



SECURING CREDIT FOR GROWTH
THE CASE FOR A NEW ASSET REGISTER IN KENYA

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Prepared by



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The Kenya Financial Sector Deepening (FSD) programme was established in early 2005 to support the development of financial markets in Kenya as a means to stimulate wealth creation and reduce poverty. Working in partnership with the financial services industry, the programme's goal is to expand access to financial services among lower income households and smaller enterprises. It operates as an independent trust under the supervision of professional trustees, KPMG Kenya, with policy guidance from a Programme Investment Committee (PIC). Current funders include the UK's Department for International Development (DFID), the Swedish International Development Agency (SIDA), and the Bill and Melinda Gates Foundation.



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Abbreviations

AMFI	Association of Microfinance Institutions of Kenya	SACCO	Savings and Credit Co-operatives
FSD	Financial Sector Deepening	SMEs	Small and Medium-Sized Businesses
ICDC	Industrial & Commercial Development Corporation	SMTP	Simple Mail Transfer Protocol
IFC	International Finance Corporation	SOAP	Simple Object Access Protocol
IT	Information Technology	UNCITRAL	United Nations Commission on International Trade Law
KBA	Kenya Bankers Association	UNIDROIT	International Institute for the Unification of Private Law
KCISI	Kenya Credit Information Sharing Initiative	US	United States of America
LAK	Leasing Association of Kenya	Vaell	Vehicle Equipment Leasing Limited
MFI s	Microfinance Institutions		
NatLaw	National Law Center for Inter-American Free Trade		
PACRA	Patents and Companies Registration Agency		
PPSAs	Personal Property Security Acts		

EXECUTIVE SUMMARY

Vision 2030 sets out ambitious goals for Kenya's economy and growth. To achieve these goals, a number of structural and legal reforms must be undertaken, including those that facilitate access to credit and reduce its costs for all types of borrowers, but primarily for SMEs. One of the tools to increase access to credit is a movable asset registry that publicizes encumbrances over borrowers' assets and establishes priorities among competing claims to the same collateral. Unlike the registry of vehicles or immovable property, this type of registry does not establish nor determine ownership to the movable asset provided as collateral. The effect of registries of this kind is reduced interest rates because the risk that the applicant for credit has already encumbered its assets is effectively reduced by the ability of the lender to consult a reliable and easily accessible source of information. This Report examines the feasibility of establishing a movable asset registry for Kenya and its impact on security devices, primarily in the nature of financial leases.

The present legal framework in Kenya is not conducive to modern security devices that would allow SMEs to access commercial credit. It is based on outdated English law instruments that are fragmented and cater to particular types of borrowers and transactions. This fragmentation increases legal complexity that is ultimately reflected in the cost of credit. The fragmentation of security devices and laws also results in the fragmentation of registration requirements. Today in Kenya, certain security devices must be registered for effectiveness against third parties while others are effective without any form of public notice. In particular, the latter increases the burden of due diligence that prudent lenders undertake and this burden is reflected in an expense ultimately added to the cost of credit. These and other impediments (e.g. stamp duties) result in the underutilization of movable assets as collateral.

Existing Kenyan registries not only function based on outdated legal concepts but their operational aspects, such as their actual registration procedures, are also in a dire need of reform. The Chattels and Companies Registries require the submission of underlying instruments creating securities. Neither provides

for any form of electronic access whether for registrations or searches. Manual registration procedures are lengthy causing significant delays and uncertainty. The actual files are at a risk of misplacement or total loss. The ability of searchers to locate the records they need to determine the creditworthiness of an applicant for credit is hampered by such a status of the records.

The inadequacy of the legal framework and existing registries has already given an impetus to many countries sharing the same legal traditions as Kenya (e.g., Australia, Canada and Malawi) to undertake legal reform. Such reform overhauls the entire framework governing security devices and results in the establishment of a movable asset registry. The registry of this kind significantly differs from the registries known to Kenyan lenders that: i) require the submission of the underlying instrument as opposed to a standardized registration form; ii) entail scrutiny of the information by the registry staff as opposed to mere processing of the information provided by lenders; and iii) charge fees based on the amount of the loan as opposed to a flat and low registration fee, among others. These are the fundamental features of a registry that has the potential to significantly increase access to credit for Kenyan SMEs.

The future Kenyan registry should be a registry for all in terms of: i) security devices, whether charges, liens or security interests; ii) transactions, whether installment loans, financial leases or factoring of book debts; iii) lenders, whether commercial banks or sellers of vehicles; iv) borrowers, whether SMEs or microenterprises; and v) collateral, whether valuable machinery or used household appliances. A single registry available for use to everybody significantly simplifies the legal and registration framework resulting in straightforward priority rules, enhanced transparency and reduced cost of credit. However, it is important for the registry to operate within an adequate legal framework that gives confidence to the users that their rights will be enforced predictably and efficiently. This report concludes with recommendations that identify the steps necessary to establish such a registry in Kenya.

INTRODUCTION

This report provides an overview of Kenya's current policy, and the legal and practical framework for registration of movable asset collateral – including leases. It also outlines the future impact of a modern movable asset registry in increasing access to credit for SMEs. The report therefore looks closely at Vision 2030: it examines it both as the established policy platform for the potential development of a movable asset registry, as well as other relevant policy goals established in connection with Vision 2030.

In addition, the existing legal framework is analyzed in brief to determine and address specific challenges arising from the multiplicity of laws currently governing movable property secured financing. In particular, this report discusses the current: Chattels Transfer Act, the Hire Purchase Act, the Companies Act and the Income Tax Act with regard to the Leasing Rules. It also provides an overview – both from a practical and legal perspective – of the existing Registries for Chattels and Charges.

In order to understand the current in-country perception towards a movable asset registry, the report includes findings from a series of interviews with a variety of public and private sector stakeholders. It also contains feedback

received after a preliminary presentation of these findings. The input and views obtained are included throughout the report.

Finally, with the use of a comparative approach, the report includes recommendations for the implementation of a movable asset registry in Kenya. Similar Registries in other jurisdictions have had significant impact on improving access to credit for SMEs. In Mexico 97% of registrations are for loans under US\$1 million,¹ and in Ghana 86% of registrations are securing loans granted to microbusinesses and SMEs.² Given Kenya's strong commitment to economic development and growth as reflected in Vision 2030, the establishment of a modern movable asset registry would help to increase access to credit and improve the overall collateral system – both important policy goals.

¹ Statistics provided by the Ministry of Economy, Mexico (April 2013), on file with NatLaw.

² Statistics provided by the Bank of Ghana, IFC, Secured Transactions and Collateral Registries Program (2013), on file with NatLaw.

Chapter 1

POLICY AND VISION

Kenya's Vision 2030 has provided the necessary policy framework to help the country move forward with legal and institutional reform. The economic pillar of Vision 2030 is predicated upon deepening financial services to reach currently un-served or underserved populations. This is not surprising considering that as of the time Vision 2030 was drafted, a mere 15% of the population was deemed to have access to finance.³ Specifically, at the outset, Vision 2030 aimed to "decrease the share of the population without access to finance from 85% to below 70%."⁴ With a total population of over 44 million, this first policy goal aims to increase access to finance from the existing 6.6 million people to at least 13 million. When comparing this goal with the results from the FinAccess National Survey from 2006 and 2009,⁵ Vision 2030 looked at use or access to credit from the formal sector. This included banks, SACCOs, MFIs, credit cards, and hire purchase transactions, and excluded the informal sector (employers, buyers and supplier credit, among other similar sources). According to FinAccess 2009, overall access to credit both through the formal and informal sector grew from 31% in 2006 to 38% in 2009.⁶ However, in 2006 the informal sector credit accounted for 22.8% and in 2009 to 24.3%. This was in fact, the most significant source of credit. In general, the percentage of Kenya's population with access to formal financial services⁷ has increased

to 22.6%.⁸ It is important to note that when combined, access to financial services from formal sources, such as banks, and other non-traditional formal sources, such as non-bank financial institutions and MFIs, financial inclusion in Kenya grew from 26.3% in 2006 to 40.5% in 2009. One of the tools that would help to achieve the Vision 2030 goals to increase access to credit and therefore access to financial services, is the establishment of a movable asset registry. This would provide a transparent and publicly-accessible system for potential lenders to verify the viability of the applicant for a loan.

As in other developing economies, SMEs in Kenya are the engines to increased economic development. However, they tend to operate in the informal sector, partly because of the high cost of incorporating a business and the need to pay tax in the formal sector. Even so, Kenya's large informal business sector employs a massive 89% of the population.⁹

In addition to SMEs, youth and women's enterprises are also within the Kenyan Government 9-point Jubilee Action Plan.¹⁰ Consistent with Vision 2030, this specific aspect of the Action Plan aims to make credit affordable to this important segment of the population. The Jubilee Administration's Action Plan goals have been included in the Second Medium Term Action Plan for implementation in 2013–2017. The movable asset registry would contribute towards the achievement of this point of the Action Plan by lowering credit risks. It would also remove some uncertainty of the legal status of the collateral, and therefore reduce the cost of credit.

³ Vision 2030 (Kenya), Popular Version (2007) §4.6, at 15, available at <http://www.vision2030.go.ke/index.php/home/library>.

⁴ *Id.*

⁵ FinAccess National Survey: Dynamics of Kenya's changing financial landscape (June 2009), at 15, available at http://www.fsdkenya.org/finaccess/documents/09-06-10_FinAccess_FA09_Report.pdf

⁶ *Id.*

⁷ Formal Financial Services include those provided by Banks, Postbanks, and Insurance companies. Financial Inclusion in Kenya (2009), Appendix 1, Summary: Main Survey Findings, at 150, available at http://www.fsdkenya.org/finaccess/documents/11-06-27_finaccess_appendix1_MainFindings.pdf

⁸ *Id.*

⁹ Ministry of Devolution and Planning, Economic Survey 2013 Highlights, at 42, at http://www.knbs.or.ke/Economic%20Surveys/Cabinet_Secretary_Presentation_on_Economic_Survey_May_2013.pdf.

¹⁰ *Id.*, at 53.

Chapter 2

EXISTING LEGAL FRAMEWORK AND REGISTRIES IN KENYA

2.1 LEGAL FRAMEWORK

The legal framework that governs lending in Kenya is characteristic of other systems that have inherited English-based security devices. Kenya has multiple laws that govern security interests under a variety of names, including charges, liens, pledges, retentions and transfers of title, among others. The collection of laws demand multiple requirements for these security transactions to become valid against third parties; in some cases, security interests must be registered (e.g., floating and fixed charges), while in other situations no registries have been established (e.g. financial leases). This fragmentation of the legal framework forces lenders to make a legal determination as to the status of the loan applicant (whether a registered company or informal) and its ability to use a particular security device. This fragmentation also means the lender is unable to use a single security device to satisfy the credit needs of the borrower, as some assets may have to be financed under a floating charge and others under a hire-purchase agreement. This legal complexity increases the cost of credit unnecessarily.

The following portion of this report reviews and provides commentary on each of the relevant laws applicable to lending against movable assets.

2.1.1 Chattels Transfer Act

The Chattels Transfer Act originally dates from 1930 and has since been amended to accommodate certain market changes.¹¹ It applies to grantors who may be both individuals and legal entities.¹² Such grantors may execute an instrument to secure the payment of a loan effectively creating an interest in chattels. The scope of this Act regulates secured lending devices that transfer or purport to transfer the property or right to the possession of chattels. Article 2 of the Act specifically and extensively lists those transactions that are excluded from its scope, such as hire purchase agreements, charges and debentures, and bills of sale of chattels among others.¹³

Agreements entered into under this Act require registration without which they are void against specified third parties.¹⁴ Articles 2 and 5 of the Act define the Registry as a transaction-registration system and require the submission of the agreement documenting the transaction, as well as a Schedule (list) of collateral or inventory.¹⁵ This requirement to submit the actual instrument creating the security for registration contrasts with modern filing systems. In these cases, a standardized financing statement, not the security agreement is submitted for registration. In addition, the Act provides a 21-day period within which the lender must register the document. The Act also provides the content and information to be lodged in to the Registry in its Schedules.

¹¹ Chattels Transfer Act, 1930 (Rev 2012).

¹² Id., art. 2, definitions of grantee and grantor.

¹³ Id., art. 2, definitions of chattels and instruments.

¹⁴ Id., art. 13.

¹⁵ Id.

The Registry Book (database) includes a field for “Nature and Date of the Instrument.”¹⁶ In practice, this field is completed with the amount of the loan secured with the collateral. A final practical note is that the Registry Book does not provide a field in which a description of the collateral could be entered. Therefore in order to identify the assets associated with the agreement, a searcher has to physically locate a copy of the instrument that should have been kept at the Chattels Registry.

Article 16 of the Act states that the instrument shall have effect as of the date of registration. The effects against third parties for failing to register are outlined in more detail within Articles 13 and 14 of the Act. Article 13 provides that an unregistered instrument is void and fraudulent as against: i) the receiver or trustee in bankruptcy; ii) the assignee or trustee acting under any assignment for the benefit of the creditors; and iii) any person seizing the chattels. The effect on bona fide third parties that deal with the chattels is spelled out in Article 14:

No unregistered instrument comprising any chattels whatsoever shall, without express notice, be valid and effectual as against any bona fide purchaser or mortgagee for valuable consideration, or as against any person bona fide selling or dealing with those chattels as auctioneer or dealer or agent in the ordinary course of his business.¹⁷

Thus failure to register makes the security vulnerable against third parties, yet preserves its validity against the borrower. Accordingly, the lender will be able to enforce his/her security against the borrower even though he/she has failed to register the required instrument.

2.1.2 Hire Purchase Act

First adopted in 1982, the Hire Purchase Act regulates a form of financial leasing in which it “. . . shall be implied. . . that the legal ownership of, and title to, the goods shall automatically be vested on the hirer upon payment by the hire-purchase price in full.”¹⁸ This Act also establishes another transaction-registration system in which agreements must be registered at the Registrar of Hire Purchase Agreements.¹⁹ The registry operates as a public registry and is accessible by anyone who wants to consult or search the records.

The limitations of this Act are established under Article 3(1) that limits the scope of the Act to those agreements that do not exceed 4 million shillings (approximately US\$49,000).²⁰ In practice, this limit excludes from registration numerous hybrid transactions that fall under the category of hire purchase agreements or financial leases, therefore creating secret liens. This system

¹⁶ Id., First Schedule, Register Book.

¹⁷ Id., art. 14.

¹⁸ Hire Purchase Act, 1982 (Rev 2010), art. 8(e).

¹⁹ Id., art. 5.

²⁰ Id., art. 3(1).

permits certain rights in the collateral to remain unregistered and not subject to any form of public notice resulting in uncertainty and unpredictability. The ability to register a hire-purchase agreement with full legal effects within thirty (30) days after its execution also undermines certainty and transparency.²¹ From the perspective of comparative law, the elimination of secret liens like these in Kenya was the primary purpose for the adoption of modern secured transactions laws in Canada²² and the United States in the 1960s, and more recently in Australia (2009),²³ Liberia (2010)²⁴ and Malawi (2013).²⁵

In addition, an incentive to register agreements is found under Article 5(4) of the Hire Purchase Act. This Article provides that failure to register results in the legal impossibility to enforce the hire purchase agreement in the case of default. This legal effect is much more significant than that under the Chattels Transfer Act because an unregistered hire purchase agreement is unenforceable, even against the hirer and not only third parties.

2.1.3 Companies Act

Effective since 1962, the Kenyan Companies Act regulates primarily the registration of companies and their business affairs, including dissolution.²⁶ Relevant to this report are the provisions of the Act on charges and debentures. Part IV of the Companies Act specifically governs the registration of charges.²⁷ According to Article 96, a charge on assets of the company has no effects against a liquidator or other creditor if it has not been registered within the statutory period of 42 days, commencing on the date of the creation of the charge.²⁸ Charges under the Act include floating charges, charges to secure debentures, charges on ships, any book debts, goodwill and other intellectual property.²⁹ The Registry of Charges is part of the Companies Registry. Some English commentators argue that this approach of itemizing charges subject to registration is fairer because it means the unknown charges cannot be registered.³⁰ However, the downside is that the lender is forced to make a legal determination as to whether or not the charge can be registered, the cost of which is inevitably passed on to the borrower.

The Registry of Charges also operates as a public registry accessible subject to the payment of a fee to search the instruments in the record for people other than interested creditors and members of the company. The Act also provides a timeframe during which records may be consulted or inspected on any given day.³¹ Specifically, Article 106 states:

- (1) The copies of instruments creating any charge requiring registration under this Part with the registrar, and the register of charges kept in pursuance of section 105, shall be open during business hours (*but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day shall be allowed for inspection*) to the inspection of any creditor or member of the company without fee, and the register of charges shall also be open to the inspection of any other person on payment of such fee, not exceeding two shillings for each inspection, as the company may prescribe.³²

It is important to note that the primary duty to register at the Registry of Charges falls on the company itself, not the lender. This duty is of such importance that if the company fails to register within the allowed period, the company itself as well as its officers will be fined.³³ This requirement is a relic of the 19th century when the first English Companies Act was adopted. At that time, no public companies registry existed. Section 14 of the English Companies Act of 1900 introduced the requirement of registration of charges with the Registrar of Companies.³⁴ As such, the pre-1900 Act placed a duty on the company itself to register a charge on its own books. This historical requirement has not been changed since even though the public companies registry has been in existence for over a century and the prevailing practice of creditors is to register charges themselves.

2.1.4 Income Tax Act (Leasing Rules)

The Income Tax Act of 2002 includes a limited set of rules on leasing operations. For the most part, the relevant rules for this report relate to definitions.³⁵ It is highly inadequate to regulate the commercial aspects of leasing only by definitions contained in tax regulations.³⁶ One of the major gaps is the failure of these definitions to recognize the trilateral nature of financial leases that involve not only the lessor and lessee but also a supplier. Furthermore, these

²¹ *Id.*, art. 5(1).

²² See Roderick J. Wood, *The Floating Charge in Canada*, 27(2) *Alberta L. Rev.* 191 (1989).

²³ See Bruce Whittaker, *The Scope of Rights in the Collateral* in Section 19(2) of the PPSA – Can Bare Possession Support Attachment of a Security Interest? 34(2) *UNSW L.J.* 524 (2011).

²⁴ Commercial Code (Liberia) (2010), ch. 5, available at <http://www.liscr.com/liscr/portals/0/iberian%20commercial%20code%20code%2010.pdf>.

²⁵ For an overview of the reform in Malawi see Marek Dubovec & Cyprian Kambili, *Using the UNCITRAL Legislative Guide as a Tool for a Secured Transactions Reform in Sub-Saharan Africa: The Case of Malawi* (forthcoming *Arizona Journal of International & Comparative Law* Winter 2013).

²⁶ Companies Act, 1962 (Rev 2009).

²⁷ *Id.*, Part IV, arts. 96–106.

²⁸ *Id.*, art. 96.

²⁹ *Id.*

³⁰ Gerard McCormack, *Registration of Company Charges* 69 (3rd Ed., 2009).

³¹ *Id.*, art. 106.

³² *Id.*

³³ *Id.*, art. 97(3).

³⁴ MCCORMACK, *supra* note 30, at 49 and Louise Gullifer, *The Reforms of the Enterprise Act 2002 and the Floating Charge as a Security Device*, 46 *Ca. Bus. L.J.* 399, 401 (2008).

³⁵ Income Tax Act Leasing Rules (2002).

³⁶ Rafael Castillo-Triana, *Final Report, Review Environment for Lease Financing in Kenya*, 26 (August 2010).

rules are limited only to equipment leasing, thus excluding the possibility of leasing other types of movable property.³⁷

The rules include definitions of finance lease and hire purchase that identify the point of distinction between these two financing devices as the intention of transferring ownership at the expiration of the term agreement.

“..finance lease” means a contract in which the lessor agrees to lease assets to the lessee for a specified period of time where the risks and rewards associated with ownership of the assets are substantially transferred from the lessor to the lessee, but with the title to the assets always remaining with the lessor.”

“..hire purchase” means a contract under which the lessor agrees to lease the assets to the lessee for a specified period of time, with the intention of transferring ownership on the expiry of the lease.”³⁸

Finally, the only reference to registration is that of an internal “register” or log book maintained by the lessor.³⁹ This type of internal log book does not constitute a registry that would provide any kind of notice or carry legal effects that would affect third parties or other lessors and creditors.

2.2 EXISTING MOVABLE ASSET REGISTRIES

The Chattels Registry is currently based in Nairobi and is manually operated based on paper submissions. This Registry is a version of a transaction-registration system in which the documents executed for the transactions (loan and/or security agreement) are recorded at the registry. These characteristics of the Registry mean that the system does not operate in real-time. For example, a document may be presented and submitted for registration but not processed until a later time as the clerk entering information into the register book makes her way through a number of documents submitted for such purpose.

Some of the most apparent risks at the Chattels Registry are the loss of paper copies of agreements and Registry logbooks. There are very few control mechanisms in place to avoid the loss of the Registry logbook pages.

Other areas of increased liability include: (i) The level of responsibility in properly transcribing information from the document submitted by the lender on to the Registry logbook; and (ii) The lack of a timestamp that would

determine priority among lenders who may have submitted documents for registration on the same day.

There are other registries available for registering security interests in collateral. As previously mentioned the Companies Registry includes a section for the registration of charges as defined under the Companies Act. This Registry is exclusively for charges on movable assets of registered businesses.

As part of the e-Government pilot program with the State Law Office, the Companies Registry will provide registry services through a mobile platform.⁴⁰ Currently, it seems that registry services and payments through this mobile platform will be limited to “registering businesses, conduct[ing] name searches and pay[ing] the attendant fees.”⁴¹ It is unclear if or when this technology will be available for registration of charges.

Finally, in practice, registration of security interests on vehicles operates through the transfer of ownership and deposit of the vehicle’s logbook with the lender (which evidences ownership). Registrations of vehicle transfers are conducted at the Kenya Revenue Authority’s Road Transport Department.⁴² Overall, lenders in Kenya are comfortable with this mechanism, particularly because processing times (approximately 1 day) are significantly shorter than at other registries.

Registration costs and time vary greatly between registries. For example, it takes one day for registrations to be processed at the Motor Vehicle Registry, but anywhere between a week and two months to process registrations at other registries. In addition, the stamp duty process adds, at a minimum, three days to the process. The time required for the stamp duty process may therefore vary greatly depending on the asset granted as collateral.

A common practice among lenders is the execution of a large number of “original” signed agreements for each transaction. For instance, lenders may request borrowers to sign up to six original documents and take them all through the registration process — both stamp duty and registry. Costs are consequently increased because the stamp duty office and the registry charge fees per original document submitted. Typically, lenders will take back five of the originally signed and stamped documents that now contain evidence of registration (seal and stamp) and will leave one original for the registry’s records.

³⁷ Id.

³⁸ Id., art. 2.

³⁹ Id., art. 6.

⁴⁰ George Omondi, Mobile company registry to boost Kenya investment climate, *Business Daily* (Aug. 8, 2013) at <http://www.businessdailyafrica.com/Mobile-company-registry-to-boost-Kenya-investment-climate/-/539546/1941686/-/13i1mj8/-/index.html>.

⁴¹ Id.

⁴² See further Kenya Revenue Authority, Road Transport Department, at <http://www.revenue.go.ke/index.php/road-transport/about-road-transport>.

Chapter 3

LOCAL PERSPECTIVE ON THE IMPLEMENTATION OF A MOVABLE ASSET REGISTRY

3.1 OVERVIEW

After conducting various interviews with stakeholders from both the public and private sectors, it is apparent that there is overall support towards the establishment of a movable asset registry. The public sector is aware of its alignment with Kenya's Vision 2030 to increase access to credit for the largest segment of the economy, SMEs and the informal sector. The private sector appreciates the need for a reliable legal framework and institution that provides real-time information on collateral, lenders and borrowers.

The financial sector in Kenya is diverse and offers a wide-range of financial products. There are 43 regulated commercial banks that are represented by the KBA. There are also a large number of MFIs in the country: 49 are members of the AMFI of Kenya. Only nine are regulated by the Central Bank of Kenya because they meet the "deposit-taking" criteria established in the Microfinance Act (2006).

In addition, there are 130 licensed SACCOs regulated by the Sacco Societies Regulatory Authority. And finally, there are leasing companies. Leasing companies per se are not regulated by the Central Bank; however, the LAK offers a self-regulatory framework for 21 member institutions that provide leasing services in Kenya today. It is worth noting that approximately 80% of LAK's members are either commercial banks or other companies such as vehicle dealerships.

Figure 1: Formal and semi-formal sector lenders

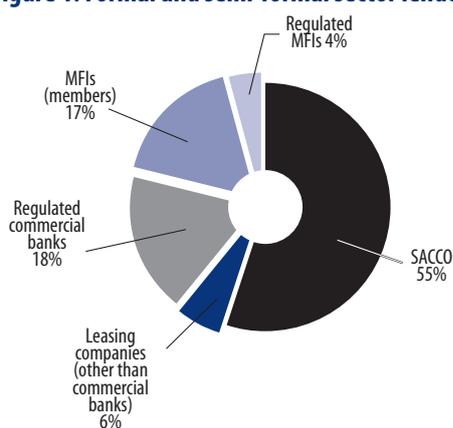
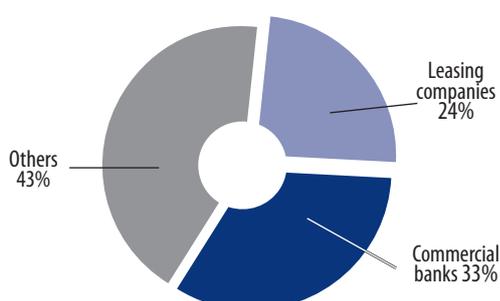


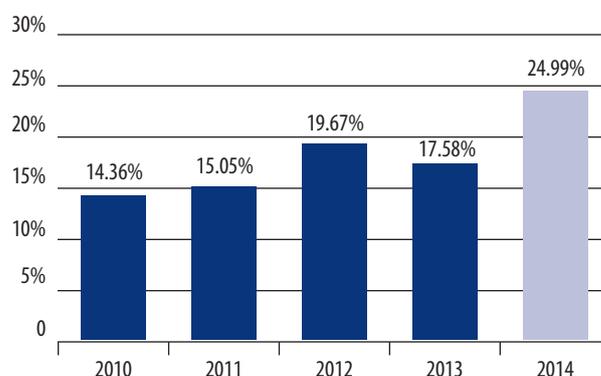
Figure 2: LAK members



In terms of loan features, an average SME loan provided by a commercial bank and secured with movable assets (typically household assets other than essential items such as bedding and cooking utensils) ranges from 1-100 million shillings (US\$12,000-\$1 million) and has an average interest rate of 17% per annum. For loans over 100 million shillings, vehicles, cattle, or farm animals are required as collateral. In contrast, the average loan provided by a Microfinance Institution and secured with assets is 35,000 shillings (US\$425) and has, at an average, an interest rate of 21% per annum. There is a significant gap between average/typical loan amounts provided by these two traditional lenders. It is within this gap that most small business loans would most likely be classified.

In addition, interest rates for loans granted by commercial banks have been fluctuating in the last three years. According to the Central Bank of Kenya, between 2012 and 2013 weighted average lending interest rates dropped by 11% – from 19.67% to 17.58% per annum. Likewise a more dramatic reduction is evident when comparing current interest rates with those from two decades ago (1993), which have dropped by 30%.⁴³

Figure 3: Commercial banks – average interest rate



3.2 MOVABLE ASSETS USED AS SECURITY

Throughout all of the previously identified lender and representative associations is a will to expand and make credit available to SMEs. However to date, lending devices are scarcely available to those SMEs who own and who can prove they own land, vehicles or specialized new machinery. The following provides a summary of commonly accepted collateral based on lender type.

⁴³ Central Bank of Kenya, Commercial Banks Weighted Average Interest Rates: Lending (data for 2013 as of July 2013) available at <http://www.centralbank.go.ke/index.php/interest-rates/commercial-banks-weighted-av>.

Commercial banks

- Vehicles.
- New equipment or machinery.
- Exceptionally: Stock financing (single large account debtor to deposit payments with lender).

Microfinance institutions

- Vehicles.
- Household assets.
- Limited: cattle .

Leasing and hire-purchase companies

- Vehicles.
- New machinery and equipment.
- Limited: refurbished machinery and equipment.

3.3 MOVABLE ASSETS CURRENTLY NOT USED AS SECURITY

Outside of what is already accepted by lenders as collateral in Kenya, there is a large potential for other assets that have commercial value and that SMEs are likely to have. The collateral potential of the following assets would be immense in combination with a modern movable asset legal and registry reform. Among some of these assets are:

- Inventory of all kinds: not just vehicles in a dealership.
- Accounts receivable: in bulk-future receivables, non-notification.
- Agricultural products: standing and future crops (agriculture represents approximately 24% of Kenya's GDP).

3.4 OTHER RELEVANT ASPECTS OF THE LENDING ENVIRONMENT IN KENYA

During the last five years, the financial sector has been adapting and implementing information sharing mechanisms. These mechanisms have been implemented both through mandatory regulations (Finance Act requiring reporting to the Credit Reference Bureau) or self-regulation (through sector associations such as the AMFI). Although initially information reported to the Credit Reference Bureau was limited to negative information, Kenya is moving towards the inclusion of positive information.

The Kenya Credit Information Sharing Initiative (KCISI) has also played an important role in the rapid growth and development of information sharing mechanisms. However, KCISI has specific challenges to address. First, it is currently housed at the KBA and this has created the perception of a possible conflict of interest or possible inclination towards preference of the members or the mission of the KBA. This perception is especially true for those within the public and other non-financial institutions that are not members of the KBA. Second, KCISI is still challenged with the need to increase awareness and reach all types of lenders and credit providers, including those that are not regulated.

With regard to payment technology, Safaricom has been growing strong in Kenya. With over 19 million customers, Safaricom offers a variety of services that range from access to the internet to payments and money transfer mechanisms. In the last year, non-voice services (internet, M-PESA, SMS, fixed services) have grown by 29%.⁴⁵

In addition, the recent agreement entered into between the Registry of Companies and Safaricom will implement a payment mechanism and other mobile-based technology for accessing registry services.⁴⁶ This technology will serve as a platform for introducing new technology to increase access and reach for the movable asset registry.

⁴⁴ CIA Factbook, Kenya (Economy) at <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>.

⁴⁵ Safaricom Ltd, FY 2013 Presentation, at 5, at http://www.safaricom.co.ke/images/Downloads/Resources_Downloads/FY_2013_Results_Presentation.pdf?itembanner=31.

⁴⁶ Omondi, Mobile company registry, supra note 40.

Chapter 4

REGISTRY MODELS AND INTERNATIONAL BEST PRACTICES

4.1 A. OWNERSHIP VERSUS COLLATERAL ONLY TYPE OF MOVABLE ASSET REGISTRY

A number of registries are set up to record ownership rights to assets. For instance, ownership to land may not be effectively transferred until the name of the buyer is entered into the Land Registry. Similarly for the sale of a vehicle to have any legal effect it must be registered in the car registry. Another example might be a person who is unable to claim protections under intellectual property laws until their patent application was approved by the Patents Office and the patent was properly registered. These kinds of registries are set up to not only record ownership rights and their transfers but also to record any encumbrances on such right like charges and liens. The advantage of these kinds of registries is that a searcher, such as a buyer, is able to find all the necessary information about the right of the seller from within a single source.

Whether or not to set up movable asset registries that record both ownership and encumbrances depends on the nature and characteristics of the underlying assets: certain assets lend themselves better to certain types of registries. First, land, vehicles, intellectual property rights and also large ships and aircrafts are uniquely identifiable by serial numbers. In contrast most movable assets, such as the inventory of a retail store, growing crops, fish, household goods or accounts receivable, lack such unique identifiers. Second, land, vehicles, intellectual property rights, etc., typically have significant market value well in excess of foods items, clothing, household goods or the crops of an SME. Finally, manufacturers and governmental agencies typically issue ownership documents relating to certain types of assets, such as cars or land. In contrast, manufacturers of furniture or growers of crops do not issue any documents evidencing ownership to each chair and table sold or bag of corn produced.

As such, the nature of assets that SMEs typically own is not suitable to the establishment of an ownership type of movable asset registry. For inventory, equipment, accounts receivable, farm products, household goods and similar items, ownership is determined outside of the registry system. For instance, a prudent lender, before approving a loan application, should verify that the accounts receivable that the borrower is offering as collateral have in fact been generated by the sale of goods or the provision of services. Inquiry with the person/s who owe/s debts to the borrower will be sufficient to establish the borrower's ownership rights to those accounts receivable. It would not be practical nor cost-effective to require the borrower to register "ownership rights" to each individual account receivable and have the person owing those debts confirm their existence. Nowhere in the world exists an ownership registry for inventory, accounts receivable or household goods.

Ghana operates a collateral registry that does not evidence ownership rights to the asset. Recently enacted laws in Liberia and Malawi contemplate the establishment of a collateral registry as well. The draft laws for Sierra Leone, South Sudan, and Zambia are all based on a registry in which ownership of

the asset is immaterial and remains a private matter between the borrower and the lender. The best international practices also recommend the creation of a registry to serve as a notification system that alerts searchers about the existence of encumbrances over assets and not of their ownership.

4.2 BENCHMARKS FOR MOVABLE ASSET REGISTRY BASED ON INTERNATIONAL BEST PRACTICES

4.2.1 All security interests should be registered

There are two approaches to structuring registries of security interests in personal property: 1) all security interests are subject to registration, regardless of the underlying property rights (e.g., financial leases, retentions of title, transfers of ownership in security, etc.); and 2) security interests in which the creditor acquires or retains ownership are exempted from registration.⁴⁷

The first approach is known as functional and means that all lenders have the opportunity to use the movable asset registry and perfect their security interests in movable property to secure any lending product.⁴⁸ As a result, all of the following secured lending devices would be under the scope of the movable asset registry:

- Microloans secured with household goods (start-up business loans for micro-entrepreneurs).
- Purchases secured with consumer goods (vehicles acquired by individuals).
- Term loans secured with fixed assets (equipment of construction companies).
- Leases of all types of assets (vehicles, equipment for individuals, and all businesses including micro-SMEs).
- Lines of credit secured with fluctuating assets (inventory of manufacturers and retailers).
- Special lines of credit (agricultural products of farmers).
- Export credit facilities (account receivables and letters of credit of exporters).

Transparency is one of the key factors that affect credit terms from the perspective of a secured lender. Countries that are in the process of reforming their domestic secured transactions laws should therefore implement a registration system that is as comprehensive and functional as possible.

⁴⁷ UNCITRAL, Legislative Guide on Secured Transactions (2010) [hereinafter UNCITRAL Legislative Guide], Recommendations 2-9, available at http://www.uncitral.org/pdf/english/texts/security-ig/e/09-82670_Ebook-Guide_09-04-10English.pdf.

⁴⁸ For a discussion on the implementation of the functional approach in Australia see John G.H. Stumbles, The PPSA: The Extended Reach of the Definition of the PPSA Security Interest, 34(2) UNSW L.J. 448 (2011).

They should not exempt any commercial transaction that performs a security function from registration.

This is not currently the case in Kenya since financing devices are independently regulated (hire purchase Act, chattels Act, charges and debentures, etc.). In addition, these devices are subject to registration at various registries based on the transaction type – or are entirely excluded from registration.

4.2.2 Notice-filing systems

There are two types of registration systems:

Table 1: Registration systems

Transaction-registration	Notice-registration
Record underlying loan documents	Record simplified notices (registration forms)
Require detailed scrutiny	Automated registration procedures
Registration is delayed by X days	Registration is almost instantaneous / real time
Support loans secured with static collateral	Support revolving loans secured with fluctuating collateral
No advance registration	Advance registration

The UNCITRAL's Legislative Guide on Secured Transactions contrasts both transaction- and notice-registration systems and recommends the use of notice-registration systems for collateral registries.⁴⁹ Among some of the benefits identified by the UNCITRAL Legislative Guide are: the simplification of the procedure, reduction of costs and time, and minimizing risks and liability undertaken by the registry.⁵⁰ A single registration in a notice-filing registry may cover the entire relationship between the lender and borrower, unlike the current requirement to register individual transactions.⁵¹ Similarly, the IFC's Secured Transactions Systems and Collateral Registries Toolkit⁵² adopts the same approach with regard to registration systems. It specifically recommends a notice-registration with "set of specific, limited information required for legal sufficiency of notice; no formalities such as signature or notarization."⁵³ These kinds of registries have been successfully implemented and have already delivered positive results on access to credit in a number of common law

⁴⁹ UNCITRAL Legislative Guide, supra note 47, at 151.

⁵⁰ Id., at 151-152.

⁵¹ Michael G. Bridge, How Far is Article 9 Exportable? The English Experience, 27 Ca. Bus. L.J. 196, 210 (1996).

⁵² IFC, Secured Transactions Systems and Collateral Registries Toolkit (Jan. 2010) [hereinafter IFC, Toolkit], available at <http://www.ifc.org/wps/wcm/connect/c5be2a0049586021a20ab719583b6d16/SecuredTransactionsSystems.pdf?MOD=AJPERES>.

⁵³ Id., at ch. 4 at 50.

jurisdictions, including Australia, the Canadian provinces, New Zealand and the U.S.⁵⁴ A registry of this kind would be the ideal approach for Kenya.

4.2.3 Flexible access by electronic means

There are two basic purposes for which a registry is accessed: registrations and searches.⁵⁵ Some countries allow unrestricted access for both searches and registrations. This means that anybody may file a registration or search the registry records without prior authorization. However, other countries are more concerned with the risks associated with providing full access to registry records. Risk considerations vary per country from potential embezzlements, kidnapping, or extortion based upon the information accessible within the registry and accessed by unknown and untraceable parties. There are a variety of restriction mechanisms that may be established to limit access while still meeting best practices in terms of overall flexibility in accessing the registry.

For instance, a movable asset registry may require the establishment of a user account upon verification of the identity of the applicant for access, or certain personal data (e.g. amounts of loans secured with collateral) may not be recorded or, if recorded, may not be disclosed in a public search. Searches may be conducted only upon payment of a fee by a method that allows the registry to trace the particular payment to the particular searcher. However, it is important to note that overarching justifications for conducting searches should not be required.

4.2.4 Registration of standardized forms, minimal and standardized registration information

The use of predetermined and standard forms for registration of security interests in movable asset collateral is a desirable feature that significantly facilitates operations of the registry itself but also the filing procedures of lenders.⁵⁶ A uniform set of data should be determined in the registry regulations for each type of registration: initial registration; amendments; terminations and enforcement. As a notice-registration system, the movable asset registry should not require all information found in the security agreement or the secured loan. Minimal and specific information on the lender, borrower and collateral will provide the necessary notice to other lenders and third parties. If third parties wish to obtain further details about a particular borrower or collateral the legal framework will impose a duty on the lender to disclose such information (e.g. how much the borrower still owes under the loan) through the borrower to the third party.

⁵⁴ The current situation in Kenya is reminiscent of the one in New Zealand prior to the adoption of the 1999 PPSA. See Mike Gedy, The Development of New Zealand's Secured Transactions Jurisprudence, 34(2) UNSW L.J. 696, 698 (2011) who noted that "The three principal registration regimes of the Chattels Transfer Act 1924, the Companies Act and the Motor Vehicle Securities Act 1989, which required registration of security agreements, or particulars of them, were abolished and replaced with a single electronic registration regime."

⁵⁵ See for e.g., UNCITRAL Legislative Guide, supra note 47, at 61 & Recommendation 54 (c).

⁵⁶ Id., Recommendation 57.

With regard to collateral descriptions, the law should allow lenders to describe their collateral in registration forms submitted to the movable assets registry generically. Such descriptions are conducive to the prevalent type of loan that is provided to SMEs operating their business with fluctuating assets such as inventory, accounts receivable and agricultural products. The requirement to specifically identify and describe every individual item of inventory or receivables would lead to frequent amendments to the registration and thus unduly increase the cost of credit.

4.2.5 Limited administrative responsibilities of the registrar

A notice-registration system does not require any verification of legality or correctness of the data in the registration form. Responsibility is placed solely on the lender who collects and enters the information into the registration form, whether the form is submitted in paper or electronically through an online registry system.⁵⁷

In a purely electronic system, the registry staff does not handle the forms or information entered therein by lenders. However, the implementation of such a system presupposes a relatively advanced informational and technological framework that is accessible to a vast majority of users, both lenders and searchers. For developing economies, a hybrid registry system that is accessible both electronically and in paper by physical delivery of written forms may be capable of ensuring access to more users than a purely electronic system. A paper-based system does not provide any functionality to submit registration forms electronically and such a system has become inefficient and costly to operate compared to an electronic system.

If a paper-based or hybrid system is implemented, the movable asset registry can limit responsibility for the transferring of information from paper-forms into the system through the use of two mechanisms: i) if submitted to a registry official, a scanned image of the form submitted may be kept as an attachment with the registration; and 2) the registry may provide self-service computers at specific locations for lenders to input the information directly onto the online system.

4.2.6 Searchability of records and indexing

The movable asset registry records should be indexed, i.e., registrations should be organized and presented to searchers, based on a unique identifier of the debtor and collateral.⁵⁸ Some countries are challenged by this feature because they lack a consistent, single and unique identifier for individual debtors. Typically, individual debtors are identified by their names that are entered into registration forms. However, there are at least two problems with such indexing of registrations: i) the commonality of names which may result in

the registry retrieving multiple registrations that identify the debtor with the same name even though the debtors may in fact be different persons, and ii) the multiplicity of names and their variations such as when the individual has a driver's license, passport and another form of identification in which her/his name is not stated exactly the same.

Kenya has a national identification document for individuals over 18 years of age, as well as other unique identifiers for companies, foreign residents and foreigners. This is a natural advantage for indexing registrations in the movable asset registry of Kenya.

The law should allow lenders to describe the collateral generically, such as "all inventory of store ABC." However, for a narrowly defined category of assets more specific descriptions should be required in order for the movable assets registry to provide more complete information to searchers. For instance, in many modern registry systems (e.g. Australia and New Zealand) vehicles used by businesses as equipment or by individuals as ordinary means of transportation must be described by a serial number, which in this case is the vehicle identification number. However, this category of assets is very limited because only a minority of assets is assigned a reliable and unique identification number. At a minimum, Kenya should consider the possibility of including serial number descriptions for vehicles in its movable asset registry. The Malawi PPSA also prescribes serial number indexing for vehicles and a few other assets such as boats.

4.2.7 Low and flat registration fees

Modern movable asset registries charge low and flat registration fees that are not based on a percentage of the loan or collateral value. Ideally, fees should be paid automatically through accounts or other accessible means of payment that would not unduly delay completion of the registration process. For Kenya, M-PESA should be considered as one of the options for processing payments. The registry office should not be collecting fees in cash as that process might lead to corruption and theft.

In addition, fees should not be used as a revenue making service. Instead they should be reinvested in the movable asset registry to ensure its maintenance, system upgrades, staff training, and facilities.⁵⁹ This will ensure that the registry remains up-to-date and costs of credit are not impacted by the registration fees.

The following is a comparative table with examples of movable asset registry fees that have been effective in achieving their expected results in supporting lower interest rates.

⁵⁷ Id., Recommendation 54 (d) & 56.

⁵⁸ Id., Recommendation 54 (f-I).

⁵⁹ Id., Recommendation 54 (i).

Table 2

Country	Registration (US\$)	Searches (US\$)
Ghana ⁶⁰	3.50	2.50
Mexico ⁶¹	0.00	0.00
Honduras ⁶²	10.00	0.00

4.2.8 Data security

Information entered to the Registry may not be “corrected” or “edited” by the Registrar or anyone else other than by creditors using appropriate registration forms.⁶³ The principle is that once the data is registered, the creditor retains the responsibility for its accuracy. To modify any information in the registration, the creditor may register amendments and discharges that will also become part of the record. Expired registrations will be archived in the system and available for retrieval if, for instance, needed to establish priorities in court proceedings.

Data security systems deter the possibility of fraudulent and unauthorized changes to information. This feature further enhances transparency and reliability of the registry records.

Other relevant aspects to data security are part of the registry software and hardware. For instance, secure failovers and backups should be in place to guarantee data integrity. Also, firewalls and other cyber security features need to be implemented to avoid unwanted access to the system.

4.3 KEY BENEFITS OF A MOVABLE ASSET REGISTRY

Movable asset registries provide benefits to a variety of stakeholders for different reasons. The following paragraphs identify the key benefits for the stakeholders typically involved or affected by transactions in which a movable asset is provided as collateral for a loan. These stakeholders include: i) lenders; ii) borrowers; iii) third parties with competing claims to the asset; iv) buyers of assets; v) agencies that collect credit information; vi) regulators; vii) policymakers and viii) donor agencies.

In general, registries provide transparency and inform interested parties about the status of rights to assets. The fundamental purpose of all types of registries, whether they are of the type that record ownership rights, encumbrances or both is to minimize the risk of third parties. All prudent lenders provide loans and establish their prices (e.g. interest rates) on the basis of the risk profile of

a loan applicant. An important component of this risk profiling is the ability to determine quickly and easily the status of assets that the applicant offers as collateral. Verification that can be done cost-free and remotely over the Internet speeds up the loan approval process. It also eliminates certain costs such as those entailed in the due diligence necessary to determine the rights of third parties, if any, that may exist to the asset outside of a public registry.

Registries also eliminate conflicts between parties with claims to the same asset. Rather than initiating legal proceedings, the parties themselves are able to easily determine who has priority to the same asset on the basis of the time and date of their respective registrations.

Registries also benefit borrowers who are able to easily demonstrate that their assets have not been previously encumbered. Without this record, they would have to provide some other proof that they own the asset offered as collateral free of any encumbrances. Hidden liens are thus eliminated, allowing borrowers to use the value of their assets fully.

Registries equally benefit ordinary buyers who, for instance, want to buy used equipment from a neighboring farmer. Buyers interested in purchasing assets may be businesses but also consumers. Registries of this kind are typically easily accessible over the Internet at a small fee or even free of charge. Buyers of vehicles in some registries for example, may send a text message with a vehicle identification number (VIN) to the registry and will immediately receive a response as to whether an encumbrance has been registered with respect to the vehicle. The ever increasing ease of access to these types of registries allows consumer-buyers to remain protected in their purchases of certain assets.

Information recorded in movable asset registries is typically included in credit reports generated by Credit Bureaux. While movable asset registries focus on information about the asset, credit bureaux focus more on information about the borrower and her/his capability to service debts. In combination, the records maintained by these two agencies provide comprehensive information to the lender contemplating a loan to the borrower.

Technological systems that support registries are designed to generate statistical information about the number and type of registrations, among other data. Such information may be used by the regulator to adjust certain requirements for asset-based loans with respect to the types of collateral in which the number of registrations is low. Some information may also provide insights as to the abusive practices of some lenders. The regulator will be able to act on this statistical information and take actions to maintain a healthy lending environment.

Policymakers will also benefit from the statistical information. They will, for example, be able to adopt measures to provide support to certain sectors which have not yet benefitted from the new legal framework and the registry.

⁵⁹ Id., Recommendation 54 (i).

⁶⁰ Registry Rules under the Borrowers and Lenders Act (Ghana) (June 1, 2012) §28, available at http://www.bog.gov.gh/privatecontent/Banking_Supervision/Act%20773%20new%20rules.pdf.

⁶¹ Registro Único de Garantías Mobiliarias (Mexico), at <http://www.rug.gob.mx>.

⁶² Property Institute (Honduras) Accord on Registration Fees (January 28, 2011) available at <http://www.garantiasmobiliarias.hn/derechos.pdf>.

⁶³ UNCITRAL Legislative Guide, supra note 47, Recommendations 54–56.

For instance, the statistical information may demonstrate that the number of registrations covering businesses involved in farming and other agricultural activities is disproportional to the number of registrations covering retailers. The policymakers can then implement measures to strengthen training on agricultural lending or provide other lending incentives to increase farm credit. Policymakers will also be able to shape some social policies on the basis of the statistical data; it may demonstrate that the volume of credit provided to

women entrepreneurs is negligible compared to that channeled to businesses owned and operated by men.

Finally, donor agencies will be able to devise programs complementing the registry such as warehouse receipts systems, out-of-court enforcement procedures for encumbrances, and streamlining procedures for collateral auctions, among others.

Chapter 5

APPROACHES FOR KENYA

5.1 ALTERNATIVES FOR THE ESTABLISHMENT OF AN EFFECTIVE MOVABLE ASSET REGISTRY FOR KENYA

There are three possible approaches to legal reform for Kenya:

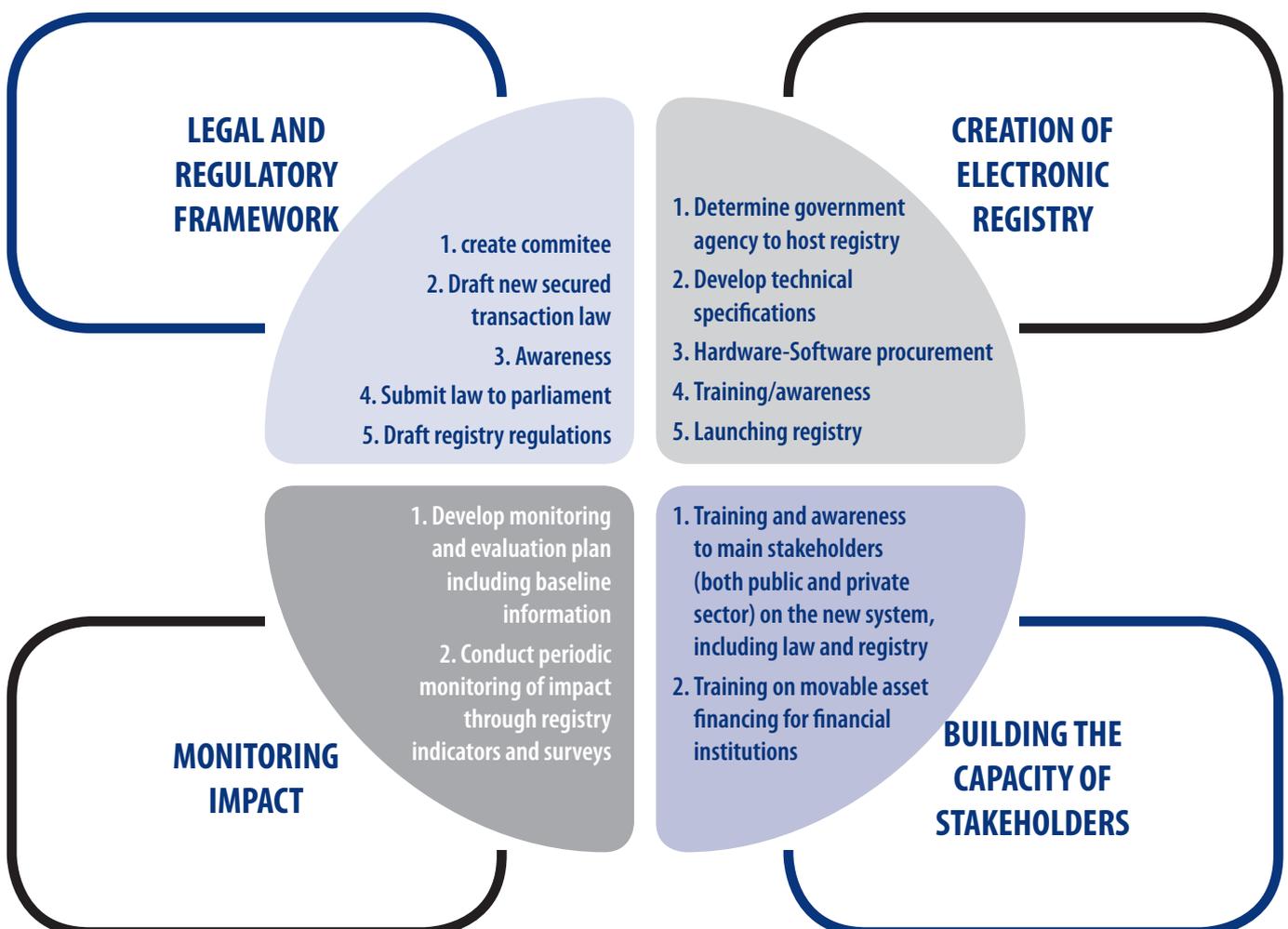
- **Minimal approach:** New law and a registry that does not affect existing legal framework.
- **Moderate approach:** New law and a registry that unifies existing framework.

- **Overhaul or comprehensive approach:** New secured transactions law, modifications to related laws such as the insolvency law.⁶⁴

NatLaw believes that the best approach for Kenya is to move forward with a comprehensive legal reform and implementation of a movable asset registry. Vision 2030 already provides the necessary policy support. The final recommendations provide further details and outline the necessary steps for the implementation of this approach.

In general, the necessary steps for this approach are:⁶⁵

Figure 4: Necessary steps for the implementation of a movable asset registry



⁶⁴ On the implementation of this comprehensive approach see Stumbles, *supra* note 48, at 456-459.

⁶⁵ IFC, Business & Delivery Model (on file with NatLaw).

An important aspect to consider in connection with the establishment of a movable asset registry is the adoption of transitional rules to preserve current rights on collateral. There are three possible approaches to accomplish this task: (i) leave existing registrations and security devices unaffected (the 1998 revision of the Uniform Commercial Code Article 9 of the U.S.); (ii) automatic migration (Australia);⁶⁶ and (iii) duty to re-register (New Zealand).⁶⁷ Generally, all three are viable options provided that clear rules are established within the law. However, for Kenya, due to the inadequate registration procedures at the current Kenyan registries, option (iii) seems best suited for Kenya.

5.2 COMMENTARY ON POTENTIAL ENTITIES OR OFFICES THAT COULD HOUSE THE MOVABLE ASSET REGISTRY

As a result of the interviews completed by NatLaw within Kenya, it became apparent that at least three entities have the potential to manage a movable asset registry: (i) the Credit Reference Bureau, Trans Union; (ii) the Registrar General's Office; and (iii) the Kenya Credit Information Sharing Initiative. All three present opportunities and challenges with regard to the establishment and operations of a movable asset registry.

5.2.1 Credit Reference Bureau, Trans Union:

- Opportunities: Data management technology available and dedicated IT staff. Private company usually means up-to-date technology and business oriented solutions.
- Challenges: Immediate perception and association with Credit Reference Bureau which, because of the negative information and the impact of such information on the creditworthiness of potential borrowers, is less likely to have the same popularity and acceptance levels within the population at large. Another challenge will be to maintain completely separate databases (regardless of possible communication between the movable asset registry and the Bureau). It is important to keep the function of a registry clearly differentiated from those of a credit reference bureau. The need for Government involvement or support at some level is typically of importance to the successful operations of the registry. International best practices call for flexible access to the registry and at least initially, it was apparent that the Credit Reference Bureau would lean towards a more restrictive and privileged type of access.

5.2.2 Current Chattels Registry, Registrar General's Office:

- Opportunities: Perception of public registry – i.e. public access, as well as Government support and involvement. Current understanding of the need to improve and enhance the Chattels' Registry operations.
- Challenges: There would be a need for acquiring resources: (i) hardware; (ii) software; and (iii) human resource, particularly IT staff. This is necessary to implement technology changes to accommodate a modern registry system. There would be an additional need for awareness-raising to communicate changes and encourage registrations and overall use of the registry. Finally, there is a need for continued updates and guaranteeing business oriented solutions.

5.2.3 Kenya Credit Information Sharing Initiative (KCISI)

- Challenges: There would have to be consensus from everyone who plays a significant role in this initiative (including the Central Bank) as the entity responsible for the movable asset registry. Need for physical space, as well as hardware, software and dedicated IT staff.
- Opportunities: Public-private partnership means, in theory, the best of both worlds, in terms of resources, government support and continued updates of technology given the private sector demand. Additionally, there is a positive perception of the KCISI from lenders outside the Bankers Association, – i.e. Microfinance Institutions. However, up until now, the KCISI has been 'housed' at the KBA building and therefore some conflict of interest may be perceived.

5.3 POSSIBLE SYSTEM ARCHITECTURE FOR KENYA'S MOVABLE ASSET REGISTRY

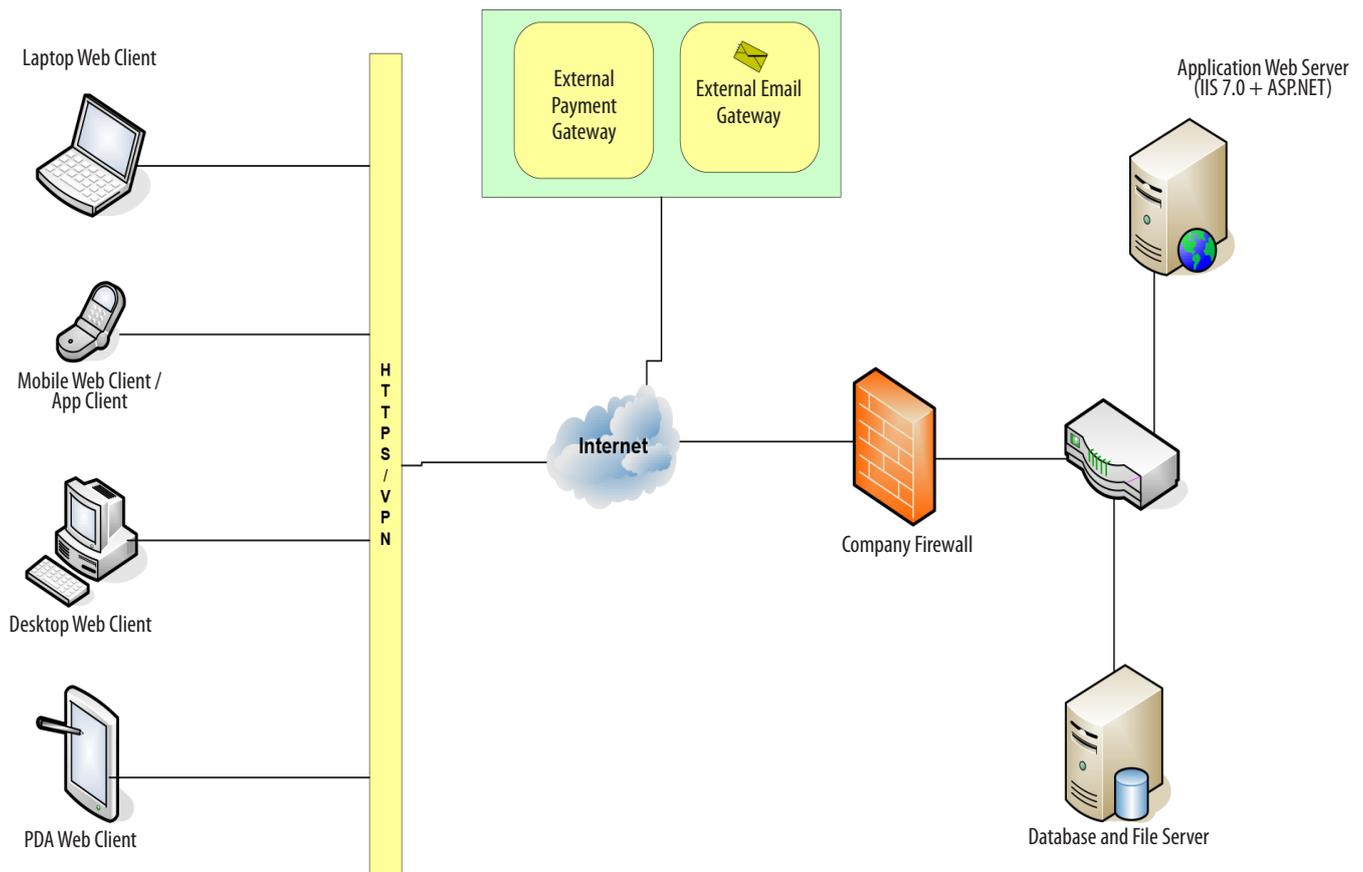
The overall architecture goal of the movable asset registry system is to provide a scalable online registry system tool for all potential users. A key architectural goal will focus on leveraging industry best practices for designing and developing such a scalable, enterprise-wide.NET application. To meet this goal, the design of the registry would need to be based on core domain-driven design patterns as well as the industry standard development guidelines for building such a system.

⁶⁶ Anthony Duggan & David Brown, Australian Personal Property Securities law 337-340 (2012).

⁶⁷ See generally Rebecca Hope, Migrated Security Interests: Lost in Transition, 34(2) UNSW L.J. 646 (2011).

The following image shows the high level proposed architectural design for Kenya's registry.

Figure 5: Proposed architectural design for Kenya's registry



The application architecture defines the various layers, modules and their interactions in the application. The online application should have a layered architecture which provides some of the key features below:

Structure: Organizing applications along business-level boundaries and not technical boundaries.

Speed and flexibility: Making some application changes through configuration and not programming.

Control: Modifying, extending or overwriting any architectural element.

Reuse: Achieving greater reusability and integration by loosely coupling application logic to infrastructure.

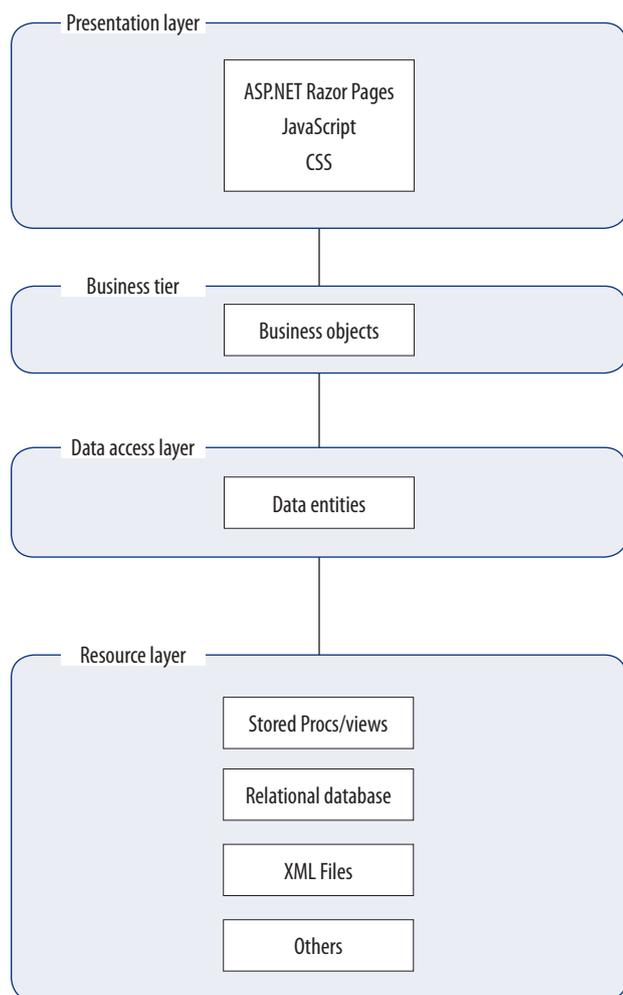
The online application would also be based on a tiered approach which assigns each tier with unique responsibility in the system. Tiers are also independent from one another. Figure 6 shows the needed layers and tiers of an effective online registry system.

With regard to access, registry users would be required to use web browsers such as Mozilla Firefox 1.5, Internet Explorer 8 (or higher), and Safari 1.0. The target operating systems are Windows XP, Windows Vista, Windows 7, Mac OS X Leopard and Linux.

Another relevant feature of the registry system is the inclusion of external payment gateway systems to provide for other payment technology such as M-PESA. Another feature is the use of an email gateway, such as an external SMTP email service, to allow email notifications to be sent from the registry system to users, such as a confirmation email of the registration.

In order to integrate the online registry application with external registries, such as with the registry of vehicles, the application will need to communicate using Internet through a standard web service protocol such as SOAP. Interconnection with other registries or databases requires additional and in-depth analysis of existing technology at such registries as well as clear rules on how they will be implemented from the user's perspective.

Figure 6: Required layers and tiers for an effective online registry system



At the initial stage, it is not recommended that Kenya design the legal and registry framework with interconnections to other registries in mind; the implementation may be significantly delayed and therefore, present a challenge to complete. Delays could be caused by the inability of the other registries to respond to requests for information from the movable asset registry. The cost of the implementation project would also be significantly increased if completion of the project relied upon modernization of the existing registries.

In sum, the foundation of any web-based system includes software, hardware and the network. A failure to meet industry standards on any one of these three fundamental components may result in performance issues or failures. In addition, the system's performance is also dependent on a well-tuned, well-configured network, a fast computing hardware and well-designed software architecture.

Therefore, other possible technical challenges that may result in delays or the inadequate development and implementation of the collateral registry include:

- i. The availability of all necessary hardware to support the registry software and ensure security of the system. This issue may be addressed by conducting an initial technical needs assessment to determine what hardware is currently available and what would need to be acquired. This assessment should be conducted within the very first stages of the process.
- ii. Timely and adequate selection of a software development company (vendor) that has the knowledge, skill and ability to translate the legal requirements into the software application system. Ideally, a developer should be identified early on the reform process to avoid unnecessary delays.
- iii. If the system is developed exclusively as a web-based online system, policy decisions need to be made as to the reach, availability of and accessibility to the registry services to all potential users through the internet.
- iv. Offering accessible payment mechanisms and options for users of the collateral registry has been a challenge in other jurisdictions; however, the potential integration of the collateral registry with M-PESA's platform would help to mitigate this challenge.
- v. The availability of IT staff with the necessary skills to maintain the registry application has also been a challenge in other jurisdictions. This may also be addressed through a needs assessment and the scheduling of advanced IT trainings if needed.
- vi. As a web-based application it is necessary to ensure that the user-interface works adequately with multiple browsers and versions of those browsers. In order to do so, the system's features need to be developed and tested as new versions of browsers become available. Adequate maintenance of the application would also be necessary. Finally, user training and the availability of user manuals indicating technical system requirements would also help to address this challenge.
- vii. With regard to performance, the test and production environments of the application do not always behave comparably, especially with regard to load tests. Therefore, performance bottlenecks and slowdown issues often occur upon launching the system to production. The key to resolving this potential performance issue is to plan ahead anticipating them and avoiding last minute guesswork in order to resolve issues efficiently and in a timely manner.

Chapter 6

FINAL RECOMMENDATIONS

As mentioned above, Kenya's current situation is characteristic of the other African countries whose legal framework is also based on English law. Since the 19th century, when the concept of a floating charge to secure loans to industrial companies with their stock was established in England, the types of security devices have gradually grown.⁶⁸ As these individual devices, such as hire-purchase agreements, came to be recognized in a statutory form, and as other devices such as conditional sales, began to function formally as security, the legal complexity surrounding the use of these devices has increased correspondingly. This fragmented legal framework for security devices combined with the multiple requirements for the recognized validity of such security devices (including registries), has been inherited by Kenya. An English Professor of Law, John de Lacy, observed that "...English law has never articulated any consistent objectives that form the basis of any of the myriad of registration schemes that currently exist."⁶⁹ Nowadays Kenyan lenders, as well as those operating under a similar framework, must make complicated legal decisions about which law and registry to employ to govern a particular transaction.

Today in Kenya many security devices remain unregistered but are still fully effective against third parties, including insolvency representatives and other creditors. Accordingly, there is a disparity between: i) the security devices under which the borrower remains the owner of the collateral (e.g. fixed and floating charges under the Companies Act), and ii) the security devices under which the lender takes or retains ownership (e.g. financial leases and hire-purchase agreements under the Hire-Purchase Act).

Several jurisdictions that share their legal background and tradition with Kenya have decided to move forward and address the negative consequences of such a fragmented legal and registration framework. Australia, Canada and New Zealand are prime examples of such jurisdictions. Each has implemented sweeping reforms and abandoned the traditional English security devices and the disparate requirements for lenders to achieve priority against their competitors, whether by registration or retaining title. Within Africa, most recently, Malawi enacted a new secured transactions law on the basis of New Zealand's Personal Property Security Act. Several other African countries are contemplating similar reforms, including Lesotho, Nigeria, Sierra Leone, South Sudan and Zambia. Ghana and Liberia have already implemented such a reform but with limited effect. Ghana has established a Collateral Registry but its underlying legal framework is seriously flawed.⁷⁰ Liberia has enacted a law within its Commercial Code⁷¹ and now it is in the process of designing its collateral registry.

⁶⁸ "There is another serious weakness about the English approach to floating charges. It promises more than it delivers." Jacob S. Ziegel, *Floating Charges and the OPPSA: A Basic Misunderstanding*, 23 *Can. Bus. L.J.* 470, 479 (1994).

⁶⁹ John De Lacy, *The Reform Of Uk Personal Property Security Law, Comparative Perspectives* 9 (2010).

⁷⁰ For a discussion of deficiencies in Ghana's legal framework see Marek Dubovec & Benjamin Osei-Tutu, *Reforming Secured Transactions Laws in Africa: The First African Collateral Registry in Ghana*, 45(1) *UCC L.J.* 77 (2013).

It is notable that in the United Kingdom such a reform has still not been undertaken⁷² despite the many proposals dating back to the 1971 Crowther Report. Commentators have observed that this is primarily due to the opposition of practitioners.⁷³ The latest revision of the English Companies Act from 2006 that regulates the registration of charges has been called "a disappointment."⁷⁴ It has been reported that over 3,000 applications for registration in the Companies Register are submitted outside the statutory 21day window for registration.⁷⁵ Accordingly, while the English system remains stuck in the 19th century, the countries that have inherited this legal framework are increasing the pace of reforms resulting in its ultimate abandonment.

6.1 FUNDAMENTALS OF KENYA'S FUTURE FRAMEWORK FOR THE COLLATERAL REGISTRY AND ITS IMPACT ON LEASING

6.1.1 The collateral registry should not be established and exist without some form of legal framework

The collateral registry is more akin to a land registry in terms of the function of information that it accepts and stores. Both collateral and land registries record encumbrances such as charges, mortgages and liens over property of the borrower. Accordingly, for registrations in the collateral registry to have any legal significance, a law or regulation must provide what the legal effect of these registrations is on the rights of lenders: i) vis-à-vis their borrowers, but also ii) as against third parties such as insolvency representatives and other creditors. Furthermore, registrations in collateral and land registries establish priorities. In contrast, information registered in credit bureaux does not have such legal significance so it is conceivable for credit bureaux to operate without any or with minimal supporting legal regulation. Establishing a registry outside of the legal framework would either cause serious legal problems or doubts about its practical utility (e.g. the lenders would ask themselves why they should incur the cost of registration if they do not gain any legal rights, including priorities from such a registration).

⁷¹ Commercial Code (Liberia) (2010), *supra* note 24.

⁷² Hugh Beale, *The Exportability of North American Chattel Security Regimes: The Fate of the English Law Commission's Proposals*, 43 *Ca. Bus. L.J.* 178 (2006).

⁷³ *Id.*, at 198 and JOHN DE LACY (2010), *supra* note 69. McCormack adds that "Practitioners have generally been at best, indifferent, and at worst, outrightly hostile to the idea." Gerard McCormack, *Pressured by the Paradigm, The Law Commission and Company Security Interests* 83 in JOHN DE LACY (2010), *supra* note 69.

⁷⁴ *Id.* at 3.

⁷⁵ Duncan Sheehan, *The Principles of Personal Property Law* 411 (2011).

6.1.2 The new legal framework and collateral registry should modify and modernize the existing framework

One may consider two approaches to reforming the legal framework and establishing a collateral registry. First, a law may be adopted and a registry established without having any effect on the existing framework. This approach would be simple to implement as it would not require any modification to the existing laws and registries. In essence, it would establish a collateral registry for unincorporated SMEs, microenterprises and individuals who currently may not create charges subject to registration. While politically and implementation-wise this approach may be the most feasible, it could result in numerous practical challenges. This approach was taken in Ghana and has caused great confusion, forcing the Bank of Ghana and the government to reconsider its implementation.⁷⁶ No other jurisdiction has implemented a reform along these lines.

The second approach entails a revision of the existing legal framework, abrogation of obsolete security devices and creation of a single collateral registry for all security devices. This approach was taken and successfully implemented in Australia, Canada and New Zealand.⁷⁷ Malawi's reform has also followed this approach and it is under consideration in Ghana, South Sudan and Zambia. It is the approach recommended for Kenya.

6.1.3 Impact on leases – the need for registration

If the second approach is chosen, it will have an impact on the current leasing system in Kenya. Currently there is no express requirement for financial leases to be registered, and lessors secure the repayment of the purchase price by effectively retaining ownership to the leased asset. The principle of registering leases as a condition to bind third parties has already been accepted in Kenya when the country ratified the 2001 Cape Town Convention on International Interests in Mobile Equipment.⁷⁸ The Cape Town Convention was enforced in Kenya on February 1, 2007.⁷⁹ Article 16 provides for the registration of "international interests," defined in Article 2(1) to include "an interest vested in a person who is the lessor under a leasing agreement." However, the legal effect of financial leases would be modified as they would be classified as security interests subject to registration in the collateral registry. Accordingly, instead of retaining ownership, financial lessors would secure their rights and priority by registration in the collateral registry. A simple and low-cost registration would protect the lessors' legal rights as against the lessees, but also alert third parties that the lessee in possession of an asset may not be

its owner. Furthermore, a new legal framework would provide additional benefits to the lessors, such as the ability to claim proceeds (e.g. the funds obtained by the lessee upon disposal of the leased asset), or any incidental assets generated by the use of the leased asset (e.g. the lessor may take a security interest in the book debts that the lessee generated while using the equipment), and access to extra-judicial and efficient judicial remedies. The flexibility of the registry system will allow lessors to include information about their rights in the registration, thus informing third parties that the lessee shall not acquire ownership to the asset until the entire debt of the lease has been repaid.

6.1.4 Which leases to register?

Kenya will have to make an important policy decision about what types of leases to subject to registration. Currently, two forms of leases are popular in the marketplace: i) financial leases and ii) operating leases. In the majority of countries (e.g. the United States, Mexico, Malawi and under the UNCITRAL Legislative Guide), only the former are assimilated to security interests and subject to registration. However, there are a growing number of countries (e.g. Canada and New Zealand) that have also subjected long-term operating leases to registration.⁸⁰ The rationale behind including these long-term leases is to eliminate some of the legal complexities involved if the court has to determine whether the lease is of a financial or operating nature. A legal requirement to register all types of leases with the duration exceeding 1-year would provide legal clarity. However, it may impose an undue burden of registration with negative consequences (see below) on those lessors who do not expect to register their leases and have never done so. Accordingly, this is an important policy decision that should be considered by Kenya with all of its benefits and detriments.

6.1.5 Legal consequence for the failure to register should be the loss of priority

The 19th century English laws and their successors result in draconian consequences for the failure to register a security device, including rendering it null and void. Modern secured transactions laws provide for less severe consequences for the failure to register at all or for insufficient registrations, which is the loss of priority. Accordingly, while third parties would be able to gain priority over a lessor who failed to register or submitted a registration that was insufficient (e.g. it incorrectly identified the lessee), the lease would still remain fully effective against the lessee. In the case of a lessee's default, the lessor would be able to enforce its rights, including repossession of the leased asset, without having to resort to the court. This legal consequence for the failure to register should be considered for adoption in Kenya.

⁷⁶ Dubovec & Osei-Tutu, *supra* note 70, at 119–120.

⁷⁷ For Australia see DUGGAN & BROWN *supra* note 66, at 14–19 and for New Zealand see Gedye, *supra* note 54, at 696.

⁷⁸ UNIDORIT, Convention on International Interests in Mobile Equipment (Nov. 16, 2001) [Cape Town Convention], available at <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>.

⁷⁹ UNIDORIT, Cape Town Convention, Status of Ratifications, available at <http://www.unidroit.org/english/implementation/i-2001-convention.pdf>.

⁸⁰ See Michael E. Burke, Ontario Personal Property Security Act Reform: Significant Changes, 48 *Ca. Bus. L.J.* 289 (2009).

6.2 NECESSARY STEPS TO ESTABLISH A VIABLE MOVABLE ASSET REGISTRY FOR EFFECTIVE SME LEASING

Projects to establish collateral registries are, by their nature, long-term because they involve a number of steps that must be taken to ensure effective implementation. However, undue delay in implementing the following steps will prolong the time needed to launch a collateral registry in Kenya.

6.2.1 Reaffirm the policy decision to increase access to credit through the collateral registry

Vision 2030 clearly identifies increasing access to credit to achieve Kenya's GDP growth of 10%.⁸¹ As mentioned earlier, collateral registries built upon a modern legal framework have been proven to have the greatest impact on access to credit, particularly for SMEs and microenterprises.⁸² Vision 2030 has acknowledged this empirical evidence and supports the creation of a collateral registry. While all relevant stakeholders in Kenya should be familiar with the objectives set out in Vision 2030, some may not have had a chance to familiarize themselves with the tools identified to achieve them. It will be important to highlight these tools and re-affirm the broad support for the collateral registry.

A suggested approach for the re-affirmation of the goals of Vision 2030 as they are related to access to credit and a collateral registry could include the development of a policy paper that would outline the steps needed to achieve the establishment, such a collateral registry. The policy paper could be developed by a committee composed of various stakeholders from within the country. This report could serve as the basis for developing the policy paper re-affirming the relevant goals of Vision 2030 and expanding on the various aspects, challenges and opportunities it identifies and recommends.

6.2.2 Identify the champion

Reforms of this kind are typically driven by a champion that has embraced the reform and facilitates all the necessary political, economic and legal decisions.⁸³ For instance, the Bank of Ghana and the Bank of Liberia are the champions in their respective countries. The champion need not necessarily be a single entity. Rather it can be formed by multiple entities such as in Zambia where the Bank of Zambia has teamed up with the Patents and Companies Registration Agency (PACRA). There does not yet seem to be a champion for this reform in Kenya. Accordingly, it may be advisable for Kenya to bring together multiple entities to contribute their expertise and experience to the project and become co-champions. For instance, the Leasing Association of

Kenya could offer its practical experience and representation of the private sector. The Registrar General could highlight the urgent need for modernization of the registration systems from their own operational perspectives. The National Economic Council and the Central Bank could provide important support from the policy-making and regulatory perspective. Finally, FSD Kenya could contribute its significant wealth of knowledge and data that clearly identifies the deficiencies in the current legal framework. A consortium that includes all of these entities would constitute a powerful force in pushing the reform initiative forward.

6.2.3 Prepare draft legislation

The next step should be to designate a task force and charge it with the preparation of a draft bill. It is recommended that the task force includes representatives from both the private and public sector, such as commercial banks, lessors, factors, micro-lenders, borrowers, lawyers, registrars, government officials, etc. This task force should also invite an international consultant experienced with the implementation of these kinds of reforms to guide it through the process and outline the fundamental rules of modern legislation. It could also highlight the laws that will be affected and thus needed to be amended, and share the experience of other countries that have also gone through this process.

6.2.4 Explore the possibility of coordinating with related reform efforts

From experience, reforms of this kind have greater chances of success when they are packaged with other related Bills and presented in an integrated form to the government and law-makers. At times, reform efforts proceed on a stand-alone and uncoordinated basis and result in conflicting legislation. During the workshop, it was stated that Insolvency and Companies Bills have already been drafted and are being considered for adoption. A similar package of three Bills on Personal Property Security, Companies and Insolvency was prepared in Malawi. The first two Bills have already been enacted and the last one is expected to become a law in the near future. Zambia has undertaken a similar approach in revising the key three pieces of pro-business and pro-credit legislation. It is advisable for Kenya to revisit the Insolvency and Companies Bills with the objective of creating a comprehensively modernized legal framework that also includes a personal property security bill and collateral registry.

6.2.5 Identify what changes in the legal system will have to be made

This step is closely related to the previous step yet goes beyond it in a significant respect. As mentioned above, Kenya's legal framework is fragmented and its security devices are governed by multiple laws and registries. These laws and registries, as explained above, should be absorbed under the new legal framework and the unified collateral registry. Some laws may become

⁸¹ Vision 2030, *supra* note 3, at 1.

⁸² See for e.g., IFC, Secured Transactions and Collateral Registries, at <http://www.ifc.org/wps/wcm/connect/793e79804ac10ff9ea69e4220e715ad/Secured+Transactions+and+Collateral+Registries+Brochure-English.pdf?MOD=AJPERES>. Also, Success Stories: Ghana, "... new secured transactions system has led to the development of productive supply chain financing schemes in the mining and oil industry, benefiting more than 100 local SMEs creating hundreds of new jobs."

⁸³ IFC, Toolkit, *supra* note 52, ch. 4.

completely obsolete and thus ripe for abrogation. Alternatively, only certain provisions of other laws will be inconsistent with the new legal framework and may have to be partially abrogated. The task force should compile the affected laws and identify what changes are the most appropriate. For instance, while the registration of charges in the Companies Act should be absorbed by the new legal framework and the collateral registry, the winding-up of businesses should remain unaffected.

This step should also involve planning for the adoption of the necessary implementing and regulatory framework, such as the registry regulations. Central Bank's policies as to the prudential lending requirements and the setting aside of reserves against defaulted loans would have to be examined and adjusted accordingly so that they do not stifle the lenders' ability to take movable assets as collateral. A general outline of the regulations for the operations of the movable asset registry should be prepared. This outline will eventually serve as the basis for the registry regulations. Regulations relating to a number of associated aspects, such as the auctioning of collateral, should also be examined and decisions should be made about whether these regulations complement the new legal and registry framework or act as obstacles to its successful implementation.

6.2.6 Outline significant policy decisions in the draft legislation

Modern secured transactions laws are not entirely uniform and countries take various approaches to certain issues based upon their own public policies and traditions. For instance, as mentioned above, the Canadian provincial PPSAs require the registration of long-term operating leases that are excluded from the law in the United States. Another example is the indexing of registrations. In Canada, this indexing is done based on the name of the borrower and a serial number of an asset while in the United States, indexing is based solely on the name of the borrower. Many important choices relating to substantive legal issues, as well as those that affect the operation of the registry will have to be made. The task force, with the guidance of an international consultant, should consider these issues and make the right policy choices for Kenya.

6.2.7 Engage stakeholders

Engagement of stakeholders is a key component to the success of a reform. It was mentioned above that the task force should include representatives of the public and private sector. Such broad representation should minimize the concerns with copying and pasting legislation from another jurisdiction. A concern with using extensively legislation of a different jurisdiction was raised in connection with Kenya's Companies Bill that is pending adoption. The second level of engagement should include public forums in which the draft Bill is presented to a wide group of stakeholders, many of whom have

not had a chance to participate in the task force. For instance, once the draft Bill for Zambia was finalized, the Bank of Zambia and PACRA organized a series of workshops for interested participants in different cities of the country during which the Bill was read, analyzed and commented upon on an article-by-article basis. A similar approach should be followed in Kenya so that the new legal framework, including the collateral registry, receives broad public scrutiny.

6.2.8 Learn from the experiences of similar projects

The task force should learn from the experiences of similar projects undertaken not only in Africa (e.g. Ghana and Malawi), but also from those completed in countries whose economies are, to some extent, similar to that of Kenya (e.g. Mexico and Honduras). For example, the Mexican Collateral Registry has been operating since October 2010, and since then and until April 2013 there have been over 132,000 registrations of collateral, 97% of which are for loans under US\$1 million.⁸⁴ In Mexico, the three largest categories of assets registered as collateral are equipment and machinery, vehicles and agricultural products.⁸⁵ Finally, since registrations are free of charge, Mexico has documented savings in registration fees of over US\$3.8 billion. These savings benefit borrowers, since registration fees are typically paid – whether directly or indirectly – by borrowers.

Similarly, in Ghana, as of December 2012 there were 45,000 collateral registrations, 86% of which secured loans granted to microbusinesses (65%) and SMEs (21%).⁸⁶ In terms of lending, there has been US\$6 billion in financing using movable assets such as inventory and accounts receivable (24%), vehicles (17%) and household goods (17%).⁸⁷

Participation at events sponsored and organized by international organizations, such as the IFC and the UNCITRAL, would also enhance the understanding of the intricate issues involved in such reforms. For instance, the IFC routinely organizes site visits of existing registries that could be a model for the reforming countries. It would be advisable for a few members of the task force to visit a collateral registry, such as the one operated by the Bank of Ghana. This would allow them not only to observe its practical functioning but also to gain insights from those responsible for its operation, such as the registrar, registry staff and IT firms.

⁸⁴ Statistics provided by the Ministry of Economy, Mexico (April 2013), on file with NatLaw.

⁸⁵ *Id.*

⁸⁶ Statistics provided by the Bank of Ghana, IFC, Secured Transactions and Collateral Registries Program (2013), on file with NatLaw.

⁸⁷ *Id.*

6.2.9 Designate an entity responsible for the collateral registry

Secured transactions laws typically designate an entity responsible for the establishment and maintenance of the collateral registry.⁸⁸ However, this is not the norm and many countries designate such an entity subsequently to the passage of the law within the implementing regulations.⁸⁹ While it is crucial to agree on an entity to operate the collateral registry, this decision may be made at any time during the implementation process. The earlier the decision is made, the more comfort will be provided to those involved in the implementation process. As to the nature of the entity itself, several approaches have been adopted by the countries that should be examined by the task force. The following entities have been designated to operate the registries in their respective countries: 1) Central Bank (Ghana and Liberia); 2) Registrar General Office (Malawi and Zambia); 3) Secretary of State Office (Canada and the United States); 4) a private sector entity (Colombia and Honduras); 5) lawyers' association (notarial bars in Hungary and Slovakia); and 6) a private firm while responsibility and ownership of the data remaining with the state (Florida). When a non-governmental entity is chosen to operate the collateral registry it is important that the country, (i.e. the government), assumes the ultimate responsibility for the data recorded in the collateral registry. Accordingly, the government should put in place an adequate regulatory framework to ensure that the collateral registry is run effectively and in compliance with the legal framework. The government should also require the private sector entity to procure insurance against losses that could be suffered by the users because of the loss or destruction of the data. While in Africa, thus far, the prevalent approach is either for the Central Banks or Registrar General Offices to operate collateral registries, the other approaches outlined above should be given consideration for possible implementation in Kenya.

⁸⁸ See for e.g., Borrowers and Lenders Act, 2008 (Ghana) §21-24; Commercial Code (Liberia) (2010) supra note 24, §5.51; and Commercial Code (Mexico) (2010 reforms), art. 32 bis 2.

⁸⁹ See UNCITRAL, Registry Guide (2013), Recommendation 2.

6.2.10 Implementation should include a training and communications campaign

An important component of reform projects is training and communication that informs the potential users about the functions of the collateral registry and features of the new legal framework. Training relates to a number of stakeholders, including: 1) registry staff, both operational and those responsible for the maintenance of information technology (IT); 2) lenders of the new asset-based credit products that may be used under the new legal framework; 3) borrowers regarding their rights and obligations in security relationships with their lenders; 4) the legal community including lawyers, insolvency trustees and judges; and 5) "others" who may have an interest or a role to play under the new framework, such as the providers of search services to those without electronic access to the registry.

Kenya should develop its overall training strategy as part of its implementation project. The strategy should identify the target groups, topics to be discussed with those target groups, and the locations where training should be conducted. It should also find consultants, such as asset-based lenders and registry staff from the countries that have implemented a similar reform, to participate in training sessions. A communications campaign involves broadcasting the new legal framework and the collateral registry to the public at large since they will be affected by its implementation. For instance, individuals should be aware of the collateral registry and the need to consult it before they buy a used vehicle from another individual. The message to be conveyed through the campaign must be simple and understandable and devoid of overly technical or legal language.

The pace of reforms that modernize the legal framework governing access to loans secured with movable property is increasing. This provides the grounds for the establishment of movable asset registries, and is a testimony to the positive effect of such reforms on access to reasonably priced credit, particularly for SMEs. While a clear impact of these reforms in the context of Africa is yet to be demonstrated, despite the early results in Ghana, Kenya should not delay implementation of credit-friendly measures that facilitate economic development and reduce poverty, such as the movable asset registry. The problems, solutions and approaches discussed in this report provide a pathway for Kenya to move towards implementation of such a modern regime.

Annex 1

STAKEHOLDERS INTERVIEWED IN THIS PROCESS

ORGANIZATION	CONTACT(S)	TITLE
Vehicle Equipment Leasing Limited (Vaell)	Paul Njeru	Managing Director
National Economic Social Council	Dr. Julius Muia	Secretary
Kenya Bankers Association	Jared Osoro	Director, Research and Policy Director
Economic Affairs Department	George Omino	Deputy Director
Strategy and Risk department, ICDC	Byron Mudhune	Strategy & Risk Manager (Head)
TransUnion Credit Bureau	Wachira Ndege	Chief Executive Officer
	Steven Kamau	Business Development Manager
	Nzau Muinde	Business Data Analyst
Co-operative Bank of Kenya Ltd.	Wanjiku Kabiru	Head SME Banking
Safaricom	Lucy Nyaguthii Muchira	Senior Manager
	Bernard Oyoga	IT
Alios Finance Kenya	Edna Kihara	Chief Executive Officer
Kenya Credit Information Sharing Initiative (KCISI)	Jared Getenga	Project Manager
SME Banking	Charles Ndambuki	Chase Bank Head
State Law Office (Sheria House)	Christine Agimba	Deputy Solicitor General
Association of Microfinance Institutions (AMFI)	Caroline Karanja	Program Officer
Central Bank of Kenya	Michael Owuor	Assistant Manager Bank Supervision Department
	Edwin Kipsitet	Assistant Manager Research

Annex 2

MOVABLE ASSETS REGISTER STUDY STAKEHOLDER WORKSHOP – LIST OF PARTICIPANTS

	NAME	ORGANIZATION
1	Anthony Kibe	Leasing Association of Kenya (LAK)
2	Marec Dubovec	National Law Center for Inter-American Free trade
3	James Kashangaki	FSD Kenya
4	Charles Nyoro	Equity Bank
5	Wang'ombe Gathuku	Vehicle Equipment Leasing Limited
6	Onesmus Wanjau	Fintech K. Ltd
7	Stephen King'ori	Equity Bank
8	Moses Mbau	Toyota Kenya
9	Violet Moyo Ndonde	IFC
10	Michael Njeru	FSD Kenya
11	Winnie Mokaya	FSD Kenya
12	Isaac Chege	Equity Bank
13	John Njenga	Alios Finance
14	Patricia Mwangi	IFC
15	Bernice Gachegu	Office of the Attorney General
16	Sam Omukoko	Metropol
17	Wachira Ndege	Trans Union
18	Michael Kihara	Fintech Kenya Ltd
19	Moses Karanu	NIC Bank
20	Jennifer Kinyoe	Chase Bank
21	Micheal Owuor	Central Bank of Kenya
22	Joseph Wambugu	CMC Motors
23	Leonard Kimani	NESC
24	Jacob M Ikiara	Office of the Attorney General
25	Kitumu Nzomo	Toyota Kenya
26	Moses Ochieng'	FSD Kenya
27	Mike Milili	Tshusho Capital
28	Rose Nganga	ECB



