



**Mutele v Weindaba & another (Environment and Land Case
E140 of 2025) [2026] KEELC 227 (KLR) (22 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E140 OF 2025
MN KULLOW, J
JANUARY 22, 2026**

BETWEEN

AGNES NAMUNYAK MUTELE PLAINTIFF

AND

JAMES MUTEEL WEINDABA 1ST DEFENDANT

JAMUWE LIMITED 2ND DEFENDANT

RULING

1. This matter is in relation to property known as Ole Dume Road Diani close gate no 7 House No 4 erected on land reference No 330/1069(original number 330/1041/2) registered in the name of the 2nd defendant herein referred to as the suit property.
2. Vide Notice of Motion application dated 5th March 2025, the Applicant seeks the following orders:
 - a. Spent
 - b. That pending hearing and determination of this application inter parties the honourable court be pleased to issue a temporary injunction restraining the 1st and 2nd defendants/respondents whether by themselves, agents, servants and/or personal representatives from selling, charging, alienating ,trespassing onto and/or in any manner whatsoever interfering with or otherwise dealing with the property as Ole Dume Road Diani close gate no 7 House No 4 erected on land reference No 330/1069(original number 330/1041/2).
 - c. That pending hearing and determination of this suit the honourable court be pleased to issue a temporary injunction restraining the 1st and 2nd defendants/respondents whether by themselves, agents, servants and/or personal representatives from selling, charging, alienating, trespassing onto and/or in any manner whatsoever interfering with or otherwise dealing with



the property as Ole Dume Road Diani close gate no 7 House No 4 erected on land reference No 330/1069(original number 330/1041/2).

- d. That the Officer commanding police station Kilimani Police station be directed to ensure compliance with the orders
- e. Costs of the application.

Applicant's case

3. The Application was supported by an affidavit sworn by the applicant where she deponed that she and the 1st defendant/respondent had been married under Luhya customary laws and that during the marriage they jointly purchased the suit property. That the property was registered in the name of the 2nd defendant to hold in trust of the applicant and the 1st defendant.
4. She deponed that she had on several occasions serviced loans taken by the 1st defendant using the title to the suit property as collateral so as to avoid public auction attaching evidence of payment through cheques and other documents indicating correspondence as between the 2nd respondent and the banks.
5. She further deponed that the marriage as between the two broke down and as such the 1st defendant has been trying to dispose off the suit property in total disregard to her ownership on the said suit property.
6. The applicant deponed that a constructive trust exists which was the intention of the applicant and the 1st defendant at the time of purchase of the suit property.

Respondent's case

7. The 2nd respondent opposed the application vide a replying affidavit sworn by Stephen Kiplagat Kipkenda dated 13th May 2025
8. He deponed that the 2nd respondent purchased the suit property via a sale agreement dated 2nd January 2002 with the same being executed by the directors of the company that is the 1st defendant and himself and nowhere was the applicant involved in the purchase of the suit property.
9. He deponed that the property solely belongs to the 2nd respondent who via a board resolution decided to have the 1st respondent as the majority shareholder occupy the premises where the applicant was residing as a guest and the issue of the property being held in trust as alleged by the applicant does not arise since there is no trust that has been written and registered as between them.
10. He deponed that the applicant had failed to substantiate how she contributed to the purchase of the suit property and thereby acquiring rights to the same, and in the absence of such proof, then she had not demonstrated how her application meets the threshold for granting of injunctive orders.
11. The applicant claims to have filed a further affidavit which is not in the court file neither is it filed on the online case tracking system portal (CTS)

Submissions by parties

Legal issues raised in the Applicant's submissions

1. Whether the applicant has legitimate claim to the property
2. Whether the applicant has established a prima facie case
12. The applicant submitted that she had been involved in the purchase of the suit property by contributing to the payment of the initial purchase price of Ksh 4,600,000/= and later contributing to



the balance of Ksh 5,600,000/.She submitted that the conduct of the parties that the 2nd respondent in holding the property, a constructive trust was secured to safeguard the interest of the applicant .She relied on the case of Shah and 7 others vs Mombasa Bricks and tiles and 5 others (petition 18(E020) of 2022(2023)KESC

13. She submitted based on the said trust, she has an equitable title that the court should protect and prevent unjust enrichment on the part of the 1st defendant and the 2nd respondent.
14. On the issue of whether she had proved a prima facie case, she submitted that the evidence had pointed to the fact that she had an arguable case and had legitimate claims to the property and it would be in the interest of justice to prevent dealings on the same pending determination of the suit citing the Mrao vs Fist American Bank of Kenya & 2 others (2003)KLR125 that give meaning to what a prima facie case is
Legal issues in the 2nd respondent's submissions
 1. Whether the applicant has satisfied the requirement for grant of temporary injunction orders
 2. Who should bear the costs?
15. Counsel submitted in reliance to provision of order 40 rule 11 of the civil procedure rules indicating that the requirements for issuance of the orders was that proof that the property in dispute is in danger of being wasted or the defendant threatens to dispose the same at the detriment of a plaintiff.
16. He further highlighted the requirements as in Giella Vs Cassman Brown (1973) EA 358 being proof of a prima facie case, irreparable injury that cannot be compensated by an award of damages and on a balance of convenience. He submitted that the applicant had alleged a constructive trust had been established but had not provided any evidence to back the same and simply stating the same did not show how she had any rights to be protected. Further he submitted that the applicant at no particular point was made director to the company neither given the authority to act on behalf of the directors of the company and any alleged transactions carried out in her name did not point out to the fact that they were made on behalf of the 2nd respondent.
17. Counsel further submitted that the applicant could not lay claim on the 2nd respondent's property as forming part of her matrimonial property being that the 2nd respondent was a different entity from the 1st respondent .That her claim on proprietary rights based on her relationship with the 1st respondent were unsustainable against the 2nd respondent relying on what was said in the case of Valentine Opiyo and Anor Vs Masline Odhiambo t/a Ellyam Enterprises High court Civil appeal No 2 of 2014.
18. He submitted as such no prima facie case had been established, and that the harm occasioned in case the matter is ruled in her favour, an award of damages would adequately compensate her.
19. Lastly, he submitted the balance of convenience tilted in not granting the orders as it would be an infringement on the 2nd respondent's right to property

Analysis and determination

20. Having looked at the application, the response and submissions by both parties, the substantial issue for determination is



Whether the Applicant has satisfied the threshold required for issuance of temporary injunctive orders

21. The law on granting interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules as follows:

Where in any suit it is proved by affidavit or otherwise –

That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit;

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

22. The principles for grant of injunction are well settled by the locus classicus of *Giella Vs Cassman Brown & Company Limited* [1973] E.A. 358., where the court stated thus:

First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

23. The important consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation is enjoined to grant a temporary injunction to restrain such acts.

24. In the instant case, it is not in dispute that the property is registered in the name of the 2nd respondent. The applicant’s case is that she contributed to the purchase of the suit property and maintenance of the same. The applicant has relied on a number of documents to substantiate the fact that she contributed to purchase including the cheque marked as AMN-4. The said cheque does not in any way shed light on what the monies were to cater for. It is addressed to Development Bank Kenya Limited and it could point out to a totally different transaction carried out that does not relate to the suit property. There is a notice of change of directors document attached to show that the applicant was made a director of the 2nd respondent company and then said document refers to a board resolution passed on 23rd April 2003, however a perusal through the records does not show any such resolution. The 2nd respondent through its director Mr. Stephen Kiplagat Kipkenda denies ever being such a resolution that made the applicant a director and pointing out to his resignation. This then raises questions as to the authenticity of the said notice being that the directors of the company are just the 1st respondent and the said Mr Stephen Kipkenda. The evidence on record is not conclusive enough to show any rights acquired by the applicant in regards to the suit property hence has not proved existence of a prima facie case.

25. Moving on to the issue of whether a constructive trust was established, the burden of proof, as already established, lies with the person asserting a fact, in this case, the Applicant who as already



submitted above has failed to show her contribution in purchase of the suit property. Section 107 of the *Evidence Act* places the evidential burden upon the applicant. Mere assertions or allegations without documentary or credible oral evidence cannot suffice to discharge this burden.

26. Having perused the record, it is clear that the sale agreement was as between the vendors and the 2nd respondent. The Applicant indicates to have contributed to the purchase but the said allegations have not been substantiated with any evidence whatsoever not to mention that the allegations are not in any way supported by the contents of the sale agreement which favored the 2nd Respondent's narrative.
27. The Court of Appeal in *Juletabi African Adventure Ltd & another v Christopher Michael Lockley* [2017] KECA 118 (KLR) explained the law on trust clearly as follows: "In *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR, this Court examined and stated the law on trusts as follows: -

According to the Black's Law Dictionary, 9th Edition; a trust is defined as

1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."

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. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... 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 para 1453). 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 ... 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)." Emphasis added



28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, 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. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant.”

28. The doctrine is further addressed in the case of *Shah & 7 Others v Mombasa Bricks & Tiles Limited & 5 Others* [2023] KESC 106 (KLR) (28) where it was held as follows:

AS constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust:

The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience “they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”

Similarly, although in a matrimonial property dispute, the Canadian Supreme Court in *Murdoch v Murdoch* [1975] 1 SCR 423 stated as follows:

As is pointed out by Scott, *Law of Trusts*, 3rd ed., 1967, vol. 5, at p. 3215, “a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property”; and, again, at p. 3413, quoting Judge Cardozo “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”



The United States Supreme Court in *Harris Tr & Sav Bank v Salomon Smith Barney Inc*, 530 US 238, 250–51 [2000] citing *Moore v Crawford*, 130 US 122, 128 [1889] stated thus:

Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favour of the one who is truly and equitably entitled to the same.’”

As has been established therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.

From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit

Determination:

29. Bearing the above principles in mind, I hold the view that the Applicant had failed to establish her contribution towards the acquisition of the suit property and hence no constructive trust is established. Thus the application for injunction is therefore not merited and same is dismissed with costs.

30. Costs to be borne by the Applicant.

It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF JANUARY, 2026.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Ms. Wanja for the Applicant

Mr. Kichwer for 1st Defendants/Respondent

No appearance for 2nd Defendants/Respondent

Philomena W. Court Assistant

