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The Scope of Due Diligence in Conveyancing.

Insights from the Dina Management Case

> A registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular and that a Court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.

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In the Dina Management Limited case, the dispute arose over a beachfront property in Nyali, Mombasa, which had originally been allocated to former President Daniel arap Moi in 1989. Dina Management later purchased the land, becoming the third owner, and erected a perimeter wall around it. However, in 2017, the County Government of Mombasa forcefully entered the land, demolished the wall, and flattened the property, claiming it was public land meant to provide access to the beach. Dina Management sued the county, asserting it was the rightful owner. The matter escalated to the Supreme Court, where the main issue was the validity of the land's original allocation and the legality of subsequent ownership.

• Introduction

The doctrine of indefeasibility of title is a fundamental principle in property law that grants an absolute and conclusive right of ownership to the registered proprietor of land. Under the Land Registration Act, 2012, Section 26(1) provides that a certificate of title is prima facie evidence of ownership, meaning that the person whose name appears on the register is presumed to be the lawful owner.

But one thing that the Dina Management case insisted on is that courts should nullify titles by "***land grabbers who stare at your face and wave to you a title of the land grabbed"*** and loudly plead the principle of the indefeasibility of title deed

This therefore means that the law recognizes that the presumption of indefeasibility of titles is not absolute.

This introduces the idea of a bona fide purchaser for value without notice—*a person who acquires land in good faith, pays valuable consideration, and has no knowledge of defects in the title*. This person is generally protected under the law. The rationale is that an innocent buyer should not suffer for fraudulent or illegal actions committed by previous owners.

Traditionally, courts have held that once a purchaser conducts a land search at the relevant registry and finds a *clean* title, they are considered to have done their due diligence. However, this position was significantly altered by the Supreme Court in Dina Management Limited v County Government of Mombasa & 5 Others, where the Supreme Court ruled that due diligence must extend beyond a mere title search to investigating the entire history of the land.

This legal update will discuss the scope of due diligence as stated by the Supreme Court.

• A bona fide Purchaser

A bona fide purchaser for value is defined in Black's Law Dictionary (9th Edition) as:

"*One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title.*"

The Supreme Court of Kenya in The Dina Management case while referring to The Court of Appeal in Uganda, in ***Katende v Haridar & Company Ltd [2008] 2 EA 173***, refined this definition by establishing a seven-part test that a bona fide purchaser must satisfy. They include:

- Hold a certificate of title;
- Purchase the property in good faith;
- Have no knowledge of any fraud;
- Purchase for valuable consideration;
- Ensure that the vendor had apparent valid title;
- Purchase without notice of any fraud;
- Not be a party to any fraud.

The main ingredient of a bona fide purchaser is that they must *have an apparent valid title which they acquired through an apparent valid conveyancing transaction and that the specific title was issued by a lands registry*. Other than that, the purchaser must not be party to or aware of any fraud in the transaction and the purchase must be in good faith and for reasonable monetary consideration. A government Land Valuer in this case must assess the value of the property in question .

Similarly, the court referred to Samuel ***Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR***, where the court emphasized that a bona fide purchaser must prove:

- That they acquired a valid and legal title;
- That they conducted the necessary due diligence;
- That they paid valuable consideration for the property.

This case highlighted the fact that non privity to fraud, purchase in good faith and for monetary consideration can only happen after a purchaser conducts necessary due diligence.

• The Scope of Due Diligence

Normally, purchasers would do a Registry search on the property as the only form of due diligence.

But in the Dina Management case, the Supreme Court reaffirmed that due diligence is not a mere formality but a substantive inquiry into the root of the title. The Court noted that due diligence is more than obtaining a search certificate from the Land Registry; it requires interrogating the legality of the entire chain of transactions leading up to the acquisition.

• Key Elements of Due Diligence

Verification of Root Title: Investigating the root of title requires tracing ownership back to the first allotment from the Crown (during colonial rule) or the State (after independence). In Kenya, land historically fell into three broad categories: Government Land (formerly Crown Land), Trust Land, and Private Land. Before independence, unalienated land was vested in the British Crown and managed under the Crown Lands Ordinance, which later became the Government Lands Act (repealed).

After independence, the government assumed control over public land, and the Commissioner of Lands was responsible for its allocation.

The first step in establishing a valid title is verifying whether the land was lawfully and procedurally allocated, meaning there was a proper allotment letter, a Part Development Plan (PDP), approval from relevant authorities, survey plans, and subsequent registration. Any irregularity in these processes renders the initial grant defective, affecting all subsequent transactions.

Under the Government Lands Act (repealed), the legal procedure for allocating unalienated public land involved several mandatory steps:

- Application for Allocation – An interested party had to formally apply to the Commissioner of Lands.
- Part Development Plan (PDP) – The Commissioner would prepare a PDP, showing the intended use of the land. This plan required approval from the Director of Physical Planning.
- Letter of Allotment – If the application was approved, the Commissioner of Lands would issue a Letter of Allotment outlining the conditions of the grant, including any payments to be made.

- Survey and Deed Plan – The land would be surveyed, and a Deed Plan prepared by the Director of Surveys to define its exact boundaries.
- Registration and Issuance of Title – Once all conditions were met, the land would be registered, and a title deed or leasehold certificate issued in the new owner's name.

The appellant in Dina Management failed this test as the original and first allocation to H.E. Daniel Arap Moi was irregular, making subsequent transfers invalid.

In this case, Daniel Arap Moi was allocated the land in 1989, but the proper legal procedure was not followed:

- There was no evidence that Moi ever applied for the land.
- There was no approved Part Development Plan (PDP) before allocation.
- The land was originally designated as public land (open space for public use), meaning it was not available for private allocation.
- The survey and allotment process was rushed and did not meet the legal requirements.
- The land was converted to freehold despite being within an urban area, where leases should not exceed 100 years under the law.

Since the original allocation was illegal, the title Moi obtained was invalid from the beginning. This also meant that any subsequent transfers, including the sale to Dina Management, were based on a flawed foundation, making the final title defective and void.

Compliance with Legal and Regulatory Frameworks: The Government Lands Act (GLA) (now repealed) required that before alienation, a Part Development Plan (PDP) be approved and a formal allotment letter issued.

The court while referring to ***Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR*** clarified that failure to follow this process renders a title defective.

Constructive and Actual Notice: The Supreme Court noted that due diligence required more than reliance on assurances from the Ministry of Lands. The appellant ought to have questioned why a beach property was being allocated without compliance with public land allocation requirements under Article 62(2) of the Constitution.

Physical visit of the property: This was noted in the **Torino Enterprises Limited V AG** case that a purchaser must also do a phyical visit of the property to see whether there is any defects with the land or any occupants thereon.

• Conclusion

The Supreme Court in Dina Management emphasized that due diligence extends beyond procedural checks. A bona fide purchaser cannot exist where the root of the title is defective. Therefore, future buyers must undertake thorough investigations, including historical allocations, regulatory approvals, and public interest considerations. Courts will no longer uphold land transactions based solely on formal title registration but will examine the substantive legality of the acquisition process.