REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 9 OF 2012

DORCAS MUTHONI KARANI

JOHN KABUI KARANI

JAMES PETER KARIUKI KARANI …….……..... PLAINTIFFS

VERSUS

JOHNSON WACHIRA KABUI

LUCY WAMBUI MURIITHI

MARGARET WACHUKA MURIITHI

LOISE WANJIRA MURIITHI …….....…..…...DEFENDANTS

JUDGMENT

By their plaint filed herein on 16th October, 2012, the plaintiffs sought the following orders against the defendants:-

a. ***Specific performance of the agreement of understanding dated 29th May, 2001 by cancellation of the names of the 2nd, 3rd and 4th defendants from the register of land parcel number INOI/KERUGOYA/1579 and the same be transferred to the plaintiffs***
b. ***Costs of the suit***
c. ***Any other relief the Court may deem fit and proper to grant***

The suit was premised upon an agreement dated 29th May, 2001 wherein the 1st defendant had agreed to donate parcel No. INOI/KERUGOYA/1579 to the plaintiffs which is where the plaintiffs live so that they could forego any claims they had against the 1st defendant. However, the 1st defendant transferred the said land to the 2nd, 3rd and 4th defendants leaving the plaintiffs landless with no alternative land to live on.

In their defence, the defendants pleaded that apart from this suit being res-judicata in view of several other suits between the parties, the plaintiffs had approached the 1st defendant with a request to transfer to them L.R No. INOI/KERUGOYA/1579, 1584 and 1586 but on the condition that there will be no more suits and this led to the agreement of 29th May, 2001 and consequently L.R No. INOI/KERUGOYA/1584 and 1586 were given to the plaintiffs who sold L.R No. INOI/KERUGOYA/1584 and purchased MUTIRA/KANGAI/1908. Notwithstanding that agreement which was not absolute, the plaintiffs filed

EMBU HIGH COURT SUCCESSION CASE NO. 8 of 2005 for revocation of grant that had been issued in KERUGOYA SUCCESSION CAUSE NO. 129 of 1980 which was dismissed on 19th October, 2005. Therefore the plaintiffs breached the agreement and the 1st defendant sold the land to the 2nd, 3rd and 4th defendant and in any case, that agreement became void by operation of ***Section 6*** of the ***Land Control Act.*** This suit is also time-barred by virtue of the ***Limitation of Actions Act.***

The defendants also filed a counter-claim seeking the eviction of the plaintiffs from LR. No. INOI/KERUGOYA/1579 which the plaintiffs have invaded and also an order for permanent injunction to restrain them, their servants, relatives, agents or anybody else claiming through them from occupying, cultivating, constructing or in any other way interfering with the said L.R No. INOI/KERUGOYA/1579.

The parties having filed their issues, the trail commenced before me on 28th August, 2013 when the 1st plaintiff gave her testimony and called the 2nd and 3rd plaintiff who supported the same. The defendants also led evidence in support of their counter-claim.

Both counsels made written submissions at the end of the trial.

I have considered the evidence by both sides together with their documentary exhibits and the submissions by counsel.

At the heart of this dispute is the agreement dated 29th May, 2001 (Plaintiffs Exhibit 3). Indeed this suit seeks the specific performance of the said agreement which is the main remedy sought in paragraph 13 (a) of the plaint as follows:-

> "***Specific performance of the agreement of understanding dated 29th May, 2001 by cancellation of the names of 2nd, 3rd and 4th defendant from the register of land parcel No. INOI/KERUGOYA/1579 and the same be transferred to the plaintiffs"***

In reply to the above averment, the defendants filed a defence in which they pleaded that not only is this suit time barred but it is also res-judicata by virtue of KERUGOYA SUCCESSION CAUSE NO. 129 of 1989 and EMBU H.C.C.C No. 113 of 1996 as well as EMBU HIGH COURT SUCCESSION CAUSE NO. 8 of 2005.

On the issue of limitation, it is clear that the agreement was signed on 29th May, 2001 and under ***Section 4*** of the ***Limitation of Actions Act***, an action founded on contract cannot be brought after the end of six years from the date on which the cause of action occurred. This suit was filed on 16th October, 2012. In her evidence in chief, the 1st plaintiff who testified on 28th August, 2013 told the Court that it was only the previous year (2012) that she realized that the land subject of this suit had been transferred and so she filed this suit. And in her submissions, Ms Thungu for the plaintiffs submitted that the suit is not statute barred because it was only on 6th October, 2010 that the breach occurred. The answer to that, in my view, is that this was an agreement for the transfer of an interest in land. Paragraph 3 of the agreement reads as follows:-

> ***"In consideration of his sympathy and out of his own will, the donor has agreed to transfer to the beneficiaries land parcel numbers:-***
>
> a. ***INOI/KERUGOYA/1584***
> b. ***INOI/KERUGOYA/1589***
> c. ***INOI/KERUGOYA/1579"***

There is no evidence that the Land Control Board gave its consent to that transaction as required under ***Section 6 (1) of the Land Control Act*** and therefore that agreement became void. An agreement that is void means it has no legal effect or is null (see ***BLACK's LAW DICTIONARY 9TH EDITION).*** Such an agreement cannot form the basis of a suit. See also ***NGOBIT ESTATE LTD VS CARNEGIE 1982***

Even if there was any fraud which was only discovered by the plaintiff in 2010 as submitted by Ms Thungu, that would have been a good reason for the plaintiff to apply for extension of time under ***Section 26*** of the ***Limitation of Actions Act*** ***Cap 22*** Laws of Kenya. There is no evidence placed before me to show that any such leave to file suit out of time was sought and obtained.

Then there is the issue of res-judicata. This was not addressed by Ms Thungu in her submissions but it has been covered at length in the submissions of Mr. Kagio for the defendants. I have therefore considered the other litigations involving the parties herein to see if this suit is caught up by the doctrine of res-judicata. Res-judicata is provided for under ***Section 7*** of the ***Civil procedure Act*** in the following terms:-

> "***No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court".***

I have looked at EMBU HIGH COURT SUCCESSION CAUSE NO. 8 OF 2005 which was seeking revocation and annulment of a grant issued in KERUGOYA SUCCESSION CAUSE No. 129 of 1989. The 1st plaintiff herein was the applicant and the 1st defendant herein was the respondent. That dispute involved, amongst other properties, the property subject matter of this suit. In his judgment in that matter, Lenaola J. complained about what he called "***the litigious nature of the parties***". The Judge went on to add that each of them was "***tainted and none should benefit from their lack of truth"***. Those are clearly not very flattering descriptions of the litigants herein.

Then there was EMBU HIGH COURT CIVIL CASE NO. 113 of 1996 in which the 1st and 2nd plaintiff herein were also the 1st and 2nd plaintiffs while the 1st defendant therein is also the 1st defendant in this suit. The property subject of this suit was part of the property in dispute in that case and the Judge Mitei J. (as he then was), up-held a Preliminary Objection on the issue of res-judicata. This long standing dispute was subsequently put to rest by the Court of Appeal in Civil Appeal No. 165 of 1999 following a consent recorded by the advocates of the parties in their presence. In the premises, the plaintiffs' suit against the defendants is not only statute barred but it is also res-judicata. It is therefore for dismissal.

Similarly, the defendants' counter-claim seeking the eviction of the plaintiffs from the land subject of this suit is also res-judicata. In my view, that claim was determined by Mitei J. (as he then was) in EMBU H.C.C.C. No. 113 of 1996 in which, from the pleadings, the ownership of the property subject matter of this suit was also in dispute. As the Court of Appeal held in ***RAJWANI VS RODEN 1990 K.L.R 4,*** estoppel per res-judicatam applies not only to what is expressly decided but also to what is assumed and admitted and is fundamental to what is decided.

In the circumstances both the plaintiffs' claim against the defendants and the defendants counter-claim against the plaintiffs are dismissed. Each party to meet their own costs.

B.N. OLAO

JUDGE

3RD OCTOBER, 2014

3/10/2014

Before

B.N. Olao – Judge

Mwangi – CC

1st Plaintiff – present

Defendants – absent

COURT: Judgment delivered in open Court this 3rd day of October, 2014.

1st Plaintiff present

No appearance by the other plaintiffs or defendants.

Right of appeal explained.

B.N. OLAO

JUDGE

3RD OCTOBER, 2014