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YEARS

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Newsletter

Meet our Senior Associate

Ian Otieno Odongoh

Also Inside

- Fresh from the bench (Sing V Tarabana)
- Legal maxim of the month

Fresh from the Bench: Who is an innocent purchaser?

Harcharan Singh Sehmi and Another-Vs-Tarabana Co. Ltd and 5 Others

FACTS OF THE CASE

In 1968, Harcharan Singh Sehmi and others bought a lease for a parcel of land in Ngara, Nairobi—L.R. No. 209/2759/9—that was set to run for 59 years from 1942 to 2001. Shortly before expiry, they applied to the Commissioner of Lands to extend the lease—an application acknowledged (with “no objections”) by both the Director of Physical Planning and the Director of Survey—but left pending for eight years. Despite that, they continued to occupy the land peacefully and paid rent and rates as usual.

Then, in 2014—about 13 years after the lease expired—agents of the Respondents suddenly evicted the Appellants from the land. This second party held a new title to the same parcel, issued in 2009. (L.R. 209/2759/9 I.R. 12263).

This situation arose because, when a leasehold title expires, the land technically reverts to the state. But in this case, the peculiar thing was that there were now two “owners” claiming rights to the same land: the original leaseholders who had applied for renewal and stayed on the land, and a new party who had somehow received a fresh title while the first application was still unresolved.

The court had to deal with the issue of bona fide purchaser because the new title holder claimed to have acquired the land legally and in good faith, without knowledge of the earlier owners' continued interest. So the question became whether someone can truly be an “innocent buyer” if the land was irregularly allocated in the first place, and whether the new title could be decalred valid.



**WHO IS A
BONA FIDE
PURCHASOR?**

The doctrine of "innocent purchaser for value without notice of any fraud" is meant to protect buyers from the impact of undisclosed encumbrances or underlying fraud. This remedy allows the buyer to acquire land free from prior claims, provided they meet specific criteria, such as acting in good faith, paying value, and obtaining a legal estate.

However, the application of this remedy has created considerable uncertainty in Kenyan law, particularly in light of cases like Dina Management, which raise the standard for due diligence in determining the extent of protection for innocent buyers. Courts have been reluctant to declare buyers as innocent purchasers, even when they were unaware of fraud, emphasizing the need for thorough due diligence to uncover any irregularities with the title from the first allotment.

The Harcharan Singh Sehmi & Another v. Tarabana Co. Ltd & 5 Others (Petition No. E033 of 2023) case before the Supreme Court brought this confusion into sharper focus. In this case, the litigants struggled to define what qualifies a buyer as an innocent purchaser, especially in situations involving legal estates, due diligence, and prior equitable interests.

The Court identified three key elements for a successful defense:

- **Innocence:** The purchaser must act in good faith, with no knowledge of a rival interest in the land. If the buyer engages in unconscionable conduct or fails to conduct reasonable inquiries, it weakens their claim to innocence.
- **Purchase for Value:** The buyer must pay consideration (money or equivalent) before receiving notice of any prior equitable interests. If the purchaser has no knowledge of such interests before completing the transaction, they can claim the defense of innocent purchaser.
- **Legal Estate:** The purchase must be of a legal estate, not just an equitable one, for the doctrine to apply.

In advancing the definition of who qualifies as an innocent purchaser, the Court also referenced a previous case, **Torino Enterprises Limited v. Attorney General (Petition 5 of 2022)**, where the Court found that an innocent purchaser must exercise due diligence, including physically inspecting the property. This is because the presence of an encumbrance or occupation of the land could have been a warning to the purchaser. The Court concluded that mere possession of the land did not entitle the buyer to protection under the doctrine of an innocent purchaser.



Furthermore, the Court discussed the application of this doctrine to leasehold estates over public land. An original allottee of such a leasehold is considered a lessee, not a purchaser, until they sell, gift, or transmit part of their estate to a third party. The doctrine of an innocent purchaser can apply to leasehold estates only if the original allottee created an equitable interest (e.g., a trust) in favor of a third party. In such a case, the buyer may take the land free from any equitable interest if they were unaware of the trust at the time of purchase.

In summary, the Court emphasized that the doctrine of innocent purchaser applies primarily to legal estates and protects against claims based on equitable interests, provided the buyer acts with diligence, pays value, and has no notice of any prior encumbrances.



Can the doctrine of Innocent Purchaser for value Without Notice protect a purchaser of an illegally/irregularly allocated title over public land?



The remedy of an innocent purchaser for value without notice is meant to protect individuals who acquire property in good faith, pay valuable consideration, and obtain a legal estate without knowledge of any defects or fraud in the title. Ideally, such purchasers should take land free from prior claims or encumbrances.

However, in Kenya, this doctrine has faced serious limitations—particularly in the wake of **Dina Management Limited v County Government of Mombasa**, where the Supreme Court emphasized that one cannot benefit from this protection if the root of the title is defective. The Court held that before determining whether someone is a bona fide purchaser, one must trace the title back to its original allocation.

This position was reaffirmed in **Harcharan Singh Sehmi & Another v Tarabana Co. Ltd**, where the Court clarified that no legal estate can arise from an illegally or irregularly allocated public title. Therefore, even a purchaser without knowledge of the illegality cannot be protected, since equity follows the law and does not sanitize an unlawful acquisition. The doctrine, then, does not shield one from consequences of buying land whose origin is tainted, no matter how innocent the buyer may be.

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To what extent the doctrine of Legitimate Expectation applies to the renewal of Leases over public land?

The doctrine of legitimate expectation can, in certain circumstances, apply to the renewal of leases over public land. As affirmed by the Supreme Court in **KRA v Export Trading Company**, a legitimate expectation arises when a public authority, through past practice or explicit representation, creates a reasonable and lawful anticipation that it has the power to fulfill. For an expectation to qualify as legitimate, four conditions must be met:

- there must be a clear promise or representation by a competent authority;
- the expectation must be reasonable;
- it must fall within the authority's legal mandate; and
- it cannot contradict the law or Constitution.

When it comes to public leases, which are inherently time-bound, the expectation of renewal can only arise if the lease contains an option for renewal or if a proper application for renewal has been made. Where such an application is submitted to the relevant authority—who has the power to renew—the lessee may develop a legitimate expectation that the application will be fairly considered. However, this does not guarantee renewal, only that the process will be transparent and procedurally fair.

Final disposition

- A bona fide (or innocent) purchaser for value is one who satisfies three essential criteria: first, they must act in good faith, without actual or constructive notice of any competing equitable interest or underlying fraud, and must conduct the reasonable inquiries expected of any prudent buyer; second, they must pay valuable consideration—money or its equivalent—before learning of any prior equitable claims, since mere execution of a conveyance instrument without payment does not suffice; and third, they must acquire a full legal estate in the land, not merely an equitable interest. Importantly, the burden of proving all three elements rests squarely on the purchaser.
- The doctrine of legitimate expectation arises in the context of lease renewal when a public authority, through clear representation or consistent past practice, engenders in an applicant a reasonable belief that their application will be granted. While legitimate expectation does not grant pre-emptive proprietary rights, it does entitle the applicant to fair consideration of their renewal request, timely notification of any decision, and reasons if their application is denied.

A portrait of Mr. Ian Odongoh, a man with a shaved head and a short beard, wearing a dark suit, white shirt, and a red and blue striped tie. He is smiling slightly and looking towards the camera. The background is a blurred green foliage.

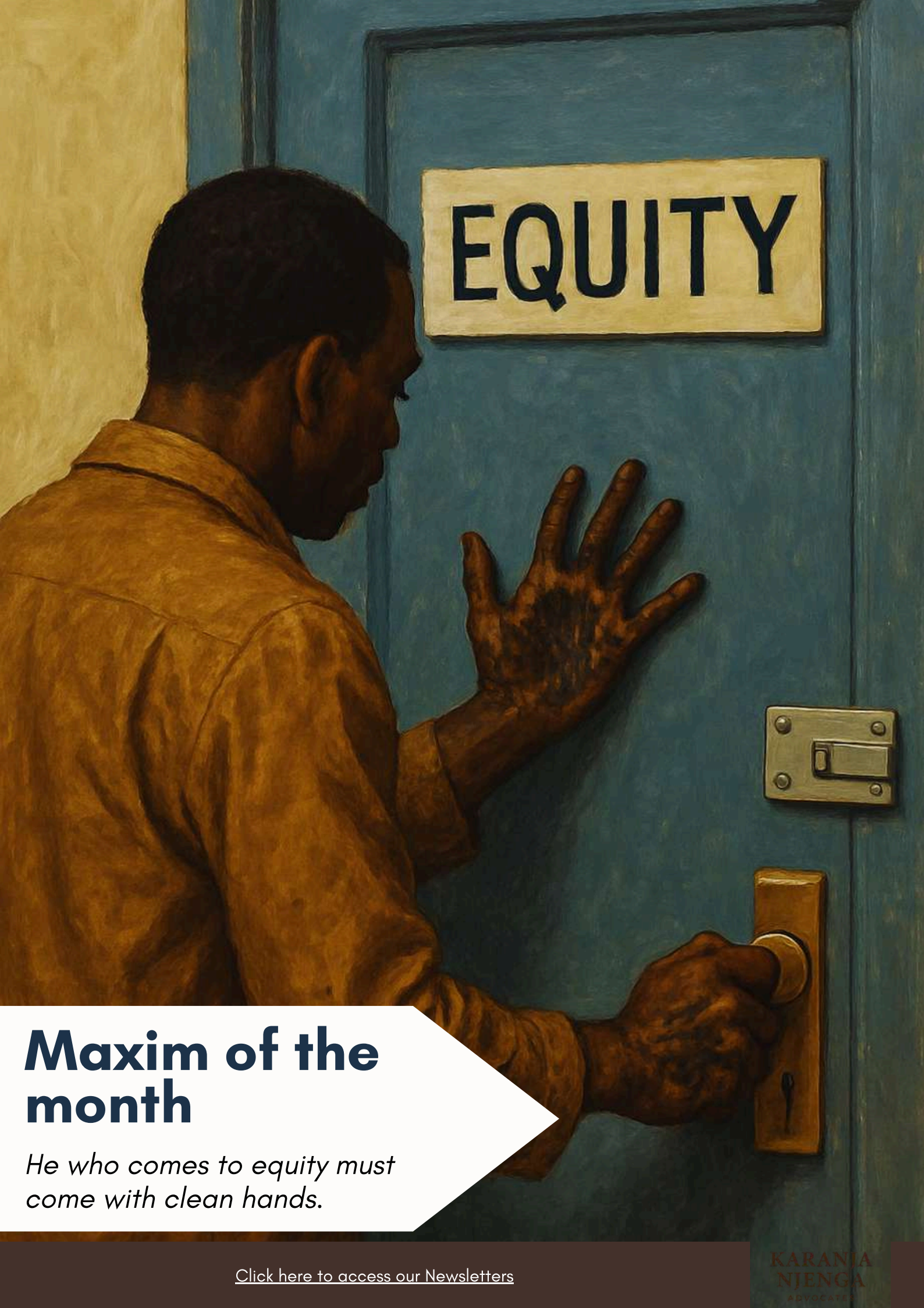
Celebrating

Mr. Ian Odongoh **– Senior Associate**

From a young, eager pupil to a seasoned Senior Associate, Ian Odongoh has risen through the ranks with quiet confidence and undeniable brilliance. While he often speaks—quite proudly—about his stellar voice and passion as a chorister (and rightfully so!), he modestly downplays the fact that he’s one of the sharpest minds in our Conveyancing department.

Ian’s years in practice have not only refined his legal acumen but have also earned him the distinction of being qualified to take on pupils of his own—a true milestone in any lawyer’s career. But it’s not just his experience that sets him apart. It’s his consistent excellence, calm leadership, and depth of knowledge that make him a trusted colleague and an asset to the firm.

Here’s to Ian—proof that talent, humility, and hard work do rise to the top.



EQUITY

Maxim of the month

He who comes to equity must come with clean hands.

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