

## Security Documentation in Kenya: Should Guarantees Be Prepared By a Qualified Advocate?

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### Introduction

Under the Advocates Act (Cap.16, Laws of Kenya) (the “Advocates Act”) certain documents relating to land are required to be “drawn by” a qualified person. It is generally accepted that documents creating a disposition in land, such as transfers, conveyances, leases, charges and mortgages should be drawn by a qualified advocate. The practice has been to indicate in the document the advocate or the firm of advocates which has drawn the documents. A question has in the past arisen on whether the requirement for the documents to be drawn by a qualified advocate would extend to guarantees.

### The Statutory Requirement

A qualified advocate is not simply someone who has studied the law and practices law. The Advocates Act defines a “qualified person” as a lawyer who has been admitted to the Roll of Advocates as an Advocate of the High Court of Kenya and who holds a valid and current practising certificate.

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Under the Advocates Act, an unqualified person may not directly or indirectly take instructions or draw and/or prepare any document or instrument relating to any of the following matters:


1. the conveyancing of property (e.g. by way of sale, transfer, lease or charge);
2. the formation of any public or private limited liability company;
3. the formation or dissolution of a partnership;
4. the filing or opposing of a grant of probate or letters of administration;
5. any matter for which a fee is prescribed by any order made by the Chief Justice ( the existing Advocates Remuneration Order is an order made to provide for the remuneration of Advocates with respect to prescribed fees in specific matters); or
6. relating to any other legal proceedings.

### **The Case Law**

In the Court of Appeal case of *National Bank of Kenya v Wilson Ndolo Ayah Civil Appeal No.119 of 2002* (“*NBK v Ndolo Ayah*”) it was held, among other things, that a Legal Charge over land and a Guarantee created/issued in favour of a commercial lender to secure certain obligations of a borrower had not been drawn and prepared by a “qualified person” and, as such, the Legal Charge and the Guarantee were invalid and unenforceable. In respect of the Guarantee, while there was no evidence on the document of the person who had drawn and prepared the Guarantee the borrower testified that the document had been drawn and prepared by the same Advocate who drew and prepared the Legal Charge. The Advocate was not deemed to be a “qualified person” for the purposes of the Advocates Act as the Advocate in question did not at the time hold a valid and current practising certificate.

### **What does this mean for Guarantees?**

It is arguable that the Ruling in *NBK v Ndolo Ayah* has created a gap in the law as guarantees are not listed in the Advocates Act as documents that are required to be drawn and prepared by qualified persons. Guarantees are unlike legal charges, which are documents that are created to convey a security interest in property in favour of a lender by way of a fixed legal



charge and, *per se*, are required to be drawn and prepared by qualified persons. Likewise, while the existing Advocates Remuneration Order provides for the remuneration of qualified persons with respect to the drawing and preparation of legal charges over property, the same Advocates Remuneration Order does not provide for remuneration of qualified persons with respect to the drawing and preparation of guarantees.

In Kenya, it is common practice for local lenders to draw and prepare their guarantees “in-house” in the lender’s standard form or template rather than procure that their guarantees be drawn and prepared by qualified persons. In these cases, lenders need to be aware that the Ruling in *NBK v Ndolo Ayah*, being a ruling of the Court of Appeal, is ultimately binding on courts subordinate to the Court of Appeal. In this regard, an “in-house” prepared guarantee presented as evidence in a subordinate court may be challenged on the grounds that it falls foul of “in-house” prepared guarantee presented as evidence in a subordinate court may be challenged on the grounds that it falls foul of the Ruling in *NBK v Ndolo Ayah* and such an “in-house” guarantee may be set aside on similar grounds unless there is evidence on the document that proves that the “in house” prepared guarantee was drawn and prepared by a qualified person (being an advocate or a firm of advocates).

## **Conclusion**

The position has for a long time been settled that financiers should ensure that charges and mortgages are prepared by a qualified advocate. With regard to guarantees, unless and until the law in this area is clarified by way of either a decision of a superior court or fresh legislation, it would be prudent for both local and international lenders to take greater cognisance of the effect of the ruling in *NBK v Ndolo Ayah* and take steps to mitigate the risks to their security by ensuring that guarantees issued in their favour are drawn and prepared by qualified persons as prescribed by the Advocates Act.

This information was provided by Anjarwalla & Khanna. The contents of this article are intended to be of general use only and should not be relied upon without seeking specific advice on any matter. For more information on security documentation in Kenya please contact the authors listed below or [nbi@africalegalnetwork.com](mailto:nbi@africalegalnetwork.com).

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