

THE IMPORTANCE OF NOTARY PUBLIC IN THE ERITREAN CADASTRE SYSTEM

Habtemicael WELDEGIORGIS, Eritrea

Key Words: notary public, cadastre system, civil-law notarial functions and duties, transactions of immovable property, professional ethics

Abstract

The Eritrean Notary Public and Cadastral System were simultaneously established at the end of the 19th century, during the Italian colonial administration. Both offices, as mutually complementary institutions worked in close harmony. Initially, the Notary Public was constituted with the sole purpose of guaranteeing a secure transfer of immovable property, and the Cadastre to guarantee certification of immovable property ownership for the Italian settlers. They were gradually transformed to embrace all legal persons following the defeat of Italy by the Allied Forces and subsequently during the British and Ethiopian occupational administrations until Eritrea attained its full independence in 1991.

This paper presents a brief overview of the origins and duties of notaries public system, background of the Eritrean Notary Public and deals with the roles that the Eritrean Notary Public has played in securing the legitimate title of persons and ensuring that any transaction of immovable property is conducted lawfully, thereby safeguarding the property rights of all legal persons from fraudulent and illicit acquisition or transfer of titles. Ultimately, it calls for the establishment of the notary public offices in all regional administration seats and major towns.

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1. BRIEF OVERVIEW OF THE ORIGINS AND DUTIES OF NOTARY PUBLIC SYSTEMS

1.1 Origins of the Notary Public System

The origin of the notary public, the oldest existing legal profession, is credited to ancient Rome. Initially, a notary public (also called “notary” or “public notary”) was called “*scribae*” (scribe), “*tabellius*” or “*notarius*” denoted to a person who noted down statements in shorthand and wrote them out in the form of minutes. But, later the title *notarius* was applied exclusively to senior government officials, courts of law, governors and secretaries to the Emperors. The notary public survived, despite the collapse of Western Empire during the Dark Ages in the 5th century AD, in Continental Europe. Civil law flourished during medieval Italy from the 12th century, and the ‘notary public formed a central institution of that law’, which still continues in most of Europe, South America and some other parts of the world. In England, the common law developed free from the impacts of the Roman law, and the notary public was introduced during the 13th and 14th centuries (notarylocator.com, and notarywise.com, 2018).

1.2 Duties of the Public Notary Systems

The World Book Encyclopedia (1994, p. 550) defines Notary Public as “an officer authorized by state law to certify certain documents and to take oaths”. Bowen (2009, in sos.ca.gov, 2018) also defines notary public as a “public official that performs invaluable services for the legal, business, financial and real estate communities”. Notary public is a public officer constituted by law to serve the public in non-contentious matters usually concerned with estates, deeds, powers of attorney, and foreign and international business engagements. Documents must be notarized to become legally valid. Thus the “notary public signs the document to certify that the individual who signed it appeared in person and swore to the notary public that the signature on the document is genuine” (World Book, 1994, p. 550). The notary public records that fact and stamps a seal on the document with purpose of protecting it from forgeries.

The duties and functions of the notary public include contract agreement of immovable property transactions, witnessing oaths and acknowledgement of deeds that embrace wills, power of attorney, administration of oaths and affirmations, taking affidavits and statutory declarations, witnessing and authentication the execution of certain classes of documents, taking acknowledgements of deeds and other conveyances, providing exemplification of notarial copies, protest notes and bills of exchange, providing notice of foreign draft,

verifying translations, preparing international contracts and agreements, authenticating personal document and information, and performing other official acts, depending on jurisdiction (Brooke's Notary, 2002 p.19, in notarywise.com, 2018).

The notary public systems have guiding principles that govern their profession in executing notarial duties and functions with competence and integrity. These are summarized in the Public Notary Code of Professional Responsibility (2010, p.1, in Weldegiorgis, 2014, p. 10). It says that the Notary Public shall: as government officer and public servant, serve all persons in an honest, fair and unbiased manner; act as an impartial witness and not profit or gain from any document requiring a notarial act, apart from the fee allowed by statute; to require the presence of each signer and oath-taker in order to carefully screen each...and to observe that each is aware of the significance of the transaction requiring a notarial act; not execute a false or incomplete certificate, not be involved with any document or transaction that the notary public believes is false, deceptive or fraudulent; give precedence to the rules of law over the dictates or expectations of any person or entity; act as a ministerial officer and not provide unauthorized advice or services; affix a seal on every notarized document and not allow this universally recognized symbol of office to be used by another; record every notarial act in a bound journal or other secure recording device and preserve it as an important public record; respect the privacy of each signer and not use or disclose personal or proprietary information for purposes other than the execution of a notarial act.

2. BACKGROUND OF THE ERITREAN NOTARY PUBLIC

2.1 Eritrea's Notary vis-a-vis Global

The Notary Public of Eritrea was a part of the global notary systems that fell within the civil law legal profession until the end of mid-1990. The civil law notaries, in most of European Union and Latin America, former African French colonies, Mexico, Russia, some Asian countries etc., are scholars of private law; they are law professionals who deal with residential and commercial conveyance and registration, contract drafting, business engagements, successions, estate planning and exercising powers of attorney. The notaries of the United Kingdom and Wales belong to the common law tradition, but are legal practitioners and executives. Notary systems of the common law jurisdictions of the USA, some parts of Canada, etc. have only the power to administer oaths, take affidavits, declarations or depositions, acknowledge and attest signatures and certify copies. Notaries in most of the USA and parts of Canada provide officially required services limited only to domestic affairs. Their number is not regulated; in the USA there are about 4.5 million lay notaries commissioned for a brief term with the possibility for renewal, in England and Wales there are about 740, and in Australia and New Zealand about 1250 notaries (Thu Ha, 2017, p.1, foreigndocuments.com, 2018).

The professional requirements also vary. The former Eritrean notaries public were civil law professionals; they were judges and lawyers. Notaries Public in common-law countries like England and Wales and in all civil law countries of Europe, Asia, Africa, Latin America,

Mexico and Australia are qualified lawyers and judges, referred as notaries-at-law or lawyer notaries. The Latin and African notaries public have also retained a civil-law tradition and a civil-law notarial profession who specialize in notarial law and prepare notarial acts. The civil-law notaries or Latin Notaries Public whose main practices are property conveyance and registration, contract drafting, commercial transactions, successions and other estate related matters are lawyers of private law (foreigndocuments.com, 2018). They generally hold undergraduate or graduate degrees in civil law and graduate degrees in notarial law, and unlike the lay notaries of the USA, they provide legal advice and prepare instruments with legal effect.

Notaries public should be independent and impartial and their appointing bodies vary. Previously, in Eritrea they were appointed by the High Courts and their number was limited to 3-4. But now the notary public is present only in Central Region and is appointed by the Governor of the Central Region. Appointment in China is made by the state through open examinations administered by the Ministry of Justice, with powers to witness civil matters for legal purpose (lawinfochina.com, 2017). In Great Britain and Canada they are appointed by the Court of Faculties, in the USA by a Governor or State Secretary (in some cases by the State Legislature) and in Australia (excepting in Queensland) by the Supreme Court of the relevant State or Territory. In New Zealand (and Queensland) it is done through the Master of Faculties, in France by the Ministry of Justice, in the Netherlands by the Crown, in Germany by the state, in India by the Central Government etc. Notaries public in many European Union (EU) countries are modelled on the French system; appointment is based on nationality, it is usually for life and limited in number (Europe-INFO, 2010, p. 3).

The literature of the global notarial practices shows variations in duties and functions, required professional qualification, appointing bodies, number for licensing and scope of service provision, depending on historical traditions, and socio-economic policies of the country.

2.2 The Eritrean Notary Public

The Notary Public in Eritrea came into existence with the establishment of cadastral system at the end of the 19th century by the Italians. Initially, the Colonial Governors were mandated to appoint the Notary Public. This was reinforced in 1935 by the Italian Proclamation No. 1649 and continued until 1956 when a revised law was introduced. According to the latter law, the power to decide the number of public notaries to be licensed, the criteria for competence, withdrawal of license, etc. was mandated to the Judiciary (GoE, 1956, in Weldegiorgis, 2014, p. 5). The Notary Public and the Cadastral Office worked in close collaboration in the registration of immovable property transactions.

The Eritrean cadastral system was established for the sole purpose of guaranteeing security of property ownership for Italian settlers. It was designed to serve the colonial policy of transforming Eritrea into a settler colony. The registration system, which was based on Italian

laws, was carried out on voluntary basis and mainly confined to urban areas and fertile agricultural lands (Weldegiorgis, 2009, p.2). The registered property had simple survey plan, and records related to ownership, area, and plot and parcel numbers. In this way the Office continued for more than a century, without any qualitative change in its procedures. After Eritrea's independence (1991), the Cadastral Office continued functioning and despite its shortcomings, it was the main supporter and reliable source of evidence providing property security in the verification of property ownership, carried out by the Housing Commission.

The Notary Public authenticates contract agreement in the transaction of immovable property. The Notary Public, unlike the notarial functions world-wide is responsible only for the transactions of immovable property and prepares all the paper work related to contract of the vendor and buyer, registers title- deeds and sends the contract agreement to the Cadastral Office for registration.

Both the Cadastral Office and the Notary Public experienced difficult periods and attempts at their elimination, during the mid-1970 under the Ethiopian military rule. The presumed justification was that all extra-houses, small and large were nationalized, thus denouncing registration of private houses as a bourgeois practice (Weldegiorgis, 2009, p. 2). This is similar to the Notary Public System of the People's Republic of China, which came to a standstill during the Cultural Revolution. However, with the introduction of economic market reforms of the late 1970s, the notary public in China revived its historic place (lawinfochina.com, 2018).

The Housing Commission (GoE, 1991) was established in 1991 to verify and ascertain ownership of nationalized, non-nationalized houses and other immovable property and to return them to their original legal owners. The nationalized houses of the Italian settlers in Eritrea were compensated in early 1980s by the Italian Government according to an agreement signed between the Ethiopian and Italian governments. The registration system maintained property records with utmost care and its contribution to the new registration system is great: a tradition of registration in itself is an advantage.



The Notary Public in Eritrea continued as an independent entity until the end of December 1995. Later, it was restructured as civil-law notary, and most recently as semi-lay notary public under the Administration of the Central Region, around the capital city of Asmara. In the other five regions it is yet to be reconstituted. Because of the absence of notary public in the five regions, immovable property purchased through internal contract is hindered from being transferred legally from the vendor to the buyer, leaving immovable property ownership insecure.

Fig. 1: Map showing location of Eritrea in Africa

3. THE CURRENT ROLE OF THE ERITREAN NOTARY PUBLIC

3.1 Duties Relative to Global

Since its reorganization under the Regional Administrative Structure in December 1995, the mandate of the Eritrean Notary Public has been limited to the notarization of contract agreements of immovable property transactions through sale or inheritance, donation, exchange, partition and wills. Land as immovable property is state-owned and not subject to sale or any other form of transfer.

The title of ownership of immovable property of a deceased person should be transferred to the rightful heirs. A time limit for the transfer of immovable property through inheritance, sale or donation is essential. In Eritrea, the time limit for transferring title of ownership through sale, inheritance or donation of immovable property is two months (GoE, 1997). But,

many immovable properties remain titled by the deceased; the law has not been enforced. Enforcement is expected to begin from May 2018, charging 20% monthly late registration penalty increment of the normal service charges prescribed by the Law. The customers have been alerted of this since May 2017. The Draft Civil Code of Eritrea (GoE, 2015, p. 17) states the necessity of death declaration, but it doesn't specify time. In South Africa, acknowledgement of death is 14 days and finalization of liquidation and distribution of account for a property worth a quarter of a million Rand (1USD=13.38 Rand) takes 6 to 13 months provided that there is no objection lodged (sanlan.co.za, 2017).

In the preparation of contracts the directives of the Eritrean Notary Public Office (1999) states that the notary ascertains the presence and verifies the authenticity of all relevant documents and clearances from tax, debt, mortgage and pledge. The main documents required for the validation of the transaction by the notary public include: construction plan, certificate of ownership, contract of sales or donation, courts' approval of inheritance or will, agreement of partitioning, power of attorney (in case of representation by other persons), certification of marital status, proof of property ownership prior to marriage (for a spouse claiming sole property ownership), signed consent of spouse for the transaction (in case of married), etc. This is done to ensure the legality of the immovable property transactions.

With the completion of verification of documents, legality of the transactions and fulfillment of the necessary clearances, the notary public directs it to the Department of Infrastructure for surveying, verification and authentication of the plan and redrawing the plan (including partitioning as required) in the name of the new owner. The contracting parties are then made to sign the contract in the presence of and the signature of witnesses in front of the notary public. Once this is accomplished, the notary public has the responsibility of ensuring that the payments of appropriate taxes and dues to the Department of Inland Revenue and Regional Administration, and settlement of the sale amounts from the buyer to the seller are effected, before directing it to the Cadastral Office for the registration and issuance of certificate of ownership of the immovable property to the new proprietor. The total amount of tax and dues paid for transactions of any immovable property, including inheritance is 9% (if partition is done at the same time) of the assessed value of the property. But, if partition is done later, after the registration of the immovable property in the Cadastral Office, the tax fee for processing by the notary is 2%.

The guidance document or the Notary Journal of California (USA), which is advisory and binding, looks similar to that of Eritrea. It consists of date of notarial act performed, type of document and type of ID presented by principals, printed address of principals and signature of principals (cdn.sos.ca.gov, 2018). The notaries should use either a Notary Record Book or Notary Journal. The American Society of Notaries recommends that notaries use a record book or notary journal for notarial acts. Despite this, the Notary Record Book is a requirement in some states, like California, Maryland, Massachusetts, Missouri, etc. and Electronic Journal in Michigan, Minnesota, New Jersey, Nebraska, Virginia, etc. (asnnotary.org, 2017). Unlike

in Eritrea, most notaries in other countries notarize commercial or personal documents which originate in other countries.

The stamp duty charged by the Notary Public in Eritrea is 5.00 ERN (1 USD = 15 ERN). The percentage tax of the assessed value of Eritrea is higher than that of Sweden and other European countries. In Sweden, it is 1.5% for private individuals and 3% when a property is bought by a legal person and for mortgage registration 2% of the sum (Swedessurvey, 1998, p. 10). The relative transfer cost of buying a house in countries such as France, Portugal, Spain, Ireland, Italy, Germany, etc. is higher than that of Sweden. But, the average relative transaction fee in Africa is much higher than in other continents.

Fees are charged for the registration and transfer of immovable property. The average fee for Sub-Saharan Africa is 7.8%, East Asia and Pacific 4.3%, South Asia 6.9%, Europe and Central Asia 2.5%, Latin America and Caribbean 5.8%, Middle East and North Africa 6% and High Income Countries (OECD) 4.2%. The 9% tax charge in Eritrea is quite high. The average time taken for immovable property registration varies from 20.4 days for Europe and Central Asia, to 22.3 days for the High Income Countries, and 59.3 days for Sub-Saharan Africa to 111.6 days for South Asia (World Bank, 2018). In Eritrea, the process for transfer of immovable property takes about 70 days.

3.2 Immovable Property Registration

The mandate of the Cadastral Office is to register all lands, rights over land, duties that emanate from such rights and the registration and issuance of certificate of ownership of immovable property acquired through sale, donation, inheritance or other legal means (GoE, 1997), as evidenced by either the Department of Infrastructure or the Notary Public. The Office is mandated to register right holders of land (usufruct) together with the property erected over it, providing information on transfers of immovable property for any encumbrances, be it pledge or mortgage and their release. It is entitled to charge fees for the services it provides. Currently, the service charge for registration, for example, is 150 ERN, which is uniform for all types and sizes of buildings. There is a proposal pending approval for upgrading the service charge fees in accordance to building type and allotted area of land for commercial agriculture.

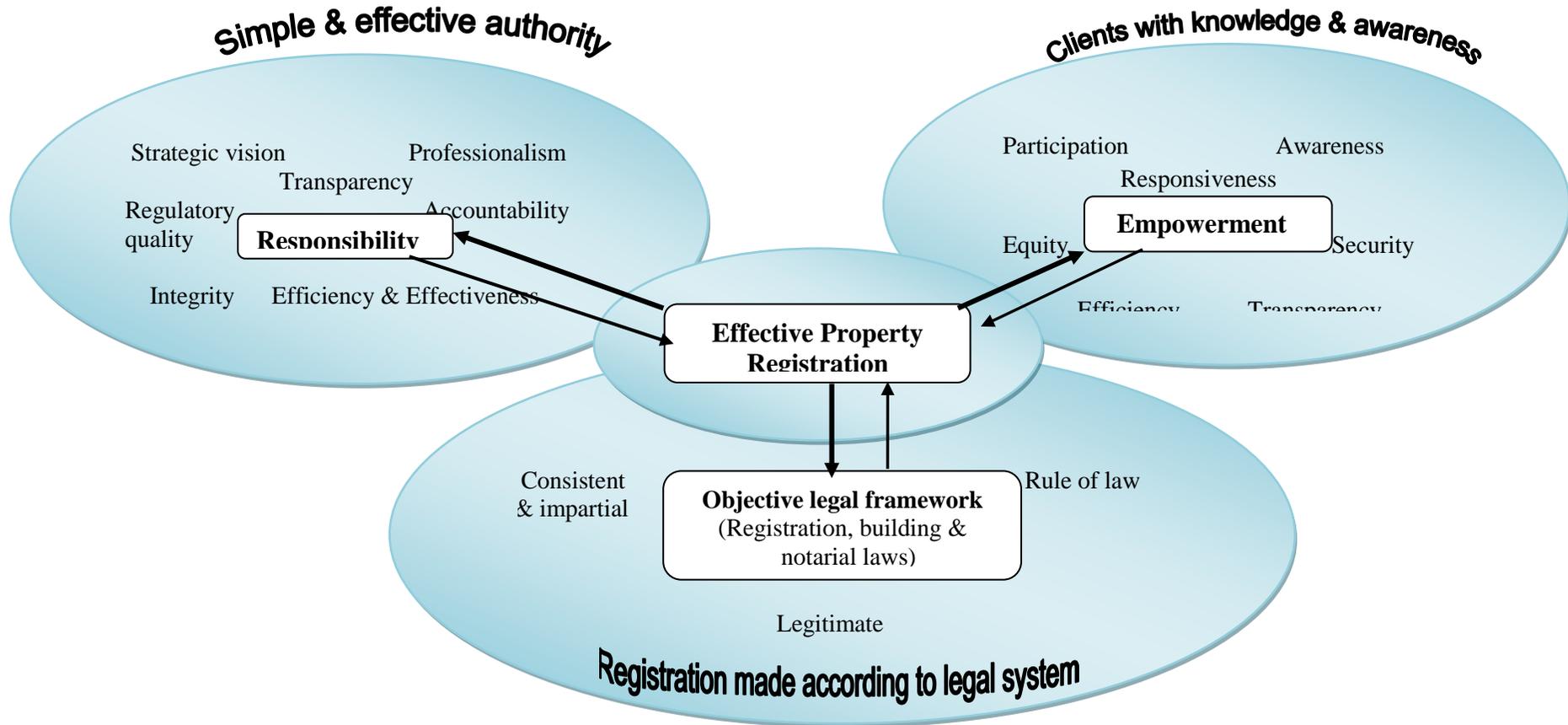
The *vision* of the Cadastral Office is to make registration of immovable property speedy and easier for all clients and its *mission* to protect and guarantee security of immovable property ownership and the use-right over land. To fulfill this all land and other immovable properties need to be registered. This necessitates application of comprehensive mapping and land use planning that is also essential for comprehensive cadastre. This type of cadastre could facilitate towards cadastre playing as a basis for sustainable development.

To realize its vision and mission, the Cadastral Office is inculcating a judicious organizational culture such as integrity, fairness, work discipline, professionalism, openness and team work

across its work procedures. The Cadastral Office is also undertaking public awareness activities through mass-media campaigns, meeting of relevant stakeholders about the benefits of property registration in protecting their property rights and ensuring legal transactions of immovable property. However, an effective model is needed.

A modified model for the effective registration of immovable property is given below. The figure demonstrates that an effective registration system requires the interplay between a responsible authority (a cadastral office), an objective legal framework for the cadastral system and notary public, competent human resources and an empowered clientele society. It is only through these prerequisites that the immovable property ownership rights can be secure.

Figure 2: Adapted from good governance in land administration (Buchanan, 2008) but modified to suit an effective immovable property registration model



3.3 Procedures of Transfer of Immovable Property

The procedures for the transactions of immovable property are shown below.

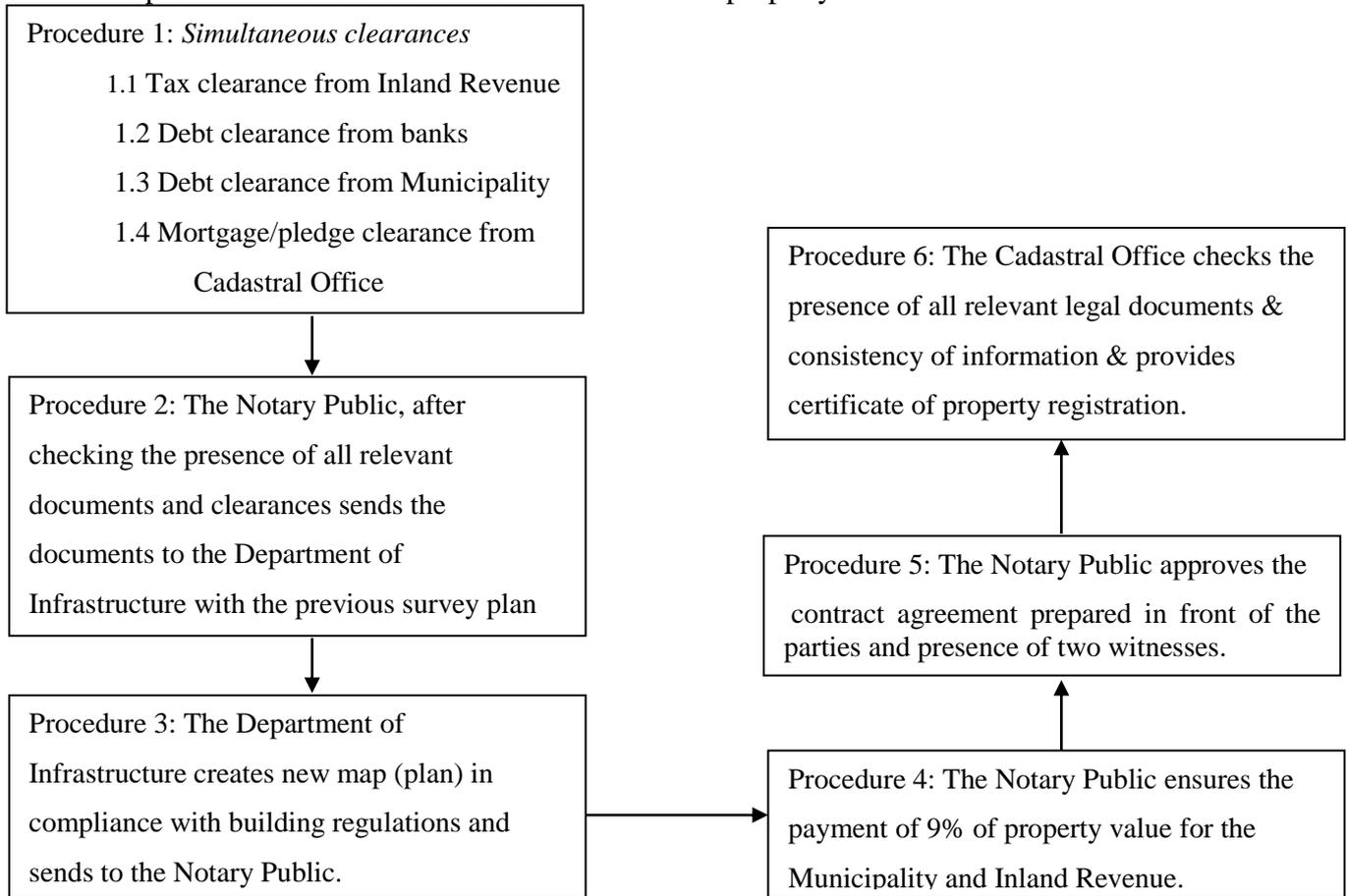


Figure 2: Procedure of Transfer of Immovable Property

Source: Weldegiorgis, H. (2014) *The Eritrean Notary Public in the Context of Global Notaries System*

The steps illustrated in figure 2 are the procedures currently practiced in Eritrea (Weldegiorgis, 2014, pp.8-9). It shows the linkages and roles played by the notary public and the Cadastral Office in the provision of effective, efficient, transparent and safe transfer of immovable property and protection of immovable property ownership rights.

Procedure one ensures that the property is free from any debts or mortgages from banks, the Inland Revenue, the Cadastre Office and the municipality in order to be transacted in any lawful manner. In step two, the notary public checks that there is sufficient authentic documentation evidencing the rightful ownership of the property by the client applying to transfer the property. Once the legal ownership has been ascertained, the technical specifications of the immovable property to be transacted are surveyed for verification by the Department of Infrastructure and accordingly a new plan drawn in the name of the new owner and this is forwarded to the notary public (step 3).

In steps four and five the notary public ensures that the client pays all his dues (9%) to the Inland Revenue and the Municipality and the settlement of the sale amounts to the seller and approves the transfer contract or agreement between the parties concerned in presence of two witnesses. In step six, the Cadastre Office issues a new certificate of registration of ownership or right holder to the legal holder and registers the immovable property in his title. The Cadastre Office retains a copy of all the documents that served the legal basis of the transactions, as processed by the Notary Public and the Department of Infrastructure.

The procedural links between the Notary Public and the Cadastral Office avoid any dubious transaction and holding of title of ownership over immovable property thereby protecting the property rights of the people.

4. LESSONS LEARNED

The need for notaries public has grown tremendously with the advent of globalization and internationalization of the market and business demands for use of legal services. Many countries use the notaries to notarize documents related to deeds, businesses, contracts, etc. in order to be legally valid. The issue of legal security is more important today than ever before since businesses and markets require notarial services for their growth. It is becoming apparent that the notary public in countries, such as Eritrea needs to embrace other notarial services beyond the contracting of transactions of immovable property.

The requirement for the appointment of notaries varies. In some countries like the USA, they are lay notaries who provide notarial services restricted to guidelines provided and their number is far greater and the fee they charge unregulated. In all civil-law countries they are legal professionals, the time of licensing unlimited, their number few and the service fee they charge regulated. They specialize in international law, international transactions and documentation, notarial theory and practice, etc. Eritrea's long-time notarial experience, although short of the broad notarial services, previously fell within this latter category.

Presently, the Notary Public in Eritrea is semi-lay notary limited to the Central Administrative Region (*Maekel*). It is ensuring secure transfer of immovable property. In the other regions legal transfer of immovable property is currently not possible due to the absence of notary public. This leads to illegal sale and purchase of immovable property, leaving transfer and ownership of immovable property insecure. In contrast to many other countries, Government revenues from tax of transfer of immovable properties are not collected in time.

5. CONCLUDING REMARKS AND RECOMMENDATIONS

The Notary Public continued its duties as an independent body until the mid-1990s, when it was restructured under the Central Administrative Region. In the other regions, it has not yet been constituted. The demand for notarial services in the other administrative regions has become urgent, in response to the emerging cities and towns. It is advisable to be restructured either under the Ministry of Justice or the Ministry of Local Government, preferably being legal professional practitioners, because the civil-law notary public had existed in Eritrea for about a century. Their number also needs to measure up to the demand of the cities and towns.

In addition, the functions of the former Eritrean civil-law or even the current semi-lay notary public are limited to contract agreement of immovable property transactions. The notarial services need to expand to embrace some of the civil-law notarial services in use world-wide. Broadening the civil-law notarial duties and its empowerment are absolutely imperative in order to effectively fulfill its duties.

Finally, the liquidation time limit of an immovable property titled by the deceased persons has to be enforced. The liquidation needs to be finalized in a specified time so that the title of immovable property ownership is given to the living heirs'; thus specified time for declaration of death is required to be legally issued. This could highly activate the timely enforcement of the law of transfer of immovable property.

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BIOGRAPHICAL NOTES

Habtemicael Weldegiorgis is the Director General of Eritrea's Cadastral Office. After 19 years of participation in Eritrea's armed struggle for liberation, and detachment from academia for 25 years, he pursued higher learning and earned M Sc in Development Management through distance learning from The Open University, UK. He is a regular contributor of peer-reviewed papers to FIG Conferences.

CONTACTS

Habtemicael Weldegiorgis
Cadastral Office
Ministry of Land, Water and Environment
P. O. BOX -976
Asmara, Eritrea
Email: [habtatw@gmail.com](mailto:habtaw@gmail.com)
habtemicael_weldegiorgis@yahoo.com
Tel.00 291 1 124253 (Off)/ 202414 (Res)
Mobile: 00 291 1 7 238497