



Mata (Legal Representative of the Estate of Charles Mata Yuma) v Nthiwa (Environment and Land Appeal E005 of 2020) [2025] KEELC 3634 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E005 OF 2020**

TW MURIGI, J

APRIL 30, 2025

BETWEEN

ANASTASIA KAVEKE MATA (LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES MATA YUMA) APPELLANT

AND

JOHN MWAKULA NTHIWA RESPONDENT

(Appeal against the judgment of Hon. E. Muiru (SRM) delivered on 26th November, 2020 in Kilungu ELC Case No. 29 of 2018)

JUDGMENT

1. By a Memorandum of Appeal dated 7th December 2020, the Appellant appealed against the judgment of Hon. E. Muiru (SRM) delivered on 26th November, 2020 in Kilungu ELC Case No. 29 of 2018 and set out five grounds of appeal.

Background.

2. The Respondent had sued the Appellant vide an amended Plaintiff dated 15th May, 2019 seeking the following orders:-
 - a. A declaration that the Defendant holds a parcel of land located within Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3 in trust for the Plaintiff.
 - b. A mandatory injunction to compel the Defendant, his servants or agents or otherwise however to forthwith and unconditionally allow the Plaintiff peaceful and quiet possession of the afore-stated parcel of land measuring approximately 3.01 acres and located within Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3.



- c. Further to prayers (a) and (b) hereinabove a mandatory injunction to compel the Defendant, his assigns or agents or otherwise whatsoever to release to the Plaintiff: -
 - i. The original Title deed of land parcels number Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3.
 - ii. Duly executed land transfer forms with all necessary legal documents for the transfer of Parcel Number Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3 in favour of the Plaintiff.
 - d. The executive officer of this Honourable Court is hereby authorized where necessary to sign and/or execute any document (s) required to ensure the proper transfer of the parcels afore-stated and the relevant Land Registrar shall accept such signed documents by the Executive officer as being sufficient to effect the transfer.
 - e. Costs and interests of the suit.
3. The Appellant filed a further amended Defence and Counterclaim dated 27th May, 2019 seeking the following orders: -
- a. That the Plaintiff's suit be dismissed with costs.
 - b. That the Honourable court do make an order evicting the Plaintiff by himself, his agents, employees, servants and anyone claiming under the Plaintiff from Parcel of land Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3.
 - c. That this Honourable court do make an order for the Plaintiff to pay the Defendant mesne profit for non-user of the land at a rate of Kshs. 150,000/= per annum since the year 1991 to the time of judgment in this suit.
 - d. Any other relief the court deems fit to grant.
 - e. Costs of this suit and interest.
4. In the proceeding before the lower court, the Appellant was the Defendant while the Respondent was the Plaintiff. After the trial, the learned trial magistrate delivered her judgment in the following terms: -
- a. A declaration does hereby issue that the Defendant holds a portion of land measuring approximately 1.5 acres in the parcel of land located within Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3 in trust for the Plaintiff.
 - b. A mandatory injunction does hereby issue compelling the Defendant, his servants or agents or otherwise however to forthwith and unconditionally allow the Plaintiff peaceful and quiet possession of the aforesaid parcel of land measuring approximately 1.5 acres located within Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3.
 - c. Further to prayers (a) and (b) hereinabove a mandatory injunction does hereby issue compelling the Defendant, his assigns or agents or otherwise whatsoever to release to the Plaintiff: -
 - i. The original Title deed of the land parcels Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3 for purposes of effecting of transfer of the portion measuring approximately 1.5 acres in the said land to the plaintiff.



- ii. Duly executed land transfer forms with all necessary legal documents for the transfer of the portion measuring approximately 1.5 acres situated in parcel number Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3 in favour of the Plaintiff.
 - d. Costs and interest to the Plaintiff.
5. Being aggrieved, the Appellant appealed against the decision on the following grounds: -
 1. That the Learned Magistrate erred in law and fact when she failed to consider the evidence given in totality by the Plaintiff and also refused to consider the pleadings as filed by the Plaintiff.
 2. That the Learned Magistrate erred in law and fact when she posed to introduce new evidence into the case on her own motion rather than being guided by the evidence given by the parties.
 3. That the Learned Magistrate erred in law and fact when she introduced new prayers and granted them yet a party in law is wholly guided by its pleadings.
 4. That the Learned Magistrate erred in law and fact when she misinterpreted the evidence given on oath by the parties hence arriving at improper judgment.
 5. That the Learned Magistrate erred in law and fact when she misinterpreted the whole case and failed to consider the facts, evidence and submissions given consequently arriving at a wrong judgment.
6. The Appellant prays for: -
 1. The Appeal be allowed and the lower court judgment set aside dismissing the lower court case.
 2. The counterclaim by the Appellant in the lower court be allowed by this Honourable Court.
 3. The Appellant be awarded costs of the lower court case and also of this Appeal with interest.
7. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions.

8. The Appellant filed his submissions dated 2nd October, 2023. On behalf of the Appellant, Counsel condensed ground 1, 4 and 5 on one hand and ground 2 and 3 of the Appeal on the other hand.
9. On ground 1,4 and 5, Counsel submitted that the Appellant is the sole registered owner of land parcel Nos. Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3. Counsel further submitted that the Appellant's counterclaim was founded on trespass on the two parcels of land registered in the name of the Appellant. Counsel contended that it was the Appellant's evidence that he never entered into any agreement with the Respondent for the sale of the disputed land.
10. It was submitted that the Respondent did not produce any sale agreement in support of his claim. Counsel further submitted that the Respondent had done nothing else other than take possession of 1.5 acres without paying the purchase price which he claimed was Kshs. 20,000/=.
11. Counsel contended that the trial court's reliance on the Court of Appeal's decision in Civil Appeal Case No. Willy Kimutai Kitilit v Michael Kibet, was distinguishable from the facts presented before the trial court.



12. It was submitted that the Respondent did not adduce any evidence to show that he had paid the full purchase price of Kshs. 20,000/= for 1.5 acres. To buttress this point, Counsel relied on the case of Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR where the court of Appeal held that:-

“The concept of trust is not new. In case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
13. Counsel further submitted that the Appellant clarified in his evidence that he had no intention of selling his land to the Respondent.
14. Submitting on ground 2 and 3, Counsel submitted that the learned trial magistrate erroneously found that the Respondent’s dealings with the Appellant were based on trust. Counsel further submitted that the learned trial magistrate erred in relying on the doctrine of constructive trust yet the same was not pleaded by the Respondent. To buttress this point, Counsel relied on the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR where the court held that: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....”
15. Counsel contended that the trial court misinterpreted the entire case and failed to consider the evidence adduced by Appellant and the submissions tendered therein.
16. Concluding his submissions, Counsel urged the court to allow the Appeal as prayed.

The Respondent’s Submissions.

17. The Respondent filed his submissions dated 19th November, 2024. On behalf of the Respondent, Counsel submitted in the sequence adopted by Counsel for the Appellant on the condensed grounds of Appeal.
18. Firstly, Counsel submitted that it was not in dispute that the parties herein entered into an oral agreement in the year 1989. Counsel further submitted that pursuant to the oral agreement, the Appellant received the full purchase price of Kshs. 20,000/= and possession of the suit property was voluntarily granted to the Respondent. Counsel submitted that the Appellant never took any steps to evict the Respondent from the disputed land despite having been in possession for approximately 35 years.
19. From the foregoing, Counsel contended that a constructive trust had arisen in favour of the Respondent and therefore, the sale agreement between the parties therein is enforceable. Counsel further contended that nothing prevents the Respondent from relying on the doctrine of constructive trust since there was a common intention between the Appellant and the Respondent regarding the suit property.
20. Counsel submitted that in the year 2005, the Appellant declined to assist the Respondent in acquiring his title for the disputed portion despite having been issued with the title deeds.



21. Submitting on grounds 2 and 3, Counsel submitted that the Appellant did not adduce any evidence to support the allegations that the trial magistrate introduced new evidence and new prayers in the case. Counsel submitted that the trial magistrate confined herself to the evidence that was tendered by the parties and granted the prayers that were sought by the Respondent. Concluding his submissions, Counsel urged the court to uphold the trial magistrate's judgment and dismiss the Appeal with costs.

Analysis And Determination.

22. The principles which guide a first Appellate Court were discussed in the case of *Selle and another vs Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court of Appeal stated as follows: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”

23. Similarly, in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 the Court of Appeal held that: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

24. At the trial, the Plaintiff testified as PW1 and called two witnesses in support of his case. PW1 testified that on 5/3/1989, the Defendant offered to sell to them 1½ acres for Kshs 20,000/=. That he purchased the dispute land and paid the purchase price in full. That in the year 1991, he constructed a permanent house on the said plot where he resides with his family. The Plaintiff further testified that they co-existed peacefully until the year 2005 when he began to pursue ownership of the said portion of land. It was his testimony that they did not record an agreement for the sale of the disputed land.

25. PW2 the wife to the Plaintiff echoed the evidence of PW1. It was her testimony that she would pay the purchase price to the Defendant's wife who was her sister.

26. PW3 the Chairman of Atangwa Clan, testified that he convened a meeting to deliberate on the land dispute between the Plaintiff and the Defendant. He went on to state that the Defendant did not attend the meeting despite being duly notified of the same. He testified that the Defendant's step brothers who attended the meeting admitted that the Defendant had sold the disputed land to the Plaintiff.

27. The Defendant testified as DW1 and called two witness in support of his case. It was his testimony that he is the registered proprietor of the suit properties and denied having sold the disputed land to the



- Plaintiff. He further testified that the Plaintiff went to his land in the year 1995 while looking for land to purchase and added that they were currently residing on his land
28. DW2 testified that the Defendant never sold his land to the Plaintiff. He confirmed that the Plaintiff resides on the Defendant's land. It was his testimony that the Plaintiff started claiming the Defendant's land in the year 2006. He further testified that the Plaintiff did not have a sale agreement to show that he had purchased a portion of the suit property from the Defendant.
 29. DW3 testified that the disputed land belongs to the Defendant. That pursuant to a meeting held on 21/6/2011 they deliberated over the dispute and added that the Plaintiff did not produce any document to confirm that he had purchased the disputed land. He further testified that the Plaintiff had given the Defendant money to purchase land on his behalf. However, the Plaintiff rejected the land and the money was refunded.
 30. The seven grounds of Appeal can be condensed to the following issues for determination: -
 - a. Whether the learned trial magistrate analyzed the evidence on record in arriving at her decision.
 - b. Whether the Appellant is entitled to the orders sought?
 31. It is not in dispute that the Appellant is the registered proprietor of land Parcel No.s Kitaingo/Uvete/4X9 and Kitaingo/Uvete/4X3. The Appellant denied having sold a portion of the suit property to the Respondent herein. It is the Appellant's case that the Respondent did not produce a sale agreement to demonstrate that he had purchased the disputed land. However, he admitted that the Respondent had been in possession of the said portion that he was claiming since the year 1995.
 32. On his part, the Respondent testified that in the year 1989 he purchased 1½ acre property from the Appellant vide an oral agreement. That pursuant to the sale, he took possession of the land and constructed a permanent home where he resides with his family.
 33. PW3 testified that he convened a meeting to deliberate on the land dispute between the Plaintiff and the Defendant. He produced the proceedings of the meeting held by the clan on 30/12/2015. It is clear from the proceedings that the Defendant did not attend the meeting despite being duly summoned. Upon hearing the parties, the Clan in summary held that the Respondent had purchased the disputed land from the Appellant and had every right to live in it.
 34. The evidence of PW2 that they paid the full purchase price through the Appellant's wife, Musili Mata, was not controverted by the Defence. The Respondent informed the court that he has been in occupation of the disputed land for approximately 35 years and has constructed a permanent home therein. The Appellant on the hand testified that the Respondent had been in occupation of the disputed since 1995.
 35. The Appellant complained that the Respondent did not produce a sale agreement to demonstrate that he had purchased the disputed land. Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested.
 36. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection.
 37. Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act is not applicable in this case as it came in force after the Appellant and the Respondent had entered into the sale agreement.



38. From the foregoing, I find that the Respondent proved to the satisfaction of the court that he had purchased the disputed land from the Appellant vide an oral agreement
39. In the circumstances, this court finds that the sale agreement between the Appellant and the Respondent does not offend the provisions of the Law of Contract Act.
40. The Appellant lamented that the learned trial magistrate erred in finding that a constructive trust had been created in favour of the Respondent.
41. Black's Law Dictionary 9th Edition defines a trust as:

“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title, a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary).”

42. The Respondent's claim was based on an oral agreement between him and the Appellant. Pursuant to the sale, the Respondent took possession of the disputed land and constructed his home thereon.
43. In the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, the court outlined the basic tenets of a trust as follows:

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see *Halsbury's Laws of England supra* at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See *Snell's Equity* 29th Edn, *Sweet & Maxwell* p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person



who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)." [Emphasis added]

44. There is evidence that the Respondent purchased the disputed portion from the Appellant vide an oral agreement. There was a common intention between the Appellant and the Respondent regarding the disputed land which the Respondent took possession and constructed his permanent home. The Appellant confirmed that the Respondent has been in occupation of the same since the year 1995.
45. There is evidence that the Respondent has no intention to confer interest to the Respondent.
46. Looking at the evidence on record I find that a constructive trust arose in favour of the Respondent.
47. The Appellant faulted the trial magistrate for failing to consider his pleading, evidence and his submissions thereby arriving at a wrong decision. He urged the court to set aside the judgement and allow his counterclaim as prayed.
48. Even though the Appellant is the registered proprietor of the suit properties, any adverse claims that may have been derived by any other person including a trespasser have to be extinguished before the expiry of twelve years as per Section 7 of the Limitation of Actions Act which provides as follows: -
'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'
49. Section 9 (1) of the Limitation of Actions Act further goes on to outline as follows: -
'Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.'
50. The Appellant conceded during his cross-examination that the Respondent took possession of his land in the year 1995. The record shows that the Appellant did not take any action to evict the Respondent from the disputed portion. His claim for the eviction of the Respondent on the basis of trespass was therefore extinguished at the expiry of twelve years that is on or about 2007.
51. The Appellant lamented that the trial magistrate erred in law by introducing new evidence and new prayers in the case. No evidence was adduced to show that the trial magistrate introduced new evidence and prayers in the case. Similarly, no evidence was adduced to show that the trial magistrate considered extraneous matters in arriving at her decision.
52. From the foregoing, I find that the learned trial magistrate analyzed and evaluated the evidence presented before her in arriving at her decision. In the circumstances, I find that the Appellant is not entitled to the orders sought.
53. The upshot of the foregoing is that I find that the Appeal herein is devoid of merit and the same is hereby dismissed. Each party to bear his own costs.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL, 2025.

