



Mueni & another (Suing in their Capacity as Legal Representatives of the Estate of the Late Makau Wambua) v Kiloli & 2 others (Environment and Land Case Civil Suit E031 of 2022) [2025] KEELC 3953 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT E031 OF 2022**

AY KOROSS, J

MAY 20, 2025

BETWEEN

JANE MAKAU MUENI 1ST PLAINTIFF

PATRIK WAMBUA MAKAU 2ND PLAINTIFF

**SUING IN THEIR CAPACITY AS LEGAL REPRESENTATIVES OF THE
ESTATE OF THE LATE MAKAU WAMBUA**

AND

ELIJAH KILOLI 1ST DEFENDANT

RAPHAEL KABAYA 2ND DEFENDANT

ONESMUS MUTISYA 3RD DEFENDANT

JUDGMENT

Background of the case

1. At the heart of this dispute is land parcel no. DonyoSabuk/Komarock Block 4 (Kolooso)/577 (“suit property”) that is registered in the name of the deceased plaintiff Makau Wambua, and by limited grant, he is represented in this suit by his legal representatives.
2. In illumination of relations between parties, the deceased plaintiff and the 3rd defendant are step-siblings as their respective mothers were the wives of the deceased Peter Wambua Mutunga (Peter).
3. Although the 1st and 2nd defendants had been sued by the deceased plaintiff, the claim against them was withdrawn on 27/10/2022, and the only suit subsisting against them is the one contained in the 3rd defendant’s counterclaim.



Plaintiff's case against the 3rd defendant

4. In a plaint dated 10/05/2022, it was pleaded that without authority, colour or right, the 3rd defendant trespassed onto the suit property on 21/04/2022, claiming he had an interest in it.
5. It was maintained in the process, the fence and crops that subsisted therein were destroyed, and beacons were forcefully erected thereat. Further, the 3rd defendant had brought land brokers and prospective purchasers to the suit property.
6. Hence, the deceased plaintiff sought this court's protection by seeking the following reliefs: -
 - a. An order of permanent injunction does issue restraining the 3rd defendant, his agents, employees, servants, accomplices and/or any other person from intermeddling, trespassing, selling, leasing, mortgaging, charging, transferring and/or in any way interfering with the suit property.
 - b. Costs of the suit.
 - c. Any other order that this court will deem just and fit in the circumstances.

3rd defendant's defence and counterclaim

7. In his defence dated 14/07/2022 and counterclaim, the 3rd defendant gave a history of how Peter acquired the suit property.
8. He alleged the suit property was a subdivision of land parcel no. 2706/9 belonging to Ngwatano Ya Akamba Self Help Group (self-help group) of which Peter was a member.
9. He stated that during the issuance of the suit property's title to the deceased plaintiff by the self-help group, it was agreed he would hold it in trust for himself and other beneficiaries of Peter's estate, but disclosures were not made as to who made the agreement.
10. He argued the registration in the deceased plaintiff's name was a mistake or fraudulent and sought the following reliefs from the court: -
 - a. An order of permanent injunction does issue restraining the deceased plaintiff, his agents, employees, servants, accomplices and/or any other person from trespassing, selling, leasing, mortgaging, charging, transferring and/or in any way interfering with a portion measuring 7 acres of the suit property.
 - b. A declaration be and is hereby made that the deceased plaintiff held the suit property in trust for himself and the beneficiaries of Peter's estate.
 - c. The title deed of the suit property be rectified to reflect the trusteeship.
 - d. In the alternative, a declaration that the 3rd defendant is entitled to a portion measuring 7 acres of the suit property, and it be excised from the suit property, and this portion be registered in his name.
 - e. Costs of the suit and interest.
11. A reply to the defence to the counterclaim was filed by the 3rd defendant dated 10/03/2023.



Plaintiff's reply to the defence and defence to the counterclaim

12. This was filed by the deceased plaintiff and it is dated 17/02/2023, and it was mostly composed of denials.
13. Nevertheless, of significance, it was argued that Peter gifted his assets to his beneficiaries during his lifetime, including the 3rd defendant. Furthermore, the suit property was a gift inter vivos bestowed solely upon the deceased plaintiff.

Defence of the 1st defendant to the counterclaim

14. It was dated 20/03/2023, and by it, the 1st defendant stated it was a stranger to any purported agreement on trusteeship and stated its role was to facilitate the transfer of the subdivision of IR 1882/16 to various members, including Peter.
15. It was asserted after subdivision of IR 1882/16, which was then registered in the names of Benson Mutisya Mutua (Benson) and Harrison Mutisya Mutua (Harrison), Peter was at liberty to register it in his name or that of his nominee.
16. According to it, the counterclaim did not disclose a cause of action against it and urged the court to strike out the suit.

Issues for determination

17. Having considered the pleadings and the evidence adduced by the parties during the hearing of the suit on merits, the following issues for determination arise: -
 - I. Whether a permanent injunction relief can be sought as a stand-alone remedy.
 - II. Whether a cause of action is disclosed against the 1st defendant in the counterclaim.
 - III. Whether the 3rd defendant proved his claim of trust against the plaintiff.
 - IV. What appropriate orders should be granted, including an order as to costs?
18. Having framed the issues for determination, this court shall summarise the parties' evidence as led on these issues that have been identified by the court.

Plaintiff's evidence

19. The matter proceeded for hearing, and Jane Makau Mueni, who is one of the deceased plaintiff's legal administrators and daughter, testified as PW1 and her evidence was led by Harrison, who testified as PW2.
20. Their evidence was composed of oral testimonies, adopted witness statements and documents that were produced in support of the deceased plaintiff's case.
21. It was PW1's testimony that in a family meeting of 7/08/2019 in which she and other family members were in attendance, the suit property was gifted by Peter to the deceased plaintiff.
22. She maintained, as a follow-up to this meeting and to give effect to the gifting of the suit property, Peter wrote a letter to the self-help group on 31/10/2019, where he categorically stated he had given the suit property to the deceased plaintiff.



23. She testified this letter was written in her presence and that of her uncle Morris Mutua. That afterwards, on 4/11/2019, the deceased plaintiff paid the sum of Kshs. 125,000/- to the self-help group for it to facilitate the transfer of the suit property to the deceased plaintiff.
24. She stated that a trusteeship was never envisaged in the transfer and that the 3rd defendant never lived on the suit property but in a place called Mbusyani.
25. PW2 testified that his deceased father, Mutua Kyule, was the chair of the self-help group. Moreover, as the administrator of his deceased father's estate, he, together with his co-administrator Benson Kyule and with instructions from Peter, transferred the suit property to the deceased plaintiff.
26. He was categorical that Peter and the deceased plaintiff were personally present during the transfer process and Land Control Board (LCB) approval.

3rd defendant's evidence

27. The 3rd defendant, Onesmus Mutisya Wambua, testified as DW1, and his evidence was led by his brother, Paul Mutua Wambua, who testified as DW2.
28. Their evidence was composed of oral testimonies, adopted witness statements and documents that were produced in support of the 3rd defendant's case.
29. The 3rd defendant stated he was not a beneficiary of the self-help group's land, but rather Peter was, and his only contention with the suit property was that it was registered in the deceased plaintiff's name.
30. When he was compelled to produce evidence of the alleged agreement on trusteeship, he admitted he did not have any. Still, he maintained he should be given 7 acres, which he would then distribute to Peter's beneficiaries.
31. He stated Peter distributed his assets during his lifetime, and he (3rd defendant) caused his then counsel, M/s. Susan Tom and Co. advocates to demand minutes of the family meeting of 7/08/2019.
32. He also acknowledged he resided in Mbusyani, and during his lifetime, Peter had sought injunctive reliefs against him at Kangundo Law Courts. DW2's evidence was largely a reiteration of the 3rd defendant's.

Evidence of the 1st defendant to the counterclaim

33. Raphael Kimeu Kabaya, who was the self-help group's treasurer, rendered the evidence of the 1st defendant to the counterclaim and his evidence was composed of his oral testimony, an adopted witness statement and produced documents.
34. He testified that as a member of the self-help group, Peter was entitled to the suit property and at the time of its transfer, Peter stated he knew which of his children he wanted to bestow ownership upon, and thereafter, he nominated the deceased plaintiff.
35. He maintained that all due processes were followed, including obtaining the LCB consent; nevertheless, at the point of transfer, which was then before the land registrar, the 3rd defendant's advocate, M/s. Susan Tom and Co. advocates objected to the transfer.
36. However, Peter was eventually given the green light to transfer the suit property to the deceased plaintiff, and he did.



Parties' submissions

37. As directed by the court, the law firms of Ms. Munguti Ngulukyo & Co. Advocates and Ms. Nzuki Nzioka & Co. Advocates, who respectively represent the plaintiff and the 1st defendant to the counterclaim, filed their respective submissions dated 11/02/2025 and 17/03/2025.
38. Thus, this court is heavily indebted to counsels for their well-argued submissions and will take their arguments into consideration in its analysis and determination of the issues for determination.
39. However, counsels did not bother to provide copies of judicial precedents and on that basis, these decisions they relied upon to advance their arguments will not be considered.
40. Additionally, it is unfortunate this court has not had the benefit of considering the 3rd defendant's submissions as they have not been filed despite strict timelines having been given. If at all, they will be filed, they shall be considered to have been filed out of time.

Analysis and Determination

41. The issues that were earlier identified as arising for determination shall be handled in a seriatim manner.

Whether a permanent injunction relief can be sought as a stand-alone remedy.

42. The plaintiff's counsel merely argued the deceased plaintiff was entitled to the reliefs sought, but did not argue whether an injunctive relief could be sought as a stand-alone relief.
43. David Bean, in his book 'Injunctions', 12th Edition, Sweet & Maxwell, at pages 13-15, had this to say on permanent injunctions: -

“Where the claimant has established that a legal wrong such as nuisance has been committed, then he will prima facie be entitled to an injunction to restrain the defendant from committing that legal wrong... although the grant of an injunction is discretionary, the court should grant an injunction necessary to uphold legal rights against a threatened invasion unless there is some factor sufficiently weighty to displace the general rule.”

44. In Principles of the English Law of Obligations, edited by Andrew Burrows, Oxford University Press (2015), pages 381-385, the editor expounded on injunctions as follows;

“Injunctions are of two main types; prohibitory and mandatory. Prohibitory injunctions seek to prevent the commission or continuation of a wrong by enforcing negative duties. Mandatory injunctions, which are less common, require the defendant to do something; they enforce positive primary duties (other than for breach of contract where the appropriate remedy is specific performance) or in the form of mandatory restorative injunction. They require the defendant to ‘undo’ a wrong...Prohibitory injunctions are granted in tortious actions, breach of contract, equitable wrongs...For example, injunctions have been awarded to prevent awarded to prevent a trustee in breach of trust.’

45. It is trite law that parties are bound by their pleadings, and the deceased plaintiff had the arduous task of laying the basis of his claim, and identify the legal wrong that the 3rd defendant had committed.
46. Moreover, in addition to seeking permanent injunctive orders, he was required to identify the specific remedies that emanated from the alleged legal wrong.



47. It therefore arises that an injunction cannot be issued in a vacuum or as a stand-alone remedy, and it has to be sought in addition to other remedies. This issue has been the subject of determination in several persuasive decisions as follows: -

In *Ernest Mwangi Waigi v Nation Bank of Kenya Ltd* [2010] eKLR, Makhandia J (as he then was) expressed himself thus;

“...the plaintiff should at least have included a prayer for a declaratory order seeking that this court declares the defendant’s intended exercise of its statutory power of sale to be unlawful. In the absence of such prayer, the plaintiff’s prayer for a permanent injunction has no legs to stand on. Prayer for injunction cannot exist in a vacuum.”

In *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, W.Korir J (as he then was) at paragraph 10 of his judgement stated;

“Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders”

In *Jennifer Kobil Kandie v James Ondiek* [2019] eKLR, Odeny J held;

“The plaintiff did not seek for an order of eviction of the defendant but a single prayer of a permanent injunction against the defendant. Supposing the court granted the order as prayed in the plaint, how was she going to deal with the defendant who has been in occupation of the suit land for a period of time, who has developed the suit land?”

48. Having considered the evidence and actions of the 3rd defendant, one would have expected the deceased plaintiff to seek eviction orders against him or pursue some form of declaratory relief, but that was to so.
49. Having failed to put a footstool upon which his prayer for permanent injunction could anchor itself, the evidence tendered by the plaintiff was bound to fail.
50. Consequently, this court finds it is constrained from granting the plaintiff the relief of permanent injunction.

II. Whether a cause of action is disclosed against the 1st defendant in the counterclaim.

51. Before delving further, it is paramount to appreciate what a cause of action is. Black’s Law Dictionary 11th Edn has it thus: -

“1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person;”

52. This court is also guided by the Court of Appeal decision of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] KECA 3 (KLR), which stated as follows:-

“per Lord Pearson in *Drummond-Jackson V.B.M.A.* (1970) 1 W.L.R. 688 at p. 696.

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.” “

53. Since the 1st defendant’s defence to the counterclaim and submissions have argued that no cause of action has been disclosed against it, this court is called upon to scrutinize the counterclaim.



54. On assessment and in agreement with the 1st defendant to the counterclaim, it arises that from the averments contained in the counterclaim, the combination of facts therein and remedies that flowed therefrom, no cause of action was disclosed against the 1st defendant in the counterclaim. Hence, this court finds the suit against him was incompetent.

III. Whether the 3rd defendant proved his claim of trust against the plaintiff.

55. The Trustee Act defines the term trustee in the following manner: -

“trust” does not include the duties incident to an estate conveyed by way of mortgage, but, with this exception, the expressions “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the Trustee office of a personal representative, and “trustee” where the context admits, includes a personal representative, and “new trustee” includes an additional trustee; “

56. As submitted by the plaintiff’s counsel, trusts are recognised in our land laws. By Section 28 of the Land Registration Act, overriding trusts are ordinarily not noted in the register, and because of their superseding nature, a proprietor’s title is defeasible on grounds of trust.

57. Within the provisions of Section 25 of the Land Registration Act, certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, bind the registered proprietor on the terms noted in the register.

58. As stated in the Court of Appeal decision of *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others* [2015] KECA 713 (KLR), trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified.

59. From the evidence, it was undisputed that a trust was not expressly stated in the title document of the suit property and suffice to say, it is not an express trust.

60. Furthermore, it was undisputed that the suit property was not ancestral land and the 3rd defendant was not claiming he had customary trust rights over it.

61. It is therefore regrettable that the plaintiff’s counsel made submissions on customary trusts. Accordingly, the questions this court will be asking itself is what, then, was the nature of the trust being claimed? Was it proved?

62. To answer them, guidance is sought from *Twalib* (Supra), which elucidates as follows on constructive trust and resulting trust, which it borrowed from Black’s Law Dictionary, 9th Edition: -

“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. ... A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). 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 para1453). 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 (see Black's Law Dictionary) (supra). 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).

63. It therefore follows that the 3rd defendant's claim is one of implied trust whereby he contends that Peter, as settlor, registered the suit property in the name of the deceased plaintiff as trustee on his behalf and that of his other siblings as beneficiaries.
64. It is trite law that a party who alleges trust must prove that it was the intent of the parties or family members that the suit property was to be held in trust and once this onus is discharged, then the court would render its decision on the intent. From the adduced evidence, the 3rd defendant never substantiated his allegations with any iota of evidence.
65. As a matter of fact, the deceased plaintiff's witnesses presented concrete evidence that was consistent and corroborated, proving Peter, who was then of sound mind, made his clear intentions that the suit property was a gift inter vivos solely for the benefit of the deceased plaintiff and his wife.
66. Probably with premonition of his impending demise and with intention of settling his estate by gifting his beneficiaries during his lifetime, a meeting was called for in Peter's homestead on 7/08/2019, and a large no. of his children, a daughter-in-law and PW1 were present.
67. Both the deceased plaintiff and 3rd defendant did not attend the meeting, but unlike the former, who gave an apology for his absence, the latter did not.
68. During the meeting, he distributed his various assets. Specifically, the suit property was gifted to the deceased plaintiff in the following words: -

“Kalooso L.R 2706/9 plot no. 577 member certificate no. 112-15 acres to be transferred to Makau Wambua only.” Emphasis added.

69. To ensure his wishes were fulfilled and with probable apparent anxiety, perhaps because the 3rd defendant had allegedly threatened to kill him as evident in the criminal proceedings of Kangundo SPM Criminal Case No. 1100 of 2019, he wrote a letter to the self-help group on 31/10/2019 and stated in part as follows: -

“I Peter Wambua Mutunga, I have a huge respect for you all to inform you that my land at Kolooso I have given to my son Makau Wambua all of it...

And I ask again when you meet you call me on my phone we talk because I cannot reach there. I want the title deed for Kalooso to be registered in the names of my son Makau Wambua.” Emphasis added.



70. It emerged from the evidence that Peter effected the transfer of the suit property as per his desire despite hurdles placed in his way by the 3rd defendant, who seemed not satisfied with various properties gifted to him.
71. Thus, and in consideration of the produced documents, it is very clear to this court's mind that a trust was never bestowed upon the deceased plaintiff and was never so intended.
72. Peter made it unequivocally known to his family and self-help group that the suit property had been gifted to the deceased plaintiff for his benefit.
73. In the end, this court finds the 3rd defendant did not prove his claim of trust to the required standards. It also finds that the deceased plaintiff does not hold the suit property in trust for any of his siblings.

IV. What orders should this court issue, including an order as to costs?

74. For the above reasons and findings, the plaintiff's and 3rd defendant's claims against each other are hereby dismissed. Since it is trite law that costs follow the event, they shall bear their respective costs.
75. Additionally, the 3rd defendant's counterclaim against the 1st defendant to the counterclaim is hereby struck out with costs. In the end, this court hereby issues the following final disposal orders: -
 - a. The plaintiff's suit is hereby dismissed with each party bearing their respective costs.
 - b. The 3rd defendant's counterclaim against the plaintiff is hereby dismissed with each party bearing their respective costs.
 - c. The 3rd defendant's counterclaim against the 1st defendant to the counterclaim is hereby struck out with costs.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 20TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

20. 05.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Munguti for plaintiff

Mr. Langalanga for 3rd defendant

Mr. Nzioka for 1st and 2nd defendant

Ms Kanja- Court Assistant

