



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 213 OF 2012

AHMED SIAD MOHAMMEDAPPELLANT

AND

MUNICIPAL COUNCIL OF GARISSA 1ST RESPONDENT

COMMISSIONER FOR LANDS 2ND RESPONDENT

(Appeal against the Ruling of the High Court at Garissa (Muketi J.) dated 2nd July, 2011

in

HCCC No. 7 of 2011, formerly

Embu HCCC No. 18 of 2010)

JUDGMENT OF THE COURT

1. The suit property in this appeal 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 of Municipal Council of Garissa.

2. 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 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. The Appellant proceeded to process and acquire title to the plot.

3. By an amended plaint filed in court dated 3rd March, 2011, the 1st respondent in this suit, Municipal Council of Garissa states that neither itself nor its Committee ever allotted the suit property to the appellant and neither does it have records purportedly allocating the same to the appellant and requesting the Commissioner of Lands to issue title on its behalf to the Appellant. The 1st Respondent avers that the Appellant acquired title to the suit property illegally and through fraudulent means. The particulars of fraud are pleaded in the amended plaint. The prayers in the plaint are *inter alia* for an order to cancel the title to the suit property which is in the name of the

Appellant. The Respondents also seek a permanent injunction to restrain the Appellant or his agents or servants from dealing, charging or selling the suit property. The Respondents seek eviction of the appellant from the suit property.

4. The Appellant in his defence admitted that he is the registered proprietor of the suit property and denied all the particulars of fraud as pleaded in the amended plaint. The appellant stated that the 1st respondent, Garissa Municipal Council, had no *locus standi* to institute the present proceedings for and on behalf of the estate of the late Mohammed Hussein Haji since the Municipal Council was not the legal representative of the Estate of the deceased. In addition, the appellant raised the issue of limitation of actions asserting that the suit as filed by the 1st respondent was time barred under the provisions of **Section 7** of the **Limitation of Actions Act**. The appellant submitted that he has had quiet user and enjoyment of the suit property from 1998 which is more than 12 years and any claim the 1st respondent may have had in relation to the suit property expired in the year 2010. Further, the appellant averred that if the 1st respondent allotted the suit property to the deceased Mohammed Hussein Haji, then the last day of enforcing any claim for and on behalf of the late Mohammed Hussein Haji was in the year 2003. The appellant further contended that the instant suit was *res judicata* as the High Court sitting in Nairobi in **Civil Appeal No. 145 of 2010** had held that the appellant's title was indefeasible.

5. Having raised issues of limitation of action, *res judicata* and *locus standi*, it befell upon the Honourable Judge in an application lodged by the appellant to consider these preliminary matters to determine the justiciability of the main suit. By a Notice of Motion dated 4th August, 2011, the appellant sought orders for dismissal of the suit filed by the 1st respondent for reason that it was time barred under **Section 7** of the **Limitation of Actions Act**. In the alternative, the appellant sought orders that the suit be struck out for being scandalous, frivolous, vexatious or otherwise an abuse of the court process.

6. The Honourable Judge (**S. Muketi, J.**) in a Ruling dated 2nd July, 2011, dismissed the motion and directed that the parties should fix the main suit for hearing. In dismissing the motion, the Honourable Judge expressed herself as follows in relation to limitation of action:

“Section 26 of the Limitation of Actions Act makes it very clear that in claims where fraud or mistake is alleged, time starts to run from the moment such fraud or mistake is discovered. Fraud is alleged in this case and therefore under the provisions of Section 26 time started to run when the fraud was discovered. In this case, it is alleged that the fraud was discovered in the year 2010. ... The prudent thing for a court to do where fraud is alleged in a claim is to allow the parties to proceed to full trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage”.

7. On the issue whether the suit filed by the respondents was frivolous, vexatious, scandalous and an abuse of the court process, the Honourable Judge held that the appellant had previously raised the same issues in an application dated 16th March, 2011, and in a Ruling delivered on 4th May, 2011, by the Hon. Justice Muchelule, the issues were addressed and as such, the appellant could not bring the same issues before the court.

8. On the question whether the 1st respondent had *locus standi*, the Honourable Judge expressed herself as follows:

“That the applicant is the registered owner of the suit property and holds a certificate of lease and registered lease in respect of the same is not in dispute. What is disputed is the manner in which he acquired the title. The 1st respondent is the custodian of all trust land within its municipality and allocates land to the residents through its Plot Allocation Committee. ...The title is leasehold for 99 years. Leasehold is not an absolute

right of ownership to the land in question. It is limited to a set period and is subject to payment of certain fees or rent to the lessor. This to me means that the lessor retains interest in the land and it is expected that at the end of the period of the lease, the land reverts to the lessor. Further, I find that this is a matter that can also be cured by an amendment to join the family of the land Mohammed Hussein Haji to the suit. With allegations of fraud and the 2nd respondent admitting culpability on the part of its agents, it would be a travesty of justice not to allow this case to go for full trial”.

9. 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 16 grounds of appeal which can be summarized as follows:

(i) The learned judge erred in law in finding that the 1st respondent had locus standi and the said 1st respondent has no reversionary interest in the suit property the lessor being County Council of Garissa whose interest will only vest upon expiry of the 99 years.

(ii) 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.

(iii) That the learned judge condemned the appellant without any evidence having been placed before the court to show the appellant acquired the title fraudulently.

(iv) The learned judge erred in law in assuming jurisdiction to question the indefeasibility of the appellant’s title.

(v) The learned judge erred in law in finding that the 1st respondent was the custodian of all trust land within Garissa Municipality yet the law is different in regard to the suit property.

(vi) The learned judge erred in failing to find that the 2nd respondent did not deny that it issued a clean title to the appellant.

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

11. Counsel for the appellant reiterated the grounds of appeal and relied on his submission made before the High Court. He reiterated that the instant suit is time barred under the **Limitation of Actions Act**. It was submitted that the appellant was registered as proprietor of the suit property on 20th 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. Counsel emphasized that the 1st respondent has no *locus standi* to bring the present proceedings as it is not the legal representative of the deceased Mohammed Haji. Counsel relied on the case of **John Teleiyo Ole Sawoyo – v- David Omwenga Masobe (2013) eKLR** in support of his submission.

12. Counsel for the 1st respondent opposed the appeal and urged this Court to uphold the judgment of the High Court. It was submitted that the present suit is not time barred as it is based on fraud and **Section 26 of the Limitation of Actions Act** creates an exception to the 12 year limitation period. Counsel admitted that the 1st respondent is not the legal representative of the estate of the deceased Mohammed Hussein Haji. However, he emphasized that the suit property is

trust land in the custody of the Municipal Council of Garissa and the 1st respondent in its capacity as a trustee has the locus to institute the present suit.

13. Counsel for the 2nd 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.

14. 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.....”

15. There are two key issues for our consideration in this appeal. The first is on limitation of actions and the second is on the *locus standi* of the 1st respondent to institute these proceedings. It is our considered view that these issues could not be summarily disposed off by way of an application before the Honourable Judge. As was stated in the case of *Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937*, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the allegation of fraud as alleged in the plaint is disputed in the defence and the issue of fraud cannot be deemed to be incontestably hopeless and be summarily dismissed by way of an application.

16. In relation to limitation of actions, it is our considered view that ***Section 26 of the Limitation of Actions Act*** establishes an exception to the 12 year limitation period when fraud is involved. In the instant case, the Honourable Judge held that fraud is a matter that cannot be determined at a preliminary stage in the suit and it requires full hearing. We concur with the reasoning and finding by the Honourable Judge. The learned judge did not err in invoking the provisions of ***Section 26 of the Limitation of Actions Act*** and ordering that this suit should proceed to full hearing. Fraud must be proved and it can only be proved through a hearing and cannot be summarily rejected.

17. On the issue of *locus standi*, it is admitted that the 1st respondent Garissa Municipal Council is not the legal representative of the estate of Mohammed Hussein Haji. It is our considered view that the present suit is not a succession cause and the respondents’ case is not premised on succession. Our understanding of the respondent’s claim against the appellant is that the title to the suit property was fraudulently and illegally obtained. The gist of the 1st respondent’s claim is that as the original owner, custodian and trustee of the suit property, it did not allocate or pass title to the appellant. In our view, it matters not who else could have been allocated the land; the gist of the 1st respondent’s case is that a parcel of land within its custody and control has illegally and fraudulently been acquired by the appellant. It is our considered view that the foundation of the 1st respondent’s case is not based on succession to the estate of Mohammed Hussein Haji but the 1st respondent has its own independent claim and cause of action in its capacity as trustee of trust land within its jurisdiction. Our view on this is fortified by the provisions of ***Section 115 of the 1963 Constitution*** which states that trust land shall vest in county councils within whose area of jurisdiction it is situated. Guided by the provisions of ***Section 115 of the 1963 Constitution*** and also taking into account the provisions of ***Article 62 (2) of the 2010 Constitution***, we do find that the Honourable Judge did not err in finding that the 1st respondent had *locus standi* to initiate the present proceedings. We further note that tracing is a remedy available to a trustee to trace and find trust property for and on behalf of the beneficiaries. 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 and the right of all parties to be heard that this case is suitable for a full hearing and trial.

18. As regards the other grounds raised in the memorandum of appeal, it is our considered view that they are triable issues and should be canvassed during the full hearing of the suit. We decline to pronounce ourselves on the merits or otherwise of these grounds as we do not wish to tie the hands of the trial

court. We find that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nyeri this 31st 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