

Due diligence in real estate purchases

When I was in the Law School (and don't ask what year) one lecturer introduced his course - Legal drafting and conveyancing with a speech that "the course is about a buyer who bought land (or so he thought) from a seller who owned the land (or so he thought)....." On and on he weaves a tale of parties who "so they thought" themselves into oblivion of the fact that the ownership status of the property was a brewing dispute. This "so he thought" tale was an opening call to adopt a mindset that the good intentions of the seller or his agent, their credibility or status in society should be discountenanced when investigating a property for purchase. The words "due diligence" is very apt and simply means a purchaser ought to apply a minimal level of "diligence" on the entire transaction -"leave no stone unturned" goes the saying. What are the stones that need to be turned in a typical property purchase? (Please note that in attempting to proffer an answer to this question this article has not covered purchases of unregistered landholdings -native or family land. That is another "jungle" fit for a separate discourse). Due diligence in real estate purchases invariably seeks to uncover three basic things: (1) Confirm that title is genuine (2) Identify the real seller. (3) Identify the actual Property.

1. Confirm that title is genuine

The typical title investigation entails a search at the relevant Land registry for confirmation that the property is indeed registered in the seller's name and that there are no "registered" encumbrances (not physical encumbrances). In this regard it is advisable for a solicitor to state in the search report the date and exact time of his search "12/08/12 at 3.55pm" because it may happen that same day after he departs the registry a Mortgage is being registered. Also if the negotiations have dragged on for a while (weeks or months) there is no harm doing a status check at the Registry a day before closing the transaction. A good title search actually should go beyond the search at the lands registry. It is advisable to:

(1) **Go to the Government survey department for a charting.** Why a charting? Very often the Government acquires a piece of property and is "yet to" serve a notice of acquisition on the owner or pay compensation but has begun mapping it out for use at the survey office. Even the owner is unaware of the acquisition. Some are currently negotiating property that is a proposed railway line or a new government layout or a road and they know not. A charting of the existing survey plan may reveal this fact.

(2) **Request to sight the original title documents.** Equitable mortgagees and other moneylenders simply accept a deposit of the title deeds instead of registering a legal mortgage. Your lands registry search will not reveal this. The sellers do not readily offer this information because you would assume they are under pressure to sell and make discounted offers. However the request to sight the originals usually forces out the story, if there is any. PLEASE BEWARE of certified true copies offered in place of the original! As an aside if you are buying the entire property do not forget to collect the original title documents from the owner as part of the exchange of documents lest he uses it elsewhere.

2. Identify the real seller.

Is it possible to be presented with genuine title by a seller who is an impostor? An emphatic Yes! He may just happen to be in possession of the title documents as a relative of some sort. He may even provide ID to show he bears the same name as on the C of O. Or he may be holding a well forged version of the original C of O. Some jurisdictions place the passport photo of the owner on the Certificate of Occupancy and this helps to identify the seller. But this depends on when the photo was taken. Being reassured of the identity of the seller is a key part of your transaction. It is advisable to request for other forms of ID (not drivers licence or passport in Nigeria) which give independent third party recognition like place of employment, bankers, past affiliations etc. Depending on the complexion of the transaction some other matters may arise. For example where the seller claims to be selling as a donee of

a Power of Attorney we must be assured that the Power was duly granted by the property owner. If the donee intends to transfer title on behalf of the owner then the Power of Attorney should be duly stamped and registered. Where the seller is a company a search at the Corporate Affairs Commission becomes imperative. PLEASE do not try to save this expense! How else do you establish: the authority and nexus of the seller with the company; the true directors and shareholders; existing debentures and liens; any limitations to sale from the Memo & Articles etc. Requesting for a Board Resolution would be apt in this scenario. This search would also be necessary to confirm the appointment of the Receiver in the event that it is a Receiver sale. Another situation is where the seller claims to be selling under the authority of a Letter of Administration because the original owner is deceased. In this case one must not only sight the original Letter of Administration but do a search at the High Court of issue. Was it issued? Have the Administrators filed any subsequent documents apportioning the properties? Is there a pending litigation?

3. Identify the actual Property

The identity of the property invariably entails a visit to the site. These visits are to confirm exact location, size, physical encumbrances, or evidence of contrary possession. The visit to the property is just as important as the title and owner identity searches. A simple situation that occurs is where an agent shows a piece of land in error which may even be just next to the actual property for sale. People are known to point at property and the person being told sees a different trajectory on that finger. It is advisable to visit the property as often as you can before purchase. Go there with the survey plan and possibly a surveyor and try to find the beacons if possible; look at the size of the land on ground vis-à-vis your survey plan and the layout. With each visit keep an eye for court orders pasted on the walls, signs that read "caveat emptor" or "not for sale" should be questioned. Look out for physical changes like recent clearing, fencing, re-established beacons etc. If there are squatters or tenants, loiter around to see if you are challenged. If not go to them and strike up conversation. Tell them your mission - unless you have good reason to do otherwise. One lawyer struck up a useful conversation with a squatter coming out of his zinc batcher and that saved her a disaster. The squatter describes the owner as a "nice man" with physical characteristics that were the direct opposite of the fellow posed as the owner at all previous meetings. It turns out that the client had almost been taken by dupes who were in possession of the original papers and knew the history of the land. On another occasion the morning a transaction was to be closed another lawyer decides to take a last visit to the land before parting with the Bank draft. On site a police officer accosts him to say the land had been re-allocated to the Nigeria Police. There was no sign of any encumbrance at the Lands Registry and the Certificate of Occupancy was still with the owner who had not been served with any Notice of Revocation. The owner knew nothing of this and in law he was still the owner. But would the Purchaser be interested in buying the onus to prove that? I think not! A visit to the site often reveals other issues like: wrong sizing on the survey plan, recalcitrant tenants, encroachments, blocked access etc.

Sundry Tips

While we are at it, let us walk through in a few tips that may "endue" your diligence. First, is to always have company during negotiations and meetings as you may need witnesses if the deal goes bust. It is also advisable to pay by cheque rather than cash. It is part of your paper trail so do not forget to get a copy of each cheque acknowledged. In collecting receipts, it is preferable to collect a receipt directly from the owner to avoid possibility of owner disclaiming agent or renegeing. Some agents are not even by reputation worth their paper printed receipts. Also do not pass on an opportunity to make a part payment with a right to exercise some immediate occupation before the balance is paid. If in doubt, request for this. It mitigates your risk. Also make sure the transfer document has a full Indemnity Clause for total refund plus expenses by the Seller in the event of a challenge to title. This may be your last resort! If you intend to apply for Governor's consent to your Assignment much later, then request a Power of Attorney in addition to the Deed of Assignment. The Power of Attorney should be for a given term giving the buyer all power to exercise rights of ownership. The

Power should be registered to give the buyer a presence at the Lands Registry pending the application for Governor's consent to the Assignment. Note that in many states if this Power of Attorney is irrevocable you would be required to pay ad-valorem Governor's consent fee whilst a revocable Power of Attorney attracts nominal registration fees. A fixed term Power of Attorney (say 24 months) is therefore preferred.

Finally, if you ever (and I hope not) buy a dispute instead of the property you bargained, do well to uncover every stone so you only look half as bad as your transaction. Caveat Emptor!

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