



REPUBLIC OF KENYA



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**Awange & another v Oyolla & another (Civil Appeal E454 of 2024)
[2026] KECA 377 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KECA 377 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E454 OF 2024
PO KIAGE, J MOHAMMED & WK KORIR, JJA
FEBRUARY 27, 2026**

BETWEEN

PERES ANYANGO AWANGE 1ST APPELLANT

RED ROSE REALTORS LIMITED 2ND APPELLANT

AND

JOHN KENNETH AJIMA OYOLLA 1ST RESPONDENT

GOLD GREEN LIGHT RESIDENCE LIMITED 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (Oguttu Mboya, J.) delivered on 6th May 2024 in Nairobi ELC Misc. E035 of 2022)

JUDGMENT

Background

1. This appeal arises from the judgment and decree of the Environment and Land Court at Nairobi (Oguttu Mboya, J.) delivered on 6th May 2024 in ELC. Misc. E035 of 2022. The dispute centres on the ownership and beneficial entitlement over Land Reference No. 209/14990/16 (I.R. No. 90324) (the suit property) a developed parcel of land whereon stands an ongoing development of a twelve-storey apartment block constructed under a joint venture agreement. The four parties in this appeal all have an interest in the outcome of the ownership of the land and the developments thereon in varying degrees.
2. Peres Anyango Awange (the 1st appellant) is the registered owner of the suit property, having acquired it in 2004 through a retirement allocation from Telposta Pension Scheme. Red Rose Realtors Limited, (the 2nd Appellant) is her corporate vehicle. Gold Green Light Residence Limited (the 2nd respondent) is a third-party investor that undertook construction on the suit property pursuant to a Joint Venture Agreement dated 12th June 2020 between it and the 2nd appellant.



3. John Kenneth Ajima Oyolla (The 1st respondent) a son-in-law to the 1st appellant, instituted the suit claiming a 72.78% beneficial interest in the suit property based on an alleged oral trust and financial contributions made towards the suit property's acquisition and development. The ELC held in his favour, finding that the land should be shared between the 1st respondent and the 1st appellant and one Lucy Oyolla Awange, in the ratio of 70:30 respectively. There was no judicial finding on the developments and interests of the 2nd respondent.
4. Aggrieved by this decision, the appellants filed the instant appeal raising nineteen (19) grounds. The core complaints revolve around the trial court's findings on ownership, the creation of a trust without sufficient evidence, alleged misdirection on the burden of proof, disregard of statutory rights under the *Land Registration Act*, and the grant of unpleaded reliefs. The Appellants also fault the ELC on the amendment of the plaint that was allowed after the conclusion of the trial.
5. In light of the substantive nature of the issues raised, the factual and legal significance of the reliefs sought vis a vis those granted, and because the contents of the Memorandum of Appeal and the prayers will be referred to and analyzed elsewhere in this judgment, we find it fit to reproduce them verbatim below. The Memorandum of Appeal sets out grounds that the ELC erred in law and in fact:
 1. in holding that the 1st appellant held the parcel of land L.R. No. 209/14990/16 [I.R. No. 90324] in trust for herself, Lucy Oyallo Awange and the 1st respondent;
 2. in holding that the 1st respondent contributed a sum of Kshs. 2,159,000/- and Kshs. 940,000/- towards purchase of L.R. No. 209/14990/16 [I.R. No. 90324];
 3. by holding that the 1st respondent discharged his burden of proof to the effect that he made contribution towards purchase of the suit property;
 4. in holding that the sum of Kshs. 4,340,000/- was the market value of the suit property at the time of the purchase by the Appellant;
 5. in its failure to take into consideration the fact that the 1st respondent had admitted that the purchase price of Kshs. 4,340,000.00 was a "discounted rate... by virtue of the 1st defendant being an employee at Telkom Kenya Limited";
 6. in its failure to consider the fact that the cost of purchase of the property included Stamp Duty, land rent and rates which was paid by the 1st appellant;
 7. in its failure to take into consideration evidence that the said property was offered to the 1st appellant in consideration of or by virtue of her pension consideration to or membership to the Teleposta Pension Fund Scheme;
 8. in holding that failure by the Appellant to call Lucy Oyolla Awange as a witness, meant that the 1st respondent's evidence on contribution towards purchase of the suit property remained uncontroverted;
 9. in apportioning ownership of the suit property by awarding to the 1st respondent a 70% share thereof;
 10. in arriving at the computation of 70% and 30% as the share of ownership of the suit property by the 1st respondent and the Appellant respectively;



11. in holding that there was no agreement for sale in respect of the suit property between the Appellant and the 2nd respondent;
12. in its failure to appreciate the legality and or legal implication of a Joint Venture Agreement in the property development industry;
13. in its failure to consider the fact that the suit property had been developed;
14. in issuing orders which are ambiguous and or incapable of execution;
15. in issuing orders which were not prayed for;
16. in allowing the 1st respondent to amend his plaint long after the parties had closed their respective cases and filed their respective written submissions;
17. in issuing a partial judgment;
18. in holding that the suit property did not constitute matrimonial property and that it was not owned by both the 1st respondent and Lucy Oyolla Awange;
19. in considering irrelevant and extraneous facts and in his failure to take into consideration relevant facts.

Reasons wherefore the Appellants pray that:

- a. That the appeal be allowed;
 - b. That the judgment and decree of the Court dated 6th May 2024 issued in Environment and Land Court Case Misc. E035 of 2022 Milimani – John Kenneth Ajima Oyala V Peres Anyango Awange, Red Rose Realtors Limited and Gold Green Residence Limited, be set aside.
6. The central claim was instituted by John Kenneth Ajima Oyolla, the 1st respondent, through a Plaint dated the 3rd of March 2022, subsequently amended on the 8th of April 2024, wherein he sought declaratory reliefs, a declaration of trust, and apportionment of ownership in the suit property. He alleged that although the suit property was registered in the name of the 1st appellant, Peres Anyango Awange, his mother-in-law, he held a substantial beneficial interest therein, arising from financial and non-financial contributions made towards its acquisition and continued maintenance. In support of his pleadings, the 1st respondent filed a Witness Statement and Bundle of Documents dated the 3rd of March 2022 and 3rd of February 2022 respectively as per the Record of Appeal.
 7. In the said Witness Statement, the 1st respondent stated that he had occupied the property continuously for over a decade alongside his wife, the 1st appellant's daughter, and had expended personal resources in constructing, furnishing, and maintaining the home. He further averred that he had entered into a family-based oral understanding with the 1st appellant that his contribution would be recognized, and that they would hold the land jointly, with his share amounting to approximately 72.78%. The basis of this percentage was linked to his computation of the value of his contributions over time.
 8. The appellants filed a Defence denying the existence of any trust, express or implied. The 1st appellant asserted that she had lawfully acquired the property in 2004 from the Telposta Pension Scheme, and that the 1st respondent's presence on the land was merely permissive. She admitted to having received monthly rent from him during the period of occupation but maintained that this was consistent



- with a licence arrangement based on familial relations rather than any form of intention towards joint ownership. The 1st appellant annexed copies of her title documents and correspondence with the Pension Scheme to support her defence.
9. The 2nd respondent, Gold Green Light Residence Limited filed a Witness Statement dated the 21st February 2023 explaining that it had entered into a Joint Venture Agreement dated the 12th of June 2020 with the 2nd appellant, for the development of a twelve-storey residential apartment block on the suit land. The agreement, approvals, and architectural plans were placed on record. The 2nd respondent averred that the 1st respondent was never party to the joint venture and had not raised any claim to the land or the project until the construction was substantially underway.
 10. The 1st respondent testified orally during trial and adopted his witness statement. He reiterated the contents of his witness statement and explained that while he had paid rent to the 1st appellant for a period of 10 years these payments were not as consideration for tenancy. He produced various documents to urge his position that he had contributed to the purchase price. He testified that he had made structural additions and incurred recurrent expenses associated with the occupation of the property. He also stated that he spent the sum of Kshs.1,000,000.00 to carry out “necessary renovations and repairs”.
 11. The appellants’ case revolved around the evidence of the 1st appellant.
She also stated that she was a Director of the 2nd appellant. She filed, relied on and adopted her Witness Statement accompanied by her List of Documents with the mentioned documents.
 12. The 2nd respondent similarly presented evidence through their witness Shaban Yilmatzurk and relied on their Witness Statement and List of Documents. He gave evidence on the commercial relationship and the desired outcome of the joint venture entered into by the parties. He also stated that the development is 80% complete.
 13. In support of his findings, the ELC Judge relied on the authority of *Twalib Hatayan & Another v Said Saggat Ahmed Al-Heidy & 5 Others* [2015] eKLR, in which this Court held that constructive trusts may arise where one party has contributed to the acquisition or improvement of property registered in another’s name, in reliance on a common intention that the contributor would hold a beneficial interest therein. The trial court applied this principle and held that a trust could be inferred from the conduct and relationship of the parties, even in the absence of written documentation. The learned judge held that the consistent occupation, family relationship, and the absence of contradiction by the 1st appellant were sufficient to establish a constructive trust on a balance of probabilities.
 14. While acknowledging the existence of the 12-storey apartment block constructed by the 2nd respondent pursuant to the Joint Venture Agreement, the trial court declined to make any pronouncement on its legal status. The court noted that the issue of the development had not been sufficiently pleaded for determination and stated that it had confined its judgment strictly to the ownership of the underlying land.
 15. Ultimately, the ELC held that the 1st respondent was entitled to a 70% beneficial interest in the suit property and that the 1st appellant and her daughter Lucy Oyolla Awange jointly retained 30%. The court issued an order directing the Chief Land Registrar to rectify the register accordingly. The ELC awarded costs against the appellants. Specifically, the court made the following orders:
 - a. A declaration be and is hereby made that the 1st defendant held the suit property namely L.R. No. 209/14990/16 registered as I.R Number 90324 on



trust for herself (1st defendant) Lucy Oyola Awange and the Plaintiff herein respectively.

- b. A declaration be and is hereby made that the Plaintiff's share in respect of the suit property known as L.R. No. 209/14990/16 registered as I.R Number 90324 is 70% thereof.
- c. A declaration be and is hereby made that all the transaction that were undertaken by and on behalf of the 1st defendant inter-alia the transfer of the suit property to the 2nd defendant and the subsequent transfer of the suit property to the 3rd defendant, were illegal, unlawful and invalid.
- d. Consequently, the entries affecting and impacting upon the suit property and in particular the entries relating to the suit property in favour of the 2nd defendant and thereafter in favour of the 3rd defendant, be and are hereby revoked, cancelled and nullified.
- e. The 3rd defendant be and is hereby ordered and directed to surrender the Certificate of Title (Lease) to the Chief Land Registrar for cancellation within 60 days from the date hereof.
- f. The transfer and registration of the suit property in favour of the 1st defendant is similarly revoked and in lieu thereof a certificate of title (Lease) shall issue reflecting that the suit property is owned by the 1st defendant, Lucy Awange and the Plaintiff in the ratio of 30% to 70% respectively.
- g. For the avoidance of doubt the 1st defendant and Lucy Awange shall be entitled to 30%, whereas the Plaintiff (John Kenneth Ajima Oyola) shall be entitled to 70%.
- h. There be and is hereby issued an order of permanent injunction to restrain the defendants either by themselves, agents, servants and/or employees from dealing with and/or interfering with the Plaintiff's 70% share/stake in the suit property in any manner whatsoever.
- i. For avoidance of doubt the Plaintiff's share and/or stake in the suit property relates to the suit property in its current status, considering the meaning and tenor of what constitute land (see Article 260 of *the Constitution* 2010).
- j. Costs to the Plaintiff as against the defendant jointly and severally.

16. At the hearing of the appeal, the parties were represented by counsel.

The appellants were represented by Senior Counsel, Mr. E.K. Mutua. Learned counsel Mr. Ouma represented the 1st respondent while learned counsel Mr. Andere appeared for the 2nd respondent. All the counsel had filed written submissions.

17. Mr. Mutua submitted that the ELC fundamentally erred by disregarding documented evidence demonstrating lawful acquisition of the suit property. That the 1st appellant's acquisition followed retirement from Teleposta Pension Scheme, as evidenced by the retirement letter dated 6th February 2003. Counsel asserted that the purchase price of Kshs.4,340,000/- reflected her employment history and was acknowledged in both the original and amended plaint. Counsel asserted that this admission should have foreclosed any claims of trust. That the ELC erroneously prioritized the 1st respondent's



uncorroborated claim of a trust over registered title and lawful commercial transfer to the 2nd appellant, executed under a valid Joint Venture Agreement.

18. Counsel asserted that the trial court inverted the burden of proof, contravening Sections 107–109 of the *Evidence Act*. Citing *Twalib Hatayan Twalib Hatayan v. Said Sagar Ahmed Al-Heidy & Others* [2015] eKLR and *Ben Duke Omwenga v. Abigael Bonareri Omwenga & another* [2021] eKLR, counsel submitted that the 1st respondent bore the duty to prove the existence of a trust, resulting or constructive. Counsel emphasized that these authorities reiterate that resulting trusts require proof of a contemporaneous common intention, and constructive trusts necessitate proof of wrongdoing or unconscionable conduct, as reiterated by the Supreme Court in *Shah & 7 others v. Mombasa Bricks & Tiles Ltd* [2023] KESC 106.

Counsel asserted that the evidence failed to meet any of these legal thresholds.

19. Counsel submitted that the ELC erroneously relied on unverified oral claims despite two glaring evidentiary deficiencies. First, the trial record lacked Cheque No. 18028, the only one allegedly supporting the 1st respondent's claim to contribution of Kshs.940,000/, whereas PW2 produced cheques totaling Kshs.4,340,000/- payable by the 1st appellant. Second, the 1st respondent delayed asserting any claim from 2004 until 2021, including six years after his separation from the 1st appellant's daughter. Citing *Archer & another v. Archer & 2 others* (Civil Appeal 39 of 2020) [2023] KECA 298 (KLR), counsel submitted that resulting trusts cannot arise from facts occurring after acquisition.
20. Counsel asserted that the trial court exceeded its jurisdiction by awarding reliefs not prayed for. These include the 70:30 apportionment of the land and the allocation of a share to Lucy Awange, who was not a party to the suit and the relief was granted in vacuo. Relying on *Lamba v. National Social Security Fund & another* (Civil Appeal E168 OF 2021) [2023] KECA 124 (KLR), counsel submitted that the ELC had no legal basis to issue such discretionary orders without a corresponding prayer in the pleadings, thereby denying the appellants an opportunity to address or rebut those claims.
21. Counsel further asserted that the impugned judgment is fatally defective for failing to resolve the entire dispute. That while apportioning the land, it ignored the twelve-storey apartment block constructed by the 2nd respondent pursuant to the Joint Venture Agreement. This, counsel asserted, offends the principles in *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others* [2016] eKLR and *De Leu v. Muteshi* [1995-1998] 1 EA 25, which require that judgments conclusively determine all issues, be free from ambiguity, and extinguish litigation.
22. In conclusion counsel submitted that the ELC improperly allowed an amendment to the amended plaint after close of evidence and final submissions, per the ruling dated 4th April 2024. Counsel contended that this prejudiced their defence and amounted to an abuse of court process. Relying on *Angelina Chepng'etich Kimaiti v. Tom Mong'are Nyariki & another* [2021] eKLR, counsel submitted that post-evidence amendments are impermissible if they alter the substratum of a case, as happened here.
23. Mr. Andere submitted that the 2nd respondent fully supports the appeal and aligns itself with the appellants' submissions. Counsel asserted that the 2nd respondent is a bona fide purchaser for value without notice of any prior equitable claims by the 1st respondent. Referring to the criteria in *Lawrence Mukiri v AG & 4 Others* [2013] eKLR and *Katende v Haridar & Co Ltd* [2008] 2 EA 173, counsel asserted that the 2nd respondent acquired the suit property through a valid Joint Venture Agreement dated the 12th June 2020, having conducted due diligence and without knowledge of the 1st respondent's alleged interest.



24. Counsel further submitted that the ELC erred in failing to appreciate the validity and prevalence of Joint Venture Agreements in property development. Counsel submitted that the ELC erroneously treated the agreement as incapable of transferring proprietary interest, thereby disregarding its investment and construction of a twelve-storey building now 80% complete. Counsel emphasized that the impugned orders of the ELC create uncertainty for third-party investments and undermine commercial certainty.
25. On the creation of a constructive trust, counsel submitted that no sufficient legal or factual basis was established by the 1st respondent to justify such imposition. Citing *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* [2015] eKLR, counsel asserted that a constructive trust must be grounded in wrongdoing or circumstances where the legal owner is unjustly enriched. In this case, counsel asserted, the 1st appellant acquired the land lawfully, and the 1st respondent even paid rent, which contradicts any notion of joint ownership.
26. Counsel assailed the impugned decision for shifting the burden of proof contrary to Section 107 of the *Evidence Act*. Counsel asserted that the 1st respondent's case lacked corroboration, was contradicted by his own testimony (including admissions about paying rent), and was unsupported by documents that created a direct relationship and common intention. Counsel described the ELC's reliance on mere oral testimony, in the absence of proof of joint venture or financial contribution, as a legal misdirection.
27. With respect to the enforceability of the decree, counsel submitted that the impugned judgment is fatally defective for failure to account for the completed structure. Counsel asserted that while the ELC apportioned the land, it excluded a finding on the fate of the building constructed by the 2nd respondent. Counsel asserted that this created a legal absurdity and rendered the decree incapable of execution. Counsel urged this Court to follow the principle that judgments must be precise, enforceable, and grounded in the prayers sought, as restated in *Kenya Airports Authority v Mitu-Bell Welfare Society & Another* [2021] KECA.
28. Conclusively, counsel submitted that the 2nd respondent is an innocent party caught in a familial dispute and that equity must shield good faith third-party purchasers from unregistered claims. Counsel urged this Court to overturn the decree made by the ELC, which in his view sacrifices certainty, commercial justice, and legal formalism in favour of sentiment. Counsel seeks not only reversal of the decree but also judicial pronouncement confirming the 2nd respondent's protected status as a bona fide purchaser for value without notice.
29. Mr. Ouma opposed the appeal in its entirety, arguing that the trial court correctly found that 1st respondent had a beneficial interest in the suit property arising from long-term occupation, substantial contributions to improvements, and an informal yet equitable arrangement with the 1st appellant. Counsel asserted that the ELC properly applied the principle that equity will not suffer a wrong without a remedy. Relying on *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 Others* [2015] eKLR, counsel submitted that legal title may be subjected to equitable interests in circumstances where occupation, contribution, or mutual understanding exist.
30. Counsel asserted that the 1st respondent resided on the suit property for over ten years and made improvements to it with the understanding that he was contributing to a shared investment. Counsel further asserted that the ELC was entitled to draw equitable inferences from the conduct of the parties. In support, counsel invoked the principle enunciated in *Lawrence Mukiri v AG & 4 Others* [2013] eKLR, which holds that registration of title does not defeat an equitable interest arising by way of constructive or resulting trust.



31. On the matter of evidentiary burden, counsel maintained that once the 1st respondent adduced evidence of occupation and contribution, the evidentiary burden shifted to the appellants to rebut those claims. Citing Sections 109 and 112 of the *Evidence Act* and *Mutsonga v Nyati* [1984] KLR 425, counsel submitted that the appellants, having control over documents and knowledge of transactions, bore the burden of disproving the trust. Counsel asserted that the trial court correctly invoked these provisions to find that the appellants failed to discharge this burden.
32. Counsel found favour with the ELC's award of equitable reliefs beyond what was specifically pleaded. Counsel submitted that the pleadings and evidence on record supported such orders, and that the impugned judgment merely clarified the extent of his beneficial entitlement. Counsel relied on this Court's decision in *Odd Jobs v Mubia* [1970] EA 476, which allows courts to grant relief on unpleaded issues if such issues are fully ventilated at trial and no prejudice is occasioned.
33. As regards the 2nd respondent's claim to be a bona fide purchaser, counsel took issue with this position, arguing that the 2nd respondent was aware of the 1st respondent's occupation of the suit property and ought to have made further inquiries. Counsel submitted that constructive notice may be imputed where possession is open and visible, as held in *Katende v Haridar & Co. Ltd* [2008] 2 EA 173. Counsel further submitted that the Joint Venture Agreement did not override the 1st respondent's prior equitable interest and therefore could not transfer rights that the appellants did not have free of encumbrance.
34. In conclusion, counsel urged the Court to uphold the judgment of the ELC as a proper invocation of equitable jurisdiction. Counsel submitted that the judgment strikes a fair balance between legal title and equitable contribution, consistent with the principle that equity will not allow statutes to be used as an instrument of fraud. Counsel implored this Court to preserve the reliefs granted by the ELC in order to avoid unjust enrichment and to give effect to informal yet morally binding family arrangements.

Determination

35. We have considered the record, the submissions by the parties, the authorities cited and the law. This being a first appeal this Court's duty is well established in the case of *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 where it was stated:

“An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif –vs- Ali Mohamed Sholan* (1955)22 EACA 270”

36. We discern the following key issues for determination:
 - a. Whether the 1st respondent established a constructive or resulting trust;
 - b. Whether the ELC erred in granting reliefs not pleaded or supported by evidence;



- c. Whether the procedural flaws raised by the Appellants vitiate the decision;
 - d. Whether the 2nd respondent is a bona fide purchaser for value;
 - e. Whether the judgment is capable of execution;
 - f. Whether the appeal is merited;
 - g. Who should bear the costs of the appeal?
37. The 1st respondent's claim rested on the proposition that he contributed Kshs.3,159,000.00 towards the purchase price of the suit property and that such contribution was evidence of a common intention to co-own the suit property. However, the suit property was offered to the 1st appellant by her employer's pension scheme in recognition of 32 years of service, at a subsidized price of Kshs.4,340,000.00, against a market value of approximately Kshs.26,000,000.00. The preferential price reflected a retirement benefit rather than an open-market transaction. The latter value is discernible from the ad valorem value accepted for purposes of stamp duty. This is common ground.
38. This Court takes judicial notice that the ad valorem value given for purposes of stamp duty is the approximate market value of a property at the time of transaction. We therefore accept the market value of the property to have been Kshs.26,000,000.00 at the time of purchase for a discounted price. The question that must follow is why the property would be sold to her at a discount of approximately 83%? We accept the 1st appellant's claim that the discount was not gratuitous but in consideration of her long service.
39. The 1st respondent was neither a pensioner nor a nominee. The contributions alleged, while monetary, were neither evidenced by supporting documents such as bank statements or payment instructions directly relating to the acquisition of the property through the 1st appellant who was the beneficiary and who now faces the sword of a claim of constructive trust she says she was not aware was being created.
40. The impugned judgment found that the 1st appellant and one Lucy Oyallo Awange, who was not a party to the suit, had familial relations with the 1st respondent and the 1st appellant and awarded her a stake in the suit property. This finding seems to have been arrived at because the payments exhibited were given to the 1st appellant by the said Lucy Oyallo Awange who was the 1st respondent's wife. More importantly, the remittance details and chain of transmission did not show a common intention to hold the property in trust. The simple fact that the 1st respondent and the 1st appellant's daughter were in matrimony cannot of itself be deemed as a direct intention expressing the payments as being consideration in furtherance of a common intention to own the property jointly.
41. During her cross examination by the 1st respondent's advocate in the trial court, the 1st appellant stated that she got the payments from her daughter, Lucy Oyallo Awange who did not inform her where she got the money. This settles the issue of lack of a common intention. There was no evidence by the 1st respondent that the money was given to his wife for purposes of joint ownership of the property that was being acquired by the 1st appellant. This link was crucial in establishing a constructive trust. None can be created without the knowledge of the 1st appellant. It cannot be said that the 1st appellant had a duty to show that she did not know the money came from the 1st respondent. It was incumbent on the 1st respondent to prove that the common intention was created by the 1st appellant's knowledge regarding the payments as creating a common intention.
42. The burden to illustrate a common intention never shifted and this deals a fatal blow to his claim that there was a common intention with the 1st appellant to create a trust. The question of where the money



came from and its purpose is hazy and can only be answered between the 1st respondent and the said Lucy Oyallo Awange. We note that the 1st respondent elected not to create that link in pleadings and evidence and it would be manifestly unfair to make a finding by assumptions that the money came from the 1st respondent who was her husband for purposes of joint acquisition in the absence of evidence showing a common intention. Lucy Oyallo Awange's participation was crucial to the 1st respondent's case and her exclusion from the pleadings by the 1st respondent in the trial court was not helpful. Her position on the hotly contested matter on which the question of a constructive trust turns may have been useful to the court in arriving at its decision. We also note that the suit was only brought after the 1st respondent's estrangement with the said Lucy Oyallo Awange.

43. A constructive trust based on common intention requires express discussions between the parties, however imprecise or imperfectly remembered; in the absence of such express evidence, a court may infer intention, but only with great caution and from the entire course of conduct between the parties. Mere contributions, such as domestic work or residing in the home, are insufficient on their own to establish such a trust (especially against a third party who claimed she was unaware about the money trail; rather, it is only direct financial contributions to the purchase price or mortgage, coupled with a mutual understanding, that may justify the presumption of a constructive trust. There is nowhere in the record where such discussions occur to create mutuality. We note that the 1st respondent and the 1st appellant's daughter are no longer living in the suit property.
44. It is trite that a constructive trust arises only where a common intention is shared between the parties that beneficial ownership shall be divided in a particular way, and that the claimant acts to his detriment in reliance on that intention. In *Lloyds Bank v Rosset* [1991] 1 AC 107, (132H-133B), Lord Bridge stated:

“In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an
45. Courts must exercise caution when addressing claims of trust within intimate relationships and familial arrangements, while such relationships may involve shared living arrangements or mutual support, this does not, in itself, give rise to enforceable property rights. The court must be satisfied that there was a clear intention to create legal obligations capable of enforcement in rem. Reliance on third party familial association is insufficient to ground a constructive or resulting trust. The courts must resist the temptation to substitute remote transactions for contract or familial arrangements (in this case between the 1st respondent and the said Lucy Awange Oyolla) for equitable doctrine, lest we undermine the sanctity of formal title and the protections it entails.
46. In the instant case, the alleged banker's cheques were made payable to a law firm and never directly to the 1st appellant who is the only person capable of establishing a constructive trust in favour of the 1st respondent. In the absence of an accompanying narrative and evidence tying the transactions to a binding proprietary intention, we find that there was no constructive trust created. How can one be created when you cannot tie the 1st appellant to the “common intention”? No correspondence, joint declarations, or legal instruments were tendered to establish mutuality between the 1st appellant and the 1st respondent.



47. In *N W K v J K M & another* [2013] eKLR, the Court citing Halsbury's Laws of England, 5th Edition Vol. 72 para 280, stated as follows:-

“Subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean a shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she had acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel”. 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 installment, will readily justify the inference necessary to the creation of a constructive trust.”

[Emphasis supplied].

48. Without evidence of this kind, the claim to a constructive trust collapses. The burden of proof lay with the 1st respondent to establish the trust. Yet the ELC shifted the evidentiary burden to the appellants.
49. Procedurally, the plaint was amended post-trial, after the parties had closed their cases, to introduce the words “and the 3rd defendant”. The 3rd defendant (now 2nd respondent), had participated in the trial and prepared pleadings without the benefit of knowing that the prayer (a consequential one since it sought an order that “A declaration that the 1st, 2nd and 3rd defendants or either of them hold certificate of title for the land known as L.R. Number 209/14990/16 in trust of the Plaintiff and the Plaintiff holds shares and has interest in the property proportionate to 72.78%” [sic]).



50. This is not a trivial amendment. It is one that now introduces the 3rd defendant to the dispute on creation of the alleged trust and it is the first time since 2022 that it is being called upon to formally deal with the question. This question, as demonstrated in the impugned judgment, had the potential of impugning its title if upheld, could not be defended by the said 3rd defendant as it had closed its case. We note that this amendment to cure the deficiency of the prayer could not be introduced at the point that the matter was being reserved for judgment. It was prejudicial to the 3rd defendant who was now being confronted with a consequential prayer in the amended plaint after it had tendered its defence, evidence, submissions and the matter was pending judgment.
51. This Court in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR stated thus:
- “The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:
- “that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”
52. Likewise, the legal position that an amendment which is intended to alter and/or change the cause of action ought not to be allowed was also highlighted and amplified by this Court in the case of *Catherine Koriko & 3 Others vs Evaline Rosa* [2020] eKLR where it was stated and held thus:
- “Comparatively, in the South African case of *Robinson -v- Randfontein Estates Gold Mining Company Limited*, 1925 AD 173 Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere with the trial court’s refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case”.
53. As an appellate court, we must state that though the amendment may seem like it only introduced the conjunction “and” as it joined the 3rd defendant in a prayer about creation of the trust and the proposed share, this is a serious prayer that the 3rd defendant was now being asked to defend at this late stage. That cannot be countenanced as technicality since it goes to the heart of the dispute. Even though amendments are allowable in most instances, the timing and stage of trial reached and the subsequent proceedings vitiate the decision, at the very least, against the 3rd defendant. Any relief claimed and granted against the 3rd defendant would be the fruit of a poisoned tree that must be set aside in the interest of fairness and orderly conduct of proceedings.
54. Closely tied to the above is the court’s unwarranted exercise of discretion in granting relief that was neither pleaded nor anchored in the 1st respondent’s prayers. The trial court imposed a 30% apportionment of the suit property, an outcome not sought in the initial Plaint, not introduced by amendment with leave, and unsupported by contractual or empirical framework. This Court must pose the question, why 70% and not the 72.78% pleaded if it had been proved? What is the formula for the apportionment and reduction of the percentage which had been pleaded with exactitude? We have struggled to find justification for the apportionment and the departure from what was pleaded even if it had been proved. Matters are compounded by the finding in favour of a non-party to the proceedings. With respect, this exceeded the limits of judicial authority and ran afoul of the principle



that courts must adjudicate only those claims brought before them. Matters in a suit only arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The need for pleadings to be as precise as possible cannot be gainsaid.

55. In *M N M vs. D N M K & 13 Others*, [2017] eKLR, it was held that:-

“Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example, in *Chalicha FCS Ltd v. Odhiambo & 9 Others* [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in *Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed*, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea* [1970] EA 476). However, that was clearly not the case in this appeal.”

56. The ELC, in conferring a percentage outside the boundaries of the pleadings without a lawful or in this case mathematical explanation for the departure was improper. The new percentages do not have any factual underpinning from the pleadings or evidence. It is a recalculation that is all the more puzzling given that the ELC then leaves all the other issues about what to do with the development and the new valuation undisturbed. This blurred the distinction between equity and adjudication, and undermined the certainty that pleadings are designed to provide. The remedy of apportioning land at a ratio of 70:30 in favour of the 1st respondent and introducing a non-party to the reliefs lacked legal or factual foundation. No valuation, contract, or joint plan was offered to support such a division especially since it is common ground that the suit property has now been developed substantially.

57. There was also no justification offered for the departure and creation of a new split formula by the ELC. The said Lucy Oyolla Awange did not participate in the suit. It is unclear how the ELC arrived at a percentage of 15% for her completely recalculating the percentages as pleaded by the 1st respondent. Allowing the 1st respondent to reap from a Kshs.26,000,000.00 property that now holds a substantial development, by asserting a Kshs.3,159,000.00 contribution without proof of intention for shared ownership, would result in unjust enrichment.

58. In *Restatement (Third) of Restitution and Unjust Enrichment 1* (2011), the American Law Institute states:

“A person who confers an unrequested benefit voluntarily will usually not be able to recover in restitution; and the law will not impose liability on an innocent recipient to a forced exchange, especially in the United States where we still prize personal autonomy and do not appreciate undue interference with our freedom to make choices. The enrichment must be



"unjustified" under the law, not simply "unjust" because you as a judge, scholar, or lawyer might think so. A corollary principle applies that "[a] person is not permitted to profit by his own wrong." Whether the defendant's conduct is "wrongful" will ordinarily turn on principles outside the scope of the Restatement. The Restatement also makes clear that restitution may be legal or equitable or both. A claimant entitled to a remedy for unjust enrichment need not demonstrate the inadequacy of available remedies at law. The term "restitution" connotes both liabilities and remedies for unjust enrichment. The term does not connote only a remedy. Throughout the Restatement, the Reporter includes comments that not only explain the blackletter but also provide helpful guidance. For example, with regard to torts, the Restatement comments that "[r]estitution is the law of nonconsensual and nonbargained benefits in the same way that torts is the law of nonconsensual and nonlicensed harms;" [Emphasis supplied].

59. In light of the foregoing analysis, it is the considered view of this Court that ELC erred by finding that the 1st respondent had acquired a proprietary interest in the suit property by way of a constructive trust. The findings lacked a foundation in both pleading and evidence and fell short of the established legal standards for imposing equitable proprietary obligations. Equity will not invent a remedy merely because the law offers none. Where the parties have not acted on a clear understanding, the court cannot step in to fill the gap with its own.
60. With respect, the ELC failed to apply the threshold principles governing constructive trusts as developed in both Kenyan jurisprudence and persuasive foreign authorities. It presumed common intention in the absence of express agreement, inferred co-ownership from unclear monetary contributions convoluted in familial relationships and tenancy/licence arrangements by the parties, and overlooked the substantial discount offered to the 1st appellant as a retirement benefit, a benefit to which the 1st respondent was neither entitled nor nominated. The ELC also improperly shifted the evidential burden and introduced substantive changes to the suit post-trial without legal basis or procedural justification. It is prudent to point out at this point that the tenancy stretching over a decade and the subsequent long period between the transfer to the 1st appellant, subsequent dealings and construction of the apartments and the time of filing suit also negates the common intention to own the property.
61. The error was compounded by the award of a 70% beneficial interest in the property, a figure not pleaded or substantiated by valuation, correspondence, or agreement. In doing so, the ELC granted the 1st respondent a windfall benefit without accounting for the full context of acquisition, including the highly subsidized purchase and the long-standing employment of the appellant. The ELC did not consider that the alleged Kshs.3,159,000.00 contribution represented not a third of the true market value but merely a portion of a discounted transaction not open to the public. There is no evidence that this money was given by the 1st respondent to the 1st appellant directly creating a common intention. The 1st appellant was the person the 1st respondent needed to establish mutuality with. This could not be accomplished indirectly through a third party, against whom no claim for a constructive trust could lie, since she was neither the beneficial owner nor the subsequent registered proprietor. We have stated above that this question could only have been settled by the said Lucy Oyolla Awange since it is apparent that the payments to the 1st appellant came from her and not the 1st respondent even though the source of the funds may very likely have been the 1st respondent through a convoluted web of payments and familial arrangements. We reiterate that there is no mutuality needed to create a trust created by the payments to support the 1st respondent's claim for a constructive trust against the 1st appellant.



62. Equity must be grounded in intention, not retrospective fairness. The court cannot impose trusts based on emotional narratives, moral sympathy, or perceived unfairness between former partners. To do so in the absence of mutual assent or an express fiduciary undertaking would be to blur the distinction between equitable obligation and personal generosity. The risk of injustice would shift from the plaintiff to the titleholder, and undermine certainty of title, especially in a system that protects registered interests under the *Land Registration Act*.
63. At the same time, the Court recognizes that where a party contributes identifiable sums of money in the mistaken or assumed belief that they would acquire an interest in property, the law may intervene through the doctrine of restitution, not to confer title, but to prevent unjust enrichment. However, such restitution must be limited to the amount contributed and must not exceed what equity demands. Moreover, this case is no longer only about two parties. There are third parties who hold proprietary interests in the suit property and developments thereon. The ELC did not issue any findings as to fraud, misrepresentation, or breach of trust affecting the third-party purchaser. In the absence of such findings, and given the presumption of validity attached to a registered title, this Court cannot uphold an order that implicitly taints such a title by requiring apportionment or reallocation of the land.
64. However, having found that the root title ought not to be cancelled as ordered by the trial court, the questions about the proprietary rights flowing thereafter becomes moot.
65. We have carefully pondered about the appropriate reliefs in the circumstance and found guidance in Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A:
- “The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
66. Similarly, In *Peters vs. Sunday Post Limited* [1958] EA 424, the Court of Appeal for Eastern Africa, stated that:
- “Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”
67. Rule 33 of this Court’s Rules sets out the powers of this court. It provides:
- “On any appeal from a decision of a superior court, the Court shall have power, so far as its jurisdiction permits
- a. to confirm, reverse or vary the decision of the superior court;
 - b. to remit the proceedings to the superior court with such directions as may be appropriate; or



- c. to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs. [Emphasis supplied].

Disposition And Orders

68. Final Determination on Ownership

- i. Upon re-evaluation of the evidence and the applicable law, we find that the 1st respondent did not establish the existence of a constructive trust or a resulting trust in respect of L.R. No. 209/14990/16 (I.R. No. 90324) (the suit property).
- ii. The apportionment of ownership in the ratio of 70:30 and all consequential rectification orders lacked legal and evidentiary foundation and are hereby set aside.
- iii. For the avoidance of doubt, this Court has conclusively determined the question of ownership of the suit property. The registered title remains vested in the appellant. The 1st respondent has no proprietary or beneficial interest in the land or in the twelve-storey development erected thereon.
- iv. The issue of ownership is final and shall not be reopened.

69. Limited Remittal

- i. The only residual issue concerns the 1st respondent's allegation that he advanced certain monetary sums to the appellant toward acquisition of the suit property.
- ii. The Environment and Land Court (ELC) did not undertake a restitutionary analysis, having determined the matter exclusively on trust principles. The record before this Court does not provide a sufficiently clear factual foundation to compute the net amount, if any, recoverable by the 1st respondent.
- iii. Determination of whether identifiable monetary sums were advanced, whether such sums were strictly proved, the legal character of those payments, and whether restitution is warranted in law requires primary findings of fact. That exercise properly falls within the jurisdiction of the ELC.
- iv. Accordingly, the matter is remitted to the ELC before a Judge other than Oguttu Mboya, J. solely for the purpose of determining whether the 1st respondent strictly proved that he advanced identifiable monetary sums to the appellant toward acquisition of the suit property and, if so, the net amount recoverable in restitution, if any, together with appropriate interest.
- v. For clarity and avoidance of doubt, the ELC shall not revisit or determine:
 - a. ownership of the suit property;
 - b. any proprietary or beneficial entitlement in the land;
 - c. any percentage entitlement in the land or the development;
 - d. any claim to the current market value of the land or the twelve- storey development;
 - e. the validity of the title or development rights.
- i. The inquiry on remittal is confined strictly to a monetary claim for reimbursement of strictly proved sums, if any.



70. Orders

In the result:

- i. The appeal is allowed;
- ii. The declarations of trust and all rectification orders are set aside;
- iii. Ownership of L.R. No. 209/14990/16 remains vested in the appellant;
- iv. The matter is remitted to the ELC before a Judge other than **Oguttu Mboya, J.** solely for determination of the monetary issue as set out above;
- v. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2026.

P. O. KIAGE

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

