

Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya

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Abstract

Land is an unparalleled cornerstone of our identity, cultural heritage, and spiritual resonance and has often dictated the pulse of nationhood. The Constitution of Kenya stands as the supreme arbiter on land matters, rendering all other laws inconsistent with it null and void to the extent of their inconsistency. Article 40 thereunder enshrines property rights, a fundamental human entitlement. However, enforcing these rights fully pivots on the acquisition of a definite title through a successful legal registration process. The land registration system aims to provide secure titles through streamlined registration processes and indefeasible ownership, guaranteeing transparency and preventing fraud. This article critiques the Supreme Court's decision in the Dina Management case on the conclusiveness of search and the doctrine of a bona fide purchaser. This paper posits that the Dina management precedent narrowly interprets Article 40, thereby imposing undue burdens on bona fide purchasers, who are made to bear the brunt of historical land injustices and flawed registry practices under the guise of the sanctity of titles. This article concludes by proposing impactful legal and administrative solutions to strengthen this cornerstone of property law and crucial human rights in Kenya, ensuring landowners enjoy a robust and secure legal framework.

Keywords: *Bona fide purchaser for value, Doctrine of indefeasibility of title, Torrens system, Deed Registration System, Land Law.*

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I. Introduction

The designation ‘Supreme Court’ denotes the apex adjudicatory agency within a nation’s judicial system holding ultimate authority in interpreting and applying the law.¹ The Supreme Court has lauded the *stare decisis* doctrine and deemed it very integral to the rule of law, ensuring impartial, predictable, and consistent development of legal principles, bolstering the actual and perceived rectitude of the judicial process.² The grand irony of the doctrine of *stare decisis* is grounded in its role as an emblem of judicial stability, notwithstanding suspicions about the flaws of the precedent.³ Consequently, decisions stemming from the Supreme Court should be reached after meticulous deliberation and rigorous scrutiny of the case. This notion was reiterated by the Supreme Court of Kenya in *Jasbir Singh Rai and three others v Tarlochan Singh Rai and four others*,⁴ in which the learned judges expounded their stance.

‘The emerging lesson is that the decisions of Kenya’s Supreme Court, which ought always to be arrived at only after the most conscientious and detailed consideration, will stand as the binding reference point in the norms governing the judicial process.’

The Supreme Court’s appellate jurisdiction is confined to cases involving the interpretation or application of the Constitution or a matter of public importance certified by the Supreme Court or the Court of Appeal.⁵ The Supreme Court, in the case of *Dina Management Limited v County Government of Mombasa* (hereinafter referred to as *the Dina Management Case*), found itself poised at a pivotal juncture to shape land law and policy in Kenya. It had a valuable opportunity to thoroughly investigate and definitively resolve the ambiguity regarding the conclusiveness of an official search, as well as to examine whether the title of a *bona fide* land purchaser for value without notice remains indefeasible despite any infirmity associated with the titles of preceding registered proprietors.

Prior to the *Dina management case*, the lower courts have engaged in the daunting task of balancing the rights of a *bona fide purchaser without notice* against the recourse to the persistent land grabbing and flawed registry transactions that have plagued our land administration system for decades. An analysis of decisions

¹ J B Ojwang, ‘Judicial Review of Service Matters in Kenya and India: A Blessing or a Curse? Supreme Court of Kenya: Insider’s Perspective on the Emerging Groundwork’ (2007) 1(1) *Kenya Law Review* 1.

² *Kidero & 5 Others v Waititu and Others* [2014] eKLR (SC), Petition No 18 of 2014 (consolidated with Petition No 20 of 2014), concurring opinion of Njoki Ndungu SCJ, para 236.

³ Randy J Kozel, ‘Stare Decisis as Authority and Aspiration’ (2021) 96 *Notre Dame Law Review* 1921, 1974

⁴ *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR, para 60.

⁵ Constitution of Kenya 2010, art 163(4)(a) and (b).

delivered by differently constituted benches of the Court of Appeal reveals a conflicting approach in regard to the application of doctrine of indefeasibility of titles.⁶

On one hand in the case of *Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority*⁷ the Court of Appeal in a majority decision found that the appellants were *bona fide purchasers for value* owing to their reliance on the accuracy of registry documentation. In this case, the appellants in Runda Mimosa Estate, Nairobi, were earmarked for demolition by the Government, alleging that they encroached on a 20-metre road reserve acquired in the 1970s.⁸ The appellants contended that they purchased their respective parcels from the vendors, Runda Coffee Estate Limited, who had purchased them from the original owners.⁹ The learned judges, in this case, held that appellants were *bona fide purchasers for value* since they had discharged their burden of proof by conducting due diligence on the property, which revealed no encumbrances. The appellants, therefore, lawfully acquired their titles without evidence of fraud or misrepresentation attributed to them and had their names registered as the owners of the property. The Court concluded that Article 40(6) of the Constitution, which limits protection for unlawfully acquired property, did not apply to them, given that no amount of due diligence would have created a suspicion that the plots they were buying had been alienated.¹⁰

Similarly, in the *Kiarie v Administrators of the Estate of John Wallace Mathare* decision,¹¹ the Court of Appeal in rejecting the applicant's application for leave to appeal to the Supreme Court found that even where it is shown that past registrations were obtained illegally, the title of the last *bona fide purchaser for value* was indefeasible under Section 23 (1) of the Section 23 of the Registration of Titles Act (now repealed).¹²

⁶ As noted in *Sehmi & another v Tarabana Company Limited & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) para 57. 'Having considered the issues raised, we find that indeed, there is uncertainty in the law with regard to the concept of the innocent purchaser for value, and to the indefeasibility of titles as is apparent in the various decisions cited by the parties.'

⁷ *Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority & 4 Others* [2019] eKLR.

⁸ *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] KECA 706 (KLR) (on Ouko's (P)) para 7.

⁹ *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] KECA 706 (KLR) (per Ouko (P)) para 9.

¹⁰ *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR, Civil Appeal No. 70 of 2013 (Sichale JA).

¹¹ *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] KECA 127 (KLR) (CA Nairobi, 8 November 2013)

¹² *Charles Karathe Kiarie and others v Administrators of the Estate of John Wallace Mathare and others* [2013] KECA 12 (KLR) (CA Nairobi), section beginning 'It follows from what we have said that there has never been any controversy...'

Conversely, a different strand of jurisprudence appears to erode this protection. For instance, in *Arthi Highway Developers Limited v West End Butchery Limited*,¹³ the Court of Appeal gave its stamp of approval to the High Court decision which found that since Arthi Highway obtained property fraudulently, it could not lawfully pass the title to the subsequent purchasers despite their *bona fide* status. In this case, West End Butchery, the original owner of the land, alleged that its shares and directorship were fraudulently transferred to Solomon Mwinzi Mwau and John Mucheni Musa, who then sold the suit property to the 1st defendant, Arthi Highway Developers Limited ('Arthi Highway').¹⁴ Following this, Arthi Highway obtained the title despite irregularities and subdivided the property into several parcels, which were then sold and transferred to various buyers, *inter alia*, the 5th, 6th, and 7th defendants.¹⁵ The Court of Appeal, in the *Arthi Highways* case, declared the titles held by the 5th, 6th, and 7th defendants, who were *bona fide purchasers for value*, null and void since Arthi Highway had no legitimate title to transfer.¹⁶ The case emphasized that if the property is obtained fraudulently, it cannot confer a valid title even to the innocent purchasers.

The Court of Appeal in *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* brought out conflicting and fundamental principles – the right to private property and public interest – into sharp focus. In this case, the disputed land was registered in 2002 and leased to Peter Njuguna and Beatrice Wanjiru, who subsequently sold the property to the 1st respondent, Mughal, in 2005. However, the property was part of an 80-metre road reserve and a 30-metre buffer zone, and when the Kenya National Highways Authority (KENHA) began constructing the Nairobi Southern Bypass, it found that the construction constituted a slip passing through the disputed property. Even though the Court found insufficient evidence to dispute Mughal's status as a *bona fide purchaser for value*, as no allegations of fraud or other mischief had been levelled against him, the court emphasized the primacy of public interest in public land cases.¹⁷ Kiage J expressed concern about the mismanagement and fraudulent dealings of public offices charged with land registration and administration.¹⁸

Unlike in *Elizabeth Wambui's and Kiarie's cases*, the *Arthi Highways* and other consistent jurisprudence suggested that the castle's keepers should go beyond the

¹³ *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR para 44.

¹⁴ *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR para 5 - 7

¹⁵ *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR para 8

¹⁶ *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR para 69

¹⁷ *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] KECA 465 (KLR) (Kiage JA).

¹⁸ *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] KECA 465 (KLR) (Kiage JA concurring).

known corridors and investigate the broader landscape for unregistered interests. The conflicting decisions from different Court of Appeal benches created a paradox in which the integrity of official search from the land registry is upheld in one case, while in another, the purchasers are expected to look beyond its confines.¹⁹ On one hand, the courts assume that the Kenyan land registries are flawless and devoid of fraud and corruption; however, on the other hand, the court remains vigilant to the illicit practices during land transactions within the registry.

For instance the Court of Appeal in *Elizabeth Wambui's case* found that the title of a registered owner can only be subject to challenge on the grounds of fraud or misinterpretation to which the owner is proved to be a party;²⁰ however, the *Arthi Highway's case* found that the original registered genuine owner of land cannot be dispossessed by a fraudster.²¹ This position resulted in ambiguity regarding the legal standpoint on the indefeasibility of titles issued by the registrar to subsequent *bona fide purchasers* who were not involved in the original acquisition of property in Kenya. The paradigm was detrimental to *stare decisis* doctrine since a different bench of the Court of Appeal or lower courts might reference the *Arthi Highway case*, which upheld the annulment of titles given to bona fide purchasers, or make reference to *Elizabeth Wambui's case*, where the court found for the *bona fide* purchasers.

Against this backdrop, this article considers the Supreme Court decision in the *Dina management case* as a potential turning point that reconciles the divergent lines of authority within the Appellate Courts. However, the article critiques the *Dina Management case's* interpretation of the doctrine of *bona fide purchaser for value* arguing that it overlooked the pivotal distinction between Kenya's dual land registration systems (the Torrens and deeds registration) and their respective search protocols, which informs the *bona fide purchaser* doctrine. The paper further explores whether the Supreme Court's interpretation of 'search into the root title' in *Dina management case* aligns with larger constitutional commitments to justice in land disputes, especially when reconciling historical injustices with contemporary legal and equitable principles.

¹⁹ In *Shimoni Resort v Registrar of Titles & 5 others* [2016] eKLR, the Land Registration Act, No. 3 of 2012 under Section 26 (1) embodied the principle and doctrine of indefeasibility of title as established under the Torrens System of Registration such that the title of a registered proprietor remains indefeasible unless it is shown that the title was obtained through fraud or misrepresentation to which the title holder is proved to have been a party.

²⁰ *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] KECA 706

²¹ *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 others* [2015] eKLR [66].

Accordingly, the paper is divided into seven sections. The next section analyses the doctrine of the *bona fide purchaser*, the key elements defining it, and its relevance. The section furthermore discusses the doctrine of indefeasibility of titles in Kenya. Section 3 offers an analysis of the Supreme Court's decision in the *Dina Management case*, considering the case's brief facts and the lower courts' findings. Section 4 criticises the judgement made in *Dina Management* within the spheres of the Torrens system and the interpretation of Article 40 of Constitution of Kenya on the protection of property and its limits. Section 5 offers insights into post-*Dina case* developments to illustrate how *stare decisis* doctrine is a double-edged sword, revealing how post-*Dina* precedents have forsaken *bona fide purchasers for value*, making them victims of historical misallocations of land and venality at the registry while cloaked in the principle of indefeasibility. Section 6 offers a comparative analysis of the Torrens jurisdictions, such as Uganda and Australia. The seventh section contains the recommendations and the conclusion, respectively.

II. Conceptualizing the Bona Fide Purchaser Rule

I. The Content and Origin of the Bona Fide Purchaser Rule

A *bona fide purchaser for value without notice* is 'a purchaser who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest.'²² *Bona fide* is a Latin term that means 'in good faith' or 'in sincere intention,' and within the legal discourse, it denotes an honest, genuine belief or action taken without any deception or ulterior motive.²³ The strict common law term describes a 'purchaser' as someone who obtains property by the actions of another, for instance, a donee, but not a squatter.²⁴

The origin of this doctrine is linked to the general rule within English common law, which held, in an uncompromising manner, that a buyer could not possess a better title than the seller had. The principle was referred to as the '*Nemo dat quod non-habet*' rule and cast a shadow over a marketplace, manifesting with a deep solemnity that nobody should bestow what they do not possess.²⁵

²² *Lwanga v Mubiru and Others* (Civil Appeal 18 of 2022) [2024] UGSC 7 (Uganda SC) cited in *Said v Shume & 2 others* (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) 26 July, [27]

²³ *Black's Law Dictionary* (9th edn, West 2009) 199.

²⁴ Kevin Gray and Susan Gray, *Land Law* (7th edn, OUP 2011) 474.

²⁵ R Ahdar, 'The Buyer in Possession Exception to the Nemo Dat Rule Revisited' (1989) 4 *Canterbury L. Rev* 149 Available at <<http://www.nzlii.org/nz/journals/CanterLawRw/1989/9.pdf>> Accessed February 23rd 2025

Amidst this order, good faith purchasers, even the ones deceived by thieves, could not trump upon the rightful owner's claim. Nevertheless, due to the thriving commerce, courts have repeatedly created exceptions to this rule based on principles of equity to safeguard the rights of innocent subsequent purchasers in cases involving equitable estoppel and fraudulent conveyances.²⁶ Central to these exceptions is the *bona fide purchaser* doctrine, which provides rights to individuals who purchase property under a defective title.²⁷

In this respect, a purchaser must satisfy four key criteria to establish protection from equitable interests that have not been overreached and are non-registrable.²⁸ First is the element of *bona fide*, and in this regard, the subsequent purchaser must have acted in good faith and conscience and was not aware of the prior equitable interest. The second requirement is the purchase for value, and value in this sense, can be satisfied by money, money's worth consideration or marriage consideration. The third criterion requires the purchaser to have a legal estate/title, and therefore, an equitable interest does not suffice.²⁹ The final tenet is that the foregoing ought to transpire 'without notice'; that is, that the purchaser must prove that they had no notice of prior interest. The doctrine protects a person who acquires property without constructive or actual notice of any defects or infirmities against the seller's title.³⁰ The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice covers actual, constructive or imputed notice of fraud.³¹ Actual notice is pertinent to the known matters, while constructive notice deals with those that could be discovered or known through reasonable inspection.³² On the other hand, imputed notice attributes an agent's knowledge of a fact to their principal.³³

²⁶ Frederick A Whitney, 'Value and the Doctrine of Bona Fide Purchase' (1933) 7(2) *St John's L Rev* 1 <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6180&context=lawreview>; *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, 607, per Devlin J. See also, *Miller v Race* [1758] 1 Burr 452,

²⁷ Kevin Gray and Susan Gray, *Land Law* (7th edn, OUP 2011) 474.

²⁸ Roger J Smith, *Property Law* (9th edn, Pearson 2017) 227.

²⁹ G.C. Cheshire and J.B. Butterworth, *The Modern Law of Real Property*, 9th edn (London: Butterworths, 1962) 227.

³⁰ *Black's Law Dictionary* (8th edn, West 2004) 1271; *Said v Shume & 2 others* (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) [27].

³¹ *Lwanga v Mubiru and Others* (Civil Appeal 18 of 2022) [2024] UGSC 7 (Uganda SC) cited in *Said v Shume & 2 others* (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) 26 July, [27]

³² Kevin Gray and Susan Gray, *Land Law* (7th edn, OUP 2011) 475.

³³ HGW, 'The Application of the Doctrine of Imputed Notice to Knowledge Acquired by the Agent in a Previous or Different Transaction' (1877) *American Law Register* 1.

II. *Indefeasibility of Bona fide Purchaser Title*

In Kenya, the doctrine of Bona fide purchaser applies by virtue of Section 3(1)(c) of the Judicature Act, which stipulates that it is permissible to apply the doctrines of equity, statutes of general application in force on 12 August 1897, as well as the procedures and practices observed in English courts at that time, when courts exercise their jurisdiction. Under this doctrine, in the event the *bona fide purchaser for value* is registered as the owner of the property, he/she acquires an indefeasible title against the entire world, including the original owner, and thereafter, the original owner's recourse is only compensation from the government.³⁴ The Torrens system of land registration is founded upon the doctrine of indefeasibility of title, signifying that the title it grants is conclusive, unchallengeable, and immune from challenge.³⁵

This principle is encapsulated within Section 23 of the Registration of Titles Act (now repealed) (RTA), which provided that a certificate of title was 'conclusive evidence' of ownership.³⁶ However, Section 26 of the Land Registration Act No. 3 of 2012 (LRA) introduced an ancillary clause that diminishes this status by stipulating that once the certificate of title is issued by the registrar, whether upon initial registration or subsequent transfer or transmission, it shall be regarded by courts 'as *prima facie* evidence' that the individual named therein as the proprietor of the land is the absolute and indefeasible owner thereof.³⁷ The presumption asserts the validity of the registered owner's title. Nevertheless, this presumption is rebuttable under Section 26(1)(a) and (b) of the LRA, which stipulates that the doctrine may be negated if the certificate of title has been obtained unlawfully, non-procedurally, or through a corrupt scheme.³⁸ To be granted '*bona fides status*,' a buyer has an obligation to prove through their pleading and supporting evidence that they deserve such protection. The doctrine is central to property law since it offers protection to the innocent purchasers (third parties) who have acquired the property in good faith and paid valuable consideration therein.

³⁴ Hassan Asaria, 'Under RTA Title Can Never Be Nullity *Ab Initio* & Interpretation of Constitution?' *Kenya Law* (Kenya Law) <https://kenyalaw.org/kl/index.php?id=1905> accessed 12 August 2024.

³⁵ Sussie Mutahi, 'Indefeasibility of Title and Adverse Possession in Kenya: An Uneasy Relationship?' (2023) 7(1) *Strathmore Law Journal* 84, citing McPhee P, 'Fraud and Indefeasibility of Title' (McPhee Kelshaw Solicitors, March 2016) <http://www.mcpheekelshaw.com.au/wp-content/uploads/2016/03/Indefeasibility-of-Title-Paper-PMM.pdf> accessed 8th July 2025

³⁶ The Registration of Titles Act, Cap 281, Revised Edition 2010 (1982) s 23 (Kenya National Council for Law Reporting, with the authority of the Attorney General).

³⁷ Land Registration Act, 2012 (Act No. 3 of 2012), Kenya.

³⁸ The Land Registration Act 2012, No 3 of 2012, s 26(1)(a)–(b).

III. The Supreme Court Decision in the Dina Management Case

i. Brief Facts and History of the Case

The central issue in the *Dina management case* involved the determination of the plight of the *bona fide purchasers for value* and the place of an official land search at the registry. A land search is usually conducted to confirm the real owners of the land and to check if the title has been charged or has a caveat.³⁹ The Supreme Court's decision in this petition illustrated a tension between the historical injustices in land allocation and the contemporary protection of property rights guaranteed under Article 40 of the Constitution.

The facts of the case revolved around the ownership of Plot No. *MN/1/6053* in Nyali Beach, Mombasa County. The suit property was initially allocated, and a freehold title was granted to its first registered owner (H.E Daniel T. Arap Moi) by the Commissioner of Lands in 1989.⁴⁰ The applicable law was the repealed Government Land Act (GLA). The property was sold to a new buyer (Bawazir & Company (1993) Ltd) and subsequently sold to the appellant. The dispute was instigated in 2017 when the County Government of Mombasa (the 1st respondent) forcefully and without prior notice entered the appellant's property at Nyali Beach in Mombasa County. The 1st respondent demolished a perimeter wall on the beachfront and then demolished the property itself, asserting that the entry and the subsequent demolitions were an enforcement action to create a thoroughfare to the beach on the stated grounds that the property was public, not private land.⁴¹

The appellant petitioned the Environment and Land Court (hereinafter, ELC), asserting its ownership and alleging violations of constitutional rights under Articles 27(1) & (2) (equality before the law, equal enjoyment of fundamental freedoms), 29 (freedom and security of the person), and 47(1) & (2) (fair administrative action) of the Constitution.⁴² The 1st respondent, in their contention, made a rejoinder that the land had been designated as an 'open space' in 1971, rendering any conversion to private ownership illegal and contravening Article 62 of the Constitution. The 1st respondent further asserted that the acquisition of the land, initially allocated in 1989 and transferred through multiple sales before reaching the appellant in 2006, was invalid. They sought orders to

³⁹ eRegulations Kenya, 'Land Search (Online)' (Kenya Investment Facilitation Portal) <https://eregulations.invest.go.ke/procedure/102?l=en> accessed 18 March 2025

⁴⁰ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 2

⁴¹ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 2

⁴² *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 4

revoke the title by the Chief Land Registrar, expunging of survey records, and eviction of the appellant.⁴³

ELC found that the alienation of the property to President Moi in 1989 had been unprocedural and unlawful because of the lack of an approved Part Development Plan from the Director of Physical Planning in compliance with the provisions of the Land Planning Act.⁴⁴ ELC also found that there existed an access road through the open space to the sea, which was later blocked by the allocation of the property in disregard of the provisions of Section 85 of the Government Lands Act, which provided that reserved roads could only be closed by a competent authority. In the ELC's contention, the county government acted within the law by removing the wall that blocked the access road.⁴⁵ The respondent, aggrieved by the ELC's court judgment, moved to the Court of Appeal. The two crucial issues for determination before the Court of Appeal relevant to this analysis were whether the title to the suit property was lawfully acquired and whether the appellant was an innocent purchaser for value without notice.

The Court of Appeal opined that the appellant could not invoke the protection under the doctrine of an innocent purchaser and underscored that, in circumstances where the title has been obtained through unlawful procedures, it could not be deemed indefeasible. The Court of Appeal found out that the suit property was designated as public land and earmarked for public utility purposes and that there was a road for the public to access the beach through 'an open space.'⁴⁶ In light of these findings, the Court of Appeal opined that the property retained its status as a public utility and could not generate private proprietary rights warranting judicial protection.⁴⁷

ii. Summary of Supreme Court Findings

Before the Supreme Court, the appellant maintained that the Appellate Court had erred in interpreting the doctrine of *bona fide purchaser for value* without notice of defect, thereby infringing upon their constitutional right to property as stipulated under Article 40.⁴⁸ The Supreme Court concurred with the ruling of both the trial court and the Court of Appeal that the appellant had to investigate

⁴³ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 5

⁴⁴ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 103, 104

⁴⁵ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR Para 9

⁴⁶ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 15

⁴⁷ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR Para 15

⁴⁸ *Dina Management Limited v County Government of Mombasa & 5 Others* [2021] eKLR, para 16(iii)

the root of the title of the property before proceeding with the acquisition.⁴⁹ The Court ultimately dismissed the appellant's contention and pronounced itself thus:

*Indeed, the title or lease is an end product of a process. If the process that was followed prior to the issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawaqir & Co. (1993) Ltd, who in turn could pass to the Appellant.*⁵⁰

The Supreme Court emphasised that while Article 40 of the Constitution of Kenya establishes a property right, however, this right is subject to the limitations outlined within the same provision. Specifically, the right does not extend to the property adjudged to be unlawfully acquired. In light of the determination that the initial allocation was irregular, the appellant's subsequent ownership could not be protected under Article 40.⁵¹

IV. The Analysis of the Supreme Court Decision

i. Search Obligations under the Deed or Torrens system.

In this context, the author finds the Supreme Court analysis flawed in two aspects. Firstly, the Supreme Court declared that to establish whether the appellant was a *bona fide purchaser for value*, it is imperative to conduct a thorough investigation into the root title to ascertain its validity.⁵² The root title in the *Dina management case* was under the Government Lands Act (GLA regime), which governed the registration of deeds system, and therefore, it is likely that the search obligation that the Supreme Court was referring to was under the deed system. Secondly, the Supreme Court made the declaration that it is the instrument that had been challenged and that the appellants could not just dangle it to prove ownership.⁵³ This position raises the question of whether Kenya operates as a Torrens jurisdiction, given that the core tenet of the Torrens system is that a registered title serves as conclusive proof of ownership, conferring the registered proprietor indefeasibility. To clearly understand this contention, it is poignant to distinguish between the deed and Torrens land registration system focusing on their respective search protocols.

⁴⁹ *Dina Management Limited v County Government of Mombasa & 5 Others* [2021] eKLR, para 111 - 112

⁵⁰ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 110

⁵¹ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 111

⁵² *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, para 94

⁵³ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, para 93

I. *Torrens Title and the Departure from the Deed Registration System*

Under the deed system, the government assumes no responsibility regarding the accuracy of the register or legal guarantee for its contents.⁵⁴ It is up to the potential purchaser of the land to investigate every deed in the chain of title back to the grant before making the purchase.⁵⁵ The deeds-registration system was hailed as having had the advantage of providing a maximum degree of elasticity, as almost every conceivable right or claim to a right in the land could be registered, thus achieving public notice.⁵⁶ The system faced inherent criticism for being financially burdensome as conveyancers had to meticulously investigate the deed's historical sequence to ensure its title was valid. The system was inherently insecure and thus discouraged the development of the land in question, as the ownership could be challenged, resulting in high dispute resolution costs.⁵⁷ In Kenya, the GLA governed allocation and administration of government lands and the lands that were registered under this regime were usually subject to the deed registration system.⁵⁸

The primary objective behind transitioning from deed registration system to the Torrens system was to remove the hassle and cost of investigating the register to elicit the history of an owner's title and verify its authenticity.⁵⁹ The Torrens title system operates based on the concept of 'title by registration,' ensuring a robust indefeasibility to registered ownership, as opposed to the conventional approach of 'registration of title.'⁶⁰ Under this system, title, once granted, serves as conclusive proof against the entire world, and the government is able to guarantee the title. This implied that there was no necessity to establish the origin of the title. One merely needed to conduct a search to determine the legal owner.

⁵⁴ Tom O Ojienda, *Principles of Conveyancing in Kenya: A Practical Approach* (LawAfrica Publishing 2008)135

⁵⁵ E.G. Bowman and E.L.G. Taylor, *The Elements of Conveyancing* (Sweet & Maxwell 1972) 121–122.

⁵⁶ Ernest Keith Phillips, *Differences Between the Systems: Property, Law of Real*' (Registrar-General of Lands, Wellington) <https://teara.govt.nz/en/1966/24436/print> accessed

⁵⁷ AfriCOG, *Mission Impossible? Analysis of the Ndung'u Report on Illegal and Irregular Allocation of Public Land* (AfriCOG)20 <https://africog.org/reports/Mission%20Impossible%20-%20Analysis%20of%20the%20Ndung.pdf>

⁵⁸ Tom O Ojienda, *Principles of Conveyancing in Kenya: A Practical Approach* (LawAfrica Publishing 2008)136

⁵⁹ Low K, 'The nature of Torrens indefeasibility: Understanding the limits of personal equities' 33(1) *Melbourne University Law Review*, 2009, 205-234.

⁶⁰ Penelope Carruthers, 'The Australian Torrens system principle of immediate indefeasibility: Is it 'fit for purpose' for the 21st century?' (2018).

The Torrens system, therefore, was premised on the doctrine of indefeasibility of title, which incorporated mirror, curtain, and insurance principles.⁶¹ The fundamental similarity between the LRA and the repealed RTA is the incorporation of the Torrens land registration system.⁶² The regime guarantees the Curtain principle, and therefore, the parties do not need to look beyond the land title register since it is definitive and final.⁶³ The curtain principle implies that the register is/should be the source of all information pertaining to the title and that the registered title is deemed final and absolute; it remains unaffected and immune from common law, equitable claims, or contingent conditions.⁶⁴ On the other hand, the mirror principle is manifest under this legal order, guaranteeing that there will be no rectification of the title upon its acquisition by the bona fide purchaser since the register accurately and completely reflects all interests affecting the property.⁶⁵ Under the mirror principle, the register is intended to operate as a ‘mirror’, reflecting accurately and incontrovertibly the totality of estates and interests affecting the registered land.⁶⁶

The insurance principle is guaranteed under this regime, and the government is deemed the sole custodian of land records. The insurance principle provides the state-guaranteed title and the consequent indemnity to any person who suffers loss if any mistakes occur.⁶⁷ The state assures the register’s accuracy, and any individual who incurs losses due to inaccuracies resulting from fraud or error in the register is entitled to receive compensation from the state.⁶⁸ In that regard, the state through the land registrar is in charge of reviewing the documents. Therefore original owners or affected parties are compensated by the state if official negligence results in losses.⁶⁹ This can be attributed to the presumption of legality which holds that all acts done by a

⁶¹ Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28.

⁶² Land Registration Act 2012, s, 24, 25, 26, 40

⁶³ Land Registration Act 2012, s 24, 25, 26, 40.

⁶⁴ Land Registration Act 2012, s 66, 67 40, 41.

⁶⁵ *Power Technics Ltd v Attorney General, Registrar of Titles and Commissioner of Lands* HCCC No 178 of 2011 (Nairobi High Court) [2012] eKLR, para 19.

⁶⁶ Tom O Ojienda, *Conveyancing: Principles & Practice* (LawAfrica Publishing 2007) 137.

⁶⁷ Tom O Ojienda, *Principles of Conveyancing in Kenya: A Practical Approach* (LawAfrica Publishing 2008)135, G Dworkin, ‘Registered Land Reform’ (1961) *Modern Law Review* 24(2) 136 <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1961.tb01058.x> accessed 8th July 2025, Barbara Bogusz and Roger Sexton, ‘Registration of Title—the Basic Principles’ in *Land Law (Oxford University Press 2022)* 1035

⁶⁸ Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28.

⁶⁹ Land Registration Act 2012, s, 81, 82, 83, 84, Registration of Titles Act (Cap 230, 1920) (repealed), s 24.\

public official has lawfully been done and that all procedures have been duly followed unless proven otherwise.⁷⁰

Under the Torrens system, the buyer obtains title based solely on the registry and alleviates the concerns of prior records or equitable claims, ensuring the security of titles and supremacy over other laws.⁷¹ Therefore, under the LRA and the RTA, the common law doctrine of '*non dat qui non habet*' is not applicable; therefore, the *bona fide purchaser for value* can acquire an indefeasible title even if the vendor's title had a defect, was void, or was forged. The title obtained from a void or forged instrument can be valid on the condition that the buyer did not know about the fraud.⁷² Importantly, transactions that arose prior to the repeal of RTA to LRA continue to be subject to RTA.⁷³

The Supreme Court, in the *Dina Management case*, failed to acknowledge the distinct land registration regimes at play. The appellants specifically pleaded under the RTA and the LRA; the court's analysis did not delve into the inquiry to find whether there was a subsequent conversion of the appellant's title to the Torrens system regime. In this context conversion refers to the process of migrating title deeds to a unitary regime as envisaged under the Land Registration Act.⁷⁴ Therefore, by suggesting an investigation into the root of the title, the Supreme Court was not clear whether it was affirming the search obligations under the deed system. The Supreme Court's approach to the *Dina Management case*, emphasised the historical flaws in the initial allotment, which aligns and reinforces the search obligations under the deed system. Therefore, what was not apparent was whether the Supreme Court was referring to search obligations under the deed system or simply adding search obligations under the Torrens system. However, if the latter were the case, then the implementation of the Torrens system would diminish in value, as purchasers are required to verify historical titles and the government disclaims any liability for compensation.

⁷⁰ *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] KECA 27 (KLR), Civ App Nos 51 & 58 of 2016 (CA Eldoret), para 86.

⁷¹ Land Registration Act 2012, s 81, 82, 83, 84

⁷² Hassan Asaria, 'Detailed Exposition of Torrens System as Incorporated in RTA and LRA' (*Kenya Law Review*, 25 August 2014)

⁷³ Land Registration Act 2012, s 106.

⁷⁴ State Department for Lands and Physical Planning, *Conversion of Land Title Deeds* (28 April 2021) <https://lands.go.ke/wp-content/uploads/2021/05/CONVERSION-OF-LAND-TITLE-DEEDS-Opt-2-STEPS-28-4-2021-1-1.pdf>

ii. *The Interpretation of the ‘Bona Fide Purchaser’ Rule*

In the *Dina Management case*, the Supreme Court adopted ‘The Black’s Law Dictionary 9th Edition’s definition of a bona fide purchaser, which defines the concept 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; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.’⁷⁵

The Supreme Court furthermore cited with approval the decision of the Court of Appeal in Uganda in *Katende v Haridar & Company Ltd [2008] 2 E A 173*, which defined a bona fide purchaser for value as follows:

‘For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove that:

- i) he holds a certificate of title;*
- ii) he purchased the property in good faith;*
- iii) he had no knowledge of fraud;*
- iv) he purchased for valuable consideration;*
- v) the vendors had apparent valid title;*
- vii) he purchased without notice of any fraud; and*
- viii) he was not a party to the fraud.’⁷⁶*

The Apex court underscored the case of *Samuel Kamere v. Lands Registrar Kajiado [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:⁷⁷

‘That they acquired a VALID and LEGAL title; secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title; and thirdly, that they paid valuable consideration for the purchase of the suit property...’

In the opinion of learned justices, for someone to have a valid and legal title, they must possess a certificate of title, which is conclusive evidence of proprietorship and is supposed to be registered by the Lands Registry.⁷⁸ They must have also conducted due diligence, which in this case refers to the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to

⁷⁵ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 90

⁷⁶ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 92.

⁷⁷ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 92.

⁷⁸ *Registration of Titles Act* (Cap 281, repealed) s 23.

satisfy a legal requirement or discharge an obligation.⁷⁹ The registered proprietor only acquires an indefeasible title when the allocation is legal and proper, and a court of law cannot sanction illegality or give its seal of approval to an illegal or irregularly obtained title under the guise of indefeasibility of title.⁸⁰ The sanctity of title, therefore, was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at another person's expense. Furthermore, the doctrine of indefeasibility of title does not protect title to land that had been obtained illegally or fraudulently merely because a person was entered in the register as proprietor.⁸¹

The Supreme Court, in the *Dina Management case*, exhibited no inclination to disentangle itself from these firmly ingrained legal doctrines, positing that in the case, the root title had been challenged, and it had to trace the root title from its original allotment.⁸² The Supreme Court found that the initial allocation of the suit property was defective based on substantive and procedural grounds. On the substantive ground, the Supreme Court found that at the time of the initial allocation, the suit property was designated as an open space, thus making it a public utility that was not available for alienation to H.E. Daniel T. Arap Moi or anyone else.⁸³ Moi's title was defective on the basis that he was allocated land designated as an 'open public land' and not unalienated public land and, therefore, not available for allocation to anyone.⁸⁴ On the procedural lens, the Supreme Court's analysis suggested that no letter was presented to the Commissioner of Lands to request the allocation of the suit property, and no Part Development Plan existed or was in place before the survey was conducted.⁸⁵ It can be discerned from the analysis that Moi's title was defective through substantive and procedural lenses and could not be passed to Dina.

a. Bona Fide Purchaser Doctrine Under a Drift?

The Supreme Court in the *Dina Management case* ruled that the *bona fide* purchaser doctrine does not apply in instances where the third-party purchaser has acquired irregular or illegally allocated public land.⁸⁶ To this extent the

⁷⁹ Black's Law Dictionary, 8th ed., s.v. 'due diligence'

⁸⁰ *Funzi Development Ltd & Others v County Council of Kwale* [2014] eKLR, as cited in *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 108.

⁸¹ *Martev Guest House Limited v Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR), para 45 Nambuye J

⁸² *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 94

⁸³ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 101

⁸⁴ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 100

⁸⁵ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR para 107

⁸⁶ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 111

Supreme Court cited with approval Maraga J's reasoning in *Waa Ship Garbage Collector*,⁸⁷ that courts should nullify the titles which are held by land grabbers even if they have the titles, because constitutional principles such as provisions of the public trust and public interest are supreme and override the principle of indefeasibility which is a statutory concept.⁸⁸ The logic underpinning Maraga's contention narrows the delicate distinction between land grabbers and the innocent purchasers. However, he was quite clear that the doctrine cannot be invoked as a protective mechanism for a land grabber, specifically when the alienation of public land contravenes the broader principles of public interest.

The Supreme Court decision primarily addressed the fraud committed by the initially registered owner (H.E Daniel T. Arap Moi), overlooking the plight of the subsequent bona fide purchaser, *Dina Management*, who acquired the property from Bewazir and paid valuable consideration therein. The court did not delve into a determination of whether *Dina Management* was in any way engaged in fraud or illegal activity during the acquisition of the suit property. The fraud should be on 'the part of a person obtaining registration and includes a proven knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.'⁸⁹ The burden of proof of fraud rests on who alleges it, and it is not allowable to leave fraud to be inferred from the facts. The standard of proof in this context is more than a mere balance of probabilities.⁹⁰ There was no fraud or misrepresentation alleged on the part of the appellant by the respondents, and in fact, the appellant alleged that they sought consent to transfer and obtained it from the Ministry of Lands, who also confirmed the validity of the title to the appellant vide a letter dated 9th October 2006 stating that 'the above plot is the genuine plot.'⁹¹ The appellants conducted their due diligence and relied on the accuracy of the search from the Lands Registry.

Registries should mirror the true state of the land, and therefore, the *Dina management case* marked a notable departure from the traditional concept of indefeasibility which has served as a robust safeguard for bona fide purchasers, insulating them from claims arising from prior defects in the title chain preceding

⁸⁷ *Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others* (2004) 1 KLR (E&L) [2004] KEHC 10 (KLR).

⁸⁸ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 102

⁸⁹ Registration of Titles Act (Cap 230) (repealed), s 2.

⁹⁰ *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, Civil Appeal (Sup) No 12 of 2013 (CA); *Martevu Guest House Limited v Njenga & 3 others* [2022] KECA 539 (KLR), Civil Appeal No 400 of 2018, para 32 (CA).

⁹¹ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 88

their acquisition.⁹² The Supreme Court premised its analysis on the misconception that under common law, a seller cannot transmit a better title than he has, holding Dina's title a nullity *ab initio*.

Furthermore, Manji and Ghai noted that in the *Dina management case*, though the Supreme Court affirmed that doctrine of indefeasibility does not shield purchasers of illegally acquired public land, it failed to expressly distinguish this from other defects shielded by the doctrine, and that it did not openly state that this represented a departure from prior interpretations of doctrine of indefeasibility.⁹³ In their opinion, while the decision still considers that certain defects can still benefit from the innocent purchaser doctrine, it does not explicitly mention the category, making the rationale of the court on this doctrine uncertain, loosely substantiated, and resulting in a sort of discrimination among innocent victims.⁹⁴ The ruling, therefore, sidestepped the doctrine and focused more on procedural aspects, public interest considerations, and historical land grabbing that the County Government of Mombasa alleged in finding that the doctrine does not apply to illegally or irregularly acquired public land.

II. *Broad Constitutional interpretation*

The Supreme Court found that Article 40(6) of the Constitution provides that the protection of the right to property does not extend to any public property found to have been unlawfully acquired, at least if the land was not available for allocation. In summary, the Supreme Court stated that;

Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot, therefore, be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.⁹⁵

⁹² As was established in the *Gibbs –vs- Messer* (1891) AC 247 PC at page 254 that suggested... 'That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer of mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.' cited in *Dr. Joseph Arap Ngok v Justice Moijo Ole Keivua* Civil Appeal No. 60 of (1997) JELR 100612 (CA) Kenya

⁹³ Ambreena Manji and Jill Cottrell Ghai, 'The Long Shadow of Land Grabbing – Analysing the Decision of the Kenya Supreme Court in Petition 8 of 2021' (Constitutional Law and Philosophy, 29 June 2023) <https://indconlawphil.wordpress.com/2023/06/29/the-long-shadow-of-land-grabbing-analysing-the-decision-of-the-kenya-supreme-court-in-petition-8-of-2021/> accessed 13 August 2024.

⁹⁴ Ambreena Manji and Jill Cottrell Ghai, 'The Long Shadow of Land Grabbing – Analysing the Decision of the Kenya Supreme Court in Petition 8 of 2021'

⁹⁵ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 111

The clause in Article 40(6) of the Constitution in the *Dina Management case* was interpreted as detrimental to *bona fide purchasers for value* as provided under section 26 of the LRA. This was a literal interpretation of the Constitution since the court failed to consider ancillary legislation such as LRA and the repealed RTA, which provides for the indefeasibility of titles. The Court, in its interpretation of Article 40(6) of the Constitution, should have considered the provisions under Section 1(2) of the RTA, which ensures the sanctity and conclusiveness of title by stipulating that the RTA should prevail over any other legislation unless another law expressly overrides it.⁹⁶ While the Constitution is the supreme law, Article 40(6), which does not explicitly override the RTA, provides that a court should harmoniously interpret the Article with the RTA's principles, such as the principle of indefeasibility of Titles.⁹⁷ The Supreme Court had a golden opportunity to engage in a purposive interpretation that aligns with the broader objectives of the Constitution, which include promoting the sanctity of land registration outlined under Section 23 of the repealed RTA and Section 26 of the LRA.

Hassan Asaria posits that the Constitution is a skeletal framework; therefore, the courts and the legislature fill in the details and ensure that its provisions are interpreted in harmony with existing statutes, such as the LRA, which embody specific legal philosophies, such as the Torrens system.⁹⁸ In his opinion, he finds Article 20(3)(b) of the Constitution, which advocates for the adoption of interpretations that favour the enforcement of rights or fundamental freedoms, very significant and that narrower interpretation of the provision of the Constitution undermines the principle of indefeasibility as a doctrine in Kenya and does not protect the legitimate interests of the innocent purchasers, leading to erosion of confidence in land registration in Kenya. In the interpretation of Article 40 (6), to reflect the legislature's intention and the Constitution's purpose, it will imply that the Article has no retroactive effect and applies only to actual fraudsters and not to innocent buyers. Therefore, as stipulated under Article 259 of the Constitution, the Constitution should be interpreted so as to best promote

⁹⁶ Registered Titles Act (Kenya), s 1(2). 'Except so far as is expressly enacted to the contrary, no Act in so far as it is inconsistent with this Act shall apply or be deemed to apply to land, whether freehold or leasehold which is under the operation of this Act'

⁹⁷ Hassan Asaria, 'Detailed Exposition of Torrens System as Incorporated in RTA and LRA' (*Kenya Law*, 25 August 2014) <https://kenyalaw.org/kenyalawblog/exposition-of-torrens-system-incorporated-in-rta-and-lra/> accessed 8 July 2025

⁹⁸ Hassan Asaria, 'Detailed Exposition of Torrens System as Incorporated in RTA and LRA' (*Kenya Law*, 25 August 2014) <http://kenyalaw.org/kenyalawblog/exposition-of-torrens-system-incorporated-in-rta-and-lra/> accessed 6 September 2024.

its object.⁹⁹ Furthermore, the Supreme Court suggested that the 1st registered owner did not acquire a valid title; however, this matter seems obfuscated as the law at that time deemed 1st registration valid even if such registration may have been fraudulently obtained and could not be defeated.¹⁰⁰

III. *Speculative expectation on the Innocent Purchaser*

The Supreme Court, in its judgment, concluded that;

*We hasten to add that the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.*¹⁰¹

From the preceding, it was the Supreme Court's opinion that *Dina* should have exercised a lot of caution in conducting due diligence, given that the suit property was lucrative in nature. The implication of *Dina's* knowledge of property value would impact her position as an innocent purchaser, introducing speculative expectations on the buyer's part and requiring them to have foreseen possible historical irregularities and past governmental seizures. The position imposes a greater and undue burden on purchasers, specifically in the event that the value of the land property appreciates with time. This approach, in turn, risks destabilising transactional certainty by introducing subjective factors while assessing the purchaser's innocence. The expectation to infer defects in title or past irregularities in title by solely considering the property's current value undermines the established protection given to innocent purchasers who act in good faith without being aware of any defects in the title.

IV. *Remedy to the Appellants.*

The Supreme Court, after finding that the *Moi's* title had a defect, did not explore *bona fide purchasers for value without notice* in detail. The Court concluded that subsequent claims became irrelevant once the original allocation was deemed irregular. The Court, for instance, did not further provide for the remedy in this aspect, an issue explored extensively in the *Ndungu* report, which addressed the status of land titles that involved historical injustices or fraudulent allocations.

⁹⁹ Constitution of Kenya 2010, art 259(1). (1) This Constitution shall be interpreted in a manner that--
(a) promotes its purposes, values and principles;

¹⁰⁰ Registered Land Act, Cap. 300 s, 143 (1), (5) (repealed), See decisions in *Obiero v. Oregu Op'yo & others* (High Court Civil Case No. 44 of 1970); *Gatimu Kinguru v. Muya Gathangi* [1976] KLR 265. Reports such as Njonjo Commission Report, p.82.

¹⁰¹ *Dina Management Limited vs. County Government of Mombasa & 5 Others* 2021 eKLR, Para 112

The report canvassed issues such as substantive breaches, such as allocation of land that had already been alienated or designated for a public utility/purpose to an individual or company¹⁰² and procedural breaches, such as lack of a letter of request for allocation submitted to the Commissioner of Lands and lack of Part Development Plan placed before surveys.¹⁰³

As the Supreme Court stated that the suit property was lucrative, the Ndungu report recommended that in the event land has been illegally allocated and developed, a proper balance between revocation and public interest must be put in place. In the event revocation of title is not feasible due to the development expenses, economic value, or public disruption, the options available to a third party (*bona fide purchaser for value*) include asking them to pay market value or granting a new, lawful title under amended legal provisions.¹⁰⁴ The third party has the right to bring legal action against the person who gave them the illegal title.¹⁰⁵ Nevertheless, the illegal title should remain inherently invalid, and the original allottees and colluding officials should be the targets of restitution or punishment.¹⁰⁶ It was the Commission's conclusion that titles tainted with irregularities should be revoked; however, where restoration to their original purpose is impractical, new lawful titles can be issued under reasonable terms to resolve the illegality.¹⁰⁷ If the *bona fide purchaser for value* loses property in land due to the defects emerging from the title, then such person should seek compensation from the person or persons responsible for the misrepresentations and/or misdeeds that led to a hollow title.¹⁰⁸ Under the Torrens system, once a

¹⁰² Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Ndung'u Report, Annexe Vol 1, June 2004) https://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf. p 52, n 2

¹⁰³ Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Ndung'u Report, Annexe Vol 1, June 2004) p. 54

¹⁰⁴ Joseph Kieyah and Casty G Mbae-Njoroge, *Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis* (KIPPRA Discussion Paper No 119, Kenya Institute for Public Policy Research and Analysis 2010) 11–12.

¹⁰⁵ Joseph Kieyah and Casty G Mbae-Njoroge, *Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis* (KIPPRA Discussion Paper No 119, Kenya Institute for Public Policy Research and Analysis 2010) 12–13.

¹⁰⁶ Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Ndung'u Report, Annexe Vol 1, June 2004) p. 63

¹⁰⁷ Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Ndung'u Report, Annexe Vol 1, June 2004) p. 64

¹⁰⁸ *Kenya National Highway Authority v Shalien Masood Mughal & 5 Others* [2017] KECA 465 (KLR), Civil Appeal No 327 of 2014, Court of Appeal at Nairobi, para 46 (Waki JA).

person is declared to be a *bona fide purchaser for value*, the government, as sole record keeper, bears the responsibility to compensate them.

V. The Post-Dina Management Jurisprudence

i. *The expanding Scope of Due diligence.*

In the *Torino Enterprise Ltd v AG case*,¹⁰⁹ the Supreme Court, in determining, among other things, whether the appellant was an innocent purchaser for value without notice, found that the appellant must have conducted a historical search to identify the previous owners of the parcel of land. The court placed a burden on land purchasers to conduct a physical site visit for verification of the land that they intend to buy. In the opinion of the Supreme Court, the appellants were supposed to have done a physical site visit and investigated the impression of the military installations on the suit premise, and therefore, due to its occupied status, the suit property must have sent a warning of ‘buyer beware’ to the appellant.¹¹⁰ From the preceding, land registry searches are not enough, and buyers should not ignore visible irregularities (e.g., existing occupation) when purchasing land.

Due diligence should therefore go beyond the documentary checks to include physical verification and inquiry into any visible occupation or use of the land e.g. visible possession by public authorities. Furthermore, the Supreme Court in *Torino’s case* held that the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter.¹¹¹

The Supreme Court cited *Dina’s* position in the case of *Fanikiwa Limited & 3 Others v Sirikwa Squatters Group and 17 Others* in affirming that financial institutions cannot be deemed innocent purchasers since they are lenders and not purchasers.¹¹² The financial institution utilised the titles as collateral to give substantial loans to parties who bought properties excised from the suit parcels.¹¹³ However, the reliability of titles provides banks and other financial entities with foundational assurance to confidently issue loans and offer mortgage products.

¹⁰⁹ *Torino Enterprises Limited v Hon Attorney General* Petition No 5 (E006) of 2022 eKLR

¹¹⁰ *Torino Enterprises Limited v Hon Attorney General* Petition No 5 (E006) of 2022 eKLR, Para 64

¹¹¹ *Torino Enterprises Limited v Attorney General* Petition 5 (E006) of 2022, eKLR para 61.

¹¹² *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105, eKLR

¹¹³ *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105, eKLR Para 132.

The Supreme Court furthermore extended the scope of due diligence in the case of *Janmohammed & another v District Land Registrar Uasin Gishu & 4 others*,¹¹⁴ where it cited the *Torino Enterprise case* and *Dina Management case* with approval, contending that in the event the title of the proprietor is challenged, it is not sufficient to merely present the title as proof of ownership. The proprietor is under an obligation to ensure that the acquisition of the said property is legal, formal, and free from encumbrance. The Supreme Court obliged the party alleging infringement to substantiate their claim to warrant constitutional protection. The decision also made a milestone in emphasising the shared responsibility of both parties to establish the legitimacy of their claims. Although this position suggests a reciprocal burden, the party whose title is under scrutiny still bears the primary burden. The Supreme Court, in the *Janmohammed case*, posited that it was unlikely that the root title of the property, by extension, the 2nd appellant's title, had been legally undermined in light of the evidence presented. Despite the appellant's criticism of the subdivision of Eldoret Municipality/Block 15/10, the appellant, in this instance, benefited from it and only asserted one subplot.¹¹⁵

Furthermore, *Harcharan Singh Sehmi & Another v. Tarabana Company Limited & 5 Others*,¹¹⁶ the Supreme Court ruled that a title obtained through an illegal or irregular process cannot form the basis of a valid legal estate. In this case, the original owners of the suit property had applied for the lease extension before its expiry; however, in the ensuing period, Rospatech Ltd acquired the property fraudulently and later sold it to the appellants, Tarabana Company Limited.¹¹⁷ The Court of Appeal determined the Appellant was a *bona fide purchaser* deserving of protection, as the title to the suit property, though acquired illegally, was acquired before the appellants came into the picture. In the opinion of the learned justices of the Court of Appeal, the doctrine of indefeasibility under Section 26 of the LRA protected the appellants since the respondent, in that matter, presented no evidence of the appellant's involvement in the illegality or irregular acquisition process.¹¹⁸ The Court of Appeal retained the appellant's title unassailable and held that they were an innocent purchaser for value. However, the Supreme Court in reversing the finding of the Court of Appeal's ruling stated that:

¹¹⁴ *Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another v District Land Registrar Uasin Gishu & 4 others* [2024] KESC 39 (eKLR) para 121.

¹¹⁵ *Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another v District Land Registrar Uasin Gishu & 4 others* [2024] KESC 39 (eKLR) para 121.

¹¹⁶ *Sehmi & another v Tarabana Company Ltd & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR)

¹¹⁷ *Sehmi & another v Tarabana Company Ltd & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) para 4-6

¹¹⁸ *Sehmi & another v Tarabana Company Ltd & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) para 24.

We hasten to add that such a transaction cannot attract the protection of equity because ‘the latter follows the law’. In this regard, two critical elements of the doctrine would be missing because, first, the purchaser must have purchased ‘a legal estate’, and secondly, such purchase must have been without ‘notice’. Since the holder of an illegally allocated title cannot confer a valid title upon a third party, there would be no ‘legal estate’ to be purchased in the first place. Similarly, the absence of ‘notice’ is in reference to the existence of ‘an equitable interest’ in the land and not ‘the incidence of illegality or irregularity of the title’ in question. Therefore, there can be no protectable ‘purchaser of an illegal title without notice of such illegality’. In other words, a purchaser will only be regarded as bona fide if he buys property in good faith without notice of any defect or claims against the title. So that if the title in question is illegal or obtained through unlawful means, the purchaser cannot claim protection even if he was not aware of the illegality.¹¹⁹

The Supreme Court noted that the element of innocence in the *bona fide purchaser for value* ‘connotes the exercise of diligence expected of any reasonable person and that the claimant must demonstrate that he acted diligently and conducted a reasonable inquiry into the status of the estate or land that he sought to purchase.’¹²⁰ The Supreme Court reaffirmed that the doctrine only applies when a purchaser acquires a legal estate, for value, and without notice of prior equitable interests. In the opinion of the apex court in *Sehmi’s case* a title obtained through an illegal or irregular process cannot form the basis of a valid legal estate.¹²¹ Therefore, from the foregoing, protection traditionally afforded to purchasers without notice is applicable only when the defect involves an equitable interest such as unregistered rights e.g. trusts or leases and not in the cases where there is an outright illegality.

The apex court in *Sehmi’s case* noted that due to shift of terminology from certificate of title being a ‘conclusive evidence’ ownership under Section 23 of the RTA (now repealed) to ‘*prima facie evidence* status’ under Section 26 of the LRA, it is no longer possible for a title holder to erect the certificate of title as a barrier to an inquiry into its legality or otherwise.¹²² However, while the Supreme Court noted a semantic shift in the evidentiary status of the certificate of title, this does not weaken the strength of registered title. The LRA still upholds the central Torrens principle by providing that registration vests absolute ownership in the proprietor.¹²³ Furthermore it affirms that the rights of a registered

¹¹⁹ *Sehmi & another v Tarabana Company Ltd & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) para 72

¹²⁰ *Sehmi & another v Tarabana Company Ltd & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) para 59.

¹²¹ *Sehmi & another v Tarabana Company Ltd & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) para 72

¹²² *Sehmi & another v Tarabana Company Ltd & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) para 69.

¹²³ Land Registration Act No 3 of 2012, s 24.

proprietor shall not be defeated unless the title was obtained through fraud, misrepresentation, or illegality to which the proprietor is proved to be a party.¹²⁴ Section 80(2) of the LRA provides that the register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it.¹²⁵

VI. Comparative Analysis

This comparative analysis section is fundamental in contextualising the approach that the jurisprudence from Kenyan courts has taken regarding the *bona fide purchaser for value* within the Torrens system. The selected countries, Uganda and Australia, provide instructive perspectives for various but mutually enhancing reasons. For example, both Kenya and Uganda inherited the Torrens system through British colonial influence, and consequently possess a comparable registration regime from both structural and statutory viewpoints. Conversely, Australia, as the originating country of the Torrens system, is essential to this analysis due to its well-developed jurisprudence, which has substantially influenced the doctrine of indefeasibility of title, fraud exceptions, and the rights of *bona fide purchasers for value*.

i. Uganda.

In Uganda, the doctrine of bona fide purchaser for value is embodied within the Registration of Titles Act, which renders protection to the purchasers and mortgagees who acquire the land in good faith without actual or constructive notice of defects in the seller's title.¹²⁶ The principle traces its pedigree from the Torrens system, which views register as the conclusive proof of ownership protecting the *bona fide purchasers* and mortgagees against adverse claims unless fraud can be proven.

The Supreme Court of Uganda, in the *Attorney General v Henley Property Developers Limited*,¹²⁷ upheld the lower courts' decisions that awarded the respondent compensation for financial losses incurred due to the cancellation of their land title. The cancellation was grounded on the fact that the SCOU

¹²⁴ Land Registration Act No 3 of 2012, s 25, 26(1).

¹²⁵ Land Registration Act No 3 of 2012, s 80(2).

¹²⁶ Registration of Titles Act 1924 (Ch 230), ss 59, 176.

¹²⁷ *Attorney General v Henley Property Developers Limited* (Civil Appeal 5 of 2023) [2024] UGSC 8 (12 January 2024).

(a third party) had earlier been granted a freehold title despite the respondent verifying the vendor's ownership through three different land registry searches. Following the acquisition, the respondent was considered a registered owner; however, subsequently, the Commissioner of Land Registration rescinded their certificate on grounds of error.¹²⁸ The Supreme Court, in upholding the decision of the lower courts, underscored the Torrens principles such as indefeasibility, registration, and assurance and reiterated that a certificate of title is conclusive evidence of ownership, which could only be defeated in the event fraud is established.¹²⁹ Importantly, the decision established that reliance on the accuracy of register information obligates the registrar to provide accurate particulars. The affected party has a right of action against the registrar in the event such reliance results in loss due to the registrar's error.¹³⁰

The sentiments of the Supreme Court in the *Henley Property Developers* case align with the foundational Torrens principles elucidated in *Kilama v Laker*,¹³¹ which laid great emphasis on the 'mirror,' 'curtain,' and 'insurance' doctrines of title registration. In this respect the register contains all the information about the title and therefore the historical search behind it to confirm that the title is valid is not necessary. If the Registrar of Titles makes a mistake regarding the correctness or validity of a title, compensation is provided for the loss of rights. In the same vein, the Supreme Court upheld the appellant's lease title in *Okello Okello v UNEB* after the lessor forfeited the prior lease held by the East African Examinations Board, the Respondent's predecessor in title.¹³² In this case it was decided that the appellant's title was protected by section 56 (now 59) of the RTA75 because there was no proof of fraud on his behalf. This sentiment was reaffirmed by Wambuzi CJ's (as he then was) in the case of *Kampala Bottlers Ltd v Damanico (U) Ltd* that held;¹³³

as already indicated in this judgment, fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such activity . . . is generally accepted that fraud

¹²⁸ *Attorney General v Henley Property Developers Limited* (Civil Appeal 5 of 2023) [2024] UGSC 8 (12 January 2024). P, 2, 3

¹²⁹ *Attorney General v Henley Property Developers Limited* (Civil Appeal 5 of 2023) [2024] UGSC 8 (12 January 2024) (Judgment of Mwendha JSC).

¹³⁰ *Attorney General v Henley Property Developers Limited* (Civil Appeal 5 of 2023) [2024] UGSC 8 (12 January 2024). P 9, 10, 11, 12

¹³¹ *Kilama Tonny v Laker Caroline Onekalit and Others* (Civil Appeal 21 of 2017) [2020] UGHC Gulu (27 February 2020).

¹³² *J.L. Okello v Uganda National Examination Board* (Civil Appeal 12 of 1987) [1988] UGSC 1 (22 December 1988).

¹³³ Cited in *Kampala Bottlers Ltd v Damanico (U) Ltd* (Civil Appeal No 2292) 1995 UGHC 34 (12 January 1995) Wambuzi CJ page 11

must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.

While the *Henley Property Developers* precedent is a milestone in reaffirming the statutory protections under the Registration of Titles Act, it has ignited a debate on the potential of undervaluing the significance of physical land inspections in Uganda. For instance, in the prior jurisprudence, such as *Sir John Bageire v Ausi Matovu*,¹³⁴ the court found that ‘lands are not vegetables, which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only of the land but also of the owner before purchase.’ The case underscored the significance of physical searches to determine the land’s actual status and occupancy, which goes beyond the registry or the land office documentation. However the application of the Torrens system and its fundamental principles is apparent in Uganda.

ii. Australia

The Australian Torrens system introduced a new framework governing the creation and regulation of interests in land, which fundamentally contrasts with its predecessor, the Deed Registration System (DRS).¹³⁵ The DRS system offered a centralised record of land transactions affecting the old title; however, the Torrens system served as conclusive evidence of ownership of property in land, offering both records and the interest created.¹³⁶ There is a distinction between the law governing the Torrens land title and the old land title issued by the crown before introducing the Torrens system and the conversion of titles. The Torrens system regime governs Torrens titles, and despite efforts to convert all old titles to the Torrens regime, there are still pockets of old titles in states such as Victoria and New South Wales.¹³⁷ The English concept, which dictates that a ‘good root title’ be done by searching for at least 60 years, is very salient in mitigating the time-consuming tasks of tracing all prior transactions to certify ownership linked to the deed system.¹³⁸

¹³⁴ *Sir John Bageire v Ausi Matovu* (CACA 7 of 1996) [1996] UGCA, 26 (Okello J.) p.8

¹³⁵ Chris Davies, *The Property Law Guidebook* (2nd edn, Oxford University Press, Melbourne 2015) 82–83.

¹³⁶ Samantha Hepburn, *Australian Property Law: Cases, Materials and Analysis* (6th edn, 2023) 601

¹³⁷ John P Bryson QC, *The History of Property Law: Tutorial on Old System Title* (13 June 2017) https://nswlrs.com.au/__data/assets/pdf_file/0019/219758/HistPropertyLawOSTitleRev5_6_2017.pdf accessed 11 July 2025.

¹³⁸ Samantha Hepburn, *Australian Property Law: Cases, Materials and Analysis* (6th edn, LexisNexis Butterworths 2023) 602.

In states such as Queensland, the milestones of legislative provisions governing the Torrens system have simplified the conversion process, and all the old titles have been successfully converted. In Queensland, the Property Law Act 1974 permitted compulsory conversion and transition to the Torrens regime.¹³⁹ However, in Victoria, conversion into the Torrens system was brought about following the deactivation of the DRS in 1999.¹⁴⁰ The transition process in Victoria is facilitated at a reasonable speed through the Transfer of Land (Single Register) Act 1998. In Australia, the indefeasibility of title is not absolute and is subject to some exceptions, which vary across different jurisdictions. These common limits include, but are not limited to fraud, *in personam* rights, short-term leases, and easements.¹⁴¹

The Australian case of *Mercantile Credits v Shell Co of Australia* addressed the question of whether all terms in a registered document would become indefeasible upon registration.¹⁴² The ruling there stated that if a term is closely related to the estate or interest, meaning it is a part of the interest, then the indefeasibility of the registered instrument will likewise extend to the term. As a result, the registered instrument's indefeasibility will last the entire duration. However, in the case of *Karacomiakis v BigCountry Pty Ltd*,¹⁴³ the court held that the covenant to pay rent is an essential component of the interest created at the time of registration. This means that if the term is a personal term that has no bearing on the estate or interest (such as a covenant of guarantee), the indefeasibility will not extend. Since *Frazer v Walker*,¹⁴⁴ the theory of immediate indefeasibility has been embraced (that is, the registered proprietor, on registration of the dealing transferring title to him or her of an interest in the land, has a guaranteed title which is effective even though there may have been deficiencies in the dealing).¹⁴⁵ Torrens' system traces its pedigree from Australia where the immediate indefeasibility standards shields bona fide purchasers from the initial claims even if the title was fraudulent.

¹³⁹ Property Law Act 1974 (Qld) ss 250–254A.

¹⁴⁰ Samantha Hepburn, *Australian Property Law: Cases, Materials and Analysis* (6th edn, 2023) 603

¹⁴¹ Chris Davies, *The Property Law Guidebook* (2nd edn, Oxford University Press 2015). 86

¹⁴² *Mercantile Credits v Shell Co of Australia* (1984) 10 BPR 18,235 (HCA) (Australia) (reported).

¹⁴³ *Karacomiakis v BigCountry Pty Ltd* (1976) 136 CLR 326 (HCA) (Australia) (reported).

¹⁴⁴ *Frazer v Walker* (1967) AC 569 (PC)

¹⁴⁵ *Frazer v Walker* [1967] 1 AC 569 (PC) 73, cited in P J Goldsworthy, 'Indefeasibility of Title' (1968) 6 *Sydney Law Review* 73

VII. Recommendations and Conclusion

i. Recommendations

This section offers recommendations that are vital in streamlining both legal and practical realisation of the doctrine of indefeasibility in Kenya. The recommendations are geared towards strengthening the legal framework and achieving coherence in regards to the interpretation of the LRA and article 40 of the Constitution.

a. Clarification of the Doctrine of Innocent Purchasers

The Supreme Court, in the *Dina management case*, settled the conundrum regarding the position of *bona fide purchaser for value* with finality, underscoring that one must investigate the root to ascertain the validity of the title. Although the decision is contentious, as it challenges the Torrens system, which is premised on the sanctity of title, it clarifies earlier conflicting Court of Appeal rulings that had created some ambiguity regarding their differing stances on bona fide purchasers. The decision in the *Dina management case* aligns with the *Arthi Highways* jurisprudence, contending that if there was no valid title during the initial allocation, then titles acquired by subsequent purchasers are also null and void.

There should be clarification on the fate of *bona fide purchasers* and how they need to be protected, particularly delineating the types of title defects specifically with regard to the public land. To prevent uncertainty and potential discrimination among the victims of irregular land transactions, the Court needs to comprehensively analyse the *bona fide purchaser* doctrine and the threshold of searches. The Supreme Court has imposed an unreasonable burden on the purchasers regarding the search procedure and the due diligence procedure they should follow. The government and other stakeholders should establish clear rules and guidelines to ensure prospective buyers conduct land searches sufficiently without imposing undue expectations on them. The *post-Dina* jurisprudence has placed an undue burden on the bona fide purchaser and has affirmed that the doctrine does not apply to an irregular or illegal title to public land purchased by a third party.

In a recent milestone addressing rampant land grabbing, the NLC, in line with its duty to protect the public land, seeks to introduce a Certificate of Reservation. This document, in contrast to Certificates of Title or Lease, ensures proper administration in line with Article 62(5) of the Constitution by particularly protecting unalienated public land. While this is a great proposal for curbing the

grabbing of public land, it must be premised on clear legal frameworks, inter-agency cooperation, and public participation.¹⁴⁶

b. Reform of Land Registration Practice

In line with the constitutional mandate outlined in Article 35 on the right to access information,¹⁴⁷ Section 10 of the LRA emphasises the electronic dissemination of Land Register information.¹⁴⁸ The government is, therefore, to take measures to safeguard accurate land records, both in paper and digital formats, to facilitate proper due diligence and protect investors' interests. Furthermore, Section 9 of the Land Registration Act of 2012 mandates that land registrars maintain land registers and relevant documents securely, ensuring accessibility and reliability, which now includes electronic formats. Section 44(3A) paves the way for electronic document execution, aligning legal practices with contemporary technology.¹⁴⁹ Moreover, the recent amendments to the Land Regulations in 2020 also incorporate electronic mechanisms to manage land inventories, issue licenses, process orders, convert tenure, and facilitate adjustments in land use.

Ardhi Sasa's success hinges on finding viable solutions to navigate diverse legal regimes and, therefore, necessitates the efforts to harmonise and reconcile various legal regimes such as freehold, leasehold, and absolute tenure under GLA and RTA statutes to prevent digitisation hurdles.¹⁵⁰ The author advocates for implementing an online cadastre map access and digitalised land registration system that will improve transparency and lower fraud. Furthermore, ardhhi sasa should provide for the comprehensive digitization of historical records such as Original letters of allotment, Part Development Plans (PDPs) and their approval stamps, survey records (mutation forms, survey plans linked to the original allocation), grant documents (e.g., Certificates of Title under GLA, RLA, ITPA) and gazette notices related to land alienation or acquisition. The root title pathways should also enable visual and interactive chains from the current owner back to the initial owner of land, links for the document access, process verification checklist to confirm whether legal requirement at the time were followed and automated flags which should provide for the knowledge base

¹⁴⁶ Collins Omulo 'NLC's new plan to curb grabbing of public land' (Nation, 12 August 2024) <https://nation.africa/kenya/business/nlc-s-new-plan-to-curb-grabbing-of-public-land-4723180> accessed 13 November 2024.

¹⁴⁷ The Constitution of Kenya, 2010, s 35.

¹⁴⁸ Ardhisasa, *Ardhisasa Online Platform* <https://ardhisasa.lands.go.ke/> (accessed 25 th August 2024)

¹⁴⁹ *Land Registration Act 2012*, s 9.

¹⁵⁰ Ardhisasa, *Ardhisasa Online Platform* <https://ardhisasa.lands.go.ke/>

of the past land laws. However this strategy can be achieved through Ministry of lands' departmental integration with Kenya Survey records, Physical Planning records, National Land Commission (NLC) Records and Court records. The paper proposes increasing the security process by departmental integration and digital fingerprinting of transferors and transferees. Moreover, offering online registration process tracking will increase efficiency.

For instance, Ardhi Sasa is crucial towards the realisation of the mirror and curtain principle; however, indemnity is still at stake. According to the LRA, the government should compensate an individual who suffers damage due to rectification of the register or any error in a copy of or extract from the register.¹⁵¹ In the opinion of Wilson Mwihuri, despite potential indemnity, government's disinterest in settling court decrees poses challenges. Furthermore, the delays in court proceedings and decree settlements may deter investors, adversely impacting the country's economy.¹⁵²

Countries such as Australia have implemented electronic land registration systems.¹⁵³ By moving to electronic registration, conveyancing becomes faster and more efficient, costs are more accurate, and are reduced.¹⁵⁴ However, even the digital sanctuaries of land registries are a double-edged sword since they are not immune from compromise. It is high time for the land registry officials to be custodians of justice and be held accountable for their deeds. As state agents, the government should be ready to compensate *bona fide purchasers for value* as betrayed victims of trust under the presumption of legality. This milestone will uphold the integrity demanded by Chapter 6 of the Kenyan Constitution and, furthermore, be a mechanism to safeguard the integrity of land records.

Furthermore, the duty to examine the title's history, spanning from its initial allocation to its present status, proves daunting due to the precarious state of land records in Kenya and the ongoing digitization process, which complicates the retrieval of historical property documents. As part of the conversion process, titles that were irregularly acquired and registered in the old system are being

¹⁵¹ *Land Registration Act 2012, s 81 (1) (a) (b)*.

¹⁵² Wilson Mwihuri, 'The Illusionary Right to Protection of Property Under Article 40 of the Constitution: An Essay on Recent Jurisprudence Regarding Indefeasibility of Title in Kenya' [2023] *The Law Society of Kenya Journal* Vol. 17, 34

¹⁵³ Low 'Opportunities for Fraud in an Electronic Land Registration System: Fact or Fiction' 2006 13 *eLaw Journal* 225. Tenure Security Reform and Electronic Registration: Exploring Insights from English Law' 2011 14 *Potchefstroom Electronic LJ* 85; and Peterson 'Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory' 2011 53 *William & Mary LR* 111.

¹⁵⁴ Low 'Opportunities for Fraud in an Electronic Land Registration System: Fact or Fiction' 2006 13 *eLaw Journal* 226.

eliminated. While this is an important milestone, the interest of the bona fide purchasers for value without notice should be considered.

c. Judicial Recognition of Commissions of Inquiry Reports

The courts should acknowledge the Public Inquiry Reports on the history of land grabbing in Kenya. Recognition of history is essential to restitution and finding a solution to a long dispute involving land. For instance, the conundrum surrounding the application of the doctrine of indefeasibility of titles in Kenya can be traced back to the accession of public land and subsequent conversion to private land, which has been entangled in a web of corruption, abuse of power and greed, as documented in the Ndungu report.

The Ndung'u Report made several recommendations for titles to be investigated and revoked, but the actual numbers given in Volume I of Annexes are relatively small. For example, the report proposed revoking 105 plots for the Nairobi bypass and investigating 250 titles allocated for the bypass, but they are missing from the Ministry of Lands files.¹⁵⁵ However, the court decisions, such as *the Mureithi*¹⁵⁶ and the *Saitoti* Cases,¹⁵⁷ have underscored the legal challenges in implementing recommendations from the Commissions of Inquiry. In the *Mureithi case*,¹⁵⁸ the court held that the state had no statutory duty whatsoever to implement the recommendations of the Ndung'u Report. In this instance, the court emphasised the doctrine of separation of powers and discretion of the President in responding to such reports and had to refrain from intervening in policy matters usually handled by the Executive and Parliament. However, the courts should look at these reports and other vital policy documents while making decisions.

¹⁵⁵ Joseph Kieyah and Casty G Mbae-Njoroge, *Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis* (KIPPRA Discussion Paper No 119, Kenya Institute for Public Policy Research and Analysis 2010) available at <<https://searchworks.stanford.edu/view/10325107>> accessed 21 March 2025

¹⁵⁶ *Mureithi & 2 others (All suing for and on behalf of Mbari-Ya Murathimi Clan) v Attorney General & 5 others* [2006] KEHC 3488 (KLR).

¹⁵⁷ *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex Parte Saitoti* [2006] eKLR.

¹⁵⁸ *Mureithi & 2 others (All suing for and on behalf of Mbari-Ya Murathimi Clan) v Attorney General & 5 others* (Miscellaneous Civil Application 158 of 2005) [2006] KEHC 3488 (KLR) (Civ) (2 June 2006) [84]–[86].

ii. Conclusion

The Supreme Court in *the Dina Management Case* held that innocent buyers cannot rely on the principle of indefeasibility of title if the initial allocation of the land was illegal or unprocedural, and that buyers must investigate the root title of the property and ascertain whether the previous purchasers obtained a good title to the property. The recent Supreme Court decisions conclusively settle the longstanding issue of the bona fide purchaser. However, the landmark rulings arguably unsettle the Torrens system, which rests on the register's integrity captured in section 26 of the LRA. This paper, therefore, opines that digitizing land records for verification through National Land Information Systems can ensure the integrity of the title. This article concludes with sentiments of Posner on the role of academics as reiterated by Ojwang and Wangeci in 'Judicial Landmarks in Modern Governance' that:

*. . . academics tackle questions they think they can answer – in other words they choose their targets – while judges perforce make decisions in cases that come to them randomly. The paramount judicial duty is to decide . . .*¹⁵⁹

¹⁵⁹ Posner R, Divergent paths: The academy and the judiciary, 22., Jackton B Ojwang and Loise Wangeci, 'Judicial Landmarks in Modern Governance: The Contemporary Constitution in a Common Law Medium' (2022) 6 *Strathmore LJ* 1. 4