



Strathmore University

Law School

Balancing the competing interests of property owners and the state: An evaluation of the delicate balance between protecting the indefeasible title of bona fide purchasers while ensuring justice for victims of illegal property acquisition.

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

Wang'ondy Chege

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Prepared under the Supervision of

Arthur Ndumu

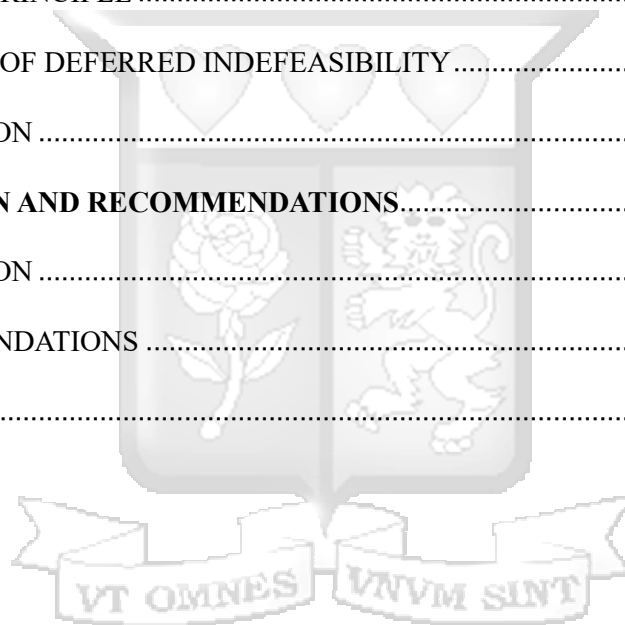
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TABLE OF CONTENTS

ACKNOWLEDGEMENTS	iii
DECLARATION	iv
ABSTRACT	v
LIST OF ABBREVIATIONS	vi
LIST OF CASES	vii
LIST OF STATUTES	viii
1.0 INTRODUCTION	1
1.1 BACKGROUND.....	1
1.2 STATEMENT OF THE PROBLEM.....	6
1.3 RESEARCH OBJECTIVES	6
1.4 RESEARCH QUESTIONS.....	7
1.5 HYPOTHESIS.....	7
1.6 JUSTIFICATION.....	7
1.7 THEORETICAL FRAMEWORK: THE THEORY OF DEFERRED INDEFEASIBILITY.....	8
1.8 LITERATURE REVIEW.	10
1.8.1 The Ndung'u report.....	10
1.8.2 On protecting the bona fide purchaser against claims of illegal and fraudulent acquisition. 11	
1.9 METHODOLOGY	12
1.10 CHAPTER BREAKDOWN.....	13
2.0 LEGAL FRAMEWORK ENSURING SANCTITY OF TITLE IN KENYA	14
2.1 INTRODUCTION	14
2.2 PRECOLONIAL SITUATION	14
2.3 COLONIAL PERIOD.....	16
2.4 POST COLONIAL ANTECEDENTS.....	18
3.0 PROTECTION OF PROPERTY TODAY	21

3.1	INTRODUCTION	21
3.2	SANCTITY OF TITLE IN KENYA.....	22
3.3	BONAFIDE PURCHASER FOR VALUE WITHOUT NOTICE.....	23
3.3.1	Process of acquiring property in Kenya.....	24
3.3.2	Challenges To The Bonafide Purchaser Doctrine.....	25
3.4	CONCLUSION	27
4.0	PROTECTING BONAFIDE PURCHASERS AGAINST CLAIMS OF FRAUD.....	29
4.1	INTRODUCTION	29
4.2	TORRENS PRINCIPLE	30
4.3	DOCTRINE OF DEFERRED INDEFEASIBILITY	33
4.4	CONCLUSION	34
5.0	CONCLUSION AND RECOMMENDATIONS.....	36
5.1	CONCLUSION	36
5.2	RECOMMENDATIONS	37
	BIBLIOGRAPHY	39



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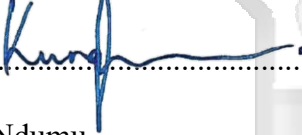
DECLARATION

I, WANG'ONDU CHEGE do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

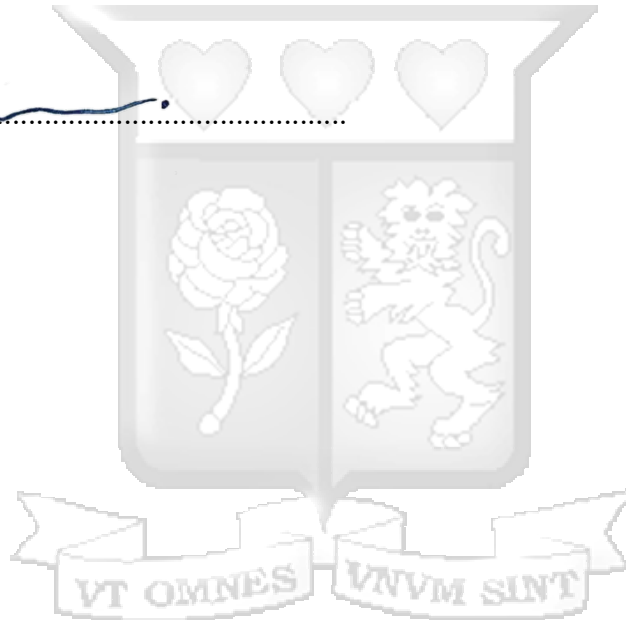
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Signed:


Mr Arthur Ndumu



ABSTRACT

Kenya's land registration system is filled with gaps, loopholes, and historical injustices. Since colonial rule to the present day, our land history has been riddled with fraudulent practices, irregular allocations, and challenges to the principle of the sanctity of title. From several judicial decisions, the interpretation of Article 40 of the Constitution and Section 26 of the Land Registration Act seem to differ depending on the adjudicator. Despite the current legal framework being aimed at protecting bona fide purchasers, it struggles to secure indefeasible titles against fraudulent sellers. Amid government efforts to reclaim illegally acquired public land, innocent purchasers hinder the supposed seamless resolve.



LIST OF ABBREVIATIONS

LRA Land Registration Act

TJRC Truth, Justice & Reconciliation Commission

NLC National Land Commission



LIST OF CASES

Gathuku v Nakuru Workers Housing Cooperative Ltd & another (Environment & Land Case 100 of 2016) [2023]

Lawrence Mukiri vs Attorney General & 4 others (2013), eKLR.

Sairowua v Olorgeso & another (Environment & Land Case E017 of 2021) [2023]

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Dr. Joseph Arap Ngok V. Justice Moiyo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997,

Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallace Muthare (deceased) & 5 others

James Nyaga V. Attorney General Misc Civil 1732 OF 2004 eKLR

Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005(Unreported)

Galaxy Realtors Limited v Kenya Forest Service 2020, eKLR.

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Katende v Haridal & Company Ltd 2008 2 E.A. 173.

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Gibbs v Messer

Embakasi Properties Limited & another v Commissioner of Lands & another (2019).

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Land Titles Act, Cap. 282, Laws of Kenya (Repealed)

Registered Land Act Cap 300, Laws of Kenya (Repealed)

Registration of Titles Act Cap 281, Laws of Kenya (Repealed)

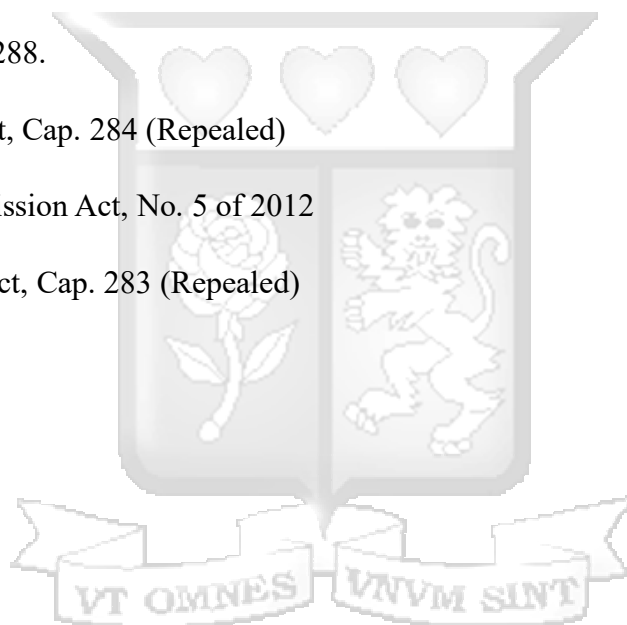
Environment and Land Court Act, 2011 No. 19 of 2011

Trust Land Act, Cap. 288.

Land Adjudication Act, Cap. 284 (Repealed)

National Land Commission Act, No. 5 of 2012

Land Consolidation Act, Cap. 283 (Repealed)



1.0 INTRODUCTION

1.1 BACKGROUND

In the annals of history, there are key moments that define a nation's destiny, and in 2010, Kenya experienced such a moment of great significance. In a sweeping declaration of progress and unity, a transformative Constitution was promulgated, replacing the relics of the past—the 1969 Constitution and the echoes of a colonial era in 1963. This marked the dawn of a new era, breathing life into the aspirations and hopes of a nation seeking social order and prosperity. With this new constitutional democracy, the stage was set for an exceptional test of its legitimacy. The measure of its success lay not only in the eloquent words on paper but in the judiciary's commitment to uphold a principled and coherent approach to interpretation.¹ Interpreting a newly developed transformative constitution provided and still provides a unique challenge for judges, as they had to grasp the desired scope of transformation embedded within the litigated constitutional provisions.² However, within the constitution, Article 259 assumes a crucial role by providing invaluable guidance for its analysis.³ It stipulates that the interpretation should actively contribute to the advancement of human rights and fundamental freedoms as have been outlined in the Bill of Rights.

In the great tapestry of fundamental rights that guide this interpretation, the right to property is fundamental.⁴ And it is within the confines of a legal system that these property rights find their refuge, and their existence granted and fiercely protected.⁵ Jeremy Bentham once postulated that property and law are inextricably intertwined, they are born together and they die together.⁶ To show the link pointed out by Bentham, Article 40 of the Constitution comes into play as it is dedicated to the protection of property rights.⁷ It reveals that amid the manifold forms of property, none commands a more profound presence than land itself.⁸ Land has been at the centrepiece to Kenya's social, economic, and political development from the precolonial era, to the relentless struggle for our independence.⁹ The constitution even goes ahead and dedicates

¹ Anditi S, *Judicial Approaches to Constitutional Interpretation in Kenya*, International Journal of Legal Developments and Allied Issues Volume 7 Issue 2, 2021, 288.

² Abungu C, *Revisiting the Place of Preparatory Documents in the Interpretation of Transformative Constitutions*, ICL journal, 2019, 69, <https://doi.org/10.1515/icl-2018-0052>.

³ Article 259, Constitution of Kenya.

⁴ Article 40, Constitution of Kenya.

⁵ Francis K, Smith O and Raphael N, *Property law*, Strathmore University Press, Nairobi, 2013, 2.

⁶ Bentham J, *The theory of legislation*, Oceana Publications, New York, 1975, 69.

⁷ Article 40, Constitution of Kenya.

⁸ Francis K, *Property law*, 153.

⁹ Public Policy Repository, *Sessional Paper No. 03 of 2009 on National Land Policy*, 17.

a whole chapter -Chapter 5- to dealing with land and the environment, portraying its value.¹⁰ The former president affirmed this in his nations address stating that ‘Land is the basis of all other economic activities and asserted the importance of sanctity of title which should never be in doubt.’¹¹

The journey to secure land rights has been tumultuous, marked by the echoes of colonial rule and transformative policies. Colonialism impacted landholding in Kenya variously: land separation from Kenyans, the imposing of English property laws, and the conversion of customary land laws introducing individualisation. In Times past, Kenyans practised communal ownership of property. A form of property that was not recognised and was seen as defective by the colonialists. They introduced policies aimed at guaranteeing individual land rights. A means perceived as tools to quell the demands for land among Kenyans.¹² This process of individualisation was done in three stages; adjudication, consolidation, and registration, a process that granted fee simple ownership of land to individuals.¹³ It was intended to bestow upon Kenyans a sacrosanct title when determining ownership.¹⁴ The colonialists followed the sentiments of Hernando De Soto, who opined that the formalisation of title was the key to unlocking the potential of informal property holdings and guaranteeing the security of tenure.¹⁵ This paved the way for a system that guaranteed people's private rights of ownership to land and fortified their confidence against the arbitrary deprivation of their land rights.¹⁶

When Kenya attained independence, the government was presented with a pivotal choice; to either retain the policies introduced by the colonial government or forge an entirely new path. In a moment of historical continuity, they opted for the former.¹⁷ Kenyans ironically found themselves compelled to either claim or buy back land that was once theirs. Conversely, as expectant Kenyans looked forward to the repossession of their land, the ruling elite saw it fit to misuse the policies adopted to amass substantial pieces of land for themselves at the cost of

¹⁰ Article 5, Constitution of Kenya.

¹¹ State of Nation Address speech by former president, Nairobi on 31st March 2016.

<http://www.president.go.ke/2016/03/31/speechby-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forcesof-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na-2/>.

¹² Francis K, Property law, 218.

¹³ John E Cribbet and Corwin W Johnson, *Principles of the Law of Property*, Third Edition, The Foundation Press, 1989, 17.

¹⁴ Francis K, Property law 219.

¹⁵ Hernando De Soto, *The mystery of capital*, Why Capitalism triumphs in the West and Fails Everywhere else, Basic Books, New York, 2000, 48.

¹⁶ Article 40(2) Constitution of Kenya.

¹⁷ Francis K, Property law, 169.

those most deserving.¹⁸ This marked a paradoxical shift, where the strategies that succeeded during the colonial era, laid the groundwork for the subsequent unlawful and illegal allocation of public land by the new sovereign administration. The state, which was both the conferrer and protector of these invaluable land rights became the facilitator of its illicit distribution.¹⁹ This turned the pages of history revealing a cycle where past struggles for justice metamorphosed into present sources of inequality. Unfortunately.

To build on this discussion on Kenya's land ownership history, a look at the legislation and judicial decisions becomes imperative. The repealed Registration of Titles Act conferred indefeasible title to a proprietor who had been registered.²⁰ Consequently, the Land Registration Act (LRA) and the Constitution have adopted this provision.²¹ However, despite this protection, the laws have been persistent in issuing caveats. The right to the governments protection of property does not cover any property acquired either fraudulently or unlawfully or through misrepresentation. When one adheres to the prescribed method of property acquisition, an individual then becomes a bonafide purchaser of property for value without notice. Uganda's Court of Appeal defined a bona fide purchaser as someone genuinely intending to purchase offered property without any wrongful acquisition intent.²² In adopting this definition, courts have come up with five elements that qualify a proprietor as a bona fide purchaser as seen in the case of *Lawrence P Mukiri v Attorney General & 4 others*.²³ As illustrated in the case above, these elements required to qualify a proprietor as a bonafide purchaser include: Some of these elements include:

- a. "The person holds a certificate of Title;
- b. The property was purchased in good faith;
- c. The purchaser was not aware of the fraud;
- d. The seller had an apparent valid title;
- e. The proprietor purchased without notice of fraud."

¹⁸ Francis K, Property law, 220.

¹⁹ National Council for Law Reporting Library, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2002, 7.

²⁰ Section 23, *Registration of Title Act* (Repealed).

²¹ Article 40, Constitution of Kenya (2010), and Section 26, Land Registration Act(No. 3 of 2012).

²² *Katende v Haridar & Company Limited*, (2008), E.A. This definition has been used and accepted widely in Kenya's jurisprudence: *Kariuki v Kinungi & another* (2012) eKLR; *Gathuku v Nakuru Workers Housing Cooperative Ltd & another* (2023) eKLR; *Lawrence Mukiri v Attorney General & 4 Others* (2015), eKLR.

²³ (2013) eKLR.

Thus, the law provides that a bona fide purchaser for value, without notice ought to be secure if they follow due process without notice of any defects to the title. Nevertheless, courts have been seen to be performing lip service when protecting a bona fide purchaser. They have chartered divergent paths in interpreting Article 40 of the Constitution as well as Section 26 of the LRA, consequently declaring an innocent buyer's title null ab initio in the pursuit of justice against historical land injustices. Section 26 (1) of the LRA establishes 'the doctrine of indefeasibility' under the Torrens System of registration. According to this principle, the registered proprietors instrument of title remains indefeasible unless proven that the title document was obtained fraudulently, or through misrepresentation, where the title owner is established to be a party to.²⁴

Judge Justice Onyancha, of the Court of Appeal, emphasized the potential danger of allowing a wrong doer the right to convey an interest in land to an innocent third party. This was held in the case of *Alberta Mae Gacii vs Attorney General & 4 Others*.²⁵ He posited that it would be 'a cursed day when a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration.' Despite the buyer being a bona fide purchaser without notice, Justice Onyancha went ahead to declare the buyer's title void.²⁶ Despite the enthusiasm to address past wrongs, the essence of Kenya's land registration being firmly rooted in the Torrens system poses a challenge when addressing land injustices.²⁷ It is a system built upon principles that seem to stand at odds with the outcome of these interpretations. Three cardinal principles guide the way for the Torrens system. First is the mirror principle which provided that the register should be a perfect reflection of the genuine state of the land title. The Curtain Principle then holds that ownership does not need to be proved by long complicated title searches as currently undertaken by all Kenyans purchasing land. Lastly, the Indemnity/Insurance principle ensures that the state provides guarantees and compensates individuals who incur losses due to inaccuracies in land registration.²⁸ Under this approach, the title instrument of a bona fide purchaser should be considered sacrosanct and not challengeable. However, this legal landscape, as demonstrated in the *Alert Mae Gacii* case, shows that challenges exist.

²⁴ *Sairowua v Olorgesio & another*, (2023), eKLR.

²⁵ (2006), eKLR.

²⁶ *Alberta Mae Gacii vs Attorney General & 4 Others*.

²⁷ Land registration being a Torrens system mechanism In Kenya has been adopted in various cases including; *Dr. Joseph Arap Ngok v Justice Moiwo ole Keiwua & 5 others*, *Charles Karathe Kiarie & 2 Others v Administrators of Estate of John Wallace Muthare (deceased) & 5 others*.

²⁸ Martin Dixon, *Principles of land law*, Cavendish, 2002, 104.

Notwithstanding, the case of *James Nyaga v Attorney General* also depicts this challenge.²⁹ Here, the Court of Appeal declared bona fide buyer's title void ab initio. The court referenced the repealed Constitution –now Article 40(6) of the new constitution. To strike a balance between justice for the affected party and to protect the rights of innocent citizens, the court invoked Article 84(6) of the old Constitution. This former article of the former constitution granted the court the unconstrained authority in granting suitable remedies available with the aim of ensuring that the ends of justice are met. In light of this, the court awarded compensation to the bona fide buyer for his loss. Sadly, some courts have shown contradicting opinions when dealing with remedying a bonafide purchase for value without notice.

With or rather without profound insight, the court in *Chemei Investments Limited v The Attorney General & Others* emphatically stated,

*"The Constitution protects a higher value, that of integrity and rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility."*³⁰

This judicial decision echoed through subsequent cases, notably in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others*.³¹ Here, the court firmly revoked the title of an innocent purchaser because the seller had acquired it fraudulently. This stance adopted by the judiciary is seen as a departure from the indefeasibility principle protected and guaranteed under a Torrens system. As a result, the bonafide buyer was deprived his property without any compensation or relief. Similarly, in *Galaxy Realtors Limited v Kenya Forest Service*, the court stripped the title from an innocent purchaser due to the seller's fraudulent acquisition.³² Acts not known to the buyer.

A notable shift in the judicial landscape occurred when the highest court in the land rendered its decision in the recent case of *Dina Management Limited v County Government of Mombasa & 5 others*.³³ In a bold move, the court blamed the bona fide purchaser for not conducting proper due diligence when acquiring the property. It opined that the bonafide purchaser should not only rely on the title registration but must go beyond the instrument of title and prove the legality of the title. The court stated that the registered proprietor ought to show that the purchase was legal, and formal, being free from any encumbrance. This goes beyond Torrens'

²⁹ (2004), eKLR.

³⁰ (2005), eKLR.

³¹ (2016), eKLR.

³² (2020), eKLR.

³³ (2023), eKLR.

principles adding burden to the buyer. From reflecting the courts' judgements, one would be compelled to question the reliability of the land register. The arbitral revocation of title challenges the infallibility of the register and brings doubt as to the sanctity of title.

The essence of the law was eloquently clarified in the case of *Elizabeth Wambui Githinji v Kenya Urban Roads Authority & 4 others*.³⁴ The court emphasized the intended use of the law; in that it is not to punish the innocent as all the trust and respect for the legal system would be broken down. Thus, one might ask, is this indefeasibility an unwavering protector of a bonafide purchaser in such a shifting legal landscape?

1.2 STATEMENT OF THE PROBLEM

Property rights are fundamental to human dignity and economic development. Article 40 of the Constitution recognizes the right to own property and provides for its protection. However, the exercise of property rights is not absolute and can be limited in certain circumstances, such as when the title to the property has been illegally acquired. The intricate challenge is to navigate between the protection of the indefeasible title of a bona fide purchaser and the imperative of rectifying wrongfully obtained titles.

Article 40(6) of the Constitution of Kenya provides that "the rights under this article do not extend to any property that has been found to have been unlawfully acquired." However, as the judiciary ensures the enforcement of this provision, diverse interpretations have emerged, creating uncertainty and inconsistency in the protection of property rights. Particularly, there is tension in protecting the rock-solid title of a bona fide purchaser who purchased the property from a fraudulent seller. A bona fide purchaser is someone who acquires property in good faith and for value, without notice of any defect in the title. The title they hold, unassailable and indefeasible, should be a shield against all challengers, including the original owner who may have lost it through fraud, mistake, or other illegal means. Thus, this project examines ways in which the constitution and Land laws should be interpreted to safeguard the indefeasible title of a bona fide purchaser for value when redressing the irregular acquisition of property.

1.3 RESEARCH OBJECTIVES

1. To explore the historical evolution of the legal framework governing property rights in Kenya.

³⁴ (2019), eKLR.

2. To analyse how property in Kenya is currently being protected.
3. To investigate how the Torrens principle and the doctrine of deferred indefeasibility of title can be used to protect the bonafide purchaser when redressing land injustices.

1.4 RESEARCH QUESTIONS

1. What has been the evolution of the legal framework governing property rights in Kenya?
2. How are the Kenyan legislation and judicial decisions protecting landowners in Kenya?
3. What are some of the principles that can be applied to protect bonafide purchasers from fraudulent sellers with illegally acquired titles documents?

1.5 HYPOTHESIS

The current interpretation of land provisions in the Constitution of Kenya as well as the other Land laws inadequately protect the indefeasible title of a bona fide purchaser for value in the redress of the irregularly acquired property. An alternative interpretation that places greater emphasis on safeguarding the rights of innocent parties would be more effective with the overarching purpose, values, and principles of these statutes. A bona fide purchaser for value gains an indefeasible title once it is registered by the registrar. Thus, the sanctity of their title necessitates respect and protection by the same government that grants the title. It is not the duty of the purchaser to investigate how other previous owners acquired the property, but only to ensure that they do due diligence when purchasing. Therefore, the hypothesis in this study is that the court's current practice of rescinding titles acquired through illegal means, even at the cost of bona fide purchasers, appears to counteract the intended objectives of Article 40 of the Constitution and Section 26 of the Land Registration Act.

1.6 JUSTIFICATION

The ownership of property is an essential aspect of legal and social relationships in any society. However, the acquisition of property is not always straightforward, and irregularities often arise, leading to disputes between competing interests. In this regard, the protection of the indefeasible title of a bona fide purchaser for value is crucial in ensuring certainty in property transactions and safeguarding the rights of innocent parties. Article 40 of the Constitution of Kenya recognizes the right to property as a fundamental right stating that "Every person has the right to own property of any description, and in particular, the right to acquire and own land." Sub-article 6 adds the caveat that such property rights do not cover any property that is

shown to be unlawfully obtained. Section 26 of the Land Registration Act provides that a registered owner's title is indefeasible, and no court may declare a title void against a bona fide purchaser for value. These two statutes are essential in the protection of the rights of innocent purchasers for value. However, the interpretation of these legal provisions has been subject to controversy, and there is a need to evaluate whether they should be interpreted differently in the redress of the irregular acquisition of property in Kenya. Previous studies have focused on the revocation of illegally acquired property claiming a seller cannot give what he does not have. This study will thus be unique in that it will focus on protecting the bona fide purchaser for value who has been given a legal title by the government from a fraudulent seller. This will be useful to lawmakers when drafting statutes that touch on land matters. It will also be useful to judges when interpreting Article 40(6) of the constitution while protecting the indefeasibility of title. This study will benefit land valuers when valuing the property of land despite its previous illegal acquisition; and banks when determining if one's property is indefeasible before taking it as security. It is also useful to researchers working on the protection of property rights.

1.7 THEORETICAL FRAMEWORK: THE THEORY OF DEFERRED INDEFEASIBILITY.

The theory of deferred indefeasibility is an important legal concept linked to the protection of the indefeasible title of a bona fide purchaser for value. In essence, this theory states that if a title can be considered initially void, it may become indefeasible after a certain period has passed, provided that certain conditions are met.³⁵ This means that bonafide purchasers can be protected despite getting a title document from a fraudulent seller. The theory is called deferred as there is a period of deferral which serves as a window for interested parties to challenge the transfer and assert their rights to the land. However, once the period has elapsed, and no challenge has been made, the title becomes indefeasible, and the purchaser's rights to the land are protected.³⁶ The theory of deferred indefeasibility arises as a means to protect the security of title in this uncertain landscape.³⁷

³⁵ Keang Sood Teo, *Deferred Indefeasibility Reinstated in the Malaysian Torrens System: The End of an Unfortunate Saga*, 2010, 3.

³⁶ Penelope J. C., *The Australian Torrens System Principle of Indefeasibility*, University of Western Australia, 2018, 24.

³⁷ Rwantagare T H, *A case for the Application of the Theory of Deferred Indefeasibility in Uganda as an instrument to Promote Indefeasibility Titles Act of title under the registration of titles act*, 28, *Makerere Law Journal*, 2022, 135.

The theory seeks to strike a balance between the need for guarantee in property transactions and the need to protect innocent parties from the consequences of fraudulent or illegal activity.³⁸ It recognizes that while the registration of a land transfer is an essential step in ensuring the transfer of title, it is not sufficient to guarantee the indefeasibility of title. Within the theory, concepts such as ‘intermediate’ and ‘deferred’ owners come into play. The intermediate owner is one who obtains their title from the fraudulent seller, whereas the deferred owner obtains the instrument of title from the intermediate owner.³⁹ Thus, it is only the deferred owner who has the right to claim indefeasibility of title, relying on the rule of bona fide purchaser for value without notice is protected. Unfortunately, the intermediate owner is not protected by the theory. This argument is based on the premise that the proprietor had the chance to investigate the transaction as well as the vendor’s title to avoid fraud.⁴⁰ It posits that neither the registration of this void document will rectify its defects, nor will it confer a good title.⁴¹ Nonetheless, the doctrine of deferred indefeasibility comes into play to protect the deferred owner from such claims of illegality.

The rationale following this theory was brought out in the case of *Gibbs v Messer* in that:

*“The protection which the statute gives to persons transacting on the faith of the register is by its terms limited to those who actually deal with and derive right from a proprietor whose name is upon the register. And so, those who deal, not with the registered proprietor, but with a forger... do not transact on the faith of the register.”*⁴²

This theory as illuminated in the case above is in overall fundamental in balancing the competing interests of certainty in property transactions and the safeguarding of innocent parties. By providing a window for interested parties to challenge land transfers, the theory seeks to enhance the security of land ownership and ensure that land transactions are fair and equitable for all parties involved.⁴³ Under this theory of deferred indefeasibility, a void title can form good root of a good title for a subsequent bonafide purchaser, despite being a void

³⁸ Ross J, *Real Property, Fraud and the Land Titles Act*, 2007, 221.

³⁹ *Ontario Inc v Canada Inc* 2019, 46.

⁴⁰ *Reviczky v. Meleknia et al* 2007, the deferred owner acquires a good title as he did not have the opportunity to discover the fraud.

⁴¹ Lord Denning famously stated in *Macfoy vs. United Africa Co. Ltd* [1961]; *If an act is void, then it is in law a nullity. It is not only bad, but incurably bad.*

⁴² *Gibbs v Messer* (1891) The Australian House of Lords.

⁴³ Penelope J. C., *The Australian Torrens system principle of indefeasibility: Is it ‘fit for purpose’ for the 21st century?* 26.

instrument of title.⁴⁴ In addition to guaranteeing the sanctity of title for an innocent purchase, this theory also saves people from the trouble and cost of investigating the history of the vendor's title.⁴⁵

The theory of deferred indefeasibility is essential in this study to show that a bona fide purchaser for value without notice can be protected when he purchases land from a fraudulent seller. The theory also protects the original owners from the illegal acquisition of their property by giving them time to petition their claim to a court before the title becomes indefeasible to the innocent purchaser. Thus, the interpretation of Article 40(6) of the constitution should not be construed to revoke the indefeasible title held by a deferred owner, a bona fide purchaser for value.

1.8 LITERATURE REVIEW.

This study is filled with a rich tapestry of research and opinions. Authors have attempted to address various issues of abrogating one's indefeasible title to redress illegally acquired title suing various means as will be discussed below.

1.8.1 The Ndung'u report.

Majority of authors writing on the redress of land injustices have based their research on the findings of the famous Ndungu report.⁴⁶ Among the many matters the Ndung'u's report focuses on, it is particularly known for noting the thousands of illegal titles that were created between 1988 and 2002.⁴⁷ It is opined that most of the illegal allocations were done on the orders of the President, other senior public officials and well-connected politicians.⁴⁸ The report then goes ahead to explain that after the leaders acquire the land, they are quick to sell the land to state corporations at hugely inflated values.⁴⁹ This puts the new buyer at risk of having a void title. However, most of these title documents have passed to even a fifth buyer who has utilised the land in one way or another. The successive governments have attempted to redress these

⁴⁴ Tukwatanise H. R. *A case for the application of the theory of deferred indefeasibility in Uganda as an instrument to promote indefeasibility of title under the registration of titles act.* 2022, 138.

⁴⁵ Penelope J. C., *The Australian Torrens system principle of indefeasibility: Is it 'fit for purpose' for the 21st century?* 28.

⁴⁶ *Report of the Commission of Inquiry into the Irregular Allocation of Public Land*, commonly known as the Ndung'u Report.

⁴⁷ Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land report*, 2004, 72.

⁴⁸ Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land report*, 2004, 12.

⁴⁹ Paul Ndungu, *Tacking Land Related Corruption in Kenya*, 5.

historical injustices by buying back the land from the ‘bonafide purchases’ who acquired it from the fraudulent sellers. For instance, it is seen that the National Social Security Fund spent approximately Kshs.30 billion between 1990 and 1995 in an attempt at repurchasing these illegally acquired properties.⁵⁰

Paul Ndung’u, the chairman of the commission that drafted the Ndung’u report, wrote a paper recommending that illegal title deeds need to be revoked by a competent authority, within the confines of the rule of law.⁵¹ This recommendation came after presenting the report. Acknowledging the large number of titles involved, and the slow, expensive, complicated, and bureaucratic processes of the conventional Courts, Ndung’u’s paper recommends the establishment of a simple, cheap, and accessible forum to deal with these problems.⁵² It recommends the prosecution of public officials who, by processing illegal titles, had actually committed criminal offences under Kenyan laws.⁵³

Additionally, Reginald Okumu, the former honorary secretary of the Institution of Surveyors of Kenya, is seen to concur with most of the recommendations of the ‘Ndung’u’ Report.⁵⁴ Nonetheless, he asserts that it would be prudent to ask whether the burden the country would have to bear in its quest to repossess the grabbed land is worth it. He also questioned the possibility of the land being utilised for its originally intended purpose upon its repossession.⁵⁵ Reginald was of the opinion that each case of illegal or irregular allocation should be treated uniquely. He catechizes if it is necessary to repossess land housing many families because it was acquired illegally.⁵⁶

1.8.2 On protecting the bona fide purchaser against claims of illegal and fraudulent acquisition.

Ahmed Nasir Abdilahi, the former chairman of the Law Society of Kenya, when responding to the ‘Ndung’u’ report, asserted that a title document remains sacrosanct and should only be

⁵⁰ Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land report, 2004, 93.

⁵¹ Paul Ndungu, Tacking Land Related Corruption in Kenya,5.

⁵² Paul Ndungu, Tacking Land Related Corruption in Kenya,5.

⁵³ Paul Ndungu, Tacking Land Related Corruption in Kenya,6.

⁵⁴ Reginald Okumu, How Should the ‘Ndung’u’ Report Recommendations be Implemented? What Kenyans Say, Newsletter of Kenya Land Alliance Volume 3, 2004, 7.

⁵⁵ Reginald Okumu, How Should the ‘Ndung’u’ Report Recommendations be Implemented, 7.

⁵⁶ Reginald Okumu, How Should the ‘Ndung’u’ Report Recommendations be Implemented, 7.

revoked through a judicial process: and this process requires careful consideration and sober decision-making devoid of a witch-hunt.⁵⁷

Advocate Hassan focuses on whether under the repealed Registration of Titles Act (RTA), title can be declared nullity ab initio.⁵⁸ He explains that under RTA common law principles and equity did not apply. Thus, when issued with a title, section 22 (1) of RTA assured you of the indefeasibility of title in rem, and section 22(3) stated that the buyer's title was deemed as a fresh grant extinguishing all past titles and interest. He goes on to explain that some courts applied a misconstrued meaning of the Act in tandem with Article 40(6) of the Constitution. He states that this misinterpretation of the statutes led to the suffering of the bonafide buyer and not the actual defrauder.⁵⁹

Academic Wilkister Nyangito has attempted to explore the different ways in which the government could repossess illegally acquired land. Her focus was on the legal challenges that have faced revocation of title deeds as an approach towards repossession of illegally acquired land in forests as water catchment areas in Kenya.⁶⁰

1.9 METHODOLOGY

The nature of the research in this study will be qualitative. To do so, the study will rely on qualitative evidence from mostly secondary sources such as books, articles, case law and reports. The study will also utilise primary sources such as the Constitution of Kenya; current and repealed land laws in Kenya and case law. In general, I expect to arrive at my findings through a deductive method whereby I will attempt to prove my hypothesis through the findings of the research questions outlined above. This study will also use the case study method to show a certain pattern of problems in court decisions and offer a solution to such.

The study will, in general, utilize a deductive approach with the first two chapters setting up a premise each, from which the main claim will be derived. The first chapter will analyse the evolution of property laws in Kenya. Chapter two will then observe the protection of property

⁵⁷ Ahmed Nasir Abdilahi, How Should the 'Ndung'u' Report Recommendations be Implemented, 11.

⁵⁸ Asaria H, Under RTA Title, Can Never Be Nullity Ab Initio & Interpretation of Constitution, Kenya Law, <http://kenyalaw.org/kl/index.php?id=1905>.

⁵⁹ Asaria H, Under RTA Title, Can Never Be Nullity Ab Initio & Interpretation of Constitution, Kenya Law.

⁶⁰ Nyangito W, *The Principle of Sanctity of Title as a Challenge in Repossession of Illegally Acquired Public Land: A Case for Review*, unpublished, University of Nairobi, 2011, 7.

in Kenya today, examining the extent to which courts have interpreted the constitution and land laws, defeating the sanctity of title of a bona fide purchaser for value.

I intend to analyse the history of the illegal acquisition of property and the way in which the government has tried to remedy that problem. This will look into the historical evolution of land laws since the precolonial era. I also intend to utilize a doctrinal analysis to show that the interpretation of the law by courts beats the purpose of the law. This is in regard to article 40(6) of the constitution and the protection of the indefeasible title of a bona fide purchaser. This wrong interpretation has affected purchasers of property in that they fear buying a good title only to be told that it was acquired illegally years ago.

1.10 CHAPTER BREAKDOWN

This study will have four different chapters that shall be essential to respond to the problem statement. The first chapter will observe the historical evolution of property laws in Kenya. In this chapter I will briefly examine where our current land laws have come from and their rationale.

Chapter two will be essential in evaluating the protection of property rights in Kenya today. In this chapter, I shall expound on how courts have pierced the sanctity of title of bona fide purchasers for value using various interpretations of the Constitution and land laws. I shall explicate the ways in which courts should facilitate the revocation of title deeds when addressing illegal titles.

Chapter three will evaluate how a bonafide purchaser can be protected by the principle of sanctity of title against fraud claims. In this chapter, I will look into the protection of the indefeasible title of a bona fide purchaser when addressing illegally acquired title. I will look into the Torrens principle as well as the theory of deferred indefeasibility.

Lastly, chapter four will be the conclusion. Here I shall offer solutions and recommendations to the challenge faced by courts in addressing illegally acquired title sold to a bona fide purchaser for value.

2.0 LEGAL FRAMEWORK ENSURING SANCTITY OF TITLE IN KENYA

2.1 INTRODUCTION

This chapter will aim to cover the legal framework behind protecting the indefeasible title of a bona fide purchaser and how it came to be. I will thus give a historical analysis of the evolution of land laws in the country to observe the reverence of land in society.

The exploration of the historical trajectory of land laws in Kenya is not merely an academic exercise but a crucial response to the prevalent gaps in understanding the contextual foundations of contemporary land reform discussions. Lawyers, legislators and even scholars, often overlook reports from commissions of inquiry, presenting an incomplete narrative of the persistent calls for a constitutional response to land issues.

Examining the history of land reform unveils its intrinsic connection to the political settlement accompanying decolonization. It was intricately linked to dismantling colonial subjugation, asserting rights to territorial space, and, significantly, reclaiming ontological recognition. In this context, the demands for land reform in Kenya cannot be fully grasped without acknowledging the ontological assault inflicted by colonialism.

This historical context becomes crucial for understanding recent legal reforms aimed at acknowledging and safeguarding customary or communal land rights. As Kenya grapples with contemporary land mischiefs, an exploration of the historical landscape becomes imperative for a holistic and insightful comprehension of the multifaceted challenges and potential solutions.

A second, more positive reason to rehearse the history of land reform as an idea, is our own Judiciary's quite explicit work itself to explore history and to put the historical impetus for change, including constitutional change, at the centre of its jurisprudence. surrounding land reform.

2.2 PRECOLONIAL SITUATION.

It is a common belief that Africa is merely an appendage of the Euro-American worldview in conceptualising property. However, this is not the case. Available records in Kenya indicate that before colonialism, communities governed land through community (informal) rules, or

what is today commonly known as customary laws.⁶¹ Under this system, no individual owned the land. Instead, land belonged to the whole community with individuals having the right to use it in a manner acceptable to the community. Thus, the allodial title belonged to the community in general.⁶² The land tenure system, defined simply as the manner in which individuals or groups in society hold or have access to land, varied greatly from one community to the other depending on cultural values, geography, climatic and socio-economic conditions. Individual property rights and land use rights existed as sub-regimes of joint community rights. Land access rights were open to every member of a social group and land was equitably distributed on the basis of individual needs to members of the social organisation in control of a particular territory. Community leaders acted as ‘judges’ and had the power to control land use.

Property relations among Africans relied on the principles of sustainability. Sustainability ensures that the resources are used to meet the needs of the present without compromising the demands of the past and the heritage of future generations.⁶³ To Africans, land was not and is not seen as merely an economic or political resource, but a transgenerational asset representing a connection between the past, present and future: the dead the living and the yet-to-be-born.⁶⁴

The African Commons are primarily the fountain from which the spiritual life and political ideology of communities sprang.⁶⁵ It is argued that the imposition of foreign property laws, devoid of spiritual connotations, contributed to the destruction, suppression and subversion of the African commons.

Western property scholars argue that the commons should not be considered as property systems, categorizing them as terra nullius or open-access resources.⁶⁶ According to them, property rights can only be vested in individuals or other legal entities granted title by a recognized authority, typically a juridical persona.⁶⁷ They posit that communities qua communities lack legal personality and are therefore deemed unfit for property ownership. To them, property rights might always derive, if not directly, but ultimately, from a sovereign. This argument is reinforced by the belief that a property system granting access based on

⁶¹ Okoth Ogendo H, *The tragic African Commons: A century of expropriation suppression and subversion*, University of Nairobi Law Journal, 2003.

⁶² Okoth Ogendo H, *Teaching Manual on the law of property*, 1982, 84.

⁶³ Okoth Ogendo, *The tragic African Commons*, 108.

⁶⁴ Republic of Kenya, *Report on The Commission of Inquiry Into The Land Law System of Kenya*, 2002, 19.

⁶⁵ Okoth Ogendo, *The Tragic African Commons*, 3.

⁶⁶ Okoth Ogendo, *The Tragic African Commons*, 4.

⁶⁷ Okoth Ogendo, *The Tragic African Commons*, 4.

inclusivity faces challenges in defining exclusive boundaries, as decision-making requires the collective participation of all community members.

The assertion that Africans lived without any governing authority is certainly not true. Take for example the Maasai who had clans, councils of elders, spiritual leaders and some organized structures giving their community a system of government. Despite their common, nomadic nature, the presumption that they lacked a settled form of government would be mistaken.⁶⁸

2.3 COLONIAL PERIOD.

The formation of the Kenya's protectorate resulted in the 'expropriation, subversion, and destruction of property systems' here in Africa.⁶⁹ Colonisation impacted the landholding ideologies in Kenya in three major ways; land alienation from Africans, the burden of the foreign property laws and the alteration of customary land law and tenure.⁷⁰ For the colonial government to justify their occupation in Kenya, they needed to assert original title over land. It is for this reason that the Commissioner⁷¹ noted that Africans did not have title to their land and were only concerned with occupational rights over their land.⁷²

The effect of the 1915 ordinance was captured by the colonial Court in the famous case of *Isaka Wainaina wa Gathomo and another v Murito wa Indangara and others*. The court in this case interpreted the Crown Lands Ordinance in that it asserted Kenyans to be mere tenants at the will of the crown -in their homeland.. They were just temporary occupants of the land.⁷³ This judgement rendered by Barth CJ effectively rendered Africans landless.⁷⁴

The introduction of English Property Law had adverse ramifications on land ownership and management in Kenya.⁷⁵ First, it signalled the commencement of individualised ownership in Kenya. Another ramification was the alteration of the role of the community concerning planning, expansion, and resettlement. The traditional concept that land belonged to society,

⁶⁸ Galaty L H, *Moving the Maasai, A colonial misadventure*, 2006, 14.

⁶⁹ Okoth Ogendo, *The Tragic African Commons*, 8.

⁷⁰ Wanjala S C, *Essays on Land Law: The Reform Debate in Kenya, 'Land ownership and use in Kenya: Past present and future'*, University of Nairobi, 2000, 27.

⁷¹ The head of government was the Commissioner until 1906 when it the title was changed to Governor. The Commissioner was the representative of the Crown, was mandated to implement laws passed in England and was accountable to him/her.

⁷² Okoth Ogendo, *Tenants of the Crown: Evolution of Agrarian law and institutions in Kenya*, Africa Centre for Technology Studies Press, Nairobi, 11.

⁷³ (1922-23) eKLR.

⁷⁴ Okoth Ogendo, *Tenants of the Crown*, 54.

⁷⁵ Wanjala S C, *Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and Their Possible Solutions*, University of Nairobi, Nairobi, 2000, 84.

became subservient to individual ownership. As the colonialists established dominion over the country, strategies were needed to facilitate their settlement. They established reserves.⁷⁶ The establishment of these reserves had numerous challenges and thus the Kenya Land Commission (Carter Commission) was formed and appointed to investigate the proper tenure type within these native reserves.⁷⁷ The Native Land Trust Ordinance was enacted to implement some of the recommendations of the Carter Commission. This ordinance was tasked with forming the native reserves and searching for additional land for these reserves. Some of its challenges included the fact that the crown could still grant leases to Europeans in these reserves. The foremost intention of the commission was to bring Kenyans under the realm of individual ownership of land.⁷⁸

In 1954, the government published the Swynnerton Plan.⁷⁹ This plan was established as a guide aimed at strengthening the agricultural development in the reserves, motivating individualization of land, providing secure tenure through an indefeasible title. The authorities were of the opinion that native Kenyans would be motivated to devote their efforts and profits to develop their small farms and to thereafter offer it as security for credit for more development. To implement this plan a three-step process was followed: adjudication, consolidation and registration.⁸⁰ Adjudication comprised of the establishment of individual or group rights amounting to ownership over land. Customary land law was on a path towards being obsolete. Consolidation then involved the unification of parts into single economic units. It was aimed at solving the problem of excessive division, reducing the movement time thus enabling planning and extension work. Lastly, registration involved the inclusion of established rights into the land register and thereafter issuing a title deed.⁸¹ Registration transformed land into a trade commodity introducing an easily obtainable and transferable title. Whence Kenya attained independent rule, individualization of land tenure was focal, and it guided all the legal frameworks in an attempt to realize this status quo.

⁷⁶ Okoth Ogendero Tenants of the crown, 53.

⁷⁷ Great Britain, Carter W M, Report of the Kenya Land Commission, H.M. Stationery Off, 1934.

⁷⁸ Okoth Ogendero Tenants of the Crown, 70

⁷⁹ The Swynnerton plan targeted the abilities of families to be self-sufficient.

⁸⁰ Swynnerton R, *The Swynnerton Report: A plan to intensify the development of African agriculture in Kenya*, 1955.

⁸¹ SC Wanjala 'Land ownership and use in Kenya: Past present and future', 30.

2.4 POST COLONIAL ANTECEDENTS

While the fight for Kenya's independence revolved around land issues, it is paradoxical to see the new government adopt the same land laws of subversion from our colonial masters.⁸² This decision to uphold colonialist land titles, unfortunately, dashed any hopes of native Kenyans seeking restitution for land acquired by our colonisers. The independent government thereafter enacted the Registered Land Act ensuring effective title registration. Once a proprietor registered their interests under this repealed act they received absolute ownership over the land.⁸³ These rights gave the proprietor rights against all adverse claims or overriding interests.⁸⁴ This act also assured the sanctity of title to all those registered under it on a first come basis. Stipulating that these rights are guaranteed by the government as they are final and conclusive evidence of title.⁸⁵ Under the act, courts were prevented from interfering with first registrations.

In 1999 the call for a comprehensive review of Kenya's land law systems gained momentum, leading to the establishment of the Commission of Inquiry into the Land Law System of Kenya appointed by the then president.⁸⁶ The primary goal of the commission was to formulate and establish principles of a National Land Policy. Another commission was then formed by the president in 2003 to investigate the irregular allocation of public land in the country. This was the famous Ndung'u Land Commission.⁸⁷ This commission shed light on several irregularities and illegalities that were used to grab land. It also investigated how presidential powers were abused in land allocation. Notably, the commission pointed out how some land set aside for the Nairobi bypass was allocated to individuals.

The year is 2003 when the Ministry of Lands, decides to publish a Draft National Land Policy tasked with the mandate to implement the recommendations in the report by the Njonjo Commission and the Ndung'u Commission. This policy was aimed at realizing an 'efficient, sustainable and equitable' use of land. The policy went ahead to recommend issues regarding land be provided for individually in the Constitution. This would also cater for some marginal groups and communities including, persons with disabilities, and even, women who had little or no access to land. Thus, other than the grave violations of the provisions of the repealed

⁸² Wanjala, Land Ownership and use in Kenya, 31.

⁸³ Section 27, Registered Land Act(repealed).

⁸⁴ Section 28, Registered Land Act(repealed).

⁸⁵ Section 37, Registered Land Act(repealed).

⁸⁶ Commission of Inquiry into the Land Law System of Kenya.

⁸⁷ The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land.

Land laws, sufficient legal awareness and treatment of community land and land owned by minority groups was impending. Arising from this policy land was then categorized as private, public or communal land.

Land law in Kenya faced significant limitations under the pre-2010 constitution, largely characterized by exceptions. This significant defect was evident in both the Independence Constitution and majority of the repealed Statutes. The era post-independence recorded a notable decline a decline in the development of land law in Kenya. This was primarily attributed to the unfettered authority vested in the presidency to willfully allocate property. It was not until the first multiparty elections that Kenya saw the material development of land law. The period spanning from 1990 to 2009 can be regarded as the period of land law derision in Kenya's history.

The *Sessional paper No. 3 of 2009* recognized that the statutes dealing with land issues were numerous and therefore proposed the harmonization of the same to bring about efficiency and transparency around Land Laws.⁸⁸ It recommended several actions by the government which include:

- 1) "Repeal the land registration stipulations of the Registration of Titles Act⁸⁹
- 2) Repeal the Land Adjudication Act⁹⁰.
- 3) Repeal the Consolidation Act⁹¹
- 4) Enact a Land Registration Act⁹²
- 5) Amend the Land Titles Act⁹³
- 6) Amend the Registered Land Act."

Then came the 2010 Constitution which sought to solve most land issues. It dedicated a whole chapter to land and the environment.⁹⁴ This chapter defines the various property types recognized in the country and then goes ahead to prescribe the regulation of property. Article 67 then establishes the National Land Commission. This commission is given several functions

⁸⁸ Public Policy Repository, *Sessional Paper No. 03 of 2009 on National Land Policy*, 2009, 1.

⁸⁹ Public Policy Repository, *Sessional Paper No. 03 of 2009 on National Land Policy*, 36.

⁹⁰ Public Policy Repository, *Sessional Paper No. 03 of 2009 on National Land Policy*, 36.

⁹¹ Public Policy Repository, *Sessional Paper No. 03 of 2009 on National Land Policy*, 36.

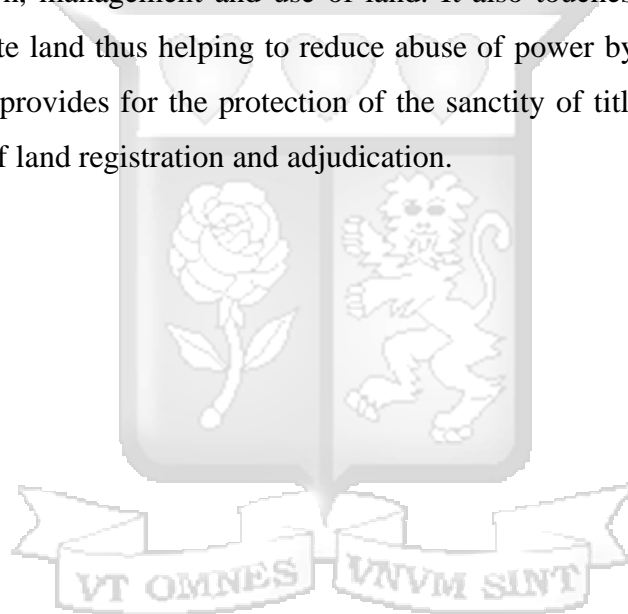
⁹² Public Policy Repository, *Sessional Paper No. 03 of 2009 on National Land Policy*, 35

⁹³ Public Policy Repository, *Sessional Paper No. 03 of 2009 on National Land Policy*, 18.

⁹⁴ Chapter Five, Constitution of Kenya.

including; the management of public land; investigating complaints on present and historical land injustices while recommending the appropriate redress; and many others.⁹⁵ It is important to note that the commission is not mandated to revoke titles for land injustices but just recommend means of redress. As if it is not enough, Article 40 of the Constitution provides for the explicit protection of property rights.⁹⁶ This provision of the law provides that every person has the right to own property of any description in any part of Kenya and that this interest in land should be protected. The article concludes by asserting that property acquired unlawfully cannot be protected.

Other legislation that governs land use and management in Kenya today include the Land Act and the Land Registration Act(LRA). The Land Act presents suitable mechanisms for the efficient administration, management and use of land. It also touches on the conversion of public land into private land thus helping to reduce abuse of power by any of our leaders or institution. The LRA provides for the protection of the sanctity of title in Kenya.⁹⁷ This act explains the process of land registration and adjudication.



⁹⁵ Article 67, Constitution of Kenya(2010).

⁹⁶ Article 40, Constitution of Kenya(2010).

⁹⁷ Section 26, Land Registration Act.

3.0 PROTECTION OF PROPERTY TODAY

3.1 INTRODUCTION

Globally, land is deemed to be one of the most valuable natural assets for mankind. In Kenya, it transcends mere geography as it also forms the basis of the livelihood of many Kenyans. Within our constitutional framework, land is classified into three tenure types; public, private, and communal.⁹⁸ Under the repealed land law regime, land fell into different classifications government, trust, and private land. Government land was held by the government; whereas the local authorities held the land in trust for the people in the locality.⁹⁹ Tenure in Kenya's landscape is more than just a legal concept. It denotes the recognition of a right, a right to hold land.¹⁰⁰ This tenure also guarantees people the right to access land and the security and confidence that they will not be arbitrarily deprived of their land rights.¹⁰¹ According to Okoth-Ogendo, to understand Kenya's land tenure arrangement, one needs to answer the tripartite question: who owns, what interests in what land.¹⁰² Interest delineates the relationship between the landowner and the land.¹⁰³ The interest holder-who, connotes the landowner, the entity in which the interest in land is vested. To examine the extent of the interest holders, the state features predominantly as it has allodial title over the land. As such, it serves as both the conferrer of land rights and its protector. Lastly, in response to the final part -what land- the various categories in our jurisdiction: public, private, and communal land, as enshrined in the constitution.

Ownership is one of the ways in which interest in land can be manifested in Kenya. It is the quantum of rights a person has in a thing that causes people to assume that the interest 'belongs' to the person.¹⁰⁴ In Kenya, this interest in land is connoted by a title deed. De Soto encourages that formalisation of title is what guarantees the security of tenure.¹⁰⁵ Title is considered to be sanctified and all other claims over land are defeated when one has title. Title is vested in a person upon going through the formalisation processes which have been established by the

⁹⁸ Article 61(2), Constitution of Kenya(2010)

⁹⁹ Section 32 Trust Land Act, repealed.

¹⁰⁰ Dekker H A L, In Pursuit of Land Tenure Security, Amsterdam University Press, 2006, 1.

¹⁰¹ Knight R S, Statutory recognition of Customary Land Rights in Africa: An investigation into the best practices for law making and implementation, FAO Legislative Study Guide, 2010, 105.

¹⁰² Okoth-Ogendo, Tenants of the Crown, 15.

¹⁰³ Francis Kariuki, property law, 195.

¹⁰⁴ Rose, 'Possession as the origin of property' University of Chicago law review, 1985, 76.

¹⁰⁵ Hernando S, The Mystery of Capital, 2001.

state. The Kenyan context recognises titles vested in the three different classifications of property.

In this chapter, I will delve into the protection of the title deed. How the state and the laws guarantee the sanctity of title in Kenya. Showing how without sanctity of title should be protected otherwise the whole land registration process would be in jeopardy. I will then move into discussing a bona fide purchaser for value without notice. This is the property owner who purchases property in good faith for value without notice of any defects including fraud.

3.2 SANCTITY OF TITLE IN KENYA.

Sanctity of title is the greatest value granted to title deeds to the point of being sacred.¹⁰⁶ This notion of sanctity is closely linked to the indefeasibility and inviolability of title which are at times used interchangeably. Indefeasible title protects the registered proprietor against all claims conflicting with the register, since the register is the authoritative record of all valid land interests.¹⁰⁷ This shows that this registered interest cannot be cancelled, voided, or revoked by any claims from any unregistered interest. An inviolable title is one that cannot be broken or invaded.¹⁰⁸ The state then assures the proprietor of respecting their interests once it issues the instrument of title.¹⁰⁹

The government's guarantee is from the details provided for in the register which grants indefeasibility. This indefeasibility implies inviolability which provides for the definitive value to the title that it is considered sacred. Notions such as the sanctity of title, indefeasibility and inviolability and the state's guarantee work hand in hand to impede the revocation of instruments of title issued to bonafide proprietors from those who acquired the land illegally. Thus, one might ask, can this illegally acquired title be declared to be valid at any point?

Article 40 of the Constitution guarantees the right to own property accorded to every person, either individually or in association with others.¹¹⁰ Section 26 of the LRA, then goes ahead to stipulate that the title documentation issued by the registrar ought to be prima facie proof that the individual named as the landowner is the absolute and indefeasible owner of the property,

¹⁰⁶ Patrick McAuslan, *Land Law Reform in East Africa, Traditional or Transformative?* Routledge, 2015, 21.

¹⁰⁷ Kelvin F K Low, *The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities*, Melbourne University Law Review, 2009, 3.

¹⁰⁸ Mugambwa, J.T. (2001), *Judicial Assault on the Citadel of Indefeasibility of Title under the Papua New Guinean Torrens System of Conveyance*, Journal of South Pacific Law, 2001, 2, <http://www.paclii.org/journals/fJSPL/vol05/2.shtml>.

¹⁰⁹ P.L Onalo, *Land Law and Conveyancing in Kenya*, (Heinemann Kenya: Nairobi), 1986, 9.

¹¹⁰ Article 40, Constitution of Kenya.

subject to the encumbrances, easements, restrictions and conditions in the Title. This essentially should mean that an innocent buyer who purchased a property and was legally issued with a title deed by a land registrar is the rightful owner even if there were irregularities or illegalities in the initial allocation process. However, in protecting the rights of the proprietor, both the Constitution and Land Registration Act provide a proviso. The laws provide that if a title has been acquired on the grounds of fraud, misrepresentation, illegality, or through corruption it can be challenged.

Section 26 of the LRA which is a replica of section 23 of the repealed Registration of Titles Act, fortifies the doctrine of the sanctity of title. This doctrine which stems from the Torrens system gives the guarantee that the state will protect the indefeasibility of a registered title unless it can be proven that the title was obtained through fraud or misrepresentation. It is according to this framework that when a person is issued a certificate of title, they gain the assurance of sole ownership, free from claims by third parties.¹¹¹

Despite having these protective mechanisms to protect property owners, land is a very delicate thing that needs proper due diligence when being dealt with. As was advised in the Arthi Highway Developers case, “... *land market in Kenya was/is a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima Market.*”¹¹²

3.3 BONAFIDE PURCHASER FOR VALUE WITHOUT NOTICE

A bona fide purchaser is a proprietor who ‘honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly’.¹¹³ The court in the case of Okedo v Buluma & another,¹¹⁴ quoted, a famous Ugandan case¹¹⁵ to describe a Bonafide purchaser. It stated that, for a purchaser to effectively rely on the bona fide rule, he must prove that:

- a. “he purchased the property in good faith;
- b. he had no knowledge of the fraud;
- c. he purchased for valuable consideration;

¹¹¹ Teresia Wangari Mbugua v Jane Njeri Nduati & another [2020] eKLR.

¹¹² Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR.

¹¹³ Teachers Service Commission v Ashford Tours & Travel Limited (2023); Lawrence P Mukiri v Attorney General & 4 others [2013] eKLR; and Marteve Guest House Limited v Njenga & 3 others (2022)

¹¹⁴ Okedo v Buluma & another, (2023), eKLR.

¹¹⁵ Katende v Haridal & Company Ltd, (2008) E.A. 173.

- d. the vendors had apparent valid title;
- e. he purchased without notice of any fraud;
- f. he was not a party to any fraud.”

Section 26 of the Land Registration Act states that;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

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

A plain reading of section 26 of the Land Registration Act suggests that a bona fide purchaser is assured of protection if he is free of any fraudulent claims. In the case of *Dr Joseph Arap Ngok v Justice Moiyo ole Keiwua*, the Court pronounced itself in that the bona fide purchaser can only be subject to fraud or misrepresentation to which he is proved to be a party. The court goes ahead to confirm that the Act is meant to give sanctity of title otherwise the whole title registration process and the property ownership system in Kenya would be in jeopardy.

3.3.1 Process of acquiring property in Kenya.

In Kenya, there are two primary forms of property ownership: freehold and leasehold property ownership. Freehold offers indefinite ownership as long as ownership conditions remain unchanged, whereas leasehold provides ownership for a limited period with the option to extend tenure upon expiration. The process of purchasing land begins with the buyer identifying a suitable parcel. After identifying the land, the buyer should ideally visit the site, to ensure it aligns with their desired criteria. To initiate the purchase, the buyer or their lawyer should obtain a copy of the title and National Identity Card of the seller.

Afterwards, the buyer should conduct comprehensive searches for both the land and the person listed as the registered owner. Section 28 of the LRA shows that land searches are an overriding

interest over land. This ensures confirmation that the purported owner is indeed the legitimate one, guarding against potential fraud. The search result will reveal the registered owner of the property; the size of the property and any encumbrances registered against the titles like prohibitions, court orders, cautions, and caveats. When the search results are satisfactory, it is advised to check for the land in the Ndung'u Land Report. This is to protect the buyer from buying land that has a claim of unlawful acquisition over it.

Upon the buyer's satisfaction with their preliminary investigation, they, or along with their advocates, should engage the vendor on terms of sale, including the price and payment conditions. After agreeing on the sale terms, the vendor's advocates will prepare the sale agreement, and send it to the vendor for approval. This agreement outlines critical aspects such as the parties' names, purchase price, payment method, completion period (typically 90 days), and the documents needed from the seller to facilitate property transfer to the purchaser. It's common for the sale agreement to include an arbitration clause, facilitating an efficient dispute resolution mechanism.

Upon mutual agreement on the terms outlined in the sale agreement, the document is engrossed and executed by the involved parties or their power of attorney. The purchaser typically initiates the signing process, and subsequently, the executed agreement, along with the deposit cheque or proof of payment, is submitted to the vendor's advocates for their execution. After the vendor's execution, the vendor's advocates are responsible for ensuring the sale agreement is promptly presented for stamping, including the necessary duty, at the land's office. This step is crucial, as articulated by section 46 of the Land Registration Act. The preparation of the transfer document is typically undertaken by the purchaser's advocate, subject to approval by the vendor's advocate, with signatures required from both parties.

Following the stamping of the transfer of land or charge over the property, along with the original titles, land rent and rates clearance certificate, consent to transfer, among other documents, shall be submitted for registration. The conclusive step in the land purchase process involves the official registration of the transfer.¹¹⁶

3.3.2 Challenges To the Bonafide Purchaser Doctrine

An interpretation of section 26 of the LRA would suggest that a bona fide purchaser is guaranteed of protection by the government, regardless of whether its previous dealings have

¹¹⁶ Section 43 Land Act.

been mired in fraud. When a landowner's ownership of a property is questioned, it is necessary that the owner shows the root of his ownership. It would not be sufficient to just show the certificate of title as proof of ownership. Since that instrument has been challenged, the proprietor must go beyond the instrument of title to prove the legality of how he acquired it, showing that the acquisition was legal.¹¹⁷ This was also seen in the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others*.¹¹⁸ The court held that;

'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conforms to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny, and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

In the *Arthi Highway Developers Ltd v West End Butchery Ltd & Others* case, the court of appeal stated that the shielding offered by section 26 is not quite as indisputable.¹¹⁹ When arriving to its decision, the court rejected valid titles transferred to bonafide purchasers after having discovered that there was fraud in the initial transfer from the first owner. It went ahead to apply the *nemo dat quod non habet*¹²⁰ principle and found that the fraudster did not have any good title to pass to the bonafide purchaser. Moreover, the decision in the Arthi Highway case is quite different when compared with another decision by the same court in *Permanent Markets Society & Others v Salima Enterprises & Others*. In this case, the bonafide purchaser for value had an indefeasible title despite learning that the previous registrations were obtained illegally.¹²¹ There is a contradiction as to the court's stance on whether to protect the indefeasible owner or not.

¹¹⁷ *Munyu Maina v Hiram Gathiha Maina*, (2009), eKLR.

¹¹⁸ *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR.

¹¹⁹ *Arthi Highway Developers Ltd v West End Butchery Ltd & Others*, (2015) eKLR.

¹²⁰ (no one gives who possesses not)

¹²¹ *Permanent Markets Society & Others v Salima Enterprises & Others*, eKLR

Furthermore, the Supreme Court of Kenya in the case of Dina Management case mentioned that the innocent purchaser for value is not guaranteed protection.¹²² The Supreme Court departed from the Torrens System of Registration and held that a title document can be invalidated if it is proven that the initial allocation process was illegal or unprocedural. This implies that the possession of a registered title document by a property owner is not conclusive proof of ownership. Already destabilising the indefeasibility of a title document as guaranteed under section 26 of the LRA.

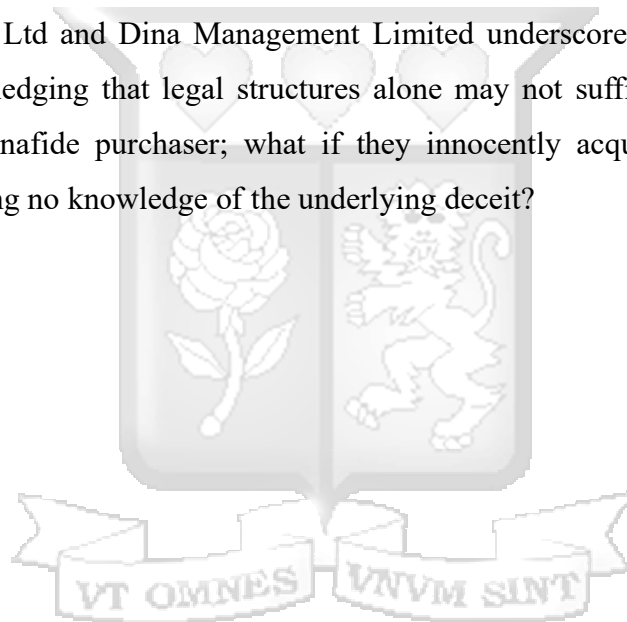
The case above revolved around the irregular allocation of a parcel of land along the Beach, that was initially owned by a former president. With time, the property changed hands through subsequent transfers until it was acquired by Dina Management Limited. One day, the County Government forcibly entered the property, asserting that the land was irregularly allocated and that it was formerly public land. On the other hand, Dina Management argued that it acquired the land lawfully and was issued with a title document to that effect. The dispute led to litigation at the Environment and Land Court, followed by an appeal to the Court of Appeal, and eventually, a petition was filed with the Supreme Court. The Supreme Court held that since the first allocation was irregular no valid legal interest could pass, as such all the subsequent transfers including the allocation to Dina Management were irregular and illegal. Therefore, the title held by Dina Management cannot be held as indefeasible. In their defence, Dina Management asserted that they followed all the due processes required and were the registered owners. However, the court dismissed their pleas and asserted that they were not bona fide purchasers. It went ahead to advise them that they should have done more due diligence in ascertaining the true history and ownership of the property. This beats the purpose of the land registry. If one is to go beyond the land register as it may be inaccurate, why have a register in the first place? The law states that everyone has the right to own property. Additionally stating that the title document ought to be held as concluding proof of proprietorship. However, the court has disregarded these provisions and gone ahead to punish the bona fide purchasers in an attempt to redress land injustices.

3.4 CONCLUSION

Kenya boasts of a comprehensive legal framework for the protection of a proprietor's property rights. From securing the sanctity of title and recognizing a bona fide purchaser for value

¹²² Dina Management Limited v County Government of Mombasa & 5 others (2023), eKLR.

without notice. The government's guarantee, rooted in the details of the register, forms the bedrock of this assurance. Once a proprietor has followed the due processes and becomes a bona fide purchaser for value, they are covered by section 26 of the Land Registration Act. It explains the person named the proprietor of the land is the absolute and indefeasible owner and shall not be subject to challenge. However, as has been seen in some cases when a registered proprietor title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. As the instrument is what is challenged one must go beyond the certificate of title to prove the legality of how they acquired the title to show its legality. The bona fide purchasers should go beyond their title document to prove ownership. This intricacy raises questions as to the sanctity of title. A paradox arises when the register, the supposed protector of the title, shows conflicting proprietors for the same parcel of land. The lessons from cases like Arthi Highway Developers Ltd and Dina Management Limited underscore the need for nuanced mechanisms, acknowledging that legal structures alone may not suffice. It then becomes a concern as to the bonafide purchaser; what if they innocently acquired the land from a fraudulent seller having no knowledge of the underlying deceit?



4.0 PROTECTING BONAFIDE PURCHASERS AGAINST CLAIMS OF FRAUD

4.1 INTRODUCTION

Landholding in Kenya has been characterised by abuse of trust, double allocation of land, and land grabbing among others.¹²³ Nonetheless, hope still exists that the promise for the sanctity of title will be upheld. As previously discussed, several challenges have obstructed the peaceful proprietor's interests that are enshrined in our legislation. Over the years, courts have applied certain elements for a purchaser to rely on the bona fide doctrine successfully.¹²⁴ The purchaser must prove that: he purchased the property in good faith; 'he did not know about the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; and he was not party to any fraud'.¹²⁵ However, there has been no mention of a bona fide purchaser who acquires property from a fraudulent seller. From the elements brought out by the courts, it is purported that the buyer ought not to be party to the fraud. Yet, the fraud of the seller is not considered. As seen in the Dina management case as well as the Ardhi Holder case, the buyers did their due diligence and purchased land from a fraudulent seller. They followed all the due processes and were registered and given an 'indefeasible' title from the land registry. They therefore placed their trust in the doctrine of sanctity of title to be their shield against all other adverse claims. Unfortunately, the courts in the two cases informed the buyers that they should go beyond the land registry and conduct more due diligence to ascertain the true owner of the property.

In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others*,¹²⁶ the Court had an interesting stance when addressing the protection of a bonafide purchaser. The learned judge stated that the protection accorded to the title would be impeached if the land was acquired fraudulently, illegally, or unprocedurally and that the landowner is shown to be a party. The judge then went ahead to affirm that a person with a good title should not be deprived of their title by the activities of fraudsters. In this case, the court stated that a good title owner should be protected against fraudsters but failed to address the issue of when the fraudster was between two good property owners. I'll give an example. Party A buys property in the year 1972. In

¹²³ Report of the Commission of Inquiry into the Irregular Allocation of Public Land, Nairobi, 2004, 2.

¹²⁴ *Martev Guest House Limited v Njenga & 3 others* (2022), eKLR.

¹²⁵ *Okedo v Buluma & another* (2023), eKLR.

¹²⁶ *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR,

1995 Person B fraudulently or illegally acquires A's property. B then sold the land to C in 1999. In 2003 C goes ahead and sells the property to D who builds a house where he leaves with his family. Now, one may ask does A, the original owner, have any claim over D, the bona fide purchaser for value without notice? There is confusion as to who holds the interest of the land in question. In this chapter, I intend to discuss the extent to which bonafide purchasers can be protected against their fraudulent sellers. I will intently look into ways in which the principle of sanctity of title can be upheld when applying the Torrens principle and the doctrine of deferred indefeasibility protecting the bonafide purchaser against the original owner.

4.2 TORRENS PRINCIPLE

Under the Torrens System of registration, title to property is attained by registration of an instrument in the appropriate form. Torrens system is not a system of registration of title but a system of title by registration.¹²⁷ This means that one ought to register first before being issued with the title document. Upon registration, the title of the person named in that instrument becomes indefeasible. This system presumes indefeasibility and conclusiveness of title that is only rebuttable by proof of fraud in which the buyer is involved.¹²⁸ The Torrens principle was first elucidated in the case of *Gibbs v Messer* where the trial judge clearly stated:

*“The main object of the Act and the legislative scheme for the attainment of that object are equally plain. The object is to save a person dealing with registered proprietors from the trouble and expense of going behind the register, to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.”*¹²⁹

From this, it is seen that the goal of the Torrens system was to ease the process of land acquisition. It was to simplify the process by preventing the buyer from going beyond the land register and conducting private searches as to the identity of the owner of the title document. This system is aimed at guaranteeing a proper record in the register and establishing a bonafide purchaser who is protected against all other claims.

¹²⁷ *Breskvar vs. Wall* (1971) 126 CLR

¹²⁸ The Land Registration Act Section 26

¹²⁹ *Gibbs v Messer*

The Torrens system is guided by three cardinal elements; the mirror principle, the curtain principle, and the insurance principle.¹³⁰

The mirror principle mandates that the register accurately and comprehensively depicts the current state of a proprietor's title. This ensures that any transfer of ownership of the parcel of land would only alter the registered owner's name while preserving the other title details. Secondly, the curtain principle emphasizes reliance only on the register. It indicates that one ought not to go beyond the register as it should contain all relevant information regarding the title in question. This is contrary to private conveyances where the title investigation requires assessing other documents relating to the transfer held by the owner. Finally, the insurance principle stipulates that the government compensates for losses resulting from any inaccuracy arising from the register.¹³¹

Thus, under this system, the title of a bona fide purchaser for value cannot and should not be impeached and if it is impeached, the bona fide purchaser should be compensated for the errors made by the Registrar of Titles.

Land registration legislation systems in Kenya have accepted beyond debate that they are a product of the Torrens system.¹³² In concurrence with this view, reference is made to the Court of Appeals decision in the case of *Charles Karathe Kiarie & 2 others vs Administrators of the Estate of John Wallace Muthara (deceased) & 5 others*. Here, the court stated:

“...the Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which was introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. The government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and

¹³⁰ The Torrens principles were summarized by the Canadian Court of Appeal in the case of *Regal Constellation Hotel Ltd Re* 2004, 13, 42. It has been quoted in several Kenyan cases including the case of *Beatrice Anyango Wanga & another v Rispa Shiundu Ong’ong’a & 2 others* [2019] eKLR, and *Maisyo David & 2 others*.

¹³¹ Martin Dixon, *Principles of land law*, Cavendish, 2002, 104.

¹³² This was acknowledged in, *Dr. Joseph Arap Ngok V. Justice Moiwo ole Keiwua & 5 others, and Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallace Muthare (deceased) & 5 others*.

*interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation...*¹³³

Some of the principles of the Torrens's system of registration of titles that can be seen in the case above include:

- (a) 'The government should guarantee indefeasibility of title against the entire world as the as the keeper of records;
- (b) The government should compensate anyone who suffers a loss;
- (c) Past irregularities and illegalities should not concern the buyer;
- (d) Despite the infirmity of the original owner's title, a bona fide purchaser acquires indefeasible title. The initial registration can yet be capable of becoming a good root of title to a bona fide purchaser for value; and
- (e) The burden of proof of fraud is one the one alleging it while the standard of proof was more than a mere balance of probabilities.'¹³⁴

Similarly, in the recent case of *Mary Ngonyo Kiume v Charles Muisyo David & 2 others*, the court emphasized on the operational framework of Kenya's land system which is guided by the Torrens system.¹³⁵ It stated that under this system, the certificate of title is prima facie definite and indefeasible evidence of land ownership.¹³⁶ It then goes ahead to reiterate the exceptions to this rule which are provided for under section 26 of the Land Registration Act. The Torrens system ensures that only the interests of a person who has legally acquired title are protected and puts in place parameters to protect the proprietary interests of landowners solely. However, this does not prevent unscrupulous individuals from attempting to deceive innocent proprietors into purchasing fraudulently acquired land. As stated in Section 26, and in line with the Torrens principle, a certificate of title is all that is needed to prove ownership, unless claims of fraud are raised.¹³⁷ Thus, one may ask how the law can safeguard innocent parties in such circumstances.

¹³³ Charles Karathe Kiarie & 2 others vs Administrators of the Estate of John Wallace Muthara (deceased) & 5 others (2013) eKLR.

¹³⁴ Charles Karathe Kiarie & 2 other Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others.

¹³⁵ *Mary Ngonyo Kiume v Charles Muisyo David & 2 others*, (2022), eKLR.

¹³⁶ *Shimon Resort –vs- Registrar of Titles & 5 others* [2016].

¹³⁷ *Buchunju (Suing for and on Behalf of the Estate of the Late Buchunju Kapchanga- Deceased) v Muyundo & 7 others*, eKLR.

In the case of *David Peterson Kiengo & 2 Others v Kairuki Thuo*, the court asserted that a purchaser is not obliged to go beyond searching the official register to prove ownership.¹³⁸ This rationale is based on the Torrens principle that guarantees that the land register is an accurate representation of land ownership. In the event of any inaccuracy in the register, the landowner holds a claim against the State rather than the bona fide purchaser. When the innocent buyer successfully proves that they are a bona fide purchaser, the Court can uphold their claim over the land despite the fraud. This relieves them from any action against the State for the recovery of damages and not against the innocent buyer.¹³⁹

However, given the potential for unfair results for the original landowners, courts have been hesitant to make such a finding. The burden of proof placed on the bonafide purchaser is normally quite high to show proper documentary evidence of the transfer process. Otherwise, their ownership rights can be extinguished, and the courts can order rectification of the land register as per Section 80 of the Land Registration Act. In such instances, the innocent buyer's relief lies in instituting a claim against the fraudulent seller for fraud or misrepresentation under contract law, seeking recovery of damages. Conversely, this often demonstrates the difficulty in tracing the fraudsters. Unfortunately, this system that calls for a correct register cannot be trusted in Kenya. This calls for the interested proprietor to do proper due diligence and follow the due process when seeking to acquire a certificate of title, to prevent being rendered homeless due to a seller's fraud. But as seen in the Dina Management case among others, indefeasibility is still not always guaranteed. How unfortunate is it to have forlorn hope of indefeasibility?

4.3 DOCTRINE OF DEFERRED INDEFEASIBILITY

When discussing indefeasibility, two doctrines come to light, immediate indefeasibility, and deferred indefeasibility. In immediate indefeasibility, the proprietor gets an indefeasible title upon registration.¹⁴⁰ Whereas under deferred indefeasibility, the proprietor who is a step ahead of the void transfer stands to be protected under the indefeasibility veil. For example, person X registered an instrument of title that is void, they do not obtain an indefeasible title. Nonetheless, X decides to transfer the instrument to C, purchasing in good faith, without fraud

¹³⁸ *David Peterson Kiengo and 2 Others v Kairuki Thuo*, [2012] eKLR.

¹³⁹ The court in *Embakasi Properties Limited & another v Commissioner of Lands & another* [2019] eKLR had a similar finding.

¹⁴⁰ *Breskvar v Wall* (1971) 126 CLR.

consideration and for valuable consideration. The bona fide purchaser is said to have an indefeasible title. The indefeasibility is deferred to the next valid transaction.¹⁴¹

The theory of deferred indefeasibility brings forward the indefeasibility of a proprietor to the bonafide individual.¹⁴² Under this theory, three different categories of owners are present; the original owner, the intermediate owner, and the deferred owner. The original owner is the one who initially had the instrument of title over the land. The intermediate owner is the one who deals with fraud and illegality. The deferred owner, typically a bona fide purchaser of value without notice, acquires the title from the intermediate owner.¹⁴³ Consequently, the deferred owner can defend against any claim made by the original owner, potentially leading the original owner to seek compensation from the state for their loss.¹⁴⁴

When the title document is obtained fraudulently, its registration does not cure its defects, nor does it give it a good title. It however can give root to a good title. This deferred owner is deemed to be the only individual who can get a good title from the intermediate owner. This is the case because the registration of the instrument of title has been done without notice of the fraud.¹⁴⁵ In the Ugandan case of *Lwanga vs, Registrar of Titles*, the court called this principle the paradox of registered conveyancing.¹⁴⁶ It was stated that if a bona fide proprietor purchased the property from a fraudulent person, and he was unaware of the fraud nor was he party to it, his title cannot be impeached. This shows that despite the registration being obtained through fraud, it may be a good root for an instrument of title for a bonafide purchaser.¹⁴⁷

4.4 CONCLUSION

According to the land registration system in Kenya, the title of a bona fide purchaser should be immune from challenge. This system provides that the land register should accurately reflect all active registrable interests for a specific parcel of land at all times. The Government, as the custodian of the principal record of all land and their owners in Kenya, promises indefeasibility of all rights and interests in the land register against the whole world and protects the proprietor of the same. Nonetheless, this assumption of indefeasibility of title instruments grounded on

¹⁴¹ *Wicklow Enterprises v Doysal* [1986], 257.

¹⁴² Keang S T, *Deferred Indefeasibility Reinstated in the Malaysian Torrens System: The End of an Unfortunate Saga*, 2010, 3.

¹⁴³ Ross J, *Real Property, Fraud and the Land Titles Act*, 2007, 88.

¹⁴⁴ Ross, *Real Property, Fraud, and the Land Titles Act*.

¹⁴⁵ Ross, *Real Property, Fraud, and the Land Titles Act*.

¹⁴⁶ *Lwanga v Registrar of Titles* (1980) HCB 24

¹⁴⁷ *Zebak Limited v Nadom Enterprises Limited* (2016) eKLR.

the register can only be rebutted by evidence of fraud or misrepresentation in which the buyer is shown to have been involved. However, this is not always the case.

The Torrens title system, based on title registration, promises a high level of indefeasibility for registered ownership. This approach aims at eliminating the need to navigate through a chain of titles and thus streamlines the land transaction process. In practice, one should be able to visit the Land Registry, search for the most recent registered owner, purchase, have the land register transferred into one's name, and then utilise the property. However, the reality is that our registration system does not reflect what is happening on the ground, thus functionality is challenged. Instances of double registrations, fraudulent acquisitions, corrupt practices, and underhand deals have given rise to numerous legal battles, with the term 'due diligence and tracing the root of the title' becoming a common refrain within the Environment and Land courts jurisdiction.¹⁴⁸

One of the key notions behind Kenya's Registration System is that the individuals managing the registration are not only skilled professionals but also individuals of good conscience, absolute honesty, and high integrity. Thus, it would be unlikely for fraud to find a foothold in such an environment. Unfortunately, this notion just exists in a utopia. Our land offices, instead of embodying these virtues, have become breeding grounds for these fraudulent and illegal activities. Those in charge often exhibit a blatant disregard for good and honest service, raising significant challenges in the actual implementation of the Torrens System and the principle of deferred indefeasibility when protecting the bona fide purchaser.¹⁴⁹

¹⁴⁸ *Haji v Attorney General & 4 others*, (2024), eKLR.

¹⁴⁹ *Beatrice Anyango Wanga & another v Rispa Shiundu Ong'ong'a & 2 others* [2019] eKLR

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

Kenya has a system of registration of title and not a registration of deeds system.¹⁵⁰ With deed registration, a public register accounts for documents giving interests related to specific land.¹⁵¹ This deed acts as evidence for transactions but does not confirm ownership. Being registered as the owner does not confer title in this system as title is derived from the deed.¹⁵² In this system, the government does not guarantee title thus creating some uncertainty. In a title registration system, ownership registration confers direct title to the land. The register in this system acts as irrefutable evidence of legal title. Thus, those with unregistered interests do not have a claim against ensuing bonafide purchasers for value without notice. In this system, title is certain and guaranteed by the government except in cases of fraud. In this system, rescinding title appears difficult as it would amount to a violation of the government's security of protecting the indefeasibility of title.

In an attempt to address this issue, the government took some steps to reclaim some unlawfully acquired land. The recommendations from the Ndung'u report,¹⁵³ and the TJRC report recommended that the title documents of the alleged owners be cancelled.¹⁵⁴ Unfortunately, over the years it has proven quite difficult to follow the recommendations made in this report as most of the fraudulent owners passed off the property to bonafide purchasers for value. The 2010 Constitution, the Land Act and the LRA seem to seek redress on this issue. These new statutes put emphasis on the importance of property rights and offer a guarantee that the state shall protect landowners except in cases of fraud.

The intersection between the challenges affecting the landowners and the legal principles present brings out questions on the sanctity of title and the protection of bonafide purchasers. The Torrens system, adopted in Kenya is designed to provide a secure and indefeasible title to all the registered proprietors. However, as seen in this thesis, the assumption of indefeasibility is not absolute especially when issues of fraud or misrepresentation arise. When assessing

¹⁵⁰ Breskvar vs. Wall (1971) 126 CLR.

¹⁵¹ Bills Committee on Land Titles Bill, Comparison of Deeds Registration and Title Registration, Parliament of Wales, 2008, 3.

¹⁵² Bills Committee on Land Titles Bill, 5.

¹⁵³ Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, Government Printer, Nairobi, 2004, 1.

¹⁵⁴ Final Report of The Truth Justice and Reconciliation Commission of Kenya, 2013, http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238

Kenya's land ownership system, it is evident that the protection of bonafide purchasers, particularly those who acquired the property from fraudulent sellers requires a delicate approach. As courts have been trying to adhere to the Torrens system, they have faced challenges in between protecting the sanctity of title and redressing land injustices. The case of James Nyaga v Attorney General depicts this. The annulment of titles acquired in good faith to rectify some injustice.

Additionally, decisions as seen in the Dina Management case show some of the challenges in interpreting Article 40 of the constitution as well as Section 40 of the LRA. Courts have now placed an additional burden on bona fide purchasers to go beyond the title register to conduct further due diligence to ascertain the real owner of the property. This is contrary to the principles and values of the land laws in the country. The Torrens principles of mirror, curtain, and indemnity, which were designed to ensure secure and efficient land registration processes have faced several challenges. On the other hand, courts have steered clear of the theory of deferred indefeasibility, also known as the 'paradox of conveyancing', which is meant to offer a prospective solution to protect the innocent party.

Kenya's land registration system is complicated and filled with gaps and doubts. The challenges to the assumed indefeasibility of the land register raise questions about the sanctity of title in instances where fraud has occurred. The protection of innocent purchasers while rectifying land injustices remains a delicate balance and calls for an integrative approach to secure property rights in Kenya.

5.2 RECOMMENDATIONS

Some of the recommendations to address the issues raised in this discussion include:

1. The government to enhance its integrity by professionalizing the land offices. This is to ensure the sanctity of title deeds is guaranteed and to reduce the cases of fraud. This can also be done by using technology for land registration and conducting regular audits of the land registers to identify and rectify errors.
2. The legal frameworks surrounding land registration and title protection need to be reviewed to cater for some of the challenges posed in this dissertation, as seen in courts. Courts should apply the concept of deferred indefeasibility as well as the Torrens principle more to protect the bonafide purchaser for value. They should be incorporated in the Land Registration Act

by express legislation. Thus, they would have protected the bonafide purchaser in the landmark Dina Management case.

3. Implement public awareness programs to educate citizens on the intricacies of land transactions, emphasizing the importance of due diligence and the potential risks associated with illegal acquisitions. This involves verifying the legitimacy of the title, investigating the history of the land, and ensuring compliance with legal processes.



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