

# Protecting Investors from the Repercussions of Unregistered Indigenous Property

**Anthea Amadi-Echendu**

<https://orcid.org/0000-0002-6940-1027>

University of South Africa

[amadiap@unisa.ac.za](mailto:amadiap@unisa.ac.za)

## Abstract

Land registration is classified as a high priority in the pursuit of economic growth and development. However, many countries still operate under customary law, resulting in limited access to credit. External investors may be ignorant of the wide range of property rights. This article highlights the difference between indigenous and Westernised property rights and transfer processes, and the effect of indigenous property acquisition on initiatives for land development. Several international case studies are discussed. The study concludes that there is a need for indigenous properties to be recorded in the national land administration system. It is recommended for the current electronic registration system project in South Africa to investigate how the incorporation of indigenous property may occur. Recommendations for future studies are made.

**Keywords:** indigenous property; land administration; land registration systems; property transfers; property investments

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## Introduction

There is a need to incorporate indigenous land administration into formal land structures. Structures for land management may vary extensively between countries and provinces (Enemark, Williamson, and Wallace 2005). Land tenure is the relationship among people regarding land, and rules of tenure prescribe how property rights devolve within communities, particularly with regard to the use, control and transfer of land. Land administration directs rules of tenure. There can be no sustainable development without secure land rights, as people will be reluctant to make long-term investments in land if security is not ensured (Akinyemi and Nkubito 2013). External investors frequently recognise titled land ownership to the exclusion of other forms of property rights that exist (Bomuhangi, Doss, and Meinzen-Dick 2011), such as unregistered indigenous rights that may affect the legitimacy of land transfers.

This article<sup>1</sup> will highlight the difference between indigenous and Westernised property rights and the differences in the process of transferring such properties. It will also show the effect that indigenous property rights may have on the acquisition of land for further development. In addition, restraints and responsibilities to land are also highlighted.

In the Western or formal setting, property rights, in general, may be prescribed through magistrates, judges or tribunals. In contrast, customary tenure rights may be enforced through customary leaders. Formal titling and indigenous land administration co-exist in many countries (Kihato and Royston 2013), but official property registers are records of private ownership and work on a system that collects documentation to legally prove ownership to the exclusion of local customary agreements of land rights (Shaw 2013). It can be argued that the formalisation of land rights through titling (the issuing of title certificates for property ownership) may have little impact in countries where informal or customary land rights are already recognised. A successful registration system provides sufficient protection of land rights against third-party infringement and other threats by keeping proper and complete records in a cost-effective way (Pienaar 2009).

Security of tenure is the confidence that land rights will be acknowledged and secured against title challenges that may arise (Abdulai and Owusu-Ansah 2014). To achieve security over the full term of property ownership, a view has emerged that full security can only take effect with full private ownership. These circumstances are not conducive for complex developmental projects whereby property improvements will be suspended pending proof of secure land rights (De Janvry, Gonzalez-Navarro, and Sadoulet 2011). Although land ownership has been linked to economic growth, Payne, Durand-Lasserve, and Rakodi (2009) found that property investments and access to formal credit have not had a prominent effect on poverty levels. Vast areas of customary land are often used for subsistence and, therefore, do not require more sophisticated systems of ownership.

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1 Paper updated from paper presented during 9th WCEAM Conference held in South Africa in 2014.

Informal rights often lack recognition and protection and may be rendered illegal if they contravene statutory law. An example is where squatters occupy land in contravention of an eviction order. In a Western or formal setting, information on land rights is recorded in a deeds office and cadastre (known as the surveyor-general office in South Africa). In customary land tenure, information is not codified, often using communal collective memory and witnesses to prove ownership. Documents that are drafted as informal proof of rights of land may be recognised by the local community, but not by the formal state structures. These informal and unregistered documents are not considered by financial institutions as valid for them to advance loans against such property for further development. Consequently, a vacuum is created, which ultimately also affects the economy of a particular country.

Often, developments are planned for land that belongs to indigenous communities. Where customary land has been developed after it was sold to “foreigners” (outsiders who do not form part of the community), existing customary methods of property management may be supplemented by regulated Westernised methods. The right to alienate such land does not vest in one person and often brings about much tension. This situation leads to the question: How can investors overcome the effects of indigenous property rights when acquiring land for further property development?

Although international law may provide protection over certain types of indigenous rights (Pentassuglia 2011), there may be a need for an enabling regulatory framework for land registration for the sections that may not be covered. Land administration will continue to have gaps and loopholes, which create increased risks unless government and customary institutions integrate their efforts and systems.

This article is organised as follows: the processes and differences that exist in indigenous legal systems and government property transfer processes are highlighted by looking at indigenous legal systems and Western property transfer systems; and the role-players that are involved in formal property processes are described. Subsequently, the article reports on data collection and data analysis methods that were used. It demonstrates that indigenous structures do not form part of formal property structures in South Africa. The article concludes with recommendations.

## Indigenous Legal Systems

Customary law was previously not codified in written legal sources such as statutes, textbooks and law reports. Indigenous legal systems predominantly originated from respected customs and traditions that were eventually classified as “law.” Knowledge of this law was vested in the community, who practised these traditions and customs. The law was transferred orally in the genealogy, predominantly through men who participated in oral traditional court procedures. The law was adapted as the values of the community evolved, which the whole community still regards as binding and complies with. Dispute resolution occurred in the community in order to protect future relations within the community. The welfare of the community was considered more

important than individual interests (David and Brierley 1985). Indigenous people cultivate a special association with their ancestral lands. Individuals and groups globally derive their identity from a deep sense of belonging arising from the generational land they still occupy (Aiken and Leigh 2011).

In terms of indigenous law, the head of a family is regarded as the custodian of the group's resources and has the power to dispose of such resources (Barry and Danso 2014). The head does not personally own the property, but exercises control over the property on behalf of and in the interest of the group. His successor, who is usually the oldest son of the family head, is regarded as the heir of the group's property, a principle known as primogeniture. An individual's share of the rights depends on his status within the group, which is influenced by the individual's family rank, gender, age and marital status. However, the status of an individual never permits the individual to act independently of the group.

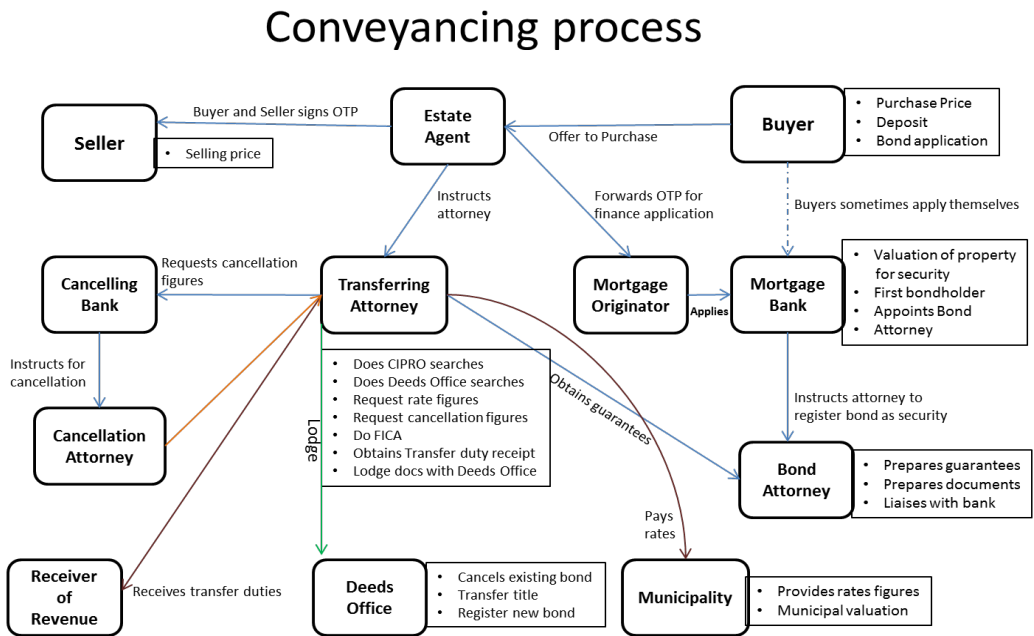
A land title is a mandatory condition for property loans (Abdulai and Owusu-Ansah 2014). This implies that unregistered property, which includes indigenous property, is excluded from obtaining property loans. By implication, indigenous groups are, therefore, excluded from participating in economic growth activities. Chiefs may dominate decisions of landownership, which may lead to the alienation of family land without the necessary consent of the group, resulting in conflict, particularly where the land was alienated to outsiders who want to develop land for financial growth.

## Western Property Transfers

In formal Western legal systems, sections of the law are codified in statutes that are passed by parliament. It is the rules of law that determine the extent of the right that holders possess. A right held by someone imposes a duty on others. For example, if one owns an immovable property, others should respect one's right of use and enjoyment of the property (De Janvry et al. 2011). Ownership rights include rights of use and enjoyment, alienation or destruction of a property (Ostrom 1990). In Westernised legal systems, an individual exercises his or her rights against third parties, including the state and the community.

Land administration consists of two databases, namely an administrative system to record ownership in a deeds office, and a digital cadastral map with related property information (Bogaerts and Zevenbergen 2001) such as the size of the land, subdivisions and property coordinates. The land register is a public document that is managed by government. Each country maintains its own property register, and different rules and processes may apply. Land administration systems generate income by charging fees and taxes for the registration of property transactions and the selling of property information. Officially documenting ownership reduces the risk of challenges to ownership.

When purchasing immovable property, an estate agent completes an offer-to-purchase agreement between the buyer and seller. If a buyer is unable to pay for the property himself, a loan may be secured from a bank. The bank requests a valuation to assess the property’s market value relative to the loan amount applied for. A bond attorney is instructed by the bank to register a bond over the property that is being financed to enable the bank to repossess the property, should the buyer not be able to repay the loan. The transfer of title and encumbrances are recorded in the Deeds Registry for creditors, subsequent purchasers, and others with an economic interest in the property (Kochan 2013). The property transfer process among the various role players is illustrated in figure 1. In the absence of a land registration system, legal experts must normally trace the origin of a title to safeguard against encumbrances, and this process can be lengthy and expensive. Copies of all documents relating to the change of title of immovable property are recorded in a secure and non-alterable form.



**Figure 1:** The role players involved in the formal property transfer process

Source: Amadi-Echendu and Amadi-Echendu 2015

There are two types of land registration systems, namely:

- Deed registration system where owners and the transaction itself are recorded in a register (Bogaerts and Zevenbergen 2001).
- Title registration system where the title itself is recorded and secured (Enemark et al. 2005).

## Contrasting Indigenous with Formal State Land Registration Systems

The rigid and bureaucratic governmental land administration systems provide legally enforceable deeds or title certificates that are registered in a government property register. Registered titles or deeds make access to credit available to landowners, thus increasing economic activity (Barry and Danso 2014). In a state-based registration system, property is registered in an individual's name, joint parties, or in a separate legal entity that is connected to specified individuals by specific role-players using defined processes.

In contrast, customary establishments use informal conveyancing methods of notes and oral agreements and avoid government-administered structures when alienating land (Barry and Danso 2014). Reliance is placed on the community to provide protection in the event of property rights being challenged by a third party. A potential buyer can, therefore, not investigate the validity of the title. Family property also vests in the entire family, and no individual can lay claim to such property in their private capacity. It has, however, happened that family heads and chiefs have sold land opportunistically to advance individual interests, thereby abandoning their fiduciary duties to the family (Barry and Danso 2014) and causing disputes within the family and community.

Indigenous property primarily devolves to male descendants. This tradition has been challenged in various countries. On April 14, 2014, the Nigerian Supreme Court unanimously confirmed the decisions of two lower courts to uphold the female child's right to inherit from her father. In South Africa, the Constitutional Court in 2004 (in *Bhe v the Magistrate, Khayelitsha*) confirmed that male primogeniture was in contravention of the Constitution. Generally, it appears as if customary laws have not kept track with socio-economic and human rights changes. Strategies are lacking to harmonise state and customary institutions in order to address social change. It is likely that the plural system of government and customary institutions will continue to enjoy joint administration in many countries.

## Research Methodology

Seated in the interpretivistic realm, an exploratory study was conducted that used qualitative interviews to explore how indigenous properties may be incorporated into Western property systems. The population comprised entities that are involved in the end-to-end property transfer process in South Africa. To obtain a national view, individuals from organisations that have national representation were interviewed. Purposive sampling was used. The sample that was interviewed included the Banking Association, the Master of the High Court, the Law Society of South Africa, the deeds office, South Africa's Central Securities Depository (Strate Ltd), Tshwane Municipal Council, and the Reserve Bank of South Africa. The focus of this article is how investors can overcome the effects of indigenous property rights when acquiring land for further property development. Aspects that relate to this article were identified in the bigger study and used for this article.

## **Phase 1: Literature Study**

There is a lack of research with regard to property-related processes and aspects in a South African context, which necessitated a broader study on the effects of indigenous property matters from a South African customary perspective. Numerous sources were employed, which included books, the Internet, journal articles, papers delivered at conferences and completed theses that deal with the subject matter. Other sources comprised discussion forums, legal documents, as well as talks and consultations with property specialists.

## **Phase 2: Personal Interviews**

During phase two, face-to-face semi-structured interviews were conducted with 19 key entities involved in the land registration process in South Africa. The respondents were all employed in managerial positions of the organisations, including professional bodies that oversee professional individuals who form part of the property supply chain. The interviews were recorded.

## **Data Analysis**

Analysis began after the first interview (Maxwell 2008) for the analysis to guide subsequent interviews (Corbin and Strauss 1990). In accordance with Doody and Noonan (2013), supplemental handwritten notes were taken during the interview process to document statements of special interest. These were compared to the recorded interviews for more accurate coding of the transcriptions.

Data obtained from the qualitative interviews were transcribed verbatim and analysed by using content analysis. Information obtained from the literature was verified against primary data that were collected. Notes were made when the researcher read through the transcripts for a third, and sometimes a fourth time. Open coding was then used to identify significant words and to label the data with initial codes. Subthemes were identified, which were clustered into bigger themes that emerged over time. The categories were sent to each participant to confirm the coding and thus increase the trustworthiness of the research. This article focuses on the aspects that relate to indigenous related matters. Pseudonyms were used for all participants, whose responses will be presented verbatim.

## **Findings**

The findings are reported based on 19 semi-structured face-to-face interviews that were conducted with role players who are involved in the property process in South Africa, literature that was reviewed, legislation, and documents that were collected during the data-collection process. Vincent confirmed the unconstitutionality of male primogeniture in South Africa: “The Bhe case found that that intestate succession where it ... where it devolves on the eldest son ... is unconstitutional because there’s the

equality clause.” Yet it seems as if contradictory legislation is in operation, as mentioned by Vincent:

... the constitution says the customs and usages traditionally observed amongst the indigenous people of South Africa must be recognised but then we have the equality clause. So the two actually clash with one other ... that is why two cases have now gone to the constitution.

As such, it becomes important to review legislation and processes to ensure that due diligence is observed. Historically, certain race groups were not allowed to own property under the apartheid laws in South Africa, and informal property occupancies were applied. The conditions were explained by Steven:

... in the past if we go back into apartheid regime we had something called permissions to occupy. That was because black people in South Africa couldn't own property so the municipalities gave the occupants of stands permissions to occupy. That was a total informal system of ... granting occupational rights and those rights were sold by people. You built a mansion on your property but you sold it informally. So then came the upgrading of Land Tenure Rights Act at 1991 ... Act 112 of 1991 ... that said all these informal rights are now upgraded into full ownership but it can only be upgraded into full ownership if the ... township register has been opened.

The informal occupancy arrangements were converted to a Westernised process for property ownership to be recorded. It is not clear from the literature whether these changes in ownership were recorded in the deeds office. Gail remarked that the current property transfer process does not make provision for indigenous or family property, and this particularly creates a big problem when the owner of the property is deceased:

That's a big problem that we're facing at this stage because the concept of a family home which isn't part of our law but is part of some of the cultures and it doesn't exist in our law. So, I can't work if somebody tells me, ja, but it was a family home, we don't wanna transfer it. You have to transfer it. It has to go to a beneficiary or a group of beneficiaries or you have to sell it to somebody but you can't ... have to take it off the deceased person's name.

Steven confirmed that informal land rights were not provided for by the Deeds Registry Act and are thus not recorded in the deeds office:

... we've ... only formal recording a registration according to the Act it's permissible. Um, things like permission to occupy or etcetera, any other, you know, uh, informal rights are not recorded and I think there is an investigation to look at informal rights at the moment to see how they're gonna record those but for legal certainty ... you need a ... formal process and it is a challenge. There are people being out with land today and there is no formal title and that's where disputes can ... come into play, you know.



Unfortunately, it is not clear why a more formal process has not yet been introduced; whether the cost factor or the fact that indigenous property rights vest in the family and not in one particular person (Barry and Danso 2014) is a deterrent. Gail stated: “That’s [indigenous property] a big problem that we’re facing at this stage because the concept of a family home which isn’t part of our law but is part of some of the cultures, and it doesn’t exist in our law. In addition, customary marriages also create a problem in terms of succession and property transfers of deceased estates.” Gail continued:

Before we can get to transferring that house, I have to sort out the family ties, who’s in the family, to figure out who are we gonna transfer this things to. ... So, it gets very complicated. You have customary marriages coming in ... there were a long time where there was uncertainties in community, out of community of property which again impacts on property rights because now does the spouse have a right on the property? Doesn’t she have a right on the property? Who’s got the right? ... As time goes by, those things are being decided in courts but we don’t have all the decisions that we are looking for yet.

It seems as if courts are approached for decisions regarding the devolvement of a deceased’s property where it is not clear who the beneficiaries are. This may add to the cost of the transfer, as well as increase the timelines for such property to be transferred. Formalised land registration systems do not adequately address informal and indigenous rights (Enemark 2004; UN Habitat 2012). Neither the Deeds Registries Act 47 of 1937, nor the Land Administration Act 2 of 1995 makes any reference to indigenous property.

Steven declared: “You first have to get title before you can transfer property, that’s the title in the deeds office.” Family-owned property does not have a registered title, as no one individual owns the property (Barry and Danso 2014). This is so because indigenous properties are not registered according to Westernised registration processes. In addition, many properties have been resold by means of informal processes that do not involve the deeds office.

The study also confirmed that families who own indigenous land are unable to access finance, which hampers their ability to develop their properties and land. Their properties are seen as unregistered and, therefore, not able to provide security for loans advanced by financial institutions. Unrecorded properties also contribute to an incomplete national property register. Indigenous property should be incorporated into the formal structure of the deeds office and cadastre.

Despite the fact that the new e-DRS Bill does not incorporate the recording of customary or indigenous property (section 9.4), the impact assessment also concluded that there is a need to incorporate indigenous properties into the national register. Chirisa, Kawadza, and Bandaiko (2014) similarly stress the need for a national electronic deeds registration system (e-DRS) that should also cater for the registration of indigenous property rights. In addition, the property rights of communities and families, as well as those of foreign investors, will be better protected.

The systems theory (Chicksand et al. 2012) views processes and outputs of a system holistically for overall improvement. This means that a holistic view should be adopted, whereby all role-players (private organisations, government institutions and indigenous tribunals) are managed as one unit. In the context of this article, a systems approach also favours the incorporation of indigenous property into the existing end-to-end property process in South Africa.

## Recommendations

It is recommended for the plural system of state and customary institutions in South Africa to be combined into one platform. Given the focus to create an electronic deeds registration system (e-DRS) in South Africa, it is recommended that this development should be used to further explore how indigenous property can be assimilated into the deeds office system. Future research may explore existing indigenous processes and how indigenous properties can be included in the property register, without compromising or diluting the family and/or community ownership standings.

This research contributes to the literature by providing an integrated view of land administration that also caters for indigenous properties. The article will be useful to indigenous tribunals, government departments that deal with properties, indigenous property owners, and scholars that focus on legal and property-related research.

## Conclusion

Land rights are central to projects that develop land for positive economic growth to occur. As explored in this article, the association between land rights and the right to alienate land appears to be attaining some eminence. Many stakeholders, including foreign investors, may purchase indigenous land without proper consent, which may lead to delays and additional expenditure to rectify. It is also clear that indigenous property rights are not always protected.

Unregistered and unrecorded properties do not qualify to obtain financial support from registered financial institutions, which may hamper property development and ultimately negatively impact on economic growth. In the long run, land management will remain a governmental responsibility. Strategies are lacking to harmonise state and customary institutions in order to address social change in local politics. It has become necessary to incorporate ownership information of indigenous property into the existing formal property systems and processes. This will allow third parties to confirm ownership information and registered encumbrances against identified properties before they embark on costly and lengthy property developments and other forms of investments.

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