

Real Estate Law

ALERT

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KENYA

Beyond the shield of indefeasibility of title: The effect of illegal and irregular allocation of public land

Indefeasibility of title is the cornerstone of land registration. Despite its importance, the principle is not absolute – especially where due and legal process was not followed in the issuance of a title. This was affirmed by the Supreme Court of Kenya in *Dina Management Limited v County Government of Mombasa and Five Others* (Supreme Court Petition No. 8 (E010) of 2021) by holding that the indefeasibility of a title is not a sufficient ground to sanction irregularities and illegalities in the allocation of public land.

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The judgment handed down by the Supreme Court of Appeal (SCA) on 15 June 2023 in *Le Roux v Zietsman and Another (330/2022)* [2023] ZASCA 102 is among the recent cases that focused on latent defects and whether a seller is liable for fraudulent non-disclosure and misrepresentation of defects in a property.

The *Zietsman* case is based on the purchase of a property by Mr and Mrs Zietsman (the respondents) from Mr Le Roux (the appellant) in July 2011. The respondents intended to use the property for a guesthouse.

The respondents had noticed signs of leaks in the guesthouse before purchasing the property and queried the leaks with the appellant. The appellant, however, assured the respondents that the roof had been repaired and no longer leaked.

Three months after the transfer of the property to the respondents, a heavy storm occurred. This caused the roof to leak severely, damaging rooms and

furniture. The respondents repaired the leaks to the best of their ability, as funds were limited, but despite such attempts the roof still leaked after any rainfall.

Civil engineer's investigation

In 2013 the respondents appointed a civil engineer to investigate the roof leak. The civil engineer detected that the likelihood of the roof having leaked since the property was constructed was high. He also noted that there was evidence showing previous attempts to seal off the roof and discovered new cracked ridge tile evidence, which indicated that the leakage had deteriorated even further over time. There was also evidence that the tiles were damaged during maintenance and repainting of the roof. The civil engineer concluded his findings that *"any claim by the previous owner that no problems with roof leak were experienced in the past would simply be impossible and untruthful"*.



Fraudulent non-disclosure and misrepresentation of property defects in sale render seller liable

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In 2014, the maintenance became unaffordable, and the respondents secured a loan for additional repair work.

The respondents instituted action in the Regional Court in Tzaneen, Limpopo for damages and loss of income. The Regional Court ruled in favour of the respondents. The appellant appealed to the High Court. The High Court upheld the judgment of the Regional Court, and the appeal was dismissed with costs.

The appellant then appealed to the SCA. The court found that the main issue was *"whether the appellant, knowing the purpose for which the property was to be used, and having knowledge of the latent defect in the property (the leaking roof), fraudulently failed to disclose same to the respondents before the sale with the aim to induce the sale"*.

The SCA upheld the decision of the Regional Court and High Court and concluded that the appellant's actions amounted to fraudulent non-disclosure and fraudulent misrepresentation to persuade the respondents to purchase the property.

In terms of the Property Practitioners Act 22 of 2019 (which came into operation on 1 February 2022), it is now mandatory for sellers to disclose defects in a property. Non-disclosure of defects known to the seller could amount to unnecessary financial and legal penalties for the seller.

It is therefore vitally important, and the law requires, that a seller disclose all known defects to the purchaser to prevent any future disputes, as it appears clear from the above that even the highest courts may well favour a purchaser's claim if enough evidence is shown.

Natasha Fletcher and Zahra Karolia



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Background

In the *Dina* case, the County Government of Mombasa entered a beachfront property registered to Dina Management Limited (Dina) and demolished the perimeter wall as an enforcement action to create a road to the beach. Dina claimed ownership of the beachfront property that it had purchased from Bawazir & Co Ltd, which had purchased the property from the former President of Kenya, H. E. Daniel T Arap Moi, the first allottee of the property. Dina consequently filed a suit in the Environment and Land Court (ELC) seeking orders to assert its ownership over the property on the ground that the property was previously unalienated government land which was lawfully alienated as private property. The ELC held that the alienation of the property was unprocedural and unlawful.

Aggrieved by the ELC's judgment, Dina subsequently appealed to the Supreme Court. Among the issues for determination by the Supreme Court included whether the interpretation

of a *bona fide* purchaser amounted to unjustifiable and unreasonable limitation of the right to property under the Constitution.

Who is a *bona fide* purchaser?

The Supreme Court outlined the elements of a *bona fide* purchaser for value, which include:

- the acquisition of a valid and legal title;
- conducting the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title; and
- payment of valuable consideration for the purchase of the suit property.

The Supreme Court further held that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal, and free from any encumbrance.

The Supreme Court concluded that the disputed property was originally designated as an open space and was therefore rendered a public utility and could not be described as unalienated public land. It was therefore not available for alienation to former President Moi. The court further held that irregularities and illegalities in the allocation of public land cannot be sanctioned based on indefeasibility of title.

Can the right to property be limited?

The court emphasised that although Article 40 of the Constitution grants the right to property, such rights are limited when the property is found to have been unlawfully acquired. Since the first allocation was irregularly obtained, former President Moi had no valid legal interest to pass it to Bawazir & Co Ltd, who in turn could not pass it to Dina. Dina's ownership of the property could not be protected under Article 40. Consequently, the doctrine of a *bona fide* purchaser did not apply.

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