



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CIVIL APPEAL NO. 214 OF 2012**

**AHMED SIAD MOHAMMED .....APPELLANT**

**AND**

**MUNICIPAL COUNCIL OF GARISSA ..... 1<sup>ST</sup> RESPONDENT**

**COMMISSIONER FOR LANDS ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal against the Ruling of the High Court at Garissa (Mutuku, J.) dated 2<sup>nd</sup> July, 2011 in Misc HC App. No 3 of 2011, formerly*

*Embu HCC Misc App. No 55 of 2010 – Judicial Review)*

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**JUDGMENT OF THE COURT**

1. This is an appeal against a ruling made in relation to a judicial review application seeking orders of prohibition and certiorari to issue against the respondents and whose purport and effect is to compel the respondents to recognize the appellant as the owner of the suit property. By a ruling dated 2<sup>nd</sup> July 2011, the Honourable Judge (**S. Mutuku J.**) declined to issue the orders of prohibition and certiorari.

2. The suit property is a plot known as **Garissa/Block 111/59**. The plot is situated within what was then known as Municipal Council of Garissa. Prior to the dispute between the parties hereto, the suit property was trust land under the custody and trusteeship of the Municipal Council of Garissa.

3. By Chamber Summons dated 27<sup>th</sup> October, 2010, the appellant sought orders for prohibition and certiorari to issue against the respondents in the following terms:

***(i) To prohibit the 1<sup>st</sup> respondent from acting on the resolution passed by its Special Town Planning Committee meeting held on 17<sup>th</sup> July 2010 to recognize Mohammed Hussein Haji (deceased) and not the applicant as the legal owner of the suit property.***

***(ii) To prohibit the 2<sup>nd</sup> respondent from acting on the Minutes of the 1<sup>st</sup>***

**respondent recalling the Lease and Certificate of Lease issued to the applicant in regard to the suit property.**

**(iii) An order of certiorari to remove into the court and quash the decisions and resolutions passed by the 1<sup>st</sup> respondent in its Special Town Planning Committee meeting held on 17<sup>th</sup> July 2010 specifically the decision not to recognize the applicant as the owner of the suit property.**

**(iv) An order of certiorari to remove into the court and quash the 2<sup>nd</sup> respondent's decision to recall and or revoke the applicant's Lease and Certificate of Lease and allot it to Halima Haji Aden representing Mohammed Hussein Haji (deceased).**

4. The grounds upon which the Appellant moved the High Court for prohibition and certiorari are that he is the registered proprietor of the suit property; that a certificate of lease was issued to him pursuant to a letter of allotment issued by the 2<sup>nd</sup> respondent dated 15<sup>th</sup> October, 1998, on behalf of the 1<sup>st</sup> respondent; that the appellant paid all the necessary dues to the Government and was issued with a certificate of title. That the appellant's title is a first registration which is indefeasible and the respondents conduct to cancel the title is high handed and in breach of the appellant's right to property which was acquired openly and transparently.

5. The 1<sup>st</sup> respondent opposed the application for orders of prohibition and certiorari. The 1<sup>st</sup> respondent stated that in the year 1991, the Plot Allocation Committee of the Municipal Council of Garissa allocated the plot known as **Garissa/Block 111/59** to the late Mohammed Hussein Haji. The Commissioner of Lands (2<sup>nd</sup> respondent) using the Plot Allocation Committee minutes allocated the plot to the Appellant, Ahmed Siad Mohammed, who was not the person allocated the plot by the Plot Allocation Committee. That the appellant acquired title to the suit property unlawfully and through fraud. That the 1<sup>st</sup> respondent addressed the Commissioner of Lands (2<sup>nd</sup> respondent) bringing to his attention the unlawful and or fraudulent registration of the appellant as proprietor to the suit property. That the 2<sup>nd</sup> respondent vide letter dated 4<sup>th</sup> October, 2010, confirmed that it had no record showing that the suit property was ever allocated or recommended for allocation to the appellant.

6. The Honourable Judge (**S. Muketi J.**) upon hearing the parties in a ruling dated 2<sup>nd</sup> July 2011 dismissed the Summons and declined to grant the orders of prohibition and certiorari. The Honourable Judge directed that the parties should fix the main suit for hearing. In dismissing the motion, the Honourable Judge expressed herself as follows:

***“Prayers 3 and 4 seek orders of certiorari to remove into this court and quash the minutes of 17<sup>th</sup> July, 2010, and the letter dated 4<sup>th</sup> October, 2010. The order of certiorari issues in cases where the tribunal or body acts in excess of its jurisdiction. Did the 1<sup>st</sup> respondent act ultra vires in making the decision dated 17<sup>th</sup> July 2010? My answer to that is in the negative. I have stated that it is within the 1<sup>st</sup> respondent's power and authority to convene its relevant committee to determine the rightful allottees to property owned by it. .... What this boils down to is that this is not a matter that can be disposed of by way of judicial review even if the orders sought were to be granted. The dispute raises serious issues which can only be ventilated fully in a trial with presentation of evidence so that all the issues are interrogated and determined”.***

7. Aggrieved by the decision of the Honourable Judge not to strike out the suit as time barred and or vexatious, the appellant has moved to this Court citing 6 grounds of appeal which can be summarized as follows:

***(i) that the learned Judge erred in law in failing to find that the appellant's title is a first registration and is indefeasible under Section 143 (1) of the Registered Land***

***Act. That the learned Judge erred in law in creating a distinction between a leasehold interest under the Registered Land Act and absolute proprietorship and stating that in a leasehold interest, the lessor can question how the title was acquired.***

***(ii) the learned Judge erred in law in failing to find that the 1<sup>st</sup> respondent had no interest known in law in regard to the ownership of the suit property and the said 1<sup>st</sup> respondent had no power to recognize or refuse to recognize anyone else as the owner of the suit property.***

***(iii) the learned Judge failed to find that the suit property was previously trust land and it was properly allocated to the appellant by the 2<sup>nd</sup> respondent on behalf of the County Council of Garissa.***

***(iv) the learned Judge erred in failing to find that the 2<sup>nd</sup> respondent was functus officio after allocating the suit property to the appellant.***

8. During the hearing of the appeal, learned counsel Messrs **J. Mwangi** appeared for the appellant; learned counsel Messrs **F. G. Thuita** for the 1<sup>st</sup> respondent while learned counsel Messrs **J. Chilaka** for the 2<sup>nd</sup> respondent.

9. Counsel for the appellant reiterated the grounds of appeal and relied on his submission made before the High Court. It was submitted that the appellant was registered as proprietor of the suit property on 20<sup>th</sup> April, 2005, and he is the lessee of County Council of Garissa. That the appellant is in possession of the suit property and he has developed the same and is running a petrol station business thereon. It was submitted that under **Section 159** of the **Registered Land Act**, a certificate of title can only be rectified or cancelled by a court order and not through resolution by the 1<sup>st</sup> respondent or letter by the 2<sup>nd</sup> respondent. Counsel submitted that the conduct of the respondents in attempting to cancel the appellant's certificate of title was contrary to **Section 159** of the **Registered Land Act**.

10. Counsel for the 1<sup>st</sup> respondent opposed the appeal and urged this Court to uphold the judgment of the High Court. It was emphasized that the suit property was trust land in the custody of the Municipal Council of Garissa. Counsel for the 2<sup>nd</sup> respondent opposed the appeal and urged this Court to find that the issues raised by the appellant in his memorandum of appeal were not canvassed before the High Court. Counsel urged this Court to uphold the decision by the Honourable Judge that this suit should go for a full hearing.

11. We have considered the submissions made by counsel in this matter and analyzed the ruling by the High Court. We note that this appeal is against an interlocutory ruling and the main suit is still pending before the High Court. In ***DT Dobie & Co.(Kenya) Ltd. -vs- Muchina, Civil Appeal 37 of 1978***, this Court expressed itself as follows:-

***“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case.....”***

12. In the instant case, the appellant is seeking certiorari and prohibitory orders whose object is to confirm his title to the suit property. Judicial review proceedings are not concerned with the merits of a particular decision. Whether it is the appellant or the deceased Mohammed Hussein Haji or the 1<sup>st</sup> respondent who is entitled to ownership of the suit property is not a matter to be determined by way of judicial review. In the case of ***R – v- Lancashire County Council Ex p Gayer, (1980) 1 WLR 1024*** it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. The judicial remedy of certiorari and mandamus were

neither created nor established to settle ownership disputes, nor to create and confer title to land.

13. Our overall re-evaluation of the facts of this case leads us to emphasize the discretionary nature of certiorari and prohibition. As observed by Lord Goddard C.J in ***R – v- Dunsheath, ex parte Meredith, (1950) 2 All ER 741, 743***, judicial review remedies are neither a writ of course nor a writ of right. In the case of ***Republic – v- Director-General of East African Railways Corporation Ex Parte Kaggwa, 1977 KLR 194***, it was correctly stated that in judicial review, the court’s discretion would not be exercised if to grant the order would constitute judicial interference with the executive arm of government. It is our considered view that in the present case, an order for certiorari or prohibition if granted would be contrary to the process and procedure outlined for setting aside and dealing with trust land.

14. The circumstances in which an appellate court can interfere with discretionary orders are well settled in the case of ***Mbogo & another – v- Shah, (1968) EA 93*** at 96. An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. We are of the considered view that the appellant has not been able to demonstrate to us that the honourable Judge erred in exercising her discretion in declining to grant the discretionary orders of certiorari and prohibition.

15. We note the provisions of **Section 115** of the **1963 Constitution** which states that trust land shall vest in county councils within whose area of jurisdiction the land is situated. We are also cognizant of the provisions of **Article 40 (6)** of the **2010 Constitution** wherein it is provided that the right to protection of property does not extend to property that has been found to have been unlawfully acquired. Mindful of these Constitutional provisions, it is in the interest of justice that all parties to this suit should be given an opportunity to ventilate their case in a full hearing and trial.

16. As regards the other grounds raised in the memorandum of appeal, we are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances and be satisfied at the end of the exercise that we have acted justly” (**See Sections 3A and 3B of the Appellate Jurisdiction Act and Douglas Mbugua Mungai -vs- Harrison Munyi – Civil Application No. Nai. 167 of 2010**). Taking a broad view of justice, it is our considered view that the other grounds raised in the memorandum of appeal are triable issues and should be canvassed during the full hearing of the suit. We find that this appeal has no merit and is hereby dismissed with costs.

***Dated and delivered at Nyeri this 31<sup>st</sup> day of March, 2014.***

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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***JUDGE OF APPEAL***

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**