



**Muinga v Ndunda (Environment and Land Appeal E016 of 2023)  
[2025] KEELC 4730 (KLR) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4730 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

**NA MATHEKA, J**

**JUNE 24, 2025**

**BETWEEN**

**WILLIAM MULI MUINGA ..... APPELLANT**

**AND**

**DAVID NGOSE NDUNDA ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, above named, appeals from the Judgment of the Honourable C.N. Ondieki, Principal Magistrate, Machakos, delivered on 29<sup>th</sup> day of March, 2023 in CM ELC. Case No. 63 of 2020, *David Ngose Ndunda v William Muli Muinga*. The Appellant sets forth the following grounds;
  1. The trial Court erred both in law and fact by delivering a Judgment in favour of the Respondent despite the fact that he did not prove his case on a balance of probabilities.
  2. The trial Court erred both in law and fact by failing to find and hold that the Respondent held parcel number Machakos/Kiandani/2183 in trust for the Appellant.
  3. The trial Court erred both in law and fact by dismissing the Appellant's defence and submissions despite the fact that the same had sufficiently controverted the Respondent's case.
  4. The trial Court erred both in law and fact for declaring the Appellant a trespasser on parcel number Machakos/Kiandani/2183 notwithstanding the fact that he took possession of the said land in 1984 and put up a permanent house thereon in the same year.
2. The Appellant prays that;
  - a. The Judgment of the trial Court delivered on 29<sup>th</sup> March, 2023 together with all the consequential orders flowing therefrom be set side and be substituted therefore with a Judgment of this Court dismissing the Respondent's suit.



- b. The cost of the Appeal be borne by the Respondent.
3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another v Shah* (1968) EA 93 where it was held that;
- “I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
4. The matter began by a plaint dated 3<sup>rd</sup> June 2020. The Plaintiff/Respondent testified that he is the owner of land parcel Machakos/Kiandani/2183 having received the same as a gift from his father Stephen Ndunda Muinga and transferred to him in 2019. He produced the title deed as an exhibit. That the Defendant/Appellant was a licensee and has now refused to vacate the suit land. PW2 the said Stephen Ndunda Muinga corroborated the Plaintiff's evidence. However, it was noted during the trial that he was very old and suffers memory loss.
5. It is not disputed that the suit land is registered in the name of the Plaintiff. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;
- “Subject to this Act, 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.”
6. Section 26 (1) of the [Land Registration Act](#) states as follows;
- “The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
7. The Defendant testified that Stephen Ndunda Muinga was his elder brother and the Plaintiff's father. That together with his other brother Joseph Musevu Muinga they worked in Uganda and the said Stephen was left in Kenya to invest for them. With the blessings of their mother various properties were acquired jointly. That he settled on the suit land in 1984 and that their brother held it in trust. DW3 Rose Ndulu David his sister testified that they bought properties jointly and DW4 the Akitutu Clan County Secretary Jones Mackenzie Mumo testified that a dispute arose over the properties and it was resolved that they be shared equally among the three brothers. In other words, the Appellant claims that a trust existed and he has an overriding interest on the suit land.



8. The Supreme Court in Petition No. 18 (E020) of 2022 *Arvind Shab & 7 Others v Mombasa Bricks & Tiles Limited & 5 Others* stated as follows;

“While Sections 25, 26 and 28 of the *Land Registration Act* recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of Article 24 of the *Constitution* therefore, the limitation of the right to property is provided under law, and includes a constructive trust. (86) We have found that the doctrines of equity are part of our laws by virtue of Section 3 of the *Judicature Act*. And while the *Constitution* entitles every person to the right to property at Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while Sections 25 and 26 of the *Land Registration Act* provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, Section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.

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.”

9. In *Archer & another v Archer & 2 others* (Civil Appeal 39 of 2020) [2023] KECA 298 (KLR) this Court stated as follows:

“A constructive trust is therefore generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. This Court upheld this view in *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others* (supra) as follows:

“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. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.”



10. The Appellant/Defendant led detailed evidence that the three brothers and their mother carried on Tobacco business in Uganda in the 1960s. they opened a joint account and used the money to buy property and cars. All the property was in their elder brother's name PW2 in trust for the family. DW2 Benjamin Ngila Ndeta, a cousin of the brothers corroborated the Defendant's evidence. He stated that there were trading in Uganda under one company called Moroto Tobacco Company and the family account was entrusted to the elder brother PW2. They then agreed to buy property including land which PW2 held under his name in trust. That the Defendant moved into one of these parcels (the suit plot) in 1980s with the authority of the family. That it was after PW2 refused to share the property when the clan came in to resolve the issue. It is not in dispute that the Plaintiff's father and the Defendant are brothers. I am satisfied that the Defendant has been in possession of the suit land from the 1980s. It is not also in dispute that the clan meeting resolved that the property was owned jointly by the brothers and should be shared. Looking at the totality of the evidence that was considered by the court below and noting that both the appellant and respondent were in peaceful occupation of their respective parcels for 39 years before the respondent filed the suit for eviction, we are persuaded that the trial magistrate was wrong in his finding. I find that it was dishonest for PW2 to transfer the suit plot secretly to his son the Plaintiff knowing very well the Defendant was and/had been in possession for decades and had constructed a house thereon. If one was to believe the Respondent for a moment, why would PW2 allow his brother, the Appellant to occupy the parcel of land for 39 years without raising any question?
11. I find that a constructive trust does exist and the Defendant/Appellant holds an overriding interest over the suit land. Having found that the Appellant has discharged the evidentiary burden on a balance of probability, this Court holds and finds that the trial magistrate erred in law when he found for the Respondent herein. The upshot of the foregoing is that this Court finds and holds that the Appeal herein as contained in the Memorandum of Appeal dated 25<sup>th</sup> April 2023, is merited.
12. On the issue of costs, Section 27 of the *Civil Procedure Act* requires that costs follow event, but the Court has the discretion to rule otherwise. The Court in Machakos ELC Pet No. 6 of 2013 *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* (2013) eKLR quoted the case of *Levben Products v Alexander Films (SA) (PTY)Ltd* 1957 (4) SA 225 (SR) at 227M held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp v Gibbon & Co.*, 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
13. This Court notes that the Appellant and Respondent are relatives and the dispute is over family property. In a nutshell, the Court finds and holds that the Appeal herein is merited and the Plaintiff's suit in the lower court is dismissed with no orders as to costs as the parties are relatives. Each party to also bear the costs of this appeal.
14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF JUNE 2025.**

**N.A. MATHEKA**

**JUDGE**

