

**THE UNCERTAINTY OF INDEFEASIBILITY: A LEGAL ANALYSIS OF
BONA FIDE PURCHASER PROTECTION IN SECTION 26 OF THE LAND
REGISTRATION ACT, NO. 3 OF 2012**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
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By

Jael Wairimu Maina

145673

Prepared under the supervision of

Andrew Ngurumi Waithumbi

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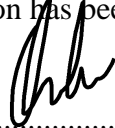
God Bless you all.

DECLARATION

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


Signed:
Date: 28/03/2025

This dissertation has been submitted for examination with my approval as University Supervisor.


Signed:
[Supervisor's Name] Andrew W. Ngurumi
Date: 27.03.25

ABSTRACT

Prior to 2023, Kenyan courts were deeply divided on whether a fraudster could confer a valid title on a purchaser or whether a legitimate property owner could lose their rights over the property solely because the property had been fraudulently transferred to an innocent buyer who had no prior knowledge of the fraud. As a result, innocent purchasers for value were at risk of losing their property despite having acted in good faith, creating uncertainty in land transactions. The urgent need for clarity led to the Supreme Court's landmark decision in *Dina Management Limited v. County Government of Mombasa & 5 others*, which declared that purchasers must investigate the root of a property's title before acquisition. The Court asserted that no protection would be granted to a purchaser with a defective or illegal title, raising critical questions about the security of bona fide purchasers under Section 26 of the Land Registration Act and the applicability of the Torrens system in Kenyan land law. Through doctrinal research, this study critically examines the protection of the bona fide purchaser for value under the Kenyan legal framework. It suggests that the conflicting decisions by the courts arise from a misalignment in our legal framework, specifically between the Land Registration Act, which is rooted in the Torrens system, and the general property rules, which originate from common law. It proposes that aligning title-by-registration laws with the general rules of property could create a clearer and more consistent legal framework, reducing conflicts and ensuring the integrity of the land register and the protection of bona fide purchasers' property rights.

LIST OF ABBREVIATIONS

LRA- Land Registration Act

RTA- Registrations of Titles Act

LTA- Land Titles Act

RDA- Register of Documents Act

NLP- National Land Policy

NLC- National Land Commission

LIST OF CASES

Charles Karethe Kiarie & 2 Others -vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 Others (2013) eKLR.

Ibrahim v Hassan & Charles Kimenyi Macharia, [2019] eKLR.

Gibbs v Messer, 1891.

Kiarie v Administrators of the Estate of John Wallace Mathare (Deceased) [2013] eKLR).

Arthi Highway Developers Limited v West End Butchery Limited [2015] eKLR.

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

Tarabana Company Limited v Sehmi & 7 others [2023] eKLR.

Daudi Kiptugen v Commissioner of Lands & 4 Others (2015) eKLR.

Samwel D. Omwenga Angwenyi v National Land Commission, Chief Lands Registrar & Attorney General (2019) eKLR.

Shimoni Resort -vs- Registrar of Titles & 5 Others (2016) eKLR.

Rev. Dr. Timothy Njoya and 6 others v the Attorney General and 4 Others (2008) KLR.

Lemeiguran & 3 others v Attorney General & 2 others (2006) KLR.

Elizabeth Wambui Kiragu v Tirus Kamau Mutoru (2014) eKLR.

Katende V Haridar & Company Ltd (2008) 2 EA.

Breskvar v Wall (1971) 126 CLR.

David Peterson Kiengo & 2 Others V Kariuki Thuo [2012] eKLR.

Hannah Wangui Ithebu & Others v Joel Nguigi Magu & Others (2005) eKLR.

Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others [2015] eKLR.

Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR.

Alice Chemutai Too v Nickson Kipkurui Korir & 2 others (2015) eKLR.

Koech v Kenya Forest Service [2024] eKLR.

Thomas Mose Kenyenyua v Arvindhendra Himatlal Mehta & 2 others [2022] eKLR.

St Thomas Academy Limited v Githumu Kangema Limited and Others (2024) eKLR.

Diamond Trust Bank Kenya Ltd V Said Hamad Shamisi & 2 Others (2015) eKLR.

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya (2010)

The Land Registration Act 2012

The Registered Land Act (Cap 300)

Registration of Documents Act (Cap 282)

Land Titles Ordinance (1908)

Registration of Titles Act (Cap 281)

Registered Land Act (Cap 300)

Indian Property Transfer Act (IPTA)

Land Registration etc. (Scotland) Act

CHAPTER 1

INTRODUCTION TO THE STUDY

1.1 BACKGROUND TO THE PROBLEM

For over a hundred and four years the *Torrens system* has served as the cornerstone upon which Kenya's land registration system is built, offering a framework intended to secure, by an official determination, registration of title to land.¹ The Land Registration Act, like its predecessors, the Registration of Titles Act and the Registered Land Act is a product of the *Torrens system*.² The *Torrens system*, introduced by Sir Robert Torrens in South Australia in the mid-nineteenth century, is founded on the concept that land title should be absolute and indefeasible.³

At the heart of the system lies three principles: the mirror principle, the curtain principle, and the insurance principle.⁴ The mirror principle dictates that the land register should reflect all active and registrable interests affecting each parcel of land, ensuring that what is on the register matches the true state of ownership and any encumbrances, removing the need for further investigation.⁵ Complementing this, is the curtain principle which holds that the register serves as conclusive proof of title, sparing parties from delving into past transactions or uncovering hidden interests.⁶ To protect the integrity of these principles, the insurance principle provides a safety net, ensuring that if an error or omission occurs in the register, those affected will be compensated by the government.⁷

¹ Wadhwa D, 'Guaranteeing Title to Land: A Preliminary Study' 41, *Economic and Political Weekly* 24, 1989, 2324.

² *Charles Karethe Kiarie & 2 Others -vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 Others* (2013) eKLR.

³ Mitchell W 'Possessory Title Registration: An Improvement of the Torrens System,' 11 *William Mitchell Law Review* 3, 1985, 828.

⁴ *Ibrahim v Hassan & Charles Kimenyi Macharia*, [2019] eKLR.

⁵ Stein R, 'The "Principles, Aims And Hopes" Of Title By Registration' 9 *The Adelaide Law Review* 2, 1983, 268.

⁶ Stein R, 'The "Principles, Aims and Hopes" Of Title by Registration' 268.

⁷ Crowley J, 'The Torrens System' 6, *Marquette Law Review* 3 1922, 115.

Indefeasibility of title, an anchor of the *Torrens system*, ensures that once a title is registered, it is considered conclusive and shielded from any challenges.⁸ In line with this concept, a bona fide purchaser for value without notice (‘bona fide purchaser for value’) gains an indefeasible right to the title, regardless of any defects in the vendor’s original title.⁹ This was affirmed in *Gibbs v Messer*, where the court held that such a purchaser, upon proper registration, is shielded from claims against the title, provided they were not involved in fraud or misrepresentation.¹⁰

While the Kenyan courts have recognized and acknowledged the *Torrens* principles, their applicability together with the concept of indefeasibility has sparked significant controversy and conflicting judicial decisions over the years.¹¹ The higher courts have frequently applied common law and equity principles to cases involving indefeasibility of titles, declaring titles of innocent buyers a nullity *ab initio* based on the common law doctrine of *nemo dat quod non habet* (*nemo dat* rule).¹² The reason behind this reliance on the common law doctrines and equitable principles has been to protect the actual owners of the land, who are usually indemnified by the state instead of recovering their land.¹³ As a result, this approach has created conflict because, while the *nemo dat* rule dictates that no one can transfer a better title than they possess, indefeasibility protects registered proprietors from claims arising from defects in prior transactions.¹⁴ This judicial misinterpretation and the incoherent blending of common law and equity doctrines with the

⁸ Mwihuri W, ‘The illusionary right to protection of property under article 40 of the constitution: An essay on recent jurisprudence regarding indefeasibility of title in Kenya’ 17 *The Law Society of Kenya Journal*, 2023, 26

⁹ Mwihuri W, ‘The illusionary right to protection of property under article 40 of the constitution: An essay on recent jurisprudence regarding indefeasibility of title in Kenya’ 26.

¹⁰ *Gibbs v Messer*, (1891) The United Kingdom Privy Council.

¹¹ Mwihuri W, ‘The illusionary right to protection of property under article 40 of the constitution: An essay on recent jurisprudence regarding indefeasibility of title in Kenya’ 34.

¹² Asaria H, ‘Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution’ Kenya law publications, < <https://kenyalaw.org/kl/index.php?id=1905> >- on 3 October 2024.

¹³ Goymour A, ‘Mistaken registrations of land: exploding the myth of "title by registration"’ 623.

¹⁴ Asaria H, ‘Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution’ Kenya law publications, < <https://kenyalaw.org/kl/index.php?id=1905> >- on 3 October 2024.

Torrens system principles has led to inconsistencies, undermining the system's goal of providing certainty and simplicity in land transactions.¹⁵

1.1.1 The Court of Appeal's View on Acquisition of Title by Bonafide Purchaser

In the year 2013¹⁶, in the case of *Kiarie v Administrators of the Estate of John Wallace Mathare*, ('the *Kiarie Case*') the Court of Appeal found that pursuant to Section 26 of the Land registration Act, the title of a registered owner can only be contested on the basis of fraud or misrepresentation, provided the purchaser was a party to such misconduct. The court further averred that, as a matter of law, a bona fide purchaser who acquires property without knowledge of any fraud must be protected.¹⁷ This is because, the court held, Section 26 takes precedence over and above other alleged equitable rights to the title.¹⁸ This reasoning is informed by the Judicature Act which states that courts are to apply common law principles where specific local statutes do not exist.¹⁹

This decision, though not binding to the Court of Appeal was however overruled in *Arthi Highway Developers Limited v West End Butchery Limited* in the year 2015.²⁰ In this case, the Court of Appeal, relying on the Snell's principles of equity, declared the titles of the purchasers, null and void because the original title was obtained fraudulently.²¹ This was despite the purchaser's non-involvement in the said fraud.²² Interestingly in 2021, in the case of *Tarabana Company Limited v Sehmi & 7 others* the Court of Appeal rendered a judgement consistent to the *Kiarie case* mentioned above holding that the only way determine whether the purchaser's title is subject to

¹⁵ Asaria H, 'Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution' Kenya law publications, < <https://kenyalaw.org/kl/index.php?id=1905> >- on 3 October 2024.

¹⁶ The author chose the year 2013 as a key starting point due to the fact it has been severally cited by courts. Additionally, the judgment in the *Kiarie case* was passed shortly after the enactment of the Land Registration Act, making it a relevant and a timely reference for understanding the application of the Act.

¹⁷ *Kiarie v Administrators of the Estate of John Wallace Mathare (Deceased)* (2013) eKLR.

¹⁸ *Kiarie v Administrators of the Estate of John Wallace Mathare (Deceased)* (2013) eKLR.

¹⁹ The Judicature Act (Cap 8, Laws of Kenya) [Rev. 2012].

²⁰ *Arthi Highway Developers Limited v West End Butchery Limited* (2015) eKLR.

²¹ *Arthi Highway Developers Limited v West End Butchery Limited* (2015) eKLR.

²² *Arthi Highway Developers Limited v West End Butchery Limited* (2015) eKLR

challenge is through Section 26(2); if the title was obtained through fraud or misrepresentation, illegal, unprocedural or corrupt scheme.²³

1.1.2 Persistent Uncertainty Regarding Acquisition of Title by Bonafide Purchaser

These inconsistencies raised questions about the practical reliability of the *Torrens system* in Kenya and by extension the Land Registration Act.²⁴ With a view to cure the inconsistencies and conflicting decisions, the Supreme Court of Kenya, in 2023, in *Dina Management Limited v County Government of Mombasa & 5 others* (*'Dina management case'*) held that the protection offered to a bona fide purchaser cannot apply where the title to the property was obtained irregularly or illegally.²⁵ Seemingly agreeing with the decision of the Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited* mentioned above. The Court emphasized that a title document, once regarded as conclusive proof of ownership under the *Torrens system*, is no longer sufficient in cases where the legitimacy of the original allocation is called into question.²⁶ The holder of a title must go beyond mere possession of the document and demonstrate that the entire acquisition process, from inception, adhered to legal standards.²⁷ Here, the Supreme Court relied on the common law doctrine of tracing the root title which was eliminated by the *Torrens system* through the mirror principle.²⁸

In the same year, seven months after the Supreme Court's judgment, the Court of Appeal, in its ruling granting the parties in *Tarabana Company Limited v Sehmi & Others* (*'the Tarabana case'*) leave to appeal to the Supreme Court, expressed reservations about the reasoning in the Supreme Court's decision in *Dina management case*. It observed that, despite the Supreme Court's judgment, uncertainty persists in the law concerning the concept of an innocent purchaser for value without

²³ Section 26, Land Registration Act, (Act No 3 of 2012).

²⁴ Mwihuri W, 'The illusionary right to protection of property under article 40 of the constitution: An essay on recent jurisprudence regarding indefeasibility of title in Kenya,' 34.

²⁵ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

²⁶ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

²⁷ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

²⁸ Asaria H, 'Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution' Kenya law publications, < <https://kenyalaw.org/kl/index.php?id=1905> >- on 3 October 2024.

notice and the principle of indefeasibility.²⁹ The Court of Appeal invited the Supreme Court to address unresolved questions including whether an irregular allocation can give rise to a legitimate title and whether the title of an innocent purchaser can be challenged if it stems from fraud.³⁰ Further, the Court of Appeal underscored that these issues extend beyond the immediate dispute, as their determination would be of public good.³¹

1.1.3 CONCLUSION

These cases demonstrate that the core of these conflicting decisions arises from the employment of either the common law alongside equity principles or the *Torrens system* principles, which are fundamentally different. Furthermore, there is no clear guidance on the extent of their application allowing land courts to arbitrarily choose between the two systems or apply both without providing any justification. The application of either system creates uncertainty as common law will often favor the actual owner of the land, whereas the *Torrens system* will often prefer the bona fide purchaser for value.³² Without a definitive system, the legal protection of property rights remains unpredictable, undermining the security and certainty the *Torrens system* aims to provide.

1.2 PROBLEM STATEMENT

Section 26 of the Land Registration Act of 2012, which provides for the certificate of title as conclusive evidence of proprietorship, except in cases of fraud, misrepresentation, or illegality, was founded with the aim of establishing indefeasibility of title to guarantee the security and certainty of registered land ownership. By passing and implementing the Act, Kenya sought to create a secure and definitive land registration system underpinned by the principle of indefeasibility.

²⁹ *Tarabana Company Limited v Sehmi & 7 others* (2023) eKLR.

³⁰ *Tarabana Company Limited v Sehmi & 7 others* (2023) eKLR.

³¹ *Tarabana Company Limited v Sehmi & 7 others* (2023) eKLR.

³² Asaria H, 'Detailed Exposition of Torrens System as Incorporated in RTA And LRA', AUGUST 25, 2014, <http://kenyalaw.org/kenyalawblog/exposition-of-torrens-system-incorporated-in-rta-and-lra/> on 3 October 2024.

However, the judiciary has consistently deviated from the Act's objectives particularly in cases where an actual owner's property is transferred to an innocent third party irregularly or fraudulently without the innocent party's knowledge. Despite the Land Registration Act being founded on the *Torrens system*, courts have frequently invoked common law and equity principles in their interpretation of section 26 to protect the actual owners. As a result, courts have required purchasers to trace the root title to demonstrate legal, regular and procedural acquisition. This has led to the prioritization of the actual owner over innocent purchasers who register the land in good faith. This judicial preference undermines the perceived conclusiveness of the land register, leading to situations where registered proprietors, who should be protected under the Act, are denied the security of the Act. This study will explore the judiciary's interpretation which diverges from the objectives of the Land Registration Act 2012 and examine the implications of this divergence for the integrity of Kenya's land registration system.

1.3 RESEARCH OBJECTIVES

1. To evaluate the legal framework and foundations of the title registration system in Kenya in safeguarding the rights of bona fide purchasers.
2. To analyze whether the title of a bona fide purchaser of land, for value without notice, is indefensible despite defects in the titles of previously registered proprietors.
3. To determine lessons Kenya can draw from Scotland's land registration system.
4. To propose recommendations for enhancing the protection of the bona fide purchasers in the Kenyan land registration system.

1.4 RESEARCH QUESTIONS

1. What is the legal framework and foundations of the title registration system in Kenya on safeguarding the rights of a bona fide purchaser?
2. How can the title of a bona fide purchaser of land for value without notice be considered indefensible, despite any defects in the title of previous registered proprietors?
3. What lessons can Kenya learn from Scotland's land registration system to resolve the conflict between common law principles and the Torrens system?
4. What recommendations can be made to improve Kenya's land registration system in protecting the bona fide purchaser?

1.5 HYPOTHESIS

If in the Kenyan land registration system, the principle of 'title promise' is upheld, whereby an individual entered onto the land register automatically acquires an indefeasible title, then that ought to be conclusive and should not be challenged, unless it was obtained through fraud or any misrepresentation to which a person was party to it.

1.6 JUSTIFICATION OF THE STUDY

The passing and implementation of the Land Registration Act, 2012, were aimed at securing title registration in Kenya. However, the interpretation of the Act by the courts has failed to adequately protect the title of bona fide purchasers of land for value, without notice, particularly when previous registered proprietors acquired the title fraudulently. This research seeks to examine whether such titles should be deemed indefeasible and hopes to propose solutions based on best practices and experiences from other jurisdictions such as Scotland, with relevance to the Kenyan context.

1.7 THEORETICAL FRAMEWORK

1.7.1 UTILITARIANISM

Utilitarianism is a philosophy whose main premise is that an action or a rule is right if the net pleasure or satisfaction it produces exceeds the loss.³³ For utilitarians the purpose of the institution of property is to maximize the total happiness and satisfaction derived from material and non-material resources.³⁴ According to Bentham, property rights serve as a basis of expectation and individuals will derive certain benefits from something they possess due to the relationship established by ownership.³⁵ This expectation for future benefits is created and sustained by law by giving individuals confidence in their ability to enjoy their property rights.³⁶ It transforms what would otherwise be transient and uncertain expectations into long term and stable assurances of

³³ Cooter R and Ulen T, '*Law and Economics*', 6th edition, Berkeley Law Books, 2016, 109

³⁴ Cooter R and Ulen T, '*Law and Economics*' 109.

³⁵ Bentham J, Etienne D, Hildreth R, and Ogden C. '*The Theory of Legislation*,' K. Paul, Trench, Trubner & Co. Ltd, New York, 112.

³⁶ Bentham J, *et al.* '*The Theory of Legislation*, 112.

property rights.³⁷ Without the protection of the law, property cannot truly exist, as the legal framework is what transforms mere possession into a reliable right.³⁸

The idea of utility is central to this philosophy. Bentham defines utility as that “property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness or to prevent the happening of mischief, pain, evil, or unhappiness.”³⁹ In essence utility is an action, object or rules that produces the greatest pleasure and reduces harm or suffering. The maximization of total utility, however, can lead to significant problems.⁴⁰ While disputes can, in theory, be resolved on utilitarian grounds by implementing rules that aim to produce the best overall outcome in a society, individual claims of property may be trampled upon. Under the philosophy, property rights are not absolute.⁴¹ A person’s ownership of property can be expended if expropriation results in a greater sum of utility for others.⁴² In essence, philosophy allows for property to be taken away if in doing so produces a net increase in societal utility, even at the expense of individual rights.⁴³

Critics argue that philosophy’s foundation on utility as the ultimate standard of morality is flawed as it is subjective, elusive and impossible to measure.⁴⁴ This creates practical challenges particularly in areas like property law, where utilitarianism can justify the exploitation of minorities, if doing so would maximize the happiness of the majority.⁴⁵

In conclusion, the relevance of using utilitarianism in this study is to underscore the injustice of preferring original owners of property over bona fide purchasers, especially in cases where they

³⁷ Bentham J, *et al.* ‘*The Theory of Legislation*’, 112.

³⁸ Bentham J, *et al.* ‘*The Theory of Legislation*’, 112.

³⁹ Bentham J, ‘*An Introduction to the Principles of Morals and Legislation*’, Dover Publications, New York, 1780, 65.

⁴⁰ Bentham J, ‘*An Introduction to the Principles of Morals and Legislation*’, 65

⁴¹ Cooter R and Ulen T, ‘*Law and Economics*,’109.

⁴² Bentham J, ‘*An Introduction to the Principles of Morals and Legislation*’, 65

⁴³ Cooter R and Ulen T, ‘*Law and Economics*,’109.

⁴⁴ Francis Kariuki, Smith Ouma, Raphael Ng’etich, ‘*Property law*’ Strathmore University Press, Nairobi, 2016, 40.

⁴⁵ Francis Kariuki *et al*, *Property law*, 40.

are entitled to legal protection. The opposite is also true, as there have been instances where the original owners of property have been unjustly deprived of their rights. The prevailing legal position, as the study will demonstrate, leans more toward favoring original owners of property and placing a huge burden on bona fide purchasers. By preferring original owners, the courts risk trampling on the rights of bona fide purchasers, especially in instances where the ownership rights are warranted.

1.8 LITERATURE REVIEW

Section 26(1) of the Act guarantees the registered proprietor's title by establishing their ownership as absolute and indefeasible.⁴⁶ This means that, once registered, the titleholder's ownership is legally protected, and their title cannot be easily challenged.⁴⁷ However, a certificate of title may be challenged if it is obtained through fraud, misrepresentation, illegality, procedural irregularities or a corrupt scheme.⁴⁸ Cooke explains that the conclusive and infallible nature of a register is paramount because it streamlines conveyancing by removing the need for extensive title investigations based on documentary and physical evidence.⁴⁹ Due to this conclusiveness of a registered title, Pownall and Hill state that the registered proprietor benefits from state-backed assurance of title.⁵⁰ This implies that in instances where the register may not provide definitive security of the registered owner's title, it offers the next best alternative: state indemnity. This indemnity ensures that the registered proprietor is not left disadvantaged when the system fails to uphold their title.⁵¹

A title registration system is designed to promote two forms of security: static and dynamic. Static security, as defined by Demogue, refers to rules designed to protect the rights of the current

⁴⁶ Section 26, Land Registration Act, (Act No 3 of 2012).

⁴⁷ *Thomas Mose Kenyena v Arvindhandra Himatlal Mehta & 2 others* (2022) eKLR.

⁴⁸ Section 26, Land Registration Act, (Act No 3 of 2012).

⁴⁹ Cooke, Elizabeth, *The New Law of Land Registration*, 100.

⁵⁰ Pownall J and Hill R, 'The Land Registry's Perspective: The Practical Challenges of Land Registration' In Goymour A, Watterson S and Dixon M (ed) *New Perspectives on Land Registration Contemporary Problems and Solutions*, Bloomsbury Publishing Plc, 2018, 204.

⁵¹ Cooke, Elizabeth, *The New Law of Land Registration*, Bloomsbury Publishing Plc, 2003, 100.

property owners when disputes arise with third-party purchasers.⁵² It is based on the notion that property owners should not be deprived of their property without consent, thereby maintaining the existing ownership structure.⁵³ In contrast, dynamic security incentivizes the acquisition of property for productive purposes. It prioritizes the interests of purchasers by ensuring they can obtain property without the risk of undisclosed claims or defects that could compromise their ownership.⁵⁴ The system aims to achieve two goals: securing title and facilitating transactions. The first goal, securing title, aligns with static security by protecting existing property rights.⁵⁵ The second goal is to simplify property transfers by reducing transaction costs, making conveyancing quicker, cheaper, and easier—essentially, enhancing dynamic security.⁵⁶ By addressing insecurity and minimizing title investigations, dynamic security lowers the costs of property transactions, promoting efficient conveyancing.⁵⁷

The challenge for the law is that it is not always possible to offer both types of security in cases where two innocent parties, the original owner and a bona fide purchaser, dispute over property rights in a registered land particularly when the conflict stems from the actions of a third party. The third party in this case might have forged a disposition of a registered interest. O'Connor argues that such disputes involve competition between the two securities.⁵⁸ Static security focuses on resolving the dispute in favor of the holder, whether registered or unregistered.⁵⁹ Dynamic

⁵² O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' in Elizabeth Cooke (ed) *Modern Studies in Property Law*, Volume 3, Bloomsbury Publishing Plc, 2005, 47.

⁵³ Lees, E, "Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002" *The Modern Law Review* 1, 2013, 64.

⁵⁴ Lees, E, "Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002" 64.

⁵⁵ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 48.

⁵⁶ Chris Bevan, *Land Law*, 3rd edition, Oxford University Press, United Kingdom 2018, 51.

⁵⁷ Chris Bevan, *Land Law*, 51.

⁵⁸ O'Connor, Pamela, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems,' 13, *Edinburgh Law Review*, 2, 2010, 194.

⁵⁹ O'Connor, Pamela, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems,' 194.

security, on the other hand, prioritizes the rights of a good-faith purchaser of a registered interest, favoring them in disputes arising from the actions of a third party.⁶⁰

Dixon argues that protection of dynamic security is preferable for several reasons.⁶¹ First, it upholds the strength of the registered title guarantee established by the registration statute, eliminating the need for a purchaser to investigate the validity of the vendor's title beyond the register. Second, it allows for a simple and straightforward application of the Act, avoiding unnecessary complexities related to legal and equitable titles. Third, and perhaps most crucially, this approach ensures that the innocent party who suffers a loss can claim full indemnity from the Land Registry, as the system provides compensation to those affected by title issues.⁶²

On the other hand, Goymour argues that favoring static security is a sound approach for several reasons.⁶³ First, prioritizing the original owner over subsequent purchasers, a stance that aligns with democratic ideals of private ownership, as it is unjust for the original owner to be divested of property without consent.⁶⁴ Secondly, favoring the original owner enhances overall title security and conforms with general property of laws. As Canadian author Thomas Mapp observes, prioritizing subsequent purchasers over the original owner could create a precarious "come easy, go easy" system, where no title is truly secure. This would leave subsequent purchasers vulnerable to void dispositions in the future, ultimately resulting in instability and uncertainty in property rights.⁶⁵

While both sides raise good arguments, choosing between the dynamic security and static security becomes challenging especially in systems where general property laws and statutes governing

⁶⁰ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 50.

⁶¹ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 623.

⁶² Dixon M, 'Not So Conclusive Title Register' *Law Quarterly Review* 129, 2013, 325.

⁶³ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 623.

⁶⁴ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 623.

⁶⁵ Cooke E, *The New Law of Land Registration*, 102.

land registration coexist.⁶⁶ These systems, described as bijural systems by the Scottish Law Commission are characterized by the coexistence of general property rules that allocate property in land alongside statutory rules that serve a similar function.⁶⁷ (The general rules of property are the foundational principles of property law that govern the creation, transfer, and extinguishment of property rights, emphasizing the validity of transactions and protecting against unauthorized or fraudulent actions. Under these rules, ownership cannot pass if the underlying deed or transaction is invalid, such as in cases of forgery. In contrast, the special rules of land registration, and specifically under a positive system, prioritize the integrity of the register, allowing rights to be conferred, varied, or extinguished by the mere act of registration, regardless of the validity of the underlying deed.⁶⁸) Due to this coexistence, a bijural ambiguity arises because the land registration statute does not clearly specify how its rules, especially those that grant registered title, interact with the general property rules.⁶⁹ Courts are left to navigate this ambiguity, often facing difficulties in determining whether the statutory rules replace or coexist with the broader property laws.⁷⁰ This creates the potential for abrupt shifts in the law, which may contradict long standing judicial interpretations or established understandings of property law.⁷¹

It gets more complicated because the land registration statutes across the Commonwealth countries, (Kenya being one) are designed to shift the law towards dynamic security and the persistence of bijural ambiguity complicates the application of this security.⁷² Courts as a result

⁶⁶ Harding M and Hickey R, 'Bijural Ambiguity and Values in Land Registration Systems' in Susan Bright (ed) *Modern Studies in Property Law*, Volume 6, Bloomsbury Publishing Plc, 2011, 285.

⁶⁷ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion Paper No 125, 2004, 3.

⁶⁸ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion Paper No 125, 2004, 3

⁶⁹ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion Paper No 125, 2004, 3.

⁷⁰ Harding M and Hickey R, 'Bijural Ambiguity and Values in Land Registration Systems' 285.

⁷¹ O'Connor, Pamela, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems,' 221.

⁷² O'Connor, Pamela, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems,' 198.

find themselves struggling to determine the appropriate balance between static and dynamic security when resolving disputes, demonstrating how bijural systems create unique challenges in navigating property law.⁷³ The interaction between general property laws and land registration statutes in such systems makes it difficult for the law to provide clear answers in these complex disputes, further underlining the inherent tensions between static and dynamic security.⁷⁴

Scotland serves as an example of conflicts that arise in the bijural system, where its 1979 Land Registration Act operated under special land registration rules, particularly that registration, by its own force, conferred title.⁷⁵ However, the accuracy of the resulting entry on the register had to be assessed against the ordinary rules of property. If both the Register and property law rules aligned—favoring the bona fide purchaser over the original owner—the purchaser’s title became unchallengeable.⁷⁶ If they did not align, the Register was considered inaccurate, and the purchaser’s title was defeasible, allowing the original owner to retain the land.⁷⁷ In 2012, after significant pressure from the Scottish Law Commission and numerous recommendations, a new land registration act was introduced to resolve these inconsistencies.⁷⁸ The primary reform was to align the general property law rules with the land registration framework, balancing static and dynamic security and removing the conflicts between the two.⁷⁹

In conclusion, the coexistence of general property law and statutory land registration rules within bijural systems presents significant challenges in balancing static and dynamic security. While

⁷³ Harding M and Hickey R, ‘Bijural Ambiguity and Values in Land Registration Systems,’ 286.

⁷⁴ Harding M and Hickey R, ‘Bijural Ambiguity and Values in Land Registration Systems,’ 286.

⁷⁵ Scottish Law Commission, ‘Discussion Paper on Land Registration: Void and Voidable Titles’ Discussion Paper No 125, 2004, 53.

⁷⁶ Scottish Law Commission, ‘Discussion Paper on Land Registration: Void and Voidable Titles’ Discussion Paper No 125, 2004, 53.

⁷⁷ Waring E, ‘Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,’ In Goymour A, Watterson S and Dixon M (ed) *New Perspectives on Land Registration Contemporary Problems and Solutions*, Bloomsbury Publishing Plc, 2018, 414.

⁷⁸ Waring E, ‘Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,’ 414.

⁷⁹ Waring E, ‘Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,’ 414.

dynamic security promotes efficient property transactions by protecting bona fide purchasers, static security safeguards the rights of original owners, emphasizing fairness and stability in property ownership. The ambiguity arising from the interaction of these two legal frameworks complicates judicial decision-making and creates inconsistencies in property rights. The Scottish experience demonstrates the potential for reform, as aligning property law with registration statutes can mitigate these tensions. Achieving this balance is crucial for fostering both confidence in the land registration system and equitable treatment of property disputes, ensuring that the legal system remains strong and flexible in the face of evolving societal needs.

1.9 METHODOLOGY

This research will use doctrinal analysis. It will rely on both primary and secondary sources through desktop research. The primary sources will consist of the Constitution and the Land Registration Act. It will also consider judicial precedents such as *Dina Management Limited v County Government of Mombasa & 5 others* [2023] eKLR, *Tarabana Company Limited v Sehmi & 7 others* [2023] eKLR, among others. It will also rely on secondary materials such as books, chapters in books, reports, and journal articles. These materials will document the opinions of various scholars on the protection of bona fide purchasers for value without notice.

1.10 LIMITATIONS

The research methodology employed in this study has limitations as it excludes fieldwork, constricting the research solely to desktop research. The study will rely exclusively on the existing data available in various statutory, academic and legal sources. Furthermore, time restriction will also impact the depth and breadth of the research. Despite these limitations, the study aims to maximize the available information to draw insightful and well-reasoned arguments.

1.11 CHAPTER BREAKDOWN

Chapter 1: Introduction to the study: This is an introduction and the foundation of the research, design of this study with the background, problem statement, research questions and objectives. as well as the hypothesis and preliminary literature review.

Chapter 2: An analysis of the legal framework and foundations for title registration in Kenya: This chapter will analyze the legal framework on title registration in Kenya from the colonial period to date. It will also assess the interpretation of the legal framework by the Kenyan courts and their rationale. Additionally, the chapter will look at the scholarly work that has analyzed the legal framework.

Chapter 3: This chapter will explore whether an innocent purchaser can be granted a valid title by the court in instances where the title was fraudulently acquired by their predecessor. It will examine how Section 26(1) of the Land Registration Act has been interpreted by various courts, highlighting the inconsistencies, conflicting approaches, and the resulting legal uncertainties that leave the issue unresolved.

Chapter 4: This chapter will explore the bijural ambiguity in Scotland's land registration system and how Scotland resolved this challenge through legislative reform. It will then highlight key lessons that Kenya can draw from Scotland's approach to address similar issues in its own land registration framework.

Chapter 5: Conclusions, findings and recommendations. The concluding chapter will serve as a conclusion to the dissertation and will propose recommendations on the appropriate best practices to be used by the Kenyan courts in balancing the due diligence requirement and the bona fide purchaser for value justification.

CHAPTER TWO

THE LEGAL FRAMEWORK AND FOUNDATIONS OF THE LAND REGISTRATION IN KENYA

2.1 Introduction

This chapter will examine the legal framework governing land registration in Kenya, tracing its evolution from the colonial period to the present day. The two sections will offer a chronological, albeit descriptive, overview of the registration system, highlighting key developments and shifts in legislation that shaped the land registration framework. Their purpose will mainly be to contextualize the historical trajectory of land registration, serving as a foundation for understanding the more critical developments in the post-2010 period, which are discussed in the third part.

The third and most significant section will delve into the current state of the system, specifically examining the impact of the 2010 Constitution on the security of land titles, with a particular focus on Article 40 and its implications. This section will highlight the multiple and often conflicting judicial interpretations of Article 40, especially regarding the protection of bona fide purchasers for value. It will also explore the enactment of the Land Registration Act (LRA) of 2012, with particular emphasis on Section 26, which appears to conflict with Article 40.

2.2 Colonial Period

Before colonialism, land ownership in Kenya was owned communally and governed by customary law. Under this system, a whole community owned the land, with each individual having a right to use it in a manner acceptable to the others.⁸⁰ 1885 marked the beginning of colonialism and the

⁸⁰ Njuguna K and Mbaya M ‘Land reforms in kenya: an institution of surveyors of kenya (isk) initiative’ https://www.fig.net/resources/proceedings/fig_proceedings/korea/full-papers/pdf/session7/njuguna-baya.pdf — accessed on the 23 September 2024.

division of Africa.⁸¹ The British introduced the English land laws in a bid to establish control over Kenyan lands by acquiring land titles and its natural resources.⁸²

The first ever land registration Act in Kenya was the Registration of Documents Act which was enacted in 1901.⁸³ A key feature of this registration system is that the records maintained under it only served as evidence that the transaction occurred. It did not confirm the validity or legitimacy of the transaction itself.⁸⁴ To complete the process, a landowner simply needed to prepare a transfer document and present it to the registrar for inclusion in the document register.⁸⁵ In 1908, the Land Titles Ordinance was introduced to address doubts and uncertainties that shrouded individual land ownership in the coastal region of Kenya.⁸⁶ The registration system under the LTA primarily served to recognize existing claims to land ownership but did not confer additional rights beyond documenting the situation as it stood.⁸⁷

In 1920, the Registration of Titles Act⁸⁸ (RTA), was enacted as an ordinance to introduce title registration for land transfers in Kenya. The Act operated on a system of title by registration, rather than a system of registration of title.⁸⁹ This means that once the registration process is complete,

⁸¹ Mungeam H, *British Rule in Kenya, 1895-1912: The establishment of administration in the East Africa Protectorate*, Clarendon, Oxford, 1966, 7.

⁸² Okoth, H.W.O, *Tenants of the Crown, the Evolution of Agrarian Law and Institutions in Kenya*, 1991 ACTS Press, Nairobi, 11.

⁸³ Omwoma R, 'Land Registration: A review of Rationale, Mechanics and Typologies'- <https://www.academia.edu/38103433/Land_Registration >- On 12 December 2024.

⁸⁴ Omwoma R, 'Land Registration: A review of Rationale, Mechanics and Typologies'- <https://www.academia.edu/38103433/Land_Registration>- On 12 December 2024.

⁸⁵ Omwoma R, 'Land Registration: A review of Rationale, Mechanics and Typologies'- <https://www.academia.edu/38103433/Land_Registration>- On 12 December 2024.

⁸⁶ K. Kanyinga, "Struggles of Access to land: The 'Squatter Question' in Coastal Kenya,'98, *Danish Institute for International Studies*," CDR Working Paper, 7, 1998, 46.

⁸⁷ P.L. Onalo, *Land Law and Conveyancing in Kenya*, 176.

⁸⁸ *Registration of Titles Act*, (Cap 281 of 1920).

⁸⁹ Asaria H, 'Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution' Kenya law publications, <https://kenyalaw.org/kl/index.php?id=1905> on 3 October 2024.

title to the land is vested in the individual(s) entered onto the register.⁹⁰ This principle is rooted in the case of *Breskvar v Wall*, where the court emphasized that the *Torrens system* is not a registration of title system, but rather a system of title by registration.⁹¹ The certificate of title does not merely describe an existing title, but rather creates and confirms ownership through the act of registration itself.⁹² The key distinction between this Act and earlier regimes lies in the nature of the benefits conferred. While previous systems primarily focused on recording documents without granting additional benefits, the registration arrangements under the RTA provided landowners with an indefeasible title guaranteed by the state.⁹³

Once granted, such a title could not be defeated.⁹⁴ This marked the first registration regime to offer a state-guaranteed title with both validity and indefeasibility. The RTA stipulated that the last registered owner's title is indefeasible or absolute.⁹⁵ Furthermore, the RTA regarded the title of the last registered owner as a new grant, nullifying any previous titles or interests, thereby eliminating the necessity for future purchasers to examine past transactions.⁹⁶ To solidify all this the RTA mandated that no interest in land could pass until it had been registered, ensuring that the register is the final authority.⁹⁷

⁹⁰ Asaria H, 'Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution' Kenya law publications, <https://kenyalaw.org/kl/index.php?id=1905> on 3 October 2024.

⁹¹ *Breskvar v Wall* (1971), The High Court of Australia.

⁹² *Breskvar v Wall* (1971), The High Court of Australia.

⁹³ Maks S, 'Conveyancing Law & Practice' -<
https://www.academia.edu/32764512/CONVEYANCING_LAW_and_PRACTICE>- On 12 December 2024.

⁹⁴ Maks S, 'Conveyancing Law & Practice' -<
https://www.academia.edu/32764512/CONVEYANCING_LAW_and_PRACTICE>- On 12 December 2024.

⁹⁵ Section 23(1), *Registration of Titles Act*, (Cap 281 of 1920).

⁹⁶ Section 22(3), *Registration of Titles Act*, (Cap 281 of 1920).

⁹⁷ Section 32, *Registration of Titles Act*, (Cap 281 of 1920).

2.3 Post- Colonial Period

The Registered Land Act (RLA), which came into effect in 1963, was introduced to provide a more simplified and unified system of land registration capable of handling mass registration.⁹⁸

Unlike the RTA, the RLA was governed by the common law of England as modified by equity, meaning that while the register was authoritative, unregistered equitable rights could affect ownership.⁹⁹ Under RLA, titles were not absolutely indefeasible as subsequent registrations could be challenged by pre-existing equitable rights.¹⁰⁰

2.4 Post 2010

2.4.1 Article 40 of the Constitution

Following the enactment of the 2010 Constitution, Kenya significantly reformed its land laws to ensure property rights protection. Article 40 guarantees every person the right to acquire and own property in any part of Kenya.¹⁰¹ It further restricts the Parliament from enacting any law that would allow the State or any person to arbitrarily deprive someone of their property. Of particular relevance to this chapter is Article 40(6) which stipulates that property rights are not protected when the property in question has been unlawfully acquired.¹⁰² This provision stands as a significant point of contention in land law.¹⁰³

In the cases of *Shimoni Resort v. Registrar of Titles & 5 Others* and *Isaac Gathungu Wanjohi & Another v. AG & 6 Others*, when addressing the application of the doctrine of sanctity of title as expressed under Section 26(1) of the LRA, in relation to Article 40(6) of the Constitution, the High

⁹⁸ Republic of Kenya, ‘Sessional Paper No. 3 of 2009 on National Land Policy’, ‘Government Printers, Nairobi, 2009, 8.

⁹⁹ Section 163, *Registration of Land Act*, (Cap 300 of 1963).

¹⁰⁰ Asaria H, ‘Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution’ Kenya law publications, <https://kenyalaw.org/kl/index.php?id=1905> on 3 October 2024.

¹⁰¹ Article 40, *Constitution of Kenya*, 2010.

¹⁰² Article 40, *Constitution of Kenya*, 2010.

¹⁰³ Asaria H, ‘Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution’ Kenya law publications, <https://kenyalaw.org/kl/index.php?id=1905> on 3 October 2024.

court adopted a literal approach to interpretation.¹⁰⁴ In both cases the judges concluded that Article 40(6) waters down the doctrine of sanctity of title, rendering any title found to have been unlawfully acquired unprotected, regardless of when or by whom the fraud was committed.¹⁰⁵ Under this literal interpretation, even a bona fide purchaser for value without notice of fraud would not be protected if a predecessor in title had acquired the property unlawfully or fraudulently.¹⁰⁶

In contrast, in the case of *Samwel D. Omwenga Angwenyi v. National Land Commission*, the High court rejected this interpretative approach, arguing that such an interpretation would mean that the very Constitution intended to protect the fundamental rights of all persons would, paradoxically, infringe upon the rights of a bona fide purchaser.¹⁰⁷ The court held that the most appropriate interpretation of Article 40(6) of the Constitution is that it applies only to defrauders, without the intent to deprive an innocent buyer of their property. Thus, Article 40(6) applies solely to registered owners who are found to have acquired their properties unlawfully, and it is only such property that would be excluded from protection under Article 40.¹⁰⁸ Property held by a bona fide purchaser, however, remains safeguarded, even if it is shown that the property had been fraudulently transacted at some point before the bona fide purchaser acquired it.¹⁰⁹

In the Dina management case, the Supreme Court took a different approach holding that since the first registered owner did not acquire the title regularly, the ownership of the suit property by the appellant could not be protected under Article 40 of the Constitution.¹¹⁰ Consequently, the

¹⁰⁴ *Samwel D. Omwenga Angwenyi v National Land Commission, Chief Lands Registrar & Attorney General* (2019) KLR.

¹⁰⁵ *Shimoni Resort -vs- Registrar of Titles & 5 Others* (2016) eKLR.

¹⁰⁶ *Shimoni Resort -vs- Registrar of Titles & 5 Others* (2016) eKLR.

¹⁰⁷ *Samwel D. Omwenga Angwenyi v National Land Commission, Chief Lands Registrar & Attorney General* (2019) eKLR.

¹⁰⁸ *Samwel D. Omwenga Angwenyi v National Land Commission, Chief Lands Registrar & Attorney General* (2019) eKLR.

¹⁰⁹ *Samwel D. Omwenga Angwenyi v National Land Commission, Chief Lands Registrar & Attorney General* (2019) eKLR.

¹¹⁰ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

appellant was denied the benefit of the bona fide purchaser defense due to a defective root title.¹¹¹ By adopting the common law doctrine of tracing the root title to establish a legal, regular and procedural acquisition, the Supreme Court departed from the spirit of the LRA which is founded on the Torrens system.

Under the LRA, ownership is created and confirmed through title by registration, therefore granting the last registered owner a new title that nullifies previous titles and interests thereby eliminating the need for the future purchasers to investigate past transactions.¹¹² However the supreme court failed to clarify on the legal protection of bona fide purchasers under law and particularly in cases where a fraudulent transaction exists within the chain of title. Instead it largely echoed the Court of Appeal determination without substantively looking into Section 26, the very provision that embodies the *Torrens system's* principle of indefeasibility of title.¹¹³ As a result, the Court of Appeal in the Tarabana case urged the Supreme Court to carefully dissent Section 26 in determining the legal protection of the Bonafide purchaser.¹¹⁴ This demonstrates that uncertainty still persists in the law on matters regarding the protection of the bona fide purchaser, even after the Supreme court gave its determination.

2.4.2 Section 26 of the Land Registration Act, 2012

The LRA was enacted in 2012 as mandated by the constitution¹¹⁵ As earlier alluded to the Constitution mandated for the revision, consolidation, and rationalization of the existing land laws.¹¹⁶ To facilitate consolidation, titles previously registered under the RLA, GLA, RTA, or LTA, which were repealed by the new law, transitioned to the LRA.¹¹⁷ However, despite the sense

¹¹¹ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

¹¹² *Breskvar v Wall* (1971), The High Court of Australia.

¹¹³ Mwihuri W, 'The illusionary right to protection of property under article 40 of the constitution: An essay on recent jurisprudence regarding indefeasibility of title in Kenya,' 26.

¹¹⁴ *Tarabana Company Limited v Sehmi & 7 others* (2023) eKLR.

¹¹⁵ Article 68, *Constitution of Kenya* 2010.

¹¹⁶ Article 68, *Constitution of Kenya* 2010.

¹¹⁷ Maina S, 'Registration of title to land: a critique of the Land Registration Act no.3 of 2012' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 47.

of expectation and optimism surrounding the inclusion of strong constitutional provisions on land, which envisioned the revision and rationalization of land registration legislation, the drafting process—intended to translate constitutional aspirations into concrete legal reforms—was marred by undue haste and a lack of meaningful consultation and debate. As a result, the registration framework established by the 2012 Act proved flawed and weak, appearing largely disconnected from its guiding document.¹¹⁸ This is evident in that the Act replicates most of the provisions from the abolished statutes.¹¹⁹ Consequently, the challenges inherent in the previous land registration laws got transferred to the current regime.¹²⁰ In particular is the *Torrens system* of registration and the challenges it faces in applying it to Kenyan legislation.¹²¹

The principle of indefeasibility of a title in Kenya is established in the LRA,¹²² and more specifically, section 26.¹²³ The section, titled ‘certificate of title to be held as conclusive evidence of proprietorship,’ encapsulates what can be referred to as the "title promise" of the LRA.¹²⁴ It highlights the positive act of the registration which vests property in a registered proprietor.¹²⁵ Upon registration, the proprietorship shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained in the certificate.¹²⁶ Therefore, by registering the land, the party is granted the title to that land and by dint of this section the

¹¹⁸ Manji A, ‘Land reform in Kenya: The history of an idea,’ 5 *Strathmore Law Journal*, 1, 2021, 274.

¹¹⁹ Maina S, ‘Registration of title to land: a critique of the Land Registration Act no.3 of 2012’ Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 47.

¹²⁰ Manji A, ‘Land reform in Kenya: The history of an idea,’ 275.

¹²¹ Asaria H, ‘Under Rta Title Can Never Be Nullity Ab Initio & Interpretation of Constitution’ Kenya law publications, < <https://kenyalaw.org/kl/index.php?id=1905> >- on 3 October 2024.

¹²² Act No 3 of 2012.

¹²³ Mutahi S, ‘Indefeasibility of Title and Adverse Possession in Kenya: An Uneasy Relationship?’ 7 *Strathmore Law Journal*, 1, 2023, 84.

¹²⁴ Pownall J and Hill R, ‘The Land Registry’s Perspective: The Practical Challenges of Land Registration’ In Goymour A, Watterson S and Dixon M (ed) *New Perspectives on Land Registration Contemporary Problems and Solutions*, Bloomsbury Publishing Plc, 2018, 204.

¹²⁵ Pownall J and Hill R, ‘The Land Registry’s Perspective: The Practical Challenges of Land Registration’ 204.

¹²⁶ Section 26, Land registration Act, (Act No 3 of 2012).

proprietor's land interests are guaranteed. However, the title of a proprietor may be challenged under specific circumstances, such as when it was obtained through fraud or misrepresentation involving the proprietor, or if it was acquired illegally, unprocedurally, or through corruption.¹²⁷ While a registered proprietor is generally entitled to legal protection and initially recognized by the court as the legitimate owner, the court may be compelled to examine the title instrument if its validity is disputed.¹²⁸ Upon finding that the title was acquired through fraud, misrepresentation, illegal means, unprocedurally, or by corrupt practices, the court has the authority to declare the title null and void. Notably, these are the sole grounds upon which a title's validity may be contested.¹²⁹

Section 26 can be said to be a reflection of the curtain principle within the *Torrens system*, establishing the title register as the final, authoritative record of ownership.¹³⁰ It establishes that, upon registration, the title serves as prima facie proof that the proprietor is the absolute and indefeasible owner of the property.¹³¹ However, in line with the curtain principle, which suggests that a purchaser need not look beyond the register, the Act outlines specific circumstances under which this "curtain" may be lifted. If the title is obtained through fraud, misrepresentation, or illegal means, the court has the authority to investigate beyond the register to determine its legitimacy.¹³² Thus, while Section 26 embodies the assurance of conclusive ownership, it also acknowledges that this certainty is not absolute, particularly in instances of unlawful acquisition.¹³³

A central issue in interpreting Section 26 is the absence of definitions for the terms 'fraud' 'illegal' 'irregular' and 'unprocedural' in the Act, leaving a significant gap in understanding the full scope and implications of the section. The RTA provided fraud to include a person obtaining registration, with a proven knowledge of the existence of an unregistered interest on the part of some other

¹²⁷ Section 26, Land registration Act, (Act No 3 of 2012).

¹²⁸ Section 26, Land registration Act, (Act No 3 of 2012).

¹²⁹ Section 26, Land registration Act, (Act No 3 of 2012).

¹³⁰ Mutahi S, 'Indefeasibility of Title and Adverse Possession in Kenya: An Uneasy Relationship?' 84.

¹³¹ Section 26, Land registration Act, (Act No 3 of 2012).

¹³² *Elizabeth Wambui Kiragu v Tirus Kamau Mutoru* (2014) eKLR.

¹³³ *Elizabeth Wambui Kiragu v Tirus Kamau Mutoru* (2014) eKLR.

person whose interests he knowingly and wrongfully defeats that registration.¹³⁴ Given that LRA is the fruit that doesn't fall far from the RTA's tree, it can be inferred that it is the law and based on the *Torrens system*, that the title of a bona fide purchaser for value and without notice of fraud cannot be impeached.¹³⁵ The Ugandan judges called it 'the paradox of registered conveyancing' whereby a title obtained through fraud though void is capable of becoming a good root for the bona fide purchaser for value.¹³⁶

An understanding of the other three terms can be drawn from the Black's Law Dictionary which defines 'illegal' as actions not authorized by law, illicit, unlawful, or contrary to law.¹³⁷ "Irregular" refers to acts that deviate from established rules or norms, while "procedure" outlines the formal steps in a legal action, including the manner and sequence required to ensure lawful progression.¹³⁸ In terms of legality and regularity the Supreme Court in the *Dina Management case* held that proof of legitimacy goes beyond mere possession of a title document; it requires the purchasers to trace the root title. For procedure, the Court of Appeal, in the case of *Samuel Kamere v. Lands Registrar* held that the purchaser must have conducted adequate due diligence to identify the legitimate owner from whom they obtained the title.¹³⁹

The departure from the *Torrens system* begins with the court's definition of illegality and irregularity, which conforms with the common law doctrine of tracing the chain of titles. Consequently, it is imperative that the Act defines these two terms for the restoration of certainty and consistency. As for procedure, neither the Act nor the courts offer a clear definition of 'due diligence,' instead it is continuously and ambiguously referring to it as "necessary due

¹³⁴ Section 2, Registration of *Land Act*, (Cap 300 of 1963).

¹³⁵ *Registration of Land Act*, (Cap 300 of 1963).

¹³⁶ Charles Karethe Kiarie & 2 Others -vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 Others (2013) eKLR.

¹³⁷ Black's Law Dictionary, 4 ed.

¹³⁸ Black's Law Dictionary, 4 ed.

¹³⁹ *Samuel Kamere v Lands Registrar* [2015] eKLR.

diligence.¹⁴⁰ Noting this, the National Land Commission, in its National Land Policy and recommendations, has highlighted the absence of a comprehensive framework for the due diligence requirements and has called for the enactment of the Land Administration and Management Act, which would provide detailed requirements for due diligence.¹⁴¹

2.5 Conclusion

This chapter examines the relevant statutory provisions, along with various courts' interpretations and a few commentaries by various authors. It has discussed the introduction of the Torrens system into our legal system which translates to the principle of indefeasibility of title. However, there has been a noticeable shift away from these core Torrens principles, with Kenyan courts struggling to consistently apply them as clearly seen in the interpretations given to Article 40 of the Constitution of Kenya and Section 26 of the LRA.

¹⁴⁰ *Elizabeth Wambui Kiragu v Tirus Kamau Mutoru* (2014) eKLR.

¹⁴¹ National Land Commission, 'Recommended National Land Policy' 2023, 48.

CHAPTER 3

ASSESSING THE INNOCENCE OF A PURCHASER IN FRAUDULENT TRANSACTIONS

3.1 Defining the Bona Fide Purchaser for Value Without Notice

A bona fide purchaser is defined in the Black's law dictionary as one who acquires property for valuable consideration without the knowledge of any competing claims or defects in the seller's title, whether actual or constructive.¹⁴² The bona fide purchaser for value without notice principle emerged from equity's attempt to balance the protection of existing property rights with the interests of good faith buyers.¹⁴³

Under common law, the foundational principle governing property transfers was *nemo dat quod non habet*.¹⁴⁴ This rule ensured that an original owner retained their title regardless of subsequent transactions, protecting them from fraudulent dispossession.¹⁴⁵ The rationale was twofold: first, to guarantee that owners were not unjustly deprived of their property and second, to place the responsibility of verifying the validity of the title on purchasers.¹⁴⁶ However, this rule often imposed harsh consequences on bona fide purchasers.¹⁴⁷ To mitigate these outcomes, courts of chancery introduced exceptions that allowed bona fide purchasers to retain title in specific circumstances which include acquiring the property in good faith, without notice of any prior

¹⁴² Black's Law Dictionary, 9 ed.

¹⁴³ O'Connor P, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in Elizabeth Cooke (ed) *Modern Studies in Property Law*, Volume 2, Bloomsbury Publishing Plc, 2003, 85.

¹⁴⁴ Hebert P and Pettway R, 'Sales of Another's Movables - History, Comparative Law, and Bona Fide Purchases,' 29 *Louisiana law review* 2 1969, 337.

¹⁴⁵ Hebert P and Pettway R, 'Sales of Another's Movables - History, Comparative Law, and Bona Fide Purchases,' 337.

¹⁴⁶ Merritt D, 'Title to Goods: The Position of the Purchaser at Common Law and under the Uniform Commercial Code,' 866.

¹⁴⁷ Merritt D, 'Title to Goods: The Position of the Purchaser at Common Law and under the Uniform Commercial Code,' 866.

notice and with sufficient consideration.¹⁴⁸ While the protection of original ownership remained a central tenet of the law, this accommodation of innocent purchasers reflected its responsiveness to the complexities of real-world transactions.¹⁴⁹

Under the *Torrens system*, the bona fide purchaser for value without notice doctrine is not merely a safeguard but the foundation of indefeasibility.¹⁵⁰ Once a purchaser acquires the title in good faith, for value, and registers it, their ownership is shielded from past irregularities regardless of the defects in the previous owner's title.¹⁵¹ This protection upholds the integrity and reliability of the register.

3.2 Defining the Bona Fide Purchaser for Value Without Notice in Kenya

In the Ugandan appellate case *Katende v Haridar & Company Ltd*, which is widely cited by the courts determining land matters, the Court of Appeal held that a bona fide purchaser is one who acts honestly in purchasing property, with the intention of acquiring it legally and without the knowledge of any fraud or defects in the title.¹⁵² The Court identified key elements that must be met for a buyer to invoke the bona fide doctrine successfully, including holding a valid certificate of title, purchasing the property in good faith, and being unaware of any fraudulent dealings at the time of purchase.¹⁵³

In Kenya, in the case of *Samuel Kamere v Lands Registrar*, it was held that to qualify as a bona fide purchaser must demonstrate three key elements: first, that they obtained a valid and lawful title; second, that they exercised due diligence to verify the legitimate owner from whom they

¹⁴⁸ Hebert P and Pettway R, 'Sales of Another's Movables - History, Comparative Law, and Bona Fide Purchases,' 337.

¹⁴⁹ Hebert P and Pettway R, 'Sales of Another's Movables - History, Comparative Law, and Bona Fide Purchases,' 337.

¹⁵⁰ *Gibbs v Messer*, (1891) Privy Council, United Kingdom.

¹⁵¹ *Gibbs v Messer*, (1891) Privy Council, United Kingdom.

¹⁵² *Katende V Haridar & Company Ltd* (2008) 2 EA.

¹⁵³ *Katende V Haridar & Company Ltd* (2008) 2 EA.

acquired the property; third, that they provided valuable consideration for the purchase.¹⁵⁴ In *Munyu Maina v Hiram Gathiha Maina* the court held that where the legitimacy of a registered proprietor's root title is under challenge, it is insufficient to only provide a title document as proof of ownership. Since the validity of the title itself is under challenge, the proprietor must go beyond the title instrument and establish that the acquisition was lawful, regular and unencumbered by any undisclosed interests.¹⁵⁵ Building on these precedents, the Supreme Court in the *Dina management case* held that the bona fide purchaser for value doctrine is not an automatic defense but is contingent on the legitimacy of the root title.¹⁵⁶

3.3 Indefeasibility of A Bona Fide Purchaser's Title in Cases Involving Previous Fraudulent Titles in the A-B-C Chain of Ownership

This chapter aims to answer the question whether a purchaser can be considered an innocent purchaser for value if they acquire a registered title in good faith, without engaging in fraud or breaching the applicable conduct standards but the title is later found to be invalid due to fraud, irregularity, or procedural non-compliance¹⁵⁷ This inquiry is inspired by the Court of Appeal's ruling in the *Tarabana Company Limited v Sehmi & Others* case, as discussed in Chapter 1, where the court invited the Supreme Court to determine whether the title of an innocent purchaser could be challenged if it is traced back to fraud.¹⁵⁸

To begin, a clear understanding of what fraud entails is needed. Fraud, as understood within the *Torrens system*, diverges significantly from its common law and equitable counterparts. At common law, fraud is rooted in the deliberate or reckless making of a false representation, where the loss arises from reliance on such misrepresentation.¹⁵⁹ Equitable fraud, on the other hand, is less rigid and focuses on breaches of conscience, often evaluated within the moral framework

¹⁵⁴ *Samuel Kamere v Lands Registrar* [2015] eKLR.

¹⁵⁵ *Munyu Maina v Hiram Gathiha Maina* (2009) eKLR.

¹⁵⁶ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

¹⁵⁷ *Tarabana Company Limited v Sehmi & 7 others* (2023) eKLR.

¹⁵⁸ *Tarabana Company Limited v Sehmi & 7 others* (2023) eKLR.

¹⁵⁹ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' In Dixon M (ed), *Modern Studies in Property Law*, Volume 5, Bloomsbury Publishing Plc, 2009, 4.

developed by the Courts of Chancery.¹⁶⁰ Torrens fraud, defined as a *sui generis* concept, however, hinges on dishonesty of a party in the land transaction and depends on intentional or reckless conduct that directly undermines the integrity of the registration process.¹⁶¹

To answer the question posed in this chapter, let's consider a hypothetical land dispute scenario involving three parties A, B and C.¹⁶² A is the original owner whose land is transferred to B pursuant to a forged instrument, and B gets registered as transferee, and B then transfers the land to C who is honest and who gets registered as the owner of the land.¹⁶³ Call this case A-B-C chain of ownership.¹⁶⁴ Who is entitled to the land between the original owner A, and the purchaser C the purchaser, assuming the purchaser was honest and conducted the necessary due diligence? The law must establish a clear adjudication framework to resolve disputes between two innocent parties over property rights—the prior registered owner A and the bona fide purchaser for value C.¹⁶⁵ Both parties may have recourse to monetary compensation through a statutory indemnity scheme or damages claim against the party responsible for the loss. While such remedies can mitigate the impact on the losing party, they do not eliminate the need for a decisive legal rule.¹⁶⁶ In most cases, A seeks restoration of their registered title free from C's claim, while C seeks to retain their registered interest.¹⁶⁷ Since both outcomes cannot coexist, the law must designate one party as the ultimate right-holder, creating a winner and a loser. The problem becomes more complicated where C disposes of an interest to a subsequent purchaser D.¹⁶⁸

¹⁶⁰ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study,' 4.

¹⁶¹ Thomas R 'Points of Tension: Fraud and Challenges under Guarantee of Titles Regimes' in Hickey R and Conway H (ed) *Modern Studies in Property Law* 9, Bloomsbury Publishing Plc, 2017, 204.

¹⁶² Thomas R 'Points of Tension: Fraud and Challenges under Guarantee of Titles Regimes,' 204.

¹⁶³ Thomas R 'Points of Tension: Fraud and Challenges under Guarantee of Titles Regimes,' 204.

¹⁶⁴ Thomas R 'Points of Tension: Fraud and Challenges under Guarantee of Titles Regimes,' 204.

¹⁶⁵ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 46.

¹⁶⁶ Thomas R 'Points of Tension: Fraud and Challenges under Guarantee of Titles Regimes' 204.

¹⁶⁷ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 46.

¹⁶⁸ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 46.

The selection of an adjudication rule to resolve disputes arising from unauthorized land registrations is arguably one of the most challenging issues within land title registration systems.¹⁶⁹ A rule that awards the property to the prior owner A promotes static security, ensuring that owners are protected from losing their land through illegal transactions.¹⁷⁰ This approach reinforces confidence among property owners that their rights are secure unless they willingly consent to a transfer.¹⁷¹ However, such a rule inevitably undermines dynamic security, as purchasers can no longer be certain that registering an instrument in good faith will guarantee them a clear and indefeasible title. A rule favoring the purchaser C emphasizes dynamic security by protecting good-faith buyers and enhancing market reliability.¹⁷² While this boosts confidence in acquiring secure titles, it compromises static security by exposing current owners to potential loss of property through invalid transactions. Thus, C gains initial assurance but faces the risk of future title challenges.¹⁷³ The law's dilemma is that we need both dynamic and static security, but the law must sometimes choose between them.¹⁷⁴

The *Torrens* jurisdictions two approaches to deal with this problem; the immediate indefeasibility followed by countries such as New Zealand and Singapore and the deferred indefeasibility applied in Canada and Malaysia. Under the rule of immediate indefeasibility, an honest transferee acquires immunity from proprietary claims immediately upon registration.¹⁷⁵ This immunity shields them from remedies that would otherwise arise due to the invalidity of the instrument affecting the transfer.¹⁷⁶ Whether the instrument is void because of forgery or any other defect, the principle ensures protection for the transferee, provided they acted in good faith and without dishonesty. Therefore, purchaser C who registers a land obtains an immediately indefeasible title even if the

¹⁶⁹ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 46.

¹⁷⁰ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' 290.

¹⁷¹ Cooke, Elizabeth, *The New Law of Land Registration*, Bloomsbury Publishing Plc, 2003. 100

¹⁷² O'Connor P, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in Elizabeth Cooke (ed) *Modern Studies in Property Law*, Volume 2, Bloomsbury Publishing Plc, 2003, 85

¹⁷³ Cooke, Elizabeth, *The New Law of Land Registration*, 101.

¹⁷⁴ Cooke, Elizabeth, *The New Law of Land Registration*, 101.

¹⁷⁵ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' 290

¹⁷⁶ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' 290

instrument is void or voidable for any reason including forgery and is protected against any action by the original owner A.¹⁷⁷

One of the major shortcomings of this rule is the fact that it makes no attempt to balance static and dynamic securities.¹⁷⁸ The main argument for this rule is that it protects purchasers from the risks associated with forgery or other invalidities in the immediate transaction, thereby offering greater security for their titles. However, this increase in dynamic security comes at the expense of static security, resulting in only a marginal overall benefit. The rule leaves both purchasers and owners exposed to potential loss through illegal or invalid transactions after acquiring title for while C's title would secure from A, his security would be short-lived as it would be prone to void dispositions in the future.¹⁷⁹ Since both groups rely on a balance of static and dynamic security respectively, prioritizing one at the expense of the other is neither practical nor fair.¹⁸⁰

Deferred indefeasibility on the other hand generates a distinct outcome in comparison to immediate indefeasibility. According to this principle, a transferee whose transfer was effected by a void instrument is not immune from registration, even if they were honest.¹⁸¹ Therefore, purchaser C does not get an indefeasible title by registering a void or voidable title instrument, even if they acted without fraud. Under this rule, the original purchaser A, previously registered, is allowed to rectify the register and restore title against purchaser C.¹⁸² However, matters get more complicated than this when a subsequent bona fide purchaser D obtains an indefeasible title once they register a valid disposition from C. The right to challenge the title is lost by A once D registers the transaction. This rule ensures that D's title is secure as long as they act in good faith and for value, and it provides dynamic security by protecting subsequent purchasers from prior title defects.¹⁸³ This approach strikes a balance between static and dynamic security in the sense that A's static

¹⁷⁷ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 46.

¹⁷⁸ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 46.

¹⁷⁹ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 623.

¹⁸⁰ O'Connor P, 'Registration of Invalid Dispositions: Who Gets the Property?' 46.

¹⁸¹ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study,' 291.

¹⁸² Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study,' 291.

¹⁸³ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study,' 291.

security is preserved as long as C has not disposed of the registered title, protecting A's rights until C's action.¹⁸⁴

3.4 The Practice in Kenya

In Kenya, there is evidence of the application of both immediate indefeasibility and deferred indefeasibility by the courts. The first two cases below will illustrate the application of the immediate indefeasibility while the latter two will demonstrate the application of deferred indefeasibility. For immediate indefeasibility, the two cases adhere to the principle of title by registration where the certificate of title does not merely describe an existing title but rather creates and confirms ownership through the act of registration itself. This indicates that the LRA operates as a comprehensive and self-contained system of land registration.¹⁸⁵ As demonstrated in these cases, there seems to be an expectation for judges to follow the LRA and refrain from considering external factors when making decisions.¹⁸⁶ In essence, judges are required to rely on the 'statutory magic' that designates C as the rightful owner, even when their personal instincts, shaped by morality, politics, or general property principles, might lead them to favor A.¹⁸⁷

3.4.1 Immediate indefeasibility

In *David Peterson Kiengo & 2 Others v Kariuki Thuo*, the property was fraudulently registered under the defrauder's name, who then transferred it to unsuspecting innocent buyers and who were then recorded as the owners.¹⁸⁸ As a result, the Thuos who were the original owners of the land, lost it. The court ruled that the buyer's title remained indefeasible, as they were not responsible for past irregularities.¹⁸⁹ Their only duty was to verify ownership through the official register. If the register was inaccurate due to misconduct by land officials, the affected parties could seek damages

¹⁸⁴ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' 291.

¹⁸⁵ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 623.

¹⁸⁶ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 623.

¹⁸⁷ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 623.

¹⁸⁸ *David Peterson Kiengo & 2 Others V Kariuki Thuo* [2012] eKLR.

¹⁸⁹ *David Peterson Kiengo & 2 Others V Kariuki Thuo* [2012] eKLR.

from the State but could not reclaim ownership.¹⁹⁰ The court emphasized that the buyer was not required to conduct any inquiries beyond the register to confirm the title's validity.

Of importance, more than the judgement is the judge's *obiter dicta* where he said that: -

"This is not an elegant solution. It is a hard result for the Thuos. They did nothing wrong. They are merely victims of a fraudster; in fact, they are vicarious victims to the fraudster because they never saw nor dealt with him. It is the other parties to the cases who were directly "victimized." Yet, through the operation of the law, these other parties have an upper hand in retaining possession and ownership of the properties in question. For me, it is not enough that I say that the "law made me do it." I believe that the results here are in keeping with the overall policy objectives of the Land Registration Act, whose stability, I also believe, maximizes the welfare of the polity. That does not make the result here any easier for the Thuos. The only saving grace is that they have a course of action against the State for recovery of damages..."¹⁹¹

In *Hannah Wangui Ithebu & Others v Joel Nguigi Magu & Others*, the respondents were also victims of fraud, as the appellants had allegedly colluded with the Land Registrar to secure fraudulent registration of land. While the respondents were victims of a fraudulent scheme, the court upheld the indefeasibility of title under the Registration of Titles Act and ruled in favor of the appellants.¹⁹² The judge pointed out the harsh reality of the legal system, stating, "much though I might dislike or disapprove of it (and I must say that indeed I disapprove of it) I am bound by it," reaffirming that the statutory framework required the courts to prioritize the indefeasibility of title over equitable considerations of justice for the victims of fraud.¹⁹³ In these two cases, the courts clearly demonstrated a commitment to the statutory framework, showing reluctance to depart from the formal legal rules laid down by the LRA. Despite the injustices faced by the plaintiffs, the courts maintained that the certainty of land registration was paramount.

3.4.2 Deferred indefeasibility

In recent years there has been a shift in judicial reasoning, with the courts seemingly leaning towards the application of deferred indefeasibility, showing a growing willingness to challenge

¹⁹⁰ *David Peterson Kiengo & 2 Others V Kariuki Thuo* [2012] eKLR.

¹⁹¹ *David Peterson Kiengo & 2 Others V Kariuki Thuo* [2012] eKLR.

¹⁹² *Hannah Wangui Ithebu & Others v Joel Nguigi Magu & Others* (2005) eKLR.

¹⁹³ *Hannah Wangui Ithebu & Others v Joel Nguigi Magu & Others* (2005) eKLR.

titles even when they appear formally indefeasible. In the landmark case of *Dina Management*, the Supreme Court emphasized that a title derived from an irregular process cannot be deemed indefeasible, particularly when the first allocation was obtained illegally.¹⁹⁴ The court held that once fraud is involved, the title is compromised, allowing a subsequent holder to be questioned despite the formal registration of the title.¹⁹⁵ The purchaser needs to trace the root of the title to establish its lawfulness.¹⁹⁶ In *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others*, (*Alice Chemutai too case*) the High Court expanded on this notion by ruling that a title could be invalidated if obtained through fraud or misrepresentation, even if the titleholder was innocent of any wrongdoing.¹⁹⁷ This creates a framework where the title is vulnerable to challenge despite the innocence of the person holding it, a stance that seems to place a stronger emphasis on the protection of the rights of the original landowner.¹⁹⁸

3.5 The Departure from The Torrens System to The Nemo Dat Rule

In an attempt to safeguard static security, both the *Dina management* and *Alice Chemutai too* cases the Courts invoke and apply the *nemo dat* rule while overlooking the fact that the LRA is built on the *Torrens system*. Although disputes resolved based on the common law emphasize on protecting the original owner's rights and discouraging fraudulent or defective transactions, this approach often results in subsequent purchasers losing their rights over the property in question, even when they have acted in good faith and without knowledge of hidden claims.¹⁹⁹

The two sets of cases exemplify bijural ambiguity: the tension arising when Land Registration Act, grounded in *Torrens principles*, coexist with broader common law property rules without clear

¹⁹⁴ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

¹⁹⁵ *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR.

¹⁹⁶ *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR.

¹⁹⁷ *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (2015) eKLR.

¹⁹⁸ *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (2015) eKLR.

¹⁹⁹ Korngold G, 'Sanborn v. McLean: Beyond the Limits of Inquiry Notice,' 2009, 252 -

<https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2248&context=fac_articles_chapters>- 12 December 2024.

guidance on their interaction and the extent of their application.²⁰⁰ By adopting the Torrens system, Kenya's land registration laws deviated from traditional common law, yet this is inconsistently reflected in judicial interpretation. The resulting ambiguity undermines the LRA's objectives of promoting efficiency, finality, and dynamic security, perpetuating legal uncertainty in land transactions.

The question of whether the title of an innocent purchaser can be challenged when it stems from fraud can be answered both affirmatively and negatively, depending on the sitting court, as long as the bijural ambiguity between the Torrens and common law approaches on property law persists in our legal framework. Scotland has addressed this conflict by aligning its land registration statute with general property rules, creating a framework that accommodates both systems' underlying values while eliminating ambiguity. Specifically, Scotland's model ensures that statutory provisions governing land registration are harmonized with general property principles. By doing so, Scotland upholds a balance where statutory rules foster transactional confidence without entirely displacing the protective safeguards inherent in common law. This will be comprehensively discussed in the next chapter.

²⁰⁰ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion Paper No 125, 2004, 3.

CHAPTER 4

LESSONS KENYA CAN DRAW FROM SCOTLAND

4.1 Introduction

This chapter will assess Scotland's land registration system, particularly regarding the bijural nature of its previous land registration system codified in the Land Registration (Scotland) Act 1979 and their transition to the current statute, Land Registration *etc* (Scotland) Act 2012, which amended the bijural ambiguity. The chapter will begin with an exposition of Scotland's 1975 land registration framework, particularly the conflict between the ordinary rules of property and the statutory land registration laws in the Act. It will go on to explore how the Land Registration *etc* (Scotland) Act of 2012 addressed the conflict by aligning the ordinary property law rules with statutory land registration laws. Ultimately, this chapter will conclude by proposing a few lessons Kenya can adopt from Scotland.

4.3 Scotland

Under the Land Registration (Scotland) Act 1979, the land register was established under a positive system of land registration with immediate indefeasibility.²⁰¹ While this approach aimed to enhance the conclusiveness of the land register and protect bona fide purchasers, it brought significant challenges.²⁰² Under the Act, when a deed purporting to create, transfer, vary or extinguish a right in land was registered, the creation, transfer, variation or extinction necessarily and automatically took place.²⁰³ This was absolutely fine if the vast majority of deeds were valid. But the same was true even when the deed turned out to be invalid.²⁰⁴ This often led to bijural inaccuracies, where ownership reflected on the register conflicted with the rules of property law,

²⁰¹ Steven A, 'Developments in the Scottish Law of Land Registration', 22 *Juridical International*, 2014, 39 <https://doi.org/10.12697/JI.2014.22.04>.

²⁰² Reid K, 'Allocating Protections on the Land Register: A Case Study from Scotland' University of Edinburgh School of Law Research Paper 2014/49, <https://ssrn.com/abstract=2527645>.

²⁰³ Scotland Law Commission, *Report on Land Registration*, 2010, 19.

²⁰⁴ Harding M and Hickey R, 'Bijural Ambiguity and Values in Land Registration Systems' in Susan Bright (ed) *Modern Studies in Property Law*, Volume 6, Bloomsbury Publishing Plc, 2011,285.

on whose judgement, the register was deemed inaccurate and subject to potential rectification.²⁰⁵ Furthermore, the positive system's rigidity and complexity meant that ownership could sometimes be conferred incorrectly, requiring claw back of rights already granted.²⁰⁶

An example illustrating the challenges of land registration under the Land Registration (Scotland) Act, 1979 is the scenario where A is the legitimate owner of land, and B, impersonating A, forges A's signature to grant a disposition to C. C, acting in good faith, registers the forged deed and is subsequently listed as the proprietor in the Register.²⁰⁷ Later, C transfers the property to D, who acts in good faith, and registers this disposition.²⁰⁸ Under the 1979 Act, both C and D would acquire ownership upon registration, despite the forged deed.²⁰⁹ However, since property law does not recognize rights derived from a forged disposition, the Register would be inaccurate according to the general property laws.²¹⁰ This inaccuracy could, in principle, be rectified, but rectification would be barred as long as the acquirer, such as C or D, remained in possession.²¹¹

In 2014, Scotland introduced Land Registration *etc.* (Scotland) Act which shifted from a positive system to a negative system.²¹² A negative system functions within the general framework of property law. While registration is typically required, it alone is insufficient to create a real right; a valid deed executed by someone with the authority to grant the right is also necessary.²¹³ In this

²⁰⁵ Harding M and Hickey R, 'Bijural Ambiguity and Values in Land Registration Systems' in Susan Bright (ed) *Modern Studies in Property Law*, Volume 6, Bloomsbury Publishing Plc, 2011,285.

²⁰⁶ Harding M and Hickey R, 'Bijural Ambiguity and Values in Land Registration Systems' in Susan Bright (ed) *Modern Studies in Property Law*, Volume 6, Bloomsbury Publishing Plc, 2011,285.

²⁰⁷ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion paper No 125, 2004, par 5.20, https://www.scotlawcom.gov.uk/files/3212/7892/7069/dp125_land_reg.pdf

²⁰⁸ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion paper No 125, 2004, par 5.20, https://www.scotlawcom.gov.uk/files/3212/7892/7069/dp125_land_reg.pdf

²⁰⁹ Reid K, 'Allocating Protections on the Land Register: A Case Study from Scotland' University of Edinburgh School of Law Research Paper 2014/49, <https://ssrn.com/abstract=2527645>.

²¹⁰ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion paper No 125, 2004, par 5.20, https://www.scotlawcom.gov.uk/files/3212/7892/7069/dp125_land_reg.pdf

²¹¹ Waring E, 'Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,'420.

²¹² Scotland Law Commission, *Report on Land Registration*, 2010, 144.

²¹³ Scotland Law Commission, *Report on Land Registration*, 2010, 144.

system, title originates from the register only to the extent that registration completes the transfer process.²¹⁴ Consequently, the registration of a forged conveyance confers no rights whatsoever.²¹⁵ This transition eliminated the dual application of laws—land registration rules and ordinary property law—and established a single, unified property law framework.²¹⁶ However, this unified system retained the integrity principle, ensuring that a bona fide acquirer could still take ownership free of register errors.²¹⁷ This was done through the adoption of the principle of "deferred indefeasibility," which provides a balanced approach between protecting the rights of the true owner and the bona fide purchaser.²¹⁸ Under this approach, if a transfer is made using a void or voidable title, a bona fide person does not automatically gain indefeasible title, even if they acted in good faith.²¹⁹ For example, if a person acquires property through a defective transaction, they are not granted an indefeasible title just by registering the property.²²⁰ The original owner retains the right to rectify the register and restore the title, provided the error has not been passed on to another purchaser.²²¹

When the property held by the first bona fide purchaser is later transferred to a subsequent purchaser who registers the title, the subsequent purchaser gains an indefeasible title, and the original owner loses the right to challenge the title once the new transaction is registered.²²² However this remains contingent upon the first bona fide purchaser possessing the property for at

²¹⁴ Scottish Law Commission, 'Discussion Paper on Land Registration: Void and Voidable Titles' Discussion paper No 125, 2004, par 1.9, https://www.scotlawcom.gov.uk/files/3212/7892/7069/dp125_land_reg.pdf

²¹⁵ Scotland Law Commission, *Report on Land Registration*, 2010, 144.

²¹⁶ Steven A, 'Developments in the Scottish Law of Land Registration', 22 *Juridical International*, 2014, 41 <https://doi.org/10.12697/JI.2014.22.04>.

²¹⁷ Steven A, 'Developments in the Scottish Law of Land Registration', 22 *Juridical International*, 2014, 41 <https://doi.org/10.12697/JI.2014.22.04>.

²¹⁸ Reid K, 'Indefeasibility of Title: Law Reform in Scotland and New Zealand' University of Edinburgh School of Law Working Paper Series No 33, 2018,5.

²¹⁹ Reid K, 'Indefeasibility of Title: Law Reform in Scotland and New Zealand' University of Edinburgh School of Law Working Paper Series No 33, 2018, 5.

²²⁰ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' 291.

²²¹ Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' 291.

²²² Harding M and Bryan M, 'Responding to Fraud in Title Registration Systems: A Comparative Study' 291.

least one year before the transaction.²²³ This rule prevents a second bona fide purchaser from acquiring title unless the first purchaser's possession was both established and sustained for a period of time, providing a safeguard for the true owner. The addition of the one-year possession requirement introduces protection for the true owner while also not burdening the bona fide purchasers excessively.²²⁴ It ensures that the original owner's rights are protected unless the title has been transferred to a second bona fide purchaser who has held the property for a year, thus making it difficult for the true owner to lose their property unjustly.²²⁵

This approach balances the need for dynamic security for purchasers with the static security for the original owners and by extension the land registration laws and the general property laws by neither favoring the original purchaser nor bona fide purchaser in a blanket manner.²²⁶ This has been accomplished by departing from the strict, formalist view that title exclusively originates from the register and instead grounding it in the broader principles of general property law, while also acknowledging that these principles may be modified to address the distinct policy concerns of the registration system.²²⁷

4.4 Scotland's Advance Notices System under the 2012 Act

Part 4 of Scotland's 2012 Act introduced the use of advance notices to provide interim protection for deeds between two named parties that are intending to transact land and subsequently register it in the land register.²²⁸ This system addresses two main risks: (a) the possibility of a competing deed being registered first, taking precedence, and (b) the seller's insolvency, which could lead to

²²³ Reid K, 'Indefeasibility of Title: Law Reform in Scotland and New Zealand' University of Edinburgh School of Law Working Paper Series No 33, 2018,13.

²²⁴ Reid K, 'Indefeasibility of Title: Law Reform in Scotland and New Zealand' University of Edinburgh School of Law Working Paper Series No 33, 2018,13.

²²⁵ Reid K, 'Allocating Protections on the Land Register: A Case Study from Scotland' University of Edinburgh School of Law Research Paper 2014/49.

²²⁶ Reid K, 'Allocating Protections on the Land Register: A Case Study from Scotland' University of Edinburgh School of Law Research Paper 2014/49.

²²⁷ Goymour A, 'Mistaken registrations of land: exploding the myth of "title by registration"' 650.

²²⁸ Kranz J, 'Expedition E-Recording, First Stop URPERA: How Universal E-Recording under URPERA Could Revolutionize Real Estate Recording in the United States and Why it Should,'13 The Minnesota Journal of Law, Science & Technology 2, 2012, 387.

property seizure by creditors.²²⁹ Unlike the 1979 Act, which mitigated these risks through insurance, the 2012 Act uses advance notices to signal a purchaser's interest to third parties, offering additional protection.²³⁰

An advance notice can be filed by the current owner or another authorized person to protect a registrable title. For instance, a property owner may file an advance notice in favor of a prospective purchaser, or a purchaser may do so with the owner's consent.²³¹ Once entered in the Land Register's application record, an advance notice ensures that no competing disposition or advance notice can take precedence during its 35-day protected period.²³² After this period, the registrar removes the notice, archiving it. While additional advance notices can be filed for new 35-day periods, they do not extend the original protection.²³³ A second advance notice may leave room for competing dispositions to arise in the interim, requiring the purchaser to conduct a Land Register search before proceeding.²³⁴ Advance notices can also be discharged earlier if the transaction falls through, offering flexibility in managing conveyancing risks. This system strengthens purchaser protection without relying solely on insurance, enhancing the efficiency and security of land transactions.²³⁵

4.5 Conclusion

This chapter sought to assess lessons Kenya can draw from Scotland by looking into their land registration system.

Drawing from Scotland's model, Kenya can adopt several valuable lessons. First is the adoption of the principle of deferred indefeasibility, where a bona fide purchaser does not automatically acquire title through registration. Instead, the indefeasibility is delayed for a specified amount of

²²⁹ Waring E, 'Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,' 426.

²³⁰ Reid K, 'Indefeasibility of Title: Law Reform in Scotland and New Zealand' University of Edinburgh School of Law Working Paper Series No 33, 2018, 23.

²³¹ Waring E, 'Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,' 426.

²³² Section 58, Scottish Land Registration Act, 2012.

²³³ Section 62, Scottish Land Registration Act, 2012.

²³⁴ Waring E, 'Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,' 426.

²³⁵ Waring E, 'Lessons from Scottish Land Registration Reform: Changes Under the Bonnet,' 426.

time to grant the original owner the opportunity to challenge the ownership, if at all. Additionally, the status of the bona fide purchaser is also not automatic. The previous owner must have possessed the land for a considerable period before transferring ownership to subsequent purchasers, for them to be deemed as bona fide purchasers.

This chapter concludes that Kenya can borrow Scotland's model to enhance the robustness, certainty, and reliability of its land registration system.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

This chapter highlights the study's conclusions, recommendations, and findings. It also analyzes whether the objectives of the research and hypothesis have been fulfilled.

5.2 Findings

5.2.1 The nature of Kenya's title registration legal framework in protecting the rights of bona fide purchasers

Bona fide purchaser protection rooted in the Torrens system is enshrined in section 26 of the LRA. This section grants legal sanctity and validity to registered title rendering it as conclusive proof of ownership. This provision prioritizes dynamic security by providing that once a title has been registered, prior deficiencies cannot impugn it.

The courts of Kenya, however, have denied the bona fide purchasers the protection afforded in section 26 arguing that even if they lack knowledge or involvement in any irregularities, the deficient title is considered to have been illegally or irregularly acquired under Article 40 of the Constitution.

5.2.2 Eligibility for the bona fide purchaser for value status where title has been obtained fraudulently, irregularly or procedurally

The issue remains highly contentious due to the **bijural** nature of Kenya's legal system governing property registration. Tension unveils especially when courts are required to choose between protecting the bona fide purchasers and preserving the rights of the owners. In other words, difficulty arises as the courts must balance between dynamic security and static security. These challenges are because of the ambiguity in the LRA which is founded on the *Torrens system* and its interaction with the general rules of property law. The absence of guidance to the extent the two systems governing property registration and transaction interact results in divergent judicial interpretations and ambiguity in cases of fraudulent and defective transactions.

5.2.3 Lessons Kenya can draw from Scotland

A crucial lesson Kenya can derive from Scotland is the principle of deferred indefeasibility, which strikes a balance between static and dynamic security. Under the Scottish land registration system, a bona fide purchaser who acquires property through void or voidable transactions cannot automatically secure an indefeasible title only by means of registration. If it is determined that the property's title was transferred to a subsequent purchaser, the second buyer may be entitled to legal protection. This is contingent upon the condition that the first bona fide purchaser must have held the property for at least one year preceding the transfer. The one-year possession requirement protects the original owner's rights by preventing unjust loss of their property while also providing protection for the second bona fide purchaser who meets the one-year criterion. This approach achieves balance by not favoring either side in a strict sense but aiming for equity.

5.3 Recommendations

5.3.1 Need for amendment of section 26 of the Land Registration Act.

The legislature should adopt the deferred indefeasibility approach and provide further clarity on the relationship between the *Torrens system*, which underpins the LRA, and general property law principles like *nemo dat quod non habet*. It should strive to align both systems while providing definitive parameters for their application to avoid ambiguity in judicial decisions. Drawing on Scotland's model, the amendment should specify the extent of the bona fide purchaser's legal protection under the LRA. This would improve clarity and reliability in the land registration system.

5.3.2 Need for due diligence standards

The legislature should develop due diligence standards as suggested in the National land Commission draft recommendations for assessing the bona fide status in law. This would, as a result, reduce the pool of bona fide purchasers.

5.4 Conclusion

This study has successfully met all the objectives outlined in Chapter 1. However, it has disproved its hypothesis considering its findings. The following were the objectives;

1. To examine the legal framework and foundations of the title registration system in Kenya in safeguarding the rights of bona fide purchasers.
2. To analyze whether a purchaser can be considered an innocent purchaser for value when the title is obtained fraudulently, irregularly, or unprocedurally.
3. To determine whether the emphasis on due diligence by Kenyan courts undermines the principle of indefeasibility traditionally attached to title instruments.
4. To propose recommendations in law to the Kenyan courts on how to balance between the protection of the bona fide purchaser and addressing challenges related to fraud and irregularities.

5.4.1 Objective I

This objective examined the legal framework and foundations of Kenya's title registration system, with a focus on its role in protecting the rights of bona fide purchasers. It concluded that both Article 40 of the Constitution and Section 26 of the Land Registration Act have inconsistent meanings.

5.4.2 Objective II

This objective examined whether a purchaser can be considered an innocent purchaser for value when the title is obtained fraudulently, irregularly, or unprocedurally. It established that, under Kenyan law, the bona fide purchaser for value doctrine is not absolute, as the legal protections afforded to such purchasers depend on the specifics of how the title was acquired. The analysis revealed that while Section 26 of the LRA offers some protection to bona fide purchasers, this protection is not unconditional. In cases where fraud, irregularity, or procedural non-compliance is involved, the purchaser's claim to innocence can be challenged. The study finds that courts must carefully examine facts of each case and consider the nature of the title's acquisition in line with the tenets of the *Torrens system*.

5.4.3 Objective III

This objective examines the Scottish Land Registration Act, particularly its adoption of deferred indefeasibility, and the lessons Kenya can draw from it.

5.4.4 Hypothesis

This study hypothesizes that the Kenyan land registration system, grounded in the principle of "title promise," should guarantee that an individual listed on the land register automatically acquires an indefeasible legal title. Such a title should be conclusive and immune to challenge, except in cases involving fraud or misrepresentation in which the individual knowingly participated.

The study disapproves this hypothesis because the current Kenyan land registration system, while aiming to provide certainty and security in land ownership, does not adequately address the complexities and nuances of fraudulent transactions or procedural errors. It fails to account for situations where a bona fide purchaser may acquire ownership through a defective title and gain indefeasible rights over property. The study also finds that section 26 of the LRA is rigid because it provides for automatic conferring of an indefeasible title upon registration, without sufficient consideration for the original owner, undermining the balance between protecting property rights and ensuring the integrity of land transactions. Furthermore, the lack of clear guidance on the interaction between statutory land registration laws and broader common law principles contributes to legal ambiguity, making it difficult to resolve disputes effectively.

Chapter four therefore addresses the problem the study sought to investigate as it discussed potential solutions Kenya can draw from Scotland that would help clarify the legal protection of bona fide purchasers for value without notice.

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