

# **Money Laundering and Real Estate Sector in Kenya: Towards Robust Regulation**

By

Ssekubwa Rogers Githinji

Student No. 094294



**October, 2022**

# **Money Laundering and Real Estate Sector in Kenya: Towards Robust Regulation**

By

Ssekubwa Rogers Githinji

Student No. 094294

**Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws  
(International Financial Law and Regulation) at Strathmore University**



©This thesis is available for Library use on the understanding that it is copyright material and that no quotation from this thesis may be published without proper acknowledgment.


## Declaration and Approval

### Declaration

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material published previously or written by another person except where due reference is made in the thesis itself.

© No part of this thesis may be reproduced without the permission of the author and Strathmore University

Student's name: **Ssekubwa Rogers Githinji**

Signature: 

Date: 24/08/2022

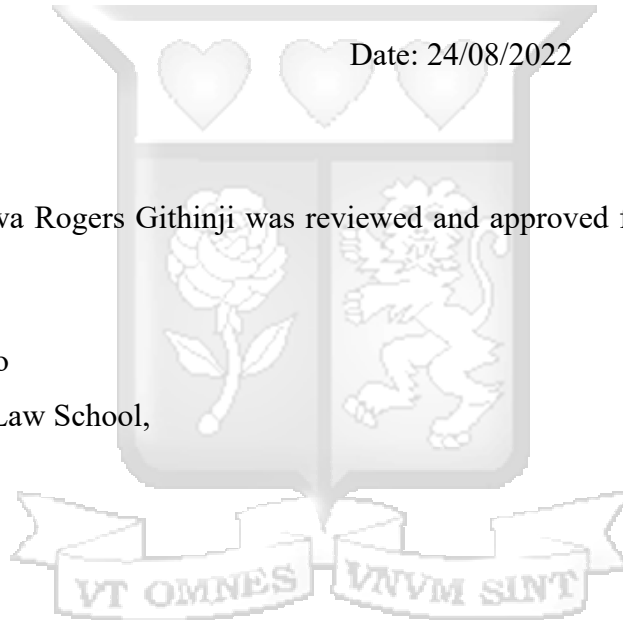
### Approval

The thesis of Ssekubwa Rogers Githinji was reviewed and approved for examination by the following:

Dr Constance Gikonyo  
Lecturer, Strathmore Law School,  
Strathmore University

Dr Peter Kwenjera  
Dean Strathmore Law School,  
Strathmore University

Dr Bernard Shibwabo  
Director of Graduate Studies,  
Strathmore University



## Abstract

The problem this study seeks to address is how the failure to impose money-laundering reporting obligations on all non-financial actors who play a critical role in land transactions where the real estate sector falls is linked to the promotion of money laundering in Kenya. With the over-regulated financial system, smart money launderers move to the underregulated real estate sector with many unregulated actors. Laundering money through real estate has led to negative consequences such as increased prices, destabilisation of the property market, and, most importantly, providing a safe investment for criminals. The legal regime on anti-money laundering and land laws does not explicitly address money laundering through real estate. The existing gaps can be exploited to invest dirty money into real estate.

This study is done through a doctrinal research methodology to investigate the research problem. The study takes land laws, POCAMLA, Anti-Corruption and Economic Crimes Act as a case study. A review of the gaps in land laws generates new insights and informs the formulation of regulations for safeguarding Kenya's real estate sector against money laundering. The study also looks at best practices in jurisdictions such as the United States of America (USA) and South Africa (SA) to draw lessons on how to address money laundering through the real estate sector. The lessons drawn from these two jurisdictions are intended to inform the formulation of robust, sector-specific legislation to curb money laundering through real estate based on Kenya's local context.

This research poses and investigates three questions to achieve its overarching purpose. First, in answering the questions on the difficulties of using the current land laws and anti-money laundering regulatory framework, the study establishes that the laws are not specific to addressing money laundering through Kenya's real estate. As a result, they are ineffective in solving the problem. This inefficiency originates from challenges arising from the non-inclusion of all non-financial actors as reporting agents. Furthermore, there is a disconnect between land laws and anti-money laundering regulations when addressing money laundering, specifically in real estate.

The research shows that there are no robust safeguards to anticipate and lock out money laundering activities from the onset of a conveyancing transaction to the completion stage, during which the title is registered in favour of a purchaser.

A specific anti-money laundering regime for real estate transactions would be effective because it will enable the implementation of context-specific and appropriate strategies for the real estate sector.

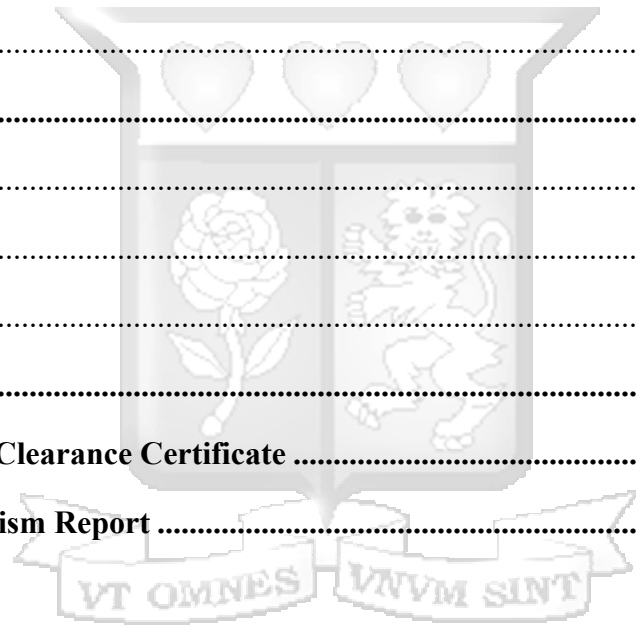
The study further concentrates on measures to curb money laundering through real estate in the USA and South Africa. The findings have important implications for the general understanding of the effectiveness of Kenya's anti-money laundering regime in dealing with real estate money laundering. Additionally, other East African countries with similar legislation to Kenya could benefit from seeing the weaknesses identified in the Kenyan regime and the possible solutions they may borrow from.

## Table of Contents

<b>Declaration and Approval</b> .....	<b>ii</b>
<b>Abstract</b> .....	<b>ii</b>
<b>LIST OF ABBREVIATIONS</b> .....	<b>vii</b>
<b>LIST OF CASES</b> .....	<b>viii</b>
<b>LIST OF STATUTES AND CONVENTIONS</b> .....	<b>ix</b>
<b>ACKNOWLEDGEMENT</b> .....	<b>xi</b>
<b>DEDICATION</b> .....	<b>xii</b>
<b>Chapter One</b> .....	<b>1</b>
1.1 Introduction .....	1
1.2 Background .....	1
1.3 Statement of the Problem .....	5
1.4 Statement of Objectives .....	5
1.5 Research questions .....	5
1.6 Hypothesis.....	6
1.7 Justification of the Study .....	6
1.8 Theoretical Framework: The Badman Theory Rational Choice Theory .....	6
1.9 Literature Review.....	10
1.9.1 Anti-Money Laundering Regulations and the Real Estate Sector .....	10
1.9.2 Challenges in Regulating Money Laundering through the Real Estate Sector..	13
1.9.3. Suggested way forward for combatting money laundering in the real-estate sector .....	14
1.10 Research Methodology .....	15
1.11 Chapter Breakdown .....	16
<b>Chapter Two</b> .....	<b>17</b>
2.1 Introduction.....	17
2.2 The Real Estate sector in Kenya .....	17

2.2.1 Commercial.....	18
2.2.2 Residential.....	19
2.2.3 Hospitality.....	20
2.3 The Real Estate sector as a channel for money laundering .....	20
2.4 The money laundering process in real estate .....	21
2.5 Legal and Institutional Framework.....	26
2.5.1 Land Act, 2012.....	28
2.5.2 Land Registration Act, 2012 .....	29
2.5.3 Estate Agents Act.....	30
2.5.4 Stamp Duty Act.....	30
2.5.5 Income Tax Act.....	31
2.5.6 Anti-Corruption and Economic Crimes Act .....	32
2.5.7 Proceeds of Crime and Ant-Money Laundering Act, 2012 .....	33
2.5.7.1 Lawyers and their roles as designated non-financial professions.....	35
2.5.7.2 Advocates client privilege.....	39
2.5.7.3 Banks and money laundering through real estate .....	40
2.6 Conclusion .....	40
<b>Chapter Three .....</b>	<b>42</b>
3.1 Introduction.....	42
3.2 Prevention mechanisms against money laundering in the USA .....	43
3.2.1 Prevention through legislation .....	44
3.2.2. Geographic Targeting Orders .....	53
3.3 Measures taken to curb money laundering in South Africa.....	57
3.3.1 A historical perspective of money laundering in South Africa's real estate sector.....	57
3.3.2 Measures to detect and deter money laundering in the South African real estate sector.....	59
3.3.3 Implementation of the FICA.....	61

3.4 Conclusion .....	62
<b>Chapter Four .....</b>	<b>63</b>
4.1 Introduction.....	63
4.2 Key Findings.....	64
4.3 Importance of findings.....	69
4.4 Recommendations.....	71
4.4.1 Sealing loopholes and omissions .....	71
4.4.2 Institutional synergy in the fight against money laundering in real estate .....	75
4.4.3 Non-financial actors as key players in real estate transactions.....	76
4.5 Conclusion .....	81
<b>Bibliography .....</b>	<b>83</b>
Journal Articles .....	83
Reports .....	84
Online sources.....	84
<b>APPENDICES .....</b>	<b>91</b>
<b>Appendix A: Ethics Clearance Certificate .....</b>	<b>91</b>
<b>Appendix B: Plagiarism Report .....</b>	<b>92</b>



## LIST OF ABBREVIATIONS

Advanced Notice of Proposed Rulemaking	ANPRM
Anti-Money Laundering	AML
Beneficial Ownership	BO
Commercial Real Estate	CRE
Customer Due Diligence	CDD
Customer Identification Program	CIP
Financial Action Task Force	FATF
Financial Crimes Enforcement Network	FinCEN
Geographical Targeting Order	GTO
Know Your Customer	KTC
Limited Liability Companies	LLCs
Politically Exposed Person	PEP
Real Estate Money Laundering	REML
Suspicious Activity Report	SAR
Suspicious Transaction Report	STR
Financial Investigation Unit	FIU
Financial Reporting Centre	FRC
United States of America	USA
Eastern and Southern Africa Anti-Money Laundering Group ( ESAAMLG)	

## LIST OF CASES

*Pillay and Others v S* 2004 (2) BCLR 158 (SCA)

*The matter of Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC)

*Hattingh v S* [2015] ZASCA



## LIST OF STATUTES AND CONVENTIONS

Annunzio-Wylie Anti-Money Laundering Act (1992) (USA)

Anti-Drug Abuse Act (1988)(USA)

Bank Secrecy Act (1970) (USA)

Constitution of Kenya (1963) (Kenya)

Constitution of Kenya (2010)(Kenya)

Crown Land Ordinance (1902) (Kenya)

Currency and Foreign Transactions Reporting Act (1970) (USA)

Financial Intelligence Act (2001) (South Africa)

Income Tax Act (2012) (Kenya)

Intelligence Reform & Terrorism Prevention Act (2004) (USA)

Money Laundering and Financial Crimes Strategy Act (1998) (USA)

Money Laundering Control Act (1986) (USA)

Money Laundering Suppression Act (1994) (USA)

Prevention of Organised Crime Act (1998) (South Africa)

Proceeds of Crime and Ant-Money Laundering Act (No. 51 of 2012) (Kenya)

Stamp Duty Act ( 2020) (Kenya)

The Land Act (2012) (Kenya)

The Land Registration Act (2012) (Kenya)

The Proceeds of Crime and Anti Money Laundering Act (2017) (Kenya)

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (2001) (USA)



## ACKNOWLEDGEMENT

I am indebted to my supervisor Dr Constance Gikonyo, Strathmore Library Team for responding to my emails timeously, my Father Dr Githinji Gitahi for his consistent support over the years. The God Almighty remains the giver of strength.



## DEDICATION

This thesis is dedicated to my friend Edwin Saluny who at the time of undertaking my Advocates Training Programme (ATP 2021-2022) at the Kenya School of Law concurrently with my Master of Laws dedicated his time out of practice to mentor me and cheer me on. The sacrifices were not in vain.



# Chapter One

## 1.1 Introduction

This study shows how land laws and land transactions facilitate money laundering. It explores the regulatory framework for land transactions and money laundering and shows how the existing regulatory gaps are not robust to fight money laundering through Kenya's real estate sector. The study will analyze how Kenya's real estate sector is used for money laundering in purchasing and selling land. A review of the gaps in land laws would generate new insights and inform the formulation of regulations for safeguarding Kenya's real estate sector against money laundering. This research will utilize a doctrinal research methodology to demonstrate the topic under study. This chapter begins with an overview of the context and background that frames the study. Then, it will state the problem statement, the statements of objectives, the research questions and the hypothesis. The chapter concludes with the justification for the study, a theoretical framework, a literature review and a research methodology.

## 1.2 Background

There is a rise in the growth of real estate in Kenya.<sup>1</sup> This growth is evident in both residential and commercial real estate.<sup>2</sup> The increased number of domestic and foreign investors is fuelling the development of Kenya's real estate sector.<sup>3</sup> However, aside from the legitimate funding source derived from these investors, media articles show that illicit funds form a substantial amount of capital invested in Kenya's real estate.<sup>4</sup>

Reports by FATF show that real estate transactions are susceptible to money laundering, a problem many countries worldwide are grappling.<sup>5</sup> However, despite the various media reports on money laundering through Kenya's real estate sector, no scholarly literature expounds on

---

<sup>1</sup> Ayemoba A, The Kenyan real estate market and the introduction of Real Estate Investment Trusts, 14 February 2017- <<https://africabusinesscommunities.com/features/the-kenyan-real-estate-market-and-the-introduction-of-real-estate-investment-trusts/>> 01 February 2022

<sup>2</sup> Ayemoba A, The Kenyan real estate market and the introduction of Real Estate Investment Trusts, 14 February 2017- <<https://africabusinesscommunities.com/features/the-kenyan-real-estate-market-and-the-introduction-of-real-estate-investment-trusts/>> 01 February 2022

<sup>3</sup> Ayemoba A, The Kenyan real estate market and the introduction of Real Estate Investment Trusts, 14 February 2017- <<https://africabusinesscommunities.com/features/the-kenyan-real-estate-market-and-the-introduction-of-real-estate-investment-trusts/>> 01 February 2022

<sup>4</sup> Mwita M, 'Nairobi named among top cities with stolen wealth in real estate' The Star, 20 July 2020 <<https://www.the-star.co.ke/business/2020-07-20-nairobi-named-among-top-cities-with-stolen-wealth-in-real-estate/>> On 22 July 2022.

<sup>5</sup> Financial Action Task Force, *Money Laundering and Terrorist Financing Through the Real Estate Sector*, 29 June 2007,4.

the relationship between Kenya's real estate transactions and money laundering. In addition, land laws are not robust in addressing money laundering through the real estate sector. The existing regulatory gaps create an opportunity for smart money launderers to invest dirty money into the real estate sector.

Money laundering refers to the injection of illicit funds into a legitimate economy, while real estate refers to residential and commercial developments.<sup>6</sup> In Kenya, the regulatory framework that deals with money laundering is the Proceeds of Crime and Anti-money laundering Act (POCAMLA); however, the Act does not explicitly address money laundering through the real estate sector. On the other side, several land laws deal with real estate transactions. These include the Land Act, the Land Registration Act, Stamp Duty Act, and the Income Tax Act. These key land legislations provide a regulatory framework that informs buying and selling of land.

The concern of this study is that the failure to impose money-laundering reporting obligations on non-financial actors who play a critical role in the land transactions where the real estate sector falls may be linked to the promotion of money laundering in Kenya. Land laws play a crucial role in buying and selling real estate. Therefore, in this quest to monitor money laundering through the real estate sector, there is a need to investigate the link between money laundering and Kenya's real estate transactions.

Interestingly, the land legislations and POCAMLA are silent on how to address money laundering through land transactions. As a result, this topic has not been discussed in academic resources in Kenya. Most of the information related to the link between money laundering and Kenya's real estate sector is in the news, but this is not to say that the problem does not exist in Kenya. Accordingly, this study will show how the gaps in Kenya's land laws encourage money laundering during the selling and purchasing of real estate.

Money laundering through real estate transactions is not just a local problem. South Africa, Canada and the United States of America are some of the countries facing manipulating land transactions for money laundering due to the gaps in existing land laws.

---

<sup>6</sup> Financial Action Task Force, *Money Laundering and Terrorist Financing Through the Real Estate Sector*, 29 June 2007,5.

Moreover, a review of FATF reports on money laundering through the real estate sector, taking the perspective of countries such as South Africa and the United States of America, exposes a link between land transactions and money laundering.<sup>7</sup>

Despite Kenya having a regulatory framework that deals with money laundering and land transactions, according to a 2020 report by 'The Sentry', Nairobi is one of the top cities with laundered money in real estate.<sup>8</sup> The city is amid a housing crisis, with dirty money driving the luxury real estate market.<sup>9</sup> Critiques have stated that the surge in real estate investment is driven by dirty cash.<sup>10</sup> This abnormality raises one fundamental question: what is fuelling the drastic growth in Kenya's real estate sector?

Smart money launderers heavily use Kenya's real estate sector to clean up proceeds from graft and other illicit financial flow, with Nairobi's real estate market being the most preferred.<sup>11</sup> This sector is favourable for laundering illegal funds because it facilitates large cash transactions and provides money launderers with an additional opportunity for profit.<sup>12</sup> As a result, Kenya is a transit point for trade-based money laundering.<sup>13</sup> It is, therefore, vulnerable to money laundering, a process made easy by lawyers who use legal privilege to circumvent money laundering investigations by refusing to provide information that they consider confidential.<sup>14</sup>

Money launderers also use limited liability companies (LLCs) and shell companies to purchase real estate in big cities. These legal entities are, in most cases, financed by other offshore

---

<sup>7</sup>Financial Action Task Force, *Money Laundering and Terrorist Financing Through the Real Estate Sector*, 29 June 2007,17.

<sup>8</sup> Mwita M, 'Nairobi named among top cities with stolen wealth in real estate' *The Star*, 20 July 2020, - <<https://www.the-star.co.ke/business/2020-07-20-nairobi-named-among-top-cities-with-stolen-wealth-in-real-estate/>> on 16 August 2021.

<sup>9</sup> Omondi D, 'How dirty cash fomented Kenya's real estate boom' *The Standard*, 22 July 2021< <https://www.standardmedia.co.ke/business/real-estate/article/2001418885/how-dirty-cash-fomented-kenyas-real-estate-boom> > On 16 August 2021.

<sup>10</sup> Omondi D, 'How dirty cash fomented Kenya's real estate boom' *The Standard*, 22 July 2021< <https://www.standardmedia.co.ke/business/real-estate/article/2001418885/how-dirty-cash-fomented-kenyas-real-estate-boom> > On 16 August 2021.

<sup>11</sup>Mwita M, 'Nairobi named among top cities with stolen wealth in estate' *The Star*, 20 July 2020, < <https://www.the-star.co.ke/business/2020-07-20-nairobi-named-among-top-cities-with-stolen-wealth-in-real-estate/>> On 31 May 2021.

<sup>12</sup>Freckleton M, 'Is Jamaica's anti-money laundering regime effective?' 22(1) *Journal of Money Laundering*, 2019,93.

<sup>13</sup> Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof' 22(2) *Journal of Money Laundering*, , 2019, 247.

<sup>14</sup> Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof' , 247.

firms.<sup>15</sup> As a result, they enjoy several benefits and protection, from keeping the beneficial owners of real estate anonymous to protecting them from any company liability.<sup>16</sup> Unfortunately, no one knows the exact amount of money laundered in the real estate sector annually because it is challenging to do so accurately, and the absence of such reliable figures is admitted at a policy level.<sup>17</sup>

Money laundering operates in three key stages: (1): placement, where illicit cash enters the financial system, commonly through bank deposits; (2) layering, where the launderer performs multiple transactions to conceal the illegal origins of the funds; and (3) integration, where the illicit funds disguised as legitimate funds is put back into the economy.<sup>18</sup> In the money laundering cycle, money laundering through real estate is encountered at the reintegration stage. During this final stage, dirty money is introduced into the real estate sector by purchasing and developing residential and commercial buildings. The illegally obtained funds can be hidden in real estate by several transactions that cloak the genuine source or invest in properties that provide a façade of legality.<sup>19</sup> Furthermore, real estate owners may sell real estate without the involvement of agents and banks through an all-cash purchase, which sidesteps anti-money laundering (AML) client-identification procedures.<sup>20</sup>

Additionally, land and house purchases involve a tremendous amount of money coupled with fewer regulatory and reporting requirements, creating a loophole to reintegrate illicit funds into the legitimate economy.<sup>21</sup> The consequence of investing dirty money into the real estate sector is that real estate becomes expensive for ordinary people to afford.<sup>22</sup> Although Kenya's steps are commendable in fighting money laundering, it is still necessary to review the specific regulatory framework in place in order to evaluate its readiness to deal with the problem of money laundering through the real estate sector.

---

<sup>15</sup>Teichmann F, 'Twelve methods of money laundering' 20(2) *Journal of money laundering*, 2017,135.

<sup>16</sup>McPherson G, 'Floating on a sea of funny money: An analysis of money laundering through Miami real estate and the federal government's attempt to stop it' 26(159) *University of Miami Business Law Review*, 2017, 165.

<sup>17</sup> King C and Zavoli I, 'New development: Estate agents' perspectives of anti-money laundering compliance - four key issues in the UK property market', 1.

<sup>18</sup>Boles J, 'Anti-money laundering initiatives for the South African real estate market' 1(1) *Journal of comparative urban law and policy*, 2017,198.

<sup>19</sup>Boles J, 'Anti-money laundering initiatives for the South African real estate market' ,200.

<sup>20</sup> Boles J, 'Anti-money laundering initiatives for the South African real estate market' ,201.

<sup>21</sup>Naheem M, 'Money laundering and illicit flows from China-the real estate problem' 20(1) *Journal of money laundering*, 2017, 17.

<sup>22</sup> Remeur C, 'Understanding money laundering through real estate transactions' European Parliamentary Research Service, 2019,7.

### **1.3 Statement of the Problem**

In Kenya, the primary focus is on fighting money laundering through banks by imposing strict reporting requirements on these financial institutions. Money laundering is characterized by taking proceeds from unlawful activities and re-introducing these proceeds back into the economy as legitimate funds, which can then be used to conduct economic activities without being linked to illicit sources.<sup>23</sup> Money launderers use skilled professionals such as investment bankers, lawyers, accountants, real estate agents, and bondholders to legitimize their criminal proceeds through innovative techniques.<sup>24</sup> With the over-regulated financial system, smart money launderers move to the underregulated real estate sector with many unregulated actors.<sup>25</sup>

The consequence of investing dirty money into real estate is that real estate becomes expensive to afford for ordinary people who earn money through legitimate means. Some of the factors that lead to money laundering in the real estate sector include the lack of effective and efficient internal controls for most players. Examining the relationship between money laundering and the real estate sector could significantly prevent the investment of dirty money into real estate. This research seeks to investigate this issue.

### **1.4 Statement of Objectives**

1. To demonstrate how land laws can prevent or aid money laundering through real estate sector in Kenya.
2. To demonstrate how money laundering is perpetuated through real estate sector in Kenya.
3. To draw lessons for Kenya from best practices in other jurisdictions (the United States of America and South Africa).

### **1.5 Research questions**

1. How can land laws can assist in preventing or aiding money laundering through the real estate sector in Kenya?
2. How is money laundering perpetuated through the real estate sector in Kenya?

---

<sup>23</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 17, European Parliament, Understanding money laundering through real estate transactions, 2.

<sup>24</sup> Smith K, 'Challenges Combating Money Laundering in the Real Estate Sector in South Africa' University of Western Cape, 2021, 34.

<sup>25</sup> Remeur C, 'Understanding money laundering through real estate transactions' European Parliamentary Research Service, 2019,1.

3. What lessons can Kenya learn from select jurisdictions such as The United States of America and South Africa?

### **1.6 Hypothesis**

There are loopholes in the land laws and anti-money laundering legislations in Kenya and this encourages laundering through the real estate sector.

### **1.7 Justification of the Study**

The findings of this study will enable Kenya's financial investigation unit and the courts to effectively detect, investigate and prosecute money laundering in the real estate sector. In addition, the study will highlight the roles of the different key players in real estate transactions and how they can be involved in resolving the problem of money laundering in Kenya's real estate sector. Increased understanding of how money laundering is done through the real estate sector and devising means to overcome this problem may minimize the chances of money laundering through the real estate sector. This will stabilize the real estate market, making it affordable for ordinary people.

Furthermore, the study will inform legislators on what improvement can be made to Kenya's regulations concerning the real estate sector. Moreover, the findings of this study may prompt legislators to include conveyancing advocates and land registrars in Kenya's legal regime on anti-money laundering as reporting agents. More still, as a result of this study, real estate title issuers may also be required to file suspicious activities reports if they suspect that a client is involved in money laundering at the point of registering a transfer in favour of a purchaser.

### **1.8 Theoretical Framework: The Badman Theory Rational Choice Theory**

This study is rooted in the nexus between the real estate sector and money laundering. It is underpinned by the Badman Theory and the Rational Choice Theory. Justice Oliver Wendell Holmes Junior propounded the badman theory. He defined law as predictions of what courts

will decide.<sup>26</sup> According to him, the law is derived from judicial decisions enforced by the state.<sup>27</sup> His view of law considers other factors that influence a legal system instead of focusing on "pure law". Such factors include philosophy and economics.

According to Justice Wendell, laws are not to be followed because they have been in existence for a long time. He said laws need to be practical and not merely formal or traditional. He states that: "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. Suppose you want to know the law and nothing else. In that case, you must look at it as a bad man who cares only for the material consequences that such knowledge enables him to predict, not as a good one, who finds his reasons for the conduct, whether inside the law or outside of it in the vaguer sanctions of conscience."<sup>28</sup>

The bad man cares only about the functional content of the law and does not care about the law on the books so long as it does not translate into the law in action. For example, why should the bad man care if the law says contracts must be performed when the only sanction for breach is a damage award that would cost the bad man less than performance? The law-on-the-books obligation to perform does not motivate the bad man unless it is backed up by a sanction sufficient to make performance in the bad man's self-interest.<sup>29</sup>

A bad man has as much reason as a good one for wishing to avoid an encounter with the public force. The bad man wants to avoid coming to crossroads to avoid sanctions.<sup>30</sup>

In speaking of the 'bad man,' it is clear that Holmes intended to include any person who is having to contemplate legal proceedings, whether (as a bad man) as an accused in criminal proceedings or a litigant, whether plaintiff or defendant, in a civil action. When the bad man hires a lawyer, he only wants to know the practical consequences of doing a certain act (which might be considered illegal). The bad man is pragmatic in that he wants to know the consequences not because he is a moralist but because he knows there is what one may call the law, a force he cannot challenge as applied by courts.

---

<sup>27</sup> Holmes O, 'The Path of the law' The Harvard Law Review Association, 110(5), 1997, 994.

<sup>28</sup> Holmes O, 'The Path of the law' The Harvard Law Review Association, 110(5), 1997, 993.

<sup>29</sup> Holmes O, 'The Path of the Law' Harvard Law Review Association 10 (8), 1897, 459.

<sup>30</sup> Holmes O, 'The Path of the Law' Harvard Law Review Association 10(8), 1897, 461.

The rational theory provides that a cost-benefit analysis influences the commission of a crime.<sup>31</sup> Man is a rational being; based on this premise, he estimates the cost (punishment) and benefit (gain) if he engages in any criminal undertaking before getting involved in any criminal activity.<sup>32</sup> Therefore, the decision to opt for laundering money using the real estate sector versus the other sectors results from money launderers gauging the effort, risks and benefits involved. The goal of investing dirty money into the real estate sector is to legitimise its origin. Money launderers are more interested in cleaning the dirty money than making a profit, even though it has been proven that laundering money through the real estate sector is more profitable than other sectors.<sup>33</sup> When buying real estate money, launderers pay close to 30% of the purchase price in cash, which is beneficial to them and the seller because this amount is not subject to tax.<sup>34</sup> The other 70% is paid through the banking system to avoid raising any red flags.<sup>35</sup>

In weighing the alternative sectors for money laundering criminals: (a) look at the risks involved, such as the chances of being caught, and (b) the amount of money that is likely to be lost in the process of cleaning the dirty money, (c) the chances of attracting attention from the public as well as raising suspicion from investigation agencies, (d) the possibility of arrest and successful prosecution and the benefits of choosing the real estate sector over other sectors. Public service officials, politicians, and civil servants hold positions that present opportunities for channelling money from the government to themselves and third parties.<sup>36</sup> This class is well-educated and knows how the real estate sector works. As such, they have the correct information before investing dirty money into the real estate sector.

By investing dirty money into the real estate sector, the elite can conceal large amounts of cash while in office and further distance themselves from the ownership of such real estate through third-party buyers.<sup>37</sup> From the money got through corruption, the elite can purchase apartment

---

<sup>31</sup> This theory was explained from an economics perspective by Gary Becker. See Becker, 'Crime & punishment: An economic approach' in Becker & Landes (eds) *Essays in the Economics of Crime and Punishment*, 1974.

<sup>32</sup> Becker G, 'Crime and punishment: An economic approach' (76)2 *The University of Chicago Press Journals*, 1968, 177.

<sup>33</sup> Teichmann F, 'Financial crimes in the real estate sector in Austria, Germany, Liechtenstein and Switzerland', *Journal of money laundering*, 2020, 12.

<sup>34</sup> Teichmann F, 'Twelve methods of money laundering' 135.

<sup>35</sup> Teichmann F, 'Twelve methods of money laundering', 135.

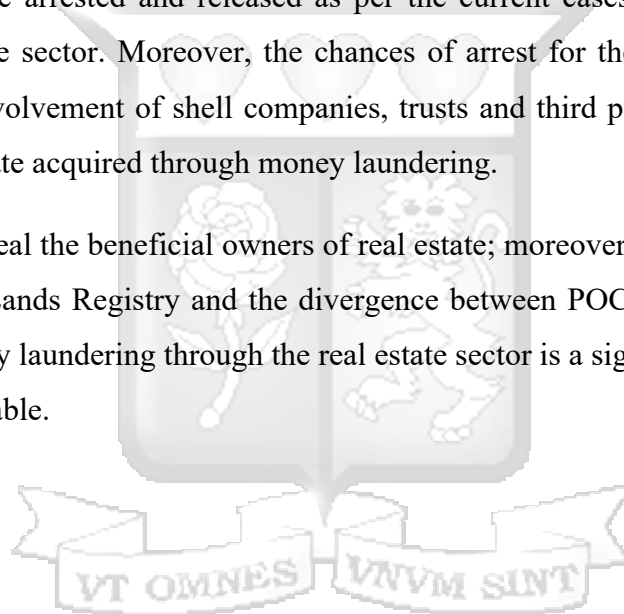
<sup>36</sup> Esoimeme E, 'Institutionalising the war against corruption: new approaches to asset tracing and recovery', 218.

<sup>37</sup> Kiplagat S, 'How Civil servant bought sh279m houses in days' *Business Daily*, 23 June 2021, <https://www.businessdailyafrica.com/bd/economy/how-civil-servant-bought-sh279m-houses-in-days-3447186> On 24 May 2022.

blocks in Nairobi's suburbs and invest in luxurious residential homes.<sup>38</sup> For politicians and the get-rich, quick middle class looking into legitimising illicit cash acquired through kickbacks and corruption, investing in the real estate sector makes the risk worth it.<sup>39</sup> Money launderers hand over their illicit cash to renovation companies, construction companies, real estate agents and other proxies to transact with it on their behalf. As such, there is minimal risk for the corrupt elites and politicians to route illicit cash into the real estate sector. On the other side, the risk is more significant for third parties who pose as real estate buyers if the money laundering scheme is unearthed.<sup>40</sup>

In terms of risk, getting caught and successfully prosecuted is near zero. The politicians, elites, and third parties investigated for money laundering in the real estate sector are often left scot-free. Most culprits are arrested and released as per the current cases of money laundering through the real estate sector. Moreover, the chances of arrest for the money launderer are minimal given the involvement of shell companies, trusts and third parties who obscure the true owner of real estate acquired through money laundering.

Shell companies conceal the beneficial owners of real estate; moreover, the weak institutional infrastructure at the Lands Registry and the divergence between POCAMLA and The Land laws in fighting money laundering through the real estate sector is a significant gap in holding the criminals accountable.



---

<sup>38</sup> Kiplagat S, 'How Civil servant bought sh279m houses in days' Business Daily, 23 June 2021, <https://www.businessdailyafrica.com/bd/economy/how-civil-servant-bought-sh279m-houses-in-days-3447186> On 24 May 2022.

<sup>39</sup> Kiplagat S, 'Civil Servant busted with half a billion shillings in four bank accounts' Daily Nation, 4 August, 2021 -< <https://nation.africa/kenya/news/civil-servant-found-with-half-billion-in-4-banks-3498166> > on 23 August 2021.

<sup>40</sup> Muthoni K, 'Court allows agency to recover shillings 39 million looted from NYS in an undefended case' The Standard, 24 July 2020 -< <https://www.standardmedia.co.ke/kenya/article/2001379874/court-allows-agency-to-recover-sh39-million-looted-from-nys-in-an-undefended-case> > On 23 August 2021.

## 1.9 Literature Review

Most of the literature on money laundering in Kenya places a heavy focus on the role of commercial banks in money laundering and the effects of the crime on the performance of financial institutions.<sup>41</sup> It also extends to the role of the legal profession in money laundering and the development of the crime concerning mobile banking.<sup>42</sup> Little has been said in literature directly targeting how money laundering interacts with the real estate sector. Still, as demonstrated in the background of this dissertation, the real estate sector has become one of the popular means through which money may be laundered in the country.<sup>43</sup>

Despite this lack of an expansive body of literature that directly speaks to how money laundering interacts with the real estate sector in the country, this literature does the following. First, it reviews the existing scholarship on money laundering in the real estate sector. Second, after doing such a review, it analyses how scholars have attempted to reconcile anti-money laundering regulations in curbing money laundering within the real estate sector. Third, it examines the literature on some challenges in addressing money laundering in real estate. It then concludes by clearly stating the way forward suggested in scholarship to solve this issue.

### 1.9.1 *Anti-Money Laundering Regulations and the Real Estate Sector*

Literature reveals two significant themes regarding scholarship on how anti-money laundering legislation can be developed to curb the crime of laundering within the real estate sector. On the one hand, there is scholarship that mainly advocates for the role of banks in the fight against money laundering to make it particularly difficult for criminals to launder their proceeds of crime using financial institutions. With this, scholars such as Naheem M argue that formal financial services play a pivotal role in detecting money laundering through the real estate

---

<sup>41</sup> Gikonyo C, 'Banks in Kenya and anti-money laundering obligations: the conflicts of interests arising' 24(2) *Journal of Money Laundering Control*, 2021. See also, Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 2019. See also, Nyaboke M, 'Money laundering in the banking sector: a critical analysis of the enforcement procedures in Kenya' - <https://suplus.strathmore.edu/handle/11071/10213> - 2020.

<sup>42</sup> Pambo K, 'Designating lawyers as reporting entities under the Kenya's anti-money laundering regime' 23(3) *Journal of money laundering control*, 2020. See also, Vlcek W, 'Global Anti-Money Laundering Standards and Developing Economies: The Regulation of Mobile Money' 29(4) *Wiley Online Library*, 2011.

<sup>43</sup> Teichmann F, 'Twelve methods of money laundering' 20(2) *Journal of money laundering*, 2017,132.

sector.<sup>44</sup> But on the other hand, it is not evident in literature how this would play out in a jurisdiction such as Kenya.

Researchers such as Farah Faiza provide that anti-money laundering legislation has placed a more significant role on commercial banks in combating money laundering.<sup>45</sup> Scholars argue that banks can be used to facilitate criminal activity.<sup>46</sup> This can be through adopting them as intermediaries of the funds for such illegal activity with the intent of hiding the source and the beneficial ownership of the money.<sup>47</sup> Further, Eleni Tsingou advances this claim, arguing that anti-money laundering professionals have an implementing and monitoring role and protect their interests, shaping the content of legislation and that this process is evident in banks and financial institutions.<sup>48</sup> Tsingou establishes that 'Professionalization has strengthened the relative standing of compliance departments against a background of lower tolerance for illegal and irregular transactions and a growing reputational and financial cost for banks knowingly or accidentally enabling such activities.<sup>49</sup> The views of Faiza and Tsingou have been grounded in the Kenyan context, as one can notice from Article 48 of the Proceeds of Crime and Anti-money Laundering Act. However, no obligations of reporting money laundering have been placed upon lawyers when it comes to professionals.<sup>50</sup>

Despite these legal mechanisms that Kenya has put in place in terms of reporting obligations placed upon financial institutions such as banks, amongst others, it has been contended that among the many ways that money laundering takes place in the real estate sector is that at the point of purchase a percentage of illicit money is paid to the owner of the property in cash.<sup>51</sup>

---

<sup>44</sup> Naheem M, 'Money laundering and illicit flows from China-the real estate problem' 20(1) *Journal of money laundering*, 2017, 12.

<sup>45</sup> Faiza A, 'Assessment of the implementation of anti-money laundering policy: perspectives of corporate bank clients' in Kenya' - <https://su-plus.strathmore.edu/handle/11071/6575> - Strathmore University, 2019.

<sup>46</sup> Report on the Prevention of Criminal Use by the Banking System for the Purpose of Money Laundering, < [Prevention of criminal use of the banking system for the purpose of money-laundering \(December 1988\) \(bis.org\)](#) > December 1988. *See also*, Measures against the Transfer and Safeguarding of Criminal Origin, Recommendation No. R (80)10 adopted by the Committee on Ministers of the Council of Europe on 27 June

<sup>47</sup> Report on the Prevention of Criminal Use by the Banking System for the Purpose of Money Laundering, < [Prevention of criminal use of the banking system for the purpose of money-laundering \(December 1988\) \(bis.org\)](#) > December 1988. *See also*, Measures against the Transfer and Safeguarding of Criminal Origin, Recommendation No. R (80)10 adopted by the Committee on Ministers of the Council of Europe on 27 June 1980. *See also*, Gikonyo C, 'Banks in Kenya and anti-money laundering obligations', 2021.

<sup>48</sup> Tsingou E, 'New governors on the block: the rise of anti-money laundering professionals', 2018.

<sup>49</sup> Tsingou E, 'New governors on the block: the rise of anti-money laundering professionals', 2018.

<sup>50</sup> *See generally* Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof' *Journal of Money Laundering*, 22(2), 2019.

<sup>51</sup> Teichmann F, 'Twelve methods of money laundering' 135.

This arrangement is incentivised because the seller and buyer benefit by not paying tax.<sup>52</sup> However, to avoid suspicion and make the sale appear legitimate, a more considerable percentage of the purchase price is paid with clean money through domestic banks.<sup>53</sup> Money launderers, therefore, tend to avoid making direct transfers from suspicious offshore destinations.<sup>54</sup> This and other similar schemes make it problematic to exclusively rely on the banks to detect money laundering in the real estate sector.<sup>55</sup> While we can conclude that this reveals that there is a need to advance the money laundering regulations within the formal financial sector (making them suited to curb the crime when it comes to real estate), it also establishes that placing a heavy reliance on the formal financial services such as the banks, there exist limitations in the detection, investigation and prosecution of money laundering in the real estate sector.<sup>56</sup>

Therefore, while the approach of combating money laundering in Kenya by placing proper safeguards when it comes to financial institutions is a step in the good direction, there is a need to take cognisance that money launderers do not heavily depend on the financial sector, as is also argued by some scholars such as Teichman.<sup>57</sup> Teichman asserts that the over-regulation of the financial sector prompts money launderers to move to other sectors with minimal risks of getting caught. One such sector is the real estate sector.<sup>58</sup> It has been argued that there is an ambiguity in anti-money laundering legislation. This, in turn, results in uncertainties in applying the laws.<sup>59</sup> There is a shortage of literature regarding anti-money laundering regulations, specifically within the real estate sector in Kenya.<sup>60</sup> Scholars such as Shehu have provided that there is a need to avoid regulatory uncertainty as this will reduce the possibility

---

<sup>52</sup> Teichmann F, 'Twelve methods of money laundering', 135.

<sup>53</sup> Teichmann F, 'Twelve methods of money laundering', 135.

<sup>54</sup> Teichmann F, 'Twelve methods of money laundering', 135.

<sup>55</sup> Other schemes some which are provided in, 'Financial Action Task Force, *Money laundering and terrorist financing through the real estate sector*, 29 June 2007'.

<sup>56</sup> Teichmann F, 'Twelve methods of money laundering', 135.

<sup>57</sup> Andrews J, 'Why financial criminals use real estate to launder money' Curbed, 10 August 2018, < <https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial> > On 1 May 2021.

<sup>58</sup> Teichmann F, 'Twelve methods of money laundering', 136. *See also*, Andrews J, 'Why financial criminals use real estate to launder money' Curbed, 10 August 2018, < <https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial> > On 1 May 2021.

<sup>59</sup> Gikonyo C, 'Banks in Kenya and anti-money laundering obligations', 6.

<sup>60</sup> The author of this research in this context is referring to research/study that specifically analyses the real estate sector when it comes to money laundering.

of abusing the financial system to laundering the proceeds of crime.<sup>61</sup> Arguments have been made that for the law to have its intended impact, it should encompass all sectors where money laundering is likely to thrive, and the real estate sector is one of them.<sup>62</sup> The following part of this literature review examines some scholars' positions in regulating money laundering in the real estate sector.

### ***1.9.2 Challenges in Regulating Money Laundering through the Real Estate Sector***

In this part of the literature review, this dissertation provides that one of the significant hurdles in the fight against money laundering through the real estate sector is the exclusion of non-financial professionals within the scope of the regulations that govern money laundering – a problem that is very live in Kenya as the preceding part of this literature review has demonstrated. Non-financial professionals include registrars, real estate agents and advocates, among others.<sup>63</sup> Scholars have argued that non-financial professionals play a central role in purchasing or selling property. However, until recently, such persons were not obligated under international standards to report suspicious activity to their national financial intelligence units.<sup>64</sup> Yet, they are in an ideal position to detect money laundering and terrorist financing.<sup>65</sup> In Kenya, for example, a lot has been written about excluding advocates from the list of professionals who should report money laundering. Yet, advocates come in handy in real-estate transactions.<sup>66</sup>

Scholars such as Constance Gikonyo have argued that this constitutes a significant gap in the preventive mechanisms of money laundering. To elucidate this, Tsingou has argued that the inclusion of non-professionals in the scope of anti-money laundering legislation can enhance the fight against money laundering.<sup>67</sup> This can also be the case within the real estate sector.<sup>68</sup>

---

<sup>61</sup> Shehu A, 'Promoting financial inclusion for effective anti-money laundering and counter financing of terrorism (AML/CFT)' *Crime Law and Social Change*, 2012, 316.

<sup>62</sup> Guy S, *Money Laundering A New International Law Enforcement Model*, Cambridge University Press, 2000,

<sup>63</sup> Financial Action Task Force, *Money laundering and terrorist financing through the real estate sector*, 29 June 2007

<sup>64</sup> Financial Action Task Force, *Money laundering and terrorist financing through the real estate sector*, 29 June 2007, 10

<sup>65</sup> Financial Action Task Force, *Money laundering and terrorist financing through the real estate sector*, 29 June 2007, 10

<sup>66</sup> See generally Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 2019.

<sup>67</sup> Tsingou E, 'New governors on the block: the rise of anti-money laundering professionals', 2018.

<sup>68</sup> Tsingou E, 'New governors on the block: the rise of anti-money laundering professionals', 2018.

For instance, it has been recognised that the legal profession generally and not just practising advocates is susceptible to money laundering, particularly in purchasing real property in Kenya.<sup>69</sup> Scholars such as Gathoni Kimani and Constance Gikonyo provide that in a bid to develop elaborate schemes that work around the anti-money laundering controls, suspected criminals have sought the assistance of legal professionals.<sup>70</sup> In analysing the relationship between the advocate-client confidentiality and the consequential effect of liability for the non-adherence to anti-money laundering legislation, they establish that advocates act as gatekeepers. Similarly, while banks in Kenya are required to file a Suspicious Activities Report in case they suspect any client depositing or transferring money to be involved in money laundering,<sup>71</sup> real estate agents and title issuers have no such requirement under Kenyan law.<sup>72</sup> This dissertation concludes this literature review by discussing the views proposed in scholarship for a country such as Kenya to effectively combat money laundering in the real-estate sector.

### ***1.9.3. Suggested way forward for combatting money laundering in the real-estate sector***

The above literature review on money laundering in the real-estate sector provides that although it is not the case, the inclusion of non-financial professionals within the scope of anti-money laundering legislation can enhance the fight against money laundering, particularly within the real estate sector as well. This literature also reveals that one of the biggest hurdles in the fight against money laundering in Kenya today is the lack of strict anti-money laundering regulations specific to the real estate sector, mainly concerning the reporting thresholds.

In an attempt to address why the real estate sector is susceptible to money laundering, Gary MacPherson provides one of the reasons as the lack of effective regulation of transactions in

---

<sup>69</sup> The FATF recommendations provide situations in which recommendation 5,6 and 8-9 shall apply to lawyers and this includes in the sale of real estate.

<sup>70</sup> Kimani G, 'Gate-keeping on anti-money laundering and counter-terrorist financing ; A case for the Kenyan advocate' 6535(3) *South Asian Law and Economics Review*, 2018. See also, Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 2019.

<sup>71</sup> Section 44, *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009).

<sup>72</sup> The Act establishes the Financial Reporting Centre. See, Section 21, *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009). One of the objectives of the Centre is to make information it collects available to the supervisory bodies. See, Section 23, *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009). One of the supervisory bodies listed is Estate Agents Registration Board. See, First Schedule, *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009). This Board is Established Estate Agency Act, 1984. It is however not specific with regard to money laundering as it merely provides for the registration of transactions and ensuring that the conduct of agents is of a high standard. Burden is placed on the financial reporting Centre whose operations in limited when it comes to real estate money laundering.

the sector, which in turn makes it difficult to deter the laundering of money.<sup>73</sup> As it stands, this research provides that the real estate sector is not well regulated.<sup>74</sup> In line with this, a study by Dennis Chisenga and Jackson Phiri on some of the factors that lead to money laundering in the real estate sector, they provide one of these includes 'the lack of effective and efficient internal controls for most players in the sector. As such, they state that there is a need for law enforcement agencies to establish effective strategies aimed at increasing cooperation at the domestic level. They provide this will help keep track of activities directly or indirectly linked to money laundering.'<sup>75</sup>

However, the above literature reveals that at the domestic level in Kenya, there is a lack of cooperation as scholarship on anti-money laundering regulations indicates that, on the one hand, there has been a heavy focus on the formal financial sector such as banks. Yet, other actors are involved in the crime, both professional and non-financial professionals. Therefore, for the effective regulation of money laundering within the real estate sectors, there is a need to establish comprehensive controls in many areas of law touching on real estate, such as land laws, because the crime of money laundering involves a variety of actors.

### **1.10 Research Methodology**

This study will be done through a doctrinal research methodology to investigate the above research problem. Further, for the reason of space and time, the dissertation will take land laws as a case study.<sup>76</sup>

It will also look at the practices in other jurisdictions such as the United States of America (US) and South Africa (SA) to pave a way forward for Kenya in dealing with money laundering in the real estate sector. The justification for settling on the US and SA as jurisdictions to learn lessons is that both jurisdictions have elaborate mechanisms to curb money laundering through the real estate sector. Drawing from these two jurisdictions, Kenya can also recalibrate the lessons learnt to suit her circumstances.

---

<sup>73</sup> McPherson G, 'Floating on a sea of funny money: An analysis of money laundering through Miami real estate and the federal government's attempt to stop it', 167.

<sup>74</sup> McPherson G, 'Floating on a sea of funny money: An analysis of money laundering through Miami real estate and the federal government's attempt to stop it', 167.

<sup>75</sup> Chisenga D and Phiri J, 'Factors That Lead to Money Laundering in the Real Estate Sector Based on the Financial Action Task Force Standards' 9(1) *Open Journal of Business and Management*, 2021.

<sup>76</sup> Mohamed K, 'Combining methods in legal research' 11(21) *Medwell Journals*, 2016, 5191.

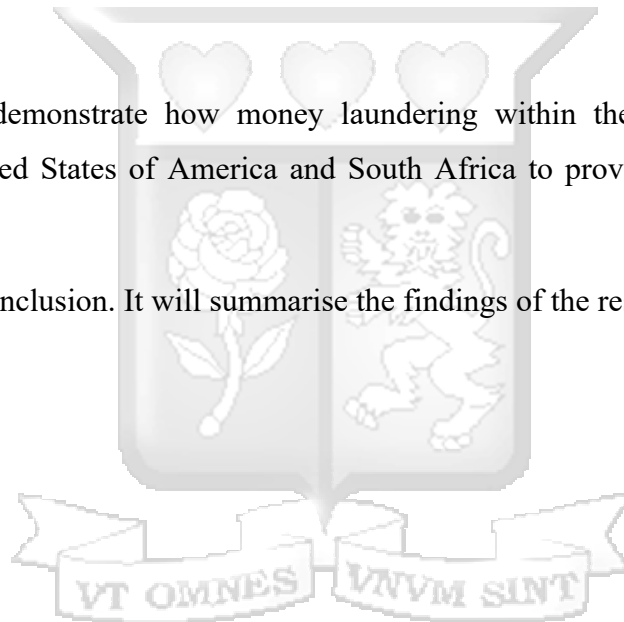
## 1.11 Chapter Breakdown

Chapter One of this paper is this Introduction. It has provided a background to the problem, a statement of the problem, research objectives, the hypothesis guiding the study, the justification of the study, the theoretical framework, and the literature review.

Chapter Two will demonstrate how land are not robust to curb laundering through the real estate sector in Kenya. Only by exploiting the loopholes in land laws regarding anti-money laundering can one understand how exactly money laundering is perpetuated in the real estate sector. Chapter II will further examine in detail how money laundering operates, and then it will look at the nature and procedure that transactions follow within the real estate sector; finally, it will conclude by establishing the link between the real estate sector and money laundering.

Chapter Three will demonstrate how money laundering within the real estate sector is addressed in the United States of America and South Africa to provide Kenya with a way forward.

Chapter Four is the conclusion. It will summarise the findings of the research.



## Chapter Two

### The Land Laws and Money Laundering in Kenya

#### 2.1 Introduction

The real estate sector in Kenya is diverse and comprises commercial, residential, and industrial real estate categories. In addition, sub-categories exist within these primary categories, which illustrates the sector's diversity and complexity, contributing to 10.5% of GDP in the Second Quarter of 2020 and 10 % in the Second Quarter of 2021.<sup>77</sup> The vastness of the sector has been utilised in money laundering activities where illicit funds are channelled through real estate transactions to camouflage the beneficial ownership and make the funds available for use in the clean economy. The real estate sector is used at all the different money laundering stages, involving placement, layering, and integration.

This chapter shall discuss the real estate sector in Kenya concerning money laundering. In so doing, the chapter shall: 1) Define the real estate sector in Kenya and what it comprises; 2) Discuss how the real estate sector is used for money laundering; and 3) Discuss the legal and institutional framework of real estate in Kenya and address whether this framework directly tackles the infiltration of money laundering.

#### 2.2 The Real Estate sector in Kenya

The real estate sector in Kenya has witnessed exponential growth in the past two decades. A key indication of this growth is the escalation in the contribution of real estate to the country's Gross Domestic Profit between 2000 and 2016. The contribution increased from 10.5% in 2000 to 12.6% in 2012 and 13.8% in 2016.<sup>78</sup> This growth has been characterised by big-ticket developments such as the construction of Centum's Centum's Two Rivers Mall, which attracted an investment of KES 6.4 billion from UK-based Old Mutual Property.<sup>79</sup> The sector experienced turbulent growth in the period between 2018 and 2020. The growth percentage in

---

<sup>77</sup> Cytonn, Kenya's Q1'2021 and Q2'2021 GDP Growth, 2022, <<https://cytonn.com/uploads/downloads/kenya-q12021-and-q22021-gdp-note.pdf>>, 1.

<sup>78</sup> Cytonn, Current real estate trends in Kenya & how they affect investors, February 2022– <<https://cytonn.com/blog/article/current-real-estate-trends-in-kenya-and-how-they-affect-investors>> on 06 February 2022.

<sup>79</sup> Ayemoba A, The Kenyan real estate market and the introduction of Real Estate Investment Trusts, 14 February 2017- <<https://africabusinesscommunities.com/features/the-kenyan-real-estate-market-and-the-introduction-of-real-estate-investment-trusts/>> 01 February 2022.

2019 stood at 5.3%, higher than the 2018 growth rate of 4.1%.<sup>80</sup> The real estate sector's contribution to GDP reflected the same trend. The contribution decreased from 7.0% in 2018 to 6.9% in 2019 and increased to 9.1% in 2020.<sup>81</sup>

The above snapshot of the real estate sector unilaterally views the sector while the real estate sector in Kenya is heterogeneous. The various categories are discussed below.

### ***2.2.1 Commercial***

#### ***a. Office***

The commercial office sector in Kenya has grown in tandem with the economic development witnessed in Kenya. Kenya is considered the regional financial hub in Sub-Saharan Africa. This title comes with the global recognition of the country as an investment destination for multinational firms. Beyond the international firms, domestic entities also increasingly seek modern office spaces which serve a competitive edge. The commercial office space in Kenya has evolved in response to these developments.<sup>82</sup>

Exciting developments in this space include introducing serviced offices, co-working spaces, and the reinvention of commercial office spaces, i.e., smart offices. Serviced offices are spaces furnished with technological input and business support services such as a receptionist. These spaces provide flexible payment options that allow users to pay daily, weekly, monthly or at other agreed intervals. The spaces are convenient for small businesses or organisations looking to expand or relocate.<sup>83</sup> The smart offices also represent another innovative product to attract consumers. These offices seek to create an ecosystem that promotes performance while providing entertainment to the user. The facilities may include a gym, cafeteria, and even a bar. The quality and elegance of the smart offices attract high-net-worth clientele.

The COVID-19 pandemic negatively affected this category of real estate in Kenya. In 2020 occupancy rates and rental yields decreased by 2.6% and 0.5% to 77.7% and 7.0%,

---

<sup>80</sup> Kenya National Bureau of Statistics, Economic Survey 2020, < <https://www.knbs.or.ke/?wpdmprom=economic-survey-2020>> 184.

<sup>81</sup> Cytonn, Nairobi Metropolitan Area commercial office report- Market under a pandemic 2021, 23 April 2021- <<https://cytonn.com/uploads/downloads/nairobi-metropolitan-area-commercial-office-final-report-2021.pdf>> 5.

<sup>82</sup> Cytonn, Current real estate trends in Kenya & how they affect investors, February 2022- <<https://cytonn.com/blog/article/current-real-estate-trends-in-kenya-and-how-they-affect-investors>> on 06 February 2022.

<sup>83</sup> Makena L, 'Co-Working Defining the Future Office Space' Business Today, 30 January 2020- <<https://businesstoday.co.ke/co-working-office-space-is-the-future-of-working/>> 04 February 2022.

respectively.<sup>84</sup> This dip is attributable to the effects of the pandemic, which resulted in an oversupply of 7.3mn SQFT of commercial office space in the same year.<sup>85</sup> The oversupply is largely based on the work-from-home arrangements that ensued after the pandemic announcement in March 2020. Other factors include the completion of large projects, which increased the supply. Within this period, the best performing areas for office space were Parklands, Gigiri, Westlands, and Karen.<sup>86</sup>

#### *b. Retail*

Commercial real estate in the retail sector has also expanded exponentially. The increase in mall space primarily characterises the growth. Some of the most notable developments in this space include the Two Rivers Mall, The Hub, and Garden City, to name a few. The growth is driven by a widening middle class with more disposable income. This demographic has also attracted the attention of international retailers such as Carrefour, Kentucky Fried Chicken, Burger King, and Adidas. The retail sector is not limited to commercial real estate but has expanded into e-commerce. As a result, online shopping is slowly gaining traction due to the high internet penetration rate of 70% and the effects of the pandemic.<sup>87</sup>

#### **2.2.2 Residential**

The residential sector is a top category of the real estate market in Kenya. The growth of this sector can be attributed to an increasing population and bulging middle class. The sector is poised to grow further due to the growing demand. A Cytonn report released in February 2022 revealed that the residential sector recently recorded the highest demand, with the nationwide housing deficit totalling 200,000 units annually, which accounts for an accumulated deficit of over 2 million units.<sup>88</sup>

Notably, the most considerable demand for residential real estate developments has been in the affordable housing sector. In response to this demand, the Government has invested heavily in housing. As a result, national Government expenditure on housing increased from KES 16.1 billion in 2017-2018 to KES 24.8 billion in 2018-2019.<sup>89</sup> These projects are expected to provide

---

<sup>84</sup> Cytonn, Nairobi Metropolitan Area commercial office report, 9.

<sup>85</sup> Cytonn, Nairobi Metropolitan Area commercial office report, 9.

<sup>86</sup> Cytonn, Nairobi Metropolitan Area commercial office report, 9.

<sup>87</sup> Cytonn, Nairobi Metropolitan Area commercial office report, 9.

<sup>88</sup> Cytonn, Nairobi Metropolitan Area commercial office report. Full citation, e.g. website where it was downloaded from, date,

<sup>89</sup> Kenya National Bureau of Statistics, Economic Survey 2020, 187.

viable housing options to the 61% of urban dwellers in Kenya who reside in slums and informal settlements.<sup>90</sup>

### **2.2.3 Hospitality**

Kenya's hospitality real estate sector is vibrant and comprises four key components; accommodation, food and beverages, leisure and entertainment, and meeting and conferencing space.<sup>91</sup> This sector is intimately connected to the tourism sector due to the parallels drawn in the services both sectors provide. Therefore, the fluctuations in the tourism sector have detrimentally impacted the hospitality sector. However, earnings from hospitality increased by 17.8%, from KES 84.6 billion in 2015 to KES 99.7 billion in 2016, and international arrivals increased by 13.5%, from KES 1.2 million in 2015 to 1.3 million in 2016.<sup>92</sup> In addition, the sector has witnessed diversification with the growing popularity of products such as dual-branding, where mixed-purpose developments have serviced apartments and hotels.<sup>93</sup>

### **2.3 The Real Estate sector as a channel for money laundering**

Real estate has remained a preferred channel for money laundering due to the ability to manipulate property prices to transfer these illicit funds between involved parties. Other factors that contribute to its popularity is the relative stability of immovable properties, the functionality of the property beyond hiding illicit funds (the properties can be used to enable other illegal activities such as hosting brothels, controlling territories, or hiding illegal goods),<sup>94</sup> and the appreciating nature of real estate such that the illegal funds accrue legitimate interest.<sup>95</sup>

---

<sup>90</sup> Cytonn, Current real estate trends in Kenya & how they affect investors, February 2022–<<https://cytonn.com/blog/article/current-real-estate-trends-in-kenya-and-how-they-affect-investors>> on 06 February 2022.

<sup>91</sup> Cytonn, Nairobi Metropolitan Area (NMA) Serviced Apartments Report 2021, 07 November 2021–<<https://www.cytonn.com/topicals/nairobi-metropolitan-area-6>> 18.

<sup>92</sup> Cytonn, Current real estate trends in Kenya & how they affect investors.

<sup>93</sup> Cytonn, Current real estate trends in Kenya & how they affect investors.

<sup>94</sup> Savona E and Riccardi M (Eds.), 'From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe, Final Report of Project OCP Organised Crime Portfolio' 2015,12.

<sup>95</sup> European Parliament, Understanding money laundering through real estate transactions, February 2019 <[https://www.europarl.europa.eu/cmsdata/161094/7%20-%202001%20EPRS\\_Understanding%20money%20laundering%20through%20real%20estate%20transactions.pdf](https://www.europarl.europa.eu/cmsdata/161094/7%20-%202001%20EPRS_Understanding%20money%20laundering%20through%20real%20estate%20transactions.pdf)> 2.

The legitimate interests may include rents, debt service payments through financing the property, and capital gains from the property sale.<sup>96</sup>

A key advantage of real estate as a means of money laundering is that the sector is a large and diffuse market with large sums of funds moving freely.<sup>97</sup> This fluidity allows individuals to place large sums of money in individual assets without suspicion.<sup>98</sup> Additionally, the placement does not require any expertise, which adds to the allure. Once placed and layered, the funds are integrated into the economy as legitimate funds deriving from real estate transactions.

A 2015 study identified real estate as one of the traditional infiltration areas for money laundering. The other areas included restaurants and bars, retail and wholesale trade, hotels, and construction.<sup>99</sup> In addition, the study indicated that real estate was a vital element of the Italian Mafia investments.<sup>100</sup> The categories of real estate included undeveloped lands, villas, and flats, among others.<sup>101</sup>

## 2.4 The money laundering process in real estate

Several mechanisms and techniques have been established that misuse the real estate sector through money laundering. These techniques include using complex loans or credit finance, manipulating the appraisal or valuation of a property, using mortgage schemes, using investment schemes and financial institutions, and using properties to conceal money generated by illegal activities.

Case study 2.2: Use of a notary when buying a real estate

(Predicate offence: suspected money laundering by organised crime)

An East European was acting under a cover name as the company director for which he opened an account with a Belgian bank. Transfers were made to this account from abroad, including some on the instructions of "one of our clients".

---

<sup>96</sup> Maloney M, Somerville T, and Unger B, 'Combating Money Laundering in BC Real Estate: Expert Panel on Money Laundering in BC Real Estate' March 2019, 16 <[https://cullencommission.ca/files/Combating\\_Money\\_Laundering\\_Report.pdf](https://cullencommission.ca/files/Combating_Money_Laundering_Report.pdf)> 03 February 2022.

<sup>97</sup> Maloney, Somerville, and Unger, 'Combating Money Laundering in BC Real Estate' 16.

<sup>98</sup> Maloney, Somerville, and Unger, 'Combating Money Laundering in BC Real Estate' 16.

<sup>99</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 13.

<sup>100</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 13.

<sup>101</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 12.

The funds were then used to issue a cheque to a notary to purchase a property. However, the attention of the notary was drawn to the fact that sometime after the purchase, the company went into voluntary liquidation, and the person concerned repurchased the property from his company for an amount considerably above the original price. In this way, the individual was able to insert money into the financial system for an amount corresponding to the initial sale price plus the capital gain. Thus, he could use a business account, front company customer, real estate purchase, cross-border transactions and wire transfers to launder money that, according to police sources, came from activities related to organised crime.

The company appeared to act as a front set up merely to carry out the property transaction.

Indicators and methods identified in the scheme:

- Instruments: check, wire transfers, real estate.<sup>102</sup>

The process of money laundering is characterised by taking proceeds from unlawful activities and reintroducing these proceeds back into the economy as legitimate funds, which can then be used to conduct economic activities without being linked to illicit sources.<sup>103</sup> Money laundering comprises a three-step cycle of placement, layering, and integration.

**Placement** involves moving the illicit funds linked to the crime and introducing them into the financial system. The introduction may take the form of large amounts divided into small purchases and deposits to avoid causing alarm or suspicion.<sup>104</sup> The payments will usually be below the threshold for reporting transactions to money laundering agencies. Note that the form of currency at the point of placement will depend on the nature of the crime. For instance, payments for crimes such as sex trade, illegal gambling, and drugs will often take cash form because the parties seek to avoid a paper trail linking them to the crime. However, in crimes such as fraud, the transactions will be in the form of bank transfers between accounts.<sup>105</sup> Numerous placement techniques exist. These include smurfing where small cash deposits are made, false invoicing of services or goods not provided, and the casino approach.<sup>106</sup> The casino approach mentioned above was well-documented in British Columbia, where it is estimated

---

<sup>102</sup> Force, Financial Action Task, 'Money laundering and terrorist financing through the real estate sector', *Paris: FATF* (2007).

<sup>103</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 17; European Parliament, Understanding money laundering through real estate transactions, 2.

<sup>104</sup> European Parliament, Understanding money laundering through real estate transactions, 2.

<sup>105</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 17.

<sup>106</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 17.

that money laundering amounts to approximately \$1 billion per year.<sup>107</sup> The casino approach in the Vancouver model primarily involves the illicit flow of funds from China to Vancouver, where the funds are withdrawn. The process starts in China, where illegal activities occur, and the illegal funds are subsequently generated. The Chinese currency controls restrict transfers of more than \$50,000 out of the country, so the funds are channelled to criminal-controlled bank accounts. This is the point of placement.

**Layering** is the second stage of the laundering process. In this stage, the illicit funds introduced into the financial system are further distanced from the illegal source. Layering occurs through a series of transactions that aim to camouflage the beneficial ownership of the funds.<sup>108</sup> The layering process utilises the complex international financial system to create innovative techniques. These include cross-border transactions, use of corporations and trusts, falsifying import and export invoices, or aborted transactions (here, money is placed in a trust account for a pending transaction and the transaction aborted, which hides the beneficial ownership over the money).<sup>109</sup> The layering stage often requires professional advisory services due to the complexities involved. Such services encapsulate lawyers, investment bankers, accountants, and securities dealers. In the casino approach mentioned above, the individuals seeking to withdraw the funds then travel to Vancouver, withdrawing the funds in Canadian dollars. The funds are then exchanged for Canadian Casino chips used to make numerous low-value debts. This is the point of layering.

The **integration** phase occurs concurrently with the **extraction** phase. This phase makes the layered funds available to fund economic activities without the funds being linked to illicit sources. The stage also helps to return the proceeds of the criminal activities to the criminals involved.<sup>110</sup> The techniques used to integrate the funds include returns from selling properties purchased wholly or partly with illicit funds, paying wages, and returns on investments made with illegal funds.<sup>111</sup> In the casino approach, the chips are subsequently exchanged for Canadian dollars and are then legitimate "laundered" funds that cannot be linked to their illicit

---

<sup>107</sup> CBC, Money laundering in B.C. estimated at \$1B a year — but reports were not shared with province, AG says, 18 January 2019 <https://www.cbc.ca/news/canada/british-columbia/money-laundering-billions-bc-david-cby-1.4983471> 20 February 2022.

<sup>108</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 18.

<sup>109</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 18.

<sup>110</sup> European Parliament, Understanding money laundering through real estate transactions, 2.

<sup>111</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 18.

sources.<sup>112</sup> This final stage is the point of integration. Importantly, all these different mediums of laundering illicit funds through real estate reveal that the process is not uniform; it is dynamic and adapts to the prevailing conditions.

The real estate sector is utilised at different stages of the money laundering process. For instance, one can purchase real estate through a corporation using a high loan-to-value ratio mortgage. The mortgage can come from an unregulated private mortgage lender. The mortgage payments may be used for placement in such a transaction, especially where cash for debt service payments are accepted.<sup>113</sup> One may opt to invest in mortgages at the layering stage since such investments provide a combined interest and return-of-capital flow of funds. This activity can be conducted parallel with other asset purchases and sales transactions to layer the illicit funds.<sup>114</sup> At the integration stage, the money launderer may choose to build a custom one or conduct renovations and consequently increase the property's value, which will then be sold at a profit which appears legitimate.<sup>115</sup>

The real estate sector in Kenya has been earmarked as a destination for money laundering. For example, a 2021 report by Sentry, an international investigative and policy team, revealed that Politically Exposed People (**PEP**) in South Sudan use real estate in Kenya to launder proceeds of foreign corruption.<sup>116</sup> In the report, South Sudanese generals are seen to own luxury properties in Nairobi that exceed their government salaries. One account shows a general purchased high-end property valued at \$1.5 million in cash.<sup>117</sup>

Some of the techniques used are manipulating the valuation of a property. Generally, it may be difficult to estimate the value of a property, especially if it is an atypical property such as hotel complexes, golf courses, shopping centres and holiday homes. As a result, this difficulty further facilitates manipulation when the property is involved in money laundering. Overvaluation or undervaluation consists of selling or buying properties at prices above or below their market value. One of the ways this technique is used is when shell companies buy real estate, and then

---

<sup>112</sup> CBC, Money laundering in B.C. estimated at \$1B a year — but reports were not shared with province, AG says, 18 January 2019 <https://www.cbc.ca/news/canada/british-columbia/money-laundering-billions-bc-david-eby-1.4983471> 20 February 2022.

<sup>113</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 20.

<sup>114</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 20.

<sup>115</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 21.

<sup>116</sup> The Sentry, *Kenya Illicit Finance Risks and Assessment*, October 2021 <<https://thesentry.org/reports/kenya-illicit-finance/>> 5.

<sup>117</sup> The Sentry, *Kenya Illicit Finance Risks and Assessment*, 5

the company is closed shortly after. The criminals then repurchase the properties at higher prices than the original price. This way, the criminals can conceal their funds by inserting money equal to the original buying price plus capital gain. This process can be used as a tell-tale to track money laundering schemes.

Another technique is successive sales and purchases of a property. In this case, the property in question is sold in consecutive transactions with a higher price. These operations often include the reclassification of agricultural land as building land. Therefore, the sale is fictitious where the criminals can conceal their illegal activity. In addition, this process covers the property owner's identity and enables them to avoid the liability for capital gains tax.<sup>118</sup>

Notably, real estate abuse in laundering illicit funds is a global phenomenon. In a report dubbed "Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream", the U.S. real estate sector was revealed to be a haven for money laundering despite the anti-money laundering measures in place. According to the study, a minimum of \$2.3 billion has been laundered through real estate in the U.S. in the last five years, and over 50% of the reported money laundering cases through this sector involved PEPs.<sup>119</sup> The Geographic Targeting Orders (**GTO**) has operated sub-optimally in curbing this vice. The GTO is a measure implemented by the Financial Crimes Enforcement Network. Insurance companies must identify all-natural persons acting through shell companies to purchase residential real estate.<sup>120</sup> The GTO is location-specific and reviews purchases above a certain monetary threshold. The system, therefore, misses money laundering activities conducted through the real estate of lower value and in areas not considered prime locations. The Vancouver case, discussed above, also sheds light on the global pervasiveness of money laundering through real estate.

---

<sup>118</sup> Force, Financial Action Task, 'Money laundering and terrorist financing through the real estate sector', *Paris: FATF* (2007).

<sup>119</sup> Global Financial Integrity, *Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream*, 02 August 2021 <<https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>> 02 February 2022.

<sup>120</sup> FinCEN, *FinCEN Renews Real Estate Geographic Targeting Orders for 12 Metropolitan Areas*, 09 October 2021 <<https://www.fincen.gov/news/news-releases/fincen-renews-real-estate-geographic-targeting-orders-12-metropolitan-areas#:~:text=WASHINGTON%E2%80%94The%20Financial%20Crimes%20Enforcement,purchases%20of%20Residential%20real%20estate>> 02 February 2022.

## 2.5 Legal and Institutional Framework

Before discussing Kenya's anti-money laundering legislation and land laws, it is essential to acknowledge that Kenya's anti-money laundering laws are linked to the international anti-money laundering (AML) framework. Events at the international level prompted the development of Kenya's anti-money laundering legislation in two significant ways.<sup>121</sup> First, Kenya is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), which is a FATF-style body, and it is undergoing review towards meeting the goals of combating money laundering and financing terrorism.<sup>122</sup>

Furthermore, the enactment of Kenya's Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) is attributed to Kenya having ratified the United Nations Convention against Transnational Organized Crimes, which provides for anti-money laundering provisions.<sup>123</sup>

The gaps in Kenya's legislation on land transactions and money laundering will show ways the law can prevent or encourage money laundering through Kenya's real estate. The identified gaps allow the laws to be misused for money laundering.

First real estate laws in Kenya cannot exist without the various land laws that have been put in place over the years; the earliest laws related to real estate being the Crown Lands Ordinance of 1902 promulgated by the Commissioner, who was empowered to sell freehold estates in land and sell any land which was not under Africans without the consent of tribal Chief.

Further, the laws developed when the Crown Lands Ordinance of 1915 amended the 1902 legislation redefining Crown land to include land which was in occupation of the natives and reserved for the use and support of the native tribes. Natives were rendered mere tenants because all land belonged to the Crown. The only rights that were accorded to the natives were occupancy rights.

---

<sup>121</sup> Gikonyo C, 'Detection mechanisms under Kenya's anti-money laundering regime: omissions and loopholes' *Journal of Money Laundering Control*, 21(1), 2018, 59 >[www.emeraldinsight.com/1368-5201.htm](http://www.emeraldinsight.com/1368-5201.htm) < On 19 July 2022.

<sup>122</sup> Eastern and Southern Africa Anti-Money Laundering Group, *From Arusha to Maseru ESAAMLG at Ten 1999-2009*, 17 August 2009, 5.

<sup>123</sup> Gikonyo C, 'Detection mechanisms under Kenya's anti-money laundering regime: omissions and loopholes' *Journal of Money Laundering Control*, 21(1), 2018, 59 >[www.emeraldinsight.com/1368-5201.htm](http://www.emeraldinsight.com/1368-5201.htm) < On 19 July 2022.

Later in 1915, the Government Lands Act was enacted to replace the Crown Lands Ordinance. This gave the Government absolute rights over unalienated land and control over terms and agreements concerning land.<sup>124</sup> Fast forward to the Swynnerton Plan, a policy to further develop agricultural practices. The plan was aimed at expanding the scale of farming through improved infrastructure, market, weather forecast, and secure land tenure methods. However, this plan encouraged individualisation of tenure and issued indefeasible titles.

The Land Order-in-Council of 1960 provided for the conversion of leasehold into freehold land. The law also permitted Africans to acquire land in the Highlands. This was to be done like a trade transaction between willing parties. Additionally, the 1963 Constitution of Kenya, Section 19, provided for rights over property, mechanisms to be used under compulsory acquisition, and the various avenues to seek remedy when proprietary rights are infringed. Under Section 132, the regional assembly was obliged to make laws to regulate land use.<sup>125</sup>

The above laws gave rise to the Land Control Act enacted in 1967 to direct activities on land. These activities included dividing the land, sale, transfer, lease, mortgage, and any other activity that involved the movement of interests or rights. In 1999, the Njonjo Land Commission was appointed by the Government to inquire into the land law systems of Kenya. It had the aim of coming up with principles of a National Land Policy.

The Ndung'uNdung'u Land Commission, 2003, was appointed by President Mwai Kibaki. It reported on the various ways to grab land and how presidential powers were abused in land allocation. The real estate sector in Kenya became something of importance in the mid-2000s. As the Kenyan economy grew, property development in major cities such as Nairobi began to attract attention with interest in various fields of the market. These include office-based businesses, retail businesses, industrial businesses, and residential purposes.

In 2009, The Ministry of Land published the Draft National Land Policy created to implement the Njonjo Commission and the Ndung'uNdung'u Commission. The policy aimed to achieve efficient, sustainable, and equitable land use. However, sessional paper No 3 of 2009 acknowledged that there were too many statutes dealing with land and proposed harmonisation to bring about efficiency and transparency. Therefore, the Government had to make the following changes, repeal the land registration stipulations of the Registration of Titles Act,

---

<sup>124</sup> *Crown Land Ordinance*, 1902.

<sup>125</sup> *Constitution of Kenya* (1963).

repeal the Land Adjudication Act, repeal the Consolidation Act, enact a Land Registration Act, amend the Land Titles Act, and amend the Registered Land Act.

### **2.5.1 Land Act, 2012**

Land in Kenya is administered in accordance with the Land Act, 2012. The scope of application of the Land Act is set out in Section 3 and includes private, public, and community land. The Land Act also highlights the guiding values and principles of land management and administration.<sup>126</sup> Further, the Land Act governs the various land systems in Kenya through a series of land regulations set out in the subsidiary legislation to the Act. It also facilitates the sustainable administration of land and land-based resources. This way, the Land Act is considered the core legislation governing land administration in Kenya. However, despite its primacy, the Act fails to make provisions for preventing money laundering within the real estate sector. The absence is demonstrated in Section 157 of the Land Act, which provides for land management and administration offences. The Section broadly prohibits fraudulent acts but does not directly address money laundering.

There is a difference between particulars of fraud and money laundering. The particulars of fraud include (1) a representation of fact; (2) its falsity; (3) its materiality, (4) the representor's knowledge of its falsity; (5) the statement is intended to be acted upon by the person in a way reasonably contemplated; (6) the injured party's ignorance of its falsity; (7) the injured party's reliance on its truth and consequential injury caused.<sup>127</sup>

Contrary to fraud, particulars of money laundering include a person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and (1) enters into any agreement with anyone in connection with that property to conceal the nature or source of that property, assist any person who has committed money laundering to avoid prosecution or tries to diminish or remove any property related to money laundering.<sup>128</sup>

Furthermore, a person who acquires uses or has in possession of property and at the time of acquisition of such property knows or ought reasonably to have known that it forms part of proceeds of crime committed by him or by another is considered to have committed the offence

---

<sup>126</sup> Section 4, *Land Act* (No.6 of 2012)

<sup>127</sup> Mitchell R, 'Effective Solutions for complex financial disputes' <https://www.robertdmitchell.com/common-law-fraud> On 21 July 2022.

<sup>128</sup> Section 3, *Proceeds of Crime and Anti-Money Laundering Act* (No. 51 of 2012).

of money laundering.<sup>129</sup> More still, a person who knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another, with intent to commit an offence, that person commits an offence of money laundering.<sup>130</sup>

There is a clear difference between the particulars of fraud and money laundering offences. The definition of what can be laundered as per sections 3, 4 and 7 of POCAMLA stated above captures a broader array of committing the offence of money laundering. Moreover, the scope of what is laundered is not only cash; you could launder real estate, which is the primary topic of this thesis. It is also important to note that by committing fraud you are able to create money or property that can be laundered.

The prevalence of money laundering within the real estate sector and the lack of specific legislation warrant legislative action. Section 160 of the Land Act empowers the National Land Commission to make general land administration and management regulations. Accordingly, the Commission should make regulations setting out mechanisms to prevent the use of land transfers as a tool of money laundering.

### **2.5.2 Land Registration Act, 2012**

The Land Registration Act, 2012 (**LRA**) also forms a substantive part of the legal framework for land administration. The LRA governs the registration of interests in land in Kenya. Section 3 of the LRA sets out the scope of application of the Act to include the registration of interests in all private, public, and community land. Section 103 of the LRA establishes the sanctions for fraudulent conduct in relation to the registration of interests in land. The provision does not directly address any fraudulent activity arising from money laundering. However, the LRA is still well-equipped to prevent money laundering. The offences set out in Section 103 (1) include knowingly making a false statement, orally or in writing, in connection with a disposition or other transaction affecting land or any other matter arising under the LRA. This offence covers instances where individuals may attempt to manipulate the land register by inaccurately registering interests in land to conceal the actual beneficial owners therein. Nevertheless, the

---

<sup>129</sup> Section 4, *Proceeds of Crime and Ant-Money Laundering Act* (No. 51 of 2012).

<sup>130</sup> Section 7, *Proceeds of Crime and Ant-Money Laundering Act* (No. 51 of 2012).

protection offered by the LRA will benefit from enacting the regulations on money laundering in the real estate sector, as proposed above.

### **2.5.3 Estate Agents Act**

The Estate Agents Act provides for the registration of persons who negotiate for clients when selling, purchasing, or letting land and buildings.<sup>131</sup> The Act intends to regulate and control estate agents' professional conduct.<sup>132</sup> For instance, unregistered persons are not authorised to practice as estate agents.<sup>133</sup> Section 25 of the Act provides for dishonest practices.<sup>134</sup> Any person who fraudulently makes or causes or permits to be made any false entry in the register or fraudulently procures the entry in the register of any name or other particulars, whether on his behalf or on behalf of any other person or knowingly and willingly makes any statement which is false or misleading to gain any advantage under the Act is guilty of an offence.<sup>135</sup>

The Estate Agent Act is keen on fraud but silent about money laundering; nevertheless, estate agents are listed as designated non-financial businesses or professions per section 2 of POCAMLA.<sup>136</sup>

### **2.5.4 Stamp Duty Act**

The Stamp Duty Act governs the levying and management of stamp duties. Section 10A of this Act empowers the Government valuer to value real estate and assign an actual open market value. The Act does not expressly tackle money laundering; however, the lack of pre-recorded market values creates room for money laundering practices.

Stamp duty is defined as tax assessed on the transfer of immovable property. The value of stamp duty is determined by a government valuer or an appointed valuer. The government valuer is empowered by Section 10A (1) of the Stamp Duty Act to "determine the true open market value of such property as at the date of the conveyance or transfer for purposes of ascertaining any additional stamp duty is payable". Upon concluding the valuation, the valuer must release a valuation report to be assessed by the Chief Government Valuer.

---

<sup>131</sup> Section 2, *Estate Agents Act* ( Act No.533 of 2010).

<sup>132</sup> Section 2, *Estate Agents Act* ( Act No.533 of 2010).

<sup>133</sup> Section 18, *Estate Agents Act* ( Act No.533 of 2010).

<sup>134</sup> Section 25, *Estate Agents Act* ( Act No.533 of 2010).

<sup>135</sup> Section 25, *Estate Agents Act* ( Act No.533 of 2010).

<sup>136</sup> Section 2, *Proceeds of Crime and Anti-Money Laundering Act* ( Act No.9 of 2019)

The autonomy given to the valuers to determine the value of stamp duty to be paid is concerning. The concern is predicated on previous occasions where the government valuers have been accused of malpractices, key among them being the falsification of compensation payments where the Government has compulsorily acquired land.<sup>137</sup>

The precedence of falsification of valuations of land by the government valuers gives way to the risk of money laundering. To recap, money laundering involves a host of parties.<sup>138</sup> First, the government valuers may collude with persons entering land sale transactions to conceal funds derived from illicit activities. In doing so, the government valuers may overvalue or undervalue stamp duty to allow for the placement of these illegal funds where the stamp duty does not reflect the "true open market value of such property".

All is not lost in terms of curbing the malpractices of government valuers. The State is set to establish a land value index to provide a register of pre-recorded land values for land in different locations. A land value index is an analytical representation showing the spatial distribution of land values in a given geographical area at a specific time.<sup>139</sup> It is purposed to steer the state compensation for compulsory acquisition of land. However, the land value index may also have the unintended effect of preventing money laundering by introducing predetermined stamp duty values based on the fixed value on the index.

### **2.5.5 Income Tax Act**

Capital Gains Tax (CGT) is a tax levied on the transfer of property located in Kenya on or before January 2015. This tax was reintroduced through the assent of the Finance Act, 2014, which amended the 8<sup>th</sup> Schedule of the Income Tax Act to impose CGT. CGT is levied at a rate of 5% of the net gain, which is defined as the sales proceeds minus the acquisition and incidental costs.<sup>140</sup>

Transfers of property that are subject to CGT include even those dispositions that are not for consideration. Notably, the net gain is subject to certain deductible expenses that may lower the net gain upon which CGT will be charged. Some deductible expenses include

---

<sup>137</sup> Mwachane I, 'Why land value index is good for public projects' Business Daily, 25 June 2021 – <http://www.nation.co.ke/oped/blogs/dot9/franceschi//2274464/3160082/-/u2nn5vz/-/index.htm> on 10 April 2022.

<sup>138</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 18.

<sup>139</sup> Mwachane, 'Why land value index is good for public projects'.

<sup>140</sup> Kenya Revenue Authority, <https://www.kra.go.ke/individual/filing-paying/types-of-taxes/capital-gains-tax> on 12 April 2022.

loan/mortgage interests, legal fees, enhancements costs, advertising to find a buyer, and expenses incurred in the property valuation. These deductible expenses are comprehensively set out in Section 15 (2) of the Income Tax Act.

The deductible expenses ensure the CGT does not unduly burden the property vendor. However, the allowable expenses may also give way to money laundering. The tax authorities charged with ascertaining the legitimacy of the deductible expenses may be compromised, and as such, they may include or fail to include deductible expenses illegitimately; thus, altering the value of the property in a manner that allows for the concealment of illicit funds.

The list of deductible expenses is elaborate. However, Section 15 and Schedule 8 of the Act are silent on how the legitimacy of the claimed deductible expenses shall be confirmed. Therefore, money laundering may be avoided where the claim of deductible expenses is subjected to a specialised and autonomous review process that involves a form of investigation.

#### ***2.5.6 Anti-Corruption and Economic Crimes Act***

The Anti-Corruption and Economic Crimes Act provides for the prevention, investigation and punishment of corruption and economic crimes. The proceeds of financial crime, such as corruption, are what money launderers legitimise through investing in the real estate sector.<sup>141</sup>

Section 55 of the Act provides that corrupt conduct means conduct that constitutes corruption or economic crimes.<sup>142</sup> Once the Commission conducts its investigation and is satisfied that a person has unexplained assets, such a person is afforded a reasonable opportunity to explain the disproportion between the concerned assets and his known legitimate sources of income.<sup>143</sup> Should the Commission not be satisfied that an adequate explanation of that disproportion has been given, such property can be forfeited after proceedings are commenced in the High Court, and evidence demonstrates that the property in question could not have been acquired legitimately.<sup>144</sup> Although section 55 is keen on asset forfeiture of unexplained assets, it is essential to acknowledge that money launderers in real estate benefit from their dirty investment for years before their assets are forfeited to the State. Therefore, there is a need to

---

<sup>141</sup>Remeur C, 'Understanding money laundering through real estate transactions' European Parliamentary Research Service, 2019,9.

<sup>142</sup>Section 55, *Anti-Corruption and Economic Crimes Act* (Act No.3 of 2003).

<sup>143</sup> Section 55 *Anti-Corruption and Economic Crimes Act* (Act No.3 of 2003).

<sup>144</sup>Section 55 *Anti-Corruption and Economic Crimes Act* (Act No.3 of 2003).

find a solution to lock out money laundering in the real estate sector from the very onset of title registration in the purchaser's names.

### ***2.5.7 Proceeds of Crime and Ant-Money Laundering Act, 2012***

The Proceeds of Crime and Ant-Money Laundering Act, 2012, is the primary legislation dealing with the offence of money laundering in Kenya. The Act provides a robust definition of money laundering. According to Section 3 of this Act, a person engages in money laundering where the person knows or ought reasonably to have known that property is or forms part of the proceeds of crime and proceeds to enter into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, understanding or transaction is legally enforceable or not. Money laundering shall also occur where the person performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to:

- (i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
- (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere, to avoid prosecution; or
- (iii) remove or diminish any property acquired directly or indirectly as a result of the Commission of an offence.<sup>145</sup>

This definition also includes the acquisition, possession, or use of proceeds of crime and the financial promotion of the criminal activity.

Key features of the Act include the Financial Reporting Centre and the anti-money laundering obligations of a reporting institution. The Financial Reporting Centre is established under Section 21 of the Act with the principal objective of assisting in the identification of the proceeds of crime and the combating of money laundering and the financing of terrorism. The Centre works with reporting institutions to receive, analyse, and interpret the reports these reporting institutions provide. A reporting institution under the Act is defined as a financial institution and designated non-financial business and profession.<sup>146</sup> The Centre may also share the report with law enforcement authorities, any intelligence agency, or any other appropriate

---

<sup>145</sup> Section 3, *Proceeds of Crime and Ant-Money Laundering Act* (No. 51 of 2012).

<sup>146</sup> Section 2, *Proceeds of Crime and Ant-Money Laundering Act* (No. 51 of 2012).

supervisory body for further action where the information in the reports indicates the presence of money laundering activities.<sup>147</sup>

The reporting obligations of the reporting institutions directly tie into the discourse on preventing money laundering in the real estate sector. Reporting institutions are found in both sectors that have a supervisory body as well as those that are unregulated. The Fifth Schedule lists the institutions that act as supervisory bodies. These include the Central Bank of Kenya, the Insurance Regulatory Authority, Betting and Licensing Control Board, and Capital Markets Authority.<sup>148</sup> The real estate sector is unregulated as it does not have a supervisory body. However, the FRC notes that this is one of the sectors subject to the reporting obligations placed on reporting institutions despite being unregulated.<sup>149</sup> The implication is that the obligations on monitoring and reporting also apply to real estate transactions. The responsibilities are set out in Section 44 (1) and (2) of the Act as follows:

(1) A reporting institution shall monitor on an ongoing basis all complex, unusual, suspicious, large or such other transactions as may be specified in the regulations, whether completed or not and shall pay attention to all unusual patterns of transactions and to insignificant but periodic patterns of transactions which have no apparent economic or lawful purpose as stipulated in the regulations.

(2) Upon suspicion that any of the transactions or activities described in subsection (1) or any other transaction or activity could constitute or be related to money laundering or to the proceeds of crime, a reporting institution shall report the suspicious or unusual transaction or activity to the Centre in the prescribed form immediately and, in any event, within seven days of the date the transaction or activity that is considered to be suspicious occurred.

Overall, the above obligations ensure that any transactions in real estate that may be used to further the ends of money laundering will be detected by the reporting institutions within the real estate sector and reported to the FRC, which shall investigate the suspicious activity. In addition, the deterrent power of the reporting obligations in preventing money laundering may be boosted by establishing a supervisory body to coordinate reporting in the real estate sector.

---

<sup>147</sup> Section 24 (b), Proceeds of Crime and Ant-Money Laundering Act (Act No. 51 of 2012).

<sup>148</sup> Fifth Schedule, Proceeds of Crime and Ant-Money Laundering Act (Act No. 51 of 2012).

<sup>149</sup> Financial Reporting Centre, <<https://www.frc.go.ke/registration/reporting-institutions.html>> on 22 April 2022.

### 2.5.7.1 Lawyers and their roles as designated non-financial professions

Section 2 of POCAMLA 2009 lists designated non-financial businesses or professions (DNFBPs). The non-financial actors relevant to real estate under this Section only cover real estate agencies. Lawyers are excluded.<sup>150</sup>

Furthermore, Sections 44 to 48 provide for obligations to monitor and report the activities of all institutions to avoid money laundering. These include verifying customer identity, maintaining and establishing customer records, and maintaining and establishing internal reporting procedures. However, lawyers, again, are excluded from these obligations.<sup>151</sup>

These immunities that lawyers enjoy under Sections 2 and 44 to 48 of the POCLAMA position them as viable conduits of money laundering in the real estate sector.

In light of the above discussion, is it essential to acknowledge the POCAMLA has undergone some amendments since it was enacted in 2009.<sup>152</sup> The Proceeds of Crime and Anti-Money Laundering Amendment Act of 2017 reinforces the powers of the Financial Reporting Centre (FRC) to impose civil penalties on non-compliant entities and persons.<sup>153</sup> It further enlarges the scope of reporting institutions to include real estate agencies and any business or profession that the Minister of Finance, based on the advice of FRC, considers vulnerable to money laundering.<sup>154</sup> POCAMLA Amendment Act of 2017 presented the first attempt to have advocates as part of reporting institutions under the Act.<sup>155</sup>

---

<sup>150</sup> Section 2, *Proceeds of Crime and Ant-Money Laundering Act* (Act No. 51 of 2012).

<sup>151</sup> Sections 44 to 47, *Proceeds of Crime and Ant-Money Laundering Act* (Act No. 51 of 2012).

<sup>152</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022.

<sup>153</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022.

<sup>154</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022.

<sup>155</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022.

This year, the Proceeds of Crime and Anti-Money Laundering Amendment Act, 2022, came into effect in January 2022. The amendments under section 2 of the Act expanded the scope and definition of designated non-financial businesses or professions to include advocates, notaries and other independent legal professionals who are sole practitioners, partners, or employees within professional firms.<sup>156</sup> The Amendment Act further makes changes to section 48 of POCAMLA on obligations of reporting to include accountants, advocates, notaries and other independent legal professionals who are sole practitioners or employees with professional firms when carrying out transactions for their clients in the following circumstances:

- a) buying and selling of real estate.
- b) managing client money, securities, or other assets.
- c) management of bank, savings, or securities accounts.
- d) Organisation of contributions for the creation, operation, or management of companies;  
or
- e) creation, operation, or management of buying and selling business entities or legal arrangements.

The implication of the Amendment Act 2022 is that advocates are considered reporting institutions who are to be held criminally liable should they fail to comply with the provisions of the Amendment Act.<sup>157</sup> Advocates are also required to report any suspicious transactions through the know your customer (KYC) procedure related to those done by banks.<sup>158</sup>

The High Court has temporarily stopped the implementation of the above-discussed provisions of the Amendment Act 2022 on the ground that the amendments violate advocate-client confidentiality.<sup>159</sup> Accordingly, section 2(c) and 14(b) of the Amendment Act 2022 obligating

---

<sup>156</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022.

<sup>157</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022

<sup>158</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022

<sup>159</sup> Wangui J, 'Dirty cash: Court stops lawyers from disclosing deals' Business Daily, 13 January 2022 < <https://www.businessdailyafrica.com/bd/economy/court-suspends-law-that-compels-advocates-financial-deals-3680222> < 19 July 2022.

advocates and their staff as reporting institutions to FRC has been halted.<sup>160</sup> It is important to note that the 2022 amendment sections to POCAMLA have not been ousted. They have just been stopped. The matter is pending in court.

In addition, The Law Society of Kenya (LSK) has acknowledged that advocates are vulnerable to exposure to money laundering while representing their clients.<sup>161</sup> Accordingly, LSK has issued guidelines on Anti-Money laundering for legal practitioners. Advocates are not exempt from the duty to report suspicious activity and large cash transactions concerning large case transactions.<sup>162</sup> The LSK guidelines further provide that advocates should report all cash transactions over Kenya shillings one million (Ksh 1 million) to the Central Bank.<sup>163</sup>

Furthermore, Sections 5,6,7, 8 and 16 of the LSK guidelines on anti-money laundering provide that advocates should implement measures such as due diligence on client accounts with enhanced due diligence on clients with high-value transactions to ascertain the nature and purpose of the transaction and source of funds and setting of maximum limits for cash deposits.<sup>164</sup>

LSK has attempted to write anti-money laundering guidelines for legal practitioners, but the main problem is how to implement these guidelines and whether all lawyers have been made aware of the existence of these guidelines.

Taking note of the implementation challenges of the LSK guidelines on anti-money laundering for legal practitioners, I believe that the POCAMLA Amendments sections of 2022 that the

---

<sup>160</sup> Wangui J, 'Dirty cash: Court stops lawyers from disclosing deals' Business Daily, 13 January 2022 < <https://www.businessdailyafrica.com/bd/economy/court-suspends-law-that-compels-advocates-financial-deals-3680222> < 19 July 2022.

<sup>161</sup> The Law Society of Kenya, 'Anti-Money Laundering Guidance for legal practioners' 3 < <https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf> > 19 July 2022.

<sup>162</sup> The Law Society of Kenya, 'Anti-Money Laundering Guidance for legal practioners' 22 < <https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf> > 19 July 2022.

<sup>163</sup> The Law Society of Kenya, 'Anti-Money Laundering Guidance for legal practioners' 22 < <https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf> > 19 July 2022.

<sup>164</sup> The Law Society of Kenya, 'Anti-Money Laundering Guidance for legal practioners' 22 < <https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf> > 19 July 2022.

court has stopped will be a significant step in fighting money laundering through Kenya's real estate sector. Advocates in real estate transactions have a monopoly over the conveyancing process. They are heavily involved in land transactions because they play a significant role when parties purchase or sell land.<sup>165</sup> Therefore, they must show high competence and ethical standards, which we cannot ignore.<sup>166</sup>

At the pre-contractual stage, advocates investigate the title and perform due diligence to ascertain the owner of the property in question. During the contractual phase, they prepare completion documents and are involved in drawing transfer documents. In addition, they may hold money on a stakeholder basis on behalf of clients.

Post the contractual stage, advocates prepare completion notices and finally facilitate the registration of a transfer by ensuring that stamp duty is paid and completion documents are fully lodged at the land's registry.<sup>167</sup> The last step in a conveyancing transaction is for the purchaser's advocate to go to the lands registry and ensure that the purchaser is correctly registered as the owner of the property in question.

Even with the significant role advocates play during real estate transactions, they are under no obligation to report suspicious transactions during the buying and selling of real estate. They have no reporting obligations in real estate transactions, yet their roles during real estate transactions can be used to facilitate money laundering. For example, they can be used to buy and register real estate using dirty money without suspicion detected or reporting requirements expected of them by the Financial Reporting Centre.

Section 2 of POCAMLA provides that once a risk of money laundering is established, a Minister may, on advice to the Centre, declare certain key players as designated non-financial businesses or professions.<sup>168</sup> However, even with this provision in place up to Date, advocates who are the mastermind of real estate transactions are still challenging the position of them being considered to be part of reporting professionals to the Financial Reporting Centre concerning real estate transactions.

---

<sup>165</sup> Tom O.Ojienda, 'Principles of Conveyancing in Kenya a Practical Approach' (1<sup>st</sup> ed, Law Africa,2008) 70.

<sup>166</sup> Tom O.Ojienda, 'Principles of Conveyancing in Kenya a Practical Approach' (1<sup>st</sup> ed, Law Africa,2008) 70.

<sup>167</sup> Tom O.Ojienda, 'Principles of Conveyancing in Kenya a Practical Approach' (1<sup>st</sup> ed, Law Africa,2008) 72.

<sup>168</sup> Section 2, *Proceeds of Crime and Ant-Money Laundering Act* (No. 51 of 2012).

### 2.5.7.2 *Advocates client privilege*

Lawyers have not been called upon to be investigators but simply to comply with the provisions of POCAMLA on reporting suspicious transactions to FRC. FRC has the role of compiling statistics and records arising out of information received and creating and maintaining a database of suspicious transactions.<sup>169</sup> Furthermore, The Assets Recovery Agency is responsible for investigating and implementing sanctions against persons who contravene the Act.<sup>170</sup> We cannot ignore that lawyers are crucial to real estate transactions. They may advertently or inadvertently be linked to money laundering by purchasing real estate through a legal practitioner's client account.<sup>171</sup>

With acknowledgement of advocate-client privilege as per sections 134 and 135 of the Evidence Act,<sup>172</sup> and the Code of Ethics and Conduct of Advocates, 2016 on the rationale of the rule of the advocate-client privilege, there is a tendency to confuse the doctrine of legal professional privilege (LPP) and client-advocate confidentiality.<sup>173</sup>

Scholars such as Constance Gikonyo reports that the former is narrower than the latter and emphasises that client advocate confidentiality covers all communication between an advocate and their client concerning advice given to the client.<sup>174</sup>

On the contrary, she states that LPP has a restricted approach with an exception to the rule providing that an advocate can disclose privileged communication with the client's express consent as per section 134 (1) of the Evidence Act. Most importantly, the legal professional privilege does not protect any communication between an advocate and a client that is made in furtherance of any illegal purpose.<sup>175</sup>

---

<sup>169</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022

<sup>170</sup> Kithinji K and Mamaris M, 'The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022: The Implication of The Act on The Advocate-Client Relationship' <https://wamaeallen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/> On 19 July 2022

<sup>171</sup> Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof' *Journal on Money laundering Control*, 22(2), 2019, 247.

<sup>172</sup> Sections 134, *Evidence Act* (Act No. 80 of 1963)

<sup>173</sup> Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof' 252.

<sup>174</sup> Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 252.

<sup>175</sup> Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof' 252.

There is a need to appreciate that the concept of legal professional privilege is not absolute. It does not apply blanketly to every situation. To curb money laundering in real estate transactions, advocates should be on the list of reporting non-financial professionals to FRC.

### **2.5.7.3 Banks and money laundering through real estate**

The banking system plays a primary role in taking deposits and transferring funds in an economy.<sup>176</sup> Therefore, banks can be used by both lawyers and clients to facilitate money laundering when dealing with real estate transactions. However, several laws have been put in place to deal with money laundering through banks, including but not limited to POCAMLA.

Due to the over-regulation of the financial sector, money launderers move to other sectors with minimal risks of getting caught. One such sector is the real estate sector.<sup>177</sup> As it stands, this research provides that the real estate sector is not well regulated.<sup>178</sup>

A key advantage of real estate as a means of money laundering is that the sector is a large and diffuse market with large sums of funds moving freely. This fluidity allows individuals to place large sums of money in individual assets without suspicion.<sup>179</sup>

## **2.6 Conclusion**

Money laundering is often viewed from the popular media's unilateral and misguided lense, where funds are channelled through high-value assets and purchases in cash stashed in briefcases. However, the reality is more modest and complex. This reality also involves a broad range of actors and sectors. One such sector is the real estate market, which is used to "clean" illicit funds and reintroduce them same back into the economy once the illegal sources have been hidden or erased. As a result, the real estate sector in Kenya has become a money-laundering destination for both local and international players. The PEPs from South Sudan are a prime example of this assertion. Consequently, this chapter launched a discussion on money laundering through real estate in Kenya to outline the interplay between the present sector regulation and the pervasive activities of money laundering. In doing so, the regulatory

---

<sup>176</sup> Gikonyo C, 'Banks in Kenya and anti-money laundering obligations: the conflict of interest arising' *Journal of Money Laundering Control*, 24(2), 2021, 1.

<sup>177</sup> Teichmann F, 'Twelve methods of money laundering', 136. *See also*, Andrews J, 'Why financial criminals use real estate to launder money' *Curbed*, 10 August 2018, <<https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial>> On 1 May 2021.

<sup>178</sup> McPherson G, 'Floating on a sea of funny money: An analysis of money laundering through Miami real estate and the federal government's attempt to stop it', 167.

<sup>179</sup> Maloney, Somerville, and Unger, 'Combatting Money Laundering in BC Real Estate' 16.

framework on real estate in Kenya was seen to be inadequate in dealing with the dynamic and evolving forms of money laundering in this sector.



## Chapter Three

### Measures taken to curb money laundering through real estate in the USA and South Africa

#### 3.1 Introduction

The preceding Chapters have discussed money laundering from a global and domestic perspective. Further, the Chapters have linked money laundering to the real estate sector in Kenya and shown how the loopholes in Kenyan legislation may encourage this typology of money laundering. The present chapter will compare measures taken to curb money laundering in the real estate sector in the USA and South Africa to draw lessons for Kenya. The USA primarily comprises the Bank Secrecy Act of 1970 and the Geographic Targeting Orders introduced in 2016. The South African context focuses on the legislative framework underpinned by the Prevention of Organised Crime Act of 1998 and the Financial Intelligence Centre Act of 2001. The applicability of the measures undertaken by these two countries is relevant to the Kenyan context because of the effectiveness evidenced herein and the international recognition of compliance of the standards with global best practices.

The present chapter seeks to illustrate the progress made by other countries in curbing money laundering in the real estate sector. The USA has been selected in the comparative analysis because of its robust anti-money laundering measures, mainly in the real estate sector. Such measures have been motivated by the prevalence of this typology of money laundering in the USA. Approximately \$2.3 billion was laundered through the US real estate sector between 2015 and 2020, as was stated earlier in this paper.<sup>180</sup> The South African context is also apt in discussing feasible anti-money laundering measures for real estate in Kenya. The applicability is based on the similarities in contextual realities of developing countries. Further, South Africa is leading the path at the continental level in preventing money laundering in the real estate sector. This assertion is supported by the fact that South Africa is the only African country member of the 39-member Financial Action Task Force.<sup>181</sup>

---

<sup>180</sup> Global Financial Integrity, *Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream*, 2 August 2021, <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

<sup>181</sup> Financial Action Task Force, FATF (Financial Action Task Force) Countries 2022, 2022-<https://worldpopulationreview.com/country-rankings/fatf-countries> on 13 May 2022.

Even though the US is the only G7 country that has not included non-financial professionals as reporting institutions, it has made significant strides in fighting cash payments for real estate by using geographical targeting orders, as will be discussed in this chapter.

### 3.2 Prevention mechanisms against money laundering in the USA

The US real estate market is a prime target for money laundering, as has been alluded to in this paper's preceding parts. This assertion is supported by a study conducted by Global Financial Integrity on the real estate sector in the US, which revealed that approximately \$2.3 billion was laundered through the US real estate sector between 2015 and 2020.<sup>182</sup> Notably, this finding was based on reported cases only. Therefore, the number may be higher. The study revealed that purchases through anonymous shell companies continued to be the preferred money laundering typology. 82% of the reported cases involved using a legal entity or complex corporate structure to conceal ownership.<sup>183</sup> The purchase of a 23,000-square-foot mansion in Washington DC is well placed to analogise the use of shell companies as a conduit for money laundering. The Grand Haft mansion in Washington near Embassy Row was purchased in cash for \$15 million back in 2006. The purchaser in this transaction was a company incorporated in Delaware; however, the actual owner was never identified. The owner's identity only came into the spotlight when the US imposed sanctions against Russia for its ongoing aggression toward Eastern Ukraine in 2018. The owner was a Russian oligarch known as Oleg Deripaska.<sup>184</sup>

Another example includes the purchase of a Manhattan penthouse in 2011 for an estimated \$30 million where, again, the beneficial owner was unknown since the purchase was conducted through a shell company.<sup>185</sup> The actual owner was later found to be Jho Low, a Malaysian national who was convicted of stealing \$4.5 billion from the Malaysian sovereign wealth fund,

---

<sup>182</sup> Global Financial Integrity, *Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream*, 2 August 2021, <https://gfintegrity.org/report/acres-of-money-laundering-why-u-s-real-estate-is-a-kleptocrats-dream/>.

<sup>183</sup> Global Financial Integrity, *Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream*.

<sup>184</sup> Helderman R and Crites A, 'The Russian billionaire next door: Putin ally is tied to one of D.C.'s swankiest mansions' Washington Post, 29 November 2017 [https://www.washingtonpost.com/politics/the-russian-tycoon-next-door-putin-ally-is-tied-to-one-of-dcs-swankiest-mansions/2017/11/28/15f913de-cef6-11e7-81bc-c55a220c8cbe\\_story.html](https://www.washingtonpost.com/politics/the-russian-tycoon-next-door-putin-ally-is-tied-to-one-of-dcs-swankiest-mansions/2017/11/28/15f913de-cef6-11e7-81bc-c55a220c8cbe_story.html) on 08 May 2022.

<sup>185</sup> Collin M, Hollenbach F, and Szakonyi D, 'The impact of Treasury's pilot program on stemming the tide of dirty money into US real estate' Brookings, 7 March 2022 <https://www.brookings.edu/blog/up-front/2022/03/07/the-impact-of-treasurys-pilot-program-on-stemming-the-tide-of-dirty-money-into-us-real-estate/> on 08 May 2022.

IMDB.<sup>186</sup> However, these examples should not detract from the fact that money laundering in this sector is pervasive, even in real estate assets valued at more modest prices.

Despite the pervasiveness of money laundering in the real estate sector, the US has a robust anti-money laundering legal and regulatory framework. This framework is built on the Currency and Foreign Transactions Reporting Act 1970 (Bank Secrecy Act) and the Money Laundering Control Act (MCLA) of 1986. The Bank Secrecy Act obligates financial institutions to keep records of cash transactions and report any cash transaction that raises suspicion and indicates money laundering. Further, the USA has also developed the Geographical Targeting Orders (GTO) as a tool used to identify money laundering activities in real estate transactions in the US. These two measures will form the bedrock of the chapter as it concerns anti-money laundering measures imposed by the US.

### ***3.2.1 Prevention through legislation***

#### **(a) The legislative history of anti-money laundering laws in the USA**

It is noteworthy that the USA was the first country to make money laundering illegal. The term 'money laundering' originated from the practice of mobsters in the 1920s and 30s concealing illicit funds through laundromat services in the US.<sup>187</sup> Consequently, the Bank Secrecy Act (BSA) was established in 1970 to identify the origin, volume, and flow of monetary instruments moving in and out of the USA. The tracking was to be achieved through imposing reporting obligations on financial institutions.

The BSA paved the way for other laws designed to combat money laundering. These included the Money Laundering Control Act (1986), Anti-Drug Abuse Act of 1988, Annunzio-Wylie Anti-Money Laundering Act (1992), Money Laundering Suppression Act (1994), Money Laundering and Financial Crimes Strategy Act (1998), Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), and the Intelligence Reform & Terrorism Prevention Act of 2004.

---

<sup>186</sup> Collin M, Hollenbach F, and Szakonyi D, 'The impact of Treasury's pilot program on stemming the tide of dirty money into US real estate' Brookings, 7 March 2022 <https://www.brookings.edu/blog/up-front/2022/03/07/the-impact-of-treasurys-pilot-program-on-stemming-the-tide-of-dirty-money-into-us-real-estate/> on 08 May 2022.

<sup>187</sup> 'The History of Money Laundering' KYC-Chain, 25 April 2019 <<https://kyc-chain.com/the-history-of-money-laundering/>> on 08 May 2022.

Through the BSA, the Secretary may require any financial institution to report suspicious transactions that give rise to an apprehension that such transactions amount to a violation of law or regulation. This scope of financial institutions includes 'persons involved in real estate closings and settlements. Further, the BSA requires these financial institutions to establish anti-money laundering programs which include the following mandatory provisions: (A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs.<sup>188</sup>

Section 6102 (c) of the Anti-Money Laundering Act, 2020 introduced an amendment in the BSA that permits the Secretary to require domestic financial institutions and non-financial trades or businesses to maintain appropriate reporting mechanisms as prescribed to guard against money laundering. This amendment benefits anti-money laundering measures in the real estate sector because FinCEN can impose reporting obligations on non-financial institutions through the BSA regulation. These include non-bank residential mortgage lenders and originators and housing-related Government Sponsored Enterprises.

The key features of the BSA provisions are outlined below. The causal link between these features and money laundering in the real estate sector will be discussed in the subsequent section.

#### (i) Suspicious Activity Reports

A Suspicious Activity Report (**SAR**) is a form that financial institutions and other identified institutions must file with the Financial Crimes Enforcement Network (**FinCEN**), where the institution suspects that a particular transaction involves money laundering.<sup>189</sup> The SARs, initially referred to as Criminal Referral Forms, came about in February 1996 when the Office of the Comptroller of the Currency, the Department of Treasury, and other institutions involved in federal bank regulation assented to the suspicious activity reporting regulations.<sup>190</sup> As of

---

<sup>188</sup> US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions* 31 U.S.C. 5318(h)(1)(A)-(D), 12 August 2021 <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions#footnote-1-p69589>

<sup>189</sup> 'What is a suspicious activity report?' Thomson Reuters, <<https://legal.thomsonreuters.com/en/insights/articles/what-is-a-suspicious-activity-report>> on 08 May 2022.

<sup>190</sup> Comptroller of the Currency Administrator of National Banks, *Bank Secrecy Act/Anti-Money Laundering: Comptroller's Handbook*, September 2000, 11.

April, 1,1996, the regulations imposed an obligation on banks to file a SAR in the following instances:

- Where an employee is engaged in activity amounting to insider abuse of any amount.
- Transactions amounting to \$5,000 that a bank knows or suspects involve money laundering activities or otherwise has suspicion to believe that the transaction:
  - i) Involves funds from illegal activities;
  - ii) The transaction is structured to evade BSA regulations;
  - iii) The transaction lacks an apparent lawful purpose;
  - iv) The transaction is beyond the scope of normal customer commercial behaviour in that the amount transferred may exponentially exceed the average amounts transacted by the customer.<sup>191</sup>

The SARs obligations have evolved since 1996. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (**USA Patriot Act**) expanded the scope of reporting obligations arising from the SARs to include reporting obligations on transactions involving domestic or global terrorism.<sup>192</sup> BSA stipulations have also expanded to include organisations such as casinos, gem dealers, entities engaged in mortgage businesses, real estate agents, card clubs, and precious metal dealers. Generally, if the day-to-day operations of an organisation expose it to the risk of money laundering, then the SAR reporting obligations enshrined in the BSA apply to that organisation.<sup>193</sup> Notably, anyone can report suspicious activity through the SARs as such reporting is open to all members of the public.

#### (i) Customer Identification Program

The USA Patriot Act incorporated a raft of amendments into the BSA. Among these amendments was the Customer Identification Programs (**CIP**). A CIP is defined as a minimum set of standards financial institutions must meet concerning their customers' identity before the customer opens an account at the financial institution.

---

<sup>191</sup> Comptroller of the Currency Administrator of National Banks, *Bank Secrecy Act/Anti-Money Laundering: Comptroller's Handbook*, 11-12.

<sup>192</sup> 'What is a suspicious activity report?' Thomson Reuters.

<sup>193</sup> 'What is a suspicious activity report?' Thomson Reuters.

An account for purposes of the CIP is defined as:

‘a formal banking relationship established to provide or engage in services, dealings, or other financial transactions, including a deposit account, a transaction or asset account, a credit account, or further extension of credit. An account also includes a relationship established to provide a safety deposit box or other safekeeping services, cash management, custodian, and trust services.’<sup>194</sup>

The CIPs were incorporated into the BSA through Section 326 of the USA Patriot Act, which required financial institutions to establish written CIPs for all customers. Accordingly, the written CIP's design should consider the size and scope of the financial institution's business. Further, the design and operation of the CIP should empower the institution to 'form a reasonable perception that it is aware of the true identity of each customer.

The general obligations imposed by the CIPs on financial institutions include:

- Establishing a written CIP program.
- Establishing identity verification procedures. The identity verification procedures are risk-based procedures used to ascertain the true identity of customers as far as is reasonably possible. The threshold tied to the procedures is such that when carried out correctly, the identity verification procedures should give the financial institutions the practicable and reasonable perception that it fully knows the customer.<sup>195</sup>
- Customer identity information includes the customer's name, postal address, date of birth, and identification number.
- Comparisons with government lists to fully ascertain the identity of the customer. The comparisons are critical where the financial institution uses non-documentary methods to verify the identity of the customers. In such cases, the financial institution shall refer to references from other financial institutions, public databases, information held by

---

<sup>194</sup> Financial Crimes Enforcement Network, ‘Post 9/11 SAR Leads to Guilty Plea in Money Laundering and Illegal Transfer of Funds to Iran Investigation’ <https://www.ecfr.gov/current/title-31/subtitle-B/chapter-X/part-1020#1020.100> on 10 May 2022.

<sup>195</sup> Federal Financial Institutions Examinations Council, *BSA/AML Examination Manual*, February 2021, <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://bsaaml.ffiec.gov/docs/manual/06\_AssessingComplianceWithBSARegulatoryRequirements/01.pdf>, 3-4.

consumer reporting agencies, and financial statements to verify the customer's true identity.<sup>196</sup>

- Giving each customer prior notice that the above information will be required before opening an account and that the data is necessary to ascertain the customer's identity.

(i) Beneficial ownership

Financial institutions must establish and indicate the beneficial ownership of customers where such customers are not natural persons. The beneficial ownership requirement closely resembles the CIP requirements. However, it is distinct because it focuses entirely on legal entity customers and seeks to go beyond the veil of incorporation to determine who are the natural persons controlling and benefitting from the operations of the legal entity customer. A legal entity customer is defined, for beneficial ownership, as any company or other types of entity that is established through filing a public document with a Secretary of State in the US or any other government official in foreign jurisdictions.<sup>197</sup>

The beneficial ownership requirement curbs money laundering by ensuring that the source of funds can be tracked down to persons to determine whether the funds are proceeds of criminal activity. The study cited above evidenced the need to determine beneficial ownership to prevent money laundering in the real estate sector, which revealed purchases through anonymous shell companies continued to be the preferred money laundering typology. In addition, 82% of the reported cases involved using a legal entity or complex corporate structure to conceal ownership. The beneficial ownership requirements, therefore, ensure such ownership is not masked.

The definition of a beneficial owner is layered and dynamic. A beneficial owner is defined in [x] as follows:

1. Each individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of a legal entity customer; and

---

<sup>196</sup> US Securities and Exchange Commission, 'Anti-Money Laundering (AML) Source Tool for Broker-Dealers' 5 January 2021 <https://www.sec.gov/about/offices/ocie/amlsourcetool.htm#4> on 10 May 2022.

<sup>197</sup> US National Archives and Records Administration, Code of Federal Regulations, <<https://www.ecfr.gov/current/title-31/subtitle-B/chapter-X/part-1010#1010.230>> on 12 May 2022.

2. A single individual with significant responsibility to control, manage or direct a legal entity customer, including:
  - a) An executive officer or senior manager (e.g., a chief executive officer, chief financial officer, chief operating officer, managing member, general partner, president, vice president or treasurer); or
  - b) Any other individual who regularly performs similar functions.
3. Suppose a trust owns directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, 25 percent or more of the equity interests of a legal entity customer. In that case, the beneficial owner shall mean the trustee. If an entity that is excluded from the definition of "legal entity customer" owns directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, 25 per cent or more of the equity interests of a legal entity customer, no individual need be identified with respect to that entity's interests.

The beneficial ownership requirement has tremendous utility in fighting against money laundering in the real estate sector. An article published in 2015 revealed that nearly half of all high-value real estate in the USA was acquired through legal entities as opposed to natural persons.<sup>198</sup> This fact appears innocuous when considered in isolation. However, when considering the fact that \$2.3 billion was laundered through the US real estate sector between 2015 and 2020, the lack of clarity on the beneficial ownership is alarming. Therefore, the beneficial ownership requirement ensures that the real identity of the owners and consequently the source of the funds is known when engaging in real estate transactions

- (b) FinCEN implementation of the BSA provisions concerning money laundering in the real estate sector

While the BSA is fundamental in addressing money laundering broadly, FinCEN is tasked with implementing the legislation concerning money laundering in the real estate market. In addition, FinCEN is tasked with safeguarding the US financial system from illicit use and

---

<sup>198</sup> Kramer Levin, 'FinCEN Considers New Anti-Money Laundering Reporting Requirements For All-Cash Real Estate Transactions' 15 December 2021- <https://www.kramerlevin.com/en/perspectives-search/fincen-considers-new-anti-money-laundering-reporting-requirements-for-all-cash-real-estate-transactions.html> on 01 June 2022.

combating money laundering through financial intelligence and strategic deployment of financial authorities.<sup>199</sup>

On 6 December 2021, FinCEN issued an Advanced Notice of Proposed Rulemaking (ANPRM) to solicit public participation and commentary on the potential amendments to the BSA legislation on money laundering in the US real estate sector. The ANPRM proposed imposing robust reporting and recordkeeping requirements on participants involved in non-financed real estate transactions without a minimum monetary threshold.<sup>200</sup>

The ANPRM uses the term non-financed transactions interchangeably with the all-cash purchase and all-cash transaction. As such, the ANPRM defines non-financed transactions as follows:

*"Any real estate purchase or transaction that is not financed via a loan, mortgage, or other similar instruments, issued by a bank or non-bank residential mortgage lender or originator, and that is made, at least in part, using currency or value that substitutes for currency (including convertible virtual currency (CVC)), or a cashier's check, a certified check, a traveller's check, a personal check, a business check, a money order in any form, or a funds transfer."<sup>201</sup>*

The 2022 ANPRM reflects a shift to non-financed real estate transactions, which have grown exponentially. Approximately 19% of all residential real estate transactions in the US are non-financed<sup>202</sup>, and FinCEN estimates that the rate of all-cash transactions in real estate is 18.5%.<sup>203</sup>

This ANPRM proposed two alternative rules establishing reporting and recordkeeping requirements under the BSA for persons involved in real estate transactions. As mentioned earlier in this paper, the obligations would effectively lift the exemption introduced in the 2002

---

<sup>199</sup> FinCEN <<https://www.fincen.gov/index.php/what-we-do>> on 01 June 2021.

<sup>200</sup> US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions* 31 U.S.C. 5318(h)(1)(A)-(D), 12 August 2021 <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions>

<sup>201</sup> US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions* 31 U.S.C. 5318(h)(1)(A)-(D), 12 August 2021 <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions#footnote-1-p69589>

<sup>202</sup> US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions* 31 U.S.C. 5318(h)(1)(A)-(D), 12 August 2021 <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions>

<sup>203</sup> Advisory to Financial Institutions and Real Estate Firms and Professionals," Financial Crimes Enforcement Network, FIN-2017-A003

obligations. The first alternative is limited in scope and would involve imposing reporting requirements similar to those placed on title insurance companies. The covered persons would be required to collect and report prescribed information. The second alternative is broader in application and would involve imposing SARs requirements, AML/CFT programs, and customer due diligence on the covered persons.<sup>204</sup> Notably, the new rule may go beyond the covered persons (i.e., persons involved in real estate closings and settlements) and include lawyers and other client-facing participants.

The public comments were due on 4 February 2022, 60 days after the ANPRM was issued. However, the ANPRM has not materialised into any enforceable regulations on money laundering in the real estate sector. Time will tell if this regulatory framework on money laundering in the real estate sector remains stagnant or will become more robust.

- (c) FinCEN regulations on money laundering in the real estate sector between 2002 and 2022

The ANPRM comes on the back of prior rulemakings by FinCEN. The BSA obliged financial institutions to establish an Anti-money laundering/Countering the Financing of Terrorism program. In April 2002, FinCEN exempted 'persons involved in real estate closings and settlements' and 'loan and finance companies from this requirement for six months. The exemption was then made indefinite in November 2002.<sup>205</sup> The exemption was done under the pretext that FinCEN wished to avoid imposing 'unreasonable regulatory burdens with little or no corresponding anti-money laundering benefits.'<sup>206</sup> Further, FinCEN proposed to continue monitoring the exempted sectors and the money laundering risks they posed as it developed appropriate regulations within six months.<sup>207</sup>

---

<sup>204</sup> Hardy P, Andreano R, Robotti M, and Hatza N, 'Real Estate and Money Laundering: FinCEN Issues Advanced Notice of Regulations for the Real Estate Industry' Ballard Spahr LLP, 13 December 2021 <<https://www.moneylaunderingnews.com/2021/12/real-estate-and-money-laundering-fincen-issues-advanced-notice-of-regulations-for-the-real-estate-industry/>> on 01 June 2021.

<sup>205</sup> US Federal Register, *Anti-Money Laundering Programs for Financial Institutions*, 11 June 2002 <https://www.federalregister.gov/documents/2002/11/06/02-27770/financial-crimes-enforcement-network-anti-money-laundering-programs-for-financial-institutions>

<sup>206</sup> US Federal Register, *Anti-Money Laundering Programs for Financial Institutions*, 11 June 2002 <https://www.federalregister.gov/documents/2002/11/06/02-27770/financial-crimes-enforcement-network-anti-money-laundering-programs-for-financial-institutions>

<sup>207</sup> US Federal Register, *Anti-Money Laundering Programs for Financial Institutions*, 11 June 2002 <https://www.federalregister.gov/documents/2002/11/06/02-27770/financial-crimes-enforcement-network-anti-money-laundering-programs-for-financial-institutions>

In 2003, FinCEN issued an ANPRM on the Anti-money laundering/Countering the Financing of Terrorism program for 'persons involved in real estate closings and settlements. The ANPRM sought public comments on the definition of this category of 'persons' and how to structure the reporting requirements based on the size and location of the persons in the real estate sector. This ANPRM received about 52 public comments, and FinCEN consequently failed to take any steps towards creating legislation that would impose the Anti-money laundering/Countering the Financing of Terrorism program obligations on 'persons involved in real estate closings and settlements'.<sup>208</sup> Therefore, this category of persons has continued to be exempt from the obligation. The implication is that this category of persons is largely exempt from the obligation to detect and report suspicious activity relating to the offence of money laundering and terrorist financing.

Noting that the non-financed transactions in the real estate sector primarily involved low-value transactions, FinCEN focused on financed real estate transactions and the risks therein. In doing so, FinCEN published numerous reports which mapped the rise of SARs related to mortgage fraud, thus, revealing the risk of money laundering in the primary and secondary residential mortgage markets.<sup>209</sup>

In light of the shift in focus, FinCEN issued a final rule in 2012 that lifted the exemption for 'loan and finance companies and defined them as non-bank residential mortgage lenders and originators. FinCEN required these entities to file SARs and satisfy the AML/CFT program requirement upon lifting the exemption. Another final rule issue supplemented this legislative move by FinCEN in 2014, whereby the SARs and AML/CFT program requirements were extended to include housing-related Government Sponsored Enterprises. These housing government-sponsored enterprises were included in the definition of financial institutions to provide FinCEN with access to data on mortgage loans to reveal the suspected mortgage fraud and money laundering activities.<sup>210</sup>

---

<sup>208</sup> US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions* 31 U.S.C. 5318(h)(1)(A)-(D), 12 August 2021 <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions>

<sup>209</sup> See, e.g., "Mortgage Loan Fraud: An Industry Assessment Based on Suspicious Activity Report Analysis," Financial Crimes Enforcement Network (Nov. 2006); "Suspicious Activity Related to Mortgage Loan Fraud," Financial Crimes Enforcement Network, Advisory, FIN-2012-A009 (Aug. 16, 2012).

<sup>210</sup> US Federal Register, *Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Housing Government Sponsored Enterprises*, 25 February 2014 <https://www.federalregister.gov/documents/2014/02/25/2014-04125/anti-money-laundering-program-and-suspicious-activity-report-filing-requirements-for-housing>

Mortgage fraud as a money laundering conduit was spotlighted in the 2021 matter of First Mortgage Company. In that case, the former president and two former loan officers of First Mortgage Company pleaded guilty to mortgage fraud. In addition, they admitted the company's ability to implement effective anti-money laundering controls to monitor, investigate, and report potentially suspicious activity involving Advantage Loan Program borrowers.<sup>211</sup>

In 2020, FinCEN issued a final rule which imposed additional AML/CFT obligations on banks lacking a Federal functional regulator. The other obligations included CIPs, Customer Due Diligence, and beneficial ownership requirements. The obligations, therefore, required such banks to report transactions involving suspicious transactions, including those in the real estate sector.<sup>212</sup> This changing regulatory landscape demonstrates the growing awareness of the risk posed by the real estate sector when combating money laundering.

### **3.2.2. Geographic Targeting Orders**

The implementation of the BSA by FinCEN fails to sufficiently address money laundering in real estate where the transaction is non-financed. For example, transactions in real estate that involve mortgages or other forms of financing are subject to BSA reporting obligations, as discussed above. However, where the property is purchased without financing, the real estate transaction does not involve a bank or other financial institution subject to the BSA-imposed anti-money laundering requirements. This loophole is exacerbated by the fact that real estate purchases in cash predominantly involve low-value transactions where the participants lack the sophistication or financial incentives to closely monitor and self-report suspicious transactions. FinCEN has noted that this variant of real estate transactions poses a significant risk of money laundering because of the difficulty in tracing the source of funds, especially where the purchase is by a legal entity.<sup>213</sup>

Furthermore, the risk posed by non-financed real estate transactions becomes even more pronounced when the prevalence of such transactions is considered. Approximately 19% of US

---

<sup>211</sup> Former Managing Director and Two Former Loan Officers Plead Guilty for Roles in Widespread Bank-Fraud Scheme, 20 May 2021 <<https://www.justice.gov/opa/pr/former-managing-director-and-two-former-loan-officers-plead-guilty-roles-widespread-bank>> on 04 June 2022.

<sup>212</sup> US Federal Register, *Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator*, 09 September 2020 <https://www.federalregister.gov/documents/2020/09/15/2020-20325/financial-crimes-enforcement-network-customer-identification-programs-anti-money-laundering-programs>

<sup>213</sup> Kramer Levin, 'FinCEN Considers New Anti-Money Laundering Reporting Requirements For All-Cash Real Estate Transactions' 15 December 2021- <https://www.kramerlevin.com/en/perspectives-search/fincen-considers-new-anti-money-laundering-reporting-requirements-for-all-cash-real-estate-transactions.html> on 01 June 2022.

residential real estate transactions are non-financed.<sup>214</sup> Considering that residential home sales account for an estimated 90% of all residential real estate in the US real estate sector, FinCEN estimates that non-financed, all-cash transactions in real estate are 18.5%.<sup>215</sup> A FinCEN report indicated that approximately 50% of all residential real estate purchases in Miami-Dade County were in all-cash between 2015 and 2016.<sup>216</sup>

These figures do not exist in a vacuum, as evidenced by a 2017 report by FinCEN outlining various examples of non-financed, all-cash purchases of residential real estate that potentially involved money laundering activities. One example involved a real estate agent named Anthony Keslinke, who was jailed in 2016 for large-scale bank fraud and money laundering conspiracy. From 2011 to 2014, Keslinke altered records and used straw buyers to purchase real estate in cash throughout Northern California, which he subsequently sold for a substantial gain.<sup>217</sup>

Against this background, FinCEN introduced the Geographic Targeting Orders in January 2016. The real estate GTOs were designed to address all-cash purchases of residential real estate

Geographic targeting orders (GTO) is a mechanism used by FinCEN to detect and track money laundering activities in the real estate sector. The GTOs impose reporting obligations that apply to covered real estate sector transactions. As of 2020, the scope of covered transactions included cash transactions undertaken by legal entities without external financing, which involved residential real property with a price of \$300,000 or above.<sup>218</sup> The GTOs filed on the covered transactions must include information on the legal entity making the purchases, the

---

<sup>214</sup> US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions*, 12 August 2021 <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions>

<sup>215</sup> Advisory to Financial Institutions and Real Estate Firms and Professionals,” Financial Crimes Enforcement Network, FIN-2017-A003

<sup>216</sup> FinCEN, ‘Advisory to Financial Institutions and Real Estate Firms and Professionals’ FIN-2017-A003 22 August 2017- <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory\_FINAL%20508%20Tuesday%20%28002%29.pdf> 4 on 03 June 2022.

<sup>217</sup> FinCEN, ‘Advisory to Financial Institutions and Real Estate Firms and Professionals’ FIN-2017-A003 22 August 2017- <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory\_FINAL%20508%20Tuesday%20%28002%29.pdf> 4 on 03 June 2022.

<sup>218</sup> Hardy P, Roy P, Grugan T, and Treanor M, ‘The Intersection of Money Laundering and Real Estate’ ICLG, 2020 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ballardspahr.com/-/media/files/articles/intersection-of-money-laundering-and-real-estate.pdf?la=en&hash=CBF6D4BC82C0FAE004F26F4A64352889> on 12 May 2022.

parties acting on behalf of the legal entities, and the beneficial owners of the legal entity. The definition of beneficial owners here differs slightly from that previously provided in the preceding section of the chapter. Beneficial owners for purposes of GTOs are 'individuals who directly or indirectly own 25% or more of the shareholding in the legal entity engaging in the covered transactions.'<sup>219</sup>

The GTOs can trace their origin to FinCEN's 17 July 2016 directive, whereby GTOs were issued to all title insurance companies. The GTOs required the title companies to undertake temporary data collection and reporting obligations on all-cash residential real estate purchases by corporate entities in California, Florida, Texas, and New York.<sup>220</sup> According to the GTO-imposed reporting obligations, the covered entities were required to report the true identity of any natural persons who owned more than 25% of any corporation engaging in the cash purchases.<sup>221</sup> The multi-layered reporting obligations show the correlation between CIPs and beneficial ownership reporting requirements incorporated in the GTO regime. The reporting ran from August 2016 to February 2017. Figure [x] below shows the outcomes of the report.

California	Florida	Texas	New York
Los Angeles - \$2 million	Broward - \$1 million	Bexar - \$500,000	Bronx - \$1.5 million
San Diego - \$2 million	Miami-Dade - \$1 million		Brooklyn - \$1.5 million
San Francisco - \$2 million	Palm Beach - \$1 million		Manhattan - \$3 million
San Mateo - \$2 million			Queens - \$1.5 million
Santa Clara - \$2 million			Staten Island - \$1.5 million

FinCEN has since extended the GTOs every six months. Notably, the reported information shall be retained for five years from the last effective date of GTO filing and available to FinCEN and other government organisations upon request. The GTOs issued in November 2019 included the following nine districts: California, Nevada, Texas, Washington, New York, Massachusetts, Illinois, Hawaii, and Florida.<sup>222</sup>

Furthermore, FinCEN recently renewed and expanded the scope of GTOs as of 29 April 2022. The new GTOs now cover Boston, New York, Chicago, Seattle, Dallas-Fort Worth, San Francisco, Honolulu, Las Vegas, Miami, Los Angeles, San Diego, and San Antonio. In addition, the scope has also expanded to Fairfield County in Connecticut, Northern Virginia,

<sup>219</sup> Hardy P, Roy P, Grugan T, and Treanor M, 'The Intersection of Money Laundering and Real Estate'.

<sup>220</sup> American Land Title Association, 'Real Estate Geographic Targeting Orders Fact Sheet' <chrome-extension://efaidnbnmnnibpcajpcglefindmkaj/https://www.alta.org/media/pdf/fincen/160812-real-estate-geographic-targeting-orders-faq.PDF> on 13 May 2022.

<sup>221</sup> American Land Title Association, 'Real Estate Geographic Targeting Orders Fact Sheet'.

<sup>222</sup> Hardy P, Roy P, Grugan T, and Treanor M, 'The Intersection of Money Laundering and Real Estate', 2.

the District of Columbia, Maryland and the Hawaiian islands of Maui, Hawaii, and Kauai.<sup>223</sup> The new territories pose a high risk of real estate money laundering, which explains their inclusion. Notably, the City and County of Baltimore have a lower reporting threshold of \$50,000 compared to the general threshold of \$300,000.<sup>224</sup>

The GTOs have successfully frustrated money laundering activities within the US real estate sector. For example, a 2020 US Treasury report cited findings from a study that indicated that legal entities' cash purchases of real estate property declined by approximately 70% following the first GTO being enforced.<sup>225</sup> Further findings in the 2020 Treasury Report on GTOs indicated that 6303 (accounting for 35% of the reported covered transactions) covered transactions captured in the GTOs involved parties also listed in the SARs filings. Of the 6303, 1082 of these parties were listed in the higher risk SARs. Additionally, 2002 of the reported covered transactions involved a beneficial foreign owner; of this 2002, 385 involved foreign beneficial owners listed in a SAR.<sup>226</sup>

The GTOs are efficient tools for combating money laundering in the US real estate sector. However, they are not without flaws. Some of the challenges involved are as follows:

The GTOs are limited to various geographical locations. This limited geographic reach presupposes that money laundering in the real estate is only limited to specific locations. This position is erroneous, as evidenced by GFI's research on cases concerning money laundering in real estate between 2015 and 2020. The study indicated that most such cases were not concentrated in the luxury residential real estate markets targeted by the GTOs.<sup>227</sup>

The GTO impose an arbitrary minimum monetary threshold of \$300,000. Similarly, this threshold makes a misguided presumption that money laundering in real estate is only effected

---

<sup>223</sup> Financial Crimes Enforcement Network, 'FinCEN Renews and Expands Real Estate Geographic Targeting Orders' April 29, 2022 <https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders> on 10 May 2022.

<sup>224</sup> Financial Crimes Enforcement Network, 'FinCEN Renews and Expands Real Estate Geographic Targeting Orders' April 29, 2022 <https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders> on 10 May 2022.

<sup>225</sup> Financial Crimes Enforcement Network, 'FinCEN Renews and Expands Real Estate Geographic Targeting Orders' April 29, 2022 <https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders> on 10 May 2022.

<sup>226</sup> Financial Crimes Enforcement Network, 'FinCEN Renews and Expands Real Estate Geographic Targeting Orders' April 29, 2022 <https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders> on 10 May 2022.

<sup>227</sup> Global Financial Integrity, 'GFI Comment Submission to FinCEN on ANPRM to Curb Illicit Financial Flows in the US Real Estate Sector' Global Financial Integrity, 22 February 2022- <https://gfintegrity.org/report/gfi-comment-submission-to-fincen-on-anprm-to-curb-illicit-financial-flows-in-the-us-real-estate-sector/> on 03 June 2022.

through high-value real estate. However, this vice may also be perpetuated by selling numerous low-value properties.

GTOs are only applied to residential real estate. This singular application excludes other real estate sectors that may be prone to money laundering. For instance, FinCEN found that money laundering in the commercial real estate industry was on a steep rise between 2003 to 2005. The determination was based on an analysis of SARs involving commercial real estate filed with FinCEN in 10 years.<sup>228</sup>

GTOs emphasise title insurance companies as the primary entities responsible for money laundering in the real estate sector. Where all-cash purchases are made within the monetary threshold by GTOs, title insurance companies are simply required to report the beneficial ownership of the purchaser. The narrow focus on title insurance companies excludes other typologies such as natural persons as third parties.<sup>229</sup>

Finally, despite the GTOs' overall demonstrated effectiveness, FinCEN has yet to issue regulations covering the real estate brokers, title insurers, escrow agents, and other real estate agents. Instead, FinCEN has engaged in de facto regulation requiring certain real estate-related businesses to issue GTOs. The Financial Action Task Force noted the above loophole in regulation in its 2016 real estate and money laundering report. The Task Force pointed out that the absence of robust anti-money laundering regulations in the real estate sector in the US caused it to lag in implementing such measures compared to other global markets.<sup>230</sup>

### **3.3 Measures taken to curb money laundering in South Africa**

#### ***3.3.1 A historical perspective of money laundering in South Africa's real estate sector***

South Africa is a crucial financial hub on the African continent. Likewise, it is a money-laundering destination due to the high-value assets available to criminals to transact in, thus,

---

<sup>228</sup> FinCEN, 'Money Laundering in the Commercial Real Estate Industry' December 2006- <https://www.fincen.gov/money-laundering-commercial-real-estate-industry> on 03 June 2022.

<sup>229</sup> Global Financial Integrity, 'GFI Comment Submission to FinCEN on ANPRM to Curb Illicit Financial Flows in the US Real Estate Sector' Global Financial Integrity, 22 February 2022- <https://gfintegrity.org/report/gfi-comment-submission-to-fincen-on-anprm-to-curb-illicit-financial-flows-in-the-us-real-estate-sector/> on 03 June 2022.

<sup>230</sup> Financial Crimes Enforcement Network, 'FinCEN Renews and Expands Real Estate Geographic Targeting Orders' 29 April 2022 <https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders>.

concealing the true source of the funds. The Former Finance Minister estimated that about \$2 to \$8 billion is laundered through South Africa annually.<sup>231</sup>

Money laundering in the South African real estate sector is of particular interest given the high-end real estate properties in regions such as the Western Cape. However, this form of money laundering is not unheard of in this country. For instance, a 2004 Sunday Times publication revealed that a former Zimbabwean finance minister purchased two multimillion-dollar properties in Capetown in cash. As a result, the Zimbabwean authorities inquired into the source of funds and arrested the minister when he could not account for the same.<sup>232</sup> Another example involved two Sicilian businessmen who purchased a range of luxury real estate properties in the Western Cape and were subsequently investigated on suspicion of engaging in money laundering. Notably, the two individuals were acquitted on money laundering charges but were found guilty of corruption and bribery.<sup>233</sup>

The prevalence of money laundering in South Africa's real estate sector is linked to the country's dark history of the apartheid regime. The apartheid regime encouraged white settlers to settle and invest in the country. However, the state rarely, if ever, undertook procedures to determine the source and legality of funds brought in by these white settlers. Moreover, the lack of scrutiny of the settlers' criminal records contributed to the growth of a criminalised apartheid regime during the 1980s.<sup>234</sup>

#### *Participants involved in money laundering in the South African real estate sector*

Criminals employ several methods to conceal their money laundering transactions. There are numerous facilitators of money laundering in the real estate sector in South Africa. These facilitators include real estate agents, lawyers, bond originators, and financial institutions.<sup>235</sup>

Conveyancing lawyers are instrumental in the transfer of property rights in South Africa. However, the lawyers may become compromised and become facilitators of money laundering. The case of *Pillay and Others v S 2004 (2) BCLR 158 (SCA)* demonstrated this predicament.

---

<sup>231</sup> Boles J, 'Anti-Money Laundering Initiatives for the South African Real Estate Market' *Journal of Comparative Urban Law and Policy*, 2017, 197\_ < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3518759](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518759)> on 13 May 2022.

<sup>232</sup> Mthembu-Salter G, 'Money laundering in the South African real estate market today' in *Money Laundering Experiences, A Survey*, First Edition, Monograph No 124, 2006. y

<sup>233</sup> Mthembu-Salter G, 'Money laundering in the South African real estate market today'.

<sup>234</sup> Mthembu-Salter G, 'Money laundering in the South African real estate market today'.

<sup>235</sup> Smith K, 'Challenges Combating Money Laundering in the Real Estate Sector in South Africa' University of Western Cape, 2021, 34.

In this case, a lawyer was charged with money laundering for brokering the purchase of the embassy Night Club in South Africa despite having prior knowledge that the funds were illegally obtained.<sup>236</sup>

Similarly, the matter of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC)* shed light on the role of real estate agents in facilitating money laundering in the real estate sector. In this case, the real estate agents were found to have conspired to drive up the prices of real estate properties during auctions, therefore, intentionally manipulating the prices.

Bond originators are also potential money laundering facilitators in the real estate sector. A bond originator acts as a link between a bank and a home loan applicant. The possible involvement of bond originators in money laundering is amplified by the pervasive use of residential mortgages and mortgage finance as a conduit for money laundering. The same was seen in the case of *Hattingh v S [2015] ZASCA*, where the accused laundered large sums of money through a residential mortgage company he owned by fraudulently misrepresenting to banks that he had registered property. The accused then processed to 'clean' the illicit funds by paying the mortgages on these phantom registered properties.

### ***3.3.2 Measures to detect and deter money laundering in the South African real estate sector***

Kenyan regulators can draw crucial points from the measures taken by South Africa in combating money laundering generally and in the real estate sector. First, South Africa is a good point of comparison because of the robustness of its anti-money laundering framework. This framework is internationally recognised. For instance, South Africa is the only African country member of the 39-member Financial Action Task Force. The members of the Task Force engaged in monitoring countries suspected of fraudulent financial practices and advising on due diligence regarding dealings with countries that the Task Force has blacklisted.<sup>237</sup> South Africa gained membership in 2003 after it passed the Prevention of Organised Crime Act of 1998 (POCA) and the Financial Intelligence Centre Act of 2001 (FICA).

FICA is instrumental in the fight against money laundering in the real estate sector in South Africa. It is the only entity allowed to collect and analyse financial data of the nature reported

---

<sup>236</sup> Smith K, 'Challenges Combating Money Laundering in the Real Estate Sector in South Africa' 34.

<sup>237</sup> Financial Action Task Force, FATF (Financial Action Task Force) Countries 2022, 2022-<https://worldpopulationreview.com/country-rankings/fatf-countries> on 13 May 2022.

to it. This pivotal position allows it to link information with the relevant law enforcement agencies tasked with preventing or prosecuting money laundering in the real estate sector.

In line with this pivotal position, FICA lists real estate agents as accountable institutions that must fully comply with the Act. Accordingly, real estate agents are referred to simply as estate agents, and the term adopts the definition provided in the Estate Agents Affairs Act, 1976 (Act 112 of 1976).<sup>238</sup> The definition of estate agents is as follows:

*"...any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any person sells or purchases immovable property or any interest in immovable property..."*<sup>239</sup>

The real estate agents are listed in Schedule 1 of the Act as accountable institutions. Consequently, the real estate agents are subject to various obligations arising from the Act. Key among these obligations is registering the real estate agents with FIC. Registration ensures that the agent/agency is known to FIC. Furthermore, the real estate agents must submit regulatory reports on cash transactions of R24,999.99. The report is also required where the real estate transaction raises suspicion as an unusual transaction or where the client/prospective client has a high-risk score due to their involvement in terrorism or other related activities.<sup>240</sup> The risk score will be discussed below as part of the risk-based approach adopted in 2017. Additionally, real estate agents are mandated to apply their institutional rules in alignment with the FICA obligations. Such alignment includes ensuring the staff comprehends the FICA obligations through in-house training.<sup>241</sup>

Notably, the FICA was amended in October 2017 to give way to greater transparency in the fight against money laundering. The amendment introduced a risk-based approach to

---

<sup>238</sup> Financial Intelligence Centre, *Anti-Money Laundering and Counter-Terrorism Financing Legislation*, 2012, 1 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fic.gov.za/Documents/FIC\_Sunday%20Times\_Article\_Print.pdf>.

<sup>239</sup> Section 1 (vi), Estate Agency Affairs Act (Act No. 112 of 1976).

<sup>240</sup> Financial Intelligence Centre, *Anti-Money Laundering and Counter-Terrorism Financing Legislation*, 2012, 2 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fic.gov.za/Documents/FIC\_Sunday%20Times\_Article\_Print.pdf>.

<sup>241</sup> Financial Intelligence Centre, *Anti-Money Laundering and Counter-Terrorism Financing Legislation*, 2012, 1 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fic.gov.za/Documents/FIC\_Sunday%20Times\_Article\_Print.pdf>.

determining the identity of clients. This risk-based approach ensures the real estate agents undertake robust customer verification measures as part of the accountable institutions, including determining the risk associated with doing business with specific customers. This analysis includes an obligation on the agents to rate the risk associated with each customer. The risk score allows FIC to deploy resources proportionate to the risk associated with each client.<sup>242</sup> Real estate agents need to have institutional risk management compliance programmes to give effect to this obligation. Such programs need to be in writing and should be updated regularly.

The POCA is also instrumental in preventing money laundering in the real estate sector. Section 38 of the POCA specifically addresses this typology of money laundering. The section allows for issuing a preservation of properties order where the applicant has reasonable grounds to believe that the property subject of the order is an instrumentality of an offence (i.e., the property was obtained from the proceeds of crime). Property subject to an order under Section 38 of the POCA may ultimately be forfeited to the state.<sup>243</sup>

### **3.3.3 Implementation of the FICA**

The FICA KYC requirements are primarily based on guidelines issued by the Financial Action Task Force. These requirements are inevitably oriented towards the Global North realities. The transplantation of the same into South Africa without considering the contextual differences is problematic. For instance, the General Household Survey report of 2017 revealed that 13.6% of South Africans lived in informal dwellings while 5.5% lived in traditional dwellings.<sup>244</sup> As a result, the households lacking formal addresses would be locked out of opening accounts with the covered financial institutions.

Furthermore, there is a need for public awareness of the FICA KYC reporting obligations. A trend has emerged where criminals move their real estate purchases to rural areas where the

---

<sup>242</sup> Financial Intelligence Centre, *Anti-Money Laundering and Counter-Terrorism Financing Legislation*, 2012, 1 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fic.gov.za/Documents/FIC\_Sunday%20Times\_Article\_Print.pdf>.

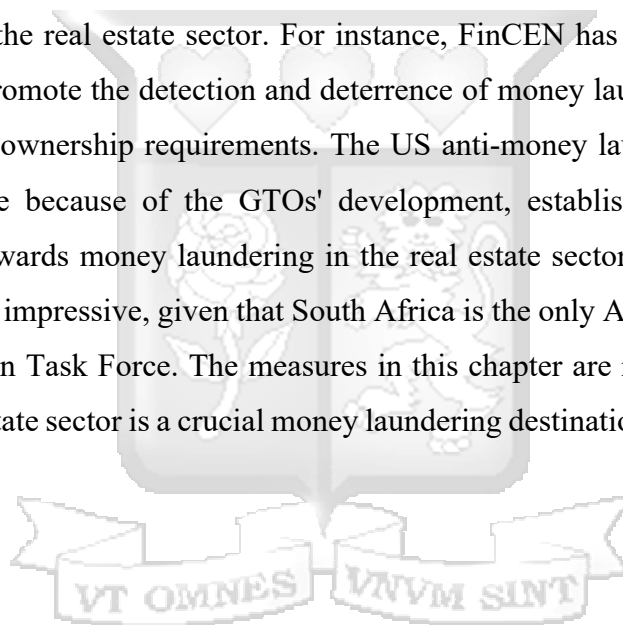
<sup>243</sup> Pillay K, 'The Station Wagon, The Heroin and the Preservation Of Property Order: Section 38 of the Prevention of Organised Crime Act, No 121 Of 1998' Cliff Dekker Hofmeyr, 13 June 2018 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-13-june-the-station-wagon-the-heroin-and-the-preservation-of-property-order-section-38-of-the-prevention-of-organised-crime-act-no-12-of-1998-.html> on 13 May 2022.

<sup>244</sup> Department of Statistics South Africa, The latest household statistics and more, 2017- <https://www.statssa.gov.za/?p=11241> on 13 May 2022.

real estate agent and regulators are less sophisticated and knowledgeable about the KYC requirements; thus, money laundering goes undetected.<sup>245</sup>

### 3.4 Conclusion

Money laundering through the real estate sector is a globally pervasive problem. Criminals use this typology of money laundering because of the stability associated with real estate, the ability to camouflage transactions using shell companies in transactions, and the ability to manipulate real estate prices to suit the needs of the money launderer. National law enforcement agencies have caught this form of money laundering. Consequently, this chapter compares measures taken to curb money laundering in the USA and South Africa. In doing so, the chapter highlights the progress made by these national law enforcement agencies in putting an end to money laundering in the real estate sector. For instance, FinCEN has taken robust measures through the BSA to promote the detection and deterrence of money laundering through CIPs, SARs, and beneficial ownership requirements. The US anti-money laundering framework is even more impressive because of the GTOs' development, establishment, and expansion specifically geared towards money laundering in the real estate sector in the US. The South African regime is also impressive, given that South Africa is the only African country member of the Financial Action Task Force. The measures in this chapter are relevant to the Kenyan context, whose real estate sector is a crucial money laundering destination, especially for PEPs.



---

<sup>245</sup> Mthembu-Salter G, 'Money laundering in the South African real estate market today'.

## Chapter Four

### Conclusion and Recommendations

#### 4.1 Introduction

This research aims to offer ways of dealing with money laundering through Kenya's real estate. The basis of the study is applying the current anti-money laundering regime in conjunction with the regulatory framework on land transactions in Kenya. The increased number of reported cases in Kenya's mainstream media on money laundering through Kenya's real estate sector prompted motivation. Laundering money through real estate has led to negative consequences. The consequences include an increase in real estate prices, destabilisation of the property market, and, most importantly, providing a safe investment for criminals.

Furthermore, the solutions employed by the existing anti-money laundering regulations to tackle money laundering are not fully effective and specific to dealing with money laundering through Kenya's real estate sector. Additionally, the current land laws do not specifically address the problem of money laundering during land transactions. Accordingly, the threat of money laundering in Kenya's real estate remains. For this reason, scholars have advocated for the scrutiny of all parties involved in real estate transactions and the inclusion of all non-financial actors in real estate transactions as reporting agents. This would aid in reducing the incentive to engage in money laundering through real estate by various non-financial actors; a possibility that scholars acknowledge has not been explored. This points to existing loopholes that need to be investigated. To a large extent, this approach would provide an alternative way of dealing with money laundering through Kenya's real estate sector. The research has thus explored the issues focusing mainly on the failure of imposing reporting obligations on non-financial actors in Kenya who play a critical role in the land transactions as being linked to the promotion of money laundering in Kenya. The research aims to demonstrate how land laws facilitate money laundering through the real estate sector in Kenya and critical lessons Kenya should learn from other jurisdictions (the United States of America and South Africa) to combat money laundering through its real estate.

This chapter highlights the main findings of the research. Next, section 4.2 will underscore the outcomes and problems identified under the critical research questions. Then, section 4.3 considers the significance of these findings and lastly, section 4.4 makes recommendations that can be implemented.

## 4.2 Key Findings

This research posed and investigated three questions to achieve its overarching purpose. In answering the questions on the difficulties of using the current land laws and anti-money laundering regulatory framework, the study established in chapter one that the laws are not specific to addressing money laundering through Kenya's real estate. The laws are ineffective in solving the problem. This inefficiency originates from challenges arising from the non-inclusion of all non-financial actors as reporting agents. Furthermore, there is a disconnect between land laws and anti-money laundering regulations when addressing money laundering, specifically in real estate. Therefore, looking at how money laundering through the real estate sector is addressed in the USA and South Africa was more of a process of understanding and drawing lessons that could inform the formulation of laws based on Kenya's local context. The Financial Action Task Force issues recommendations on how best to tackle money laundering through real estate. It has advocated for including non-financial actors as reporting agents in real estate transactions.

However, not all countries have included non-financial actors as mandatory reporting agents in real estate transactions. For example, the USA, which formed part of this study, has not yet included all non-financial actors as reporting agents but has made significant strides toward fighting money laundering through its real estate. Nonetheless, FATF has issued recommendations on combating money laundering through real estate. Moreover, several countries, including the G7 except for the USA, have adopted FATF's recommendations, which formed part of this study.

FATF's recommendations at the international level are not mandatorily applied at national levels as countries can choose to implement them into their anti-money laundering national regime or not. Kenya has not implemented FATF's recommendations on including non-financial actors involved in real estate transactions as reporting agents. The lack of a specific regulatory framework dealing with money laundering through real estate presents a challenge in Kenya. There is a disconnect between the office of the registrar of land and FIU. Registrars are the ultimate gatekeepers of land transactions, yet they are among the non-financial actors who are not obligated to report suspicious real estate transfers.

Moreover, there are no safeguards to anticipate and lock out money laundering activities from the onset of a conveyancing transaction to the completion stage, during which the title is registered in favour of a purchaser. These divergences demonstrate that the existing anti-money

laundering laws and land laws are not robust enough to effectively deal with the problem, perpetuating non-financial actors' evasion of accountability and transparency on many occasions. Regarding non-financial actors, eluding answerability permits them the freedom to continue facilitating money laundering in real estate and recouping profits.

Chapter one considered the first question on the theoretical applicability of anti-money laundering regulations and the real estate sector. The chapter established a link between real estate and money laundering. This is because the proceeds of corruption and other illegal activities are invested in real estate to make money appear 'clean' and reintegrate it into the legitimate economy. With specific reference to Kenya's real estate, applying the Bad Man Theory and Rational Choice Theory helped understand the causes of money laundering through real estate. Accordingly, the utilisation of the Bad Man theory to assist in identifying and providing an appropriate solution to money laundering through real estate.

The Bad Man Theory advocates for the functional content of the law. A bad man does not care about the law on the books so long as it does not translate into the law in action. Therefore, the law-on-the-books obligation to perform would not motivate the bad man unless it was backed up by a sanction sufficient to make performance in the bad man's self-interest. The practical application of the theory to money laundering through real estate for investment and profit entails implementing measures that disincentivise the crime of money laundering through real estate. This has been done for Kenya's real estate by freezing real estate assets acquired using dirty money. Moreover, reducing the benefit to criminals can be achieved by having specific anti-money laundering legislation addressing money laundering through real estate.

Additionally, further justification for employing anti-money laundering laws specific to the real estate sector was established by considering the threat of money laundering through real estate. Mainly, this is based on the fact that Financial Action Task Force proposes denying money launderers the opportunity to benefit from money laundering through real estate. To achieve this, FATF proposes requiring non-financial actors involved in real estate transactions to be considered reporting entities.

The research shows that Kenya's anti-money laundering laws are in place. However, the anti-money laundering laws are not explicitly designed to address money laundering through the real estate sector. The different non-financial actors involved in real estate transactions have no obligation to report money laundering cases through real estate. These non-financial actors include conveyancing practitioners, proxies, and land registrars. Non-financial actors are

central to propagating money laundering in real estate transactions. They benefit from crime proceeds while facilitating money laundering through real estate transactions. Therefore, including them as reporting agents in Kenya's anti-money laundering laws will disincentivise them from aiding and abetting the investment of dirty money into Kenya's real estate. In addition to freezing assets, this study proposed that all non-financial actors facilitating real estate transactions involving dirty money should be held accountable.

The theoretical discussions in chapter one also emphasise the application of anti-money laundering laws to deal with the real estate sector as a new destination for money laundering. In principle, anti-money laundering laws may be applied to all sectors to counter financial crime for which benefit is gained. After that, laundering is done to 'cleanse' the benefit and facilitate consumption. As a result, since anti-money laundering laws prevent criminals from enjoying their illicit funds, specifically in the real estate sector, there is a need to have unique anti-money laundering laws. These laws should be focused on taking the proceeds of crime and providing for scrutiny, and background checks before interest in real estate is registered in the name of a new owner. This approach of aligning land laws to anti-money laundering laws will make it possible to target money laundering through real estate wholesomely. This will be done through keen scrutinisation of non-financial actors and parties to real estate transactions at various stages of conveyancing. A joint review of land laws and anti-money laundering laws will significantly strengthen the prevention of money laundering through real estate.

Considering that the conclusions in chapter one were heavily based on theoretical underpinnings, chapter two sought to look into the practicability aspect. This was achieved by applying Kenya's anti-money regulatory framework and land laws targeting money laundering through real estate. Except for enabling the freezing of real estate assets tied to money laundering, the chapter investigated whether Kenya's regulatory framework is sufficient to monitor and detect cases connected to money laundering through the real estate sector. Therefore, the discourse in chapter three helped provide a way out to the second research question. In a nutshell, there is an anti-money laundering legislative and institutional framework to monitor, detect, and investigate money laundering through real estate. Moreover, the existing regulations, if used, provide suitable means of freezing assets of proceeds of crime.

However, specifically in connection with money laundering through the real estate sector in Kenya, the study confirmed that POCAMLA, The Land Act and The Land Registration Act, Estate Agents Act and Anti-Corruption and Economic Crimes Act do not have express clauses

dealing with money laundering through real estate. On one side, the prohibitive measures within POCAMLA regarding money laundering have made it easy for the different institutions and authorities to investigate cases of money laundering based on the Act. On the contrary, POCAMLA and the critical land legislations present regulatory gaps concerning the prevention of money laundering during the onset of a conveyance

The major problem in using POCAMLA in preventing money laundering through real estate would be that it is not streamlined explicitly to the existing land laws in a quest to prevent money laundering through real estate. Moreover, the non-inclusion of all non-financial actors as reporting entities under the Act perpetuates money laundering through real estate.

Furthermore, as discussed in chapter two, the Fifth Schedule to POCAMLA lists the institutions that act as supervisory bodies. These include the Central Bank of Kenya, Insurance Regulatory Authority, Betting and Licensing Control Board, and Capital Markets Authority.<sup>246</sup> However, the real estate sector is unregulated to this extent as it does not have a supervisory body. Therefore, the deterrent power of the reporting obligations in preventing money laundering may be boosted by establishing a supervisory body to coordinate reporting in the real estate sector.

In the fight against money through real estate POCAMLA provides ideal solutions such as assets forfeiture and freezing the proceeds from such assets. The critical concern of the research was on the prevention of using dirty money to purchase real estate transactions from the initial stages when parties enter into a sale agreement until a registrar reviews completion documents and registers a transfer in favour of a new buyer.

The research further confirmed that since money laundering through the real estate sector is a complex offence, cooperation between the office of the land registrar and FIU and other relevant state agencies is necessary for the monitoring, supervision, investigation, prosecution, and enforcement. For this cooperation to be practical, there must be mutual assistance from these critical institutions. However, collaborations may be a challenge because of the lack of this synergy. Consequently, it is difficult to weed out money launderers in real estate transactions before a registrar transfers the title in the purchaser's name. Money laundering cases through real estate in Kenya are only investigated years after the property is transferred in favour of a purchaser. As a result, some money launderers go undetected as they enjoy

---

<sup>246</sup> Fifth Schedule, Proceeds of Crime and Ant-Money Laundering Act (Act No. 51 of 2012).

investing in real estate registered under their name as legitimate owners. The failure to have a coordinated background check on a seller and a real estate purchaser before a registrar registers an interest in favour of purchasers presents a significant gap. The other challenge is that real estate transactions are one-offs between purchasers and sellers, unlike the bank customer relationships that last for years by monitoring a client's credit and debits.

The deliberation in chapter two also points to identifying gaps in Kenya's anti-money laundering regime concerning real estate. These present a challenge for effectively using the current regulatory framework on anti-money laundering and land laws to deal with money laundering. The loopholes allow money launderers to invest dirty money in real estate and recoup profits as legitimate owners. Suppose the laws do not translate into action backed by heavy sanctions. In that case, the aim of disincentivising the crime of money laundering through real estate as contemplated in the Badman Theory is not achieved. Moreover, the incentive to continue laundering money through real estate is not removed.

The loopholes and omissions identified include the non-inclusion of non-financial actors such as conveyancing practitioners, land valuers, proxies and land registrars. Despite the possibility of their being misused, knowingly or unknowingly, to facilitate money laundering through real estate transactions. Furthermore, the lack of proof of source of funds for purchasing real estate before a registrar registers an interest in favour of a new buyer and lack of coordination between the lands registry and FIU was established.

The Land Act governs the various land systems in Kenya through a series of land regulations set out in the subsidiary legislation to the Act. It also facilitates the sustainable administration of land and land-based resources. This way, the Land Act is considered the core legislation governing land administration in Kenya. Despite its importance, the Act fails to make provisions to prevent money laundering within the real estate sector. The absence is demonstrated in Section 157 of the Land Act, which provides for land management and administration offences. The Section broadly prohibits fraudulent acts but does not directly address money laundering.

The prevalence of money laundering within the real estate sector and the lack of specific legislation warrants legislative action. The land registrar's office has the final say in all land transactions. Land registrars are better positioned to scrutinise all land transactions by working with other law enforcement agencies to ensure that the purchaser's source of funds is verified before a registrar registers an interest in land in favour of a purchaser. Registrars should be able

forward land records FRC to monitor on an ongoing basis all complex, unusual, suspicious, large or such other transactions, whether completed or not. FRC should pay attention to all unusual patterns of real estate sales and purchases to establish any periodic patterns of transactions. The deterrent power of the reporting obligations in preventing money laundering through real estate is missing.

The existing regulatory framework neither explicitly addresses money laundering through the real estate sector nor adequately addresses money laundering during the purchase and transfer of an interest in real estate. Persons involved in real estate closings and settlements are not under any obligation to detect or report any money laundering cases through real estate. Even where all cash purchase transactions in real estate are used, no reporting and record-keeping requirements are imposed on parties. Money launderers purchase real estate without any financing from heavily regulated banks. Instead, they opt to pay for real estate through an all-cash transaction.

To retaliate, there are numerous potential facilitators of money laundering in real estate in Kenya. These include land valuers, conveyancing practitioners and land registrars who are not considered reporting agents under POCAMLA.

#### **4.3 Importance of findings**

On the whole, anti-money laundering laws make it possible to address the problem of money laundering through real estate by freezing any assets related to proceeds of crime there by taking away the benefit gained. In terms of contributing to the existing literature on the topic, the findings under this study assist close up the gap identified by scholars regarding applying anti-money laundering laws and land laws to curb money laundering through real estate.

From the onset, a 'one-size-fits-all' approach to dealing with money laundering in real estate will not work because the different ways used to launder money in real estate are context-specific. Therefore, understanding FATF recommendations on fighting money laundering in real estate and international perspectives and measures taken by countries such as the USA and South Africa to curb money laundering in real estate is paramount. The USA, for instance, has been evaluating its regulation of real estate as a potential destination for money laundering. Drawing lessons from these countries on how they have addressed money laundering issues through real estate would help identify the appropriate strategies. For example, in Kenya, anti-money laundering laws dealing with money laundering through real estate are suitable for asset

forfeiture. However, applying anti-money laundering laws and the existing land laws may not work in situations aimed at ensuring that no registration of an interest in real estate is granted until a new buyer's legitimate source of funds is established.

Second, it was established by considering the complexity of money laundering through real estate transactions that realigning anti-money laundering laws with land laws and policies is justified. The research proceeded to consider further how this could be practically achieved. The other assertions about including all non-financial actors involved in real estate transactions as reporting agents were also reiterated. These include the need for cooperation between the office of land registrars and Financial Reporting Centre, and FIU. Land Registrars play a significant role in determining whether a land transaction will succeed. They are the ultimate pillar at which land is transferred from the seller's name into a purchaser's name, and a new title is issued. Therefore, the success or failure to curb money laundering through the real estate sector is hugely dependent on the registrars working in conjunction with the Financial Reporting Centre and FIU at the point when a land title is to be registered in favour of a purchaser. Regarding money laundering through real estate, cooperation amongst these different authorities is needed to ensure that one of the significant conditions precedents to the issuance of title is confirming the legitimate source of funds used to purchase real estate.

However, the research did not address how construction and renovation companies in Kenya are used to clean dirty money through real estate. Instead, the focus was on buying and selling real estate and using mortgage schemes to launder money. Accordingly, looking into construction and renovation as a conduit for money laundering in Kenya is an area where further research needs to be undertaken. In addition, further research should be done on how anti-money laundering laws may be aligned with conveyancing practices in Kenya to tackle other forms of money laundering through real estate.

Focusing on Kenya and looking at the USA and South Africa made it possible to understand how money laundering in real estate is generally done. A review of USA and SA's anti-money laundering laws dealing with real estate provided a benchmark and lessons to be drawn. Concentrating on Kenya also made it possible to examine further the relationship between Kenya's land laws and money laundering. Consequently, the effectiveness of Kenya's anti-money laundering laws and land laws in dealing with money laundering through real estate was established. This helped spot the strengths and weaknesses in Kenya's regulatory regime concerning the real estate sector and money laundering. Therefore, solutions must be provided

to address the existing shortcomings. This recognition of the current weaknesses is significant to the relevant stakeholders, including policymakers and monitoring, investigative, and prosecutorial authorities.

Whilst the study under chapter three concentrated on measures taken to curb money laundering through real estate in the USA and South Africa, the findings also have important implications for the general understanding of the effectiveness of Kenya's anti-money laundering regime in dealing with real estate money laundering. Additionally, other East African countries with similar legislation to Kenya could benefit from seeing the weaknesses identified in the Kenyan regime and also the possible solutions offered, which they may borrow from.

To a large extent, the study shows a need to include non-financial actors in real estate transactions as reporting agents to FRC. There is also a need to realign anti-money laundering laws with land laws to wipe out any possibility of money laundering at registering an interest in land and issuing a title to a new buyer. The study also established a theoretical basis for applying various strategies to curb money laundering by different non-financial actors involved in real estate transactions. Accordingly, this provides context for further research into Kenya's real estate sector and money laundering. The study further shows that Kenya's anti-money laundering laws and land laws have certain flaws concerning regulating money laundering through real estate transactions. These flaws should be tackled to ensure that the real estate sector is well regulated concerning money laundering, thereby having an effective and efficient safeguard in place.

#### **4.4 Recommendations**

The deliberations hereunder will concentrate on the recommendations to provide solutions or alternatives to deal with the identified weaknesses. The proposals have been categorised as follows: 1) sealing loopholes and omissions; 2) Institutional synergy in the fight against money laundering in real estate; 3) non-financial actors as reporting entities.

##### ***4.4.1 Sealing loopholes and omissions***

###### ***Recommendation 1***

Introduce all-cash purchase transactions disclosure for all real estate transactions. GTOs should be introduced in Kenya, covering all the counties. The real estate GTOs should be designed to

address all-cash residential real estate purchases. The GTOs filed on all cash purchases must include information on the legal entity making the purchases, the parties acting on behalf of the legal entities, and the beneficial owners of the legal entity.

Unlike in the US, where GTOs are location-specific, Kenya should introduce them across the country. Furthermore, unlike in the US, GTOs should be introduced in Kenya to apply to all residential property purchases without a monetary threshold.

The study found that intelligent money launderers invest in high-end residential real estate. However, they have shifted their investment to cheap real estate to avoid suspicion and attract attention. As discussed in chapter three, the current approach of GTO in the US is not entirely adequate to capture and address the scale and size of money laundering in the US. For Kenya, full implementation of GTOs would mean implementing GTOs across all the counties in Kenya with reporting obligations covering all real estate transactions. In addition, exposing all real estate buyers involved in an all-cash purchase will enhance transparency in real estate transactions.

#### *Recommendation 2*

Include non-financial actors such as conveyancing practitioners, escrow agents, land registrars and other parties involved in the closing and settlement of real estate transactions as reporting agents under POCAMLA. This is considering the potential of these non-financial actors being misused to aid money laundering in real estate.

The definition of designated non-financial businesses or professions should include all non-financial actors involved in real estate transactions.

The deterrent power of the reporting obligations in preventing money laundering should be boosted by establishing a supervisory body to coordinate reporting in the real estate sector.

#### *Recommendation 3*

Introducing a land value index to provide a register of pre-recorded land values for land in different locations. The land value index may also have the unintended effect of preventing money laundering by introducing predetermined property market value in stamp duty values based on the fixed value on the index. The position of a government land valuer may be misused for overvaluation or undervaluation of land to clean dirty money. Section 10A, the stamp Duty

Act, empowers the Government valuer to perform an independent valuation of the property in question and assign an actual open market value.

During valuation and payment of stamp duty, the Act does not anticipate money laundering, yet the lack of pre-recorded property market values creates room for money laundering practices. Valuers have the autonomy to determine the value of stamp duty to be paid. The concern is predicated on previous occasions where the government valuers have been accused of malpractices, such as falsifying compensation payments where the government has compulsorily acquired land.<sup>247</sup>

The precedence of falsifying land valuations by the government valuers gives way to the risk of money laundering. Money laundering involves a host of parties.<sup>248</sup> The government valuers may conspire with persons entering land sale transactions to conceal funds derived from illicit activities. In doing so, the government valuers may overvalue or undervalue stamp duty to allow for the placement of these illegal funds where the stamp duty does not reflect the 'actual open market value of such property.

#### *Recommendation 4*

The study found that every seller must pay Capital Gain Tax (CGT) when transferring property. Notably, An adjusted cost consisting of the initial cost of a property plus incidental costs are subtracted from the transfer value as discussed in chapter two.

Incidental costs include deductible expenses that lower the net gain upon which CGT is charged. Some of the deductible expenses include loan/mortgage interests, legal fees, costs of enhancements, costs of advertising to find a buyer, and expenses incurred in the property valuation. These deductible expenses are comprehensively set out in Section 15 (2) of the Income Tax Act. The study found that the deductible expenses ensure a property seller is not unduly burdened by CGT.

However, the allowable expenses may also give way to money laundering. Parties charged with ascertaining the legitimacy of the deductible expenses may be compromised. As such, they

---

<sup>247</sup> Mwathane I, 'Why land value index is good for public projects' Business Daily, 25 June 2021 – <http://www.nation.co.ke/oped/blogs/dot9/franceschi//2274464/3160082/-/u2nn5vz/-/index.htm> on 10 April 2022.

<sup>248</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 18.

may include or fail to include deductible expenses illegitimately, thus, altering the property's value in a manner that allows for the concealment of illicit funds.

The list of deductible expenses is elaborate. However, section 15 and Schedule 8 of the Act are silent on how the legitimacy of the claimed deductible expenses is to be confirmed.

The claim of deductible expenses should be subjected to a specialised and autonomous review process involving an investigation with the intended effect of detecting any form of money laundering.

#### *Recommendation 5*

Kenya's Companies (Beneficial Ownership Information) Regulation works with the Data Protection Act, limiting the general public's disclosure of beneficial ownership information. The company's registrar is supposed only to use a beneficial owner's information to communicate with a beneficial owner. A beneficial owner's information is only shared under exceptional circumstances, including making the information accessible to a competent authority.

One of the shortcomings of Kenya's beneficial owner's regulations is that: The Companies (Beneficial Ownership Information) Regulations do not cover foreign legal entities. However, as discussed in chapter three, the layering process of money laundering utilises a complex international financial system to create innovative techniques. These include cross-border transactions use of corporations and trusts.<sup>249</sup> For example, a foreign company can conspire with a legal entity incorporated in Kenya to finance its operations using laundered money.

Furthermore, there is a need for an all-rounded e-registry for beneficial owners that focuses on real estate companies to overcome this. For foreign companies to be authorised to invest in Kenya's real estate sector, a list of beneficial owners should be provided reflecting the amount of investment made.

The Land Registration Act should be amended, requiring land registrars at the point of registration of a transfer in favour of a company to demand that the company purchasing a property in question submits a list of its beneficial owners as part of the mandatory completion documents.

---

<sup>249</sup> Savona and Riccardi, 'From Illegal Markets to Legitimate Businesses', 18.

Ultimately, the Companies (Beneficial Ownership Information) Regulations should embrace a public registry of people who derive benefits from companies. A public e-registry that lists individuals who derive profits from a company when a legal entity is registered as legally belonging to other individuals will enhance transparency in real estate transactions. Such registered owners may be relatives or proxies of the beneficial owner.

#### ***4.4.2 Institutional synergy in the fight against money laundering in real estate***

##### *Recommendation 1*

Mandatory production of financial statements of the seller and purchaser for the past ten years as part of the completion documents should be included in clause 8.4.1 of the LSK conditions of sale. These financial statements should act as proof of source of income that reflects the means and financial position of a seller and a buyer.

Money launderers perform subsequent real estate sales each time at a higher price. Accordingly, the financial statements of both a seller and a purchaser will be helpful when determining the capability of a purchaser to afford the property in question. In addition, financial statements reflect an individual's net worth and leave a paper trail of how money has been acquired in the past ten years up to the current year when a purchaser has entered into a conveyancing transaction to purchase land and have a transfer registered in his name.

##### *Recommendation 2*

Kenya's FRC working closely with the Ministry of Land should issue regulations on money laundering typologies through residential and commercial real estate in Kenya. In addition, land Registrars and conveyancing practitioners must be obligated to identify risks in commercial and residential real estate transactions.

##### *Recommendation 3*

FRC working with the Ministry of Land and registrars should issue guidelines on the background checks before registrars effect a transfer of property in favour of foreign PEPS.

#### ***4.4.3 Non-financial actors as key players in real estate transactions***

##### *Recommendation 1*

Land Registrars can determine whether the transfer of registration in favour of the purchaser will succeed. First, land Registrars have the power to require any person to avail of any instrument, certificate or other documents related to the land, lease, or charge in question.<sup>250</sup> Secondly, they can also call upon anyone to appear and provide any information or explanation concerning land or any completion documents submitted for purposes of registration of a transfer.<sup>251</sup> Moreover, land Registrars have the discretion to decline to proceed with any land registration in circumstances where information relating to land is not produced or the failure to submit required documents.<sup>252</sup>

In addition to the powers bestowed on land registrars under section 14 (1) of the Land Registration Act, the Chief Registrar can formulate practice instructions and guidelines for implementation of the registration policies and strategies; prepare and submit a yearly report on the state of land registration to the Commission and the Cabinet Secretary.<sup>253</sup>

Land Registrars play a significant role in determining whether a land transaction will succeed. This is because they are the ultimate pillar at which land is transferred from the seller's name into a purchaser's name, and a new title is issued. Therefore, the success or failure to curb money laundering through the real estate sector is hugely dependent on the registrars working in conjunction with the Financial Reporting Centre at the point when land title is to be registered in favour of a purchaser.

##### *Bank Deposits*

In a conveyancing transaction, after payment of the purchase price deposit on a stakeholder account managed by a seller's advocate, the next step involves handing over all the completion documents to the buyer and their advocate. According to the LSK. Condition of Sale. The completion date is Ninety (90) days from the date of execution of a sale agreement for the land.

A seller must, on or before the completion date, provide to the purchaser the following completion documents in exchange for the purchase price balance.

---

<sup>250</sup> Section 14, Land Registration Act (Act No. 3 of 2012).

<sup>251</sup> Section 14, Land Registration Act (Act No. 3 of 2012).

<sup>252</sup> Section 14 Land Registration Act (Act No.3 of 2012).

<sup>253</sup> Section 14(2) Land Registration Act 2012 (Act No.3 of 2012)

- I. Original title document for the property;
- II. A duly executed transfer, in triplicate, of the property in favour of the purchaser;
- III. Copies of the Vendor's PIN certificate and National Identity Card and three coloured passport-size photographs of the Vendor;
- IV. A Rent clearance certificate, if any;
- V. A Rates clearance certificate, if any;
- VI. Spousal Consent(s), if any and
- VII. Any other document(s) in the seller's possession is necessary to effect the transfer of good title of the property in favour of the purchaser.

The scope of a land registrar's powers under section 14 of the Land Registration Act should be expanded, making it mandatory for the seller and buyer to submit their income statements to the land registrar as part of the required completion documents to effect a transfer.

Furthermore, the interpretation section under section 2 of POCAMLA should be amended to include land registrars as reporting agents to FRC before any land title is registered and issued in favour of any person purchasing land in Kenya.

Money launderers buy expensive real estate to inject a lot of the dirty money at a fast rate. However, this study has shown that intelligent money launderers now invest in cheap real estate development to avoid suspicion. Accordingly, by land registrars reporting all land transactions to FRC to do a background check on the parties, this move will unmask money launderers investing in high-end and cheap real estate to clean their dirty money.

Registrars should be explicitly included in the list of reporting institutions to FRC. With or without suspicion of the seller or buyer of land, income statements for at least ten years of individuals in a land transaction should be part of the mandatory completion documents submitted to the land registrar. The registrar will then forward the completion documents to the Financial Reporting Centre to do a background check on the 10-year income statements of both the seller and purchaser.

A seller's previous source of income should be confirmed. The intention will be to determine whether a seller has been involved in successive selling and buying of property as the primary source of income, one of the tricks used by money launderers who buy property, renovate it by

injecting in dirty money and sell it each time at a higher price. For a purchaser, income statements will be assessed to ascertain the origin of the funds used in the purchase.

After reviewing the 10-year income statements of a buyer and seller by FRC, the Centre's findings shall be put in writing and addressed to the registrar. Should a review of the income statements done by FRC reveal that the buyer's income statements are disproportionate to the intended value of a property to be purchased, the registrar will not effect a transfer in favour of the purchaser. However, in such a scenario, the purchaser will then be required to seek clearance with FRC by explaining the source of income used to buy the property in question.

This reporting of all land transactions should be mandatory to allow the Centre to assess the submitted income statements and give the green light to the registrar to proceed with the registration of a transfer in favour of a purchaser or not. This way, money launderers acting on their own or using third-party individual buyers will find it difficult to clean dirty money through purchasing and selling real estate.

#### Cash Sales

Where a conveyancing transaction is completed, and consideration is an all-cash purchase. A list of mandatory completion documents submitted to the registrar before a transfer is registered in favour of the purchaser should include the original sale agreement between a seller and a buyer reflecting the agreed consideration. Additionally, a valuation report of the land in question should match the market value based on an established public land valuation index. Furthermore, a seller's and buyer's income statements for the past ten years should be submitted.

Similarly, as already discussed, the completion documents, including the income statements of the purchaser and seller, once received by the registrar, the registrar should submit them to FRC to conduct its due diligence concerning the source of income of the parties concerned. FRC should conduct its due diligence by going back up to 10 years to establish the legitimate source of a payment made by the purchaser. In instances where a purchaser has no bank statements and alleges that all his income and transactions are performed through cash. A registrar will write a notice to FRC indicating that parties involved in a land transaction only deal in all-cash transactions. Once the completion documents and a notification of a cash sale transaction are submitted to FRC. FRC will be required to do its due diligence while working closely with the parties involved in the transaction. When a purchaser cannot explain the legitimate source of funds used to purchase the property, FRC will note this finding in its

response to the registrar. Accordingly, the registrar will decline to register a transfer in favour of a purchaser until such a purchaser can reasonably explain the source of the cash used to purchase the property in question.

Kenya's FRC -working closely with the Ministry of Land, should issue regulations on money laundering typologies through residential and commercial real estate in Kenya. In addition, land Registrars and conveyancing practitioners must be obligated to report risks in commercial and residential real estate transactions.

FRC working with the Ministry of Land and registrars should issue guidelines on the background checks before registrars effect a transfer of property in favour of foreign PEPS.

### *Recommendation 2*

As discussed in chapter one, the study found that scholars such as Gathoni Kimani and Constance Gikonyo provide that in a bid to develop elaborate schemes that work around the anti-money laundering controls, suspected criminals have sought the assistance of legal professionals.<sup>254</sup> They establish that advocates act as gatekeepers in analysing the relationship between advocate-client confidentiality and the consequential effect of liability for the non-adherence to anti-money laundering legislation.

During the purchase of land, we have a buyer and a seller. The money is deposited into a stakeholder account to safeguard the deposit and a remainder of the land purchase price. A purchaser can agree with an advocate to have the payments made to the seller's advocate's account on a stakeholder basis. The primary reason for such an arrangement is to ensure a seller only gets access to the payment sum from the advocate holding it upon registration of a transfer in favour of the purchaser.

When a purchaser makes a deposit and eventually the entire agreed sum on the stakeholder account, there is no background check regarding the source of the funds. A seller's advocate who holds the funds only ensures the transaction is successful without worrying about the origin of funds. This potential gap can be exploited to clean dirty money through real estate purchases.

---

<sup>254</sup> Kimani G, 'Gate-keeping on anti-money laundering and counter-terrorist financing ; A case for the Kenyan advocate' 6535(3) *South Asian Law and Economics Review*, 2018. See also, Gikonyo C, ' The legal profession in Kenya and its anti-money laundering obligations or lack thereof', 2019.

In 2021 there was an amendment to POCAMLA introducing section 2(c) and section 14 (b), making advocates and all their employees, whether advocates or not, to be reporting agents of the Financial Reporting Centre (FRC). Justice James Makau suspended the operation of sections 2(c) (i) and section 14 (b) of the Proceeds of Crime and Anti-Money Laundering (Amendment ) Act.<sup>255</sup>

Conveyancing practitioners should be obliged to ask for proof of sources of funds for purchasing land when a purchaser deposits money into a seller's advocate's account.

This study exposed particular areas of weakness to be tackled by Kenyan legislators. Fighting money laundering through the real estate sector requires an analysis of the current regulatory framework on money laundering through real estate and sealing all the regulatory gaps and the existing compliance mechanisms. The land registrar's office is paramount in fighting money laundering through real estate. Land registrars working with the Financial Reporting Centre at the point when a land transfer is to be registered in favour of a purchaser will be an effective control mechanism. Intelligent money launderers are moving away from the overregulated financial sector to the non-financial sector, such as real estate.<sup>256</sup>

Including non-professionals in anti-money laundering legislation can potentially enhance the fight against money laundering. Accordingly, non-financial actors within the real estate sector should be regulated.<sup>257</sup>

The approach to combating money laundering in Kenya by placing proper safeguards on financial institutions is a step in the good direction. However, there is a need to acknowledge that money launderers do not heavily depend on the financial sector.<sup>258</sup> Teichman asserts that the over-regulation of the financial sector prompts money launderers to move to other sectors with minimal risks of getting caught. One such sector is the real estate sector.<sup>259</sup>

---

<sup>255</sup> Wangui J, ' Dirty cash: Court stops lawyers from disclosing deals' Business Daily, 13 January 2022, ><https://www.businessdailyafrica.com/bd/economy/court-suspends-law-that-compels-advocates-financial-deals-3680222> > On 22 May 2022.

<sup>256</sup> Fabian Maximilian Johannes Teichmann- Twelve methods of money laundering page 137.

<sup>257</sup> Tsingou E, 'New governors on the block: the rise of anti-money laundering professionals', 2018.

<sup>258</sup> Andrews J, ' Why financial criminals use real estate to launder money' Curbed, 10 August 2018, < <https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial> > On 1 May 2021.

<sup>259</sup> Teichmann F, 'Twelve methods of money laundering',136. *See also*, Andrews J, ' Why financial criminals use real estate to launder money' Curbed, 10 August 2018, < <https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial> > On 1 May 2021.

## 4.5 Conclusion

Anti-money laundering laws generally are not robust enough to effectively deal with the specific problem of money laundering through the real estate sector. This requires taking into consideration alternative measures. Specifically for money laundering through Kenya's real estate sector, both practical and theoretical considerations show a need for anti-money laundering legislation designed to regulate money laundering through real estate transactions. A specific anti-money laundering regime for real estate transactions would be effective because it will enable the implementation of context-specific and appropriate strategies for the real estate sector.

Generally, apart from the existing anti-money laundering laws dealing with asset forfeiture and freezing of property acquired using illicit funds. The study shows alternatives that can be used to ensure that dirty money is not used to purchase real estate from the very onset. Ascertaining the legitimate source of funds used to buy real estate should be a condition precedent to registering any interest in real estate by the registrar. All non-financial actors such as conveyancing practitioners, land registrars, and legal entities should be reporting agents for all real estate transactions. In instances where a benefit of whatever form is gained by non-financial actors to facilitate money laundering through real estate, such a benefit will be targeted by investigation authorities and concerned parties put under an obligation to account for it.

This strategy should be applied to all non-financial actors, provided they have participated in any deal of real estate purchase or sale designed to clean dirty money. It should not matter whether the real estate transaction is complete or not. Once it is established that a real estate transaction is financed by laundered money, all parties involved should be held accountable. Eventually, this would disincentivise all non-financial actors in real estate transactions from participating in dirty real estate transactions. Consequently, creating an avenue for non-financial actors to distance themselves from dirty real estate transactions to avoid the risk of either losing their practising licenses or accounting for the proceeds earned from such transactions. To a large extent, anti-money laundering laws can be employed in conjunction with land laws dealing with the registration of interest in land as a means of locking out any possibility of using land laws to launder money through real estate and holding all parties in real estate transactions accountable. Conclusively, using sector-specific anti-money laundering laws to deal with all forms of money laundering through real estate can potentially enhance the

fight against money laundering, particularly within the real estate sector. The lack of strict anti-money laundering regulations specific to the real estate sector is one of the significant challenges in curbing money laundering in Kenya's real estate.



## **Bibliography**

### ***Journal Articles***

- Becker G, 'Crime and punishment: An economic approach' (76)(2) *The University of Chicago Press Journals*, 1968.
- Boles J, 'Anti-money laundering initiatives for the South African real estate market' 1(1) *Journal of comparative urban law and policy*, 2017.
- Chisenga D and Phiri J, 'Factors That Lead to Money Laundering in the Real Estate Sector Based on the Financial Action Task Force Standards' 9(1) *Open Journal of Business and Management*, 2021.
- Esoimeme E, 'Institutionalising the war against corruption: new approaches to asset tracing and recovery' *Journal of Financial Crime*, 27(1), 2020.
- Freckleton M, 'Is Jamaica's anti-money laundering regime effective?' *Journal of Money Laundering Control*, 22(1), 2019.
- Gikonyo C, 'Banks in Kenya and anti-money laundering obligations: the conflicts of interests arising' 24(2) *Journal of Money Laundering Control*, 2021.
- Gikonyo C, 'The legal profession in Kenya and its anti-money laundering obligations or lack thereof' *Journal of Money Laundering*, 22(2), 2019.
- Guy S, *Money Laundering A New International Law Enforcement Model*, Cambridge University Press, 2000.
- Kimani G, 'Gate-keeping on anti-money laundering and counter-terrorist financing ; A case for the Kenyan advocate' 6535(3) *South Asian Law and Economics Review*, 2018.
- King C and Zavoli I, 'New development: Estate agents' perspectives of anti-money laundering compliance -four key issues in the UK property market', 1
- McPherson G, 'Floating on a sea of funny money: An analysis of money laundering through Miami real estate and the federal government's attempt to stop it' 26(159), *University of Miami Business Law Review*, 2017.
- McPherson G, 'Floating on a sea of funny money: An analysis of money laundering through Miami real estate and the federal government's attempt to stop it' 26(159), *University of Miami Business Law Review*, 2017.
- Mohamed K, 'Combining methods in legal research' 11(21) *Medwell Journals* ,2016, 5191.
- Naheem M, 'Money laundering and illicit flows from China-the real estate problem' 20(1) *Journal of money laundering*, 2017.

Naheem M, 'Money laundering and illicit flows from China-the real estate problem' 20(1) *Journal of money laundering*, 2017.

Pambo K, 'Designating lawyers as reporting entities under the Kenya's anti-money laundering regime' 23(3) *Journal of money laundering control*, 2020.

Teichmann F, 'Financial crimes in the real estate sector in Austria, Germany, Liechtenstein and Switzerland' *Journal of money laundering*, 2020.

Teichmann F, 'Twelve methods of money laundering' 20(2) *Journal of money laundering*, 2017.

Tsingou E, 'New governors on the block: the rise of anti-money laundering professionals', 2018.

Vlcek W, 'Global Anti-Money Laundering Standards and Developing Economies: The Regulation of Mobile Money' 29(4) *Wiley Online Library*, 2011.

Savona E and Riccardi M (Eds.), 'From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe, Final Report of Project OCP Organised Crime Portfolio' 2015.

### **Reports**

Financial Action Task Force, *Money laundering and terrorist financing through the real estate sector*, 29 June 2007'.

Financial Action Task Force, *Money laundering and terrorist financing through the real estate sector*, 29 June 2007

Measures against the Transfer and Safeguarding of Criminal Origin, Recommendation No. R (80)10 adopted by the Committee on Ministers of the Council of Europe on 27 June 1980.

The FATF recommendations provide situations in which recommendation 5,6 and 8-9 shall apply to lawyers and this include

### **Online sources**

American Land Title Association, 'Real Estate Geographic Targeting Orders Fact Sheet' < <https://www.alta.org/media/pdf/fincen/160812-real-estate-geographic-targeting-orders-faq.PDF> >

Ayemoba A, The Kenyan real estate market and the introduction of Real Estate Investment Trusts, 14 February 2017- <<https://africabusinesscommunities.com/features/the-kenyan-real-estate-market-and-the-introduction-of-real-estate-investment-trusts/>> 01 February 2022

Andrews J, ‘ Why financial criminals use real estate to launder money’ Curbed, 10 August 2018, < <https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial> >

Andrews J, ‘ Why financial criminals use real estate to launder money’ Curbed, 10 August 2018, < <https://archive.curbed.com/2018/8/10/17674584/money-laundering-real-estate-paul-manafort-trial> >

Boles J, ‘Anti-Money Laundering Initiatives for the South African Real Estate Market’ *Journal of Comparative Urban Law and Policy*, 2017, 197\_< [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3518759](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518759)>

CBC, Money laundering in B.C. estimated at \$1B a year — but reports were not shared with province, AG says, 18 January 2019 <https://www.cbc.ca/news/canada/british-columbia/money-laundering-billions-bc-david-eby-1.4983471>

Collin M, Hollenbach F, and Szakonyi D, ‘The impact of Treasury’s pilot program on stemming the tide of dirty money into US real estate’ Brookings, 7 March 2022 <https://www.brookings.edu/blog/up-front/2022/03/07/the-impact-of-treasurys-pilot-program-on-stemming-the-tide-of-dirty-money-into-us-real-estate/> on 08 May 2022.

Comptroller of the Currency Administrator of National Banks, *Bank Secrecy Act/Anti-Money Laundering: Comptroller’s Handbook*, 11-12.

Cyttonn, Current real estate trends in Kenya & how they affect investors, February 2022—<<https://cytonn.com/blog/article/current-real-estate-trends-in-kenya-and-how-they-affect-investors>>

Cyttonn, Kenya’s Q1’2021 and Q2’2021 GDP Growth, 2022, <<https://cytonn.com/uploads/downloads/kenya-q12021-and-q22021-gdp-note.pdf>>

Cyttonn, Nairobi Metropolitan Area (NMA) Serviced Apartments Report 2021, 07 November 2021- <<https://www.cytonn.com/topicals/nairobi-metropolitan-area-6>>

Cyttonn, Nairobi Metropolitan Area commercial office report- Market under a pandemic 2021, 23 April 2021- <<https://cytonn.com/uploads/downloads/nairobi-metropolitan-area-commercial-office-final-report-2021.pdf>>

Department of Statistics South Africa, The latest household statistics and more, 2017-<https://www.statssa.gov.za/?p=11241>

European Parliament, Understanding money laundering through real estate transactions, February 2019 < <https://www.europarl.europa.eu/cmsdata/161094/7%20->

[%2001%20EPRS\\_Understanding%20money%20laundering%20through%20real%20estate%20transactions.pdf>](#)

Faiza A, 'Assessment of the implementation of anti-money laundering policy: perspectives of corporate bank clients' in Kenya'- <https://su-plus.strathmore.edu/handle/11071/6575> - Strathmore University, 2019.

Federal Financial Institutions Examinations Council, *BSA/AML Examination Manual*, February 2021> [https://bsaaml.ffiec.gov/docs/manual/01\\_Introduction/01.pdf](https://bsaaml.ffiec.gov/docs/manual/01_Introduction/01.pdf)

Financial Action Task Force, FATF (Financial Action Task Force) Countries 2022, 2022-  
<https://worldpopulationreview.com/country-rankings/fatf-countries>

Financial Action Task Force, FATF (Financial Action Task Force) Countries 2022, 2022-  
<https://worldpopulationreview.com/country-rankings/fatf-countries>

Financial Crimes Enforcement Network, 'FinCEN Renews and Expands Real Estate Geographic Targeting Orders' <https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders>

Financial Intelligence Centre, *Anti-Money Laundering and Counter-Terrorism Financing Legislation*, 2012, 1 <chrome extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.fic.gov.za/Documents/FIC\_Sunday%20Times\_Article\_Print.pdf> .

Financial Reporting Centre, <<https://www.frc.go.ke/registration/reporting-institutions.html>>

FinCEN <<https://www.fincen.gov/index.php/what-we-do>>

FinCEN, 'Advisory to Financial Institutions and Real Estate Firms and Professionals' FIN-2017-A003 22 August 2017- <chrome extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.fincen.gov/sites/default/files/advisory/2017-08-

22/Risk%20in%20Real%20Estate%20Advisory\_FINAL%20508%20Tuesday%20%28002%29.pdf>

FinCEN, 'Money Laundering in the Commercial Real Estate Industry' December 2006-  
<https://www.fincen.gov/money-laundering-commercial-real-estate-industry>

FinCEN, FinCEN Renews Real Estate Geographic Targeting Orders for 12 Metropolitan Areas, 09 October 2021 <<https://www.fincen.gov/news/news-releases/fincen-renews-real-estate-geographic-targeting-orders-12-metropolitan->

[areas#:~:text=WASHINGTON%E2%80%94The%20Financial%20Crimes%20Enforcement,purchases%20of%20residential%20real%20estate>](#)

Force, Financial Action Task, ‘Money laundering and terrorist financing through the real estate sector’, *Paris: FATF* (2007).

Former Managing Director and Two Former Loan Officers Plead Guilty for Roles in Widespread Bank-Fraud Scheme, 20 May 2021 <<https://www.justice.gov/opa/pr/former-managing-director-and-two-former-loan-officers-plead-guilty-roles-widespread-bank>>

Global Financial Integrity, ‘GFI Comment Submission to FiNCEN on ANPRM to Curb Illicit Financial Flows in the US Real Estate Sector’ Global Financial Integrity, 22 February 2022-  
<https://gfintegrity.org/report/gfi-comment-submission-to-fincen-on-anprm-to-curb-illicit-financial-flows-in-the-us-real-estate-sector/>

Global Financial Integrity, *Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat’s Dream*.

Hardy P, Andreano R, Robotti M, and Hatza N, ‘Real Estate and Money Laundering: FinCEN Issues Advanced Notice of Regulations for the Real Estate Industry’ Ballard Spahr LLP, 13 December 2021 <<https://www.moneylaunderingnews.com/2021/12/real-estate-and-money-laundering-fincen-issues-advanced-notice-of-regulations-for-the-real-estate-industry/>>

Hardy P, Roy P, Grugan T, and Treanor M, ‘The Intersection of Money Laundering and Real Estate’ ICLG, 2020\_ <chrome-extension://efaidnbnmnnibpcajpcgclclefindmkaj/https://www.ballardspahr.com/-/media/files/articles/intersection-of-money-laundering-and-real-estate.pdf?la=en&hash=CBF6D4BC82C0FAE004F26F4A64352889>

Helderman R and Crites A, ‘The Russian billionaire next door: Putin ally is tied to one of D.C.’s swankiest mansions’ Washington Post, 29 November 2017 [https://www.washingtonpost.com/politics/the-russian-tycoon-next-door-putin-ally-is-tied-to-one-of-dcs-swankiest-mansions/2017/11/28/15f913de-cef6-11e7-81bc-c55a220c8cbe\\_story.html](https://www.washingtonpost.com/politics/the-russian-tycoon-next-door-putin-ally-is-tied-to-one-of-dcs-swankiest-mansions/2017/11/28/15f913de-cef6-11e7-81bc-c55a220c8cbe_story.html)

Kenya National Bureau of Statistics, Economic Survey 2020, <<https://www.knbs.or.ke/?wpdmpo=economic-survey-2020>>

Kiplagat S, ‘Civil Servant busted with half a billion shillings in four bank accounts’ Daily Nation, 4 August, 2021 -< <https://nation.africa/kenya/news/civil-servant-found-with-half-billion-in-4-banks-3498166> >

Kiplagat S, Business Daily, 23 June 2021, <https://www.businessdailyafrica.com/bd/economy/how-civil-servant-bought-sh279m-houses-in-days-3447186>

Kramer Levin, 'FinCEN Considers New Anti-Money Laundering Reporting Requirements For All-Cash Real Estate Transactions' 15 December 2021- <https://www.kramerlevin.com/en/perspectives-search/fincen-considers-new-anti-money-laundering-reporting-requirements-for-all-cash-real-estate-transactions.html>

Kramer Levin, 'FinCEN Considers New Anti-Money Laundering Reporting Requirements For All-Cash Real Estate Transactions' 15 December 2021- <https://www.kramerlevin.com/en/perspectives-search/fincen-considers-new-anti-money-laundering-reporting-requirements-for-all-cash-real-estate-transactions.html>

Lilly Makena, Co-Working Defining the Future Office Space, 30 January 2020- <https://businesstoday.co.ke/co-working-office-space-is-the-future-of-working/>

Maloney M, Somerville T, and Unger B, 'Combatting Money Laundering in BC Real Estate: Expert Panel on Money Laundering in BC Real Estate' March 2019 , 16 < [https://cullencommission.ca/files/Combatting\\_Money\\_Laundering\\_Report.pdf](https://cullencommission.ca/files/Combatting_Money_Laundering_Report.pdf)>

Mthembu-Salter G, 'Money laundering in the South African real estate market today' in *Money Laundering Experiences, A Survey*, First Edition, Monograph No 124, 2006. Y

Muthoni K, 'Court allows agency to recover shillings 39 million looted from NYS in an undefended case' The Standard, 24 July 2020 -< <https://www.standardmedia.co.ke/kenya/article/2001379874/court-allows-agency-to-recover-sh39-million-looted-from-nys-in-an-undefended-case> >

Mwathane I, 'Why land value index is good for public projects' Business Daily, 25 June 2021 – <http://www.nation.co.ke/oped/blogs/dot9/franceschi//2274464/3160082/-/u2nn5vz/-/index.htm>> on 10 April 2022.

Mwathane, 'Why land value index is good for public projects'. Kenya Revenue Authority, [https://www.kra.go.ke/individual/filing-paying/types-of-taxes/capital-gains-tax\\_on\\_12\\_April\\_2022](https://www.kra.go.ke/individual/filing-paying/types-of-taxes/capital-gains-tax_on_12_April_2022).

Mwita M, 'Nairobi named among top cities with stolen wealth in real estate' The Star, 20 July 2020, -<<https://www.the-star.co.ke/business/2020-07-20-nairobi-named-among-top-cities-with-stolen-wealth-in-real-estate/>>

Nyaboke M, 'Money laundering in the banking sector: a critical analysis of the enforcement procedures in Kenya' - <https://su-plus.strathmore.edu/handle/11071/10213> - 2020.

Omondi D, 'How dirty cash fomented Kenya's real estate boom' The Standard, 22 July 2021 <  
<https://www.standardmedia.co.ke/business/real-estate/article/2001418885/how-dirty-cash-fomented-kenyas-real-estate-boom> >

Pillay K, 'The Station Wagon, The Heroin and the Preservation Of Property Order: Section 38 of the Prevention of Organised Crime Act, No 121 Of 1998' Cliff Dekker Hofmeyr, 13 June 2018 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-13-june-the-station-wagon-the-heroin-and-the-preservation-of-property-order-section-38-of-the-prevention-of-organised-crime-act-no-12-of-1998-.html>

Report on the Prevention of Criminal Use by the Banking System for the Purpose of Money Laundering, < [Prevention of criminal use of the banking system for the purpose of money-laundering \(December 1988\) \(bis.org\)](#) >

Smith K, 'Challenges Combating Money Laundering in the Real Estate Sector in South Africa' 34.

The History of Money Laundering' KYC-Chain, 25 April 2019 <<https://kyc-chain.com/the-history-of-money-laundering/>>

The Sentry, *Kenya Illicit Finance Risks and Assessment*, October 2021 <<https://thesentry.org/reports/kenya-illicit-finance/>>

US Federal Register, *Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Housing Government Sponsored Enterprises*, 25 February 2014 <https://www.federalregister.gov/documents/2014/02/25/2014-04125/anti-money-laundering-program-and-suspicious-activity-report-filing-requirements-for-housing>

US Federal Register, *Anti-Money Laundering Programs for Financial Institutions*, 11 June 2002 <https://www.federalregister.gov/documents/2002/11/06/02-27770/financial-crimes-enforcement-network-anti-money-laundering-programs-for-financial-institutions>

US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions* 31 U.S.C. 5318(h)(1)(A)-(D), 12 August 2021 <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions#footnote-1-p69589>

US Federal Register, *Anti-Money Laundering Regulations for Real Estate Transactions*, 12 August 2021

US Federal Register, *Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator*, 09 September 2020.

US National Archives and Records Administration, Code of Federal Regulations, <<https://www.ecfr.gov/current/title-31/subtitle-B/chapter-X/part-1010#1010.230>>

US Securities and Exchange Commission, ‘Anti-Money Laundering (AML) Source Tool for Broker-Dealers’ 5 January 2021 <https://www.sec.gov/about/offices/ocie/amlsourcetool.htm#4>



# APPENDICES

## Appendix A: Ethics Clearance Certificate



31<sup>st</sup> May 2022

Mr Githinji Rogers,  
rogers.ssekubwa@strathmore.edu

Dear Mr Githinji,

**RE: Towards a Robust Regulation of the Real Estate Sector in Kenya: Curbing Money Laundering through this sector**

This is to inform you that SU-IERC has reviewed and **approved** your above **SU Masters'** research proposal. Your application reference number is **SU-IERC1359/22**. The approval period is **31<sup>st</sup> May 2022 to 30<sup>th</sup> May 2023**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

for: **Dr Ben Ngoye,**  
**Secretary; SU-IERC**

**Cc: Prof Fred Were,**  
**Chairperson; SU-IERC**



# Appendix B: Plagiarism Report



## Document Information

Analyzed document	Ssekubwa Rogers Githinji_094294 (LLM Thesis) 2022.docx (D142820798)
Submitted	2022-08-11 11:20:00
Submitted by	
Submitter email	rogers.ssekubwa@strathmore.edu
Similarity	14%
Analysis address	library.strath@analysis.arkund.com

## Sources included in the report

<b>SA</b>	<b>Final Draft 15.07.docx</b> Document Final Draft 15.07.docx (D110507999)
<b>W</b>	URL: <a href="https://ag-pssg-sharedservices-ex.objectstore.gov.bc.ca/ag-pssg-cc-exh-prod-bkt-ex/703%20-%20Work%20Stream%201%20Feasibility%20Study%20-%20Dec%209%202020.pdf">https://ag-pssg-sharedservices-ex.objectstore.gov.bc.ca/ag-pssg-cc-exh-prod-bkt-ex/703%20-%20Work%20Stream%201%20Feasibility%20Study%20-%20Dec%209%202020.pdf</a> Fetched: 2021-10-27 04:57:57
<b>W</b>	URL: <a href="https://www.moneylaunderingnews.com/2021/12/real-estate-and-money-laundering-fincen-issues-advanced-notice-of-regulations-for-the-real-estate-industry/">https://www.moneylaunderingnews.com/2021/12/real-estate-and-money-laundering-fincen-issues-advanced-notice-of-regulations-for-the-real-estate-industry/</a> Fetched: 2022-08-11 11:22:00
<b>SA</b>	<b>11A052.docx</b> Document 11A052.docx (D27932638)
<b>W</b>	URL: <a href="https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf">https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://cytonn.com/blog/article/current-real-estate-trends-in-kenya-and-how-they-affect-investors">https://cytonn.com/blog/article/current-real-estate-trends-in-kenya-and-how-they-affect-investors</a> Fetched: 2022-08-11 11:21:00
<b>SA</b>	<b>1650350_Kanya Prathima V._10 BA LLB C.docx</b> Document 1650350_Kanya Prathima V._10 BA LLB C.docx (D101834391)
<b>W</b>	URL: <a href="https://cullencommission.ca/files/Combating_Money_Laundering_Report.pdf">https://cullencommission.ca/files/Combating_Money_Laundering_Report.pdf</a> Fetched: 2022-08-11 11:23:00
<b>W</b>	URL: <a href="https://gfintegrity.org/report/gfi-comment-submission-to-fincen-on-anprm-to-curb-illicit-financial-flows-in-the-us-real-estate-sector/">https://gfintegrity.org/report/gfi-comment-submission-to-fincen-on-anprm-to-curb-illicit-financial-flows-in-the-us-real-estate-sector/</a> Fetched: 2022-08-11 11:22:00
<b>W</b>	URL: <a href="https://wamaellen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/">https://wamaellen.com/the-proceeds-of-crime-and-anti-money-laundering-amendment-act-2022/</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://www.robertdmitchell.com/common-law-fraud">https://www.robertdmitchell.com/common-law-fraud</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://www.kra.go.ke/individual/filing-paying/types-of-taxes/capital-gains-tax">https://www.kra.go.ke/individual/filing-paying/types-of-taxes/capital-gains-tax</a> Fetched: 2022-08-11 11:23:00
<b>W</b>	URL: <a href="https://www.businessdailyafrica.com/bd/economy/court-suspends-law-that-compels-advocates-financial-deals-3680222">https://www.businessdailyafrica.com/bd/economy/court-suspends-law-that-compels-advocates-financial-deals-3680222</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://www.fhfaig.gov/sites/default/files/AUD-2019-008%20BSA%20Audit%20%28public%29%20Redacted.pdf">https://www.fhfaig.gov/sites/default/files/AUD-2019-008%20BSA%20Audit%20%28public%29%20Redacted.pdf</a> Fetched: 2022-05-26 10:46:36
<b>W</b>	URL: <a href="https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%2528002%2529.pdf">https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%2528002%2529.pdf</a> Fetched: 2022-08-11 11:21:00
<b>W</b>	URL: <a href="https://www.kramerlevin.com/en/perspectives-search/fincen-considers-new-anti-money-laundering-reporting-requirements-for-all-cash-real-estate-transactions.html">https://www.kramerlevin.com/en/perspectives-search/fincen-considers-new-anti-money-laundering-reporting-requirements-for-all-cash-real-estate-transactions.html</a> Fetched: 2022-08-11 11:22:00
<b>W</b>	URL: <a href="https://legal.thomsonreuters.com/en/insights/articles/what-is-a-suspicious-activity-report">https://legal.thomsonreuters.com/en/insights/articles/what-is-a-suspicious-activity-report</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://bsaaml.fiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/01.pdf">https://bsaaml.fiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/01.pdf</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://www.ecfr.gov/current/title-31/subtitle-B/chapter-X/part-1010#1010.230">https://www.ecfr.gov/current/title-31/subtitle-B/chapter-X/part-1010#1010.230</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://www.sec.gov/about/offices/ocie/amlsourcetool.htm#4">https://www.sec.gov/about/offices/ocie/amlsourcetool.htm#4</a> Fetched: 2022-08-11 11:24:00
<b>W</b>	URL: <a href="https://www.alta.org/media/pdf/fincen/160812-real-estate-geographic-targeting-orders-faq.PDF">https://www.alta.org/media/pdf/fincen/160812-real-estate-geographic-targeting-orders-faq.PDF</a> Fetched: 2022-08-11 11:20:00

