



ROBA & ASSOCIATES
A Broader Perspective

THE DUE DILLIGENCE CONUNDRUM OVER LAND TITLES CLARIFIED BY THE SUPREME COURT



DaShanne Stokes

*“Facts are threatening
to those invested in
fraud.”*

Property Due Diligence

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The importance of comprehensive due diligence has been a recurrent theme across various major forums. Prospective property buyers are consistently urged to undertake meticulous due diligence, but what exactly does this process entail? Where does one begin, and what factors should be considered?

Our alert methodically educates you on the fundamental elements of thorough due diligence, its origin, the legal conundrum that existed before and the step by step process of conducting a proper land search in Kenya.

Who is a Bona Fide purchaser for value ?...

A bona fide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

Generally, a bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defense against the claim of any prior equitable owner. It is for this reason that courts have further insisted that the principle of a bona fide purchaser will only be applicable where there is a registered title to land as was seen in the case of **Mohamed v Duba & another (Civil Appeal 83 of 2019) [2022] (Judgment).**

Historical principle of Due Diligence

Before the application of this principle, the state initially created and maintained a register of land holdings which served as the conclusive evidence (termed "indefeasibility") of title of the person recorded on the register as the owner and of all other interests recorded on the register. This was the Torrens system and had been localized through the passage of the Registration of Titles Act Cap 281 (Now repealed).

The interpretation of Section 23 of the (RTA) had been the subject of numerous court decisions. In the often cited case of **Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwua, Civil Appeal No. 60 of 1997.** The Court of Appeal held as follows:

"Section 23 (1) of the Act (RTA) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title-holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title."

Transition from RTA to LRA

Barely after the enactment of the LRA in 2012, more criticism challenged the new law for retaining the Torrens system. For instance, Hassan Asaria (Advocate of Kenya & Barrister at law in the U.K) published a paper in the Kenya Law reports in 2014, titled "Detailed Exposition of Torres System as incorporated in RTA and LRA". In his paper, he categorically stated that RTA and LRA were basically similar because the Torrens system of registration was still incorporated in the two Acts. Further, he adds that the principle had not been mooted out in a real sense inside or outside the court and as such, the concept was quite not understood in Kenya. Indeed Section 26 of the Land Registration Act, No. 3 of 2012, provides that that a certificate of title shall be taken by all courts as prima facie evidence that the person named as a proprietor of land is the absolute and indefeasible owner of such land, except in the following circumstances:

i)if the proprietor was party to the fraud or misrepresentation leading to issuance of the certificate of title; or

ii)where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The Supreme Court Decision and its Implications

Despite the ubiquitous reference to the Due diligence principle in Kenyan property transactions, a recent landmark judgment from the Supreme Court will clarify the grey areas that had seen the court of Appeal taking different positions over the years. This was the case of **Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] (Judgment).**

Brief facts: The County Government of Mombasa challenged the validity of the title for the property, known as MN/1/6053 belonging to Dina Management Limited situated in Nyali Beach (the Property), on the grounds that the first owner of the Property had obtained the title in 1989 through unprocedural means and that the Property was public land reserved for a public road. As such, the County entered the Property and demolished the perimeter wall facing the beachfront to create a public right of way to the beach.

Dina Management Limited, being the third owner of the Property, challenged the actions of the County Government claiming that it was a bona fide purchaser for value, having paid KES.18 million to acquire the Property. In its defence, Dina Management Limited indicated that it was not party to the unprocedural process of acquiring the title and had undertaken its due diligence before acquiring the said title.

The Court's Decision: The Supreme Court affirmed the decisions of the High Court and the Court of Appeal that the Property was a public utility incapable of giving rise to a private proprietary interest capable of being protected by a court of law.

The Supreme Court additionally noted that the title to the Property was:

- Freehold title contrary to the provisions of the Government Land Act (Repealed) which provided that the leases of town plots should only be granted for any term not exceeding one hundred years; and
- The Property was an open space which had been set aside for "public purpose" and therefore, could not be considered as "unalienated land" meaning its ownership could not be transferred

Key Take-away: This is best summarized from the judgment's excerpt as follows:

"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed."

In effect, one must go to the root of the Title in order to satisfy oneself as to the Title's validity.

Implications caused by the Decision: The decision upsets the Torrens system that had been predicated upon the sanctity of the Register and resolves earlier conflicting decisions by the Court of Appeal with regards to the Bona Fide Purchaser principle. For example, In **Tarabana Company Limited v Sehmi & 7 others, (Civil Appeal 463 of 2019) [2021] (Environment and Land),** The Court of Appeal determined the Appellant to be a bona fide purchaser as the illegal title had been acquired before the Appellant came into the picture.

The Conundrum...

The court held *"There was no evidence adduced before the trial court to show that the Appellant played any role, or was involved in any way in the said process. If title was acquired by fraud, or misrepresentation, illegal, unprocedural or corrupt scheme, the same was before the Appellant came into the picture. We therefore find that the appellant was a bona fide innocent purchaser for value for these reasons, and its title could not and cannot be challenged."*

However, contrasting ***Tarabana's case*** with ***Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others (2015) Eklr.***, a different holding was given where the Court of Appeal held that the Appellant was not a bona fide purchaser. The court reasoned that the Appellant's documents of share transfer were marred with forgeries. These documents were subsequently used by fraudsters to sell the suit property to the appellant who then sub-divided it into different parcels. The court held that no valid title passed to the appellant since it was irredeemably fake, noting that titles acquired by subsequent purchasers of the subdivisions were also null and void.

The only time that this question almost went before the Supreme Court was in the case of ***Kiarie v Administrators of the Estate of John Wallace Mathare (Deceased) [2015] eKLR***. In its ruling delivered on 16 October 2015, the Supreme Court held as follows:

"On the basis of the record before us, we are left with no option but to find that the applicants have not demonstrated any inconsistency in the state of the law regarding the doctrine of indefeasibility of registered title to land, occasioned by contradictory decisions by either the High Court or the Court of Appeal. We are, thus, in agreement with the Court of Appeal's conclusions on this question."

Thereafter, the Supreme Court declined to certify the Kiarie appeal as raising a matter of general public importance and dismissed the application. It is therefore upon this ground that the landmark Dina Properties case came to clarify this conundrum.

Due Diligence Processes that ought to be completed before purchasing a property

It is essential for a prospective purchaser to investigate the root of the title they intend to acquire. Among the due diligence processes that ought to be concluded include:

- Conducting a historical search of the property at the relevant Lands Offices;

-Conduct an official search at the Land Registry

-Green card verification; title deed must match with the details written on the green card

-Review Caveats and other restrictions on the title. For instance, Sections 28 and 93(3) of the Land Registration Act as read together with Section 12(5) of the Matrimonial Property Act, require spousal consent.

-County government land rates and rent; this will confirm whether land rates have been settled together with the details of the registered user.

- Requesting for letters of allotment;

In *Torino Enterprises Limited vs Attorney General (Petition 5 (E006) of 2022) (2023).*

The Supreme Court averred that a letter of allotment, even when perfected, does not inherently grant transferable title to the allottee until the purchasers are officially registered as land proprietors following the finalization of the allotment letter. This case is important as it came after the Dina Properties case.

Due Diligence Processes ...

- Confirming that the property is not listed in any of the published Volumes of the Ndung'u Report on Illegal/Irregular Allocation of Public Land in Kenya
- Seeking a confirmation from the National Land Commission (NLC);
- Seeking confirmation from the Kenya Urban Roads Authority (KURA) /Kenya Rural Roads authority (KeRRA), as may be applicable.
- Undertaking a search at the Survey of Kenya office, over the intended property.
- Confirm that the property you intend to purchase complies with the zoning laws of that particular area and/or such other county directives that may be applicable.

CONCLUSION

Once all the above steps are undertaken successfully and the results show that the transaction is clean, the buyer will have the necessary confidence to proceed with the transaction. It is always better to take caution rather than rush into a transaction and later suffer losses. It is also advisable to contract the services of a qualified Advocate. Feel free to contact us anytime.

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