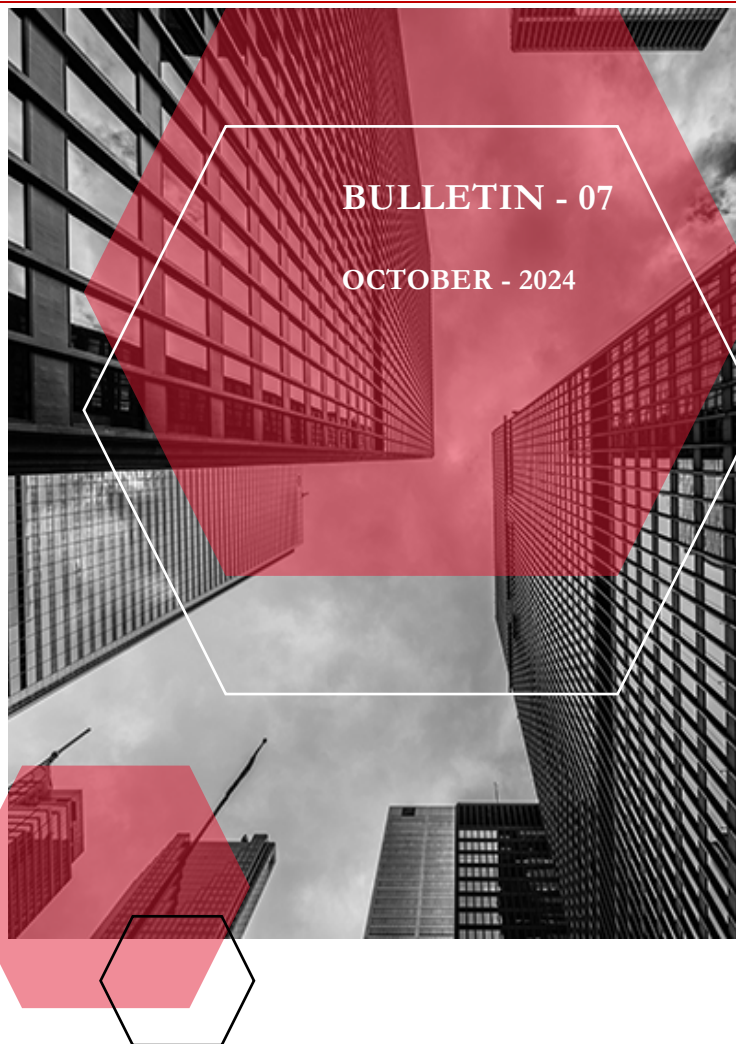




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Expanding the Scope of Due Diligence in Land Transactions

If traditional searches and by-the-books due diligence have proven inadequate over time, how can real estate investors, developers, and financial institutions better protect themselves against land fraud?

The courts – the cornerstone of the rule of law – have not offered much reprieve here, as the prevailing jurisprudence insists purchasers ought to conduct due diligence, further to the point of ascertaining the roots of property ownership. However, conducting historical searches has proven insufficient given [a myriad of issues](#) such as missing records, document loss, corruption, tampering, and issuance of multiple titles for a single parcel of land, have plagued Kenya's land registries for decades. On the administrative front, too, the government was in late September [forced to come out to allay fears](#) that critical documents used to print titles that were stolen from the government printer would not be used to facilitate land fraud.

As a result, many have for years advocated for the digitization of land administration systems. The introduction of Ardhi Sasa is a step in that direction, but much work remains to be done.



Due diligence in property transaction refers to the process of obtaining information through conducting a series of through investigation to verify the details of property ownership.

Conducting due diligence before purchasing property in Kenya is crucial to ensure a smooth transaction and to avoid potential legal and financial pitfalls.

Conveyancing in Kenya and the process of investigating title has always entailed the following procedures.

- **Searches:** these are inquiries made to the e-citizen portal for standard searches or government registries for historical searches to ascertain ownership, planning regulations, environmental issues, and other encumbrances.
- **Pre-Contract Inquiries:** this entails physical inspections and evaluations of the property to determine its condition regarding any latent and patent defects.
- **Requisitions:** any questions arising from the title documents.

As discussed, the components of due diligence have proven superficial and, to some extent, ineffective. In an attempt to give further depth and meaning to due diligence, the Supreme Court case of [Dina Management Limited vs. the Government of Mombasa](#), annulled the appellant's ownership of the suit property due to a flawed process of alienation of land, highlighting the necessity for thorough due diligence when purchasing property. This aligns with the court of appeal's decision in [Kawaljeet Singh Rekhi v. Peter Wainaina Kamau](#), which stressed the importance of comprehensive investigations into property titles and physical inspections before transactions.

It is evident the courts are confronting issues and striving to find solutions. However, judicial intervention alone will not suffice; a comprehensive approach involving all stakeholders might be the antidote to a graft-riddled land transaction system.

Apart from confirming ownership, further investigations are essential to evaluate whether the property is suitable for its intended purpose and truly occupiable. Unfortunately, individuals often unknowingly acquire parcels of land in valleys or along riverbanks, which greatly limits their envisioned utility.



Given the evolution of market practices we recommend purchasers undertake the following further steps to be further guaranteed to obtain value for money:

Confirm Zoning and Land Use Regulations

Zoning regulations in Kenya aim to keep incompatible land uses separate. These rules facilitate organized urban development, manage population density, and safeguard the environment. The main categories of zoning include residential, commercial, industrial, agricultural, and recreational areas. A prospective purchaser ought to conduct a search at the county government to ascertain whether the property is suitable for its intended purpose. Still, there is some emergent complexities since property developers have recently encountered significant challenges with zoning and regulatory authorities, who sometimes impose stringent requirements that appear designed to frustrate development efforts or block construction all together.

Notably a recent court ruling has paved way for developers to proceed with construction despite denials of approvals from relevant authorities. This decision reflects the judiciary's commitment to restoring the integrity of the land administration systems.

Due Diligence on Sellers

Sometimes, simply researching the seller's history in property transactions can greatly aid one to avoid fraudulent parties. If purchasing from an individual it is crucial to obtain their full names, nationality, area of residence and details of the national identity card number. In addition, enquiries into land rates transaction can further attest to true ownership. Such information could assist in conducting a search at the registry of persons.

In addition, the purchaser ought to find out whether land rates have been cleared as a rates clearance certificate determines that the actual owner of the property has been paying rates as required.

Court Registry Searches

When buying property from beneficiaries of a deceased's estate, it is important for one to find out whether beneficiaries can, in fact, transfer properties to third parties.

Under such circumstances, the purchaser should request to be provided with the grant of probate. Take note that letters of administration do not accord the beneficiaries powers to distribute the assets of a deceased. With the electronic filing system in place, and with the assistance of a lawyer, one can investigate the case activities of a succession matter to find out its details.

Crucially, a person who attempts to distribute a deceased's property without legal authorization commits the criminal offence of intermeddling, as defined in section 45 of the Law of Succession Act. Such an individual may be liable for a fine of up to ten thousand shillings, a prison term of up to one year, or both.

To highlight the fraudulent behavior exhibited by some beneficiaries, legal professionals often encounter cases where individuals misrepresent themselves as the sole heirs of a deceased estate, failing to disclose other rightful beneficiaries. If such transactions are contested, they are typically nullified by the courts.

Financial Considerations

Buyers are also advised to obtain independent valuation of the property to confirm the price is fair. By determining the actual value of the property, buyers and sellers can [accurately calculate the amounts owed for stamp duty and other taxes](#).



Physical Inspection of the property

Physical inspection is important not only to ascertain the location of the property but also to identify any patent or latent defects. Additionally, such inspections can inform a prospective purchaser whether the land is encumbered or not available for sale.

When contracts have favorable terms that grant purchasers the right of entry and occupation pending the completion of a land transaction, we have observed the depositing of materials on the site or erection of temporary structures that alert other potential buyers or property owners to one's presence, as particularly useful tactics for uncovering any untoward elements regarding the land. Moreover, such acts can prove useful if a claim were to arise further down the line, where someone falsely claims ownership of a property citing long term possession and alleges trespass on part of the purchaser. The structure itself can serve as evidence of the purchaser's long-term presence

As such, expanding the scope of due diligence in land transactions is essential to ensuring buyers and sellers navigate the complexities of property ownership safely and effectively. Administrative processes that are time consuming ultimately drag the circulation of capital. Therefore, all relevant stakeholders should pool together under the ambit of government to expedite and sanctify land transactions.

Fundamentally, diligent preparation and informed decision-making empower buyers to make sound investments by securing their legal interests in the property market. Naturally, for clients, enlisting the help of one or two experts in this process can be well worth the investment.

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