

# Legal Insights



# Table of Contents

## 01 The Dina Case

Proprietary rights are so important that the Constitution recognizes them as a fundamental human right and directs the state to defend them.



## 02 Off-Plan Purchase

The concept of sectional property optimizes the use of land as a resource by encouraging vertical development of land.



## 03 Relocation of Children

The Children Act 2022 outlines child custody as both legal and actual custody.



# 01 The Dina Case

## SUPPLEMENTING OR SUPPLANTING THE TORRENS PRINCIPLES

Proprietary rights are so important that the Constitution recognizes them as a fundamental human right and directs the state to defend them. To that goal, the state has designated the Ministry of Lands as the custodian of land records.



A purchaser wishing to purchase land is expected to adhere to the principles of *caveat emptor* (buyer beware) as well as the principle of *nemo dat non quod non habet* (no one can give what they do not have).

In this regard, the burden lies on the purchaser to undertake due diligence to acquire a good title. Regarding due diligence on the title, the tradition has always been that an official search at the Lands Office is sufficient to confirm the registered owner of the parcel. This is in agreement with the Torrens principles which provide that the purchaser's due diligence only entails looking into the details in the register.

Nonetheless, the Supreme Court's decision in the Dina case appears to broaden the reach of the Torrens principles by requiring

one to go beyond the *mirror and curtain* principles. The article examines whether the Supreme Court ruling supplements or supplants the Torrens principles, which hold that an official search at the Lands Office is sufficient to confirm the registered owner of the property, and after purchase, confer a legal and valid title.

### 2. The Torrens Principle

The Torrens principles can be divided into three as highlighted below:

- a) The *Mirror* Principle -The register perfectly reflects the exact state in which the title exists.
- b) The *Curtain* Principle - A potential purchaser does not need to be concerned about what is not recorded in the register.
- c) *Insurance/Indemnity* Principle – The purchas-

# 01 The Dina Case



er should be guaranteed compensation for loss arising from fraud by private persons or any errors committed by the Registrar of Lands.

The Torrens principles, taken together, provide that if a purchaser's due diligence only entailed looking into the details in the register, without carrying out an extensive investigation of the issues underlying the title, such as its history, the purchaser would still be considered a bona fide purchaser. A *bona fide* purchaser is an innocent buyer who has a recourse when their title is challenged. Once their name is entered into the Lands' Register, this would serve as conclusive evidence of proprietorship and they would acquire an indefeasible title to the land.

## 2.1. Incorporation of the Torrens Principles in the law

Both statute and case law confirm that the Torrens principles are an essential part of our laws in relation to land transactions.

### 2.1.1. Statute

For a long time, the Torrens principles have been integrated into Kenyan law. Section 23 of the now-repealed Registration of Titles Act stipulated that once a certificate of title was issued to a purchaser upon transfer, it is to be taken as conclusive evidence that the person is the indefeasible owner of the land. The position as laid out in Section 23 is replicated in the Land Registration Act. Section 26 of the Land Registration Act, which currently governs the system of land registration in Kenya. The said section provides that a certificate of title should be considered conclusive proof of ownership, with the person named in the title being the absolute and indefeasible owner of the land.

#### 2.1.1.1. Exceptions

Section 26 of the Land Registration Act provides for two instances when the Torrens principles (mirror, curtain and insurance/indemnity) will be overlooked:

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; and
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

## 01 The Dina Case



The above provision was underscored in the case of *Fuzi Development Limited & Others V City Council of Kwale [2014] eKLR*. The court reiterated that “a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was proper and regular. The court further reiterated that it “cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

### 2.1.2. Case Law

In the case of *Republic V The Chief Land Registrar and 5 others*, the Environment and Land Court, applying the mirror principle, concluded that since the land registers did not mirror the true state and ownership of the land, the titles in question were not indefeasible. The court then went on to invoke the indemnity principle and ordered that the officials who were responsible for the errors should compensate those who suffered loss.

### 3. The Dina Case

The Supreme Court, in the recent case of *Dina Management Limited V County Government of Mombasa and 5 others [2023]*

*eKLR*, entered a decision that appears to have supplanted or at the very least upset the Torrens principles. According to the court, to benefit from the doctrine of bona fide purchaser, one must have investigated the root of the title and determined that the first registered owner of the land acquired its title regularly. Based on this decision, it is no longer enough to just look at the register; one must ensure that the title they are acquiring is valid.

The Court went beyond the conditions set out in Section 26 for one to establish themselves as an indefeasible owner of land. To obtain an indefeasible title, the purchaser needs to show that (i) it/he/she acquired the title legally; and (b) the original proprietor did not acquire the title illegally. While the decision in *Dina* does not invalidate Section 26, it essentially bars purchasers from relying only on their certificates of title as a defense of their proprietorship.

A brief discussion of the case is as below.

### 3.1. Background of the Case

The petitioner in the case before the Supreme Court had bought a parcel of land whose first registered owner had illegally obtained the parcel’s title. As a result, the County Government of Mombasa later demolished the perimeter

# 01 The Dina Case



wall built on the land. The Petitioner maintained that it was entitled to the land under the doctrine of bona fide purchaser since it was not a party to the irregularities. Furthermore, the Petitioner had conducted due diligence which did not reveal any defects in the title. Therefore, the demolition and the subsequent repossession of the land violated its property rights. On the other hand, the Respondent contended that there was no valid title that could have been transferred to the Petitioner since the land was public land. The illegal acquisition of the same could not rob the government of the land even in light of an innocent purchaser.

## 3.2. The Court's Determination

The Supreme Court held that what was being challenged in the dispute was the root title to the land, not whether the Petitioner was the proprietor according to the register. As such, the Petitioner had to demonstrate the legality of the root title to prove that it had a right to the land. The Respondent sufficiently proved that the first registered owner of the land, from whom the root of the title emerges, had fraudulently obtained the land. This means that the

Court could not recognize the Petitioner as the rightful owner of the property under the guise of the indefeasibility of title. The right to property under Article 40 of the Constitution did not extend to property that had been illicitly acquired, even if it is later transferred to an innocent purchaser.

## 4. Before and After Dina

### 4.1. Before Dina

Before the Supreme Court's decision in Dina, courts in Kenya were amenable to applying the Torrens principles directly. For instance, in the case of *Republic V The Chief Land Registrar and 5 others [2005] eKLR*, the Environment and Land Court, applying the mirror principle, concluded that since the land registers did not mirror the true state and ownership of the land, the titles in question were not indefeasible. The court then went on to invoke the indemnity principle and made an order that the officials who were responsible for the errors should compensate those who suffered loss.

### 4.2. After Dina

After Dina, the Supreme Court, in the case of *Torino Enterprises Limited V Attorney General*, once again reiterated the need for rigorous due

## 01 The Dina Case



diligence on the part of purchasers of land. The Court looked past the Torrens principles by finding that the purchaser was not entitled to be considered an innocent purchaser, and therefore did not have rights of recourse, despite being allocated the land by the Commissioner of Lands. The purchaser could not acquire an indefeasible title to the land because the Commissioner did not have the authority in the first place to allocate the property to the purchaser (*nemo dat quod non habet*) as well as to the seller from whom the purchaser acquired the land. The Court this time stated that the purchaser should have at least conducted a physical visit to the parcel of land to find out its state, that is, the person or entity that was occupying the land. The purchaser could not be deemed to be a bona fide purchaser since a simple inspection of the land, which it did not do, would have raised questions as to whether it could acquire a valid title from the seller. Just like in Dina, the court rejected the notion that following the laid down procedure for the transfer of title would, on its own, entitle one to be deemed an innocent purchaser.

### 5. Can Purchasers Rely on the Bona fide Purchaser for Value Principle?

#### a) Pre – Dina Position

The traditional position has been that once a potential purchaser does a search of the register of lands in respect of the parcel they wish to purchase, and proceeds to purchase the land relying on the results of the search, they become a *bona fide* purchaser for value. An official search at the land registry preceding the purchase of the title entitled one to rely on the “*bona fide* purchaser for value” principle.

Therefore, the position that prevailed until Dina, was that a person would be entitled to a recourse if their title was challenged had they conducted due diligence in the form of an official search and subsequently paid the registered proprietor of the suit property to transfer title to them. An official search was sufficient for one to be considered an innocent purchaser in relation to other parties' claims to the property's title.

# 01 The Dina Case



## b) Post - Dina position

The Supreme Court in the Dina Case underscored the case of *Samuel Kamere V Lands Registrar Kajjado [2015] eKLR* on matters relating to bona fide purchasers. For one to be considered a bona fide purchaser of land, they must satisfy the following:

- a) They acquired a VALID and LEGAL title;
- b) They carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title; and
- c) They paid a valuable consideration for the purchase of the suit property.

In both Dina and Torino, the Court went ahead to add the following conditions that ought to be met for one to rely on the principle of bona fide purchaser for value:

- a) The purchaser must have done a historical search to find out the previous owners of the parcel of the land; and
- b) The purchaser must have visited the property and found out the status of occupation.

Therefore, in addition to the usual due dil-

igence involving an official search at the lands registry, for one to be deemed an innocent purchaser worthy of a recourse, one must investigate the root of the title as well as the current occupants of the parcel in question.

## 6. Implications for the Torrens Principles

The decision by the Supreme Court in Dina may be viewed as either supplanting or supplementing the Torrens principles.

It may be viewed as supplanting the principles because it requires those who wish to purchase land to go beyond looking at the register while doing their due diligence, failure to which a purchaser would be prevented from relying on the principle of bona fide purchaser for value. The Torrens principles on the other hand stipulate that since the register provides a mirror as to the state in which a parcel of land exists, a buyer does not need to look further, and as such, losses arising from taking the details in the register at face value should be covered by the government.

The Dina case undoes the mirror and curtain principles. The register is no longer considered under the law as a perfect reflection of the state of the title and potential purchasers must go



## 01 The Dina Case



beyond looking at the register (“the curtain”) in their due diligence. To this extent, one may argue that some of the Torrens principles no longer have a place within the Kenyan legal context.

Alternatively, the Dina case may be viewed as supplementing the Torrens principles. This is because the decision does not entirely do away with the doctrine of bona fide purchaser. Instead, the decision in Dina places additional conditions to the search required by the Torrens principles for a person to be deemed a bona fide purchaser for value. Following Dina, a purchaser’s due diligence must involve not only an official search of the register but also a historical search and a physical visit to the property.

The indemnity principle would still apply if a purchaser undertook all three. Furthermore, while the register no longer functions as a conclusive reflection of the state of a title, the Dina case did not interfere with the role of the register in respect of a purchaser’s due diligence. One must still do an official search of the register, but the official search is no longer enough on its

own; it must be supplemented by a historical search and a physical visit to the property.

Regardless of whether the Dina case supplemented or supplanted the Torrens principles, the Case has completely redefined the law on property due diligence in Kenya and has far-reaching consequences for persons engaged in land transactions as discussed below.

### **7. Implications for Purchasers, Purchasers’ Advocates and Banks**

Purchasers of land must now be even more vigilant in their dealings as they can no longer fall back on a certificate of official search to label themselves *bona fide* purchasers entitled to indemnity. In essence, proving the validity of a title is now entirely the responsibility of a purchaser.

As for a purchaser’s advocate, they would also need to conduct extra due diligence beyond the official search, especially if the purchaser delegates the task of due diligence to the advocate. If the task of due diligence is delegated to an advocate, and the advocate fails to investigate the root of the title, and the purchaser subsequently suffers loss, the advocate may find themselves liable to compensate the purchaser for negligence.

# 01 The Dina Case



In the case of banks, which often accept parcels of land as security for loans, the Dina case will probably have the long-term effect of dissuading them from creating charges over parcels of land situated in notorious locations or owned by people who have a history of suspect dealings. This would be out of an abundance of caution as banks would not be able to exercise their power of sale in the event of default over parcels whose titles are later found to be invalid.

In conclusion, the decision of the Supreme Court in the Dina case has far-reaching consequences on all who, for one reason or another, engage in land transactions.



# 02 OFF-PLAN PURCHASE

## COMMON PITFALLS TO AVOID AS A PURCHASER

An off-plan purchase is one where a buyer invests in property that is yet to be constructed or completed. The development is expected to be completed within a specified agreed-upon time to allow the purchaser to enjoy their investment's benefits.



In most cases, the purchaser's monetary contribution enables the project developer to complete it.

Property bought off-plan is usually sold at prices lower than the market value. Consequently, off-plan purchases are usually appealing to buyers.

### 1.1. Risks of off-plan purchases

An off-plan purchase is a transaction involving property that does not yet exist at the time of contracting, so such transactions can be risky to the purchaser. Some of the risks of off-plan purchases are:

#### 1.1.1 Non - Compliant End Product

A purchaser may find that the end product is different from what was originally prom-

ised. This is especially the case where the developer has not aligned its marketing and other sales material with the actual designs provided by the architect and other professionals involved in the development.

#### 1.1.2 Low Quality

A developer may under-deliver by producing low-quality results that are not commensurate with the value of resources invested by the purchaser.

#### 1.1.3 Fraud

An off-plan purchaser relies largely on the word of the developer and his/her agents. Without proper due diligence, a purchaser may not be able to tell the difference between good developers and persons hell bent on swindling members of public.

## 02 OFF-PLAN PURCHASE



### 2. Due Diligence

For a purchaser, the most important aspect of a transaction is carrying out adequate due diligence checks.

#### 2.1. Pre-contractual due diligence

The pre-contractual stage is the period of negotiation between the buyer and the seller before the contract is executed by the parties. The putative purchaser ought to perform the below-noted due diligence.

##### 2.1.1. Documentation

One of the ways a purchaser can conduct due diligence is by ensuring that the necessary and relevant approval is obtained by the developer. The purchaser should therefore confirm that the developer avails copies of the necessary documents before an Agreement is made. These documents include approvals from relevant offices such as NEMA and the county government.

##### 2.1.2. Search on the title

A search on the title of property verifies that the vendor is the registered owner of the land and will therefore be passing good title to the purchaser.

Additionally, a purchaser can tell whether

there are any encumbrances on the property, e.g., a charge over the land.

##### 2.1.3. Identity verification

A purchaser should request copies of the Seller's ID and KRA PIN Certificate to verify the identity of the seller. If the seller is a company, then a purchaser should ask for a Certificate of Incorporation and the Company's PIN, as well as the Directors' PINs and IDs.

##### 2.1.4. Physical search

A purchaser is also expected to have an on-site visit and see the property for themselves. This will help them confirm the location and identify any defects on the property. This can be done with the help of a surveyor.

### 2.2. Contractual due diligence

Contractual due diligence takes place when the seller has prepared and availed the draft contract to the purchaser for their review and consequent execution.

#### 2.2.1. Clauses to Look Out for in an Off-plan Purchase/ Sale Agreement

Once the above pre-contractual due diligence is in order, the purchaser is ready to proceed to the Off-plan Purchase/Sale Agreement (the

## 02 OFF-PLAN PURCHASE



Agreement) with the seller/developer. The Agreement between the parties should be in writing.

The following are a few important clauses to look out for in an Off-plan Purchase Agreement:

### **2.2.1.1 Details of the property**

The Agreement should contain a clause that clearly identifies the property (usually an apartment). Information such as the design and the floor that the apartment will be on, the name of the apartment (e.g. Apartment Number 7), the land parcel that the property will be constructed on, and necessary documents such as building drawings are necessary to achieve this.

### **2.2.1.2. Completion dates**

The completion date in an Agreement for Sale is ideally the date when the purchaser pays the balance of the purchase price to the vendor and the vendor hands over the documents necessary for the registration of the transfer to the purchaser.

Off-plan agreements should have an antic-

ipated practical completion date which is the date when the parties agree to have the project completed. This date, however, is not to be confused with the sale completion date which comes afterwards. The period between these two dates allows both parties to fulfil their obligations for the transfer to be effected.

### **2.2.1.3. Remedies**

The Agreement should have a remedies and termination clause that assures both parties of available recourse if the other party fails to fulfil their obligations.

### **2.2.1.4. Obligations of parties**

Both the developer and the purchaser have responsibilities in the Agreement. Some of those of the developer include ensuring the project is developed following the building plans and drawings, and is completed by the anticipated practical completion date.

The purchaser must, in addition to other duties, meet their payment obligations by the sale completion date.

## 02 OFF-PLAN PURCHASE



### 2.2.1.5. The Purchase Price

The parties should agree on the price at which the purchaser will buy the desired piece of property. The Agreement will dictate a deposit and the means of payment - whether in instalments, in full, or by financing. It will also have information on when and where to make the payments, as well as the currency of payment.

### 2.2.1.6. Amenities

At the time of contracting, the purchaser must ensure that the amenities initially offered such as a gymnasium, swimming pool and lift, are provided for in the Sale Agreement. This is because anything that is not included in the Agreement will not qualify as a term of the Agreement and the purchaser may be precluded from claiming for them.

### 2.2.1.7. Dispute resolution

Developers often insist on arbitration as a mode of dispute resolution. While it may be fast for resolving disputes, it is more expensive than mediation or court. The purchaser should therefore insist on mediation and/or court as a means of resolving a dispute to save on costs.

### 2.2.1.8. Defects Clause

A purchaser should make sure that the Agreement provides for recourse if defects are discovered after they take possession.

### 2.2.1.9. Utilities

The Agreement should have a provision/guarantee that the developer will provide separate water and electricity meters for the apartments.

## 3. Post Construction Phase

The Developer is obligated to provide to the purchaser the completion documents listed in the Agreement. The developer should have undertaken, in the Agreement, to transfer the reversionary interest to the corporation.

Developers also offer a snag period after completion. This is a period when the purchaser occupies the property for an agreed-upon time (usually six months). During this period, the developer takes care of any defects discovered by the purchaser at no extra cost.

## 4. Conclusion

Off-plan purchases have the potential to be rewarding for purchasers if done properly. Potential purchasers of off-plan properties should be meticulous in their due diligence and undertaking the requisite checks before proceeding with such purchases.

## 03 RELOCATION OF CHILDREN

Child custody is a key concern when handling matters of relocation. The Children Act 2022 outlines child custody as both legal and actual custody.



Legal custody is the conferral of parental rights and responsibilities to a person who has lawful custody over a child for a defined period of time pursuant to an order of a court of competent jurisdiction. Actual custody is physical possession, care, and control over a child, whether exercised independently or jointly with another person.

### **Considerations for a Custody Order**

The Children Act 2022 has stipulated the guidelines/ principles that are relied on by Courts while determining custody disputes. These principles (set out in Section 103) include:

- (a) the conduct and wishes of the parent or guardian of the child;
- (b) the ascertainable wishes of the relatives of the child;
- (c) the ascertainable feelings and wishes of the child concerned having regard to the

child's age and understanding;

(d) any harm the child may have suffered or is at the risk of suffering;

(e) the customs of the community to which the child belongs;

(f) the religious persuasion of the child;

(g) whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;

(h) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(i) the likely effect on the child of any change in circumstances; and

(j) the best interest of the child.

Courts when considering the above are guided by the best interest of the child principle that is enshrined in Article 53(2) of the Constitution of Kenya.

## 03 RELOCATION OF CHILDREN



### Parental Responsibility Agreement

Where the parents have are separated or divorced the issue of custody among other terms such as care and control, access and travel is usually prescribed either by (a) a court order or (preferably) (b) in a Parental Responsibility Agreement.

The advantage of a Parental Responsibility Agreement is that issues of custody are substantially discussed and mutually agreed upon by the parties directly or with the guidance of a mediator/the parties' legal representatives. Travel & Relocation is a crucial term that the parties need to agree on especially where there is likelihood of relocation by either parent.

### Breach of Custody Order

Where a child has been removed from the custody of the parent who had actual custody or has been removed from the jurisdiction of the Court or the Republic of Kenya, an application can be made to court for a production order or a wardship order under the Children Act. The effect of these orders is as detailed below:

(a) A production order when issued directs the person to whom it is issued to

(i) disclose the whereabouts of the child; or (ii) produce the child before the court and refrain from removing the child from the country for such period as the court may specify.

(b) A wardship order makes the Court the supreme guardian of the child to ensure their protection and safety. When a wardship order is issued, a child cannot leave the country without the leave of the court.

### Conclusion

Relocation of children is a matter that touches on child custody. Ideally, the matter of custody should be settled between the parties involved (usually the parents). Where there is a dispute regarding the same which parties are unable to resolve, intervention of the court should be sought so as to secure the best interests of the child. Finally, the court is clothed with wide ranging powers to both prescribe and enforce matters of custody (including relocation).



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