

RMM LLP BULLETIN

PAPER DREAMS:

Are All Title Deeds Worth the Paper they're Printed On?



EDITORIAL

A popular phrase expressed in the Kikuyu language by land selling companies *“Mûgûnda nî title”* loosely translated means *“title is the guarantee of land ownership”*.

Indeed, this common belief informs the premium that the general populace attaches not only to land ownership but also to title documents.

Many however would be surprised to learn that title documents are only *“prima facie”* evidence of ownership and whereas in most instances the title documents convey accurate information on ownership, there are many cases where title documents have been impugned and the title owners left holding documents not worth the paper they are printed on.

The reference here is not to backstreet fabricated *“title deeds”* but instruments issued at lands offices across the country. There have been instances where land officers give conflicting testimony on the veracity of title documents, some attesting to their authenticity and others denouncing them as fake.



The lamentations of Justice Munyao Sila against this practice in **ELC No.87 of 2007 Peter Ndugunya Ole Sono vs Lands Limited & another 2019 e KLR** best illustrates the frustrations the courts face when they encounter these fraudulent manipulations that are orchestrated with the connivance of land officials. In his words;

“It is actually a shame, nay, a scandal, that these titles were ever prepared in the first place, and maps purporting to authenticate them drawn. If such could happen under the watch of the Chief Land Registrar and the Director of Surveys, then we have reason to worry whether the custodians of our land records can be entrusted by the public to keep good straight records... I am personally very afraid and very worried at the scandal that has been revealed to me in this case.”

This sad phenomena of double or even more titles existing in respect of one parcel of land has far reaching and grave macro and micro economic consequences not to mention the legal and social disruptions that are attendant to such contestations.

This brief synopsis is intended mainly for general readership and focuses on prospective purchasers of land and/or creditors who rely on real estate as collateral. It is intended to outline the meaning of title, the judicial interpretation thereof and the implications arising from such interpretation and finally seek to outline measures that the target audience may take to reasonably protect and guard themselves against sharp practices that emanate from fraudsters that may include some corrupt officials at the Land's offices.

Section 26(1) of the Land Registration Act No. 3 of 2012 provides; -

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

This means on the face of it, a title instrument is valid and authenticates the information contained therein including the land parcel number, the proprietorship and the acreage etc.

This section has exceptions to the general rule and the title can be invalidated: -

- a) *on the grounds of fraud or misrepresentation to which the person is proved to be a party; or*
- b) *where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme*

Section 26(1) above is not only a legislative innovation but is also firmly anchored in Article 40 of our Constitution, which on one hand guarantees the right to property but on the other is explicit that such rights are not absolute and under Sub-Article (6) thereof provides that those rights do not extend to *“...property that has been found to have been unlawfully acquired.”*

Unfortunately, the proviso in section 26 (1) of the **Land Registration Act No. 3** applies not only to the perpetrators of the unlawfulness but extends to an innocent purchaser/creditor who transacts on the basis of such title documents.

A buyer and/or a creditor is therefore called to undertake sufficient due diligence before engaging on any transaction and mere reliance on title documents will not pass muster, especially when two or more competing titles emerge.

The Supreme Court has affirmed the requirement to undertake a “root” due diligence on titles or title documents to establish their authenticity before one commits themselves to any transactions. The court in **Dina Management Limited VS County Government of Mombasa and 5 others 2023 eKLR** observed: -

“Where the registered proprietors root title was under challenge it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of title ensure that the acquisition was legal, formal and free from any encumbrance including interests which would be noted in the register”.

However, this decision that is binding on all courts below the Supreme Court, poses a legal conundrum. It is expected and indeed the norm that the contestation of title ordinarily occurs after acquisition and not before. How then, is a prospective purchaser or creditor to know that the title they are dealing with will be contested in the future especially if they undertake due diligence on the title obtain an official search, enter into written agreement and have the instrument of transfer and/or charge officially registered with the lands office?

This requirement places an onerous duty on the general public considering the only opportunity given to them to



undertake due diligence at the lands office is to place a request at the counter situated at the general hall of most lands offices and to make reliance on the information and documents conveyed by the same land officers. The opportunity to fall prey to “corrupted” documents is very high if insiders are complicit

More significantly after registration and acquisition of title the proprietor’s ownership will remain uncertain unless it acquires judicial imprimatur. The judicial process is lengthy and costly as can be attested by the Dina Management Case that traversed the Environment and Land Court progressed to the Court of Appeal and finally to the Supreme Court.

Ultimately there is no foolproof mechanism that presently exists to guarantee such legal instruments of title. The move towards digitization is a step in the right direction.

One can do more though. Engaging legal expertise for starters to undertake due diligence not only on the land and the title documents but also on the parties involved is an added step in ensuring that the transaction is genuine. Engaging through the advocate or directly other experts e.g. surveyors to establish the property beacons and physically interacting with the land and the survey office is an extra precaution.

One may also choose to engage with the neighbourhood, especially where resident associations exist. Other innovations include incorporating a term in the sale agreement that allows the prospective purchaser to undertake some preliminary activity on the land upon payment of the deposit to the vendor's lawyers who must hold it on a stakeholder basis pending completion and who may have to refund it should red flags emerge.



On a policy level, considering the frequency of these incidents, the government should now introduce deterrent legislative measures that target perpetrators by providing penal consequences and reparative remedies against the fraudulent persons including land officers involved.

At a judicial level, the courts should go beyond impugning dubious titles and purposively target officers and any persons involved in the malpractice by slapping them with sufficiently deterrent consequences.

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