

# Land Court: Demystifying An Enigma

*by Honorable Gary W.B. Chang*

To many lawyers, land court is as foreign and misunderstood as a galaxy far, far away. But to those who operate in the land court system, it is a reliable, trustworthy, formal system of land title registration. This article attempts to untangle some of the mystery of land court and offer a few practice pointers.

## **I. What Is “Land Court”?**

There is some confusion regarding the use of the phrase “land court.” Does it necessarily refer to a judicial proceeding? Does it refer to the circuit court building or the bureau of conveyances? Where do I take a document to be filed in land court? An understanding of land court organization may help to address these questions.

Generally, the phrase “land court” refers to a comprehensive system of land title recordation that is

separate and distinct from the “regular system” of land title registration (grantor-grantee indices). “Land court” is an oft used colloquial term that loosely refers to the Torrens system of land title recording.

The Torrens system is named after Sir Robert Torrens, who first invented this system of title recordation in Australia. The Torrens system was first adopted by the Territory of Hawaii in 1903. The hallmark distinction between the Torrens system and the regular system of land title registration is a document called the certificate of title or “TCT” (“transfer certificate of title”) found in the land court system. This document will be discussed in greater detail below.

All land in Hawaii was originally registered in the regular system of land title registration.<sup>1</sup> Upon the enactment of the Torrens Land Act in 1903, landowners could apply to have their regular system land for-



mally registered as land court property by order of the land court.<sup>2</sup> Land court has exclusive jurisdiction over the registration of regular system land into the land court system.<sup>3</sup>

The Hawaii land court system consists of two components: (1) an adjudicatory arm (that decides all contested and uncontested issues pertaining to land court title) and (2) a recording arm (that records land court title documents and registers title).<sup>4</sup> The adjudicatory arm is headed by the land court judge (adjudication) and the registrar of the land court (administration), while the recording arm is headed by the assistant registrar of the land court.

The land court judge appoints the registrar of the land court.<sup>5</sup> The registrar's direct duties include the filing of land court litigation documents and scheduling and attending land court hearings. The registrar's office is physically located on the first floor in the Kaahumanu Hale (circuit court) courthouse, which is located at 777 Punchbowl Street in Honolulu (across from Restaurant Row on Pohukaina Street). The land court judge also holds its judicial hearings on the fourth floor of Kaahumanu Hale.

The land court judge also appoints the assistant registrar of the land court.<sup>6</sup> The actual functions of

recording and registration of title documents are statutorily delegated to the assistant registrar.<sup>7</sup> The assistant registrar's office is physically located in the Kalanimoku Building, located at 1151 Punchbowl Street in Honolulu (across from the State Capitol). This is where the filing and recording of land court title documents (as contrasted from litigation documents) takes place, and is also where the bureau of conveyances is located.

The assistant registrar of the land court's office<sup>8</sup> is, however, wholly different and distinct from the bureau of conveyances<sup>9</sup> in location, function, jurisdiction, funding, administration, and organization. The assistant registrar of the land court's office handles all of the land court filings and recordings. The bureau of conveyances handles all of the regular system filings and recordings.

Each island does not have a land court judge or a registrar of the land court. There is only one registrar<sup>10</sup> and one land court judge<sup>11</sup> for the entire state and they are both located in Honolulu.

Organizationally, the registrar and the assistant registrar of the land court are created under two separate branches of government. The assistant registrar, where land court title documents are recorded, is under

the executive branch (governor) and the registrar of the land court and the land court judge are under the judicial branch (chief justice).

Notwithstanding that the registrar and the assistant registrar fall under different branches of government, the two offices are not wholly independent. The land court (judicial branch) bears some supervisory authority over the assistant registrar (executive branch).<sup>12</sup>

Additionally, where the assistant registrar has a “doubtful question” regarding the registration of land court title, there is a formal procedure for the assistant registrar to refer such doubtful questions to land court for formal determination and adjudication.<sup>13</sup> This “doubtful question” procedure has rarely been used, however. Most recordation questions are resolved informally.

Thus, the phrase “land court” can, depending upon its context and usage, refer to a court of limited jurisdiction, a system of recording land title under the Torrens system, a clerical office in Kaahumanu Hale (the circuit court building) where court documents are filed for land court cases, or the place in the Kalanimoku Building where land court title deeds and other instruments are recorded (and also where the bureau of conveyances is located).

## II. Fundamental Principles of Land Court

### A. Chapter 501

With that general explanation, we now address some general concepts that drive land court.

First, land court is like any other creature of statute. If one practices litigation or transactional law in the area of land court, there is no way around reading the governing statute: Haw. Rev. Stat. Chapter 501. There are approximately 123 sections in Chapter 501. However, for any given land court issue one may face, there are typically only about five to ten sections of statutes and court rules that apply.

The greatest challenge for professionals who dabble in the area of land court, is that such dabblers are typically not inclined to invest the time to acquire expertise in land court matters. As a consequence, they struggle to navigate their way through what they view as a morass of confusion and frustration.

The key to an understanding of land court is to read the applicable provisions in Chapter 501, which is not overly lengthy. A quick glance over the entire chapter will give the reader a flavor of the topics addressed. Chapter 501 is broken down into 23 convenient subject matter areas with subheadings describing each area. After perusing the entire chapter, the reader can then focus on the provisions that are directly applicable to his/her matter of interest and read those provisions with great care. The land court statutes set forth detailed requirements that guide



professionals in the preparation and recording of land court documents as well as related litigation documents, such as a money judgment, the collection of which may involve the execution upon land court property. In that instance, it would behoove an attorney to include the TCT number of the property in the text of the judgment,<sup>14</sup> which will enable the attorney to record the judgment in land court and to establish a lien on the land court property.

Additionally, an attorney should ensure that the name of the judgment debtor matches the exact name of the registered owner of the land court property. Leaving out a middle name or misspelling a name could be problematic in recording the money judgment with the assistant registrar of the land court.

## B. The Transfer Certificate of Title

As was mentioned above, the primary distinguishing feature between the land court system and the regular system is the certificate of title in land court, also colloquially referred to as the “TCT” in land court.<sup>15</sup>

The information set forth in every TCT includes: (1) a unique TCT number that is assigned and dedicated to a specific parcel of land court property, (2) the date of issuance of the TCT (the same date the underlying title document is recorded), (3) name(s) of the registered owner(s) of that land court parcel of land, (4) the nature of the tenancy of the title being held by multiple owners, (5) the trust powers, if a registered owner is a trustee, (6) the legal land court description of the land (which land court description is different from a regular system land description and which does not include any reference to the tax map key number or street address number), and (7) a comprehensive list of all encumbrances and memorials of those who own an interest in the land other than an ownership interest in title (such as a lease, mortgage, easement, etc.).

There is no comparable document to the land court TCT in the regular system. The TCT is a single document (that is typically multiple pages long) that lists each current registered owner of the property and every encumbrance or other interest that binds the property. This enables anyone who is interested in ascertaining who has any ownership or other interest in a parcel of land court property to determine who owns what interest in or encumbrance upon the property. All one has to do is to check the current TCT. Everyone and everything is

conveniently listed on a single TCT document.

This is different from the regular system, where one must search both the grantor index and the grantee index to ascertain who has any interest in or encumbrance upon a parcel of regular system land. Therefore, there is a greater chance that a person searching the indices may miss some transaction that created some interest in or encumbrance upon the property.

## C. The Backlog

As described above, the land court system provides a much more efficient and convenient method of ascertaining who or what has an interest in or encumbrance upon any property that is registered as land court property; with one significant caveat: a backlog. Currently, there is a lengthy “backlog” (years) from the time a land court document is first recorded and the time when the effect of that document upon the TCT is certified as being reviewed and verified by the assistant registrar as meeting the requirements of land court. The reason for this backlog is simply a matter of the combination of the extreme volume of documents recorded and a lack of manpower.

Many years ago, when the form of land title instruments was simple and few in number, the assistant registrars at the receiving counter could immediately review and certify the correctness of a document that was presented for recordation. The land court recordation stamp could be affixed to the document and all relevant information would be noted on the TCT without delay. However, since then, the content of documents being recorded have become more complex (e.g., globalization, convoluted trust provisions, foreclosures, multi-party transactions, international parent and subsidiary parties, and so forth) and the number of documents being recorded have increased exponentially. Now many hundreds of documents are recorded every day.

With limited staff, it takes much more time and expertise to review the correctness of the documents before they are certified on the TCT. A corresponding decline in attorney or client skill in drafting these increasingly high volume and complex land court instruments adversely compound the situation.<sup>16</sup> As a consequence, a substantial backlog has developed between the time a document is presented for recordation at the assistant registrar’s filing counter and the time the TCT is certified by the assistant registrar.

This backlog situation sometimes creates a circumstance where a transaction occurs between the time a

document is presented for recordation and the time it is certified, which could be years later. As will be explained below, this situation raises a substantial question regarding when the document is considered “entered” in the land court records. Is the document “entered” on the date it was recorded or on the date that the TCT is certified years later?

#### **D. Voluntary Dealings with Land**

The most widely utilized sections of the land court statute are those that relate to “voluntary dealings with land.” This concept involves every land transaction that is voluntarily entered into. The vast majority of real estate transactions are voluntary dealings. All

land sales, leases, mortgages, contracts, real estate trusts, and any other fathomable dealing involving land falls under this broad category.

Haw. Rev. Stat. §§ 501-101 (voluntary dealings with registered land) and 501-196 (alternation upon registration book) are the sections that most frequently relate to these areas. That is not to say that the many other provisions of Chapter 501 would not factor heavily in any particular transaction. However, at a minimum, an attorney should become familiar with these two sections.

Section 501-101 is an extremely critical provision. It provides that the act of registration of a title document is the operative act that transfers title in land court. When a document is registered or

recorded with the assistant registrar of the land court, the assistant registrar is required to stamp the instrument with the date, hour, and minute the document is presented for recordation. Haw. Rev. Stat. § 501-107. That date, hour, and minute are binding upon the world, except in the case where title is procured by fraud. An innocent bona fide purchaser for value is not bound by the fraudulent TCT holder and, in fact, is protected against such a fraudulently procured title and TCT. *Id.* § 501-106.

Any contract for the transfer of title to land (or interest in the land) that is not registered with the assistant registrar shall not bind the land (*i.e.*, does not give notice to the world regarding the terms of the contract) and only acts as a



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contract between the parties. *Id.* § 501-101. An unrecorded contract does not bind the world or strangers to the contract. Bona fide purchasers who do not have notice of the existence of an unrecorded instrument are typically not likely to be affected by the unrecorded instrument.

In addition to meeting size and margin requirements, all voluntary instruments must contain (1) the correct full name of the grantee or other party acquiring the title or interest in the property, (2) the grantee's marital status and full name of the spouse, (3) the TCT number and legal land court description of the subject property, and (4) a certificate of acknowledgement by a notary public with properly typed full names that do not vary from the names in the text of the instrument. *Id.* at §§ 501-105, -108; Rules of the Land Court 58.

Where a grantee is a corporation or a partnership, there are some special requirements for such a deed or other voluntary instrument. Haw. Rev. Stat. § 501-105 provides that where a grantee is a corporation or partnership, the deed or other voluntary instrument shall state in the document or indorsed on a fly sheet the state where the entity is registered or organized and the entity's address.

Land court rule 58 also prohibits the assistant registrar from recording a deed or other voluntary instrument that grants title to land court property to a corporation or a partnership unless:

The assistant registrar has verified the existence and good standing of any grantee, assignee, lessee or mortgagee which is a corporation incorporated in the state or a partnership registered in this state; or there is presented as to any grantee, assignee, lessee or mortgagee which is a foreign corporation or partnership: (a) evidence that such foreign corporation or partnership is registered to do business and in good standing in the state; or (b) evidence (which may be in the form of an opinion of counsel) that such foreign corporation or partnership is in good standing in its state of incorporation or organization.

Rules of the Land Court 58 (Michie 2017).

Of significance is the requirement that, with respect to a voluntary instrument that involves a corporation or partnership acquiring the title or interest in the land court property, the party seeking to record such instrument must demonstrate to the assistant registrar where the registered owner of title is organized and that it is in good standing. Good standing is

typically established by a governmental certificate of good standing or by an opinion letter of good standing by counsel.

Additionally, any such instrument that conveys title or other interest to a corporation or partnership must meet all of the other requirements of any other land court voluntary instrument, including the correct full name of the entity and the TCT number of the subject land court property.

### **E. Adverse possession**

One of the unequivocal protections the land court statutes provide to a land court property owner is the prohibition of adverse possession. The doctrine of adverse possession does not apply to land court property. Haw. Rev. Stat. § 501-87 expressly provides that no right, title, or interest in land court property can be acquired by adverse possession.

### **F. Power of attorney**

There are special requirements for land court transactions that involve a party that acts through a power of attorney. Section 501-174 provides:

Any person may by attorney procure land to be registered and convey or otherwise deal with registered land, but the letters of attorney shall be acknowledged and filed or recorded with the assistant registrar and registered. Any instrument revoking such letters shall be acknowledged and registered in like manner.

Haw. Rev. Stat. § 501-174 (2006 Replacement).

One must be mindful that recording a land court transaction that is conducted by an attorney-in-fact must be accompanied by the recordation of the applicable power of attorney.

The land court has not, thus far, required that the power of attorney be recorded before the deed or other voluntary instrument is recorded. However, the land court does require evidence that the power of attorney was executed, valid, and in effect at the time the deed or other voluntary instrument was executed.

## **III. Significant Issues of Land Court**

### **A. Entry of a New TCT**

The issue regarding when a recorded transaction has been "entered" in the land court system has been addressed by the land court. This issue often arises in the foreclosure setting, whether the foreclosure is

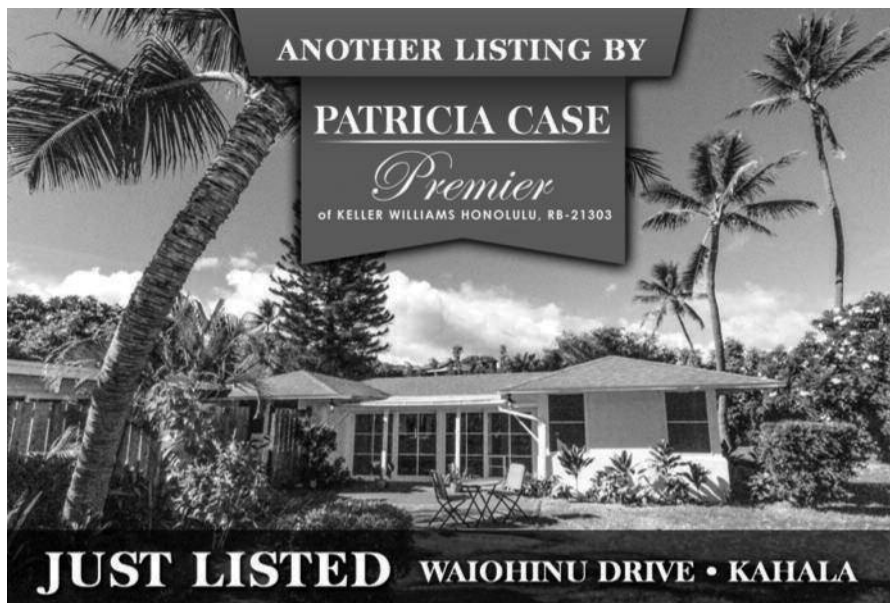
accomplished by court action or by power of sale.

Typically, the creditor will foreclose and then acquire the title to the property as the highest bidder (usually by credit bid) at the auction. As the new owner of the property, the creditor proceeds to record their deed with the assistant registrar. After the deed is recorded and the assistant registrar stamps the date, hour, and minute of recording and a new TCT number onto the deed, the borrower/debtor who was in default on the obligation generally files a land court petition or a civil action to challenge the validity of the foreclosure process before the TCT is certified by the assistant registrar.

The controlling land court statute states that “[n]othing in this chapter shall be construed to prevent the mortgagor . . . from directly impeaching by action or otherwise, any foreclosure proceeding affecting registered land, prior to the *entry* of a new certificate of title.”<sup>17</sup> Since the judicial challenge to the foreclosure proceeding is typically filed during the pending backlog period, the dispositive question becomes: “When is the new certificate of title considered to be ‘entered’ under Haw. Rev. Stat. § 501-118?”

The creditor typically contends, on the one hand, that the new certificate of title was “entered” on the date the deed was recorded and the new TCT number was stamped onto the deed by the assistant registrar, notwithstanding that the assistant registrar has not yet completed a “secondary review” to ensure that the deed has met all of the applicable land court requirements.<sup>18</sup>

The borrower/debtor, on the other hand, contends that, although



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the date, time, and new TCT number are stamped onto the document being recorded, the new TCT is still executory or provisional because it is pending the “secondary review” by the assistant registrar and has not yet been certified on the TCT. Therefore, the borrower/mortgagor contends that the new TCT has not yet been “entered” until the “secondary review” is completed and the TCT is certified.

The presiding land court judge has held that a new TCT is deemed “entered” when the deed is recorded and the date of recording and a new TCT number is stamped onto the deed by the assistant registrar, notwithstanding that the secondary review is still pending.<sup>19</sup> The Hawaii Intermediate Court of Appeals has also issued a memorandum opinion that is consistent with this land court ruling. *Wells Fargo Bank N.A. v. Omiya*, No. CAAP-13-0000133 (Haw. Inter. Ct. App. July 24, 2017)(this was a foreclosure case in circuit court (Judge Edwin C. Nacino presiding), not a land court case).

To date, the land court has been unable to accept the borrower/debtor’s position because it would effectively impose an unfair moratorium upon the alienation of the title to the property, pending the completion of the “secondary review,” which could be as long as 5 years.<sup>20</sup> Moreover, there is no statutory definition of the term “entry” of the new TCT in Haw. Rev. Stat. § 501-118, or of the phrase “secondary review” in chapter 501.

The court made a pragmatic decision to construe Haw. Rev. Stat. § 501-118 in a manner that does not unduly interfere with the free alienation of title.<sup>21</sup> The land court ruled that the TCT is “entered” when the deed is recorded and not when it is certified upon completion of a secondary review.

## **B. Exclusive Jurisdiction to Amend or Modify the TCT.**

Section 501-196 is the land court statute that authorizes the land court to direct the assistant registrar to modify and amend the TCT pursuant to the order of the land court. It provides that the assistant registrar shall not erase, alter, or amend the TCT without an order of the land court.

This section further requires that a land court petition to amend a TCT be filed by a person or entity that has standing with an existing or claimed interest in the title to the subject property. It further requires that the petitioner cite or provide service of process

(the citation) to all interested parties. This section also mandates the archaic practice of including in the case caption the language from the original application for registration of the land as land court property.

Not all land court petitions are required to be disposed of by notice and hearing. Certain routine, uncontested changes of title have evolved to be allowed by ex parte petitions. These would typically include ex parte petitions to (1) correct a clerical spelling error, (2) note death, (3) note divorce, (4) note marriage, and (5) note a name change. The Permanent Committee on Land Court Matters is currently near completion of a project to develop a standard form ex parte petition to facilitate and standardize these five uncontested, non-controversial matters. Once finalized, the ex parte petition form would be reviewed and approved by the Hawaii Supreme Court and circulated for public comment before it can be adopted for use.

## **C. Interplay Between Land Court and Circuit Court**

Another area that is full of controversy and confusion is the jurisdictional interplay between land court and circuit court. These two courts share much concurrent jurisdiction and many issues that can be adjudicated in one court can also be adjudicated in the other. However, land court has exclusive jurisdiction over the registration of land into the land court system and over the amendment or modification of the TCT. No court, other than land court, may direct the assistant registrar of the land court to amend, modify, or change a TCT.

That is not to say that another court of competent subject matter jurisdiction other than land court cannot affect the title to land court property. For example, family court can order that one of two divorcing spouses is entitled to 100% of the title to the marital real property, or a circuit court can order in a partition or foreclosure case that title to the property changes from one party to another. In such instances, the family court or the circuit court can even compel a party to execute a deed that transfers title from one party to another.

However, neither the family court nor the circuit court in either instance can order or direct the assistant registrar to alter or amend the TCT to reflect the new registered owner of the property. Only the land court, exclusively, can do that. The new owner may certainly introduce evidence in the land court of the



decree or order in the family court or the circuit court that directed that title to the property be transferred to him or her, together with the deed that actually transfers the property to him or her, as evidence that a certain person or entity is the new registered owner.

It is important to know that a court order that purports to order a change to the registered owner of law court property is not, by itself, sufficient to authorize the land court to direct the assistant registrar to alter or amend the TCT. The land court requires evidence of a properly executed deed or other instrument that conforms to the order before a TCT can be altered or amended to reflect the change so ordered.

Thus, if the prayer for relief includes a request to amend or

modify the TCT, such action must be brought in the land court to obtain that relief. The plaintiff can also elect to waive or abandon the item of relief regarding the amendment or modification of the TCT and continue to pursue the remainder of the relief sought.

One other distinction of consequence between a circuit court action and a land court petition is that the circuit court is a court of general jurisdiction and, therefore, can entertain a wide range of actions (except to direct the assistant registrar to modify or amend the TCT). The land court is a court of limited, in rem, jurisdiction, and can only entertain litigation that is related to the amendment of the TCT. For example, both the land court and the circuit court can

entertain actions such as a quiet title action or a breach of contract action that relates to land court property. Once again, it is the prayer to amend the TCT that may dictate in which court the plaintiff must file.

The action can only be filed in the land court if the prayer includes a request to have the TCT amended or modified. Without such a prayer involving the TCT, the action can only be filed in the circuit court.<sup>22</sup>

The interplay between land court and other specialty courts, such as family (divorce) court and probate court, is another matter that is a source of some confusion. If such specialty courts have exclusive jurisdiction over matters that involve their respective subject matter, then the land court has



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generally declined to exercise jurisdiction over controversies that involve those specialty issues.

For example, if a controversy that is raised in land court involves a property division issue that is carried over from the family court, and if that issue is raised in time to litigate before the family court, the land court is likely to defer to the family court to dispose of that issue. The land court will still retain that part of the case that relates to amending the TCT.

As a further example, if the parties in a land court matter are litigating a matter dealing with a successor trustee controversy, it is likely that the land court will defer its jurisdiction to the probate court to adjudicate the trustee dispute. Again, however, the land court will retain jurisdiction over the aspect of the case that seeks to amend the TCT.

#### D. Fly Sheets, Liens, and Notices of Pendency of Action

The area of liens and the use of “fly sheets” in land court are another fertile area for confusion and misunderstanding. A “fly sheet” is a single page document that is, on an ad hoc and after-thought basis, stapled onto the front of a document to be recorded in order to provide missing information, or to correct erroneous information, which is deemed necessary in order to record the document in land court. By adoption of a new land court rule 58.5 on January 1, 2017, the Hawaii Supreme Court formalized and regulated the use of a fly sheet.

A fly sheet is now formally defined as “a single sheet of paper affixed to the first page of a voluntary instrument covered by [land court] Rule 58 . . . or 62(a) to 62(d) . . .” The form of a fly sheet is also strictly regulated by rule 58.5 and the recommended form is now attached to the land court rules as Form B. As of the date of this article, new rule 58.5 and Form B may only be available online.

The uses of a fly sheet are also restricted by rule 58.5(b). A fly sheet may now be used for making certain corrections to an individual’s name,<sup>23</sup> to add a marital status (but may not change a marital status that is indicated in the text of the document),<sup>24</sup> the state or jurisdiction of incorporation,<sup>25</sup> to update the TCT number that is already stated in the text of the document,<sup>26</sup> and to provide the current address of a grantee, assignee, or transferee.<sup>27</sup> The fly sheet may not be used to clarify or change the name of a corporation, partnership, limited liability company, or other legal entity

that is a party to the document.<sup>28</sup> Any other use of a fly sheet is generally not permitted: “Except as specifically permitted by this Rule, a fly sheet may not be used to change, correct, or add to any information that is not otherwise contained in the instrument being presented for recordation.”<sup>29</sup>

An exception to the general rule is recognized where a statute expressly allows certain information to be provided after the document’s execution: “Any indorsement permitted by statute or by these rules shall be stated only on a fly sheet in conformance with this Rule.”<sup>30</sup>

For example, Hawaii law provides for an update by indorsement of a document that has already been executed: “If the *certificate reference in the instrument* is not current, an *endorsement* [sic]<sup>31</sup> of the current certificate of title shall be required.” Haw. Rev. Stat. § 501-108(a) (emphasis added). Such a post-document-execution indorsement to update the TCT number that is already stated in the body of the instrument is now required to be provided by a fly sheet. Note that, if the TCT is missing from the instrument, then neither Haw. Rev. Stat. § 501-108(a) nor rule 58.5 authorizes one to use a fly sheet to provide a missing TCT number. That must be addressed by petition to the land court judge. Proof would be required to establish that the grantee/judgment debtor is, in fact, the owner of the land court property in question.

One specific type of lien, a money judgment, presents a complex situation that may create a trap for the unwary. There are significant land court requirements in order to impose a lien upon land court property based upon a money judgment.

The specific land court statute that relates to recording a lien upon land court property is Haw. Rev. Stat. § 501-102. This statute specifically requires that the money judgment state the TCT number in the text of the judgment:

Every . . . lien, . . . order, [*money judgment, or*] decree . . . affecting registered land, which would under existing laws, if recorded, shall, if registered, filed, recorded, or entered in the office of the assistant registrar in the bureau of conveyances, be notice to all persons from the time of such registering, filing, recording, or entering and *shall contain a reference to the number of the certificate of title and an indorsement of the current certificate of title, if applicable, of the land to be affected.*

Haw. Rev. Stat. § 501-102 (2016)(emphasis added).

It is rare, if ever, that a money judgment contains the TCT number of the defendant's land court property. However, that is not the only obstacle to drafting a "land court friendly" money judgment. The defendant's name is oftentimes another challenge.

As stated above, any document that is sought to be registered with the assistant registrar must expressly set forth the full name of the registered owner in the exact form, with first, middle, and last names spelled out correctly. The reason for this is that less than the full name of the registered owner of the land court property could easily lead to a mistaken identity.<sup>32</sup>

Notwithstanding these formal prerequisites for instruments or judgments to be recorded as a lien upon land court property, many lien documents tend to lack some of the information required to register such documents as a lien upon land court property. Unfortunately, many frustrated creditors discover that a fly sheet cannot save their unrecordable document.<sup>33</sup>

The Permanent Committee on Land Court Matters addressed this lien situation and recognized a need to assist the legal and real estate communities with the recordation of money judgment liens. The Committee first examined how liens upon regular system property were handled. The Committee found that the regular system's handling of the recordation of money judgments as a lien was addressed by Haw. Rev. Stat. § 636-3: "Any money judgment . . . shall be a lien upon real property when a copy thereof . . . is recorded in the bureau of conveyances." Haw. Rev. Stat. § 636-3 (2016 Replacement).

However, Haw. Rev. Stat. § 636-3



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is a statute of general application. Therefore, this statute does not excuse the application of the land court lien requirements set forth in Haw. Rev. Stat. § 501-102, which require the judgment creditor to record its lien with the assistant registrar of the land court in order to bind the land. As such the money judgment cannot be recorded without the TCT number or the registered owner's full name stated in the body of the judgment.

The Committee's solution was to propose new legislation that was adopted in 2014. Haw. Rev. Stat. § 501-82 was amended to provide a companion procedure for land court liens that would mirror the Haw. Rev. Stat. § 636-3 regular system lien procedure. Currently, one must comply with the following procedure for recording a money judgment as a lien upon land court property:

Every . . . purchaser of registered land who takes a certificate of title for value and in good faith, [shall] hold the same free from all encumbrances except those noted on the certificate in the order of priority of recordation, and any of the following encumbrances which may be subsisting, namely:

. . . .

(9) money judgments . . . if the same are recorded in the bureau of conveyances; provided that only the monetary lien created by the recordation shall affect the land; provided that no other provision of a judgment . . . shall affect the land unless otherwise registered in compliance with this chapter.

Haw. Rev. Stat. § 501-82(a) (2016 Cumulative Supplement).

Pursuant to the foregoing, money judgments that were previously non-conforming and not capable of being recorded in the land court due to missing information, can now be recorded in the regular system of the bureau of conveyances and now have the legal force and effect of a lien upon land court property. It is no longer necessary to attempt to use a fly sheet to record a money judgment lien with the assistant registrar of the land court.

The land court statute also specifically authorizes a notice of pendency of action to be recorded.<sup>34</sup> A judgment creditor in an action to which Haw. Rev. Stat. § 501-151 applies (actions against title, not an action for a money judgment) must be careful about the special time limit for filing a judgment for a case in which a notice of pendency of action is recorded. The statute

requires that any judgment that is filed in an action for which a notice of pendency of action is recorded in land court must be registered with the land court within 60 days of the rendition thereof. Haw. Rev. Stat. § 501-151.

In order to be capable of being registered or recorded with the assistant registrar, the judgment against a defendant's land court property title must state (1) the TCT number of the land court property that is the subject of the judgment, (2) the social security number, Hawaii general excise tax number, or federal employer identification number for persons, corporations, partnerships, or other entities against whom the judgment is rendered. *See* Hawaii Court Records Rules 2.19 *et seq.*

#### IV. Practice Pointers

Many practitioners who dabble in the area of land court fall prey to the many technical requirements land court demands. This article cannot possibly provide a comprehensive panacea for all the technicalities that are required in the drafting of land court instruments. However, it is the intent of this article to give the reader a flavor of the level of precision and exactness required for drafting documents that relate to land court matters.

The first practice pointer by which all land court practitioners must abide is to find a way to be precise and accurate in the preparation of land court instruments. A clerical error in a single digit of a 7-digit TCT number can mean the difference between a piece of property that is located in Kapahulu or in Kamuela.<sup>35</sup> Precision and accuracy in the preparation and proofreading of documents is critical.

There is also the related danger of using forms and failing to make necessary adjustments to the current transaction. Take great care when using forms. Using a form document as a template for drafting a land court instrument can be a recipe for disaster if the drafter is not careful and meticulous.

The second practice pointer is to be aware that, in order for a land court document to be recorded, it must comply with strict form requirements of Chapter 501 and the land court rules. First, all paper must be letter size, not legal size. Haw. Rev. Stat. § 501-108(d). Second, the margins of the document must comply with the statutory requirements. *Id.* § 501-108(b). Third, names and numbers deserve a great deal of attention. Names in a document are extremely important and are the subject of strict regulation.

The failure to comply with these requirements often forms a basis for rejecting a document that is presented for recordation.

For any transactional document, such as a deed, contract, lease, or mortgage, the “names of all natural persons signing in their individual capacity in the instrument shall be typewritten, stamped, legibly printed by hand, or by a mechanical or electrical printing method beneath all signatures.” *Id.* § 501-108(c). Moreover, “[n]o discrepancy in any name shall exist between the printed name, as it appears either in the body of the instrument, beneath the signature, or in the notary’s certificate of acknowledgement.” *Id.*

Every grantee in a voluntary instrument who is a person shall be identified by full name or names and state whether each such person is married or unmarried. If the grantee is married, then the instrument shall also state the full name of the spouse. *Id.* § 501-105. If the voluntary instrument fails to provide the grantee’s full name or whether the grantee is married or unmarried, then, at the time of recording, such information may be indorsed by a fly sheet. *Id.*

The third practice pointer deals with the necessity to state the TCT number in the text of a deed or voluntary instrument to convey land court title. The statute actually prohibits the assistant registrar from registering or recording a deed that fails to state the TCT number in the text of the instrument: “provided that no deed, mortgage, lease, or other voluntary instrument shall be accepted by the assistant registrar for registration unless a reference to the number of the certificate of title of the land affected by such instrument is incorporated *in the body of the instrument* tendered for registration.” *Id.* § 501-108(a)(emphasis added). Moreover, a fly sheet cannot be used to cure the failure to state the TCT number in the body of the instrument.

In the event one seeks to record a voluntary instrument that contains in the body of the instrument a cancelled TCT number that has been superseded by a new TCT number, the law requires the TCT number to be updated by a fly sheet with the current TCT number. *Id.*

## V. Integrity of the TCT

Many members of the public have criticized land court personnel for being too strict in their review of documents that are submitted for registration. Such persons see no reason why the land court clerks or the assistant registrars reject their land court documents for the smallest errors.

There is no question that the personnel of the land court, registrar, and assistant registrar are strict about every detail that is required by law before a document can be recorded and certified. The reason is this: The state stands behind the integrity of the land court record of title. The state essentially guarantees good title.

If the land court registrar or the assistant registrar commits an error in its title records and that error causes pecuniary harm to the registered owner of land court title, then the registered owner can sue the state for the consequential damages sustained. Section 501-213 provides in relevant part:

If any contract claim is prosecuted to recover for loss or damage, or for deprivation of land, or of any estate or interest therein, arising *wholly* through fraud, negligence, omission, mistake, or misfeasance of the registrar, assistant registrar, or of any of the examiners of title, in the performance of their respective duties, then the action shall be brought against the state director of finance, as *sole defendant*. If any action is brought to recover for loss or damage, or for deprivation of land, or of any estate or interest therein, arising *wholly* through any fraud, negligence, omission, mistake, or misfeasance of some *person other* than the officers and assistants above named, or arising jointly through the fraud, negligence, omission, mistake, or misfeasance of such other person and any such *officers and assistants*, then the action shall be brought against *both the director and such other person* as joint defendants.

Haw. Rev. Stat. § 501-213 (2006 Replacement)(emphasis added).

This exposure to liability for damages, and possibly for attorneys’ fees and costs, is the primary motivation for the registrar and the assistant registrars being careful in their enforcement of the land court laws and requirements. The law demands that level of precision.

## VI. Conclusion

This article is intended to provide an introduction to land court and to some of the concepts embodied in the Torrens system of land title recordation. The many requirements to render an instrument recordable are demanding and unyielding. The registrar and the assistant registrars are duty bound to strictly comply with the requirements of Chapter 501 and the land court rules.

Above all, land court practice demands consistent accuracy and precision in the preparation of land court documents. The competent practice of law in the area of land court demands that the practitioner take the time to read, digest, and learn the requirements of Chapter 501 and the land court rules.

Practice in the area of land court is not free from difficulty, but it is a reliable system of title recordation.

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<sup>1</sup> Hawaii Revised Statutes Chapter 502 (2006 Replacement and Supp. 2016)(hereinafter “Haw. Rev. Stat.”) regulates the regular system of land title recording.

<sup>2</sup> *Id.* § 501-71.

<sup>3</sup> *Id.* § 501-1.

<sup>4</sup> *See generally id.*

<sup>5</sup> *Id.* § 501-6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 501-9.

<sup>8</sup> *Id.* ch. 501.

<sup>9</sup> *Id.* ch. 502.

<sup>10</sup> *Id.* § 501-8.

<sup>11</sup> *Id.* §§ 501-1 and -2.

<sup>12</sup> *Id.* §§ 501-6 and -7.

<sup>13</sup> *Id.* § 501-104.

<sup>14</sup> *Id.* § 501-102; Rules of the Land Court 62.

<sup>15</sup> It should be noted that the term “transfer certificate of title” does not actually appear in Chapter 501. Instead, the TCT is actually referred to as the “certificate of title.” However, it is generally recognized that the “certificate of title” is the initial certificate of title that is issued by the land court when the regular system land is first registered as land court property. Thereafter, whenever title to the property is transferred to a new owner, a new “transfer certificate of title” is prepared by the assistant registrar. Therefore, the real estate and title practitioners colloquially refer to every certificate of title after the initial certificate of title as a “Transfer Certificate of Title” or “TCT.”

<sup>16</sup> Mortgage and lending documents are examples of complex instruments that present a challenge for the assistant registrars. These types of documents often contain a high rate of errors, many of them typographical, which ultimately render these documents not recordable. In particular, the volume of problematic documents generated by the lending and mort-

gage foreclosure industry in the decade before (and the near decade since) the mortgage crisis of 2008 has contributed mightily to the existence of the current land court backlog. Lending documents were being recorded by the thousands, a significant percentage of which were being drafted and submitted for recording by non-Hawaii entities, with little regard to or knowledge of the requirements for the Hawaii law. This foisted a tremendous burden upon the assistant registrar to vet all of these defective documents and to note on the TCT the issues affecting whether such instruments were qualified to be registered. Thus, the backlog was born.

<sup>17</sup> Haw. Rev. Stat. § 501-118 (emphasis added).

<sup>18</sup> The term “secondary review” was coined by the assistant registrar and the title industry and refers to the process whereby the assistant registrar (1) receives a document to be recorded, (2) file stamps it as being recorded, and (3) issues a new TCT number to the new registered owner of title, after which the final act of certifying the new TCT as being recognized by the assistant registrar is reserved until the document and the content of the superseded TCT can be studied and examined to determine whether the new transaction meets the requirements of land court. Indications that a newly issued TCT is pending a “secondary review” often include: (a) the TCT is not initialed by the assistant registrar, or (b) the list of encumbrances/memorials on the newly issued TCT are left totally blank.

<sup>19</sup> *See also Aames Funding Corp. v. Mores*, 107 Haw. 95, 110 P.3d 1043 (2005).

<sup>20</sup> For example, the author is aware of a “secondary review” of a 2010 satisfaction of mortgage (recorded due to refinancing) not being certified by the assistant registrar until 2015.

<sup>21</sup> *See also* Haw. Rev. Stat. §§ 501-101, -106, and -107.

<sup>22</sup> *E.g., In re Rice*, 68 Haw. 334, 713 P.2d 426 (1986).

<sup>23</sup> Rules of the Land Court 58.5(b)(3).

<sup>24</sup> *Id.* 58.5(b)(5).

<sup>25</sup> *Id.* 58.5(b)(6).

<sup>26</sup> *Id.* 58.5(b)(7).

<sup>27</sup> *Id.* 58.5(b)(8).

<sup>28</sup> *Id.* 58.5(b)(4).

<sup>29</sup> *Id.* 58.5.

<sup>30</sup> *Id.*

<sup>31</sup> There was a lack of consistency in the spelling of the words “endorsement” and “indorsement” in the Haw. Rev. Stat. Therefore, the Permanent Committee on Land Court Matters, which developed the current rule regarding fly sheets and money judgment liens, determined that the

appropriate spelling of the word is “indorsement” and not “endorsement.”

<sup>32</sup> For example, former world heavyweight champion George Foreman had five sons: George Foreman, Jr., George Foreman, III, George Foreman, IV, George Foreman, V, and George Foreman, VI. If a plaintiff held a money judgment against defendant George Foreman and the plaintiff sought to record a money judgment as a lien against land court property owned by “George Foreman,” the assistant registrar would have to guess upon whose property (George Forman, or one of his sons) the judgment lien is to be recorded.

<sup>33</sup> Needless to say, there are no reliable bases for ascertaining the reliability or accuracy of any additional information set forth on a fly sheet because the information on the fly sheet is neither certified nor sworn to by any competent witness and the opportunity for error or deception is great. Thus, using a fly sheet to provide missing information was often an imperfect means of attempting to record a money judgment or other lien that failed to provide the basic, required land court information.

<sup>34</sup> Haw. Rev. Stat. § 501-151. The land court construes this section as applying to cases that relate directly to the title to the land court property because such cases are the only kind in which a notice of pendency of action can be filed. A notice of pendency of action cannot be filed in connection with an action for damages where the plaintiff hopes to satisfy the money judgment out of land court land owned by the defendant.

<sup>35</sup> TCT numbers are assigned on a random, chronological order depending upon when a document is recorded. Therefore, if one mistypes a single number in a seven digit TCT number, the document prepared will apply to a completely different parcel of property and recording the document will not give the world any notice of the subject transaction.

*Judge Gary W.B. Chang was appointed to the First Circuit Court on June 1, 1999 and reappointed on June 1, 2009. He presides over civil cases as well as the Land and Tax Appeal Court. Prior to his appointment to the Circuit Court, he was a partner with Matsui Chung Sumida & Chang (1984-1999), a deputy attorney general (1980-1984), and a law clerk (1979-1980). Judge Chang received a B.A. degree from the University of Hawaii at Manoa (1972-1976) and a J.D. degree from the University of Gonzaga Law School in Washington (1976-1979). He served as the managing editor of the Gonzaga Law Review.*

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