



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 110 OF 2018

JOSHUA KYALO NTHAKYO

OBADIAH NTHAKYO MUUMBI

MWETHYA KITUKU

MUSYOKA KITAKA

RICHARD MUKITI MBINDYO..... PLAINTIFFS

VERSUS

JOSEPH MASAI MUUMBI.....DEFENDANT

JUDGEMENT

1. By their plaint dated 13th November, 2018 and filed in court on 15th November, 2018 the Plaintiff's pray for judgement against the Defendant for an order directing the Defendant to join the Plaintiffs in obtaining consent to transfer plot number Mbitini/Kyemundu/770 and transfer the said plot by filing the same after paying stamp duty at the County Land Registry Makueni. The Plaintiffs further pray for costs of the suit.

2. The Plaintiffs have pleaded in paragraphs 11, 12 and 13 of their plaint that on 03rd July, 2018 the Defendant agreed to surrender the trust and transfer plot number Mbitini/Kyemundu/770 to Joshua Kyalonthakyo and on the same date he applied for land control consent by completing an application form transfer to accompany the application for consent and search form of the title, the Plaintiffs and the Defendant jointly fixed a date of hearing of the application for consent with the board/secretary at Matiliku (Nzau) and that the Defendant failed to turn up at Matiliku County Commissioner's office to apply for consent to transfer the plot to the 1st Plaintiff causing the Plaintiffs to spend the whole day waiting for the Defendant in vain.

3. The matter proceeded as undefended suit after the Defendant though served with summons to enter appearance and to file his defence failed to do so.

4. The 5th Plaintiff, Richard MukiliMbindyo was the first to be sworn in on the 18th July, 2019 but was soon thereafter stood down before he could testify. The matter was thereafter adjourned to 09th September, 2019 when the 3rd Plaintiff, MwethyaKituku told the court that her co-Plaintiffs are her siblings while the Defendant is the son of her sibling. She said that the Defendant was registered to hold the suitland in trust since the other Plaintiffs were not near. The 3rd Plaintiff proceeded to adopt her statement dated 13th November, 2018 as her evidence. She also produced the transfer of document dated 03rd July, 2018 and title for land parcel number Mbitini/Kyemundu/770 in her list of documents filed in court on 15th November, 2018 as P.Exhibit Nos.1 and 2 respectively.

5. The 1st Plaintiff, Joshua Kyalonthakyo adopted the evidence of the 3rd Plaintiff together with his statement dated 22nd October, 2019 as his evidence.

6. In his written submissions, Mr. Kisongo for the Plaintiffs submitted that the Defendant signed the transfer forms to the Plaintiffs in the presence of a lawyer. He went on to submit that the executed transfer by the Defendant amounted to a contract and an instrument of transfer under section 37 of the Land Registration Act. He pointed out that failure by the Defendant to apply for consent to transfer was a breach of the contract.

7. The Counsel further submitted that the Plaintiffs have satisfied all the requirements of the law relating to customary requirement and as

such the court should enter judgement for the Plaintiffs as prayed.

8. Having heard the evidence of the Plaintiff and read the submissions filed, my finding is that the Plaintiffs' evidence that the Defendant was registered to hold land parcel number Mbitini/Kyemundu/770 in trust for the Plaintiffs remains uncontroverted. The same applies to the evidence by the Plaintiffs that in a meeting that they held, the Defendant agreed to transfer the said land to the 1stPlaintiff. He went ahead to sign the necessary application form for consent from the relevant Land Control Board to transfer the land to the 1stPlaintiff only for him to renege on the agreement.

9. I would agree with the Plaintiffs' Counsel that the Plaintiffs have established customary trust against the Defendant.

10. Arising from the above, I am satisfied that the Plaintiffs have on a balance of probabilities satisfied this court that they have a cause of action against the Defendant. I therefore proceed to enter judgement in their favour and against the Defendant as follows: -

a. An order is hereby issued directing the Defendant to join the Plaintiffs in obtaining consent to transfer land parcel number Mbitini/Kyemundu/770 and thereafter transfer the same after paying stamp duty at the County Land Registry Makueni.

b. For good measure of (a), the Deputy Registrar of this court is authorized to sign the transfer forms in case the Defendant declines or is unable to do so.

c. Costs of the suit are provided for.

Signed, dated and delivered via email at **Makueni** this **29th** day of **April, 2020**.

MBOGO C. G.,

JUDGE.

Court Assistant -Mr. Kwemboi

MBOGO C. G. (JUDGE),

___/04/2020.