

THEME II:

THE LEGAL SECURITY OF THE REAL ESTATE MARKET: THE NECESSITY FOR REGULATORY BILLS

SUMMARY

Legal security is an important factor which influences the economic behavior of investing stakeholders in a perpetual evolutionary real estate sector. This dynamism must be controlled and accompanied by the Notaryship so that the real estate transactions in Africa enjoy legal security. This contributes at the same time to the emergence of an expanding and credible real estate sector. It is therefore advisable to properly confine the African real estate market in order to elaborate better regulatory bills.

The African real estate market is characteristic and requires a security.

This characteristic market is influenced by several elements, due to the diversity of countries, particularly in regards of their lands status and the constructions market. The status of lands is contrasted between sub-Saharan Africa and the Maghreb. Since the implementation of the reforms introducing the land registration regime, the rate of the registrations remained very low because of administrative red tapes, prohibitive procedure costs and the ineffectiveness or the absence of land registry. Some councils proceed to land repartition without respecting the preliminary formality of registering the plots allocated to the State as held in the laws of Mali, Benin or Guinea; thus contributing to maintain the climate of law insecurity. To this insufficiency of regulations application, is added the recent phenomenon of lands cornering by the national and international investors. The constructions market even adapts to this contrasts. However, beside the modern buildings domain of construction, are the auto-constructions and the new stakeholders (who are property developers offering technical and legal guarantees). Besides, the financing of real estate is rather singular in Africa due to the fact that, it is rare and the debt capacity of borrowers remains very low, as well as an unsuitable tax system. The current legislations do not really consider the complexity of real estate. Only some countries have texts which govern the co-ownership, the real-estate development. It is therefore necessary to legally secure the real estate market.

This market would be secure in Africa if all stakeholders contributed to confer it legal and technical guarantees. The construction and ownership of a built building needs legal security in order to do away with the possible precariousness of the property.

Therefore, the contracts of real estate property ownership need a renewal to provide substantial security to those who acquire a built building. Professions linked to real estate needs to be regulated through Africa, so as to enlighten their conditions of practice.

The regulation of the African real estate market depends on existing guarantees and wide perspectives.

The existing guarantees essentially concern the Notary who is at the center of the real estate transaction, as well as between parties and the State.

The notarial act is an instrument of guarantee between the parties. The emergence of a dispute concerning the authentic acts is almost nil in Senegal and in Togo particularly but is high in Mali because of the poor organization of the municipal state-owned administration. The Notary insures a legal security through his multiple controls and verifies the conformity of contracts with the current laws. He is impartial in the elaboration of acts. An authentic act portrays two fundamental elements that are **transparency** and **security**. The Notary offers legal security to stakeholders of the real estate market in their contractual relationships. He is the guarantor and supervisor of the financial transactions that take place during the conclusion of the acts which he receives. The notarial profession therefore constitutes an effective and sure means of controlling the real estate market in Africa.

The notarial act is an instrument of guarantee and reliability for the State. The Notary thus contributes, to the direct collection of the tax and guarantees the reliability of the public registers. As a prominent state auxiliary, he efficiently recovers considerable amounts the state budget. He beforehand has to submit himself to the duty of advice regarding taxes while insuring that the law is applied.

The same duty guided the Senegalese Chamber of Notaries to make proposals to governmental authorities which led to the current revision of some measures of the General Code of taxes in order to reduce the prohibitive tax rates. The Chamber of Notaries of Mali also committed negotiations this way with their authorities. The Notary also guarantees the reliability of the real estate registers. The reliability of a public register becomes an economic fundamental value because it offers an irrefutable guarantee, *erga omnes*, being translated in security for stakeholders of real estate market and favoring the increase of economic exchanges. The Notary makes, as such, a large number of controls which could not precede the state agents of the prohibitive registration office. As soon as the «notarial acts» create, modify or publish a legal situations, they guarantee the reliability of the real estate public registers, the base of this market sustainable development. However, in spite of the existence of public registers, real estate transactions experience diverse fortunes in the African

countries. If in Senegal, these acts have to be taken to be authentic to be registered, it is not the case in Mali. This situation is an infringement that engraves the integrity of the notarial function as well as the legal security of economic reports knotted during real estate transactions. An efficient land policy is a factor of socioeconomic stability and promotion of the sustainable development of the real estate market. It is thus necessary to pursue the welfare of the land reform which will guarantee the security of land activity and will constitute a major lever in the competency expansion process of African notaries.

Two outstanding perspectives are identified. Primo, it would be desirable that our States, in the welfare of land reforms, adopt laws making the Notary a key stakeholder. Finally, it is imperative to stop precarious titles and encourage the establishment of land title as only valid legal instrument in real estate matters.