

BRYANT'S LAW

LLP

ADVOCATES

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Heading

Legal risk within Kenya's land regime.

Sub-heading

Inconclusiveness of a Kenyan certificate of title.

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A. Foreword

1. Kenya is emerging as one of the attractive zones for investment in Africa. The month of March, 2026 revealed that Dubai investors had earmarked USD 3 billion for Kenya, divided into two industrial parks in the Kenyan coast and Nanyuki.



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2. Without having to go into details, the current geo-political environment for west Asian investors will tend towards zones outside of the USA continental space. Far Eastern Asia zones such as Vietnam, S. Korea, Japan might be attractive in terms of political stability, largely due to their authoritarian government regimes but, concurrent with that, these countries have falling population growth. For example, South Korea has the lowest birth rate in the world. This means that the long-term demand market in those countries will remain subdued. Again, due to geo-political factors, outside the remit of this brief, west Asian investors might not seek over-exposure in China.
3. Kenya and other African countries have recorded explosive population growth. In the year 2050, Kenya will have a population of between 90-100 million. The current population is at 60 million. We concede that Political stability is not Kenya's strong point. In spite of this constant weakness on that score, the country has managed to cobble together, however patchwork they are, elections every five years since Kenya gained independence in 1963. In a system of representative democracy, the subterranean pull of the population for regular elections to be conducted, would tend, in the long run, to smooth over the occasional bumps experienced normally in countries undergoing "transitional democracy".
4. In this context, we wish to focus on the concept of legal risk in Kenya's land law regime. New investors and current financial and insurance institutions holding massive amounts of Kenya's debts on their books, are alike in that although they might be attempting to certify their investment via a pressure test on a Kenyan land certificate of title, this article argues that, using the framework of "legal risk", the Kenyan Land Registration Act¹ [hereinafter "LRA"] fails to provide hard objectivity regarding the conclusiveness of the register. The actual question of whether an investment in land evidenced by a certificate of title is protected from all challenges reveals an answer mired in a state of ambiguity or indeterminacy. We conclude that the level of legal risk in holding a Kenyan certificate of title is correctly plotted via a straight line from source

¹ 2nd May, 2012 commencement date

[x/y] showing that any increase in investment results in higher legal risk, with no appreciable ceiling found on the chart.

5. A minority of General counsel and/or Heads of Legal Departments, etc, employed in either Kenyan corporates or international investment firms might not be privy to the intricate legal positioning regarding Certificates of Title as established by the LRA and as further settled by the Kenyan judiciary in the recent past. Our view is that these changes are contrary to the normative interpretation of conclusiveness of land titles in Commonwealth land law. The largest target audience of this note will be General counsel and/or Head of legal in various corporates either already invested or planning to invest via Kenyan certificates of title while considering the purchase of land and/or creating security over land via instruments of charge and/or debentures.

B. A framework of legal risk.

6. Legal risk is classically managed as follows.
 - Companies assess legal risk by reviewing regulatory obligations, evaluating contractual exposures, analysing past legal incidents, and identifying areas where legal disputes or noncompliance could arise.
 - Companies might keep a legal risk register is a documented list of identified legal risks, including their potential impact, likelihood, responsible owners, and mitigation strategies.
 - Boards oversee legal risk by setting governance expectations, reviewing legal risk reports, ensuring appropriate internal controls are in place, and working closely with the general counsel and risk leaders.
 - Technology can reduce legal risk by automating compliance monitoring, managing contracts, tracking regulatory changes, and providing better visibility into legal obligations and risk exposures. However, remember the GIGO principle while relying on technology.
 - Companies hire general counsel or Head of Legal, which person then leads legal risk management by advising leadership on legal exposures, overseeing regulatory

compliance, managing disputes, and ensuring that business decisions consider legal implications.

- Legal risk assessments should typically be conducted annually, with additional reviews when regulations change; new markets are entered, or significant operational changes occur.
- Organisations can integrate legal risk into Enterprise Risk Management by aligning legal risk assessments with enterprise risk frameworks, maintaining centralised risk registers, and ensuring regular reporting of legal exposures to risk committees and executive leadership.

7. The 2008 financial crash in the Western financial world was largely a case of legal risk not being identified in time. We quote from David Dayen's book on the crisis, ²:

In this case, these whistleblowers, armed with only a few websites and a hunger for the truth, found that the mortgage industry fundamentally ruptured a centuries-old system of U.S. property law; that millions of documents generated to foreclose on people's homes were phony; and that all those purchasing a mortgage in America were taking a gamble that they would be tossed onto the street with nothing, even if they made every payment and played by the rules.

In summary, beginning with President Reagan in October, 1984:

institutional investors who previously were barred from making dangerous investments could purchase mortgage-backed securities as long as they had a high rating from a nationally recognised statistical rating organisation.”³

8. We do not wish to get into the gory details of the development of legal process which finally describes how Banks like JP Morgan securitised the loans by placing them in a trust which then employed U.S. Bank as trustee for the assets, who then employed

² *Chain of Title*, David Dayen, New Press, New York, 2016, pg. viii

³ *Supra*, pg 23, 3rd para.

Chase Home Finance to collect monthly payments⁴ from the mortgagors. The mortgage backed securities [“MBS”] scandal, as it became known, should have been identified in 2004 at the latest as “legal risk” by General Counsel advising involved corporates but sadly, only a tiny minority did so. It is instructive that the MBS crisis did not evolve overnight but rather, began with a slight change in a Federal statute which cascaded over a significant period of time until the year 2008. Likewise, the legal risk we identify as inherent in Kenyan certificate of titles issued with respect to land located within urban municipalities, is a risk submerged within s. 26(1) of the Land Registration Act, [May, 2012]. However, the real legal risk began its embryonic journey in 1989.

C.1 Kenya’s history of land registration

9. Registration of Title to land in Kenya began after 1902, when Governor Elliot published his various ordinances, inter alia, setting up laws and registries pertaining to land registration. We recall that England itself had only had forty years of experience with registered titles by 1902, since the English Registry Act had been enacted forty years earlier in 1862. This Act:

“failed through an over-concern with boundaries and technical imperfections of title”⁵

10. England prior to 1862 practised unregistered conveyancing, which was based on a deed system of exchange upon a conveyance of a parcel of land. Indeed, the Kenyan Registry of Documents Ordinance, promulgated by the same Governor, introduced a system of registration of deeds used for conveyancing in land. A few parts of Nairobi, Kilifi county, Malindi township and Mkomani location, Mombasa County still retain registered deeds-based conveyancing systems arising from the Land Titles Ordinance in 2026. However, the international trend in the early 1920’s in the Commonwealth and the USA favoured registration of titles based on government managed registries.

⁴ Supra, pg 24, 4th para.

⁵ *Encyclopedia of Forms and Precedents*, 5th ed, vol 25, London, Butterworths, 1989, para 202.

11. In the present English registration system, the Land Registration Acts and regulations provide a justification for the imposition of a land registration system, inter alia,⁶:

“1.1 an authoritative and final examination of title by the Land Registry so as to avoid repeated retrospective examination of each successive dealing;

1.2 a register of proprietors of land with title guaranteed by the state and with, in some instances, electronic storage and retrieval of this information;

12. It was not always so. There was early resistance from lawyers to the introduction of land registration system that registered title to land, which we will touch on later. One of the foremost proponents of the modern land registration system was Sir Robert Torrens. He is mostly credited within the USA and the British commonwealth as being the person who introduced the current land registration system they currently utilize today. Many historical articles and cases from this period of time [mid nineteenth century to first quarter twentieth century] refer to the land registration system as the Torrens system, in deference to his name. Joseph H. Crowley, LL.B, an American lawyer wrote an article in 1922 entitled the “*The Torrens System*”.⁷ He stated:

The theory of the Torrens system is, in effect that when a title is registered neither a purchaser nor a mortgagee needs to look any further than the registrar’s roll, and he can rely absolutely on a clean title shown there.

We shall elaborate later on the amendments that the registration of land titles in Kenya received to the initial usage of the Torrens registration system.

C.2 Indemnity: the backbone of a land registration regime

13. Sections 81-84 of the current Kenyan Land Registration Act do provide for State funded indemnity to be provided to persons who lose their titles under a limited number of

⁶ Supra, para 201.

⁷ Marquette Law Review, Vol 6, Issue 3 (1922), pg 114

circumstances. Indeed, the provision of the State indemnity has been a pillar of the Torrens system from its inception. Mr. Crowley, L.L.B., had some acerbic remarks to make about the indemnity system.

If it is a proper government function to issue certification of title superseding the policy of title insurance, why is it not proper for the government to undertake fire and theft insurance.....the indemnity fund is wholly inadequate because a county or state has no right to enter into the business of guaranteeing or insuring titles, and a guarantee fund can only be built up by taxing one man to pay a possible defect in another's title.⁸

14. Mr. Crowley, L.L.B., also highlights an aspect of the original Torrens system that unfortunately does not appear in the LRA. The system involved the presence of a judicial proceeding as part of the creation of a Certificate of Ownership to a parcel of land.

....the entry of transactions on the register is essential to their validity, and the original registration and entry of subsequent transactions operates as a warranty of title in the registered owner, and as a bar to adverse claims. An official examiner of the Court examines thoroughly the title, upon a written explanation filed by the owner, accompanied by such usual evidences of title as are required by the Torrens law, before any decree of registration is made. When satisfied that the title is good, the Court enters a decree of registration, and a Certificate of Ownership is issued by the County Recorder to the owner in duplicate, the original appearing on one page of the Recorder's Register, on which are entered the incumbrances upon the property.⁹

15. In light of the numerous Kenyan cases on fake or fraudulent or unprocedural or unlawful certificates of title issued by countless numbers of Kenyan State employed Land Registrars, we believe that the interjection of a judicial proceeding, as noted by

⁸ Supra, pg 116

⁹ Supra, pg 117

Mr. Crowley, L.L.B., into some of the avenues for processing Kenyan certificate of title might have led to less litigation, thus saving precious court time. Unfortunately, Kenya ELC Court judges take part in judicial proceedings only after the Land Title issuance process might have experienced all sorts of chicanery. However, our remit here is not land law reform but rather, the highlighting of legal risk.

16. Mr. Crowley's article summarises the advantages of the Torrens system in ten paragraphs. We quote numbers 1 and 3.

[par 1] Title is warranted whereas under the recording system the record is no bar to adverse claims and carries no warranty prior to the record.

[par 3]. An ample assurance fund is provided as indemnity to covering loss or damage.

We shall return to the working of the indemnity system in Kenya after the identification and exposition on the weak link in LRA's registration of titles in Kenya within urban municipalities. We do wish it to be noted that even the early critics of the Torrens system conceded to its utility, with the proviso being that a warranty and an indemnification fund is set up to guarantee the workings of the registration system.

C.3 *The book: "Registration of Title to Land throughout the Empire".¹⁰*

17. In 1920, a certain Australian Barrister, Mr. Hogg, M.A., Oxon, wrote the above book as a sequel to his book, *"the Australian Torrens system"*. The sub heading of the *Registration of Title to Land throughout the Empire* was *"a treatise of the law relating to the warranty of title to land by registration and transactions with registered land in Australia, New Zealand, Canada, England, Ireland, West Indies, Malaya, etc."* This book, hereinafter "Hogg", deserves its own examination since it covered in detail twenty-two jurisdictions in the Commonwealth, including the East African Protectorate [now Kenya]. It bears noting that Mr. Hogg, M.A., had similar concerns to Mr. Crowley, L.L.B., which appear in the sub heading of his treatise. We of course refer

¹⁰ James E. Hogg, Toronto, the Carswell Company Ltd, London, Sweet & Maxwell, 1920.

to “*law relating to the warranty of title*”. Indeed, the crucial aspect of warranty of title caused many acute observers of the new system to retain doubts as to the long-term stability of the Torrens registration system.

18. The index to Hogg and the index to the present LRA are not dissimilar; the correspondence is broad rather than a strict chapter-for-Part match, and the LRA's opening Parts I and II (preliminary matters, and organisation and administration) and its closing Part XI (miscellaneous provisions) fall outside the comparison.

HOGG	LRA
Ch. 2 initial registration & removal from land	Part III Dispositions affecting land
Ch. 3 Possession & registration	Part IV Leases
Ch.4 leases	Part V Charges
Ch.5 charges	Part VI Transmissions and Trusts
Ch. 6 transmissions & trusts	Part VII Restraints on Disposition
Ch. 7 restraints on dispositions	Part VIII. Rectification and indemnity
Ch. 8 rectification & indemnity	Part IX. Co-tenancy and Partition
Ch. 9 co-tenancy & partition Analogous Rights	Part X Creation of Easements and
Ch. 10 creation of easements	

19. The above noted similarities exist because the roots of the Kenyan LRA are from a Torrens System, modified over the last ninety-two years, following iterations via the Registration of Titles Ordinance, the Native Lands Registration Ordinance, the Registration of Titles Act and the Registered Land Act.
20. It bears noting that the conclusiveness of the register, the very subject of this paper, is not itself a structural Part of the LRA but a rule of effect: section 26, within Part II (Effect of Registration, sections 24 to 26), declares a certificate of title to be prima facie conclusive evidence of proprietorship, subject to the exceptions of fraud or

misrepresentation to which the proprietor is a party, and of title acquired illegally, unprocedurally or through a corrupt scheme.

21. The Registration of Titles Ordinance [“RTO”] contained section 24, which was amended vide s. 23 of the 1959 Ordinance, s.7, to state:

Permits the person deprived of land by.....[inter alia]...the registration of any other person as proprietor of the land or interest.....may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act.....provided that (i) except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a person to bring the land under the operation of this Act....that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for the transfer, might have been recovered from him....then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant.

22. S. 24 of the RTO permitted an action in law against the Government of Kenya [“GOK”] via the Lands Registrar for recovery of damages in cases where a person has been deprived of land from a wrong registration of a titled interest. In other words, the land would be retained by the successive owner but in the presence of recognised mistake/error of the GOK’s registration process, [*the Torrens system*], the GOK would pay damages to the rightful owner of the land. The rightful owner being the person who should have received the Title in his name, but for the wrongful registration, the Title ends up in the name of another person. Up to this point in our telling of the story, Mr. Crowley, L.L.B. and Mr. Hogg, M.A., would be largely in agreement with the mechanisms of the Torrens system as promulgated by the Kenya Colonial administration/Legislative Council producing legislations such as, inter alia, the RTO.
23. Hogg begins by informing us that registration as applied to land may be defined as a system of recording in a public office from time-to-time transactions with land, or the

mere fact of ownership of some interest in land. ¹¹ Hogg then contrasts the Torrens system with Deed registration, being primarily a system under which instruments are recorded merely as such, and not with special reference to the land they purport to affect. As historical note, Kenya still retains the Registration of Documents Act, whose roots began on 1st November, 1902 as the Registration of Documents Ordinance. Under the modern version of this ordinance, Deed registration still occurs in the Registry of Documents, Coast Registry, Mombasa and its counterpart in Nairobi, the Inland Registry.

24. Hogg presents four characteristics of a registration title system.
- a. Land placed on the register as a unit of property;
 - b. Transactions are registered with reference to the land itself, and not merely as instruments executed by the owner;
 - c. Registration of transactions is essential to their validity; and
 - d. Registration, initial or of subsequent transactions, acts in some degree as a warranty of title in the person registered as owner, and as a bar to adverse claims.¹²
25. In Hogg's analysis:
- The statutory warranty of title, which makes the registration of each successive owner a bar to adverse claims, is the feature in which title registration differs most from deed registration.¹³
26. Chapter X of Hogg, entitled "State indemnity for Loss", preceded by his examination of twenty-two different commonwealth jurisdictions, contains his conclusion that:
- The indemnity machinery set up by most of the statutes, for the purpose of compensating persons who suffer loss through others being registered with a

¹¹ Hogg, *supra*, pg 1

¹² Hogg, *supra*, pg 2

¹³ Hogg, *supra*, pg 4

warranted title, is complementary to the provisions by which the warranted title is conferred.¹⁴

27. Hogg continues to observe:

In every one of the remaining nineteen jurisdictions, provision is made by the State for the payment of indemnity by the State in certain cases of owners being deprived of property through the statutory warranty of title operating in favour of others.¹⁵

28. The 19 commonwealth jurisdictions all conceptually agree on inclusion of the principle of indemnity as opposed to cancellation of title. This unique feature of the Torrens system is only weakly adhered by the Kenyan Judiciary due largely to the new land law regime post Constitution of Kenya [“COK”] 2010. The initial Torrens registration system, even in Kenya, still incorporated elements of strength and steel within the system, which were leaning in favour of the State NOT cancelling a registered title to land in cases where an owner had been deprived of property but at the same time retention of the State provision of full compensation to the owner deprived of his/her property via the statutory warranty of title. It is important to ponder on why the Torrens system did not choose the easy road of cancellation of title and returning the land to the owner deprived of land. We shall elaborate further on the emerging jurisprudence from the Kenyan judiciary in cases of urban plots in Kenya.

29. In Chapter IV, entitled “Conclusiveness of the Register”, Hogg proposes his analysis on the mechanics of the workings of the warranty of title:-

The warranty of title given by the statutory conclusiveness of the register operates in two ways, and the register has two functions – affirmative and negative respectively. Affirmatively, the register warrants that the title of the

¹⁴ Hogg, supra, pg 384, 1st para.

¹⁵ Hogg, supra, pg 384, 3rd para.

owner is as stated on the register; negatively, the warranty is that the owner's title is not affected by anything that is not stated on the registry.¹⁶

D. Modern indemnity provisions in Kenya

30. The Kenyan Legislature, in its wisdom, promulgated the LRA after the COK 2010 via Art 60. Germane to this discussion is Art 60(1)(b):-

Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles-

[inter alia]

(b) security of land rights.

Art 60(2) provides the implementation avenue. It states:-

These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.

As stated earlier, our interest lies not in the arena of land law reform. We merely avert to the possibility of constitutionally sound principles being advocated for and upheld within a national land policy legislation derived from a land policy that adheres to the Art 60 principles.

31. Section 26(1) of the Kenyan LRA follows the Hogg pattern as described above to a certain extent.

Certificate of title to be held as conclusive evidence of proprietorship

(1) 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

¹⁶ Hogg, supra, pg 96, 2nd para

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, except—

(a) on the ground 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.

32. The proviso to LRA s. 26(1) provides that a challenge to a registered certificate of title can succeed, if the challenger proves the impugned owner acquired registered title via any of five means. These are:

(a) fraud; or

(b) misrepresentation; or

(c) illegalities; or

(d) unprocedurally; or

(e) via a corrupt scheme.

33. An observant reader will note that the avenue for challenge in the 1959 amendment to the RTO was not as wide as what is now promulgated within LRA s. 26. The application of the Torrens and Hogg principles would correspondingly mean that the amount of the indemnity fund to cover the increase in the number of successful challenges to title should also be statutorily provided in the LRA. This is because out of the five means [32 (a)-(e) above] available in support of a successful challenge to a registered certificate of title, four of these would involve the active participation of the impugned owner/applicant for the Certificate of Title. This is consistent with s. 24 of the RTO, cited above. The odd one out is the issue of “unprocedurally”.

34. The GOK must be observed to be in control of the “procedures” within its land departments and other related departments while creating and thereafter issuance of a Certificate of Title. To conclude otherwise would be to permit chaos and unruly behaviour by civil servants in the execution of their tasks. The statutory introduction

of procedural errors into the Torrens system registration providing for indemnity creates uncertainty and begins to open the proverbial barn yard door, to permit all sorts of claims of “wrong procedures” into the analysis under s. 26(1) of the LRA. Procedural errors can be the variety of “losing a scale drawing”, mistakes in spelling of an land titles registration system, and the absence of a crucial document from the original Land files thirty years after the event, as found by the Kenyan Supreme Court. We shall provide a deeper analysis later on. However, anyone familiar with the Land Adjudication Act, Land Consolidation Act and Land Control Act would be aware that these statutes contain myriad instances of “procedures” that are undertaken by the applicant and also by numerous State and Government officials, clerks, typists, etc. Section 26(1) LRA fails to distinguish between procedures undertaken or initiated by the Applicant for a Title and the procedures undertaken by State and Government officials while processing of the Applicant’s filed and paid for application. If it is discovered after twenty years, nay, thirty years, that unfortunate mistakes were made in procedures by State and Government officials, will the Certificate(s) of Title still be warranted by the Kenyan government? Under the modern version, as seen in s. 26(1) LRA, a Court would not be faulted for issuing an order to cancel a Certificate of Title if it is found that procedures were flouted two or even four decades earlier. All normal rules of evidence would alert a keen observer to the near impossibility of obtaining witnesses with acute memories to recall the processing of an individual application for a title to an urban plot of land thirty years earlier. In the absence of proper record keeping, this unfortunate turn of events will admit of no remedy. We now turn to the current GOK indemnity provisions.

35. The LRA indemnity provisions are:-

81. Right to indemnity

- (1) Subject to the provisions of this Act and of any written law relating to the limitation of actions, any person suffering damage by reason of—
 - (a) any rectification of the register under this Act; or
 - (b) any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under this Act, shall be entitled to indemnity.

(2) No indemnity shall be payable under this Act to any person who has caused or substantially contributed to the damage by fraud or negligence, or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who caused or substantially contributed to the damage.

36. When we read the two LRA sections, s. 26(1) and s. 81(2) together, we find that a successor in title whose certificate was cancelled due to unprocedural errors/loss of documents and/or applications by his predecessor in title and/or the civil servants processing the said application all the while the predecessor in title was acquiring the first registration, would be entitled to a full indemnity. A rectification of the register resulting in a cancellation of a certificate of title results in the right to indemnity and subject to being a bona fide purchaser having paid full purchase price, that person cannot be denied State funded damages by way of indemnity.

E.1 Pressure testing the Kenyan land registration regime.

37. Pressure testing in the context of legal systems can be simply defined as “evaluating the capacity of a legal system to withstand crises and systemic shocks. This involves stress-testing institutional resilience, the rule of law, and procedural fairness under extreme conditions, such as sudden emergencies or constitutional changes.”

38. We will first proceed to examine an actual case in the framework of the Torrens Registration system, as established over the years. The examination will examine the output of the Kenyan Supreme Court, while under the stress of dealing with a case wherein a county government and other state organs sought the cancellation of a registered certificate of title. The rule of law is naturally a boundary marker for the case, and the procedural fairness which the registered holder of the Certificate of Title experienced will be commented on.

39. Secondly, as part of the pressure test, we shall examine statutory law, regulations and processes that impacted in Kenya’s past history and examine whether or not in the

near future thousands of Certificates of Title can withstand litigation pressure initiated either by State organs or private citizens. The cohort of Certificates we wish to examine when weighed financially are valued in the Billions of Euros, and thus should form part of the legal risk analytical framework for Corporate Legal officers and other lawyers, domestic and international, advising clients on the risk profile for large investments in land located in Kenyan urban areas. We shall not actually weigh the risk, but simply point out relevant landscape features that might require deeper research prior to the conclusion of the investment decision.

E.2 Dina Management Ltd and the Kenyan Supreme Court

40. The case is Dina Management Limited v County Government of Mombasa & 5 others, Petition 8 (E010) of 2021, [2023] KESC 30 (KLR).¹⁷ Dina Management Ltd [“DML”] bought a property known as Sub No 6053, Section I, Mainland North, Mombasa [the “Plot”], located near Nyali Beach. DML purchased the Plot from Bawazir & Co. (1993) Ltd, which had itself purchased from the first allottee, H.E. Daniel arap Moi (allotted 1989). In or around September, 2017, the Respondents demolished the immovable property built on the Plot and defended their actions stating that the demolition was lawful because the Plot was located on a public road leading to a nearby beach.
41. DML argued that the Plot was originally, prior to purchase by the first proprietor, “unalienated government land” which became private property in 1989. DML also produced a letter from the GOK’s Lands department which confirmed validity of the Certificate of Title to the Plot.
42. At first trial, the Court determined that the issuance of a Certificate was unlawful due to the absence of a Part Development Plan [“PDP”]. In 1989, the Planning regulations required that a PDP should be present prior to issuance of a Certificate. The Court dismissed the plea of being an innocent purchaser because DML failed to demonstrate that it was diligent before it purchased the Plot from the first proprietor.

¹⁷ Kenya Supreme Court, Pet No 8/2021

43. At this stage, our comment on pressure testing is as follows. S. 26(1) LRA provides that a Certificate of Title can be challenged if the title acquisition process was “unprocedural”. At this point, the trial Court is correct solely due to s. 26(1). The presence of the PDP was not proven, the PDP was an essential part of the procedure prior to the issuance of a Certificate, hence its absence causes the Certificate to be capable of being cancelled. However, what was not observed by the trial Court is this. Who produces the PDP? The purchaser of the Plot or, certain State officials in Survey/Planning/Lands departments and offices? If State officials failed to produce a PDP, why should the purchaser bear the brunt of the negligent omissions of State officials? On the point of procedural fairness, should the trial Court not have stopped to consider the plight of DML, and make a finding that it should benefit from the State indemnity fund? Using the pressure test, we find that procedural fairness was not upheld by the trial Court.
44. On appeal, the Court of Appeal held that since the property was within the Municipality of Mombasa, the Plot needed to have been transacted within the parameters of s. 10 of the Government Lands Act regarding the term of the lease that can be granted. In addition, on the DML defence of indefeasibility of title, the Court of Appeal held that where a property is acquired through a procedure against the law, this doctrine cannot apply.
45. Our comment on the PDP lack or absence is already made above. On s. 10 of the GLA, we shall visit the GLA in the second part of the Pressure Test.
46. On appeal to the Supreme Court, the Court¹⁸ quoted the Court of Appeal in Munyu Maina v Hiram Gathiha Maina, Civil Appeal No. 239 of 2009 [2013] eKLR¹⁹

“When the root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership.”

¹⁸ Supra, para 93

¹⁹ Court of Appeal, Appeal No: 239/2009

The burden of proof on any proprietor of land facing a root title challenge is now measurably heavier.

“it is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register”

47. The “unseen” interests are not to be found on a Department of Lands search nor on a Certificate of Title issued by the same Department. In addition, the Supreme Court indicated that the acquisition must be “legal” in the formal sense.
48. Our pressure test comments on the Supreme Court need not extend further. Indeed, in the classical sense, the Court's decision turned on the constitutional status of the land rather than a bare application of s. 26(1) LRA: the Nyali beachfront was public land reserved for public access and incapable of valid alienation, so under Article 40(6) no protection attaches to unlawfully acquired property, and under Article 62(2) the land vested in the county. The case should not be read as authority that any procedural flaw in an ordinary private title warrants cancellation without indemnity. Our paragraph 33 above sets out the argument that an indemnity should have been paid to DML, though the point is contestable: s. 81(2) LRA denies indemnity to a claimant who caused or substantially contributed to the loss by negligence, and the courts found DML had not conducted adequate due diligence on a beachfront plot demanding greater caution. However, since that did not happen, the procedural fairness test when applied to the facts of this case shows that the Kenyan judiciary fails to apply procedural fairness. It is also a historical fact, perhaps unknown to the judicial officers trying the case, that Nyali Limited was the original owner of all land in Nyali. When Nyali Limited closed down, it transferred its reversionary interests to the National government, including spaces that would be marked as roads. Therefore, whether or not the County government has title to a road which originated from a transfer of reversionary interest to the National government was not a question that was raised or answered.

E.3 Sections 10-12 of the Government Lands Act [“GLA”] and the Dina Management case doctrine

49. In the Dina case, the Court of Appeal introduced s. 10 of the GLA into its judicial findings while deciding the appeal. The Court said:

The suit property being within the municipality of Mombasa, the land was to be allotted in accordance with sections 9 and 12 of the GLA (division of a township into plots, and sale by auction unless the President orders otherwise).²⁰

The GLA was the operative Act for government land prior to 2010, when, following the COK 2010, new legislation was enacted. The GLA was repealed on the commencement of the Land Act 2012 and the Land Registration Act 2012; it is therefore spent for current transactions, but remains the law against which the validity of grants made while it was in force must be tested. We then as part of our pressure test wish to introduce s. 12 of the GLA into the matrix discussion. S. 12 GLA states:

s. 12. Leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction.

50. The next query would be the definition of a town plot. GLA does not disappoint. We find in GLA s. 9 and the heading of the Chapter of the GLA which provides extensive notes on the management and sale of town plots. It reads:

Part III—Disposal of Land Within Townships

s. 9. The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.

²⁰ Dina case, *supra*, para 14.

51. The plot in question in the Dina case and the plots which we now turn our attention to, were, prior to creation of the first registration, government land located within townships. The ruling definition is found in s. 2, GLA, “interpretation”.

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

52. We hold the view that any plot which is not yet issued with a title and is found within those parts of Kenya that were not part of the Kenya protectorate and also not part of Native Trusts Land [prior to 1st June, 1963] or Trust Land [after 1st June, 1963] and are found within a township, constitute plots that properly fall within the definition of “unalienated Government land”. S. 12 GLA therefore concerns itself with town plots which are unalienated Government Land. It is trite law that after 12th December, 1963, any Act of Parliament in Kenya which contained the word Governor General should be read as President. We mention this because in large part, the GLA used to be known as the Crown Lands Ordinance [“CLO’] and indeed, its provisions governed the establishment of most of the modern towns in Kenya today. The word “President” in s. 12 GLA was preceded by the word “Governor” in the equivalent section in the CLO.
53. We now turn to recent history in Kenya, known to most lawyers who were practising in the decade of the 1990’s.
54. The sale and divestiture of Government of Kenya (GOK) civil servant housing estates were directly driven by World Bank and IMF Structural Adjustment Programmes (SAPs) in the 1990s, which mandated that the government divest from directly housing its employees to reduce the public wage bill.
55. This historic policy shift structurally transformed how public sector housing operates in Kenya, replacing the traditional government-provided "pool housing" system with commercial markets and self-ownership funds.

56. To satisfy Bretton Woods conditions to scale down state assets and eliminate subsidies, several prominent civil servant pool housing estates in Nairobi, Nakuru, Kisumu, Mombasa and elsewhere were either entirely sold off, earmarked for tenant-purchase programmes, or targeted for redevelopment. Examples are from Nairobi are Estates such as Ngara Estate, Kilimani & Kileleshwa, Jogoo Road, Shauri Moyo, Nairobi West, Highridge. In Nakuru, Milimani Estate. In Kisumu, Milimani Estate. In Mombasa, Kizingo Estate.
57. The specific IMF directives impacting government staff housing whose impacts have been seen to include:
- Elimination of Subsidies: The IMF pushed for the liberalisation of the housing market and the removal of highly subsidised benefits for civil servants to save on public wage and operational costs.
 - Privatisation and Asset Stripping: State-owned enterprises (SOEs) and public housing schemes were marked for privatisation to reduce government control over the economy.
 - Civil Service Retrenchment: Downsizing the civil service reduced the state's obligation to house its employees.
 - Local Impacts and the "Land Grabbing" Era: While the broader goal of the IMF was to stabilise public finances, the transition to a privatized housing market caused immense socio-economic hardships.
 - Irregular Sales: The directive to sell off state commercial enterprises and unneeded public assets coincided with severe political patronage. Many government pool houses and public plots were irregularly allocated or sold off cheaply to private individuals, a phenomenon famously referred to in Kenya as the "land grabbing mania" of the 1990s.
 - Loss of Welfare: Civil servants, already reeling from wage stagnation and inflation, lost their institutional housing benefits, which forced them into the unregulated private market where housing was increasingly unaffordable.

E.4 Government estates in Urban Townships. Did the sale of plots derived from Government Estates comply with Part III of the GLA?

58. This question will be very hard for most judicial officers who practised as judicial officers in the 1990's. Why? Some may have benefited from allocations of this kind during that period, which could give rise to a perception of conflict of interest. Where that risk arises, appropriate disclosure or recusal safeguards would help preserve confidence in the judicial process. Similar considerations may apply to other officials who benefited from allocations at the time. We attempt now to faithfully answer this question, with an eye to the next Generation of young Kenyans who might be minded one day to fully and properly investigate the loss of huge Government assets via this World Bank/IMF approved scheme.

59. The Dina case applies fully to the disposal of Government Estates in urban areas of Kenya because the subject matter of Dina, as established by the Court of Appeal in Dina, was an urban plot. The doctrine of Dina as averted to above is that as quoted from the Munyu Maina case:

“it is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

60. A challenger to any plot acquired by any Kenyan civil servant, either as allottee or outright recipient of government grant of lease interest, would simply need only to pose the following queries>

- did the first registered proprietor of the urban plot have any proof of government held auctions of the said plot?

- If there was no proof of any government auction, did the first registered proprietor have any letter from the President of Republic of Kenya granting a Presidential order that the said government lease may be granted without an auction?

61. These are simple tests. However, it is our considered view that an estimated 99% (a figure asserted rather than empirically established) of all government leases whose plots are geographically located by a Government Survey plan or map as being located in former Government estates would fail these tests. In other words, Part III GLA was not complied with by the GOK when it worked with the IMF/World Bank to strip-mine Kenya of all of its State owned housing estates.

Alert to lenders: the practical impact for banks lending against land in Kenya

General briefing note for information only; not legal advice.

62. A Kenyan certificate of title is strong evidence of ownership, but it is not conclusive. Under section 26(1) of the Land Registration Act 2012, the title of a registered proprietor may be impeached on the ground of fraud or misrepresentation to which that proprietor is a party, or where the title was acquired illegally, unprocedurally or through a corrupt scheme. In Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) (21 April 2023), the Supreme Court confirmed that, where the root of a title is tainted, even an innocent purchaser for value cannot rely on the register or on the doctrine of the bona fide purchaser. In that case, the land was public beachfront reserved for public use, and so incapable of valid private allocation; the wider principle, that a buyer must satisfy itself as to the root of title, is nevertheless of general application.
63. For a lender this matters directly. A charge is a derivative interest: it can be no stronger than the chargor's title. If the chargor's root title is later cancelled or rectified, the charge registered over it is liable to be extinguished with the title (*nemo dat quod non*

habet), leaving the bank with an unsecured claim against the borrower rather than realisable security.

64. The statutory indemnity is not a dependable substitute. Section 81 of the Land Registration Act 2012 provides for an indemnity from the State where a person suffers loss through rectification of the register, but section 81(2) denies indemnity to a claimant who caused or substantially contributed to the loss by fraud or negligence. Following Dina, a lender who relied only on an official search, without investigating the root of title, is exposed to the argument that it was negligent. In addition, section 82 LRA caps the amount recoverable and excludes remote or consequential loss, claims are subject to the law of limitation, and there is at present no funded and readily accessible State indemnity scheme.

Against that background, banks and other lenders may wish to consider the following:

- investigate the root of title, and not merely obtain an official search, before advancing new facilities secured on land, particularly land derived from former government estates;
- review the existing charge book to identify security concentrated in higher-risk titles, and consider appropriate borrower representations, indemnities or, where available, title insurance;
- factor latent root-of-title risk into enforcement and recovery expectations, since a purchaser on a sale by the chargee will itself be expected to investigate the root of title; and
- obtain specific legal advice on individual transactions and on the portfolio as a whole.

This note is provided for general information only. It is not legal advice, it does not take account of the facts of any particular transaction, and it does not create an advocate-client relationship. Specific advice should be obtained before any step is taken or omitted in reliance on it. Prepared by Bryant's Law Advocates.