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Securing Your Dream Property: A Guide to Due Diligence in Conveyancing

The allure of owning property, whether a cozy home or a lucrative investment, is undeniable. However, the journey to holding those coveted title deeds requires more than just a signed contract and a transfer of funds. It demands a meticulous process known as **due diligence** – a comprehensive investigation to ensure the legality and security of the title you are about to acquire. Think of it as your shield against potential pitfalls that could cloud your ownership experience.

In essence, due diligence in conveyancing means going beyond the surface of the title document. It's about delving into the history of the property, understanding any existing claims or encumbrances, and verifying the seller's right to transfer ownership. Simply receiving the instrument of title is not enough; you must actively seek assurance that your investment rests on solid legal ground.

Here's a comprehensive roadmap to navigate the crucial steps involved in ensuring you obtain a good and unencumbered title:

1. Unearthing the Roots: Investigating the Title's Foundation

Imagine a majestic tree. Its strength and stability depend on its roots. Similarly, the validity of a property title hinges on its origin. If the root title – the initial acquisition of the land – is challenged, the current instrument of title alone won't suffice. As a buyer, you (or your legal representative) must diligently trace the title back to its source, proving that each transfer in the chain of ownership was legal, formal, and free from any hidden burdens. This becomes particularly critical when whispers of irregular or unlawful initial acquisition arise.

2. Proceed with Caution: Especially for Prime Properties

The glint of gold often attracts the most scrutiny. Similarly, highly desirable properties, such as those boasting prime beach access or lucrative development potential, warrant an extra layer of caution. The more attractive the property, the more rigorous your due diligence should be. Leave no stone unturned in your quest for clarity.

3. Seeking Official Confirmation: Verifying with the Registry

Think of the government land registry as the official record keeper of property ownership. A crucial step in your due diligence is to directly engage with this registry. Seek confirmation that a

valid title, capable of being transferred to you, genuinely exists. This official verification provides a strong layer of security.

4. Obtaining Necessary Permissions: Ensuring Smooth Transfer

Just as you need the right keys to open a door, certain transactions require specific consents to proceed smoothly. These might include the consent to transfer from the relevant authorities, the head lessor (if the property is leasehold), or any existing charge holders if the transfer is subject to a mortgage or other encumbrance. Securing these consents beforehand prevents potential roadblocks during the registration process. Consents from the spouse (if the seller has one) is also critical.

5. Defining Boundaries: Mapping Your Territory

Imagine buying a piece of a puzzle without knowing its exact shape. To avoid boundary disputes and ensure you know precisely what you're acquiring, obtain detailed survey plans. These documents clearly define the property's boundaries and extent. Furthermore, ensure that any existing buildings or structures fall within these legally defined limits. If you encounter missing or disputed boundaries, the Registrar of Lands can assist in ascertaining or re-establishing them.

6. Unveiling the Past and Present: Conducting Thorough Searches

The land registry holds a wealth of information about a property. Conducting searches is akin to reading its history book and current status report.

- A **current status search** provides a snapshot of the present, detailing existing entries in the register, certified copies of relevant documents, and the cadastral map or plan.
- A **historical search** offers a chronological journey through all past transactions related to the property.

Remember, once you acquire the property, you are legally deemed to have had notice of every entry in the register that existed at the time of your acquisition. Ignorance is not bliss in this context.

7. Identifying Burdens and Benefits: Registered Interests and Encumbrances

The register also reveals any existing interests or encumbrances affecting the property. This includes charges (like mortgages), easements (rights of way), and restrictive covenants (limitations on property use). If the transfer is subject to an existing charge, obtaining the charge holder's consent is paramount. Be particularly attentive to any **cautions** noted in the register, as the current owner would have received notification of these potential claims.

8. Beyond the Register: Understanding Overriding Interests

While the register is a primary source of information, be aware that certain liabilities, rights, and interests may exist even if they are not formally noted. These "overriding interests" can include things like public rights of way, unregistered leases for short terms, or rights acquired by adverse

possession. Understanding these potential unregistered claims is crucial for a complete picture of the property's status.

9. The Illusion of Infallibility: Limitations on Indefeasibility of Title

While a certificate of title serves as strong initial evidence of ownership (*prima facie*), it's not an absolute guarantee. The law recognizes instances where a title can be challenged, particularly if the certificate was obtained through illegal or unprocedural means, a corrupt scheme, or as a result of fraud or misrepresentation in which the current owner was involved.

10. Navigating Purchases from Chargees: Protection for Buyers

When purchasing property from a chargee (e.g., a bank) or a receiver exercising their power of sale due to default on a loan, the law offers some protection. Generally, as a buyer, you are not held responsible for how the chargee or receiver uses the sale proceeds, nor are you obligated to investigate the borrower's default or the regularity of the sale process. However, this protection evaporates if you have actual or constructive notice of fraud, misrepresentation, or dishonest conduct by the chargee.

11. Confirming the Seller's Identity: Ensuring Legitimate Transactions

A fundamental aspect of due diligence is verifying the identity of the seller. Ensure that the details of the current registered owner precisely match the individual or entity selling the property. This involves scrutinizing names, identification documents (ID/Passport), tax identification numbers (PIN), address, and, if the owner is a company, their certificate of incorporation.

12. Anticipating Government Action: Awareness of Compulsory Acquisition

Be aware that if the government intends to acquire the property compulsorily for public purposes, an entry of this intention will be made in the register upon notification. While compensation is required in such cases, the process involves its own due diligence to determine rightful ownership.

13. Understanding Gifted Property: Transfers Without Consideration

If you are acquiring land as a gift or without providing valuable consideration, the law stipulates that you hold the property subject to any unregistered rights or interests that the person transferring the land to you held. This underscores the importance of investigating the title even in seemingly straightforward transfers.

14. Dealing with Trustees: Limited Notice of Trust

If the registered owner is acting as a trustee, the law generally protects a buyer who deals with the registered owner from being automatically deemed to have notice of the trust. This holds true even if the trust instrument is deposited with the Registrar; it doesn't automatically become part of the official register.

In Conclusion

Securing a good title is not a passive process. It demands proactive engagement, thorough investigation, and a keen eye for detail. By diligently undertaking these steps, you empower yourself as a buyer, mitigating risks and paving the way for a secure and peaceful ownership experience. Remember, investing in thorough due diligence at the outset is an investment in the long-term security and enjoyment of your property.

Disclaimer: Please note that this information is provided for general guidance on restraints in Kenyan land transactions and does not constitute legal advice. Laws and regulations can change, and individual situations require specific legal analysis. For advice tailored to your circumstances, please consult with a qualified Kenyan advocate. info@mnwlaw.co.ke; +25473349415.