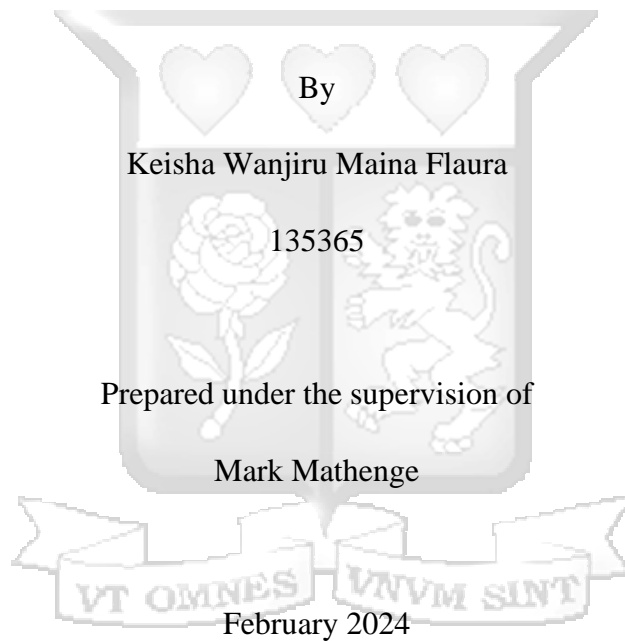




Strathmore
UNIVERSITY

The Search on Official Searches: The Consent Conundrum under Ardhi Sasa.

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



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DECLARATION

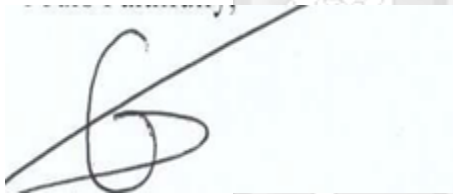
I, KEISHA WANJIRU MAINA FLAURA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly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



Signed:

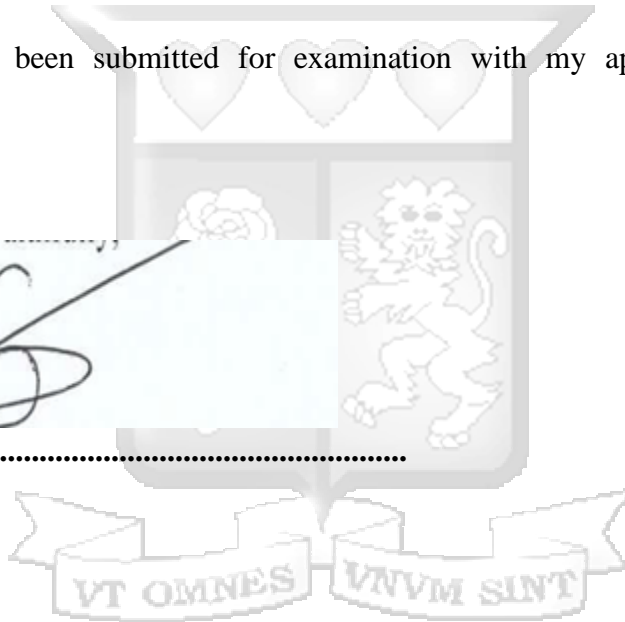
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This dissertation has been submitted for examination with my approval as University Supervisor.



Signed:.....

Mark Mathenge



ABSTRACT

Land administration operates as a 'gatekeeper' for a resource with a significant collective stake held by the public. Striking a balance between managing this contested resource and delivering effective service is crucial, emphasising the necessity for well-established administrative practices. Key to achieving efficient land administration is the land policy principle of transparency enshrined under Article 60(1)(d). However, a conflict arises with the consent requirement which stands contrary to the transparency principle by impeding open data and access to information.

This conflict is particularly evident in official searches essential for due diligence in property transactions, as they are hindered by the mandatory need for prior owner consent. From this, it becomes apparent that hindering access to information not only compromises transparency but also infringes upon the fundamental right to property. This right, which ideally safeguards ownership and acquisition, should inherently encompass the enabling process of due diligence that precedes these crucial factors.

As Ardhi Sasa exists as an electronic manifestation of the Land Registration Act, the study critically evaluates the rationale behind the inclusion of the consent requirement prior to conducting official searches. Unravelling this question becomes the core focus of the study, aiming to provide insights into the complexities of the consent requirement and its impact on transparency in the conveyancing process. Ultimately, the study aims to forge a path towards promotion of a land information system where transparency is not just a principle but a living reality.

LIST OF ABBREVIATIONS AND ACRONYMS

LGAF- Land Governance Assessment Framework

MoLPP- Ministry of Lands and Physical Planning

NLC- National Land Commission

NLIMS- National Land Information Management System

OGD- Open Government Data



LIST OF CASES

Rose Wangui Mambo and 2 others v. Limuru Country Club and 17 others (2014) eKLR.

Ngere Tea Factory Company Ltd v Alice Wambui Ndome (2018) eKLR.

Joseph K. Nderitu & 23 others v Attorney General & 2 others (2014) eKLR.

Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others (2013) eKLR.



LIST OF LEGAL INSTRUMENTS

Land Registration Act (Act No. 3 of 2012).

National Land Commission Act (No 5 of 2012).

Registration of Titles Act (Cap 281).

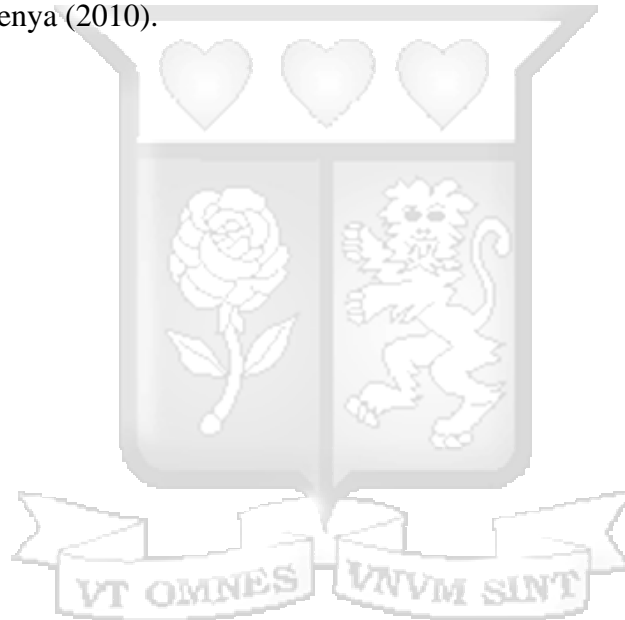
Registration of Documents Act (Cap 285).

Registered Land Act (Cap 300).

Sessional Paper No. 3 of 2009 on The National Land Policy.

Land Title Act (Cap 282).

The Constitution of Kenya (2010).



CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

A Land registration system is defined as any public system of records concerning legal rights to land.¹ The need for land registration stems from the challenges of land ownership that have been witnessed during the long history of land occupancy, ownership, and disposal; as well as the importance of land to human existence. The need for registration thus stems primarily from man's desire for the secure and tranquil occupation and usage of land.²

The purpose of land registration is therefore to ensure that a person's rights to own, lease, and peacefully utilise property are protected. Land tenure rights must be recognized, documented, and protected, and this requires registration.³ Without paperwork, one lacks proof of what they possess, and without protection, their rights may be infringed upon or violated.⁴ Land may be defined and recognized as a valuable asset by documents that are made available through registration. This unlocks dead capital, serves as credit security, and makes credit available for investment in other development endeavours⁵

There are two systems of land registration: title registration and deed registration. Deed registration emerged first. In the United States, this procedure is known as "land recordation," and it entails registering or documenting papers that influence interest in land.⁶ The second mechanism is title registration. Sir Robert Torrens originally implemented this approach in Australia in 1858. In addition to proving possession, it displayed the real situation of ownership. The government guaranteed all rights listed in the land registry, and the land parcel served as the fundamental unit for registration instead of the deed.⁷ A comparable system

¹ Hanstad T, 'Designing Land Registration Systems for Developing Countries' 13(3) *American University International Law Review*, 1998, 650.

² Omwoma R, 'Land Registration: A Review of Rationale, Mechanics and Typologies' *Academia Journal*, 2016, https://www.academia.edu/38103433/Land_Registration_A_review_of_Rationale_Mechanics_and_Typologies on 3 February 2023.

³ Omwoma R, 'Land Registration: A review of Rational, Mechanics and Typologies', 2.

⁴ Mwachane I, 'It is Possible to Deal with Cartels Preying on People's Land' *Nation Newspaper*, 4 July 2020 -< <https://nation.africa/kenya/blogs-opinion/opinion/it-is-possible-to-deal-with-cartels-preying-on-people-s-private-land-339410>> on 15 February 2023.

⁵ De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, New York, 2000, 5.

⁶ Hanstad T, 'Designing Land Registration Systems for Developing Countries' 652.

⁷ Omwoma R, 'Land Registration: A review of Rational, Mechanics and Typologies', 19.

emerged in England shortly after Torrens introduced the idea of title registration in Australia; this is the system that was adopted in Kenya.⁸

Kenya has been subject to at least five different statutory registration regimes, leading to five distinct forms of land titles. Even though the registrations that supported these regimes have currently been repealed and unified into a single legislation, the documents of title originating from the regimes are still valid and recognized by the law.⁹ The Registration of Documents Act,¹⁰ Kenya's first-ever land registration law, established a straightforward process for recording deeds that were reflected in a special register of documents. The Land Titles Act¹¹ was subsequently passed in 1908 to resolve the ambiguities and concerns surrounding private property ownership in Kenya's coastal area. With independence, the Government Land Act entered the picture and included deed plans to the registration process. The Registration of Title Act¹², which was based on the Torrens principles to make the transfer of properties easier was adopted in 1920. It provided the landowner an indefeasible title which was backed by the state. The Registered Land Act¹³ went into force in 1963 in search of a more streamlined and uniform manner of land registration that could accommodate mass registration.

In November 1999, Charles Mugane Njonjo was appointed as the head of the Commission of Inquiry into the Kenyan Land Law System on Principles of a National Land Policy Framework, the Constitutional Status of Land, and New Framework for Land Administration (Njonjo Commission).¹⁴ Notwithstanding the fact that the Commission was de-gazetted before it had finished its work, it is noteworthy that it made significant suggestions that have affected contemporary thinking and change in relation to land law and conveyancing. The Njonjo Commission Report proposed the formation of a land policy for Kenya as well as an explanation of the major tenets that would guide such a strategy. It observed that the purpose of land policy in Kenya should be to create a framework of institutions and principles that would guarantee that land and related resources are owned, utilised, and managed in an

⁸ Nzomo P, 'An Investigation Into Land Registration Process and its Effects on Urban Land Development' University of Nairobi, Nairobi, 2008, 10.

⁹ Omwoma R, 'Land Registration: A review of Rational, Mechanics and Typologies', 21.

¹⁰ *Registration of Documents Act* (Cap 285).

¹¹ *Land Title Act* (Cap 282).

¹² *Registration of Titles Act* (Cap 281).

¹³ *Registered Land Act* (Cap 300).

¹⁴ Mulevu E, 'A critical analysis of the extent to which the national land commission addresses the land question in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 20.

effective, efficient, and sustainable manner.¹⁵ It also emphasised the need for new legislation in the domain of land and conveyancing and urged for the constitutional enshrinement of some aspects of land policy. Notwithstanding the legislative requirements, the commission believed that for land reforms to be successful, they must be combined with constitutional reforms.¹⁶

As a result, the 2010 Draft Constitution (Wako Draft) aimed to establish certain basic concepts of land law.¹⁷ Chapter 7 of the Draft exclusively dealt with the topic of land and property. As per the draft, land in Kenya is identified as the primary resource of the country and the cornerstone of people's livelihoods. Consequently, it is imperative that land is owned, utilised, and governed in a manner that is productive, efficient and sustainable. The draft entrusted the government with the duty of formulating and consistently assessing a national land policy.¹⁸ The result of this was the creation of a new National Land Policy in 2009 that set the guiding principles for managing and administering land.¹⁹ The 2010 Kenyan Constitution incorporated the fundamentals of land policy under Article 60 as per the recommendations of the Njonjo commission.²⁰ Subsequently, the Land Registration Act was passed in 2012 to consolidate the land registration laws in Kenya in a single act.

Section 9 of the Act provides the basis for the National Land Information Management System (NLIMS) alias *Ardhi Sasa* as it requires the Registrar to maintain the Land Register in an accessible and reliable and secure format, which includes maintaining it electronically.²¹ Section 10 further provides that the Registrar shall make information in the register accessible to the public as per the constitution and any other law regarding freedom of and access to information.²² Subsequent to this, the Ministry of Lands and Physical Planning in consultation with the National Lands Commission and other stakeholders established *Ardhi Sasa* in 2021 to digitise existing cadastral maps.²³

¹⁵ Parliament of Kenya, *Report of the Commission of Inquiry into the Kenyan Land Law System on Principles of a National Land Policy Framework, the Constitutional Status of Land, and New Framework for Land Administration*, 2002, 34-36.

¹⁶ Boone C, Dyzenhaus A, Manji A, Ouma S, Owino J, Gargule & Klopp J, 'Land Law Reform in Kenya: devolution, veto players, and the limits of an institutional fix' *Oxford University Press*, 2019, 217.

¹⁷ Article 77, *Draft Constitution of Kenya* (2010)

¹⁸ Article 77, *Draft Constitution of Kenya* (2010).

¹⁹ Sessional Paper No. 3 of 2009 on The National Land Policy.

²⁰ Article 60, *Constitution of Kenya* (2010).

²¹ Section 9, *Land Registration Act* (Act No. 3 of 2012).

²² Section 10, *Land Registration Act* (Act No. 3 of 2012).

²³ Mwathane I 'Status of Land Information Management in Kenya' Land Development & Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 11 February 2023.

Section 34 of the Land Registration Act provides for searches improve required due diligence and security of land rights.²⁴ An official search is the outcome of a search conducted and provided by the Land Registrar at the request of a party upon payment of the necessary search costs, and the accuracy of the results of such official searches is assured by both the registration and the Government. Kenya's land registration system has traditionally always been open. This implies that individuals with a vested interest in property can conduct an official search and obtain details regarding the ownership and any encumbrances associated with a registered land parcel, provided that they pay any necessary statutory fees in the land registry.²⁵

Ardhi Sasa allows one to conduct official searches. However, it requires that prior to this, the property owner must give their consent for the search to be conducted.²⁶ This requirement may be contrary to the fundamental goals of property searches as well as the guiding principles of land policy entrenched in the constitution.²⁷ This is because, without the owner's consent, obtaining the necessary information to exercise one's property rights will be barred.

1.2 STATEMENT OF THE PROBLEM

The National Land Information Management System, "Ardhi Sasa" requires that a person intending to conduct an official property search must obtain the prior consent of the property owner before conducting the search. This requirement is contrary to the guiding principles of land policy enshrined in the Constitution. The consent requirement will be challenging for the general public, investors, and advocates. Moreover, banks may face difficulties in conducting due diligence as the owners of properties targeted for forced sales by lending institutions are unlikely to provide their consent for searches to be made against their properties. This is because, where consent from the proprietor is not obtained, it may be constrictive to land administration by restricting information on the ownership and encumbrances on any registered land parcel.

1.3 RESEARCH OBJECTIVES

²⁴ Section 34, *Land Registration Act* (Act No. 3 of 2012).

²⁵ Mwathane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

²⁶ -<<https://lands.go.ke/ardhisasa-faqs/>>- on 14 February 2023.

²⁷ Article 60(1)(d), *Constitution of Kenya* (2010).

1. To assess the two approaches to official searches in the conveyancing process, that is restricted and unrestricted searches and to identify which of the two approaches Kenya has adopted.
2. To assess the land policy principle of transparency and determine what it entails in the land administration process.
3. To determine whether the requirement to obtain the consent of a proprietor prior to conducting an official search conflicts with the land policy principle of transparency enshrined under Article 60(1)(d).

1.4 RESEARCH QUESTIONS

1. What are the two approaches to official searches in the conveyancing process and which of the two approaches to official searches has Kenya adopted?
2. What is the land principle of transparency and what does it entail from the land administration processes?
3. Is the requirement to obtain the consent of a proprietor prior to conducting an official search in conflict with the land policy principle of transparency enshrined under Article 60(1)(d) of the constitution?

1.5 HYPOTHESIS

The strict requirement of obtaining prior consent from property owners for official property searches in the 'Ardhi Sasa' National Land Information Management System places a constraint on efficient land governance.

1.6 JUSTIFICATION

The requirement under Ardhi Sasa to obtain the consent of a proprietor prior to conducting an official search is contrary to the land policy principle of transparency enshrined in the constitution.²⁸ It restricts the land administration process because the public, investors and advocates will have difficulties where they seek to conduct official searches without the proprietor's consent. Other than the report on the status of land information management systems in Kenya which briefly highlights this issue,²⁹ I have not come across scholarly work on this critique so far. This study will thus be unique by going beyond the numerous scholarly

²⁸ Article 60(d), *Constitution of Kenya* (2010).

²⁹ 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 12.

works on transparency in land administration³⁰ by examining whether the requirement under Ardhi Sasa to obtain consent prior to conducting official searches in Kenya contravenes the land policy principle of transparency.

This study will yield information to lawmakers by guiding them on legislative amendments to ensure Ardhi Sasa's conformity to the principle of transparency in the constitution. It will further be useful to the National Land Commission as they exercise their mandate to take all necessary measures to ensure the compliance with the principles of land policy³¹ set out in the Constitution.³²

1.7 CONCEPTUAL FRAMEWORK: Due diligence in business transactions

Conveyancing is a business transaction.³³ A business transaction consists of a number of logical tasks that must be completed by resources, which can include people, things, data, and software. According to this definition, conveyancing is a business transaction containing various actions relating to land. The land transaction process involves a number of participants, and each actor is responsible for performing a certain task. Both the seller and the buyer must submit a request for the transaction to be registered, together with the necessary documentation.³⁴ The registrar then processes the request and modifies administrative data. When the situation calls for it, a surveyor will go out into the field to gather data and make edits to it. Eventually, the buyer and seller are informed that the transaction has been successfully completed. Hence, as a land transaction involves a number of processes, activities, and actor involvements, constituting it as a business transaction.³⁵

The concept of due diligence is maybe the most crucial one when discussing commercial deals.³⁶ The purpose of due diligence is to provide the buyer the confidence they need to

³⁰ Boone C, 'Legal Empowerment of the Poor through Property Rights Reform: Tensions & Trade-offs of Land Registration and Titling in Sub-Saharan Africa' 55(3) *Journal of Development Studies*, 2019, 388; Antonio D, Ndungu H, Gitau J, Sylla O, 'Innovative Approaches in Securing Land Rights & Enhancing Transparency in Sub-Saharan Africa: Good Practices & Lessons Learned from Four African Countries' Conference of Land Policy in Africa, Abidjan, 25- 19 November 2019, 6; Phuong T, 'Enhancing transparency in land transaction process by reference architecture for workflow management system' Pacific Asian Conference of Information System, Ho Chi Minh, July 2012, 8.

³¹ Section 6(2)(c), *The National Land Commission Act* (No 5 of 2012).

³² Article 60, *Constitution of Kenya* (2010).

³³ Phuong T, 'Enhancing transparency in land transaction process by reference architecture for workflow management system', 29.

³⁴ Srivastava T and Reddy Y, 'An Introduction to Due Diligence' *Journal of Law and Legal Research*, 2022, 3.

³⁵ Phuong T, 'Enhancing transparency in land transaction process by reference architecture for workflow management system', 30.

³⁶ Srivastava T and Reddy Y, 'An Introduction to Due Diligence' 2.

proceed with the acquisition and conclude it.³⁷ It involves confirming the truth of the seller's claims, identifying difficulties that were not revealed, and locating hidden resources and business prospects. The buyer performs due diligence to ensure that he or she is completely aware of all facets of the company that is for sale.³⁸

The process of due diligence is made easier in business transactions through the availability of information at business registries.³⁹ Business registries are essential because they make sure that the data they obtain from these businesses is both stored in their systems and made publicly accessible.⁴⁰ By identifying the people who eventually profit from equity property rights, even if they are not the legal owners, it increases openness in the corporate environment.⁴¹ Similarly, in land administration, land registries were established in order to make it simple for third parties to determine property ownership and to gather information on the operation of the real estate markets, particularly prices and transaction numbers to inform economic decisions.⁴²

This concept will aid the study in that, by regarding conveyancing as a business transaction, the concept of due diligence is also a requisite to the process. The information on land should thus be readily available to the public as it is in business registries. The requirement to obtain the consent of a proprietor prior to conducting an official search places a constraint on the due diligence process where the proprietor refuses to grant consent for an official search to be conducted on their property.

1.8 LITERATURE REVIEW

So far, the literature on transparency in the land administration process has mostly focused on introducing the general issues, the importance of transparency in the land administration process,⁴³ the role of national land policies in enhancing this transparency⁴⁴, the need for

³⁷ Geleen T, Daley B and Green B, 'Due Diligence', *Journal of Finance*, 2020, 1 - <http://dx.doi.org/10.2139/ssrn.3702560>>- on 15 February 2023.

³⁸ Mullins T and Thornton B, 'The Role of Due Diligence in the Business Evaluation Process' 5(5) *Journal of Business and Economics Research*, 2007, 2.

³⁹ Hilhorst T and Meunier F, 'How Innovations in Land Administration Reform Improve on Doing Business' World Bank, 13 -< <http://creativecommons.org>>- on 3 February 2023.

⁴⁰ Hilhorst T and Meunier F, 'How Innovations in Land Administration Reform Improve on Doing Business' World Bank, 9 -< <http://creativecommons.org>>- on 3 February 2023.

⁴¹ Kundeliene K, 'Business Information Transparency: Causes and Evaluation Possibilities' *Procedia- Social and Behavioral Sciences*, 2015, 341.

⁴² Hilhorst T and Meunier F, 'How Innovations in Land Administration Reform Improve on Doing Business' World Bank, 13 -< <http://creativecommons.org>>- on 3 February 2023.

⁴³ Phuong T, 'Enhancing transparency in land transaction process by reference architecture for workflow management system', 20.

⁴⁴ De Zeeuw, Benn T, Unger E, Teo C and Bennett R, 'The proposed United Nations framework for effective land administration' 2020 World Bank Conference on Land and Poverty, Washington, 20 March 2020,6.

official searches as a requisite for due diligence⁴⁵ and proposing ways of enhancing the transparency of the land administration process.⁴⁶ Although the report on the status of the land information management system has touched on my research problem,⁴⁷ the report makes a broad claim that the requirement for consent contradicts the constitutional requirements for transparency and access to information. It however does not touch on why it is contradictory or how this problem can be amended. I therefore expect that my study will be a unique contribution through its scope and argument.

1.8.1: On the requirement for transparency in land administration

The ongoing academic literature surrounding land administration is in agreement that transparency is a requisite in the land administration process.⁴⁸ Transparency in whatever form has been acknowledged to begin with the emphasis on the availability of information, especially through registers and cadastres.⁴⁹ The ability to defend and safeguard tenure rights as well as ensure equitable and accountable land use and allocation depend on transparency. The effects of a lack of transparency include greater difficulty in realising the value of the land as an asset and a lack of knowledge about land laws and legal frameworks that might jeopardise the security of the land tenure, possibly resulting in an incorrect distribution of land rights.⁵⁰

Klaus Deninger and Gershon Feder, among other scholars, propose that open access to information on ownership, value and use of land is the most effective way to enhance transparency in land administration.⁵¹ Tran Hai Phuong develops this view further by

⁴⁵ Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, LawAfrica Publishers, 2010, 169.

⁴⁶ Jeckoniah J, Akyoo E and Kabote S, 'Large Scale Agricultural Investments and Its Impact on Gender Relations and Wellbeing of Small Holder Farmers- Evidence from Kilombero Valley in Tanzania' *African Journal of Land Policy and Geospatial Sciences*, 2020, 173; Echendu A, 'A Study on Data and Information Integration for Conveyancing, Cadastre & Land Registry Automation' Portland International Conference on Management of Engineering and Technology (PICMET), South Africa, 2016, 804.

⁴⁷ Mwathane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021, 12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

⁴⁸ Booth K and Bayer C, 'Open Data for Improved Land Governance' FIG Congress- Volunteering for the future - Geospatial excellence for a better living, Warsaw, 11-15 September 2022, 25.

⁴⁹ Locke A, 'Transparency & governance in land— two sides of the same coin' ODI -< <https://odi.org/en/insights/transparency-and-governance-in-the-land-sector-two-sides-of-the-same-coin/>>

⁵⁰ 'OpenData and Land Governance: Increased accountability and transparency as a means to overcoming poverty?' <https://landportal.org/node/35488#:~:text=In%20land%20governance%2C%20a%20sector,can%20be%20defended%20and%20protected.>:->

⁵¹ Jeckoniah J, et al 'Large Scale Agricultural Investments and Its Impact on Gender Relations & Wellbeing of Small Holder Farmers- Evidence from Kilombero Valley in Tanzania', 174; Deininger K and Feder G, 'Land Registration, Governance, and Development: Evidence and Implications for Policy' *Oxford University Press*, 2009, 25.

advocating that for this information to be considered transparent, it must be visible, predictable, and understandable for all parties.⁵²

Oliver R.W argues that transparency has developed the concept of “openness” in terms of information and suggests that methods and initiatives for land administration should promote and guarantee transparency at all levels.⁵³ Similarly, Professor Moha, claims that improving transparency in land administration necessitates changing the sector's traditional operating procedures. He also urges policymakers to take action by strengthening openness in the land registry.⁵⁴

Unfortunately, despite the evident need for openness in land governance, the data needed to connect these relationships remains closed. Data that is made widely accessible for everyone to access, use, and share, has the potential to close these gaps, but this potential is severely underutilised.⁵⁵ Public registries were established with the primary aim of simplifying property ownership verification for third parties and facilitating access to data on real estate markets.⁵⁶ Impracticality thus arises when information on land is not easily accessible. To maintain efficiency, minimise transaction costs, and deter discretion, a transparent system becomes crucial. Such a system necessitates the public availability of all land-related information, adhering to legal confidentiality requirements, well-defined procedures, and easily accessible data.⁵⁷

1.8.2 On the significance of official searches in the conveyancing process

According to Professor Tom Ojienda, official searches are advantageous because they reflect a true copy of the register and enjoy state guarantee as the government can be held responsible for whatever they purport to find.⁵⁸ Theodore Ruoff and Robert Roper assert that a person can protect themselves by making an official search of the register immediately before the

⁵² Phuong T, ‘Enhancing transparency in land transaction process by reference architecture for workflow management system’, 29.

⁵³ Oliver R, *What is Transparency?* McGraw-Hill, New York, 2004, 31; Bagdai N, ‘Transparency as a Solution for Uncertainty in Land Privatization: A Pilot Study For Magnolia’ FIG (International Federation of Surveyors) Working Week, Israel, 3- 8 May 2009, 11.

⁵⁴ Jeckoniah J, et al ‘Large Scale Agricultural Investments and Its Impact on Gender Relations and Wellbeing of Small Holder Farmers- Evidence from Kilombero Valley in Tanzania’, 169.

⁵⁵ OpenData and Land Governance: Increased accountability and transparency as a means to overcoming poverty? <https://landportal.org/node/35488#:~:text=In%20land%20governance%2C%20a%20sector,can%20be%20defended%20and%20protected.>->

⁵⁶ Hilhorst T and Meunier F, ‘How Innovations in Land Administration Reform Improve on Doing Business’ World Bank, 5 -< <http://creativecommons.org>>- on 3 February 2023.

⁵⁷ Hilhorst T and Meunier F, ‘How Innovations in Land Administration Reform Improve on Doing Business’ World Bank, 13 -< <http://creativecommons.org>>- on 3 February 2023.

⁵⁸ Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, 169.

completion of the purchase.⁵⁹ They emphasise that official searches are important to ensure that no other entries have been made on the register since the date of the official copy which the vendor has supplied to him.⁶⁰ Stephen Cretney similarly maintains that through an official search, a purchaser should be able to satisfy himself that there are no other relevant transactions affecting the property of which he ought to know of.⁶¹

Bennito Arrunada contributes to this discussion by highlighting the importance of official searches to avoid ‘nasty surprises’ on the part of the purchaser.⁶² He contends that without searches, the likelihood of hidden property rights widens the knowledge gap between the parties to a conveyance since the seller is more aware of hidden property rights than the purchaser. He also emphasises the significance of conducting searches to identify any competing property rights and identify the owners of such rights.⁶³

1.8.3: Whether there is conflict between the Ardhi Sasa consent requirement and Article 60(1)(d) of the Constitution.

The report on the status of land information management systems in Kenya addressed the issue that the requirement to obtain a proprietor’s consent prior to conducting an official search under the Ardhi Sasa land information portal contradicts constitutionally mandated principle of transparency, right to access information, and the salient objective of property searches.⁶⁴ The report claimed that because of this requirement, valuers and banks would face difficulties in searching and doing due diligence for properties targeted for forced sale by lending institutions because property owners would be unlikely to grant their consent for the searches to be conducted against their properties.⁶⁵

The United Nations Expert Committee on Land Administration and Management states that land policy frameworks often serve as the mandate for land administration systems.⁶⁶ This

⁵⁹ Ruoff T and Roper R, *The Law and Practice of Registered Conveyancing*, 4th ed, Stevens and Sons, London, 1979, 9.

⁶⁰ Ruoff T and Roper R, *The Law and Practice of Registered Conveyancing*, 9.

⁶¹ Cretney S, ‘Land law and conveyancing reforms’ 6(1), *Real Property, Probate and Trust Journal*, 1971, 119.

⁶² Arrunada B, ‘Property titling and conveyancing’, in Ayotte K and Smith H, eds., *Research Handbook on the Economics of Property Law, Research Handbooks in Law and Economics Series*, Cheltenham UK, 2011, 13.

⁶³ Arrunada B, ‘Property titling and conveyancing’, 13.

⁶⁴ Mwachane I ‘Status of Land Information Management in Kenya’ Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwachane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

⁶⁵ Mwachane I ‘Status of Land Information Management in Kenya’ Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwachane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

⁶⁶ De Zeeuw, Benn T, Unger E, Teo C and Bennett R, ‘The proposed United Nations framework for effective land administration’, 16.

means that the Land Registration Act of 2012 finds its basis in the Constitution of Kenya which enshrines the 2009 national land policies.⁶⁷ This can be witnessed from the various provisions in the Act which draw reference from the constitution. By virtue of Article 2, which provides for the supremacy of the constitution, the constitution binds all persons and state organs, and its validity shall not be challenged.⁶⁸

1.8.4: Contribution

This study will contribute to land and conveyancing studies to challenge the constitutionality of the requirement for consent prior to conducting an official search under the Ardhi Sasa system. A study that has previously challenged the constitutionality of the requirement for the consent of a proprietor to be obtained prior to conducting an official search was the report on the status of land information management systems in Kenya.⁶⁹ However, this report does not elaborate how this conflict can be remedied.

This study will thus be unique in so far as it i) discusses how the land policy principle of transparency under Article 60(1)(d) should be interpreted in the conveyancing process. Previous studies have emphasised on the need for transparency and the concept of openness of information in the land administration processes.⁷⁰ The study will go a step further to illustrate how the principle of transparency can be interpreted into the process of conducting official searches in Kenya. ii) discusses how the requirement to obtain a proprietor's consent prior to conducting an official search is unconstitutional and iii) proposes the amendment of the National Land Information Management System.

1.9 METHODOLOGY

The nature of this study will be Doctrinal research as it will be mainly desk-based qualitative research. The main sources of data will be secondary sources such as books, journal articles, working papers and reports. It will also rely on primary sources such as statutes and the Constitution of Kenya. The study will, in general, utilise a deductive approach with the first two chapters setting up a premise each, from which the main claim will be derived. The second chapter, for example, will demonstrate the approach that Kenya has taken towards conducting

⁶⁷ Article 60, *National Land Policy* (Sessional Paper No. 3 of 2009).

⁶⁸ Article 2, *Constitution of Kenya* (2010).

⁶⁹ Mwathane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

⁷⁰ Oliver R, *What is Transparency?* 31.

official searches while the third chapter lays out the requirements of the land policy principle of transparency, its impact in the land administration process and thereafter assess whether the requirement for consent prior to conducting an official search under Ardhi Sasa is in line with this principle.

In order to determine Kenya's approach to official searches, the study will first look into the two approaches towards official searches in land administration: restricted and unrestricted searches. This shall be through a historical analysis which shall be done by examining the history of land searches in the administration process. A historical analysis will further be preferred to determine the origin and rationale for the land policy principle of transparency. This will be mainly by looking at articles and books by other scholars who have detailed this history.

After this, I will employ a doctrinal analysis to assess what the land policy principle of transparency under Article 60(1)(d) entails from the land administration process. This analysis will be useful to determine whether the requirement to obtain a proprietor's consent conforms to the requirements of the principle. The study will then undertake a doctrinal analysis to prove the hypothesis of the study. This will entail an analysis of the black letter of the law; the Land Registration Act and the Constitution of Kenya, in order to determine the constitutionality of the consent requirement for official searches under the Ardhi Sasa system.

1.10 CHAPTER BREAKDOWN

1.10.1 Chapter One: Introduction

This research proposal will form the first chapter of the study. It will form the basis for the subsequent chapters. It details, among others, the research objectives, research questions, conceptual framework and the justification of the study.

1.10.2 Chapter Two: A Critical Analysis of Land Search Approaches

This chapter will assess the two approaches to official searches in the conveyancing process: restricted searches and unrestricted searches. It will make the argument that Kenya adopts restricted searches through the requirement to obtain consent from a proprietor prior to conducting an official search under the Ardhi Sasa system.

1.10.3 Chapter Three: Understanding Transparency in Land Administration: A Focus on Article 60(1)(d)

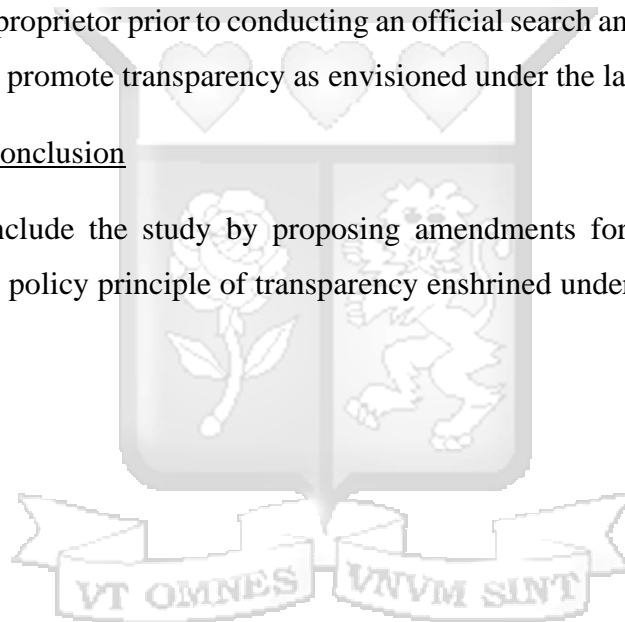
This will entail an examination of the land policy principle of transparency under Article 60(1)(d) and determine what it entails from the land administration process. It will assess what transparency means in the context of land administration, how it facilitates the process, and how it should be applied in all stages of the land administration process.

1.10.4 Chapter Four: A conflict of principles: Examining the Consent Requirement vs Transparency in Land Administration

Chapter four will be dedicated to proving the hypothesis of the study- whether the requirement to obtain the consent of a proprietor prior to conducting an official search conflicts with the land policy principle of transparency enshrined under Article 60(d) of the constitution. It will do this by comparing what transparency entails in land administration with the requirement to obtain consent from a proprietor prior to conducting an official search and making the argument that the latter does not promote transparency as envisioned under the land policy principles.

1.10.5 Chapter five: Conclusion

This chapter will conclude the study by proposing amendments for how Ardhi Sasa can conform with the land policy principle of transparency enshrined under Article 60(1)(d) of the constitution.



CHAPTER TWO

A CRITICAL ANALYSIS OF LAND SEARCH APPROACHES

2.1 Introduction

Public registries are a key component of the conveyancing process. They have been analogized to the Roman god Janus as they have two faces; they simultaneously play two roles: one as an obstructive role by preventing non-consensual deprivation, and another as a facilitator by expediting transactions between willing sellers and purchasers.⁷¹ Public registers were established in order to make it easier for third parties to identify who owns property and to gather information that is needed to make decisions. This served as one of the primary inspirations for their creation.⁷²

Registries amplify the value of property rights by preventing fraudulent transactions and facilitating those done in legitimate markets.⁷³ The value of property rights in our society can be significantly enhanced by the information found in registers because they are the formative forces that shape the world of property and no theoretical account of the institution of property can be complete without them.⁷⁴

Information on property title is essential for a property law system to operate properly. Furthermore, the best protection against infringement on an owner's rights is offered via registration. One has to know their title in order to take full use of property rights. The value of an asset would be severely compromised if someone "owned" it but no one knew. Moreover, without sufficient information to complete transactions, buyers would not show up readily. According to Professor Arruñada, the seller is more knowledgeable about concealed property rights than the buyer and thus transfer of information reduces the transaction costs of the conveyancing process as it eradicates the need to find out who their right holders are, bargaining with such right holders to obtain their consent and contracting or somehow formalising an agreement with them⁷⁵

⁷¹ Bell A and Parchomovsky G, 'Of Property and Information' 116(1) *Columbia Law Review*, 2016, 237.

⁷² Hilhorst T and Meunier F, 'How Innovations in Land Administration Reform Improve on Doing Business' World Bank, 13 -< <http://creativecommons.org>> on 3 February 2023.

⁷³ Bell A and Parchomovsky G, 'Of Property and Information' 263.

⁷⁴ Bell A and Parchomovsky G, 'Of Property and Information' 285.

⁷⁵ Arrunada B, *Institutional Foundations of Impersonal Exchange- Theory and Policy of Contractual Registries*, University of Chicago Press, Chicago and London, 2012, 4.

Investigation of title is the means by which the buyer ensures that the seller does own the land and can convey it.⁷⁶ It is the basis for due diligence in the conveyancing process which is the phrase used to describe the buyer's examination of the seller's assets and documentation in an effort to confirm ownership and the veracity of the underlying assumptions that set the purchase price.⁷⁷ Official searches have more advantages than personal searches since they are carried out by registrar authorities and are thus state guaranteed.⁷⁸ It thus enables a purchaser to safeguard themselves prior to completion of the purchase. By doing this, they should be confident that there have not been any additions to the register since the official copy's date, which the vendor gave him⁷⁹

Buyers and their advocates thus ought to trust land searches⁸⁰ and they should have no cause to question that the land titles they have looked through are devoid of any interests that could unduly impede the land's capacity to be freely alienated.⁸¹ The purpose of titles is to guard against fraud and mistakes as well as the potential for property disputes to arise from the suppression or omission of a document from which title is inferred.⁸² One can prevent "nasty surprises"⁸³ and ensure that there are no other pertinent transactions impacting the property that he should be aware of by officially searching the registration.⁸⁴

2.2 The two approaches to official searches

It is generally acknowledged that more transparency and improved understanding lead to better land governance when it comes to land-related issues.⁸⁵ However, there is more to responsible land administration than meets the eye. As a result, opinions on what land data should be made public and how "open" it should be continue to differ.

2.2.1: The Freedom of Unrestricted Searches

⁷⁶ Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, 169.

⁷⁷ Jones J and Robinson M 'Due Diligence for the 90s From the Land and Legal Perspectives' *Annual Institute on Mineral Law*, 1995, 4.

⁷⁸ Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, 169.

⁷⁹ Ruoff T and Roper R, *The Law and Practice of Registered Conveyancing*, 9.

⁸⁰ Lim F 'The Importance of Land Searches' In Personam, 27 January 2017 -<<https://www.in-personam.com/articles/2017/the-importance-of-land-searches/>> on 15 October 2023.

⁸¹ Webster J, 'The Quest for Clear Land Titles Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation' 44(1) *North Carolina Law Review*, 1965, 104.

⁸² 'Open Data and Land Governance: Increased accountability and transparency as a means to overcoming poverty?' Land Portal, 6 September 2016 -<<https://landportal.org/>> on 14 October 2023.

⁸³ Arrunada B, 'Property titling and conveyancing', 2011, 13.

⁸⁴ Cretney S, 'Land law and conveyancing reforms' 119.

⁸⁵ 'Open Data and Land Governance: Increased accountability and transparency as a means to overcoming poverty?' -<<https://landportal.org/>> on 14 October 2023.

One camp advocates for unrestricted searches on the basis that information on land should be readily available in order to keep transaction costs low and prevent discretion, unofficial payments, and other abuses; a transparent system is essential.⁸⁶ In such a system, all land-related information must be made available to the public, subject to clearly defined procedures, and easily accessible information.

This camp further purports that expanding accessibility to information may add to its worth.⁸⁷ In order to carry this out, the concept of unlimited access to all data and information resources whose creation and maintenance are financed by public funds must be advanced. Supporters of the knowledge economy contend that restrictions should not be placed on land information in order to allow public access to it.⁸⁸ Land information should thus be organised such that it is easily accessible to the various user communities, which comprise almost all economic sectors. When making decisions, the information is typically coupled with additional social and economic data. They should thus be organised to facilitate their combination and cross-referencing with other information products that may be required for alternative purposes.⁸⁹

It seems that the Kenyan registry system embodies this concept as Kenya has always maintained an open registry system. This suggests that anybody interested in a registered land parcel can apply for an official search in the land registry without any limitations.⁹⁰ The Land Registration Act provides for official searches under Section 34 which states that upon payment of the prescribed fee, one is entitled to receive the details of the entries listed in the register.⁹¹ The absence of any restrictions alludes to the conclusion that the Act promotes unrestricted and open access to information on land for the purpose of land transactions.

2.2.2: The Intricacies of Restricted Searches

⁸⁶ Hilhorst T and Meunier F, 'How Innovations in Land Administration Reform Improve on Doing Business' World Bank, -<<https://landportal.org/>>- on 3 February 2023.

⁸⁷ Hilhorst T and Meunier F, 'How Innovations in Land Administration Reform Improve on Doing Business' World Bank, -<<https://landportal.org/>>- on 3 February 2023.

⁸⁸ United Nations, 'Land Management Information Systems in the Knowledge Economy: Discussion and Guiding Principles for Africa' ECA, ICT, Science and Technology Division, Ethiopia, 2008, 30.

⁸⁹ United Nations, 'Land Management Information Systems in the Knowledge Economy: Discussion and Guiding Principles for Africa', 30.

⁹⁰ Mwathane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

⁹¹ Section 34, *Land Registration Act* (Act No. 3 of 2012).

Contrary to this view, the opposing camp may ask the question, ‘How open is too open?’ and uses this as the basis to advocate for restricted official searches.⁹² Although proponents on this side of the fence do advocate for transparency, they build on the concept of ‘Property Enforcement as Organized Consent’ to justify the requirement for consent when conducting an official search.⁹³ According to this concept, a right cannot be harmed by the state enforcing it as a property right unless the right holder gives their consent to it. Therefore, because transactions between parties do not transfer property rights with the promised in rem extent until all affected right holders have given their approval, this consent requirement secures enforcement.⁹⁴

Thus, there is a trade-off that has both advantages and disadvantages. Positively, as they require the permission of right holders to be affected, they ensure enforcement, which promotes specialisation.⁹⁵ The downside is that it takes expensive institutions and resources to arrange the process of looking for, negotiating with, and contracting for consent in order to secure their existence after the transfer, which might give rise to the issue of hidden property rights.⁹⁶ If the owner of the property does not give consent, it leads to an asymmetry of information which can create an imbalance between the parties involved.⁹⁷ The Ardhi Sasa Land Information system enshrines this system of restricted searches as one must be aware of the owner of a piece before conducting an official search against it because anyone wishing to search a registered land parcel must first acquire permission from the owner.⁹⁸

2.3: Conclusion

In spite of the general agreement that transparency is a fundamental aspect of the conveyancing process, there is a disagreement regarding the definition of transparency concerning land registries and the information they contain. The benefits of open data in land registries are unlikely to be realised anytime soon unless there is a basic understanding among key

⁹² Open Data and Land Governance: Increased accountability and transparency as a means to overcoming poverty?’ Land Portal, 6 September 2016 -<<https://landportal.org/>> on 14 October 2023.

⁹³ Arrunada B, ‘Property Enforcement as Organized Consent’ *Journal of Law, Economics, and Organization*, 2003, 5.

⁹⁴ Arrunada B, ‘Market and Institutional Determinants in the Regulation of Conveyancers’ 23(2) *European Journal of Law and Economics*, 2007,5.

⁹⁵ Arrunada B, ‘Property Enforcement as Organized Consent’ *Journal of Law, Economics, and Organization*, 2003, 7.

⁹⁶ Arrunada B, ‘Property Enforcement as Organized Consent’, 7.

⁹⁷ Arrunada B, ‘Market and Institutional Determinants in the Regulation of Conveyancers’ 5.

⁹⁸ Mwathane I ‘Status of Land Information Management in Kenya’ Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

stakeholder groups as to what constitutes open data and why it is important to have unrestricted searches.

The promise of open data, which is defined as full information that is openly accessible and available for anyone to collect, use, and share, is severely unrealized. In essence, transparency is not an ultimate objective in itself; rather, enhanced transparency regarding specific categories of land-related information has the potential to yield more favourable outcomes, including heightened capacities for well-informed decision-making and enhanced mechanisms of accountability.⁹⁹



⁹⁹ Open Data and Land Governance: Increased accountability and transparency as a means to overcoming poverty?' Land Portal, 6 September 2016 -<<https://landportal.org/>> on 14 October 2023.

CHAPTER THREE

UNDERSTANDING TRANSPARENCY IN LAND ADMINISTRATION: A FOCUS ON ARTICLE 60(1)(d)

3.1 Introduction

Article 60(1)(d) of the Constitution provides that land in Kenya shall be held, used and managed in a manner that is efficient, productive and sustainable in accordance with the principle of transparent and cost effective administration of land.¹⁰⁰ The Black's Law dictionary defines transparency as a lack of any hidden agendas with all information being available,¹⁰¹ an allusion that the two go hand in hand. The Land Registration Act provides for transparency in relation to land under Section 7(2) which states that the Land Registrar shall ensure that all information in the land registry is accessible to any person.¹⁰² Moreover, Section 10 further provides that subject to the constitution,¹⁰³ the Registrar is to make the information in the register accessible to the public by electronic means or any other means reasonably prescribed by the Chief Land Registrar.¹⁰⁴

These provisions are in line with the constitutional right to access to information which provides that every citizen has the right to information held by the State and information held by another person and required for the exercise of any right or fundamental freedom.¹⁰⁵ Without a doubt, transparency and access to information are enshrined as fundamental principles in the laws governing land administration, However, the question remains as to what exactly they mean in relation to land administration and what they call for from the entire process.

The Open Government Guide views the transparency of processes as a crucial component that supports governance.¹⁰⁶ The Land Government Assessment Framework (LGAF), introduced by the World Bank, acknowledges the importance of openness in fostering improved land-sector governance, specifically with regard to land-use regulations, assessments, expropriation, the transfer of public to private land, and the charging of fees for various services rendered by

¹⁰⁰ Article 60(1)(d), *Constitution of Kenya* (2010).

¹⁰¹ Black's Law Dictionary, 2nd ed.

¹⁰² Section 7(2), *Land Registration Act* (Act No. 3 of 2012).

¹⁰³ Article 35, *Constitution of Kenya* (2010).

¹⁰⁴ Section 10, *Land Registration Act* (Act No. 3 of 2012).

¹⁰⁵ Article 35, *Constitution of Kenya* (2010).

¹⁰⁶ Locke A, 'Transparency and governance in the land sector— two sides of the same coin?' ODI -<
<https://odi.org/en/insights/transparency-and-governance-in-the-land-sector-two-sides-of-the-same-coin/>>

governments.¹⁰⁷ From this perspective, transparency in whatever form begins with its emphasis on provision of information, especially through registers and cadastres.¹⁰⁸ This view is in line with the objective of the Land Registration Act, which is to create a truly transparent, accurate and comprehensive Register.¹⁰⁹

Transparency International describes transparency as “the characteristic of governments, companies, organisations and individuals of being open in the clear disclosure of information, rules, plans and procedures.”¹¹⁰ It also emphasises how revealing and registering a business's or piece of land's ownership, for instance, compels owners to follow current rules and laws and forbids unethical behaviour such as tax evasion, money laundering, and speculating. Ultimately, attaining the Sustainable Development Goals and fostering inclusion, justice, and prosperity for all depends on a shared understanding and clarity around land ownership, rights, and uses.¹¹¹ This definition brings out the concept of ‘open data’ as another characteristic of transparency and places it at the forefront of what it entails.

3.2 Transparency as Open Data

Open data is defined as the data which typically originates from governments, is produced or utilised during the business of governing, or is created or published at the request of governments.¹¹² However, Open Knowledge International provides the clearest definition of the phrase "open data." It assumes that open data refers to information that is publicly available for anybody to use, reuse, and share for any purpose.¹¹³ Although most databases do not have all the listed characteristics, the common characteristics of open data are that it must be:

- I. Free to access
- II. Available in a convenient form

¹⁰⁷ Locke A, ‘Transparency and governance in the land sector--- two sides of the same coin’ ODI -<
<https://odi.org/en/insights/transparency-and-governance-in-the-land-sector-two-sides-of-the-same-coin/>>

¹⁰⁸ Locke A, ‘Transparency and governance in the land sector--- two sides of the same coin’ ODI -<
<https://odi.org/en/insights/transparency-and-governance-in-the-land-sector-two-sides-of-the-same-coin/>>

¹⁰⁹ Bogusz B, ‘Bringing Land Registration into the Twenty-First Century - The Land Registration Act 2002’ 65(4) *The Modern Law Review*, 2002, 556.

¹¹⁰ Jaitner A, Matthaei E & Schilling F ‘Open Data as a Means to Promote Transparency in Land Governance- What It Takes’ 2020 World Bank Conference on Land and Poverty, Washington DC, 16-20 March 2020, 1.

¹¹¹ Jaitner A, Schilling F and Matthaei E, ‘Open Data as a Means to Promote Transparency in Land Governance- What It Takes’, 2.

¹¹² Davies T, Rubinstein M, Perini F and Walker S, ‘The State of Open Data Histories and Horizons’ African Minds and International Development Research Centre, Cape Town, 2019, 7.

¹¹³ -<<https://okfn.org/en/library/what-is-open/#:~:text=Open%20knowledge%20is%20any%20content,building%20blocks%20of%20open%20knowled>
[ge](https://okfn.org/en/library/what-is-open/#:~:text=Open%20knowledge%20is%20any%20content,building%20blocks%20of%20open%20knowled)>- on 9 January 2023.

- III. Allow for use and re-distribution and
- IV. Allow for re-use and re-distribution regardless of their purpose.¹¹⁴

Most of this data is published by public institutions and is commonly in the fields of social issues, economic life, environment, and employment.¹¹⁵

Open data paves the way for access to information which has been highlighted as an important requisite for transparency, accountability, participation, and eventually for good governance and anti-corruption.¹¹⁶ In the context of land, the availability of open land data holds the potential to enhance administrative efficiency. For instance, it can prevent complications such as overlapping land claims or duplications in data sets during land registration procedures. Beyond streamlining administrative processes, open land data has the capacity to empower landowners and users in safeguarding their land rights and properties. This empowerment stems from the ability to monitor decision-making processes related to land, enabling individuals to influence land policy and reform initiatives.¹¹⁷

3.3 Transparency as access to information

The constitution guarantees the right to access information which includes data held by the State as well as information held by individuals that is essential for the exercise or safeguarding of any right or fundamental freedom.¹¹⁸ In the context of conveyancing, this paper argues that ‘any right or fundamental freedom’ extends the right to access information to the protection of the right to property. Information on land is obtained from land owners who feed the relevant information to the land registries which are maintained by the State. This, coupled with Article 40, which classifies the protection of property as a right,¹¹⁹ forms the basis for the justification of the necessity for citizens' right to information in relation to land transactions. In the conveyancing process, the relevance of access to information manifests itself in the due diligence process which is enabled by official searches on land.

¹¹⁴Dymora P, Mazurek M and Kowal B, ‘Open Data- An Introduction to the Issue’ *ITM Web of Conferences*, 2018, 1 -<<https://doi.org/10.1051/itmconf/20182100017>>- on 9 January 2024.

¹¹⁵ Dymora P, Mazurek M and Kowal B, ‘Open Data- An Introduction to the Issue’ 1 - <<https://doi.org/10.1051/itmconf/20182100017>>- on 9 January 2024.

¹¹⁶ Jaitner A, Schilling F and Matthaei E, ‘Open Data as a Means to Promote Transparency in Land Governance- What It Takes’, 1.

¹¹⁷Open Data and Land Governance: Increased accountability and transparency as a means to overcoming poverty?’ -<<https://landportal.org/>> on 14 October 2023.

¹¹⁸ Article 35, *Constitution of Kenya* (2010).

¹¹⁹Article 40, *Constitution of Kenya* (2010).

The concept of due diligence is facilitated by the availability of information relevant to the transaction. Its purpose is to provide the buyer the confidence they need to proceed with the acquisition and conclude it.¹²⁰ It involves confirming the truth of the seller's claims, identifying difficulties that were not revealed, and locating hidden resources and business prospects.¹²¹ As stated in the case of *Ngere Tea Factory Company Ltd vs Alice Wambui Ndome*, it is the duty of the purchaser to inform themselves of all the relevant aspects of the property which they intend to purchase.¹²² This aligns with the principle of caveat emptor which asserts that a buyer assumes the risks of the purchase. The rationale is that patent defects are discernible through inspection and ordinary vigilance on the part of the purchaser.¹²³

One can therefore not sell something they do not possess, and the buyer therefore cannot subsequently claim ownership after making a purchase.¹²⁴ After such a transaction, the person claiming ownership will only be eligible for damages if they are able to successfully sue the alleged seller. In the event that a transaction fails, a person may be considered an “innocent purchaser for value” if they can prove they conducted adequate research before buying a property.¹²⁵ The primary ways of conducting due diligence include physical inspection of the land and more importantly, title deed searches at the Land Registry.¹²⁶

Section 34 of the Land Registration Act provides for official searches, stipulating that any individual seeking an official search for a specific parcel is entitled to obtain certified information on existing entries in the register. Additionally, the provision allows for the issuance of certified copies of relevant documents and the cadastral map.¹²⁷ The process of conducting official searches is part and parcel of the conveyancing process as one can prevent "nasty surprises"¹²⁸ and ensure that there are no other pertinent transactions impacting the property that he should be aware of.¹²⁹ Official searches under the Land Registration Act have

¹²⁰ Geleen T, Daley B and Green B, ‘Due Diligence’, 1.

¹²¹ Mullins T and Thornton B, ‘The Role of Due Diligence in the Business Evaluation Process’ 5(5) *Journal of Business and Economics Research*, 2007, 2.

¹²² *Ngere Tea Factory Company Ltd vs Alice Wambui Ndome* (2018) eKLR.

¹²³ Merriam Webster Dictionary, 4th ed; Halsbury’s Laws of England, 4th ed.

¹²⁴ Kageha P, ‘Due diligence in home property ownership’ MMS Advocates, 19 April 2023 - <https://mmsadvocates.co.ke/due-diligence-in-home-and-property-ownership/> - on 20 December 2023.

¹²⁵ Kageha P, ‘Due diligence in home property ownership’ MMS Advocates, 19 April 2023 - <https://mmsadvocates.co.ke/due-diligence-in-home-and-property-ownership/> - on 20 December 2023.

¹²⁶ -< <https://www.usernameproperties.com/blog/proven-ways-to-conduct-property-due-diligence-in-kenya/> - on 20 December 2023.

¹²⁷ Section 34, *Land Registration Act* ((Act No. 3 of 2012).

¹²⁸ Arrunada B, ‘Property titling and conveyancing’, 2011, 13.

¹²⁹ Cretney S, ‘Land law and conveyancing reforms’ 119.

typically enshrined transparency and its related concepts of open data and access to information.¹³⁰ This is because after one pays the prescribed fee, there exists no obstacles to obtaining the relevant information necessary to realising the value of the land as an asset and a lack of knowledge about land laws and legal frameworks that might jeopardise the security of the land tenure, possibly resulting in an incorrect distribution of land rights.¹³¹ However, the same can not be said about the consent requirement required to conduct an official search under *Ardhi Sasa*.

Article 259(1) of the Constitution provides that the constitution should be interpreted in a manner that fosters the purpose, values, and principles articulated in the Constitution. It should also strive to promote the rule of law while upholding the human rights and fundamental freedoms enshrined in the Bill of Rights.¹³² Article 60(1)(d) of the Constitution should thus be interpreted in fulfilment of this. The prevailing understanding¹³³ is that the constitution should be interpreted in a broad manner as seen in the case of *Rose Wangui Mambo and 2 others v. Limuru Country Club and 17 others*. However, Article 20(3) does not call for either a broad or narrow interpretation.¹³⁴ Rather, the Article denotes that when applying a provision of the Bill of Rights, the interpretation that best supports the enforcement of a right or fundamental freedom should be embraced.¹³⁵

The right to property and the right to access to information are fundamental rights under the Bill of Rights. In the context of land administration, they find basis under Article 60(1)(d) which provides for the land policy principle of transparency.¹³⁶ In order to truly enshrine the principle of transparency in the conveyancing process, Article 60(1)(d) must be interpreted in such a way that promotes the fundamental freedoms of property and access to information. Transparency in land administration entails open data which is a result of free access to information. The three concepts are thus conjunctive rather than disjunctive and thus transparency in the land administration process calls for all three elements in cohesion. Official searches are fundamental to the land administration process. Therefore, under *Ardhi Sasa*, they

¹³⁰ Section 34, *Land Registration Act* ((Act No. 3 of 2012).

¹³¹ OpenData and Land Governance: Increased accountability and transparency as a means to overcoming poverty?' <https://landportal.org/node/35488#:~:text=In%20land%20governance%2C%20a%20sector.can%20be%20defended%20and%20protected.>-> on 14 October 2023.

¹³² Article 259(1), *Constitution of Kenya* (2010).

¹³³ Yongo C, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding' 27(2) *African Journal of International and Comparative Law*, 2019, 204.

¹³⁴ *Rose Wangui Mambo and 2 others v. Limuru Country Club and 17 others* (2014) eKLR.

¹³⁵ Article 20(3), *Constitution of Kenya* (2010).

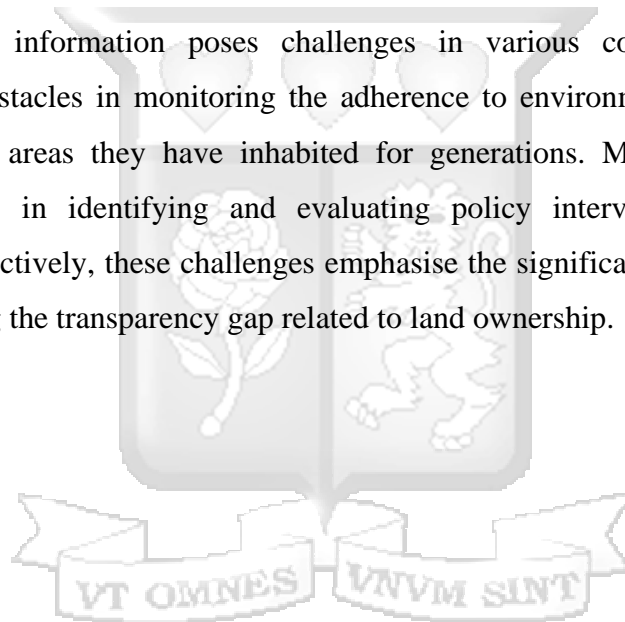
¹³⁶ Article 60(1)(d), *Constitution of Kenya* (2010).

should embody transparency, mirroring the provisions of the Land Administration Act. This entails the elimination of the consent requirement from the land owner when conducting an official search.

3.4 Conclusion

For the utilisation of open data and transparency to contribute to good governance, there must be established political and legal frameworks, a readiness and willingness to acquire and disclose data, recognition of the necessity for such data, and the capability to proficiently manage and utilise it.¹³⁷ Ultimately, issues with land ownership and the lack of openness around property transactions affect the public sector, the commercial sector, civil society organisations, and the government.¹³⁸

Lack of transparent information poses challenges in various contexts. For instance, Communities face obstacles in monitoring the adherence to environmental protections and asserting rights over areas they have inhabited for generations. Moreover, governments encounter difficulties in identifying and evaluating policy interventions to encourage development.¹³⁹ Collectively, these challenges emphasise the significance of open data as an instrument in bridging the transparency gap related to land ownership.



¹³⁷ Jaitner A, Schilling F and Matthaëi E, 'Open Data as a Means to Promote Transparency in Land Governance- What It Takes', 5.

¹³⁸ Davies T, Walker S, Rubinstein M and Perini F, 'The State of Open Data Histories and Horizons' 182.

¹³⁹ Davies T, Walker S, Rubinstein M and Perini F, 'The State of Open Data Histories and Horizons' 183.

CHAPTER 4

A CONFLICT OF PRINCIPLES: EXAMINING THE CONSENT REQUIREMENT VS TRANSPARENCY IN LAND ADMINISTRATION

4.1 Introduction

An analysis of what transparency and access to information entails in the previous chapter has established that transparency, open data and access to information operate as a trifecta. The Constitution enshrines transparency as a principle of land policy under Article 60(1)(d).¹⁴⁰ Although there exists no provision about what exactly transparency entails in land administration, it provides that these principles shall be implemented through a national land policy and through legislation.¹⁴¹ The National Land Policy lays down an imperative on the government to facilitate the establishment of an efficient land information management system, which, among a multitude of factors, calls for transparency.¹⁴² While transparency is echoed as essential in the implementation of land policy principles, its concrete definition remains elusive.

4.2 Scrutinising the elements of transparency vs the consent requirement under Ardhi Sasa

In order to advance the argument that the consent requirement under Ardhi Sasa is in conflict with the land policy principle of transparency enshrined under Article 60(1)(d) and the right to access information under Article 35, it is crucial to examine the components of transparency as described in the previous chapter vis a vis the aforementioned consent requirement under Ardhi Sasa:

4.2.1 The concept of open data vs the consent requirement

The imposition of a consent requirement prior to conducting an official search within the Ardhi Sasa platform stands in stark contradiction to the principles of open data, a cornerstone of transparency and effective governance.¹⁴³ As elucidated in the preceding chapter, open data embodies a fundamental aspect of accountability and transparency in government

¹⁴⁰ Article 60(1)(d), *Constitution of Kenya* (2010).

¹⁴¹ Article 60(2), *Constitution of Kenya* (2010).

¹⁴² Section 163, *The National Land Policy* (2009).

¹⁴³ Mwathane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

operations.¹⁴⁴ In the realm of land administration, open land data can contribute to more efficient administrative operations such as preventing overlapping land claims or duplicate data sets in land registration procedures.¹⁴⁵ Moreover, it provides all stakeholders with equal access to information, thus equalising the playing field and setting the groundwork for safe land and property rights.¹⁴⁶

Open data is characterised by specific attributes, all of which work in tandem to uphold its essence. Although most databases do not enshrine these characteristics, essentially, open data must be free to access, available in a convenient form and allow for use and redistribution, regardless of their purpose.¹⁴⁷ Despite the fact that the Ardhi Sasa platform is an electronic manifestation of the processes outlined in the Land Registration Act,¹⁴⁸ there exists a slight discrepancy between the act and Ardhi Sasa with regards to how official searches are to be conducted. While the Land Registration Act stipulates that individuals are entitled to receive particulars from the register upon payment of the prescribed fee, it notably omits any provision mandating consent from property owners to conduct official searches.¹⁴⁹ In contrast, the Ardhi Sasa platform introduces a consent requirement, diverging from the open data principles of free access and unrestricted use.¹⁵⁰

This discrepancy raises concerns about the alignment of the consent requirement with the core tenets of open data. The essence of open data lies in its openness and accessibility, ensuring that information is not restricted or encumbered.¹⁵¹ The imposition of a consent requirement in the Ardhi Sasa platform thus runs counter to this, potentially impeding the fluidity and openness that open data principles advocate. In essence, the consent requirement within Ardhi

¹⁴⁴Jaitner A, Schilling F and Matthaei E, 'Open Data as a Means to Promote Transparency in Land Governance-What It Takes', 1.

¹⁴⁵Jaitner A, Schilling F and Matthaei E, 'Open Data as a Means to Promote Transparency in Land Governance-What It Takes', 1.

¹⁴⁶Sorensen N, 'The Necessity for Open Data on Land and Property Rights' *Land Portal*, 2018, 5 - <<https://data.landportal.info/library/resources/necessity-open-data-land-and-property-rights>>- on 11 January 2024.

¹⁴⁷Dymora P, Mazurek M and Kowal B, 'Open Data- An Introduction to the Issue' *ITM Web of Conferences*, 2018, 1 -<<https://doi.org/10.1051/itmconf/20182100017>>- on 9 January 2024.

¹⁴⁸Section 9, *Land Registration Act* (Act No. 3 of 2012).

¹⁴⁹Section 34, *Land Registration Act* (Act No. 3 of 2012).

¹⁵⁰Jaitner A, Schilling F and Matthaei E, 'Open Data as a Means to Promote Transparency in Land Governance-What It Takes', 1.

¹⁵¹Janssen M, Charalabidis Y and Zuiderwijk A, 'Benefits, Adoption Barriers and Myths of Open Data and Open Government' *Information Systems Management*, 2012, 258 - <<https://doi.org/10.1080/10580530.2012.716740>>- on 22 December 2023.

Sasa appears incongruent with the very spirit of open data, raising questions about its compatibility with the ideals of transparency in the land administration process.

4.2.2 Access to information vs the consent requirement

The requirement for consent under Ardhi Sasa presents a significant impediment to the access of pertinent information crucial for conducting official searches. As established in the previous chapter, access to information is not only a fundamental right under Article 35 of the Constitution but is also integral to the efficient functioning of land administration systems.¹⁵² As highlighted by the Land Administration Development Model (LADM), the two main functions of every land administration include providing information in the registries and keeping its contents up to date.¹⁵³ Having up-to-date and easily accessible information empowers people and organisations, encouraging a more responsible and equitable land management system that adheres to good governance ideals.¹⁵⁴ This positions them as formative forces that shape the world of property.¹⁵⁵

The right to information is two-pronged as it provides that a citizen has a right to information held by the state and information held by another person for the exercise of a fundamental right or freedom.¹⁵⁶ In the context of Ardhi Sasa, the platform was developed by the Ministry of Lands and Physical Planning (MoLPP), the National Land Commission (NLC) and key partners in government.¹⁵⁷ Moreover, the information obtained from an official search is fed in by land owners which is essential for the protection of the fundamental right to property enshrined under Article 40.¹⁵⁸ This paper argues that because the information contained from an official search is crucial to exercising one's right to property and because this information is held by the state, the consent requirement under the Ardhi Sasa platform exists in disregard to the right to information as a tenet of transparency enshrined in the National Land Policy and the Constitution.

¹⁵² Ruijter E, Grimmelikhuijsen S and Meijer A 'Open data for democracy: Developing a theoretical framework for open data use' 34(1) *Government Information Quarterly*, 2017, 45.

¹⁵³ -<<https://www.iso.org/obp/ui/en/#iso:std:iso:19152:ed-1:v1:en>>- on 10 January 2024.

¹⁵⁴ 'OpenData and Land Governance: Increased accountability and transparency as a means to overcoming poverty?' -<<https://landportal.org/>>- on 14 October 2023.

¹⁵⁵ Bell A and Parchomovsky G, 'Of Property and Information' 237.

¹⁵⁶ Article 35(1), *Constitution of Kenya* (2010).

¹⁵⁷ -<<https://ardhisasa.lands.go.ke/home#about>>- on 23 December 2023.

¹⁵⁸ Article 40, *Constitution of Kenya* (2010).

This argument lies in the recognition that transparency is not a one-sided responsibility; it involves both the right of citizens to access information and the duty of the state to provide it. In the case of *Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others*, the Court emphasised on the reciprocal nature of the right to information. It highlighted that while citizens have the entitlement to access information, the State bears the duty to provide it. As stipulated in Article 35(3) the court opined that this obligation extends beyond the proactive publication of information as the State is also required to ensure open access to information that individuals may seek from the government.¹⁵⁹ The court's position underscores the dual responsibility inherent in the right to information, emphasising the State's role in facilitating access to information as a fundamental aspect of good governance.

Moreover, as stated in the case of *Joseph K. Nderitu & 23 others v Attorney General & 2 others*, the import of Article 35 is to have access to information which affects one's rights.¹⁶⁰ Access to information as a tenet of transparency facilitates the protection of the fundamental right to property¹⁶¹ as it ensures that all involved parties can make informed decisions during the conveyancing process.¹⁶² This includes buyers making decisions based on accurate property details and sellers understanding the legal implications of the transfer.¹⁶³ In the case of land transactions, where the right to property is intimately tied to the conveyancing process, unrestricted access to information, unencumbered by unnecessary consent requirements, is paramount.¹⁶⁴

To align with Article 35(1)(b)¹⁶⁵ and the National Land Policy,¹⁶⁶ the Ministry of Lands should undertake measures to streamline information availability on Ardhi Sasa. This includes revisiting the necessity of the consent requirement to ensure that citizens can seamlessly obtain crucial information for official searches. By doing so, the state not only fulfils its constitutional

¹⁵⁹ *Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others* [2013] eKLR.

¹⁶⁰ *Joseph K. Nderitu & 23 others v Attorney General & 2 others* (2014) eKLR.

¹⁶¹ Article 40, *Constitution of Kenya* (2010); Article 17, *Universal Declaration of Human Rights*, 10 December 1948.

¹⁶² Jaitner A, Schilling F and Matthaei E, 'Open Data as a Means to Promote Transparency in Land Governance- What It Takes', 9.

¹⁶³ Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, 169.

¹⁶⁴ Mwachane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwachane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

¹⁶⁵ Article 35(1)(b), *Constitution of Kenya* (2010).

¹⁶⁶ Section 163, *The National Land Policy* (2009).

duty but also facilitates an environment where citizens can exercise their right to property through well-informed decisions during the conveyancing process.

4.3 Borrowing from Land Information New Zealand (LINZ)

In the realm of digital property transfer services, New Zealand's LandOnline, the product of Land Information New Zealand (LINZ), stands as a pillar of efficiency and transparency.¹⁶⁷ As Kenya seeks to enhance its own land management system under Ardhi Sasa, drawing inspiration from LINZ could pave the way for transformative changes.

New Zealand places paramount importance on open and transparent governance to guide the administration of cadastral information. The core principle behind this was to empower citizens through open access to information.¹⁶⁸ In the spirit of this vision, the government emphasises that the data it holds must be open, trustworthy, well-managed, and readily available to the public.¹⁶⁹ LandOnline enables property owners and advocates to have direct access to land records anywhere in New Zealand.¹⁷⁰ It enables users to search for and buy property records such as titles, survey plans and other various instruments such as mortgages, easements and caveats.¹⁷¹

The overall goal of ensuring continuity, accessibility and responsiveness of land information services so that New Zealanders would continue to have confidence in property rights.¹⁷² This was facilitated through LandOnline which improved on the accessibility and quality of property rights information.¹⁷³ The system thus enshrines the discussed tenets of transparency without any barriers as in the Ardhi Sasa. Despite this, the system maintains protection of security and

¹⁶⁷ Korbly K, 'Adding Spatial Capabilities to a Land Database Land Information New Zealand Creates Online Title and Land Survey Database' ArcNews Online, -<
<https://www.esri.com/news/arcnews/winter0102articles/landinfo-newz.html>>_ on 15 January 2024.

¹⁶⁸ Grant D, Dyer M and Haanen A, 'A New Zealand Strategy for Cadastre 2034' FIG Congress: Engaging the Challenges - Enhancing the Relevance, Kuala Lumpur, 16- 21 June 2014, 3.

¹⁶⁹ Grant D, Dyer M and Haanen A, 'A New Zealand Strategy for Cadastre 2034' FIG Congress: Engaging the Challenges - Enhancing the Relevance, Kuala Lumpur, 16- 21 June 2014, 3.

¹⁷⁰ Korbly K, 'Adding Spatial Capabilities to a Land Database Land Information New Zealand Creates Online Title and Land Survey Database' ArcNews Online, -<
<https://www.esri.com/news/arcnews/winter0102articles/landinfo-newz.html>>- on 15 January 2024.

¹⁷¹-<<https://www.linz.govt.nz/products-services/land-records/land-record-search>>_ on 15 January 2024.

¹⁷² Eppel E and Lips M, 'LINZ Landonline: A successful digital government case study' *Digital Government Case Studies*, 2021, 6 -<
<https://www.victoria.ac.nz/sog/researchcentres/egovt/research-projects/case>>- on 16 January 2024.

¹⁷³ Eppel E and Lips M, 'LINZ Landonline: A successful digital government case study' *Digital Government Case Studies*, 2021, 6 -<
<https://www.victoria.ac.nz/sog/researchcentres/egovt/research-projects/case>>- on 16 January 2024.

privacy of land owners as it insists that personal and classified data and information must be protected.¹⁷⁴ This beats any argument which advocates for the consent requirement under Ardhi Sasa on the basis of protection of privacy. However, this argument holds no water in light of the fact that if the online official search provides the same data as it would when done in the registry, what then is the purpose of the consent requirement to begin with?

4.4 Conclusion

The process of conveyancing is hinged on control and exchange of information about real property.¹⁷⁵ The conveyancing process entails the act or business of drawing deeds, leases, or other writings for transferring the title to property.¹⁷⁶ Making information accessible and transparent in the conveyancing process is essential and thus involves provision of clear records on property titles, liens, and other pertinent details through official searches. This is to ensure that no other entries have been made on the register since the date of the official copy which the vendor has supplied.¹⁷⁷ Moreover, through an official search, a purchaser can satisfy himself that there are no other relevant transactions affecting the property of which he ought to know of.¹⁷⁸ However, in the absence of such information due to refusal of consent, how then can one conduct the necessary due diligence required to exercise their right to property?

The obligation to the government thus lies in not only publishing information on the Ardhi Sasa platform but also ensuring that this information can be used to affect the objectives of registry systems.¹⁷⁹ Low-cost access to trustworthy information on an individual's land ownership, based on clearly defined land rights, lowers transaction costs and uncertainty that impede the exchange of land in markets for the purpose of renting or selling as well as the use of property as collateral for credit.¹⁸⁰ The mandatory consent requirement under Ardhi Sasa hinders access to vital information in the scenario where a property owner denies their consent

¹⁷⁴ 'Declaration on open and transparent Government' Government CIO, 2013 - <http://ict.govt.nz/programmes/open-and-transparent-government/declaration-open-andtransparent-government>>-

¹⁷⁵ Bell A and Parchomovsky G, 'Of Property and Information' 256.

¹⁷⁶ Merriam Webster Dictionary, 4th ed.

¹⁷⁷ Ruoff T and Roper R, *The Law and Practice of Registered Conveyancing*, 4th ed, Stevens and Sons, London, 1979, 9.

¹⁷⁸ Cretney S, 'Land law and conveyancing reforms' 6(1), *Real Property, Probate and Trust Journal*, 1971, 119.

¹⁷⁹ Jaitner A, Schilling F and Matthaei E, 'Open Data as a Means to Promote Transparency in Land Governance- What It Takes', 2.

¹⁸⁰ Jeckoniah J, Akyoo E and Kabote S, 'Large Scale Agricultural Investments and Its Impact on Gender Relations and Wellbeing of Small Holder Farmers -Evidence from Kilombero Valley in Tanzania, 174.

to conduct an official search.¹⁸¹ The essence of the conveyancing process lies in providing transparent information to prospective buyers, allowing them to make informed decisions about property acquisition.¹⁸² The potential frustration of the conveyancing process thus underscores the need for a careful reconsideration of the consent requirement.



¹⁸¹Mwathane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 12 February 2023.

¹⁸² Hilhorst T and Meunier F, 'How Innovations in Land Administration Reform Improve on Doing Business' World Bank, -<<https://landportal.org/>>-- on 3 February 2023.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

The previous chapters extensively explored the theoretical concept of transparency in the land administration process and contextualised it within the framework of Ardhi Sasa. This chapter aims to summarise the essence of the entire study, bridging the initial study objectives with the findings. Additionally, it transitions towards a more pragmatic approach by laying the groundwork for potential reforms.

5.1 Summary of findings

The objective of this study was to assess the land policy principle of transparency enshrined under Article 60(1)(d), probing into what it demands from the land administration process and as a result, determine whether the consent requirement under Ardhi Sasa meets this threshold for transparency. The purpose of this aim would ultimately be to remedy the ineffective requirement under Ardhi Sasa to obtain the consent of a proprietor prior to conducting an official search using the platform.

The research has delved into Article 60(1)(d) and brought out the elements of transparency as open data and access to information. As neither the legislative text nor the constitution explicitly defines what transparency entails, the paper builds on existing scholarly work as the basis to conclude that for a system to truly be said to be transparent, it must enshrine both of these tenets.¹⁸³ Notably, transparency has been widely recognized as a significant principle for good land governance.¹⁸⁴ As discussed, transparency involves acting openly which remains impossible without making information freely available.¹⁸⁵ This forms the basis for the argument against the consent requirement under Ardhi Sasa, which contradicts the land policy principle of transparency as it neither conforms to the tenet of open data nor access to information.¹⁸⁶

¹⁸³Jaitner A, Schilling F and Matthaai E, 'Open Data as a Means to Promote Transparency in Land Governance- What It Takes', 1.

¹⁸⁴Asiama S, Haile S, Permezel M et al, *Tools to Support Transparency in Land Administration* UN-Habitat, Nairobi 2013, 11.

¹⁸⁵Asiama S, Haile S, Permezel M et al, *Tools to Support Transparency in Land Administration* 74.

¹⁸⁶Mwathane I 'Status of Land Information Management in Kenya' Land Development and Governance Institute, 2021,12 -< <https://ibrahimmwathane.com/index.php/frontpage/entry/status-of-land-information-management-in-kenya>>- on 11 February 2023.

Furthermore, the concept of access to information contained in the registry was further expounded on and justified by the need to protect the fundamental right to property.¹⁸⁷ This is because official searches are a crucial component of the due diligence process which then enables one to acquire or own property.¹⁸⁸ The study has shown that this right must not only be protected post acquisition but must also protect its enabling factors. Given this, the research has shown that the consent requirement under Ardhi Sasa bars open access to land information and can potentially inhibit one's right to property.

Moreover, the study has drawn on the land information management system in New Zealand (LandOnline) to showcase how transparency is advanced through open data and access to information.¹⁸⁹ LandOnline is maintained as per the Land Transfer Act in New Zealand and thus provides access to the register in the same way one would have had at the registry.¹⁹⁰ This study argues that Ardhi Sasa can borrow a page from this book and implement Ardhi Sasa simply as an electronic manifestation of the Land Registration Act. If this is achieved, it automatically translates to removal of the consent requirement which is not evident in the Act. The author therefore questions what the rationale behind its inclusion is and advocates for its reconsideration.

In critiquing the inclusion of a consent requirement under Ardhi Sasa, it is essential to highlight that the research does not seek to undermine the significance of Ardhi Sasa, the headway it has made thus far or the potential it has to effect more efficient land administration in Kenya. However, the critique centres on the specific aspect of the consent requirement, which runs contrary to the fundamental principle of transparency. The objective is not to discredit the entire initiative but to highlight an area where refinement is imperative to align with broader principles of good land governance. Removing the consent requirement is a step toward fostering transparency, and it is equally crucial to emphasise the importance of open and accessible data. Ultimately, the recommendation for reform is aimed at fortifying Ardhi Sasa as a transparent tool in the broader landscape of land administration in Kenya.

¹⁸⁷Article 35, *Constitution of Kenya* (2010).

¹⁸⁸Geleen T, Daley B and Green B, 'Due Diligence', 1.

¹⁸⁹Grant D, Dyer M and Haanen A, 'A New Zealand Strategy for Cadastre 2034' FIG Congress: Engaging the Challenges - Enhancing the Relevance, Kuala Lumpur, 16- 21 June 2014, 3.

¹⁹⁰ <<https://www.linz.govt.nz/products-services/land-records/land-record-search>>- on 15 January 2024.

5.2 Recommendations

This study seeks to make three recommendations for further study and implementation.

First, in line with its mandate to ensure compliance with the principles of land policy, the National Land Commission should promote open government data (OGD) practices within the land administration sector.¹⁹¹ The commission should take proactive measures to make land-related information available to the public in a transparent and easily accessible manner. This entails considering Ardhi Sasa as an electronic manifestation of the Land Registration Act. Embracing open government data principles would contribute to more informed decision-making, enhance public trust, and strengthen the overall transparency of the land administration process.¹⁹²

Second, due to the relative newness of the Ardhi Sasa platform and its current limited application to land in Nairobi,¹⁹³ the National Land Commission should consider benchmarking against global best practices in land administration. Comparative studies with countries that have successfully implemented transparent and efficient land management systems, similar to the LandOnline system in New Zealand, can offer valuable insights and lessons to Kenya. By adopting international best practices, Kenya can fine-tune its land administration processes towards achieving greater transparency and further strengthen the credibility and effectiveness of Ardhi Sasa.

Third, there needs to be the establishment of a comprehensive framework governing e-conveyancing in Kenya which outlines the principles and standards for transparency in the electronic land administration processes. Currently, although Ardhi Sasa is governed by the Land Registration Act, there is need for secondary legislation to underpin all the developments which have been made with regard to electronic conveyancing.¹⁹⁴ By doing so, the government can ensure the alignment of digital initiatives with broader legal and policy objectives while fostering a secure and transparent online land administration system.

¹⁹¹ Section 6(2)(c), *The National Land Commission Act* (No 5 of 2012); Janssen M, Charalabidis Y and Zuiderwijk A, 'Benefits, Adoption Barriers and Myths of Open Data and Open Government', 258.

¹⁹² Jaitner A, Schilling F and Matthaei E, 'Open Data as a Means to Promote Transparency in Land Governance-What It Takes', 9.

¹⁹³ -<<https://mman.co.ke/content/ardhisasa-%E2%80%93-abc>>_ on 15 January 2024.

¹⁹⁴ Bogusz B, 'Bringing Land Registration into the Twenty-First Century - The Land Registration Act 2002' 567.

These recommendations come together and ultimately lead to the overarching message in the study which advocates for the removal of the consent requirement in order to conduct official searches under *Ardhi Sasa*. Essentially the idea of this is to strengthen the principle of transparency in the land administration sector in the digital age by embracing open data principles and access to information in line with Article 35 of the Constitution.¹⁹⁵



¹⁹⁵ Article 35, *Constitution of Kenya* (2010).

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