 36,000 registered estate agents in South Africa.<sup>140</sup> It has been observed that dealing with estate agents in South Africa is similar to dealing with one in Australia, Europe

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<sup>136</sup>Consumers Estate Agents and Redress Act, Section 11.

<sup>137</sup>Consumers Estate Agents and Redress Act, Section 47.

<sup>138</sup> Consumers Estate Agents and Redress Act, Section 26.

<sup>139</sup> *ibid*

<sup>140</sup>Justlanded.org, 'Estate Agents: All You Need to Know to Deal with Estate Agents' <<http://www.justlanded.com/english/South-Africa/South-Africa-Guide/Property/Estate-Agents>> accessed 7 March 2017

or the United States as most are well organized and professional.<sup>141</sup>

During the apartheid rule, the business was dominated by white people.<sup>142</sup> Upon the end of the apartheid rule black players have joined the industry.<sup>143</sup> Currently they are facing similar challenges to the ones we have in Kenya. Issues of fraud, scarcity of decent housing, a big population transitioning from the rural areas to urban centre among others.<sup>144</sup> It thus offers a perfect opportunity for a study on how they are managing the many challenges with a view to emulating some of their best practices.

### **3.4.1 The Legislative Framework**

The business of estate agents in SA regulated under the Estate Agency Affairs Act, 1976. It is an all-inclusive piece of legislation covering all the aspects of regulation.

#### **3.4.1.1 The Estate Agency Affairs Act, 1976**

The Estate Agency Affairs Act, 1976 is the key statute dealing with estate agency business in South Africa. It was enacted to provide for the establishment of an Estate Agency Affairs Board and an Estate Agents Fidelity Fund; for the control of certain activities of estate agents in the public interest; and for incidental matters.

#### **3.4.1.2 Clients' Interests**

Clause 2 of the Act imposes a duty on estate agents to protect the public interest. Clause 3 thereof outlines the mandate of estate agents for instance paragraph 3.1 thereof prohibits estate agents from offering, purporting to offer any immovable property for sale or to let or negotiate in connection therewith or canvass or undertake or offer to canvass a purchase or lessee

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<sup>141</sup> *ibid*

<sup>142</sup> Collins Mucheuki, 'Race and Housing in Glenwood and Umbilo: The Role of Estate Agents in Residential Racial Integration' (Masters of Development Studies, Research Project, University of KwaZuluNatal 2011)

<sup>143</sup> *ibid*

<sup>144</sup> The Estate Agency Affairs Board website <https://www.eaab.org.za> accessed on 18 September 2018

therefor, unless he has been given a mandate to do so by the seller or lessor of the property, or his duly authorised agent.

Clause 4 imposes a duty of disclosure on estate agents in terms of disclosing information pertaining to property he is dealing with, nature of his business i.e. whether it is a franchise, name of his business i.e. if he is trading in a name or style other than his own name.

While taking into account clients' interests, Clause 5 imposes a duty not to make misrepresentations or false statements or to use harmful marketing techniques. The same is further fortified by the requirement under Clause 6 which imposes a duty in respect of offers and contracts whereby estate agents are supposed to respect and uphold offers and contracts.

Additionally, Clause 7 of the Act imposes a prohibition against undue influence. It stipulates that no estate agent shall without good cause and sufficient cause, directly or indirectly, in any manner whatsoever, solicit, encourage, persuade or influence any party or potential party to a pending or a completed transaction to utilise or refrain from utilising services of any particular attorney, conveyancer, or firm of attorneys, services of financial assistance offered by any financial institution to members of the public in general; or financial assistance afforded to such party by any person.

Clause 10 introduces an element of confidentiality and estate agents are thereby prohibited from divulging to any third party any confidential information obtained by him concerning the business affairs, trade secrets or technical methods or processes of a client or any party to a transaction in respect of which he acted as an estate agent.

Clause 11 codifies the doctrine of vicarious liability and it is to the effect that every estate agent who is a sole proprietor of an estate agency business or a partner in a partnership or a director shall be held responsible for any contravention of or failure to comply with the Code by any

other partner, director, or member of such sole proprietorship, partnership company or close corporation, unless he has prior to such contravention taken all reasonable steps to prevent the same and could not in the circumstances have prevented such contravention or failure to comply.

### **3.4.1.3 Clients' Money**

The issue of handling of client's money is one which is taken seriously in SA. The Estate Agency Affairs Act, 1976 establishes the Estate Agents Fidelity Funds in which shall be paid:<sup>145</sup>

- a) All monies paid as annual contributions in accordance with the Act;
- b) Income derived from the investment of monies in the Fund;
- c) All monies recovered by or on behalf of the fund in the exercise of any right of action conferred by the Act;
- d) All monies received on behalf of the Fund from any insurance company;
- e) Interest paid to the Fund;
- f) Any other monies accruing to the Fund from any other sources.<sup>146</sup>

The Fund is controlled and managed by the Board and it is kept in an Estate Agents Fidelity Fund Account.<sup>147</sup> The Board may in the public interest arrange any group insurance scheme with any insurer registered or deemed to be registered under the Insurance Act of South Africa for the provision of indemnity insurance cover for estate agents' liability to members of the public on the grounds of malpractice, up to an amount determined by the Board. In that regard, any premium payable in respect from the Fund, the insurance contemplated herein is to be

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<sup>145</sup> Estate Agency Affairs Act, 1976, Section 12, (1).

<sup>146</sup> *ibid*

<sup>147</sup> Estate Agency Affairs Act, 1976, Section 12, (2)



paid<sup>148</sup> Subject to the provisions of the Act, there shall be paid out of the Fund whenever it is required:

- a) The amount of all claims, including costs allowed or established against the fund as hereinafter provided.
- b) Any contribution in the discretion of the Board in respect of any expense incurred by any claimant in establishing his claim;
- c) All legal, accounting and other expenses incurred in investigating and defending claims made against the Fund or otherwise incurred in relation to the Fund;
- d) All premiums payable in respect of contracts of insurance entered by the Board;
- e) The expenses involved in the control of the Fund, including remuneration and allowances to members of the Board in connection with the management of the Fund;
- f) Interest on and redemption of loans negotiated by the Board on behalf of the Fund;
- g) Any other monies which shall or may be paid out of the Fund in accordance with the Act.<sup>149</sup>

The aim of the Fund is to be held and applied to reimburse persons who suffer pecuniary loss by reason of:

- a) Theft of trust money committed by an agent:
  - (i) Of any money or other property entrusted by or on behalf of such persons to him in his capacity as an estate agent;
  - (ii) Of any monies collected or received by him and payable in respect or account of a contract of purchase and sale in respect of immovable

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<sup>148</sup> Estate Agency Affairs Act, 1976, Section 12c.

<sup>149</sup> Estate Agency Affairs Act, 1976, Section 13.

property or any contract or deed of alienation under the Alienation of Land Act;

- (iii) Of any other monies including insurance premiums, collected or received by him and payable in respect of immovable property, any interest in immovable property or any business undertaking.<sup>150</sup>

The Act mandates estate agents to keep accounting records.<sup>151</sup> The said records must reflect and explain the state of affairs of all monies received or expended by him including monies deposited to trust accounts or invested in a savings or other interest-bearing account; of all assets and liabilities; and of all his financial transactions and the financial position of his business. The Act further requires that such accounts records be audited by an auditor within four months after the final date of the financial year of the estate agent.

In addition, the Act imposes a responsibility upon estate agents to keep Trust Accounts in which money held by an agent in trust of clients is to be kept and the Act also gives the agents the right to invest such monies held in the Trust account if events where such monies are not immediately required.<sup>152</sup>

### **3.5 The Institutional Framework.**

There are two key institution which are mandated to regulate the affairs of estate agents, that is The Estate Agency Affairs Board.<sup>153</sup>

#### **3.5.1 The Estate Agency Affairs Board**

This is the key body charged with the mandate of regulating the estate agent business in South

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<sup>150</sup> Estate Agency Affairs Act, 1976, Section 18.

<sup>151</sup> Estate Agency Affairs Act, 1976, Section 29.

<sup>152</sup> Estate Agency Affairs Act, 1976, Section 32.

<sup>153</sup> Estate Agency Affairs Act, 1976, Section 2

Africa. It has formulated a Code of Conduct to supplement the provisions of the Act.<sup>154</sup> The Code prescribes conduct to be adhered to by persons engaged in estate agency business in South Africa.<sup>155</sup>

The Estate Agency Affairs Board is established under Section 2 of the Act and it is composed of 15 members namely; five from estate agents industry; five from the civil society, representing consumer interest; and five members from related professions and institutions such as the legal profession, financial institutions, property owners and developers.<sup>156</sup> The powers of the Board include to:

- a) Appoint committees to advise the Board on any matter in respect of its powers;
- b) Frame and publish, a Code of Conduct;
- c) Encourage and promote improvement of standards of training of and services rendered by estate agents;
- d) In general, to take such other steps and to perform such other acts as may be necessary or expedient in order to achieve its object.<sup>157</sup>

### **3.6 Comparison of the Legislative and Institutional Framework Governing Estate Agency Business in the United Kingdom and South Africa with Kenya**

As can be deduced from the above brief analysis the three countries under study have various similarities as well as certain differences in terms of the regulation of the estate agency business.

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<sup>154</sup> Estate Agency Affairs Board Code of Conduct [https://www.eaab.org.za/disciplinaries/code\\_of\\_conduct](https://www.eaab.org.za/disciplinaries/code_of_conduct) accessed on 17 September 2018

<sup>155</sup> *ibid*

<sup>156</sup> Estate Agency Affairs Act, 1976, Section 3.

<sup>157</sup> Estate Agency Affairs Act, 1976, Section 8.

At the institutional level, the key institution in Kenya is the Estate Agents Regulation Board which is charged with the mandate of enforcing the Estate Agents Act and Regulations made thereunder. The Judiciary through the courts play a crucial role as an adjudicatory body while the Kenya police together with the Office of the Director of Public Prosecution play an investigative and prosecuting role. On the other hand in UK a number of institutions work jointly together in enforcing and regulating estate agency business. While in South Africa, the Estate Agency Affairs Board is the key institution charged with that mandate.

In terms of conducting estate agency business, the three jurisdictions share a common similarity that for one to conduct estate agency business, they must be registered as such and there is a public Register to which the names of such registered persons. In all the jurisdictions, all unregistered persons are barred from engaging in estate agency business.

While in Kenya and South Africa there are professional qualifications to be met for one to engage in estate agency business, no such professional qualifications have been imposed under the UK laws.

In Kenya, the Estate Agents Registration Board is required, in consultation with the Minister for the time being responsible for matters relating to Land, to publish a Code of Conduct to give effect to the Estate Agents Act. An equivalent role is played by the Secretary of State in the UK.

In regard to clients' money, the three jurisdictions impose a requirement that every estate agent must open and operate clients' account to which clients' monies are to be deposited. Furthermore, the estate agents are required by law to give an annual audit of their records and financial statements. These measures are geared towards ensuring that clients' monies are properly utilized.



The three jurisdictions impose a requirement for all persons engaging in estate agency business to be indemnified. Such persons are mandated by law to take insurance policy. It will be noted that under the Kenyan law, the specific sums of monies have been imposed depending on the nature of the estate agency business, whether a partnership, sole proprietorship or a company. The same is not the situation in the UK while in South Africa the amounts to be paid may be prescribed by the regulatory body. The incorporation of the requirement of indemnity in terms of insurance policy shows the importance attached to the client's interests. Interestingly, in the UK, a person may be granted exemption to operate without such an indemnity.

A peculiar feature however with South Africa is the concept of the Estate Agents Fidelity Fund. This Fund is created and applied to reimburse persons who suffer pecuniary loss by reason of among others theft of trust money committed by an estate agent of any money or other property entrusted by or on behalf of such persons to him in his capacity as an estate agent; and of any monies collected or received by him and payable in respect or account of a contract of purchase and sale in respect of immovable property or any contract or deed of alienation. This Fund thus plays a crucial role in ensuring that clients' monies are kept in safe custody and there is guarantee that clients who suffer the contemplated loss would be reimbursed and indemnified. The Fund, being a national scheme offers an avenue for indemnification as the need may arise.

In regard to the enforcement and taking disciplinary actions in regard to estate agents, in the UK there is a specific legislation specially enacted to address questions of redress. The Consumers, Estate Agents and Redress Act of 2007, as discussed elsewhere in this paper, establishes various consumer redress schemes whose mandate include receiving and acting on complaints pertaining to estate agents.

Other key distinguishable features of the South African regulation are the provisions dealing with aspects of confidentiality, vicarious liability and the duty imposed upon estate agents to

ensure that they do not misrepresent information to the clients. Whereas there are no such direct provisions in the Estate Agents Act of Kenya, the same is envisaged to be outlined in the Code of Conduct to be established by the Cabinet Secretary.

The UK compared to Kenya, has several pieces of legislation and institutions regulating the estate agency business in the UK. In Kenya however, there is only one key statute and one main body, the Estate Agents Registration Board.

### **3.7 Conclusion**

As it has been demonstrated in this chapter, there are key features that the Kenyan Government can borrow from the UK and South Africa pertaining to the regulation of estate agency business in Kenya. Whereas the three countries share some common features the Kenyan model seems to put a lot of faith in one institution while the UK and South Africa models apply a multi-agency regulatory framework. Further Contrary to earlier beliefs that qualifications play a big part in fighting unethical behaviour among agents, the UK experience offers a different perspective. The UK system does not have minimum academic qualifications but the quality of services offered is not compromised. In fact the UK agents have been found to be better compared to Realtor in the USA and offer much more and charge less.<sup>158</sup>

Both the UK and South Africa have invested heavily on public awareness. This is complimented by the fact that they both maintain online databases which are easily accessible by consumers. The complaints reporting mechanism have been simplified and in both countries

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<sup>158</sup> Collection of consumer views published in the *Economist* <http://www.economist.com/node/21554204> accessed on 20 September 2017.

it is done online. This helps to keep the agents in check and they are forced to improve their services. A South African based firm won the best agent award in the world.<sup>159</sup>

Another fact to be noted is that the UK has a regulator similar to the EARB in Kenya but the agents are encouraged to join a voluntary ombudsman thus encouraging self-regulation. It is the writers view that self-regulation if implemented well has the potential to bring better results.

In the next chapter, the study shall make recommendations for improving the estate agency business in Kenya.

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<sup>159</sup> Private Property <https://www.privateproperty.co.za/advice/news/articles/south-african-estate-agent-voted-worlds-best/5244> accessed on 20 September 2017.

## CHAPTER FOUR

### 4. CONCLUSION AND RECOMMENDATIONS

#### 4.1 Conclusion

The primary objective of this study was to examine and evaluate the effectiveness of the regulatory regime governing real estate agents and business in Kenya. Other specific objectives of the study included to examine the present institutional and legislative framework regulating real estate agents and business in Kenya and its efficiency in regulating the sector; to investigate whether there are best practices in other jurisdictions in terms of the institutional and legislative framework regulating real estate agents and business that can be a model for emulation by the Kenyan Government; and to make proposals for reforms that if adopted would improve the institutional and legislative framework regulating real estate agents and business in Kenya. In terms of the institutional and legislative framework, the study revealed that at the institutional level, the key institution in Kenya is the Estate Agents Regulation Board which is charged with the mandate of enforcing the Estate Agents Act and Regulations made thereunder. The Judiciary through the courts plays a crucial role as an adjudicatory body while the Kenya Police together with the Office of the Director of Public Prosecution play an investigative and prosecuting role. On the other hand in UK, a number of institutions work jointly together in enforcing and regulating estate agency business. While in South Africa, the Estate Agency Affairs Board is the key institution charged with that mandate.

While examining the effectiveness of the regime governing estate agency business in Kenya, the study also revealed that whereas the Estate Agent Act is comprehensive on the various aspects of the regulation of estate agency business in Kenya, it still falls short in various aspects. For instance, the Act is silent on the role to be played by the County Governments following the new system of Governance that was introduced following the promulgation of the



Constitution, 2010. The Estate Agents Act furthermore does not make provisions or in any way anticipates any roles to be played by the County Governments in regard to the regulation of the estate agency business in Kenya. Additionally, the Act is silent on the question of how the Board is to operate within the 47 counties in Kenya. The Act merely provides that the Board is to operate and keep a register and conduct its activities as outlined under the Act. The Act however does not foresee any scenario whereby persons may as well wish to engage in estate agency business in other counties other than Nairobi. This omission presents a logistical challenge for instance in regard to a person situated in remote parts of the country and who would wish to register and engage in estate agency business.

Similarly, the Act does not make express provisions in regard to the code of conduct to be adhered to by estate agents. It merely gives the Minister in charge of land matters the powers to formulate such rules and regulations concerning the code of conduct to be adhered to.

In terms of the institutional front, the key body charged with the mandate of implementing the Act and regulating the estate agency business in Kenya is the Estate Agents Registration Board. Perhaps additional institutions or sub-committees could be introduced so as to operate within different County Governments.

Despite the foregoing, the study however revealed that the Estate Agents Act of Kenya has contributed immensely for the improvement of the regulatory environment of estate agency business in Kenya.

As it has been demonstrated in the previous chapters, there are key features that the Kenyan Government can borrow from the UK and South Africa pertaining to the regulation of estate agency business in Kenya. Whereas the three institutions share some common features there is still need for reforming the Kenyan legislative and institutional framework so as to improve the regime governing estate agency business. The real estate sector continues to grow each day

and the regulatory regime must be sensitive to these growths. The Kenyan legislature should endeavour to amend the laws in order to align the same with the changes. Borrowing from the UK, Kenya should strive to build the self-regulation capacity of the estate agents. The country should make efforts to promote self-regulation as a means of improving the sector among others.

With the introduction of a devolved system of governance, there is need to align the Act with this new development. There is need to involve county governments in the regulation of this sector. The services of the Board ought to be devolved within the forty-seven counties. As this study pointed out elsewhere, the need for change has been acknowledged even by the Cabinet Secretary of Lands and Physical Planning who has alluded to the fact that there is need for rethinking the regulatory framework governing estate agency business in Kenya.

What then is the way forward?

## **4.2 Recommendations.**

The study proposes the implementation of the recommendations herein below through the joint involvement of the Government and various stakeholders. The study therefore proposes the following measures:

### **4. 2.1 Short term actions**

- a. A comprehensive review of the Estate Agents Act to provide for the following:**

- i. Code of Conduct**

This study proposes that the Estate Agents Act be amended to include express provisions governing the conduct of estate agents. As it stands, there are no express provisions in the Act

touching on the conduct of estate agents. The Act merely gives the Minister the powers to enact a Code of Conduct. In having express provisions, it would create more certainty and the same would highlight on the importance attached to the code of conduct to be observed by estate agents.

#### **ii) Involvement of County Governments**

This study recommends that the national government engages the county governments so as to enable them to play a role as well in the regulation of estate agents which shall be in line with the mandate of county governments as stipulated in the Fourth Schedule to the Constitution. The county governments may provide the much needed capacity to enforce the existing regulations as they have enforcement officers throughout the country. This may involve having the regulatory board second a compliance officer to every county.

#### **iii) Establishing a consumer compensation fund**

The current regulations requires an agent to have an indemnity cover with an insurance company.<sup>160</sup> The problem with such an arrangement is that the compensation for a customer is pegged to the customer establishing that a tort has been committed. This mainly involves a court process. On the other hand the compensation fund should be managed by a board comprised of all the stakeholder in the sector and payment will only require a ruling by the regulatory board or the appeals tribunal as the case maybe.

#### **iv) Establishing different categories of licences.**

Regulating the big well established estate agents firms is easy because they stand to lose more if their licences are withdrawn. The major challenge are the briefcase agents who also has another job and only engages in the business as a side hustle. Using the same yard stick to

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<sup>160</sup> Estate Agents Act, cap 533 section 19

regulate the two may not be easy. A mechanism should be established to have several categories of licences with each having different requirements. For instance the agents who specialises in letting services in the residential estates should be given a simple letting licence. This should be made simple to encourage them to register. Those doing complex services should on the other hand have more stringent licencing procedures including minimum education or on job experience.

**v) Appoint consumer representatives in the regulatory board.**

Consumer protection is now a constitution requirement. Article 46 of the constitution mandates parliament to pass legislation to uphold consumer rights. Whereas the Consumer Protection Act was passed, it deals with the issue in a general terms. There is need to harmonise the current Estate Agents Act with the constitution and the Consumer Protection Act.

One of the ways that consumer's rights can be protected is to have their representatives in the regulatory board. The challenge however will be how to identify such representatives. Perhaps we could start by co-opting the various organisations that fight for consumer rights.

**vi ). Establish an Estate Agents Appeals tribunal.**

There is need to establish a specialised tribunal to handle appeals emanating from disputes involving agents, their customers and the regulatory body. The idea to have a body that is dedicated to hear such disputes with less formality compared to our courts. The members of the tribunal should be appointed from various stakeholders including the government, the agents themselves, lawyers and consumer representatives.

**b) Use of Technology**

There are various ways that technology can be used to enhance regulation. One way is to maintain a well-functioning website. The website should contain all the information that a



consumer requires to know including their rights. The same website should contain the list of the agents who are in good standing, list of complaints against agents, and a user friendly portal where consumers can lodge complaints and even seek advice.

In South Africa, estate agents are now required to make use of a digital seal in all electronic media which confirms their current registration status. Accessing the seal enables consumers to check that the person that they are dealing with is a registered and qualified estate agent. The seal, in addition, incentivizes estate agents to ensure their contact details are always updated with the EAAB so as to provide the correct details. This study recommends the adoption and use of such or similar technology in order to avert the situation whereby quacks engage in estate agency business illegally while deceiving innocent members of the public. Such technology would go a long way in restoring the integrity of the estate agency business in Kenya. Although introducing and maintaining such technology may be expensive, the same will however greatly improve the estate agency business in Kenya.

#### **c) Public awareness.**

This perhaps should be the most important reform that the sector requires. So long as the public is not aware of their rights they will continue falling prey to rogue agents. Information required include knowledge of the laws , where and how to find registered agents, risks involved in using unregistered agents, amount of commission payable, how to make a complaint against an agent among other things. This can be done by the EARB in corroboration with the parent ministry and county governments.

#### **4.2.2. Long term proposals include;**

##### **a. Training and Continuous Development**

Borrowing from South Africa, the Estate Agents Board of Kenya should endeavour to offer more continuous training development programmes so as to boost and strengthen the skills of estate agents. Such trainings would greatly boost the skills and improve on the professionalism in the sector.

Closely related to training, the study recommends that the government, in collaboration with various stakeholders, does introduce courses on estate agency business and further offer loans and incentives to enable people take up such courses and to enable institutions to provide such courses.

#### **b. Self-regulation.**

The agents should be encourage to form organisations that will regulate the members. This will be in addition the regulation by the EARB. Being a member of such an organisation should be made a prerequisite to the annual renewal of the practise licence. This will be similar to the dual regulation of lawyers by the government and the law society.

#### **c. Encourage Gender balance.**

The business of real estate is traditionally viewed as a preserve of men. In Kenya the majority of the estate agents are male. Psychologist believe that men are more likely to break rules than women. According to the studies by Maslach, Santee, and Wade (1987), part of the masculine gender role is to be independent and assertive, therefore leading males to conform less. At the same time, they stated that part of the feminine role involves being sensitive to others, therefore leading to conformity to maintain harmony. These contrasting personality traits found in men and women set a solid foundation for their conforming or nonconforming behaviours.<sup>161</sup>

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<sup>161</sup> Christina Maslach, Richard T. Santee, & Cheryl Wade, Individuation, gender role, and dissent: Personality mediators of situational forces (1987) 53(6) Journal of Personality and Social Psychology 1088.

Maybe if we have more women in the field we may achieve better compliance levels than being experienced at the moment. We can encourage women to join by giving them incentives and other forms of affirmative action.

**d. Continuous revision of the regulations.**

There is need to invest in continuous market research so as to enable the regulator to keep on revising the regulations to adopt to the changing market dynamics. This is because human beings keep improvising new tactics to beat the system and therefore the system need to be improved continuously.

**e. International Cooperation and Capacity Building**

Just like South Africa, this study recommends that the Estate Agents Board co-operates with the international community and organizations dealing with real estate and estate agents. As this study has pointed out, the South African EAAB has continued to cooperate with international bodies such as the Association of Real Estate License Law Officials (ARELLO). These will further strengthen the capacity of the Estate Agents Board.

Achieving international cooperation may be difficult as it depends with the political will of the government in question. In this regard however, the civil society through non-governmental organizations and activists may come in handy to pile pressure upon the government for it to cooperate with the international community and other international organizations in order to address the needs and demands of the estate agency sector.

**f. Further Research**

This study proposes that further research be conducted in this area of study. Whereas the author's comparative analysis was only limited to South Africa and the UK, similar analysis may be conducted in regard to other jurisdictions so as to examine the various features obtaining therein.

Furthermore, a broader analysis and research may further be conducted on aspects of the estate agency business that have not been captured in the present study.



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