

The Role of Notarial Instruments in Securing Real Estate Transactions

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Abstract

Notarial instruments guarantee the preservation of rights and play a crucial role in securing real estate transactions between individuals. Therefore, the Algerian legislator has regulated them, ensuring that these instruments are drawn up by a notary and given official status. As such, they can be relied upon as evidence and constitute an official deed and formal proof that can only be challenged by alleging forgery.

Keywords: Notarial Law No. 06/02, notarial instruments, registration, publicity (land registration), evidentiary value (probative force).

Introduction

Investing in real estate can contribute to economic growth and improve the lives of individuals and communities. Investing in real estate can generate stable income from rents and increase property value over time. However, it is important to acknowledge the risks associated with real estate transactions. These risks may include price fluctuations, changes in supply and demand, and the impact of economic and political events. Investors also have to bear the costs of maintenance and management, and they may encounter tax and administrative issues.

In Algeria, real estate transactions were uncommon until the late 1980s, particularly following the adoption of the 1989 Constitution¹. This constitution changed the country's economic system, giving private individuals the opportunity to own property and break free from the restrictions of socialism. After independence, the state owned most of the real estate, leading to a lack of culture surrounding real estate transactions and the marginalisation of their importance among most segments of society.

Accordingly, the 1989 Constitution acted as a 'lifeline' that enabled individuals to enter the real estate sector after transactions in this area had been virtually non-existent. It revived the real estate market and Algeria became one of the countries with significant real estate transactions. However, a lack of trust in transactions and a lack of legal controls to regulate these numerous dealings led to many abuses. All of these abuses have one thing in common: they threaten everything related to real estate transactions.

For this reason, the legislator introduced several rules to protect and secure real estate transactions by ensuring they are carried out correctly and achieve their economic and social

¹ - Order No. 89/11, dated 25 February 1989, containing the Algerian Constitution, Official Gazette (J.O.R.A.) No. 9, issued on 28 February 1989.

objectives. The most significant control introduced by the legislator to secure real estate transactions is the requirement for them to be concluded through an official document called a notarial deed. This requirement was established in several legal texts, such as Notarial Law No. 70/91², which was issued at a time when real estate transactions were rare — something which highlights the importance of these transactions for both the state and its legislators.

Through our study of this topic, we aim to clarify the legal frameworks governing real estate transactions, ensuring compliance and raising awareness among participants, real estate professionals and all those interested in real estate transactions about the need for notarialisation. Additionally, we will explain the guarantees that arise from adhering to regulations concerning the notarialisation of real estate transactions.

Accordingly, we raise the following problem:

Do notarial instruments successfully secure real estate transactions?

To address this issue, we will consider the topic in two parts:

Firstly, the requirement of formalities in concluding real estate transactions.

Secondly, we will consider the guarantees resulting from the mandatory notarialisation of real estate transactions.

First: The requirement of formalities in concluding real estate transactions

An agreement or contract is one of the most common legal acts between people because it provides benefits in daily life. In general, two sound wills are enough for it to be formed.

The Civil Code defines a contract as an agreement by which one or more persons undertake to give, do, or refrain from doing something (Article 54). However, some contracts require a special form to be valid. This is because they relate to real estate.

To this end, the Algerian legislator has introduced various mechanisms to enforce formal requirements, including notarial instruments. Special procedures have also been adopted to establish their effectiveness and ensure they produce all their legal effects.

A) Notarial instruments as a formal requirement for the conclusion of real estate transactions

The term ‘notarial instruments’ is frequently used and discussed in legal and doctrinal fields. These instruments are understood to be legal acts — specifically, contractual acts — prepared by a notary in accordance with the provisions of the law, based on the information provided by the interested parties within the limits of the notary’s personal and territorial authority and jurisdiction³.

The Algerian legislator did not define notarial instruments specifically. Instead, they are defined within the general concept of an official/public document (official paper), with notarial instruments being considered a type of official document in Article 324 bis of the Civil Code. According to this article, an official contract is one in which a public official (or officer) or a person entrusted with a public service records what occurred before them or

² Order No. 70/91, dated 15/12/1970, containing the Notarial Deed Law (J.O.R.A. No. 105), issued on 29/12/1970, repealed and amended by Law No. 06/02, dated 15/06/2006, containing the Notary Law (J.O.R.A. No. 46).

³ Fahima Guessouri, 'The Legal Regime of the Electronic Notarial Contract in Algeria', *Journal of Governance and Economic Law*, University of Batna 01, Vol. 3, No. 1, February 2023, p. 79.

what they received from the interested parties, according to the legal forms and within the limits of their authority and jurisdiction.

From this legislative text, we understand that the Algerian legislator has set out conditions that must be met for an instrument to be valid and produce all its effects. These conditions are: (list to follow).

B) Conditions for the validity of notarial instruments

In addition to the general conditions of an official/public document — namely, that it must be issued by a public officer/public servant or a person entrusted with a public service, within the limits of their authority and according to the formalities laid down by law — there are special conditions related specifically to notarial instruments. These include:

1. The notarial instrument must be issued by the notary: This means that the notary is the only person authorised to prepare notarial instruments. This is due to the legal expertise that they possess, which others do not.
2. The notary must draft the notarial instrument within their scope of authority: This condition requires the notary to draft the notarial deed within the limits of their power and jurisdiction.

Subject-matter jurisdiction: the notary prepares only the deeds which the law requires him to prepare, and nothing else. For example, he cannot issue a birth certificate, as this falls outside his area of expertise.

- Time jurisdiction: The notary is required to prepare deeds during their official working hours.
- Territorial jurisdiction: this extends to the entire national territory, provided that the act is carried out in the notary's office⁴.

3. Compliance with legal formalities when preparing notarial deeds

The notary must ensure that the notarial deed complies with certain formal requirements, including:

- it must be drafted in Arabic;
- the deed must include the year, month and day on which it is signed⁵.

The deeds must not have been tampered with in any way, such as writing between the lines or adding words, in the transactions or information recorded in the notarial content. Any such irregularity renders the deed void. Furthermore, if a word is crossed out or if the text is ambiguous, this must be certified or confirmed at the end of the contract.

In addition, the deed must contain a set of essential information. If these requirements are not met, the deed becomes void⁶. These essential elements are:

- The name and surname of the notary and the location of their office;
- The names, surnames, capacity (status/role), addresses, dates and places of birth, and nationalities of the parties;

⁴ Article 2 of Law No. 06/02 concerning the Notary Law.

⁵ Article 26 of Law No. 06/02 concerning the Notary Law.

⁶ Bachir Mohamed and Dallal Yazid, 'Transfer of Real Estate Ownership by Means of the Notarial Instrument in Algerian Legislation', *Academic Journal of Legal and Political Research*, University of El Oued (Ain)/Laghouat, Vol. 6, No. 2, September 2022, p. 538.

- The names and surnames, capacity, address, date and place of birth of the witnesses, when applicable;
- The name, surname and address of the interpreter, if applicable;
- A statement identifying the subject matter of the deed;

The place, year, month and day on which the deed was concluded.

- The powers of attorney granted by the parties, which must be attached to the original deed.
- A statement that the notary read the applicable tax and legal texts aloud to the parties;
- The signatures of the parties, witnesses, notary and interpreter, where applicable⁷.

C) Procedures for Notarising Real Estate Transactions

A set of procedures must be followed to notarise real estate transactions. These involve writing down what the parties have agreed upon in a notarial instrument and registering it to make it publicly available through land registration at the real estate office.

1. Drafting the notarial instrument

Notarial deeds issued according to specific formalities reflect the intent of the parties involved⁸. As these instruments embody the parties' intent and have significant legal implications, the notary must draft them carefully, ensuring they are free from errors and omissions.

Therefore, the notary must respect the legal rules governing drafting, such as:

- drafting;
- avoiding erasures/strikethroughs;
- ensuring the accuracy and correctness of recorded information;
- including all mandatory data;
- ensuring the deed is signed, since signatures are essential;
- obtaining signatures from all parties and witnesses.

2. Registration of the notarial instrument

Once the notary has drafted the notarial deed, the next step is registration. The deed must be registered by the notary. This registration must be accompanied by the mandatory documents set out in the Registration Law, including:

- Summary/total declarations (الإجمالية الكشوف): These are free forms provided by the Tax Administration (Directorate of Taxes). They are required by Article 153 of Ordinance No. 76/105⁹.
- Original copies (naskh al-asliyya): The notary is required to file original copies of the contracts so that registration inspectors can accurately review, examine and verify them. This requirement is set out in Article 9-01 of Ordinance No. 76/105.

Finally, in addition to the above documents, the notary must also submit:

- A contract summary: In addition to filing the original copies, the notary must file a summary of these contracts. This is required by Article 9-02 of Ordinance No. 76/105.

⁷- Article 29 of the Notary Law.

⁸- Fatima Zahra Hajj Chouaib, 'Rules for Drafting Notarial Contracts and the Issues They Raise', Journal of Legal and Economic Research, University of Tiaret, Vol. 6, No. 1, January 2023, p. 634.

⁹- Order No. 76/105, dated 09/12/1976, containing the Registration Law (see above). J.O.R.A. No. 81, issued on 18/12/1976.

Furthermore, the notary must adhere to the deadlines for submitting contracts for registration. These deadlines vary depending on the type of transaction concluded before them¹⁰.

3. Publicity (land registration) of the notarial instrument

Publicity is a fundamental procedure that the notarial deed must undergo because it gives the real estate transaction legal force and opposability against any third party (i.e. it gives it legal force against anyone, regardless of who they are).

Land publicity is a series of procedures designed to inform everyone of any act or disposition relating to the property.

The Algerian legislator made all real estate dispositions subject to publicity through:

- Ordinance No. 75/74, concerning the preparation of the general survey and the establishment of the land register¹¹; and Executive Decree No. 76/63, concerning the establishment of the land register¹².

Subjecting the notarial deed to publicity protects both parties to the contract, as well as future owners of the property. However, it should be noted that publicity (registration) of a contract does not eliminate the possibility of its annulment. Therefore, publicity serves as both an information mechanism and a robust protective measure for the parties to the notarial contract¹³.

In addition, publicity prevents conflicts between ownership documents. This is because ownership titles are based on a single source, namely the set of land information cards/buffers, provided these records are correct and intact. This will benefit those involved in future transactions, for example by enabling them to obtain loans based on the property's value or use it as collateral¹⁴.

The publicity procedure passes through two basic stages:

A) Lodging (filing) stage

This is the first procedural stage for registering the transaction deed ('the act of disposing of real property'), as set out in Article 91 of Decree No. 76/63, as mentioned above. The notary public, acting as one of the persons authorised to perform this procedure, is obliged to submit the notarial instrument to the filing office and attach two copies of the contract to it. This must be completed within three months of the instrument being drawn up, otherwise a fine will be incurred as set out in Article 99 of Decree No. 76/63.

This measure enables the real estate registrar (the 'conservator of property records') to verify the documents' validity, integrity and freedom from defect, thereby avoiding future problems. The time allowed for examining the file is fifteen days. If an error is found in the documents or they fail to meet the requirements set out in Article 100 of Decree No. 76/63, the conservator may refuse to lodge them for real estate registration.

¹⁰- Article 9 of Order No. 76/105 concerning the Registration Law (above).

¹¹- Article 15 of Order No. 75/74 dated 12/11/1975, which includes the preparations for the general land survey and the establishment of the real estate register, Official Gazette No. 98 issued on 18/11/1975.

¹²- Article 41 of Executive Decree No. 76/63 dated 25/03/1976, which includes the establishment of the Land Registry, Official Gazette No. 23.

¹³- Fathi Wess, *Land Registration in Algerian Law and Comparative Laws*, Dar Houma for Printing and Distribution, Algeria, 2014, pp. 172-173.

¹⁴- Ahmed Al-Nouay, 'The Systems of Land Registration and the Position of the Algerian Legislator', *Journal of Legal and Political Thought*, University of El Oued (Laghouat), Vol. 6, No. 2, 2022, p. 1394.

This effectively grants the real estate conservator a period in which the parties can correct any defects. It also addresses situations in which the parties delay correcting such defects or refuse to do so intentionally.

B) The registration stage

Once the filing has been completed, the real estate conservator verifies that the documents to be registered satisfy the requisite conditions. They then register them by endorsing the relevant documents and the real estate card relating to the property that is the subject of the transaction. Furthermore, the conservator may refuse registration if the conditions set out in Decree No. 76/63 are met. Accordingly, the contract becomes registered following the registration procedure, not during the lodging stage.

Secondly, ensuring the evidentiary/enforceability effect of the notarial instrument: once the notarial instrument has been prepared in accordance with all the applicable conditions, it acquires legal probative force. This is because it is one of the types of official instrument. We shall therefore address the probative force of the notarial instrument with respect to its parties, then with respect to third parties ('non-parties'), and finally with respect to copies of the notarial instrument.

A) Probative Force of the Notarial Instrument with Respect to Its Parties

When the notary public draws up the notarial instrument, he may record facts and information presented before him, as well as other information that has not been presented in his presence. Accordingly, we shall address:

1) The evidentiary/probative force of the information presented before the notary

These are the statements that the notary includes in the contract based on what occurred in his presence. They are divided into two types:

The first type concerns statements produced and drafted by the notary himself, as well as those received from the persons concerned. Examples of what the notary prepares personally include the date on which the instrument was drawn up, the place where the contract was concluded, and the attendance of the persons concerned. These statements have probative force with respect to the parties to the real estate transaction and may only be challenged by alleging forgery. This is because these statements are made in the presence of the notary; therefore, contesting their accuracy is tantamount to questioning the credibility of the notary, a status granted to them by the legislature as public officers.

The second type concerns statements that the notary receives from the persons concerned and that occur within his view. These include events such as the buyer paying the seller an amount equal to five percent of the price in the notary's presence, as in the case of concluding a contract for the sale of real property. Such events may not be challenged except through forgery and carry probative force. The legislator has conferred probative force on statements and declarations made in the notarial instrument within the hearing and sight of the notary, together with the facts, because such elements constitute the trust placed in the notary as a public officer bearing the seal/power of the State¹⁵.

2) Probative force of information not presented before the notary

¹⁵ - Omar Zouda (d), Evidence in Civil and Commercial Matters, s.d., Dar Bilqis Publishing, Algeria, 2023, p. 68.

Information not presented before the notary is usually information from the parties to the real estate transaction. One of the parties may declare facts that occurred in the notary's absence. Here, a distinction must be made between:

- The information recorded in the notarial instrument; and
- The underlying facts themselves, i.e. facts that the notary merely records without witnessing their occurrence.

As for the facts recorded in the notarial instrument, they may only be challenged by alleging forgery, since it is the notary who records them based on what they heard from the contracting parties.

However, the facts themselves are subject to the general rules of evidence. Denial of these facts is not restricted to forgery and follows the ordinary rules of evidence without requiring them to be denied solely by forgery¹⁶.

B) Probative Force of the Notarial Instrument with Respect to Third Parties ('Non-Parties')

A third party is any person who is not involved in the real estate transaction. Nevertheless, a third party's status as a 'non-party' does not prevent the transaction from taking effect against them, provided the requirements for dispositions to be effective against third parties are met, such as registration/public notice (e.g. publication through the relevant system) and entry in the records (as applicable)¹⁷.

The disposition operates against the third party (i.e. the person to whose benefit the transaction is effective), who may be confronted with and held to the notarial instrument. Accordingly, it can be said that the law grants the notarial instrument the same probative force as that granted to the parties to the contract, provided that the instrument is valid. A third party cannot dispute the validity of the notarial instrument except by alleging forgery, pursuant to Article 324 of the Civil Code.

C) Probative force of copies of the notarial instrument

The notarial instrument is drawn up from the original for the first time¹⁸ and a copy is issued alongside it¹⁹. It is possible that the original instrument may be missing, while copies remain. In that situation, the probative force of the copies of the notarial instrument must first be assessed in light of the existence of the original. If the original is absent, the evaluation applies successively according to the rules governing the copies in its absence.

1) The probative force of copies of the notarial instrument in the presence of the original

The notarial instrument is first drawn up at the notary's office. This document is therefore referred to as the 'original' with respect to the information recorded on it for the first time, as well as the signatures affixed to it. As a rule, the original is kept in the notary's office.

Article 325 of the Civil Code states that:

¹⁶ - Omar Zouda (d), Previous reference, p. 69.

¹⁷ - Mohammed Ben Braq Al-Fawzan, Al-Wafi in the Origins of Shari'a Pleadings, 1st edn, Library of Law and Economics, Saudi Arabia, 2016, p. 709.

¹⁸ - Article 10 of the Algerian Notary Law.

¹⁹ - Article 11 of the Algerian Notary Law.

‘If an official document has an original, its official copy, whether handwritten or photographic, has probative force to the extent that it corresponds to the original.’ The copy is deemed to correspond to the original unless one of the parties disputes this. If a dispute arises, the copy is reviewed against the original.’

It follows that applying this rule requires the presence of two principal conditions:

1. The existence of the original notarial instrument; and
- (2) The existence of an official copy of that original.

The official copy is the copy that the notary creates from the original. If these two conditions are met, the official copy has the same probative force as the original, whether handwritten or photographic. Anyone who wishes to rely on it must submit it as evidence to show that it corresponds to the original.

2) Probative Force of Copies of the Notarial Instrument in the Absence of the Original

This situation is relatively rare in practice. Notarial offices maintain a notarial archive, and the legislator has also ensured that contracts drawn up by notaries are preserved so that they can be consulted when issues arise regarding probative force or other matters.

Article 326 of the Civil Code distinguishes between three situations, which we will set out in turn.

As for the first situation, this concerns the original official copy, which can be either enforceable (‘executory’) or non-enforceable. It is the copy transferred directly from the original. Any copies derived from it always acquire the probative force of the lost original, provided their appearance does not give rise to any doubt as to their correspondence with the lost original²⁰.

However, if the external appearance of the copy is questionable, such as due to the presence of scribbles, alterations, overwriting or crossed-out portions affecting the document, then the document’s probative force is rejected. Clearly, the official copy derives its probative force from itself and its apparent integrity rather than from the lost original.

As for the second situation, this concerns an official copy taken from official copies of the original. In other words, the copy is not made directly from the original, but rather from the original official copy (i.e. the copy referred to in the first situation). Consequently, its probative force does not exceed that of the original official copy. Therefore, the probative force of this second copy is obtained through its correspondence to the original official copy.

As for the third (last) situation, this concerns a copy taken from official copies of copies — that is, a copy taken not from the original official copy. This is the third copy in terms of sequence. In order for it to have probative force, it must be matched/corroborated against the original official copy.

If the original official copy is missing and the third copy is compared to the second copy instead, such a comparison has no practical value because probative force is only presumed when the third copy is found to correspond to the first copy (the original official copy).

Conclusion

²⁰ - Abdel Razak Ahmad Al-Sanhouri, *The Middle Commentary on Civil Law, Part Two*, Dar Al-Nahda Al-Arabiya, Egypt, 1968, p. 168.

In conclusion, whenever notarial instruments satisfy the legal conditions required by law, they acquire the status of an official (public) document and are presumed to have probative value — i.e. they are accepted as evidence in their own right. Consequently, those who rely on them are not required to prove their authenticity; rather, the party contesting them must provide evidence of their invalidity. Notarial instruments therefore constitute a presumption of integrity up to materiality, as they are issued by a legally competent person — the notary public.

As previously mentioned, for a notarial instrument to have autonomous probative force, its external appearance must be sound and free from defects, i.e. it must not create any doubt or ambiguity, so that it can be relied upon as evidence between the parties and with respect to third parties.

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