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The Honourable Chief Justice & President of the Supreme Court of Kenya
Supreme Court of Kenya
Nairobi.

The President
Court of Appeal of Kenya
Nairobi.

RE: APPELLATE DYSFUNCTION AND THE ESCALATION OF LAND FRAUD. A CALL FOR INSTITUTIONAL REFLECTION AND CORRECTIVE ACTION.

I write to you after thirty-eight (38) years of practice within the corridors of our courts. I write as a witness. The patterns I have seen from the trial bench to the highest appellate levels compel me, in my capacity as an Advocate of the High Court of Kenya and a member of the Senior Counsel Bar, to raise a matter of great constitutional importance. It concerns the growing and systematic role of appellate adjudication in the entrenchment of land fraud, a crisis that strikes at the heart of Articles 40, 47, and 50 of our Constitution.

We have long acknowledged the endemic corruption in our land registries and the administrative malpractice. Yet a deeper, more insidious institutional failure has now firmly taken root at the appellate level. In a disturbing number of cases, fraudulent outcomes are not merely errors to be corrected on appeal. They are perfected, solidified, and laundered into legitimacy through appellate affirmation. This phenomenon, which I have observed evolve over decades and now respectfully term "appellate dysfunction", has become the central driver of judicial impunity and the most powerful accelerant of land fraud in Kenya.

The Constitutional Role of Appellate Courts in Land Justice

In land disputes, appellate courts carry heightened constitutional responsibility. Titles, allotments, and acquisitions are all strictly statutory processes. Errors at the trial level therefore demand the most rigorous appellate scrutiny.

Appellate courts are duty bound to correct misapplications of law, misapprehensions of evidence, and procedural unfairness. Their mandate must ensure statutory processes were followed, title chronology is correct, and constitutional property protections are real.

When this role is faithfully done, fraudulent schemes collapse. When it is not, illegality is laundered into legitimacy.

From Observable Error to Institutionalized Distortion

All human institutions, including courts, err. Not every mistake is sinister. However, my long experience now reveals not isolated errors, but a clear and recurring pattern. This pattern is characterized by a conscious ignoring of dispositive evidence on record. It involves the reengineering of factual matrices to fit a desired outcome. It is marked by a deliberate declination to resolve the central, often difficult, legal question while debating comfortable peripherals. It includes the endorsement of mutually contradictory findings without any attempt at reconciliation.

This, My Lords, is not ordinary judicial fallibility. It is institutionalized distortion. It is the system learning how to use its own rules to protect a wrong outcome.

In practice, this distortion manifests in specific, predictable ways. There is a recurrent failure to interrogate how a second title could magically arise in the face of an earlier registered grant. There is an acceptance of irregular, unperfotted allotments as if they were the equivalent of a registered interest. Courts routinely assume a surrender of title without ever demanding the production of a surrender instrument. There is a palpable avoidance of the disciplined work of tracing title chronology, choosing instead to elevate procedural technicalities over substantive legality.

Once such distortions receive the stamp of an appellate judgment, fraudulent titles acquire a judicial respectability they do not deserve. They become bankable. They attract investment. They are used to ground evictions against rightful owners. Meanwhile, those original proprietors are left with beautifully polished judgments that are, in substance, worthless. Fraud, therefore, migrates upward. It travels from the corrupted registry desk into our hallowed books of jurisprudence, gaining a force no criminal can ever bestow.

How Dysfunction Breeds Systemic Impunity

The most corrosive effect of this trajectory is the total collapse of deterrence. When magistrates, judges, and land officers observe that fabricated allocations and contradictory findings are routinely affirmed on appeal, they internalise a dangerous institutional truth. They learn that in the end, the outcome is all that matters, not the integrity of the process.

Three structural consequences follow, each more devastating than the last.

(i) First, fraud becomes a rational economic calculation. Syndicates simply price the cost of litigation into their business model, viewing the appellate process as a final, manageable risk.

(ii) Second, misconduct at the trial level is effectively immunised. There is little genuine prospect of meaningful correction from above, rendering the right of appeal a hollow promise.

(iii) Third, and most critically, public confidence in legal remedies evaporates. This desperation drives citizens away from the courts and towards political patronage or private, violent enforcement. Judicial impunity thus ceases to be exceptional. It becomes the systemic expectation.

Respectability Capture and the Weaponisation of Precedent

Modern appellate distortion is rarely crude. It is masterfully wrapped in elegant prose, selective citations of precedent, and abstract constitutional language. It employs performative invocations of the public interest. Yet beneath this respectable rhetorical facade, there is almost always a conspicuous and telling absence. The judgment will meticulously avoid the single decisive question. How did this disputed title actually arise in the first place?

This phenomenon is what I term "respectability capture". **It allows judgments to appear impeccably principled while quietly entrenching profound illegality.** The language is elevated. The analysis is evasive. Land fraud survives not because it is invisible to the court, but because **it is rhetorically laundered within it.**

A New and Specific Danger: The Distortion of Dina and Torino

The Supreme Court's landmark decisions in *Dina Management* and *Torino Enterprises* were a vital and necessary corrective. They correctly demanded a forensic examination of the roots of each title to cure historical fraud. Yet a dangerous and widespread misapplication of these very principles is now routine in our appellate courts.

It is the fallacy of mutual exclusivity. Upon finding one title defective, courts automatically and illogically assume the competing title must therefore be valid. They fail entirely to subject both titles to the same independent, sequential scrutiny the law requires. This is a fundamental abdication of the appellate duty and a direct violation of the right to a fair hearing. It creates a perverse incentive where a party can win on appeal not by proving the strength of their own legitimate claim, but solely by exploiting a weakness in their opponent's, while their own fraudulent root is strategically left unexamined.

This has given rise to a sinister litigation strategy. **A party with a dubious title can now weaponise the appellate process.** They can focus the court's entire inquiry like a laser on attacking their opponent's root, inviting the court to become an unwitting partner in a narrow forensic exercise that delivers a distorted victory. The court, believing it is applying *Dina*, instead perfects a fraud.

Furthermore, this approach strategically builds **a jurisdictional cage.** By crafting the decision as a final factual finding on one root, it seeks to insulate the injustice from further scrutiny by the Supreme Court of Kenya. The powerful precedent (*attitude in Dina and Torino*) meant to ensure justice is thus **hijacked to cement final injustice at the Court of Appeal level**. The law is used not as a shield for the people, but as a sword for the fraudster and a cloak for the court.

The Broken Link and the Abdication of Authority

We have statutory land governance bodies like the National Land Commission. Yet appellate courts frequently sidestep their findings, decline to compel the production of original green cards and parcel files, and fail to insist on accountability from the very state organs that created the problem. Without judicial insistence on original documents, forensic title reconstruction, and examining administrative custody, corruption remains perfectly insulated. The courts risk becoming passive recipients of tainted paperwork rather than active, demanding examiners of legality.

A Constitutional Inflection Point

This, your Ladyship and My Lord, is no longer a matter of private disputes. It is a constitutional crisis. When the highest courts normalise these distorted outcomes, they directly undermine the foundational promises of Articles 10, 40, 47, and 50. At scale, this **judicially-enabled land fraud** destabilises our economy, fuels bitter social tension, and annihilates public confidence in governance itself.

A judiciary that fails to confront this dynamic head on risks forfeiting its sacred role as the constitutional guardian of the people.

A dangerous inversion now defines our reality. The innocent citizen must prove their innocence against a fraudulent title, while the fraudster enjoys the presumptive legitimacy bestowed by a judgment. Kenya's land crisis will not be resolved at the registries alone. It will be resolved, or it will be permanently entrenched, at the appellate level.

Judicial independence was never intended to mean judicial immunity from accountability.

A credible system demands the rigorous, unbiased interrogation of title chronology. It requires transparent and honest engagement with all evidence. It must have consequences for demonstrably false factual findings. Above all, it calls for appellate courage to dismantle illegal outcomes, not to rationalise them with sophisticated prose.

Where appellate dysfunction is tolerated, land fraud flourishes.

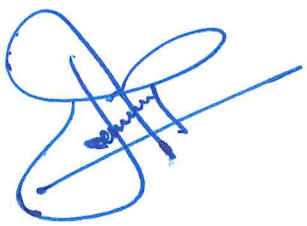
Where land fraud flourishes, social stability erodes.

Where stability erodes, constitutional democracy weakens.

Restoring discipline, intellectual rigor, and true accountability in appellate adjudication is therefore not a matter of preference. It is the foundational prerequisite for land justice and for the survival of the rule of law itself.

I therefore place this matter before you, not as a critic from the sidelines, but as an officer of this court with nearly four decades of service. I have seen our justice system at its best, and I have witnessed this dysfunction take root. I appeal directly to your Lordships' leadership as the guardians of our judicial conscience.

The Supreme Court, through its landmark jurisprudence, has illuminated the path forward. The principles in *Dina*, *Torino*, *Torino* and *Sehmi* provide the very tools needed to restore integrity. Yet



these tools are being misapplied downstream, creating new injustices in the name of curing old ones. This places a profound responsibility on your Court.

The corrective action required is twofold. **First,** a clear directive from your offices to the appellate bench, emphasising the non-negotiable duty of rigorous, impartial, and sequential scrutiny of *all* competing titles in every appeal, ensuring the right to a fair hearing is not sacrificed on the altar of procedural expediency. **Second,** there is need to halt the weaponisation of precedent and to provide the lower courts with a balanced framework that does not punish the innocent for the sins of the state or the original fraudster.

The stability of property law, the credibility of the judiciary, and the social contract itself await your Lordships' decisive action. I submit this appeal with the utmost respect for your offices and with a steadfast hope for the restoration of the foundational purpose of the Judiciary.

Yours faithfully,

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