

THE REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT AT MACHAKOS
ELC APPEAL NO. E025 OF 2025

FRANK NDONYE KILUNGU:.....1ST APPELLANT

JAMES MAKAU KILUNGU:.....2ND APPELLANT

VERSUS

HENRY KILUNGU KIVILA:.....1ST RESPONDENT

COSMAS MULWA KILUNGU:.....2ND RESPONDENT

KONZA RANCHING & CO. SOCIETY:.....3RD RESPONDENT

JAPHETH MUTUA MUSANGI:.....4TH RESPONDENT

JUDGEMENT

The Appellants being dissatisfied and aggrieved by the Judgment delivered by the Co-operative Tribunal Hon. J. Mwatsama (Mr.) on the 3rd day of October, 2024 at the Co-operative Tribunal at Nairobi in CTC No. 264 of 2014 appeal on grounds, namely:

1. That the Honourable Co-operative Tribunal erred in fact and in law by dismissing the Appellants' Claim despite the existence of sufficient evidence that had been adduced.

2. That the Honourable Co-operative Tribunal erred in fact and in law by failing to properly analyze and appreciate the material evidence adduced by the Appellants, thereby reaching an erroneous determination.
3. That the Honourable Co-operative Tribunal erred in fact and in law and in law by erroneously holding that the balance of probabilities was in favour of the Respondents contrary to the weight of evidence presented by the Appellants.
4. That the Honourable Co-operative Tribunal erred in fact and in law in failing to evaluate the evidence in its totality and falling to take into consideration submissions and authorities submitted by the Appellant thereby arriving at a wrong decision.
5. That the Honourable Co-operative Tribunal erred in fact and in law by failing to consider and give due regard to the fact that the Deceased shareholder, Naum Munyiva, held the shares in trust for the benefit of all family members including the Appellants.
6. That the Honourable Co-operative Tribunal erred in fact and in law by failing to recognize and address the illegality perpetrated by the 1st and 2nd Respondents who intermeddled with the property of the Deceased shareholder, Naum Munyiva, by disposing it off to the 4th Respondent without adhering to the provisions of the Law of Succession.

The Appellants pray;

- a) That the Appeal herein be allowed.
- b) That the Judgment entered on 3rd October 2024 be set aside and judgment be entered in favour of the Appellants as pleaded in the Statement of Claim.
- c) That in the alternative to prayer (b) above, the matter be remitted back to the Court below for retrial.
- d) That the costs for the appeal be awarded to the Appellants.
- e) That such other Orders as the Honourable Court may deem fit and just to grant.

This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. As was further stated in the case of *Jabane vs. Olenja* [1986] KLR 661 664 the court held that;

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus

Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278
and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”

The Claimants case is that sometime in 1964, the Claimants' and the 1st and 2nd Respondents' grandmother, Monica Katee Mumbo (Deceased) purchased shares in Konza Ranching and Co-operative Society and registered them under the name of Joseph Mwanza Kilungu, the Claimants' elder brother. Additional contributions were made in subsequent years and after disputes with the said Joseph Mwanza Kilungu it was resolved by the family on 30th October 1979 that Joseph be substituted with the grandmother, Monica Katee Mumba (Deceased) again.

After the grandmother's demise, another meeting held on 20th August 1990, substituted her with Naum Munyiva Kilungu (Deceased), who was the Claimants' stepmother. The shares were to be divided according to individual contributions, with specific amounts contributed by each party outlined. In 2011, the Claimants further purchased six additional shares in the society at Kenya Shillings Three Thousand (Kshs. 3,000/-). However, when the plot was issued in 2012, it was done to the person whose name appeared on the register, Naum Munyiva Kilungu, who proceeded to collect the allotment letter. The Claimant took possession of the plot in 2012 until 23rd July 2014, when Naum Munyiva (Deceased), together with the 1st and 2nd Respondents, claimed to have sold the property and threatened to demolish

the Claimant's house. They proceeded to fence off part of the property and began constructing permanent structures. That the suit land was held in trust for the beneficiaries including the Appellants. That Naum Munyiva Kilungu was a trustee and was not mandated to sell and/or transfer the share she held in trust to a beneficiary who is not a beneficiary.

The Respondents submit that Konza was started in 1964 and the Claimants brought up their claim in 2014 after 50 years- this brings to everyone a question - what was the reason to wait 50 years- if not that they (Appellants) waited for their mother to die for they could not do that when she was alive for it is an abuse to the family. The Claimants mother died in 2010. That the Appellants list of documents filed here as evidence were rejected by the Tribunal court for they did not qualify to be agreement documents and the Claimants were advised to produce original document of which they have not done so.

That Konza gave their statements and clarification in this case. In the appellant document page 86 is a statement by the Chairman Konza Mr. Mutangili and page 107 is a statement by the secretary Mr. D Yaitha. That the children of the two mothers are beneficiaries each from their mother's share. That they are not shareholders at all. That the society has 2 equal plots Konza North Block 1/671 for claimant's mother and Konza South block 5/724 for their mother. Konza North

Block 1/671 is already occupied by the 2nd Claimant on behalf of the other siblings; page 124 the statement of the Claimant's Elder brother in the Appellant's document.

In *Twalib Hatayan Twalib Hatayan & Anor vs Said Saggar 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

The 1st Appellant testified that he paid for the shares of the suit land together with other members of the family and held in trust by their step mother Naum Munyiva Kilungu. The allotment letter was in her name for plot No. 505 agricultural 10.8 acres where he resides and plot No. 213 commercial 2 acres. The 1st Appellant moved there in 2012 and in 2014 the 1st and 2nd Respondent came and said it had been sold.

I have peruse the court record and find that indeed the shares were transferred and held in the name of Naum Munyiva Kilungu, The family gave their statements over this matter specifically Page 121 and 122 is the statement of the Claimant's uncle one Johnson Mwakula Nthiwa. Pages 123, 124,125,128 and 129 are the statements of the Appellants blood brothers (same mother) Joshua Maingi Kilungu, Joseph Mwanza Kilungu, Cosmas Mulwa Kilungu and Jackson Kimuyu Kilungu who have all stated that plot No. 505 agricultural 10.8 acres and plot No. 213 commercial 2 acres belong to Naum Munyiva Kilungu. That the Appellants have no claim on the same since their share in member number 557 was hived out

resulting in a parcel known as Machakos/Konza North Block 1/671. I have perused copies of agreements produced in court dated 30th October 1979, 20th August 1990 and 16th July 2011 by the Claimants and find that the same are unsigned and are of no evidential value. I find that the Claimants have failed to prove that the suit land was held in trust for their benefit. Applying the emphasized principles to the case before us, all indications are that the suit land is not held in trust for the Appellants by Naum Munyiva Kilungu. The Appellants have failed to prove their appeal on a balance of probabilities and I find that the Tribunal did no err in their findings.

On the issue of costs, Section 27 of the Civil Procedure Act requires that costs to follow event, but the Court has the discretion to rule otherwise. The Court in Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others (2013) eKLR quoted the case of Levben Products vs Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227M held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the

successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

This Court notes that the Appellants and Respondents are relatives. In a nutshell, the Court finds and holds that the Appeal herein is not merited and is dismissed with no orders as to costs as the parties are relatives.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF
APRIL 2026.**

N.A. MATHEKA

JUDGE