

TALENTED PERSONNEL, TIRELESS PREPARATION & PERFECT EXECUTION

NJAGA & CO. ADVOCATES

A Comprehensive Guide to **Due Diligence** in Property Transactions in **Kenya**





Despite its ubiquitous reference in Kenyan property transactions, due diligence remains substantially neglected in its practical application. Due diligence in property transactions refers to the process of conducting a comprehensive investigation and survey of a property to ascertain the identity of the proprietors of the land, the actual size of the land, whether the land is encumbered, whether the property exists, as well as whether or not the ownership documents are in order before entering into a purchase agreement.

Even though a seller should, in the ordinary course of business, conduct their affairs with a duty of care, the onus to be diligent is placed on the buyer of the property before entering into an agreement. This is buttressed by the doctrine of Caveat Emptor, a Latin phrase translated loosely as ‘buyer beware,’ that

assigns the onus upon the purchaser to conduct a thorough scrutiny of a property prior to completing a transaction.

For many purchasers, understanding land titles can be challenging. To ascertain the authenticity of land titles, it is advisable to engage the services of a licensed Advocate of the High Court of Kenya (conduct the search at the [Law Society of Kenya](#)). Such professionals can facilitate the verification of land ownership through registry searches and can also advise on numerous other processes.

It is mandatory for one to exhaust all available processes and methods of verification when undertaking due diligence. The ensuing discussion is a step-by-step guide for what elements need to be investigated before closing out an agreement for property transfer.

1. OFFICIAL SEARCH AT THE LAND REGISTRY



The first and most significant step involves conducting a search at the Land Registry closest to where the land is sold to confirm whether the seller (vendor) is the actual proprietor of the land. The Ministry of Lands has all the [contact details for Land Registries](#). A land search is the process of retrieving information about a particular piece of land from the relevant authorities. This information includes details about ownership, size, boundaries, encumbrances, and any other pertinent details that may affect the property.

a) To conduct a manual search:

Visit the nearest land registry where the land is located

Carry:

- i) Title deed
- ii) Seller's KRA PIN form
- iii) Seller's National ID
- iv) Request for a Land Search Form (form RL 26)
- v) Attach a copy of the land title, National ID and KRA PIN
- vi) Submit the form and wait as directed by registry officials.

The results will typically be out in a matter of hours or days in the form of a search report.

b) To conduct a land search online,

The buyer needs to carry out the following steps:

- a) Log in to the eCitizen portal and click on the Ministry of Lands and Housing link.
- b) Select land search options and key in the title deed number.
- c) Fill in the online land search form for Kenya and upload the required documents.
- d) Confirm whether the details are correct and click "submit" to proceed to the next step.
- e) Pay the applicable fees online and obtain an e-slip as proof of payment.
- f) Collect the search report from the [eCitizen portal](#) or the land registry. The report will contain crucial information about the land, such as ownership, encumbrances, and other relevant data.

Notably, for properties held under a lease, the search should disclose who the head lessor is and what the terms of the lease are.

Currently, the Ministry of Lands is implementing the digitisation of land registry records and moving to an application called [ArdhiSasa](#). The results will come out immediately once the property has been added to the system and is verified by the Ministry of Lands.

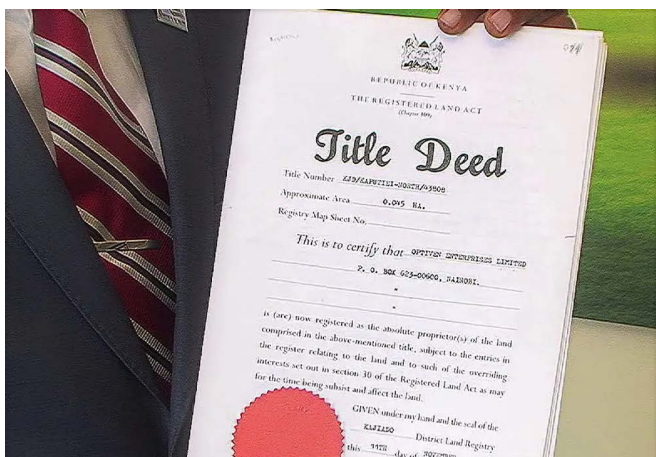
2. GREEN CARD VERIFICATION



A green card search is a more thorough search that one may elect to conduct. This is because fraudsters have, at times, managed to collude with unscrupulous registry officials to generate fraudulent search reports. The green card is the green leaf of a manila card that sits at land registries. Being a reference document, the information recorded therein must be the same as the information given on any document relating to land.

The green card holds all the original records of all transactions relating to a piece of land. It is what is used to obtain a title deed. A title deed has to match the details written on the card. Notably, a new ownership document is issued when land is subdivided; therefore, a new green card must be opened for it, and any activity conducted that affects your ownership of the land is recorded therein. Typically, the green-card search is obtained after the normal search.

3. REVIEW CAVEATS AND OTHER RESTRICTIONS ON THE TITLE



It is worth noting that where a search reveals a caveat or encumbrance, the purchaser should discover what is the nature of the caveat or encumbrance. The purchaser should then request that the potential restrictions and caveats on the seller's property be lawfully removed before the completion of the purchase.

Prospective purchasers should, nonetheless, be aware that certain interests, while unregistered, enjoy legal protection and impose obligations on the property owner as per the law. These interests are called overriding interests. They may be in the form of rights of way, rights of water, as well as any other rights provided under any written law. For instance, Sections 28 and 93(3) of the [Land Registration Act](#), as read together with Section 12(5) of the [Matrimonial Property Act](#), require spousal consent. These provisions require that the spouse of the transacting spouse consents to charge or transfer land or a dwelling house which that other spouse holds in their individual name. This consent is typically given by way of an Affidavit.

A routine search may not reveal such interests, but a comprehensive due diligence process would uncover them.

4. PHYSICAL SITE VISIT AND SURVEY MAP



Once you are satisfied with the search results as well as details in the green card corresponding with the Title, a site visit is recommended. A site visit ensures that the land being purchased indeed exists. In addition, it is crucial to ascertain the accurate size of the property. To authenticate the acreage, potential purchasers have the opportunity to enlist the services of an impartial surveyor. This precautionary measure guarantees alignment between the stated land

size and the seller's assertions.

Employing a proficient **surveyor** for conducting a land survey is indispensable. This survey ought to validate the land's boundaries and pinpoint any encroachments or boundary disputes. It is paramount that the survey adheres rigorously to the stipulations outlined in the [Survey Act \(Cap. 299\) of Kenya](#). Survey maps serve as invaluable tools in delineating the boundaries of a piece of land. They can be obtained from the Ministry of Lands upon request or purchased directly from a surveyor.

Upon obtaining the survey maps, it is prudent to join the surveyor and the seller during a visit to the property to delineate the boundaries and beacons and ensure they correspond with those on the registered index map. This proactive measure serves to preemptively address any potential disputes that may arise during the course of the sale process. Critically, the delineation of the land's position on the survey map will determine the necessity for conducting additional inquiries with the following governmental entities:

- (a) [KENHA](#) or [KURA](#): for verification regarding whether the land falls within a designated road reserve;
- (b) [NEMA](#): to ascertain whether the land is situated within a riparian reserve or forest reserve;
- (c) [Kenya Railways Authority](#): to confirm whether the land is located within a railway reserve.

Additionally, it is recommended to consult with neighbouring residents and local administrative authorities to gather insights regarding the property. They may possess knowledge regarding undocumented family disputes or legal cases associated with the property. While the existence of such disputes does not necessarily preclude the purchase of the property, it is prudent to ensure that any

ongoing disputes have a likelihood of resolution and that the title can be cleared before proceeding with the transaction.

5. COUNTY GOVERNMENT LAND RATES AND RENT



Different parcels of land in different counties across Kenya are subject to land rating. It is advisable to visit the closest County Government land registry office with a copy of the title and an up-to-date official search to first verify whether the seller has settled all outstanding land rates. It is critical that the existing land rates and land rent (for leasehold tenure) are fully settled. Secondly, the County registry is also important in order to determine the approved land use regulations. It is essential to comprehend the zoning regulations and building restrictions applicable to the land. For instance, properties earmarked for residential purposes cannot be utilized for commercial endeavors, and conversely. Hence, if the intended use deviates from the designated zoning, an application for a change in land use becomes necessary.

Upon payment of the requisite fees, the county government registry will furnish the buyer with the following details concerning the land:

- a) confirmation of whether land rates have been settled and are current
- b) identification of the registered "user" of the land.

Thereafter, request clearance certificates from the County Government to confirm that all financial obligations have been duly settled.

6.A CURSORY LOOK THROUGH THE NDUNG'U REPORT



The Ndung'u Report, officially titled the "[Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, June 2004](#)," identifies numerous properties whose ownership is subject to contestation. Additionally, the National Land Commission issues notices disclosing properties with disputed titles or subject to challenge. Prospective purchasers are advised to enlist the services of qualified professionals, such as advocates, capable of thoroughly examining these databases to mitigate the risk of purchasing properties listed in the Ndung'u Report.

7. VERIFICATION OF THE SELLER'S IDENTITY



To avoid becoming a victim of deceit by an untrustworthy seller posing as a legitimate owner, it is crucial to conduct a thorough

investigation into the seller's background and authenticate their identification documents.

If the seller is an individual, this inquiry should be directed to the [National Registration Bureau](#); for a company, it should be conducted at the [Company Registry](#); and for a Sacco, inquiries should be made at the [Sacco Societies Regulatory Authority \(SASRA\)](#). It is important to note, however, that access to these registries is restricted to members of the public, necessitating the engagement of a legal representative, such as an Advocate, to procure the necessary information on your behalf.

Courts of law have also pronounced themselves on matters land transactions and due diligence.

THE SUPREME COURT POSITION



In the past, Kenya functioned under the Torrens System, wherein there was no necessity to delve into the background of land transactions beyond the land title itself. This was because it was presumed that land records accurately represented the respective land parcels. This stance was exemplified in the case of [David Peterson Kiengo and 2 others v Kariuki Thuo](#), wherein it was determined that a purchaser was not obligated to undertake any further investigation beyond conducting a search at the official register to ascertain land ownership.

However, the [Supreme Court of Kenya](#)

recently pronounced itself on this matter. In the case of [Dina Management Limited v County Government of Mombasa & 5 others \(2023\)](#), the County Government of Mombasa demolished the perimeter wall of a beachfront property owned by Dina Management Limited (Dina) to create a road to the beach. Dina claimed ownership of the property, which it had purchased from Bawazir & Co Ltd, who in turn had acquired it from the former President of Kenya, H. E. Daniel T Arap Moi, the initial allottee. Dina filed a lawsuit in the Environment and Land Court seeking to assert its ownership over the property, arguing that it was previously unalienated government land lawfully converted into private property.

[The Environment and Land Court](#) ruled that the property's alienation was unprocedural and unlawful. Dina appealed this decision to the Supreme Court. [The Supreme Court](#) upheld the decisions previously made by the Environment and Land Court as well as the Court of Appeal. The apex court determined that the actions taken by Dina Management Limited in regard to the beach property were unlawful and unprocedural as they obstructed public access to the beach. This decision sets an important precedent in relation to due diligence in property transactions.

The Supreme Court averred that the initial allocation and issuance of the beach property title to former president Daniel Arap Moi was conducted in an irregular manner. As a result, subsequent purchasers, including Dina Management Limited, did not obtain a valid legal interest in the property. The court emphasised that bona fide purchasers bear the responsibility of verifying the validity and legality of the property titles they acquire. This is because an individual cannot vend what they do not possess. Thus, if I lack ownership of a property, I am precluded from its sale, and any subsequent purchaser cannot assert ownership post-acquisition. Any party purporting ownership subsequent to such a transaction may only be eligible for damages upon

successful litigation against the purported seller.

Prospective buyers are presently confronted with the imperative of executing comprehensive and meticulous due diligence procedures before finalising land acquisitions. The strategies outlined above to authenticate the validity of land titles such as customary searches conducted at the land registry, requisitions for allotment letters, on-site inspections, and procurement of copies of the green card among others are useful. This position seeks to protect those who are yet to buy land, without regard for those who have already made investments believing that a search was sufficient due diligence.

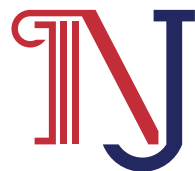
In addition, the Supreme Court also ruled on another contentious issue after the Dina case. On September 22, 2023, the Supreme Court issued a new ruling that could potentially disrupt the land acquisition process for property investors in Kenya even more. In [Torino Enterprises Limited v Attorney General \(Petition 5 \(E006\) of 2022\) \[2023\]](#), the Court averred that a letter of allotment, even when perfected, does not inherently grant transferable title to the allottee until the purchasers are officially registered as land proprietors following the finalisation of the allotment letter. Furthermore, the Court imposed an obligation on land purchasers to conduct a physical site inspection to verify the land they intend to purchase.

CONCLUSION

Due diligence should always be conducted at the outset of the transaction, not during or after. It is essential to allocate sufficient time and effort to perform thorough due diligence. Upon successful completion of the aforementioned steps outlined and confirmation of a clean transaction, the purchaser can proceed with confidence. It is advisable to exercise caution rather than hastily entering into a transaction and potentially encountering losses later on.



SCAN ME



NJAGA & CO. ADVOCATES

P : +254 701 63 55 03

w : www.njagaadvocates.com

E : info@njagaadvocates.com

njagaadvocates@gmail.com

Westlands Commercial Center,
Block D (Old Block) 2nd Floor, Suite 2,
Ring Road, Parklands