



**Kibunguchy v Muhatia (Environment and Land Appeal  
E006 of 2023) [2025] KEELC 3783 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3783 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

**EC CHERONO, J**

**MAY 8, 2025**

**BETWEEN**

**HEREBERT WANJALA KIBUNGUCHY ..... APPELLANT**

**AND**

**MEDIATRIQUES MUHATIA ..... RESPONDENT**

*(Being an appeal arising from the judgment of the Hon. P.Y KULECHO,  
PM delivered on 18/08/2023 in WEBUYE SPM-ELC NO.34 of 2018)*

**JUDGMENT**

**Introduction.**

1. Vide a Memorandum of Appeal dated 22/08/2023, the Appellant who was the plaintiff before the trial court appeals to this court challenging the judgment delivered on 18/08/2023 in Webuye SPMC ELC CASE No. 34 of 2018 wherein the court dismissed the Appellant's case with costs to the Respondent.
2. The brief background of this case is that the Appellant and the Respondent were involved romantically and the Appellant who was earning took up the role of caring for the Respondent and her son in terms of their upkeep and education needs. That in the year 2016, the Respondent suggested to the Appellant that he should build a house for her since they had planned to get married and immediately the Appellant scouted for an appropriate location to put up a residential house. He entered into a two land sale agreement with one Rebecca Nelima for the purchase of two separate parcels of land measuring 0.1Ha and 0.013ha to be carved out of land parcel no.Bokoli/Kituni/1047.
3. That on the promise of marriage and without receiving any contribution, the Appellant had the name of the Respondent indicated in two sale agreements as purchaser. The two parcels of land were sub-divided from land parcel no.Bokoli/Kituni/1047 and later registered as land parcel no.Bokoli/Kituni/2616 and 2885 in the name of the Respondent. The Appellant thereafter embarked on constructing a residential house fully financing the project to completion. That the Respondent



thereafter jilted the plaintiff and quickly moved in with another man and the two have been cohabiting in the house to this day to the detriment of the appellant. He argued that the Respondents is registered as a trustee of the suit land. The Appellants claim against the respondent was for;

- a. In terms of paragraph 20 above. A declaration that the plaintiff solely is entitled to ownership and possession of the suit land. A declaration that the defendant is holding the suit land in trust for the plaintiff. A mandatory order directing the defendant to transfer the suit land to the plaintiff failures of which the deputy registrar of the High Court do sign the transfer forms in favour of the plaintiff. An order for eviction of the defendant from the suit land. Damages for loss of use of the suit land from June 2017 to date of judgment.
  - b. Interest
  - c. Cost of this suit.
  - d. Any other or further relief that this honourable court may deem just and fit to grant.
4. The Respondent filed a defense dated 04/09/2018, and averred that she is the absolute registered owner of land parcels Bokoli/Kituni/2616 and 2885. She claimed that she entrusted the Appellant with funds to purchase the properties and construct a residential house on her behalf. According to her, she raised the money through friends, including the Appellant, and from various odd jobs. She denied ever promising to marry the Appellant and stated that she consistently rejected his advances. Furthermore, she accused the Appellant of harassment and coercion, alleging that he was pressuring her to either accept a relationship with him or relinquish the disputed property. She maintained that the case was driven by malice and sought its dismissal with costs.
  5. During pre-trial directions, the parties agreed to proceed with the hearing of the suit by way of viva voce evidence with the Appellant calling four (4) witnesses in support of his claim while the Respondent testified as a sole witness.
  6. PW1 Herbert Wanjala Kibunguchy adopted his witness statement dated 20/08/2018 as his testimony-in-chief and produced the items contained in his list of documents containing 8 items as P-Exhibit 1-8. P-Exhibit 1 was an agreement dated 10/04/2016 for the sale of a portion Measuring  $\frac{1}{4}$  acre from LR No. Bokoli/Kituni/1047 registered in the name of Josephat Simiyu Misiko for a consideration of Kshs. 170,000/-. P-Exhibit 2 is an acknowledgment of payment dated 18/06/2016, -/07/2016 and 12/11/2016 for Kshs. 24,000/=, 48,000/= and 50,000/= respectively. P-Exhibit 3 is a bank statement for Mana Limited for the period starting 13/08/2016 to 30/09/2017, P-Exhibit 4 was a bank statement for an account in the Appellant's name for the period starting 13/8/2016 and ending 30/09/2017, P-Exhibit 5 is a labourer's payment record for the period 01/08/2016 to 31/08/2017, P-Exhibit 6 is a bundle of receipts addressed to Kamp David. P-Exhibit 7a & b are copies of official search for the suit parcels of land while P-Exhibit 8 is a demand letter addressed to the Respondent dated 02/12/2017.
  7. He testified that he and the Respondent were lovers since July 2013. On cross-examination, he testified that the sale agreement indicates the respondent as the purchaser. That there is no indication that the Respondent is holding the property in trust in the agreement or title deeds registered in the name of the Respondent. He testified that when he met the Respondent, she was a gym instructor and amateur boxer. On re-examination, he testified that he solely negotiated on the purchase of the suit land and funded the construction of the house.
  8. PW2 Rebecca Nelima adopted her witness statement dated 22/08/2018 as her testimony-in-chief. She testified that he sold her land to the Appellant. On cross-examination, she stated that the Appellant told her that the Respondent was purchasing the land and that at the land control board the transfer



was effected to her. On re-examination, she testified that she negotiated on the sale with the Appellant and the consideration was paid to her by him.

9. Andrew Wangila Namambu (PW3) adopted his witness statement as his testimony-in-chief. He stated that he is a broker and he connected the Appellant to PW2. That he attended all negotiations and witnessed payment of the purchase price which he stated, was paid by the Appellant. On cross-examination, he testified that he did not know that the Respondent was the purchaser of the suit properties.
10. Joshua Kalton Sure (PW4) adopted his witness statement and testified that he was the one taking construction material from the hardware shops on credit to the site on instructions of the Appellant. That the construction went on from August 2016 to September 2017. He could not confirm whether the materials were paid for or not. He had with him a record of payment of the casual workers and stated that the Appellant was responsible for paying the contractors. On cross-examination, he stated that the parties were in a relationship and could not tell whether the Respondent paid any money.
11. Mediatriques Muhatia (DW1) adopted her witness statement dated 10/09/2019 as her testimony-in-chief. She also produced the items contained in her list of documents which contained a plan for the construction of the house on land parcel no. Bokoli/2885 and Bokoli/Kituni/2616 as P-Exhibit 1. P-Exhibit 2 shows that she participated in a boxing programme from the year 2010. P-Exhibit 3 is award of a tender to her business with one Evelyne Khaemba. D-Exhibit 4 is a partnership agreement between her and the said Evelyne Khaemba. D-Exhibit 5 are payment receipts for tiling works where she paid Kshs. 1,580/=. She also produced receipts dated 27/06/2018, 09/06/2017 and 06/07/2017 for payment of Kshs. 50,000/= and Kshs. 2,000/= as D-Exhibit 6 a & b. She produced an advertisement dated 06/07/2017 as D-Exhibit 6 (c)
12. On cross-examination, she stated that she is the registered owner of the suit properties and that she constructed the residential house thereon herself. She testified that she constructed the above residential house from funds received from friends including the appellant and that she stated that She also earned Kshs. 800,000 from her tender where she was supplying a hotel. She testified that she has dated the Appellant for three years and that she has two sons with him.

### **The Appeal.**

13. The Appellant's grounds of appeal are contained in the memorandum of appeal dated 22<sup>nd</sup> August, 2023 as follows:
  - a. The learned trial magistrate erred in law and in fact by failing to consider critical evidence adduced by the respondent in cross-examination thereby arriving at a wrong decision.
  - b. The learned trial magistrate erred in law and in fact to find that the respondent had employed deception to acquire proprietary interest in LR No. Bokoli/Kituni/2616 and Bokoli/Kituni/2885 to the detriment of the appellant.
  - c. The learned trial magistrate erred in law and in fact in failing to consider indefeasibility of title on account of fraud and misrepresentation thereby arriving at working decision.
  - d. The learned trial magistrate erred in law and in fact by failing to find that the manner in which the respondents acquired proprietary interests in LR No. Bokoli/Kituni/2616 and Bokoli/Kituni/2885 created a constructive trust in favour of the appellant.



- e. The learned trial magistrate erred in law and in fact in failing to appreciate the concept of constructive trust which is engrained in our constitutional order as a tool to guard against unjust enrichment.
  - f. The learned trial magistrate erred in law and in fact in placing too much weight in Samuel Njuguna Kimemei v. Rose Mgeni Mtwana (2012) eKLR. Which is distinguishable from the fact of the case before her and casting a blind eye to relevant authorities cited by the appellant thereby arriving at a wrong decision.
  - g. The learned trial magistrate erred in law and in fact in failing to consider full submissions by the appellant.
  - h. The learned trial magistrate erred in law and in fact in failing to give reasons for disagreeing with the appellants arguments.
14. The Appellant sought to have the judgment of the lower court delivered on 18/08/2023 set aside and the appeal allowed by substituting the order dismissing the suit with an order allowing the prayers in the plaint dated 22<sup>nd</sup> August, 2018.
  15. When the appeal came up for directions, the parties agreed to have it canvassed by way of written submissions.
  16. The Appellant his filed submissions dated 28/02/2025 where he begun by reminding the court of its duty as a court of first appeal and the concept on the burden of proof. He framed and submitted on the following issues;
  17. The first being whether the Appellant proved the existence of a trust in his favour. He submitted that the circumstances of this case imposed a resultant trust and argued that equity dictates that the Respondent should not enjoy properties acquired through corrupt means. He further urged the court to consider the intention of the parties in making its determination. He placed reliance in the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & Others (2015) eKLR and Charles K. Kandie vs. Mary Kimoi Sang(2017) eKLR and Jelutebi African Adventure Limited & Another vs. Christopher Micheal Lockley (2017)eKLR .
  18. The Respondent on her part filed submissions dated 07/03/2025 where she relied on the case of Samuel Njuguna Kimemia vs. Rose Mgeni Mtwana (2012) eKLR, KN vs. JMT (2018) eKLR and Wilson vs. Carnely (1908) All.ER.

### **Analysis and determination.**

19. I have reviewed the record of appeal, the grounds of appeal outlined in the memorandum of appeal and the rival submissions in totality. The court is reminded of its duty as the first appeal court. See Kenya Ports Authority v. Kunston (Kenya) Ltd (2009) 2EA 212.
20. In my view, the following are the issues for the determinations by this court;
  - a. Whether the Appellant has established the existence of a trust over the suit properties against the Respondent.
  - b. Who bears cost of suit.
21. Both the Appellant and the Respondent assert, independently, that they are the sole rightful owners of the suit parcels. While the Appellant claims that the registration of the suit properties in the Respondent's name is subject to a trust on the grounds that he purchased and developed the same



on the alleged understanding that the Respondent would be his second wife, the Respondent claims that she is the sole and absolute owner of the suit parcels having fully financed the purchase and development of the same using her income and the support of friends who include the Appellant herein.

22. In support of his claim, the Appellant called witnesses who confirmed that the plaintiff personally negotiated with the vendor of the suit land, paid the purchase price, and was solely responsible for hiring construction workers and procuring building materials, thereby overseeing the entire development of the suit properties. The Respondent on the other hand testified that she is a professional and competitive boxer and that she acquired the suit properties and financed the construction of the residential house using proceeds from her boxing career, income from a catering tender, and contributions from friends.

23. The legal framework on legitimacy of title documents is governed by Sections 24, 25 and 26 of the *Land Registration Act*. Section 24(a) thereof recognizes the registered owner as the absolute owner of land. This section provides as follows;

“The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

24. This absolute right is limited by Section 25 which provides that land shall be held by the registered proprietor together with all other privileges appurtenant thereto but subject to charges, leases, encumbrances, restrictions, liabilities, rights and interests as stipulated in Section 28. Section 26 provides that courts shall consider a certificate of title issued by the Registrar as a prima facie evidence that the person registered as proprietor is the owner. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

25. Although prima facie the Respondent is the registered owner of the suit property, she needed to prove how she acquired it upon being challenged. In the case of *Munyu Maina v. Hiram Gathiha* (2013) eKLR, the Court of Appeal expressed itself thus; “We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

26. The question that the Court must then ask itself is whether there was resulting and or constructive trust in respect of the suit properties for the benefit of the Appellant. It is trite that the onus of proof lies on he who alleges. The Appellant claims the suit properties on the existence of a trust. It is incumbent upon him to prove it through evidence. That was the holding in the case of *Charles K. Kandie V. Mary Kimoi Sang* (2017) KECA 775 (IKLR) where the court stated as follows;

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”



27. The court is further guided by the decision of the Supreme Court in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) where the Superior Court stated as follows;

“A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment.

The Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust: “The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”

The United States Supreme Court in *Harris Tr & Sav Bank v Salomon Smith Barney Inc*, 530 US 238, 250–51 (2000) citing *Moore v Crawford*, 130 US 122, 128 (1889) stated thus: “Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same..”

From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

28. Further, *Twalib Hatayan Twalib Hatayan & Another vs. Said Saggah Ahmed Al-Heidy & Others* (2015) eKLR, also comes in handy and is relevant. The court in that case expounded on the law on trusts as follows:

“According to the Black’s Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as “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 29<sup>th</sup> 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)."

29. The Appellant asserts that he was involved in a romantic relationship with the Respondent during which both parties intended to eventually marry. While the Respondent acknowledges the existence of the romantic relationship, she denies that there was any mutual intention to enter into marriage. It is on this basis that the Appellant contends that he purchased the suit properties and constructed a house so as to settle the Respondent. In her testimony, the Respondent conceded that the Appellant was her 'mbaba,' a term colloquially used to denote a benefactor who provides financial support. Based on this admission, the court takes judicial notice of the nature of the parties' relationship in assessing their intentions regarding the purchase and development of the suit property.
30. According to the sale agreement submitted by the Appellant, it is not in dispute that the Respondent is named as the purchaser, while the Appellant is listed as a witness to the transaction. The Appellant, however, also presented acknowledgment agreements in support of his claim that he paid the purchase price for the suit properties. Additionally, the Appellant called witnesses who confirmed that he (Appellant) personally met with the vendor, negotiated the terms, paid the consideration, and coordinated and financed the construction of the house on the suit properties. To further substantiate his allegations, the Appellant produced bank statements showing debits corresponding to the funds allegedly used for the alleged purchase and construction. He also provided payment records and receipts for labour and building materials, all of which support his assertion.
31. I am guided by the reasoning of Justice Angote in LN v SMM [2013] eKLR, where the learned judge affirmed that the equitable presumption of a resulting trust arises where the purchase price is contributed by one party. This position is consistent with the holding in Calverley v Green (56 ALR), where the court stated as follows:

“Where a person pays the purchase price of a property and causes it to be transferred to another, the property is presumed to be held by the transferee upon trust for the person who provided the purchase price.”
32. In my evaluation of the Appellant's case, although the Respondent is listed as the purchaser in the sale agreement and registered as such, the evidence of the Appellant's financial contribution supports a claim of beneficial ownership or a resulting trust such that although the Respondent is the holder of the legal title, the beneficial interest of the suit properties is in favour of the Appellant. It is my considered view that the Appellant discharged his evidentiary burden of proof which therefore shifted to the Respondent.



33. The Respondent on her part testified that she had a source of income and was financially capable of purchasing the suit properties and undertaking developments thereon. However, she did not produce empirical evidence such as bank statements payment receipts and transactions. In my considered view, beside asserting that she is the registered owner of the properties, the Respondent did not provide any substantive evidence demonstrating how she acquired ownership of the suit properties and the developments thereon. No documentation or proof was tendered to show her participation in the purchase of the properties or the construction of the residential house situated thereon. In my considered view, mere registration without supporting evidence of payment of consideration or involvement in acquisition is insufficient evidence of ownership, especially where the ownership is being challenged. The rules of equity call upon the court to consider substance over form by looking beyond registration to actual contributions and intent.
34. In view of the foregoing, I find that the Appellant's rights and interest over the suit properties merit protection under Article 40 of *the Constitution* of Kenya, 2010. In the absence of any rebuttal evidence from the Respondent, I am satisfied that the Appellant established his claim and is entitled to an order for vacant possession of the suit property.
35. In the circumstances, and for the reasons stated hereinabove, I find that this appeal is merited and the same is hereby allowed as follows;
- a. The judgment of the trial Magistrate Hon. P.Y Kulecho in Webuye SPM-ELC No. 34 of 2023 delivered on the 18<sup>th</sup> August, 2023 dismissing the Plaintiff's suit be and is hereby set aside and/or reviewed
  - b. Further to paragraph (a) above, an order is hereby issued substituting the dismissal of the Appellant's suit with an order allowing the same as follows;
    - i. A declaration that the Appellant solely is entitled to ownership and possession of the suit land.
    - ii. A declaration that the Respondent is holding the suit land in trust for the Plaintiff/Appellant.
    - iii. A mandatory order is hereby issued directing the Respondent to transfer the suit land to the Appellant failure of which the Deputy Registrar of this Court do sign the transfer forms in favour of the appellant.
    - iv. Pursuant to the orders issued under paragraph (iii)} above, the Land Registrar is authorized to dispense with the production of the original title document and any other statutory requirements in the transfer of the suit property in favour of the Appellant.
    - v. The Respondent is hereby ordered to surrender vacant possession of the suit land within thirty (30) days of the delivery of this judgement and in default, eviction shall issue.
    - vi. The Respondents shall bear the costs of this appeal.
36. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 08<sup>TH</sup> DAY OF MAY, 2025.**

.....  
**HON.E.C CHERONO**



## **ELC JUDGE**

In the presence of;

1. M/S Ateya H/B for Mr. Amasakha for the Respondent.
2. Mr. Maloba for the Appellant.
3. Bett C/A.

