



Kimani & 2 others v Akuisi Farmers Company Limited & another (Environment and Land Appeal E046 of 2023) [2025] KEELC 4497 (KLR) (17 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4497 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E046 OF 2023**

**MAO ODENY, J
JUNE 17, 2025**

BETWEEN

**SIMON KIMANI 1ST APPELLANT
DAVID MWANGI NJAMA 2ND APPELLANT
KIREMBA FARMERS CO-OPERATIVE SOCIETY LTD 3RD APPELLANT**

AND

**AKUISI FARMERS COMPANY LIMITED 1ST RESPONDENT
KIFCO FARMERS CO-OPERATIVE SOCIETY LTD 2ND RESPONDENT**

(Being an Appeal from the Judgment and decree of Hon. R. KEFA (P.M) delivered on the 13th day of December, 2023 in Nakuru CM ELC NO E022 of 2020)

JUDGMENT

1. This appeal arises from the Judgment and decree delivered by Hon. R. Kefa (P.M) on 13th December, 2023 in Nakuru CMCC ELC No E022 of 2021. The Appellant being aggrieved by the entire judgment and decree lodged a Memorandum of Appeal dated 27th December, 2023 and listed the following grounds of Appeal:
 - a. That the Learned Trial Magistrate erred in law and in fact and misdirected herself on the finding of ownership of Parcel No 678 notwithstanding the evidence on record.
 - b. That the Learned Magistrate erred in law and in fact and misdirected herself in failing to appreciate the fact that the Applicants had proved their case to the requisite standards as there was overwhelming evidence on record.
 - c. That the Learned Trial Magistrate erred in law and fact by failing to appreciate in totality the evidence before the Honourable Court and submissions of the Defence and critically analyze



the same and accord it due weight to the extent that it was able to prove that the coffee factory is up and running and all pending bills cleared.

- d. That the Learned Trial Magistrate erred in law and in fact in finding that the 1st Plaintiff had supervisory authority on land that is public utility land.
 - e. That the Learned Trial Magistrate erred in law in failing to appreciate that the 2nd Plaintiff was not duly constituted as required by the Co-operatives *Societies Act* No 12 of 1997 hence could not perform its functions.
 - f. That the Learned Trial Magistrate erred in law and in fact in evicting the appellant on the face of all available evidence.
2. The Appellant prayed that:
- a. That the judgment/decree of the honourable court dated 13th December 2023 be reviewed and/or set aside.
 - b. That the Respondents do bear the costs of this appeal.
3. The Respondents had sued the Appellants in the lower court vide plaint dated 7th November, 2020 seeking the following orders:
- a. A permanent order of injunction restraining the Defendants by themselves, their agents and/or servants and all other persons acting under them from entering, remaining onto dealing with or in any way interfering with the 1st Plaintiff's parcel of land marked 678 extracted from LR NO 8943/8944 and the coffee pulping machine/factory constructed therein.
 - b. An eviction order to issue against the Defendants by themselves, their agents and or servants and all other persons acting under them to vacate from the said 1st Plaintiff's parcel of land marked 678 extracted from LR NO 8943/8944 and the coffee pulping machine/factory constructed therein.
 - c. Damages for loss of property caused for defendant's trespass.
 - d. Costs of this suit be borne by the Defendant.
 - e. Any other relief that this Honourable Court may deem fit to grant.
4. The Appellants filed a counter-claim dated 8th January, 2021 and sought the following orders:
- a. The 3rd Defendant (now turned 3rd Plaintiff) is the sole and lawful proprietor of all that land parcel marked 678 extracted from LR No 8943/8944, the factory, borehole.
 - b. In the premises this suit as against the 1st, 2nd and 3rd Defendants is incompetent, bad in law, unmaintainable and does not lie and should therefore be dismissed with costs.
 - c. Mesne Profits.
 - d. That the Plaintiffs be awarded costs of the Counter-claim together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order.
 - e. Any such other or further relief as this Honourable Court may deem appropriate to order.
5. The suit was heard and the Trial Magistrate in her judgment dated 13th December, 2023 found in favor of the Respondents and dismissed the Appellant's counterclaim with costs.



3rd Appellant's Submissions

6. Counsel for the 3rd Appellant filed submissions dated 4th April, 2025 and identified the following issues for determination:
 - a. Whether the Ballot paper is proof of ownership?
 - b. Whether a constructive trust on behalf of the 3rd Appellant was created?
 - c. Whether public utility can be re-allocated?
 - d. Whether the 3rd Appellant has proved its case on a balance of probabilities?
 - e. Whether the 3rd Appellant is entitled to costs?
7. Counsel provided an elaborate background to the case at the lower court and the current Appeal. On the first issue as to whether the ballot paper was proof of ownership, counsel relied on the cases of Solomon Ndegwa Kamau v Lawrence Hindu & Witeithie Gwaka Investment Ltd. [2021] eKLR and Lucia Wambui Kariuki & Another v Grace Wanjiru & Another [2022] eKLR and submitted that the 3rd Appellant relied on the ballot paper, made payments and was in occupation thus proving a legitimate interest in the suit parcel of land.
8. It was counsel's further submission that the Appellant after being issued with a ballot paper, went ahead and paid the utility bills, repaired the damaged factory and in their efforts to secure the factory to the farmers to regularize ownership wrote several letters objecting to the issuance of the title deed to the 1st Respondent.
9. On the second issue as to whether a constructive trust on behalf of the 3rd Appellant was created, counsel submitted that the same was created by virtue of payments made, and reliance on the allocation and possession of the land. Counsel further submitted that the actions of the 3rd Appellant demonstrate a genuine investment in the land and it would be inequitable to deny it interest and relied on the case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR.
10. On the third issue as to whether a public utility can be reallocated, counsel submitted that public utility land cannot be reallocated for private purposes unless legally degazetted and the reallocation is done following due process. Counsel relied on *the Constitution* of Kenya 2010, Section 38 of the *Land Act*, 2012 and the cases of African Line Transport Co. Ltd v The Hon. AG & Others [2013] eKLR and Friends of Karura Forest v Nairobi City Council & Others [2012] eKLR.
11. Counsel submitted that the Appellant has proved their case on a balance of probabilities and relied on the Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR and Miller v Minister of Pensions [1947] 2 All ER 372 and urged the court to allow the Appeal with costs.

Respondents Submissions

12. Counsel for the Respondent filed submissions dated 5th May, 2025 and identified the following issues for determination:
 - a. Who is the owner of the suit property?
 - b. Whether the appeal is merited?
 - c. Who bears costs?



13. Counsel also provided a brief background to the case and submitted that the land in dispute was extracted from parcel No. 8943/8944 which was registered in the name of the 1st Respondent, whereby the original title deed was surrendered to the Survey of Kenya for subdivision which facts were admitted by both parties during the hearing.
14. Mr. Mburu further submitted that the 1st Respondent produced a Share Certificate in respect of the suit parcel of land, electricity bill registered in its name and the 1st Appellant also produced Mpesa electricity payment in its name. Further that the Appellant also confirmed that all subdivisions arising from LR. No. 8943/8944 including the suit parcel are registered in the name of the 1st Respondent.
15. Counsel further submitted that the reliance by the Appellant on the case of Solomon Ndegwa Kamau v Lawrence Hindu & Witeithie Gwaka Investment Ltd. [2021] eKLR where the court held that a ballot paper does not confer ownership rights as it serves merely as evidence of participation in an allocation process and indicates an intention to allocate land. Counsel submitted that the Appellant neither produced any receipts, documents nor register of members and plots allocated to them to demonstrate that they paid for the suit land.
16. According to counsel, the 1st Respondent is the custodian of the shareholders' documents including share certificates and the register of its members hence its evidence has probative value. Counsel further submitted that the totality of the evidence presented in court led to a conclusion that the Appellants seem to have managerial problems with the 1st Respondent but they are litigating it in the wrong forum.
17. It was counsel's submission that the Appellant led evidence that the suit property is public utility which was set aside by shareholders of the 1st respondent but they did not produce any evidence to demonstrate that the suit property was ever surrendered to the County government or the National Government as required by law and cited the case of Dorice Atieno Rajoru & 145 Others v Mjihad Suo-chairman Harambee Maweni Committee self-help group & 2 others [2016] eKLR.
18. Counsel submitted that the 1st Respondent proved beyond reasonable doubt that the 3rd Appellant was only granted operational rights therefore they cannot claim ownership of the suit property as per the letter dated 18th August 2014 which gave the Appellant 45 days' notice to show cause why the operational rights should not be revoked. It was counsel's submission that the 3rd Appellant failed to show cause and the operational rights were revoked. Counsel relied on the cases of Mbogo & Another v Shah [1968] EA, John Teleyio Ole Sawoyo v David Omwenga Maobe [2013] eKLR, Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1KAR.
19. Mr. Mburu further submitted that Appellants in their pleadings sought to be declared the sole owners of the suit property but their testimony was contradictory where they stated that the suit property is a public utility. Further that the Appellants' submissions that the 2nd Respondent did not have legal capacity to institute a suit and the issue of constructive trust were not issues before the trial court hence the Appellant wants to introduce new evidence.
20. Counsel submitted that neither a report nor a witness from the National Land Commission was produced or called to give such evidence to buttress the allegations of the suit land being for public utilities. Counsel therefore urged the court to dismiss the Appeal with costs.

Analysis And Determination

21. The issue for determination is whether the Appeal has merit on the grounds listed in the Memorandum of Appeal, whether there was constructive trust created in favour of the Appellant, whether the ballot paper conferred proprietary interest to the Appellant and who is the rightful owner of the suit land.



22. In the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

23. Similarly, the Court of Appeal for East Africa in the case of *Peters v Sunday Post Limited* [1958] EA 424 Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

24. From the Record of Appeal and the evidence that was tendered in the lower court, it is not disputed by both parties that the suit land was excised from the mother title L R NO. 8943/8944 that was surrendered to Survey of Kenya for subdivision and the same was registered in the name of the 1st Respondent Akuisi Farmers' Company Limited.

25. It is further not disputed that the Appellants admitted in their evidence that they own individual plots, which they fully paid for and are awaiting issuance of title deeds. What is disputed is that they have proprietary interest in the suit land by way of constructive trust and that the suit land was for public utility.

26. In the Supreme Court 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) the court cited Halsbury's Laws of England, 4th edition, volume 48 at paragraph 690 which 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.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive. 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. Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement. The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive.

Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

27. A constructive trust is an equitable remedy that arises where the intention of the parties cannot be ascertained and in such cases it would demand that equity treats the legal owner as a trustee, and 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).
28. The Appellant’s case hinges on two angles, one of constructive trust and another as an owner having balloted and issued with a ballot paper. The Appellant argues that the suit is for public utility and in the same breath pleaded that it is the sole owner of the suit land. The two claims cannot be tenable in one suit. If the suit land was for public utility, what makes the Appellant the rightful owner of the suit land?
29. If the land was allocated for public utility, then the 1st Respondent who had held the mother title and the Company designated to manage the affairs of the shareholders would be the right party to hold the land for the benefit of the community.
30. The Appellant did not give any evidence to debunk the 1st Respondent’s allegation that they had been given 45 days’ Notice to show cause why operational rights could not be revoked and by the end of the period the same was revoked. There was no evidence that the Appellant complied with the Notice dated 18th August 2014. If the Appellant had proprietary rights over the suit land, why was a notice being issued to them to comply with the operational rights, similarly if they were the owners, why did they not assert their rights to the land? They waited to be sued by the 1st Respondent to file a counterclaim for ownership. I find the Appellant’s argument as untenable.
31. On the issue whether the ballot paper was proof of ownership, in the case of Solomon Ndegwa Kamau v Lawrence Hindu & Witeithie Gwaka Investment Ltd. [2021] eKLR the court held that a ballot paper does not confer ownership rights as it serves merely as evidence of participation in an allocation process and indicates an intention to allocate land. It is on record that the Appellant neither produced any receipts, documents nor register of members and plots allocated to them to demonstrate that they had paid for the suit land. They did not complete the process that would eventually confer ownership.
32. Furthermore, the issue of constructive trust which counsel submitted on elaborately was never raised in the lower court. Parties are bound by their pleadings and it should be noted that the issue of constructive trust was not a ground of Appeal in the Memorandum of Appeal.



33. In the case of Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto [2018] eKLR (as cited in Frera Engineering Company Limited v Morris Mureithi Mutembei[2020]eKLR) the court held that:

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case...In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”

34. The Appellant has not followed any procedure for raising additional issues or evidence on appeal therefore the line of argument for consideration of a constructive trust being inferred in its favour is not tenable. It therefore flops.
35. Having considered the evidence on record and the submissions by counsel, I find no reason to interfere with the well-reasoned judgment of the Trial Magistrate. The appeal therefore lacks merit and is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF JUNE 2025.

M. A. ODENY

JUDGE

