



REPUBLIC OF KENYA



KENYA LAW
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**Wekesa v Akedi (Environment and Land Case 2 of 2022)
[2025] KEELC 6130 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 2 OF 2022
DO OHUNGO, J
SEPTEMBER 23, 2025**

BETWEEN

BONFACE JUMA RASTUS WEKESA PLAINTIFF

AND

JANE NASAKA AKEDI DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on 15th September 2020 at the Environment and Land Court at Bungoma when the Plaintiff filed Plaintiff dated 30th August 2020. The matter was later transferred to this Court, hence its current case number.
2. The Plaintiff averred in the Plaintiff that at all material times, the Plaintiff and the Defendant were married under Bukusu Customary Law and that their union was blessed with three children. That the Defendant filed divorce proceedings through Busia CMCC DC No. 98 of 2019 which was later transferred to Chief Magistrate's Court at Bungoma.
3. The Plaintiff further averred that during the subsistence of the marriage, he put up funds for the purchase and development of a number of undeveloped properties which the Defendant later registered in her name to the exclusion of the Plaintiff and the children and in breach of trust. The Plaintiff therefore prayed for judgment against the Defendant for:
 - a. This court be pleased to declare the defendant a constructive trustee of the plaintiff, herself, and the three children Gloria Nasimiyu Wekesa, Esther Nafula Wekesa and Dennis Masinde Wekesa in respect of the proprietorship, ownership and benefit of land parcels number Butsotso/Shikoti/5198 and Butsotso/Shikoti/13785, and Butsotso/Shikoti/3491;
 - b. The defendant be compelled by order of this court to execute all such instruments of consent, and transfer of title of Butsotso/Shikoti/5198, Butsotso/Shikoti/13785, and Butsotso/



Shikoti/3491 into the joint names of the plaintiff, herself, and Gloria Nasimiyu Wekesa, Esther Nafula Wekesa and Dennis Masinde Wekesa;

- c. In default of such transfer by the defendant, the Deputy Registrar of this Court do sign and execute all and such instruments of transfer for registration of the property into the joint names of the plaintiff, the defendant, their children Gloria Nasimiyu Wekesa, Esther Nafula Wekesa and Dennis Masinde Wekesa as proprietors in common;
 - d. Costs be in the cause.
4. The Defendant filed Statement of Defence dated 28th October 2020. She admitted that they were married under Bukusu Customary Law and that they had three children. She denied that the Plaintiff put up funds for the purchase and development of the properties or that she registered them in her name in breach of trust. She averred that she singlehandedly worked hard and sacrificed to purchase and develop the properties. Consequently, she prayed that the Plaintiff's case be dismissed with costs.
5. On 27th June 2022, prior to commencement of the hearing, the parties recorded the following consent:
... we have agreed on the following facts which will now not need proof:
1. The Plaintiff and the Defendant were husband and wife but have since divorced at the instance of the Defendant, at the Subordinate Court in Bungoma.
 2. There are three (3) children of the marriage, all of them young adults.
 3. The subject matter of the suit are two properties in Kakamega Town, acquired and developed during marriage.
 4. The issues for determination are two:
 - a. Whether the Plaintiff contributed to acquisition and development of the suit properties.
 - b. Whether the Defendant is a constructive trustee for the Plaintiff, the Defendant and the three (3) children of the marriage.
 - c. Who pays costs of the suit?
6. The Plaintiff testified as PW1 and adopted his witness statement dated 30th August 2020 and produced copies of the documents listed as item numbers 1 to 24 in his list of documents dated 7th September 2020. He stated that during the subsistence of the marriage, they were blessed with children whose names are Gloria Nasimiyu Wekesa, Esther Nafula Wekesa and Dennis Masinde Wekesa. That during the marriage, he personally put up funds for the purchase and development of a number of undeveloped properties and that the properties were later registered in the Defendant's name to the exclusion of their children and him in breach of his trust.
7. He further stated that the Defendant and him undertook all property transactions in the expectation that the properties and development would be for their joint benefit together with the children. That he directly and substantially contributed to the money that financed the purchase of the land as well as time and energy to the planning, cost of materials, labour and professional charges in the construction of a block of residential flats situate on the said property.
8. The Plaintiff went on to state that the Defendant and him were beneficial owners of a company known as Nakewa Enterprises Limited incorporated on 1st July 2013 and bank account number 1119043387 held at Kenya Commercial Bank. That he paid the entire purchase price of land parcel Number



Butsotso/Shikoti/5198 and Butsotso/Shikoti/13785 to Stephen Onyango Odenyi for acquisition thereof and transfer to the Defendant on 14th October 1993. He also stated that he provided money to the Defendant which she handed over to Constance W Wanyama Musabi in satisfaction of part payment of the purchase price for parcel number Butsotso/Shikoti/3491 in instalments of KShs 100,000, KShs. 30,000 on 14th April 2007, KShs 25,000 on 1st May 2007, KShs. 15,000, on 2nd May 2007.

9. He further stated that Nakewa Trading Company was a family enterprise which was engaged in gainful business and that part of its income was applied in development of family property as well as the servicing the development loan. That the Defendant moved out of the matrimonial home in June 2019 and filed divorce proceedings in October 2019. Relying on a valuation report by Odongo Kabita & Company Valuers, he stated that parcel numbers Butsotso/Shikoti/5198 and Butsotso/Shikoti/13785 together with the developments thereon were valued at KShs 31 million. He also testified that the Defendant obtained a loan totalling KShs 5,272,300 from Ukulima Sacco.
10. Under cross examination and re-examination, the Plaintiff testified that he has ancestral land in Matunda, Webuye which he inherited from his father. He also stated that he did not build any house for the Defendant in the ancestral land and that the matrimonial house is located on parcel number Butsotso/Shikoti/5198 while the commercial apartments are on parcel number Butsotso/Shikoti/13785. That between the years 2013 and 2018, he purchased steel bars worth KShs 5 Million and that when the Defendant moved out of the matrimonial home in June 2019, the matrimonial home was complete while the commercial apartments block was not complete.
11. The Plaintiff went on to testify that the commercial apartments block has eight units and that each unit was raising rent of between KShs 20,000 and KShs 25,000 which was being paid to him.
12. Stephen Onyango Z Odenyi (PW2) testified that he inherited parcel number Butsotso/Shikoti/3490 from his father together with his brother Silvanus and that he was a witness to an agreement through which Silvanus sold a portion of his share to the Plaintiff. That the Plaintiff paid KShs 55,000 in his presence and that upon subdivisions, parcel number Butsotso/Shikoti/3490 resulted into parcel number Butsotso/Shikoti/5186 which was further subdivided to result into 10 parcels one of which he transferred to the Defendant.
13. Constance Wamalwa Wanyama Musabi (PW3) testified that he sold a portion of land to the Plaintiff through an agreement dated 7th February 2007. That agreement was between him and the Defendant, but it was the Plaintiff who personally paid the first instalment of the purchase price in cash and that the Plaintiff paid the balance in instalments which were delivered on the Plaintiff's behalf through one Elphas. That upon subdivision, the portion that he sold became parcel number Butsotso/Shikoti/13785 and that the apartments are built on the said parcel.
14. Othieno Akoth Edward (PW4) testified that he witnessed the agreement dated 7th February 2007 and that the Plaintiff personally paid the first instalment of the purchase price in his presence. He added that the Plaintiff told him that the agreement was made in the Defendant's name to protect the Plaintiff's family.
15. Erick Magawi Owiti (PW5) testified that he was operating a workshop in Eldoret known as Owiti Welding and that he had known the Plaintiff since the year 2011. That the Plaintiff went to his workshop in the year 2013 and told him that he needed a lot of steel to use in a building he was constructing in Kakamega. He added that the Plaintiff told him that the steel was for reinforcement of the foundation, columns, beams and slabs as well as for fabrication of windows, stair rails and balcony grills.



16. PW5 went on to state that he introduced the Plaintiff to a friend who was operating a hardware in Eldoret known as Prayosha Ventures Hardware and that the Plaintiff contracted him (PW5) to informally source steel products for him from the said hardware. That the friend worked out the total value of the steel that the Plaintiff needed at about KShs 5 million. He added that the Plaintiff used to send him to collect steel products using hired vehicles and that he fabricated and installed steel railings for staircases and balconies and was fully paid by the Plaintiff.
17. Maurice Masinde Schangi (PW6) testified that he was a registered building contractor and that the Plaintiff engaged him as the main contractor. That he prepared architectural plans and pursued statutory approvals for the Plaintiff. He added that as the main contractor, he oversaw everything about the project and was paid by the Plaintiff.
18. Elphas Mulamula Libeya (PW7) adopted his affidavit which he swore on 28th October 2019. He further stated that the Plaintiff was his close friend and that he witnessed the agreement dated 7th February 2007 and saw the Plaintiff pay KShs 100,000 in cash to PW3. That later on 14th April 2007, he (PW7) accompanied the Defendant when she went to make payment of KShs 30,000 to PW3 and that the Plaintiff engaged him severally to deliver building materials to the site.
19. Lastly, Hudson Meya Isiche (PW8) adopted his witness statement dated 22nd January 2021. He stated that he worked at the construction site as a mason and a foreman and that he was paid by the Plaintiff.
20. The Plaintiff's case was then closed.
21. The Defendant testified as DW1 and stated that the Plaintiff was her husband and that they had since divorced. She adopted her witness statement dated 28th October 2020, and her list of documents dated 12th May 2021. She did not however produce any of the documents on the listed, instead stating that the documents had been produced by the Plaintiff.
22. The Defendant stated in her witness statement that her marriage with the Plaintiff was blessed with three children who are all adults. That during the marriage, the Plaintiff was unsupportive as a husband and a father, both financially and emotionally and was constantly abusive to her physically and psychologically. That the Plaintiff was never development conscious and that her constant request and suggestions for joint investment for a better and brighter future led to serious fights between them.
23. She went on to state that sometime in the year 1993, without support of the Plaintiff, she purchased land Registration number Butso/5198 measuring 0.11 hectares which was hived from Butso/5186 and immediately commenced construction of a bungalow which she moved into sometime in 1996 since she was working within Kakamega region.
24. That sometime in the year 2007, she singlehandedly purchased and registered land parcel number Butso/13785 measuring 0.05 hectares, which was hived from Butso/3491 and immediately commenced development of flats on Butso/Shakti/ 13785. She added that she took a loan in the year 2012 using Butso/5198 as security. That after substantial development of Butso/Shikoti/13785, she took another loan in 2013 using the same title as security which amount she used to complete construction of the flats to habitable level. That she did all that on her own after realizing that the Plaintiff was not going to have a joint investment with her and that during the said period the Plaintiff was working and living in Thika.
25. The Defendant went on to state that she singlehandedly developed the suit properties with money from her salary, loans, merry-go-rounds and soft advances from friends and that all the while the Defendant took a back seat and never contributed even his opinion. That it is therefore not true that



- the Plaintiff paid part or the whole of the purchase price of the suit properties or even contributed to their development.
26. That Nakewa Enterprises Limited was established in 2013 after she took a loan and that its management was left in the hands of the Plaintiff without any income generated by the company benefiting her. That the income generated by the Company was neither applied in development of the suit properties nor servicing development loans. That instead, the Plaintiff used the money for his own upkeep and the upkeep of his children born with other women.
 27. The Defendant also stated that she ensured that all the children of the marriage received proper education to university and post graduate levels and were all gainfully employed. That the Children should therefore invest for themselves instead of laying a claim on what is rightfully her. She added that did not hold the properties in trust for the Plaintiff and the children and that the children should wait to inherit whatever will be left behind after her demise.
 28. The Defendant also testified she earned money from her employment as career civil servant, membership in women groups and also taking bank loans. She stated that it was not true that the Plaintiff gave someone else money to pay the purchase price of the suit properties. She admitted that her advocates received request for particulars dated 9th November 2020 from the Plaintiff's advocates and added that she did not respond to it because she no longer had access to her former house. That the apartments cost about KShs 30 million to construct and that she spent the amount in bits and pieces.
 29. Rose Kahaviza Kiriza (DW2) adopted her witness statement dated 9th September 2021. She stated that the Defendant was her close friend who she had known since 1997 and that the Defendant informed her that she was buying the suit properties in readiness for her retirement. That in the year 1998, the Defendant and her formed a merry-go-round which had 20 members and that whenever they met in a member's house, they would raise KShs 300,000 which they would give the member. She added that it took 1 year and 8 months before a member could receive money again.
 30. DW2 further testified that on one occasion, she lent the Defendant KShs 20,000 and also accompanied the Defendant to purchase building materials on one occasion.
 31. Esther Deborah Akiso (DW3) adopted her witness statement dated 12th May 2021 and stated that she was a member of the same merry-go-round as the Defendant. She added that the Defendant led a pathetic and demeaning life during the period she had problems with the Plaintiff. That the Defendant borrowed money frequently and that she lent her about KShs 120,000. She also stated that the Defendant was always in a financial crisis and that she did not know how much it cost the Defendant to construct the apartments, the sources of the materials used or even the names of the professionals employed during the construction.
 32. The defence case was then closed.
 33. Directions for filing and exchanging written submissions were then given, based on timelines that the parties themselves proposed. The Plaintiff did not file any submissions for over one year, owing to health challenges on the part of his counsel on record. On her part, the Defendant filed her submissions on 9th December 2024, without the benefit of being served with any submissions from the Plaintiff. On 3rd April 2025, the Plaintiff's counsel sought and was granted ten more days to file and serve submissions. A further order was made that the Defendant files and serves supplementary submissions within fourteen days of service of the Plaintiff's submissions. The Plaintiff did not comply.



34. After being indulged severally, the Court granted the Plaintiff a final opportunity on 12th June 2025 with an order that the Plaintiff files submissions by 17:00 hours on 16th June 2025 and that any submissions filed after that deadline would stand struck out.
35. I have perused the case tracking system (CTS), and I note that the Plaintiff did not comply with the order of 12th June 2025. He did not file any submissions by 17:00 hours on 16th June 2025. I see that the Plaintiff filed a list of authorities on 16th June 2025 at 17:44:36 hours followed by written submissions at 06:32:02 hours on 17th June 2025.
36. I have agonised on whether to consider the submissions filed by the Plaintiff. Ultimately, I came to the conclusion that in view non-compliance with the order of 12th June 2025, the submissions stood struck out as soon as they were filed and that there are therefore no submissions from the Plaintiff capable of being considered. I note that the Plaintiff did not seek to regularize his submissions and that the Defendant did not file any supplementary submissions, perhaps in full realization that the default order of 12th June 2025 had become operational and that there were no submissions to respond to through supplementary submissions. If the Court were to admit and consider the Plaintiff's said submissions, it would not only be contrary to the order of 12th June 2025 but would also be unjust to the Defendant.
37. I have carefully considered the parties pleadings, evidence and submissions by the Defendant. The issues for determination are those that the parties agreed on through the consent which they recorded on 27th June 2022: Whether the Plaintiff contributed to acquisition and development of the suit properties; Whether the Defendant is a constructive trustee for the Plaintiff, the Defendant and the 3 children of the marriage and lastly, Who pays costs of the suit?
38. Arising from the prayers in the Plaint, the properties that are in dispute in this matter are land parcel numbers Butsotso/Shikoti/5198 and Butsotso/Shikoti/13785. Although parcel number Butsotso/Shikoti/3491 is mentioned in the prayers, it is really not in contention since it is the parcel whose portion was purchased and when subdivided created Butsotso/Shikoti/13785, among other parcels.
39. There is no dispute that the Defendant is the registered proprietor of parcel numbers Butsotso/Shikoti/5198 and Butsotso/Shikoti/13785. Based on the copies of the certificates of official search that were produced in evidence, the Defendant was registered as proprietor of parcel number Butsotso/Shikoti/5198 on 8th December 1993 and title deed issued to her on 3rd January 1994. On 16th August 2012, a charge was registered in favour of Kenya Commercial Bank Limited to secure a loan of KShs 2 million.
40. Further, the Defendant was registered as proprietor of parcel number Butsotso/Shikoti/13785 on 14th April 2008 and title deed issued to her on the same date. On 5th September 2013, a charge was registered in favour of Kenya Commercial Bank Limited to secure a loan of KShs 3 million.
41. There is no dispute that parcel number Butsotso/Shikoti/13785 was created following subdivision of Butsotso/Shikoti/3491. Indeed, the Plaintiff produced a copy of mutation form which was registered on 3rd March 2008, thereby creating Butsotso/Shikoti/13785, among other parcels. It is also not in dispute that the land that later became parcel number Butsotso/Shikoti/13785 was acquired through sale agreement dated 7th February 2007.
42. The sale agreement dated 7th February 2007 was between the Defendant and Constance Wamalwa Wanyama Musabi who testified as PW3. According to the agreement, the purchase price was KShs 170,000. The agreement states that "Mrs. JANE NASAKA WEKESA has paid 100,000 on this day of 7th February 2007. The balance of Kshs. 70,000 will be paid by end of March 2007." Although the Plaintiff, PW3 and PW4 testified that the Plaintiff availed the funds that were used to settle the purchase



- price, I note that the agreement speaks for itself, that the Defendant paid. I further note that PW7 who was the Plaintiff's witness testified that he accompanied the Defendant on 14th April 2007 when she went to make payment of KShs 30,000. Besides, the purchase price of KShs 170,000 was well within the Defendant's financial capability since she was a salaried public servant. In the circumstances, I am not persuaded that the Plaintiff paid the purchase price of parcel number Butso/Butso/Shikoti/13785.
43. Regarding parcel number Butso/Butso/Shikoti/5198, there is no dispute it is a subdivision of Butso/Butso/Shikoti/5186. In turn Butso/Butso/Shikoti/5186 was a subdivision of Butso/Butso/Shikoti/3490. Although the Defendant testified that she singlehandedly purchased parcel number Butso/Butso/Shikoti/5198, she neither stated who she purchased it from or even the purchase price. Further, she did produce any sale agreement and did not call any vendor to testify and vouch for her claims that she purchased the parcel.
 44. On the other hand, the Plaintiff testified that he paid the entire purchase price of the land that became parcel number Butso/Butso/Shikoti/5198. Among the exhibits that the Plaintiff produced is a sale agreement dated 22nd September 1993, between the Plaintiff and one Silvanos Yeswa Odenyi. The agreement states that the Plaintiff purchased a 37 metre by 20.5 metre portion of parcel number Butso/Butso/Shikoti/3490 from Silvanos Yeswa Odenyi at a consideration of KShs 55,000. The agreement which was witnessed by Stephen Onyango Odenyi among other witnesses, stated that KShs 30,000 was paid on 22nd September 1993 and that the balance of KShs 25,000 was paid on 23rd September 1993.
 45. Stephen Onyango Odenyi testified as PW2 and confirmed that he inherited parcel number Butso/Butso/Shikoti/3490 from his father together with his brother Silvanos and that Silvanos sold a portion of his share to the Plaintiff. He further confirmed that the Plaintiff paid the KShs 55,000 in his presence and that upon subdivision parcel number Butso/Butso/Shikoti/3490 resulted into parcel number Butso/Butso/Shikoti/5186 which was further subdivided to result into 10 parcels one of which he transferred to the Defendant. This account is supported by transfer document dated 14th October 1993 which the Plaintiff produced, and which shows that PW2 transferred Butso/Butso/Shikoti/5198 to the Defendant. In the circumstances, I am persuaded that the Plaintiff paid the purchase price of parcel number Butso/Butso/Shikoti/5198.
 46. The other aspect of the first issue for determination is whether the Plaintiff contributed to the development of the suit properties. There is no dispute that both properties were developed after the Defendant became the registered proprietor. A bungalow which became the parties' family home was constructed on parcel number Butso/Butso/Shikoti/13785 while an 8 unit block of apartments was constructed on parcel number Butso/Butso/Shikoti/5198. According to the Inspection and Valuation Report by Odongo Kabita & Company Valuers dated 31st October 2019, which the Plaintiff produced, the bungalow is a three bedroom house including a master ensuite bedroom and has a servant quarter while the apartments are three bedroom each.
 47. While they both claim that they financed the development of the properties, none of the parties gave any exact figure on how much they spent on such development. The valuation report puts the value of the permanent constructions on parcel number Butso/Butso/Shikoti/5198 where the block of apartments stands at KShs 22,000,000 and the value of the permanent constructions on parcel number Butso/Butso/Shikoti/13785 where the bungalow stands at KShs 5,550,000. Thus, the combined value of the developments is approximately KShs 27,550,000.
 48. The Plaintiff did not produce any tabulation showing how much he actually spent in developing the suit properties. Construction costs are expenses that should be fully supported through receipts and other documentary evidence. The documents that the Plaintiff produced do not add up to even half of the approximate development costs KShs 27,550,000. The irony is that the Defendant did not produce



- any single document supporting her position that she singlehandedly developed the suit properties. Yet it is incontestable that the suit properties were developed. In fact, based on the valuation report, the developments made the value of the suit properties appreciate 8 times as regards parcel number Butso/So/Shikoti/5198 and 5 times as regards parcel number Butso/So/Shikoti/13785.
49. The Plaintiff's position is that the Defendant was incapable of funding the developments based on her earnings. That notwithstanding, in his testimony, the Plaintiff acknowledged that the Defendant obtained loans totalling KShs 5,272,300 from Ukulima Sacco. Further, as noted earlier in this judgment, the Defendant obtained loans totalling KShs 5 million from Kenya Commercial Bank Limited which were secured through charges registered against parcel numbers Butso/So/Shikoti/5198 and Butso/So/Shikoti/13785. Besides these loans, the Defendant had income from her salary, her merry-go-round activities and borrowings from friends like DW2 and DW3.
50. Contrary to the Plaintiff's contention, and based on material on record, it was within the Defendant's financial capacity to fund a significant portion of the developments, as much half of the cost. Unlike the Plaintiff who availed evidence of persons who he transacted with and who took part in the construction activities, the Defendant did not offer any on her version of the construction process and any persons who she engaged in it. She seems to place reliance on her position as a registered proprietor, yet it is that very position which is being challenged. In the circumstances, I am satisfied that the Plaintiff contributed to development of the suit properties. In view of the material on record and considering the then prevailing matrimonial relationship, I assess the parties' contribution at 50% each.
51. I now turn to the question of whether the Defendant is a constructive trustee of the Plaintiff, herself and the 3 children of the marriage. From the onset, I bear in mind that the children of the marriage are all adults. They are not parties to this suit. They opted to be bystanders, perhaps prudently so in view of the raging dispute between their parents. They have not sought any reliefs. I see no basis for the Plaintiff to purport to litigate on behalf of adults, even if they are his children. Consequently, the issue of constructive trust arises only as between the Plaintiff and the Defendant.
52. The Defendant is the registered proprietor of the suit properties. The rights of a registered proprietor of land are well articulated in law. Such a proprietor is entitled to the rights, privileges, and benefits spelt out under Article 40 of *the Constitution* which secures protection of right to property and Sections 24 and 26 of the *Land Registration Act*. Pursuant to Section 26 of the *Land Registration Act*, the Court is obligated to accept the proprietor's certificates of title as prima facie evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established.
53. Section 24 of the *Land Registration Act* provides as follows:
- Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
54. The foregoing notwithstanding, Section 28 (d) of the *Land Registration Act* provides that all registered land shall be subject to overriding interests as may for the time being subsist and affect it without their being noted on the register, including trusts. Even though Section 25 of the *Land Registration Act* provides that the rights of registered a proprietor shall not be liable to be defeated except as provided in



the Act, subsection 2 thereof is explicit that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

55. As defined in Black's Law Dictionary, 9th Edition, a trust is a right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title. The same dictionary defines a constructive trust as "An equitable remedy that a court imposes against one who has obtained property by wrong doing."
56. A party who alleges existence of trust must prove it. See *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR. In *Dorcas Indombi Wasike v Benson Wamalwa Khisa & another* [2010] eKLR the Court of Appeal stated:

The appellant's counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular *Mbothu & 8 Others vs Waitimu & 11 Others* [1986] KLR 171, are clear that: -

"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 intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

57. The Supreme Court stated in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) thus:

- (68) Halsbury's Laws of England, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts:

"A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where:

- (1) there was a common intention that both parties should have a beneficial interest; and
- (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate. ...

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

- (74) Vide Section 3(1) of the *Judicature Act*, Cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. It states that common law, doctrines of equity and statutes of general application shall apply in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. ...
- (78) The applicability of the doctrine of constructive trust is therefore now settled within our jurisdiction and is applied to land sale transactions. ...



- (87) We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.
58. There is evidence on record that the Plaintiff paid the entire purchase price of parcel number Butso/ Shikoti/5198 where the block of apartments was later constructed. On the other hand, a bungalow which became the parties' family home was constructed on parcel number Butso/ Shikoti/13785. As I held earlier in this judgment, the Plaintiff contributed to development of the suit properties. I am persuaded that the properties were acquired and developed for the benefit of both parties, as a family home and a family investment. Indeed, the parties transacted on the properties together. The Defendant signed as a witness to the sale agreement dated 22nd September 1993 while the Plaintiff was equally a witness in sale agreement dated 7th February 2007. The two agreements birthed the suit properties.
59. The Defendant's conduct of relying on her registered proprietorship to seek to exclude the Plaintiff from benefits of proprietorship is precisely the wrongful conduct with a view to unjust enrichment which constructive trust must remedy. Her attempt to exclude the Plaintiff from proprietorship is unconscionable conduct which justice and good conscience must correct. I am satisfied that the Plaintiff has established constructive trust.
60. In view of the foregoing discourse, I find merit in the Plaintiff's case. I enter judgment in favour of the Plaintiff and make the following orders:
- a. It is hereby declared that the Defendant is a constructive trustee of the Plaintiff and herself in respect of the proprietorship and benefit of land parcel numbers Butso/ Shikoti/5198 and Butso/ Shikoti/13785.
 - b. The Defendant to execute all such instruments of consent, and transfer of title of Butso/ Shikoti/5198 and Butso/ Shikoti/13785 into the joint names of the Plaintiff and herself within 60 (sixty) days from the date of delivery of this judgment,
 - c. In default of such transfer by the Defendant, the Deputy Registrar of this Court to sign and execute on behalf of the Defendant all such instruments of transfer for registration of the properties into the joint names of the Plaintiff and the Defendant as proprietors in common.
 - d. In view of the previous matrimonial relationship between the parties, each party to bear own costs of the suit.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 23RD DAY OF SEPTEMBER 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Wasilwa for the Plaintiff

Ms Wakoli for the Defendant



Court Assistant: B Kerubo

