**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & MARAGA, JJ.A.)**

**CIVIL APPEAL NO. 21 OF 2013**

**ERASMUS IRERI NJERU……..…….....…..APPPELLANT**

**VERSUS**

**NYAGA MUTUMBI…….....1ST RESPONDENT**

**NYAGA MWANGANGE…….…….....2ND RESPONDENT**

**NICHOLAS N. NJERU (Suing for themselves and**

**as Representatives of MUKERE CLAN OF MBEERE).....….3RD RESPONDENT**

**THE HON. THE ATTORNEY GENERAL……...…….....4TH RESPONDENT**

**THE DIRECTOR OF LANDS ADJUDICATION & SETTLEMENT....5TH RESPONDENT**

**THE CHIEF LAND REGISTRAR…….....……..…6TH RESPONDENT**

**LAMECK GICHANGI (Sued as representatives**

**of the NDITI CLAN OF MBEERE)…….....……...…7TH RESPONDENT**

**NYAGA CIATHATHI…….....……..8TH RESPONDENT**

**MATHEW MUGO N. NGARI…….....….9TH RESPONDENT**

**JAMLICK NJIRU NTHUNI…….....10TH RESPONDENT**

**JOHN MUTITU NGACHA…….…….....…..11TH RESPONDENT**

*(Being an appeal against the Judgment and Order of the High Court of Kenya, at Embu (Ong'udi, J.) dated 26th June, 2013*

*in*

*H.C.C.C. No.165 of 2008)*

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## JUDGMENT OF THE COURT

[1] This is an appeal against the ruling of Ong'udi, J. dated the 26th day of June, 2013. In that ruling, the learned Judge dismissed an application by way of Notice of Motion wherein the applicants (now appellants), had sought a review of the order made by the same Judge on 19th December, 2012 which stated: -

> ***"A judgment was delivered herein on 15th March, 201l. The court dismissed the plaintiff's claim and found that it had failed to bring the suit within the ambit of the CIVIL JURISDICTION of the Court. The defendants' counterclaim is premised on the suit that was filed by the plaintiff. An appeal has been filed against that judgment of this court. It is prudent that the appeal be determined as that will determine the way forward in this matter especially on the issue of the counterclaim. The plaintiffs who have appealed are hereby asked to expedite the hearing of the appeal".***

[2] After hearing and considering the rival submissions in regard to the application for review, the learned Judge was not convinced the application met the threshold of the provisions of ***Order 45*** of the ***Civil Procedure Rules*** and thus dismissed it with costs. That order of dismissal is what provoked this appeal that is predicated on 12 grounds of appeal.

[3] All the grounds of appeal were argued together. They boil down to one issue; that is the learned Judge erred by failing to allow the counterclaim that was part of ***High Court Civil Case No.165 of 2008***. It is contended by the appellant that when Karanja, J., (as she then was) determined the suit, there was no mention of the counterclaim in her judgment. The respondents appealed against the judgment of Karanja, J., in ***Civil Appeal No. 110 of 2011*** but the appellants did not cross-appeal as they were not dissatisfied with the orders of Karanja, J. Mr. Mugo, learned counsel for appellants insisted that since Karanja, J. did not pronounce herself in regard to the counterclaim; the prayer in this appeal is for the counterclaim to be remitted to the E.L.C. Court for hearing and disposal.

[4] In his address to us during the hearing of this appeal, Mr. Mugo relied on this Court's decision in the case of ***John Peter Kamau v Kenya Reinsurance Corporation, Civil Appeal No. 208 of 2006.*** In the aforesaid case, this Court dismissed an appeal that challenged the orders of Aluoch, J. *(as she then was)*, reviewing a Judgment of Aganyanya, J. *(as he then was)*, on a counterclaim that was part of a suit. When Aganyanya, J. determined the suit in question, he did not pronounce himself on the counterclaim. There was an application to review Aganyanya, J's. judgment which was successfully reviewed by Aluoch, J. In upholding the decision of Aluoch, J. this is what this Court stated in a pertinent part of the judgment:

> ***"…Justice Aluoch did not overturn any of Justice Aganyanya's findings. The issue of sitting on appeal on her colleague's decision does not, therefore, arise. She never held a mini trial either she did not hear any further evidence in the matter. She simply relied on what was on the record and entered judgment for the respondent. The respondent had called evidence in support of its counterclaim. That evidence was not controverted. Justice Aluoch was, therefore, justified in entering judgment for the Respondent".***

[5] Mr. Mugo urged us to follow the above dicta and allow the counterclaim to proceed for a fresh hearing, before the Environmental and Land Court in Kerugoya. This appeal was also supported by Ms. Ndorongo for the 10th respondent. She submitted that there was no determination of the counterclaim in ***HCCC No. 165 of 2008,*** and even in ***C.A. No.110 of 2011***. Moreover, Ong'udi, J. stated that she would abide by the directions of this Court, thus it would serve the interest of Justice if the counterclaim was remitted to the Environment and Land Court for trial.

[6] This appeal was opposed by the other respondents. Mr. Kiome for the 3rd respondent relied on his very detailed written submissions which he highlighted. In his view there is nothing outstanding

regarding the counterclaim which he contended was dismissed alongside the suit. The counterclaim turned on the same issue that faced the main suit. The main suit was dismissed because Karanja, J. held that the issue at stake was challenging an adjudication process and the decision of the Minister. The court found the suit ought to have been filed by way of Judicial Review. In that case the counterclaim that also sought orders based on the main suit would suffer the same fate as the suit.

[7] This is because both the suit and the counter-claim were by way of plaints. Mr. Kiome referred to the ruling of Ong'udi, J., who reasoned that opening the counterclaim would entail rehearing the witnesses and that would amount to the same court issuing two judgments in the same matter. According to counsel, the High Court had the counterclaim in mind when dismissing the suit and even this court when dealing with ***Civil Appeal No. 110 of 2011,*** when it remarked that there was no cross-appeal by the appellants regarding the counterclaim; nothing could have stopped the appellants from cross-appealing if they wanted the issues in the counterclaim resolved; the suit land is registered in individual names who are not parties in the suit, that was initiated in the name of a clan.

[8] Mr. Mutito learned counsel for the 11th respondent associated himself with the submissions by Mr. Kiome. He also relied on his written submissions which he highlighted. He emphasized that under the provisions of ***Order 7 Rule 3*** of the ***Civil Procedure Rules,*** a counterclaim moves with the suit and unless a specific order is made that a counterclaim be heard separately from the main suit, a court pronounces itself on both; if the appellant was aggrieved that the court failed to address the counterclaim, he ought to have cross-appealed. If the appellant failed to adduce evidence to support the counterclaim, the court cannot re-open the proceedings, which is what the appellant is seeking to do in this appeal. The High Court is divested of jurisdiction to hear witnesses and it would be un-procedural to re-open the matter. On those submissions, Mr. Mutito urged us to dismiss the appeal with costs to the 11th respondent.

[9] This appeal raises one issue: whether the Judge erred by dismissing the application that sought to review an earlier order in which the appellant wanted the court to hear the counterclaim. Essentially an application for review involves the exercise of the Judge's discretion. It is trite that before this court can interfere with the Judge's discretion, it must be satisfied that he/she misdirected himself/herself in some matter and as a result arrived at a wrong decision or, that he/she misapprehended the law or failed to take into account a relevant matter.

[10] In ***Mbogo & Another v Shah, 1968 E A 93*** at page 95, ***Sir Charles Newbold P***. expressed himself on this proposition as follows:

> ***"…a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…".***

[11] The suit before the High Court at Embu, that is ***HCCC No. 165 of 2008,*** was instituted by way of a plaint. The appellant who was sued as the 7th defendant counterclaimed as follows:

> ***"The 7th defendant refers paragraphs 5-17 and particulars of fraud above and counterclaim:***
>
> a. ***Plaintiffs having sued as their clan representatives, we do pray that in the event plaintiff loses this case, all members of their clan and purchaser's or beneficiaries claiming under plaintiffs be compelled to retransfer the suit land to defendants failure of which the Deputy Registrar of the Honourable Court be mandated to sign all the relevant documents to retransfer such parcels to the defendants".***

[12] The appellant testified before the trial Judge but he did not adduce any specific evidence to support the counterclaim. It is no wonder that Ong'udi, J. stated in the ruling that is subject of this appeal that the

court was being called upon to rehear the 7th defendant's case and write another judgment.

[13] We have considered this appeal with anxious minds while bearing in mind that this is a dispute that has dogged the entire hierarchy of the Court structures for decades from 1964. It is in the interest of justice if the matter is settled by this court addressing it comprehensively. This appeal is an off-shoot of ***HCCC No. 165 of 2008***. The parties are the same and the subject matter is the same. After hearing the parties in ***Case No. 165 of 2008***, Karanja, J. dismissed the suit and stated as follows:

> ***"My considered finding on this issue, therefore, is that this court has no jurisdiction through a deliberately judgment to fault the judgment to fault the judgment of the Minister which it was otherwise no civil jurisdiction to impagne. The plaintiffs missed that chance when they failed to move the court in time on Judicial Review in its "sui genesis" jurisdiction.***
>
> ***The court cannot also order the 2nd and 3rd defendant to rectify registers or remove any restrictions (sic) place on the said plots. I may also mention here that the actions of the Director of Land Adjudication and the Chief Land Registrar were not unlawful in that the law enjoins them to make the relevant entries in the register upon finalization of the appeal before the Minister after receiving copies of the Minister's orders to that effect. The provisions of Section 29(2) and 3(a) and (b) are couched in mandatory terms and the 2 officers have no leeway which would allow them to refuse to comply with the Minister's order".***

[14] The above decision was appealed against in ***Civil Appeal No. 110 of 2011***. In agreeing with the trial Judge that the matter was *res-judicata* because it was litigated in various forums, this Court went further to look at what the appellants *(now respondents)* were referring to as a new "*cause of action*". This is what this Court stated after reviewing the evidence and the material that was before the Judges:-

> ***"The appellants' titles were not absolute as they could not deal with the titles as they pleased: the titles had restrictions that were placed by the registrar pending the decision of the Minister. The decision of the Minister could not have been implemented in 1978, because the restrictions were placed in the title pending its implementation. We are reinforced in this view by the fact that the appellant attempted to challenge the restrictions but abandoned the matter and decided to file a fresh cause of action…..***
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> ***Be that as it may, this matter is further compounded by the fact that the persons whose titles were concluded were not named and worse still the parties who were allegedly issued with the over 200 titles that the court is asked to cancel were not also named. It is a cardinal principles of law that a court of law is supposed to hear parties before making orders that affect them.***
>
> ***The appellants' claim is made on behalf of the clan whose membership is not named and against persons who were issued with titles and they are not named. The land was not registered in the name of a clan but individuals. Similarly, the land given out to the respondents' clan was also given to individuals who needed to be sued in their personal capacities as the land was not registered in the clan name".***

[15] Basically, this Court was in agreement with the trial Judge that the issues were res-judicata and the jurisdiction of the High Court was wrongly invoked by way of plaint instead of Judicial Review to challenge on administrative decision of a Minister. This Court went further to consider the merits of the claim and found that the suit was filed on behalf of Mukera Clan as against Nditi Clan although the titles of the suit land were in individual names and not in the name of the clan. There were over 200 titles in individual names that could not be determined without participation of the registered owners.

[16] In view of the above, we find the appellant's claim by way of a counterclaim, although nothing was specifically said about it in the judgment of the trial Judge, would have had no leg to stand on. Secondly

the specific persons who were targeted by the prayers and the specific titles would compound the problem as they are not named. Apart from these issues that emanate from the two decisions of the High Court and Court of Appeal, there is a further problem in that no evidence was adduced by the appellant in support of the counterclaim. If the counterclaim was remitted for retrial, that would be tantamount to litigation in installments that would go contrary to public policy. See the case of ***Pop-In (Kenya) Limited & 3 Others v Habib Bank Ag Zurich, 1990 KLR page 609***, where this Court stated as follows:

> ***"…The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact".***

[17] The appellant presented his defence and failed to urge the counterclaim. When the respondents appealed against that Judgment, he cannot say he was satisfied with the Judgment, if his counterclaim was not determined. He should have filed a cross-appeal and call upon this Court to determine the counterclaim. Finally, we have to say that the facts of this matter are different from what this Court was dealing with in the case of ***John Peter Kamau*** (supra). That was purely an application for review of the judgment of Aganyanya, J. that had left out a pronouncement on the counterclaim where evidence was adduced. In this case, Ongu'udi, J. was being called upon to review her order in which she declined to hear the counterclaim. It was not an application to review Karanja, J.'s judgment. Moreover, in this case, no evidence was adduced to support the counterclaim.

[18] In the result we find no merit in this appeal and we accordingly order it dismissed with costs to the 3rd and 11th respondents who opposed the appeal.

***Dated and delivered at Nyeri this 6th day May, 2014.***

***ALNASHIR VISRAM***

**……**

***JUDGE OF APPEAL***

***M. K. KOOME***

**……..**

***JUDGE OF APPEAL***

***D. K. MARAGA***

**……..**

***JUDGE OF APPEAL***

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**