



Nalyanya v Opati; Wepukhulu (Interested Party) (Environment and Land Case E007 of 2023) [2025] KEELC 8226 (KLR) (27 November 2025) (Judgment)

Neutral citation: [2025] KEELC 8226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE E007 OF 2023
EC CHERONO, J
NOVEMBER 27, 2025**

BETWEEN

RICHARD MAKOKHA NALYANYA APPLICANT

AND

PETER KANG'ASHI OPATI RESPONDENT

AND

MARGARET NASIBWONDI WEPUKHULU INTERESTED PARTY

JUDGMENT

1. The Applicant filed an amended originating summons dated 06/04/2024 seeking to have the Respondent's proprietary rights over Land Title Number East Kanduyi/South Kanduyi/7676(hereinafter referred to as "the suit land") deemed extinguished under the principal of constructive trust in his favour and for the respondent to execute all transfer documents in relation to the suit land or in the alternative for the executive officer of the court to execute the same to enable registration in his name and lastly for a permanent injunction against the Respondent and his agents from interfering with his peaceful occupation of the said land.
2. The summons is supported by the affidavit of the Applicant sworn on 06/04/2024 wherein he deposed that he purchased the suit land in the year 1999 and thereafter took occupation with the consent of the Respondent. That he was unable to obtain a land control board consent due to the frustrations of the Respondent and therefore, the respondent held title to the suit property on his behalf under the doctrine of constructive trust.
3. The Respondent filed a relying affidavit to the originating summons sworn on 09/06/2023 where he stated that he knew the interested Party in the year 1974 but solemnized the marriage in 2004. He deposed that he sold the suit land to the Applicant in the year 1999 and the consideration was paid in



full on 31/08/2001. That the Applicant disappeared only to return in 2022 to claim the land when he sought to obtain a land control board consent which was objected to by the interested party.

4. The interested party swore a replying affidavit dated 02/11/2024 reiterating the averments in her replying affidavit sworn on 27/02/2024 wherein she deposed that she is the Respondent's wife having been married customarily in the year 1974. That she was a primary school teacher and that she contributed to the acquisition of the suit land where they build their matrimonial home and where they have buried two of their children. That she learnt that the Respondent had sold the suit land and lodged a caution on the grounds that her spousal consent was not sought. That she also filed a suit against the Applicant and the respondent which was consolidated with the instant suit as a counter-claim.
5. In the said plaint filed on 15/05/2023, she sought to have the sale agreement between the Applicant and the Respondent dated 12/10/1999 over the suit land cancelled and declared null and void, for an eviction order and a permanent injunction against the Applicant and his agents from occupying the said land, and an order against the Respondent from disposing of the said land and costs of the suit. Lastly, she averred that the applicant and the respondents intend to defeat her interest in the land and she seeks to have the originating summons dismissed.

Evidence by the parties.

6. The suit proceeded by way of viva voce evidence.
7. The Applicant testified as the sole witness where he relied on the averments in his supporting affidavit of 20/04/2023, 06/04/2024 and 11/03/2024. He testified that he does not know the Interested party and that when he purchased the suit land, the Respondent had already moved to Naitiri. In cross-examination, he testified that the Interested Party did not sign the agreement for sale and denied the assertion that he did not conduct due diligence before purchasing the land. He testified that the Interested party has not proved her interest in the suit land.
8. The Respondent in support of his case reiterated the averments in his replying affidavit as above and added that his wife contributed to the acquisition of the suit land and that they have constructed rental units. That he sold the suit land while they were still residing therein without the involvement of the Interested Party who later objected to the transfer and lodged a caution. He testified that he has no problem with the court ordering for the transfer of the land to the Applicant.

Parties submissions.

9. The Applicant filed submissions dated 15/07/2025 and submitted that he acquired ownership of the suit property through constructive trust under Section 28 of the *Land Registration Act*, 2012, having purchased and taken possession of the land since 1999. Relying on *Arvind Shah & 7 Others v Mombasa Bricks & Tiles Ltd & 5 Others* [2023] eKLR, it was argued that the respondent holds title in trust for the applicant and should be compelled to transfer it, or the Deputy Registrar be authorized to do so.
10. It was further submitted that the question of whether the land is matrimonial property falls outside this court's jurisdiction, and in any event, the interested party's rights were extinguished by operation of law after 12 years of the applicant's possession. That the sale agreement, executed in 1999, remains valid as spousal consent was not then required under the repealed Registered *Land Act*. The applicant maintained that declaring it void would amount to unjust enrichment, opposed any orders for eviction or injunction, and prayed that costs be awarded to him against the interested party.



11. As for the Interested Party, she adopted her witness statement dated 15.05/2025 as her evidence in chief and produced into evidence 3 items as contained in her list of documents. She reiterated her case as summarized above and added that although the suit land is registered in the name of the Respondent she contributed to its acquisition in 1986. That when they relocated to Naitiri, they left the Applicant in occupation of the land although she did not understand the circumstances leading to this.
12. The Interested Party filed submissions dated 18/08/2025 where it was submitted that the Applicant failed to prove his claim to the required standards as the agreement relied on was never witnessed and thereby contravened the provisions of Section 3(3) of the Law of Contracts. Reliance was placed inter alia in the case of *In Machakos District Co-Operative Union Limited =Vs = Philip Nzuki Kiilu*[1997] eKLR. It was further submitted that the Applicant failed to prove a trust and the court cannot be expected to imply one. She quoted the case of *In Charles K. Kandie v Mary Kimoi Sang* [2017] KECA 775 (KLR).
13. It was further submitted that this court is clothed with the jurisdiction to determine the parties claimed interest. It was further submitted that the Applicant was well aware that the suit land was matrimonial property and thus the Interested Party had an overriding, equitable and unregistered interest over the same rendering the sale agreements between the Applicant and the Respondent void ab initio. Reliance was placed in the case of *In Vincent =VS= Kotiani & another* (Environment and Land Appeal E026 of 2023) KEELC 5217 (KLR) (14th November 2024) (Judgment). Lastly, the court was asked to award costs to her.
14. The Respondent filed submissions dated 14/08/2025 where he admitted to selling the suit land without the Interested Party's consent and that he has drawn a banker's cheque for Kshs.520,000/= being the purchase price in favour of the Applicant. That the Applicant has not proved a case for constructive trust and sought to have the case dismissed with costs and the counter-claim by the Interested Party allowed.

Analysis and determination.

15. The Applicant's claim is founded on the doctrine of constructive trust, asserting that although the suit land is registered in the name of the Respondent, the same was held in trust for him, having paid valuable consideration and taken possession of the land. He contends that equity should intervene to prevent the Respondent from unjustly enriching himself at his expense. On the other hand, the Respondent does not dispute that there was an agreement between himself and the Applicant for the sale of the suit land. His contention, however, aligns with the Interested Party's position that spousal consent was not obtained prior to the execution of the said agreement. He and the Interested Party therefore argue that the transaction was void ab initio, and no interest legal or equitable could pass to the Applicant.
16. I have considered the pleadings by the parties, the oral as well as the written testimony and rival submissions. In my considered view, the key issues for determination are twofold:
 - a. Whether the absence of spousal consent rendered the sale agreement void and incapable of conferring any equitable interest upon the Applicant; and
 - b. Whether, a constructive trust can be inferred in favour of the Applicant.
17. I shall now proceed to discuss the two issues concurrently.
18. The definition of a constructive trust was demystified by the Court of Appeal at length in *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others* [2015] Eklr. Our apex



Court in the case of *Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 (KLR) also weighed in on this matter as follows:

“A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law...A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit.”

19. The transaction giving rise to this dispute occurred in 1999, before the enactment of the [Land Registration Act](#), 2012 and the [Matrimonial Property Act](#), 2013. At the material time, there was no express statutory requirement for spousal consent to the alienation of land, except in limited circumstances under where a spouse’s occupation of the matrimonial home could be protected by way of a caution or overriding interest. The law then recognised the registered proprietor’s title as indefeasible, subject only to overriding interests such as trusts, rights of occupation, or fraud, as provided under sections 27, 28, and 30 of the Registered [Land Act](#)(Repealed). Thus, while there was no codified “spousal consent” requirement, the courts nonetheless acknowledged that a spouse in occupation or one contributing to acquisition of matrimonial property could hold a beneficial interest under a trust, which operated as an overriding interest not requiring registration.
20. Accordingly, where one spouse was registered as sole proprietor, the courts would inquire into whether that registration was subject to a resulting or constructive trust in favour of the other spouse, particularly where there was evidence of joint contribution, common intention, or use as a matrimonial home.
21. In this case evidence shows that the Respondent and the Interested party were married customarily in 1974 and solemnized their marriage in 2004. It is further stated that the Interested party was in gainful employment and that she contributed to the acquisition of the suit land during the subsistence of the marriage. Consequently, while the Interested Party’s contribution could give rise to a beneficial interest, in this courts considered view, that interest would not automatically invalidate the 1999 sale and the courts are called upon to investigate the circumstances of each case.
22. The evidence before the Court indicates that following the sale, the Respondent and the Interested Party voluntarily vacated the land and relocated to Naitiri, leaving the Applicant in peaceful and open occupation. Their conduct in giving vacant possession is inconsistent with an intention to retain a beneficial or trust interest over the property. The Court therefore finds that, though the Interested Party may have contributed to the acquisition of the land during the marriage, the decision by both spouses to relinquish possession and allow the Applicant to occupy the property uninterrupted from 1999 negates any continuing claim of a beneficial trust or overriding interest. Further, there is no evidence by the Respondent or the Interested Party that they ever repossessed the suit land since their relocation all those years ago.
23. Accordingly, the Interested Party’s equitable claim though grounded in contribution cannot override the Applicant’s purchasers’ Interests derived from a transaction that was valid under the law then in force. The absence of a spousal consent requirement at the time, coupled with the voluntary transfer of possession, leads this Court to conclude that the Applicant acquired valid proprietorship interests, free from any overriding interest on the part of the Respondent or the Interested Party.



24. In the result, this Court finds and holds that the Applicant's case succeeds and proceeds to allow the same with costs. As for the Interested Parties counter-claim, the same is hereby dismissed with costs to the Applicant.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF NOVEMBER, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

M/S Nekesa H/B Mr. Bwonchiri for the Interested Party.

Applicant-present

Respondent-present.

Bett C/A

