IN THE COURT OF APPEAL

AT ELDORET

(CORAM: G.B.M. KARIUKI, KIAGE & MURGOR JJA.)

CIVIL APPEAL NO. 223 OF 2013

BETWEEN

WILLIAM KOROSS (Legal personal Representative

Of ELIJAH C.A. KOROSS) ……...….APPELLANT

AND

HEZEKIAH KIPTOO KOMEN .....1ST RESPONDENT

JONATHAN KIPKOROSS CHESANGUR ……...….....….... 2ND RESPONDENT

CHEBIANTORI CHEMCHOR ……...….... 3RD RESPONDENT

JULIUS KIBET CHEROTICH ……...……...…… 4TH RESPONDENT

KIPSEREM ROTICH ……...……...…….....… 5TH RESPONDENT

(An appeal from a Judgment and Decree of the High Court of Kenya at Kitale (J.R. Karanja, J.) dated 12th February 2013

in

HCCC NO. 89 OF 1997

(Formerly Kakamega HCCC No. 43 of 1997)

****

JUDGMENT OF THE COURT

Reading through the record of this appeal calls to mind Charles Dickens' satire on intractable litigation rendered in his peculiar and memorable prose, in *Bleak House;* (Bradbury and Evans, (1853); Gadshill Edition, P5).

"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so

complicated that no man alive knows what it means …. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself a real horse, and trotted away into the other world … a long procession of chancellors has come in and gone out; … but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless."

Though not on the scale of the fictional Jarndyce and Jarndyce, this case has had its share of joinders, judges, deaths, and complexities in a long and chequered history.

It all started in the last century when, by a plaint dated 22 nd May 1978 and filed in the High Court at Kakamega, one Elijah C.A. Koross sued Hezekiah Kiptoo Komen seeking to have him evicted from a parcel of land known as LR. I.R. 11440 in Endebes, Trans Nzoia District. That land, hereafter "the suit property", is eponymously known as 'Koross Farm' after the plaintiff in whose name it was registered. It was alleged in the suit that the defendant had, without any reason and/or consent of the plaintiff, trespassed and settled on the suit property. This was on the pretext that he, the defendant, having been forced to vacate a different piece of land namely L.R. No. 9154 co-owned by the plaintiff and some five other persons, could take over part of the suit property. The plaintiff had sold to the defendant some 15 acres out of his share in L.R. No. 9154. The plaintiff's co-owners did not want the defendant and the plaintiff refunded part of the Kshs. 10,000 consideration for the 15 acres.

To that suit the defendant filed a written statement of defence in which he conceded that the plaintiff was the registered owner of the suit property. He pleaded, however, that the said registration was fraudulent. No particulars of the said fraud were stated. The defendant denied ever agreeing to buy 15 acres or any other part of the plaintiff's share in L.R. No. 9154 for Kshs. 10,000 or at all. He also denied taking possession of the 15 acres and being rejected and forced to leave that piece of land by the plaintiff's partners, the very knowledge of whom he denied. He denied the payment into court of the balance of Kshs. 6,000 for his collection.

Although the defendant's pleading was not titled "Defence and Counterclaim", it did contain a counterclaim in the following terms;

"13. The defendant repeats what is stated in paragraph 2 to 12 above both paragraphs inclusive and states that in or about the year 1974 together with Jonathan Kipkoros Arap Chesabur, Kibet Cherutich and sons and Cheserem Rotich they all jointly and severally contributed the total sum of Kshs. 68,000 for the purchase of all that parcel of land being L.R. 11440 and appointed the plaintiff to be in charge of the said moneys for the purposes of effecting the said purchase though the plaintiff never made any contribution to the said purchase money at all.

14. The plaintiff thereupon submitted an application for the consent of the said Control Board to the said transaction and did fraudulently represent himself as the purchaser before the said Board and did fraudulently have the said consent granted in his name instead of in the names of the parties referred to in paragraph 13 of this counterclaim.

15. The plaintiff thereupon wrongfully did fraudulently transfer the said parcel of land being L.R. No. 11440 in his own name.

16. By reason of the matters hereinabove complained of the defendant and the other persons aforestated have been deprived of their farm and have suffered damage".

On the basis of that pleading, the defendant prayed that the plaintiff's suit be dismissed and his counterclaim be allowed for;

"(a) ***A declaration that the plaintiff is not entitled to the registrable interest in L.R. No. 11440.***

(b) A declaration that the registration of the plaintiff as owner of L.R. No. 11440 was secured by fraud.

(c) A declaration that the <u>true owners of L.R. No. 11440 are the</u> <u>persons set forth in this counterclaim.</u>

(d) An order rectifying the register and directing that the persons aforesaid be registered against L.R. NO. 11440 ….".

(*Our emphasis).*

Those persons were never made parties to the proceedings and never filed any pleadings of their own.

To that pleading the plaintiff responded with a reply to defence and defence to counterclaim by which he denied the allegations of fraud made against him and denied that the defendant and the persons named in the defence raised money for the purchase of the suit property and appointed the plaintiff to be in charge of the purchase. At paragraph 6, the plaintiff pleaded thus;

"6. <u>Alternatively</u> and without prejudice to the foregoing the plaintiff states that even if the defendant or any other persons named in paragraph 13 of the counterclaim were parties to the purchase of the farm by agreement or otherwise (which is denied) the alleged agreement (if any) is null and void and unenforceable in law as the defendants did not obtain the consent of the relevant Land Control Board and the agreement if any was not in writing".

After a number of adjournments caused in the main by the non-attendance of the defendant or his advocates at the scheduled hearings, the suit came before Scriven, J. on 2nd April, 1980 when Mr. Kapten appeared for the plaintiff while Mr. Minishi held brief for Mr. Gautama for whom he sought an adjournment on account of his being 'sick'.

Scriven J, no doubt mindful of the defendant's and his counsel's history of absence borne out by the record including 23rd April 1979, 26th June 1979 and 29th January 1980 before Cotran J, and before himself on 26th May 1980 and 23rd June 1980, rejected the application for adjournment and ordered the matter to proceed.

The record then shows that Mr. Kapten opened the plaintiff's case then called him as a witness. The plaintiff was sworn and proceeded to give evidence in support and proof of the averments in the plaint. At the end of his testimony Scriven J was satisfied that the plaintiff had proved his case and therefore granted prayers (a) (b) and (c) which were that;

(a) The defendant, his servants and/or agents be ordered to vacate L.R. No. 11440.

(b) The defendant, his servants and/or agents be restrained from trespassing on L.R. Nos. 11440 and 9154.

(c) The defendants do pay the costs of this suit and interest thereon.

Scriven J. said nothing of or about the defendant's counterclaim though it is clear from the plaintiff's evidence that he was led on it and did testify in denial and opposition thereto. This provoked an application by the plaintiff to strike out the counterclaim. That application came before Scriven J on 9th November 1981 who, by what he termed a "Judgment", ordered a retaxation of the plaintiffs bill of costs and also that "counterclaim be stayed pending such taxation and disposal of any objections thereto".

The record then shows that all manner of activities took place in and out of court in the decade or so that followed. The costs were taxed. The judgment of Scriven J granting the prayers in the plaint were executed. The defendant and the persons he named in the counterclaim and/or their servants and agents

were ejected from the suit property in execution of the decree of the Court. They however resorted to extra judicial and extra-legal methods to get back to the suit property a short two days later on 24th March 1982. They did so with the aid of the local police and with threats and menaces as detailed in affidavits and lamented by the plaintiff's advocates on page after page of the record.

While engaging in those extra-judicial activities, the defendant did not bother to prosecute his 'pending' counterclaim. Eventually, the plaintiff by a notice of motion dated 31st October 1994 prayed for an order that;

> ***"(a) The counterclaim filed in the suit in 1978 be dismissed, as the defendant never took any steps to prosecute the counterclaim for a period of over 16 years".***

That application was listed before Tanui J on 30th November 1994. Whereas Mr. Wafula was present for the plaintiff, there was no appearance for the defendant notwithstanding that the date had been fixed by consent. Tanui J proceeded to grant the application, ordering the defendant's counterclaim dismissed with costs.

The dismissal roused the defendant and the people named in the counterclaim, who by now were all styled "defendants", and galvanized them into action. They filed an application dated 6th December 1994 seeking to set aside the dismissal orders and praying that the counterclaim, which they referred to as belonging to them all, be reinstated and that in the meantime "there be a stay of the eviction orders earlier obtained by the plaintiff/respondent".

That application was strenuously opposed by the plaintiff who decried the 16 years of inaction; noted that the defendant(s) never appealed against the eviction orders given many years previously by Scriven J; complained about their defiance of the court order by using the administration especially the then D.O. Samuel Oreta and the late Ezekiel (sic) Oyugi; and bemoaned the suffering, he had endured "under the tactics of the defendants". This suffering as deposed to in the plaintiffs' affidavit sworn on 20th January 1995, included the defendant's returning to the suit property after eviction and, under the escort and protection of the Provincial Administration and a horde of police officers, apportioning to themselves a total of 187 acres of the suit property, erecting structures thereon, cutting trees and performing other acts of waste with bold abandon and impunity.

That application was heard by Nambuye J. (as she then was) who, being ***"alive to the now notorious practice of the Courts that they should be bend (sic) on hearing disputes on merit instead of on points of technicalities and on the basis that the fault lay with counsel …", allowed it. The judge ordered that the order dismissing the counterclaim be set aside on condition that "the defendants fix and have the counterclaim heard within 60 days from the date of the reading of this ruling failing which the ex parte order shall revert and the plaintiff will be at liberty to execute the decree".***

That counterclaim was not heard within 60 days of Nambuye J's ruling on 30th September 1997. Instead, the order, which would have conduced to the expeditious disposal of the case, was by consent of parties vacated by Nambuye J herself on 25th November 1997 and so the interminable march of the litigation proceeded at a snail's pace.

The case eventually proceeded on the hearing of the counterclaim on 25th February 1998 and several other dates over a period of three years until 20th February 2001 when it was stood over generally with eleven witnesses having testified.

Nambuye J also left the station and was succeeded in this tired litigation by W. Karanja J (as she then was) who took the evidence of two more witnesses between 7th June 2005 and 10th April 2006. She, too, was transferred out of station and, after mention touches by Fred Ochieng J; N.R.O. Ombija J. M. Koome J (as she then was) and Muketi J, it finally fell upon J.R. Karanja J to handle it as from 30th January 2012, a long thirty-five years, almost, since it was filed by the plaintiff.

Before he could do so however, the learned judge was confronted by an application dated 9th January 2012 by the substituted plaintiff, which, had it succeeded, would have brought the long-drawn out litigation to an end. The application was founded on **Section 7** of the Civil Procedure Act, Order 51 Rule 1 and order 2 Rule 15 of the Civil Procedure Rules and provided a pointer to the main issues the learned judge would ultimately have been called to determine in the suit. It sought a number of prayers including;

> ***"2. THAT pending the hearing and determination of this application there be a stay of any further proceedings in this suit.***
>
> ***3. THAT the counterclaim filed by the 1st defendant be struck out.***
>
> ***4. THAT the plaintiff be ordered to execute the judgment and the decree.***
>
> ***5. THAT the 1st defendant, and the purported other 'defendants' be condemned to meet the costs of this application and the entire suit since 1978.***
>
> ***6. THAT there be made such other orders as the interests of justice may demand and the upholding of the dignity of the court***
>
> ***…."***

The grounds upon which the application was brought included;

> ***"1. THAT the 1st defendant (sic) counterclaim is RES JUDICATA.***
>
> ***2. THAT the counterclaim in issue is an abuse of the process of this Court.***
>
> ***3. THAT the continued entertaining of other 'defendants' is further an abuse of the processes (sic) of this Court".***

That application was argued before the learned judge on 30th January 2012 and a ruling thereon was delivered on 14th February 2012. We are unable to trace the said ruling in the record but there is no doubt that it dismissed the plaintiff's application with the result that the suit was ordered to proceed with the further hearing of the counterclaim. The learned judge took the evidence of the 14th and 15th witness for the 'defendants'/counter claimants as well as that of **WILLIAM KIPKEMOI KOROSS** (the appellant herein) who substituted the plaintiff who died before this matter was put to rest. The 2nd, 4th and 5th "defendants" also departed this life but no substitutions were made.

The hearing concluded on 3rd October 2012.

After submissions were taken, the learned judge delivered his judgment on 12th February 2013 by which he granted the prayers in the counterclaim in the following concluding terms;

> ***"All in all, judgment is entered for the defendants against the plaintiff as prayed in the counterclaim to the extent that the plaintiff is not entitled to sole registrable interest in the suit land (prayer (a)) and that the appropriate register be rectified to have the suit land registered in the names of the plaintiff and the true defendants and/or their personal legal representatives (prayer (a)). Thereafter the parties shall on their own work out modalities aimed at sharing and/or distributing among themselves the entire portion of land".***

We have taken the trouble to set out as comprehensively as possible a summary of the long and convoluted history of this matter because it seems clear to us that much of the path the case has trodden was marked by procedural missteps that had the effect of obfuscating what should have been quite a straight-forward dispute capable of settlement by application of plain legal principles as we shall shortly

show.

The appellant was aggrieved by that judgment and lodged a notice of appeal followed by, in due course, a record of appeal. The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better. Out of the many grounds, we are able to extract the appellant's main grievances against the judgment to be the following, decanting the rest;

> ***(a) Failing to find that the plaintiff was the sole purchaser and owner of L.R. No. 11440.***
>
> ***(b) Failing to find that the respondents are trespassers on L.R. 11440.***
>
> ***(c) Failing to find that there was no valid Land Control Board consent, for any transaction involving the respondents.***
>
> ***(d) Failing to find that the respondent's counterclaim was res-judicata.***
>
> ***(e) Failing to find that the respondents were in contempt of court and undeserving of audience having forcefully returned themselves to the suit property after lawful eviction.***
>
> ***(f) Failing to find that the 2nd, 3rd, 4th and 5th defendants were not entitled to any orders having filed no pleadings and some having died without substitution.***
>
> ***(g) Failing to make a determination on distribution thus restoring the status that necessitated the suit.***

We will first deal with the issue of *res judicata* which we see as dispositive of this entire appeal. As we have already noted, this aspect of the case was brought to the attention of the learned judge before he embarked on the further hearing of the case. This was by application supported by affidavit which was argued before the learned judge. It was also addressed at length in the plaintiff's written submissions. Moreover, the record itself spoke to *res judicata* being an issue. Indeed, the opening words of the learned judges' judgment brought the matter into sharp relief;

> **"This judgment is on the defendant's counterclaim against the plaintiff who already has a judgment in his favour on the main suit against the defendants".**

Before delving into *res judicata* proper, we need to state that there cannot properly be two judgments, and contradictory ones at that, in the same suit. The presence of a counterclaim in a suit, while essentially amounting to a cross-suit, does not give rise to a separate, stand-alone second judgment. A counterclaim never stands on its own and cannot be a pleading independent of a defence.

That much is clear from Order 7 Rule 3 of the Civil Procedure Rules;

> ***"A defendant in a suit may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set off or counterclaim sound (sic) in damages or not, and whether it is for a liquidated or unliquidated amount, and such set off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion such set off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof".***
>
> *(Our emphasis)*

This rule is in *pari materia* with **Order 8 Rule 6A (2)** of the Indian Civil Procedure Rules and Sir Dinshah Fordunji Mulla in *The Code of Civil Procedure, 18th Edition,* 2011 at p. 1928 has addressed the essence of the suit and the counterclaim as constituting unfiled proceedings as follows;

> ***"A counterclaim has the effect of a cross -suit but only one final judgment is to be pronounced in the suit on the original claim of the plaintiff and the counterclaim of the defendant".***

Had all the judges who handled this matter appreciated this aspect of the law, a lot of the time, grief and loss that attended this case over three long decades would have been avoided. We are in no doubt whatsoever that the one judgment entered by Scriven J on 2nd April 1980, in so far as it was never reviewed, set aside or appealed against, remained the only valid judgment in the cause and in law determined both the plaintiff's claim and the defendant's counterclaim. By the defendant we mean the 1st respondent herein because the other respondents were never sued by the plaintiff, were never formally enjoined in the proceedings and never filed any pleadings.

A plain reading of **Order 7 Rule 13** shows that whereas a stay, discontinuance or dismissal of the plaintiff's suit may still leave a live and efficacious counterclaim that may be proceeded with and determined by way of a judgment, there is no corresponding provision whereby a judgment for the plaintiff leaves a residual counterclaim to be determined at a later date as purported to happen in this case.

Indeed the irony and mischief occasioned by the learned Judge's proceeding to hear (as did a number of his learned colleagues before him) and to determine by a judgment, the counterclaim while Scriven J's aged judgment remained in force is seen in the fact that the resultant decree is a strange and unusual document purporting to be given on two dates thirty-three years apart by two different judges. What is more, the rival decrees contained in the one decree issued by the Deputy Registrar of the High Court at Kitale on 15th July 2013 effectively cancel each other out and are a study in judicial check-mate. Such a situation is clearly untenable.

We are in no doubt therefore that the learned judge was in error when he pronounced himself that ***"The success of the counterclaim would invariably render the ex-parte judgment obtained against the defendants way back in 1980 obsolete".*** With great respect, the learned judge was bereft of jurisdiction to entertain the counterclaim and had no power in law to uproot, supplant or strike with obsolescence the judgment of a judge of equal jurisdiction by merely making contrary findings. Such an action on the part of the learned judge was a nullity in law incapable of upsetting Scriven J's judgment.

Turning now to *res judicata*, the learned judge treated it thus in the penultimate paragraph of his judgment;

> ***"As to 'res judicata, it does not apply in the present circumstances. The counterclaim by the defendants has been treated as a separate suit. Its subject matter and that of the main suit may be similar but certainly not the cause of action. Herein, the declaratory orders are sought against the plaintiff whereas in the main suit, the claim was based on trespass. The prayers sought in the main suit and counterclaim are distinct".***

With all due respect, we very much doubt that the distinctions the learned judge referred to can hold. *Res judicata*, which means, literally and simply "the case is decided" is embodied in **Section 7** of the Civil Procedure Act, 2010 in peremptory exclusionary terms;

> ***"No court shall try any suit or proceeding in which the matter in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".***

The philosophy behind the principle of *res judicata* is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is

meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

Speaking for the bench on the principles that underlie *res judicata*, Y.V. ChandraChud J in the Indian Supreme Court case of **LAL CHAND Vs. RADHA KISHAN**, AIR 1977 SC 789 stated and we agree;

> ***"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue".***

Most unfortunately this case appears to be a repudiation and negation of those salutary aims of the *res judicata* bar. The defendant and the persons he named in his counterclaim, all of them the respondents herein, were improperly and impermissibly allowed to relitigate, re-agitate and re-canvass matters that were settled with finality by Scriven J. The judgment of the learned judge impugned in this appeal amounted to an impeachment of Scriven J's judgment when the only lawful path by which the respondents could attain that aim would have been by appeal, which they did not pursue.

There really can be no serious doubt that the issues for determination in the plaintiff's suit, and those raised in the 1st respondent's counterclaim fell within the purview of *res judicata* once the main suit was decided. True enough, the prayers were different, the former being for the 1st respondent to vacate the suit property and be restrained from trespassing thereon, and the latter for declarations that the plaintiff was not entitled to a registrable interest in the suit property having been registered by fraud and that the true owners of the same were the persons set out in the counterclaim. However, the common denominator between the suit and cross-suit was the issue of title or ownership of the suit property. Both parties laid a stake to the ownership of the suit property as the basis for the prayers they sought. Ownership was the foundational question upon which the entire claim and counterclaim rested. And ownership therefore was directly and substantially in issue in both. The essence of both the judgments of Scriven J and that of the learned judge subject of this appeal was that they established ownership as belonging to the rival parties.

Scriven J having found in favour of the appellant, it was not open for any other judge of the High Court to have revisited the issue and by doing so, all who did, including the learned judge in the judgment before us in this appeal did violence to the doctrine of *res judicata* and so fell into error calling for reversal. That the learned judge did so despite and over the appellant's protests by the application we have referred to is puzzling. It is the more befuddling when the record clearly showed that the central issue of ownership had long ago been settled and so acknowledged.

We note in particular that there was on the record before the learned judge a ruling by D.K.S. Aganyanya J (as he then was) in Eldoret HCCC No. 115 of 1988 (O.S) by which he dismissed the 1st respondent's application for extension of a caveat he had placed on the suit property and is worthy of full reproduction;

> ***"RULING***
>
> ***In light of what has been submitted before this court by both counsels, (sic) this application appears to be a complete abuse of the process of this court.***
>
> ***The applicant has lost in High Court Civil Case Number 10/80 and High Court Case Number 167 of 1981 over the same disputed land, facts which he has hidden from his lawyer and only revealed in the replying affidavit and submission of the respondent's side.***
>
> ***The letter of consent obtained by the applicant in 1979 was declared invalid by the High Court in HCCC No. 10 of 1981 and it appears the applicant has used similar method which I find unlawful to obtain another consent dated 9th March, 1988 as the addressee of this letter is***

neither the applicant nor the respondent. I thus similarly declare it null and void.

Previous litigation (sic) have established that the land in dispute belongs to the respondent and the matter should end there. The attempt by the applicant to reverse this situation by the present applicant is futile. He has in fact been ordered to vacate the land much earlier.

There is a stage when litigation should come to an end and the applicant seems to want to prolong this case, valueless though his wish is.

I dismiss this application with costs and order the administration to keep off this matter as they are helping no one by involving themselves. Copy of this ruling should be supplied to the Trans Nzoia District Commissioner and all the District Officers under him as well as the O.C.P.D. Trans Nzoia.

D.K.S. AGANYANYA

JUDGE"

(*Our emphasis*).

That the 1st respondent and his alleged co-defendants were allowed to engage the plaintiff and the appellant in endless rounds of this litigation for decades after the issue had been determined by Scriven J is not particularly complimentary of our courts and clearly amounted to a vexatious abuse of process. The learned judge (and his colleagues before him) ought to have put a stop to the rigmarole at the earliest opportunity that presented itself. In failing to do so he erred and in entertaining the counterclaim and rendering a second judgment while well-aware of the existence of Scriven J's judgment of 2nd April 1980, he acted on wrong legal principles thus inviting our interference as held in a long list of authorities including **EPHANTUS MWANGI Vs. DUNCAN MWANGI WAMBUGU** [1985] eKLR cited to us by counsel for the respondents.

As *res judicata* constitutes a mandatory bar that injuncts and precludes any fresh trial or reconsideration of a concluded issue (See this Court's decision in **NGUGI Vs. KINYANJUI & 3 OTHERS,** [1989] KLR 146 where Apaloo JA referred to a later reference of a concluded issue to arbitration as "unorthodox proceedings" that effectively reversed an earlier judgment of the High Court "by the back door", which could aptly be applied to this case) we find and hold that the learned judge's decision was on that basis also a nullity and cannot be countenanced.

Having come to that view of the matter, we find it unnecessary to pronounce ourselves on the other equally weighty issues we summarized from what is raised by the appellant save to say that they are by no means insubstantial and would, singly or in combination, suffice to upset the judgment of the learned judge.

The upshot is that this appeal succeeds. The judgment of J.R. Karanja J given on 12th February 2013 is set aside in its entirety. The respondents shall pay the appellant's costs of this appeal and of the High Court.

Dated and delivered at Nairobi this 6th day of March, 2015.

G.B.M. KARIUKI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR