



**JKK v AAA (Environment and Land Appeal E071 of 2022)  
[2024] KEELC 4921 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4921 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E071 OF 2022**

**CK NZILI, J  
JUNE 19, 2024**

**BETWEEN**

**JKK ..... APPELLANT**

**AND**

**AAA ..... RESPONDENT**

*(Being an appeal from the judgment of the magistrate T.M Mwangi  
– SPM dated and delivered on 10.2.2021 in Meru ELC 3 of 2018)*

**JUDGMENT**

1. The appellant, as the plaintiff at the lower court, had sued the respondent as the defendant by a plaint dated 16.1.2018, claiming breach of trust over L.R No. Ntima/Igoki/xxxx bought in 2008, during the subsistence of their marriage as matrimonial home. It was averred that on or about February 2017, the respondent attempted to dispose the land without regard to spousal rights and, despite an existing caution, subdivided the same into L.R No's. Ntima/Igoki/xxxx and xxxx, without involving the appellant, all pointing to a likelihood of disposing of the land in breach of the trust and without regard to the interests of their two minors. The appellant sought a permanent injunction stopping any dealings over the title and or a subdivision and declaratory order that the suit parcels of land are family land that should be jointly registered under their two names in trust for the kid.
2. Through a statement of defense dated 19.2.2018, the respondent denied the appellant's claim, stating that he solely acquired the suit land with the assistance from his elder daughter; hence, there was no intended trust in a come we stay arrangement". Further, the respondent averred that both parties had separated even before the appellant was transferred from his former working station. Additionally, the respondent averred that before he met the appellant, who was a mitumba dealer in 2007, he was previously married in 2001.



3. In the alternative, the respondent averred that he was never married to the appellant, and given her menial career as a second-hand clothes kiosk operator, she had no means to contribute to the projects he was undertaking. He admitted that though their love was a secret, they had two children before they separated in 2015, but he had taken responsibility for the children's needs by investing in many places for the benefit of all his children.
4. Further, the respondent averred that L.R No. Ntima/Igoki/xxxx had been sold, and the proceeds were invested elsewhere; otherwise, the appellant was out to frustrate him, yet their relationship was illegal, matters children should not be brought in land disputes, and her claim should not be entertained in any court. Moreover, the respondent averred that all the developments on L.R No. Ntima/Igoki/xxxx were done through bank loans. Lastly, the respondent averred that L.R No. Ntima/Igoki/xxxx was never ancestral or family, since he acquired the same out of his business and investment endeavors.
5. At the trial, FKK, the appellant, testified as PW 1. She said that she was a business lady and that the respondent was her husband through a customary marriage as indicated in her witness statement dated 16.1.2018. PW 1 said that they started cohabiting as husband and wife in 2007 up to 2015, when they separated. During that time, PW 1 said that they pooled their resources together and bought L.R No. Ntima/Igoki/xxxx, built residential and rental buildings which were registered under the respondent's name as head of the family. PW 1 said that the respondent was working in Nyeri, and they were blessed with issues of marriage in 2019, 2009, and 2012, respectively, and after the respondent was transferred to Nairobi, the distance caused them to separate.
6. PW 1 said that she realized that the respondent was trying to dispose of the land and hence placed a caution in which he removed and subdivided the land without involving her. She feared that the respondent was eventually likely to dispose of the parcels to her detriment and that of the issues of marriage. PW 1 relied on a green card for L.R No. Ntima/Igoki xxxx official search certificate undated letter from the land registrar, birth certificate for the two children, a bundle of photographs, bank statement showing that they jointly operated an account to develop the houses as P. Exh No's. 1-6 respectively.
7. Subsequently, PW 1 said that in 2007, she was operating a wines and spirit shop and hence was running their business, given that the respondent was in Nyeri. She admitted that the respondent had another family and has been maintaining the children. In cross-examination, PW 1 said the bank statement was evidence enough of her contributions toward the acquisition and development of the suit land though it was the respondent who paid the vendor in 2008 and that she accompanied him to the land control board meeting as well as at the time of making the sale agreements. PW 1 had no evidence of the marriage ceremony or payments for the building materials save for the bank statements.
8. Nonetheless, PW 1 told the court that she has been living in the matrimonial house together with her children. She said that the respondent had set up several businesses for her that are in operation, including a club and bar business, which she was almost on the verge of closing. Even though the respondent had a right to sell his properties, PW 1 said that she ought to have been consulted, including in the collection of rental income.
9. PW 1 also stated that the respondent had visited her parents to solemnize the marriage and took gifts as a sign of or part of the marriage ceremony. Though separated PW 1 said there had been no formal customary marriage divorce. PW 1 insisted that she had contributed towards the renovation of the dwelling house and the construction of the rental houses; otherwise, her claim was for the land to be jointly registered in trust for the children.



10. Augustine Asumara Amboka testified as DW 1 and adopted his witness statement dated 11.2.2019 as his evidence in chief. He told the court that he was married to FA, but in 2007, she cohabited with the appellant for seven years; which relationship was blessed with two children whom he was taking care of DW 1 said that the suit land was bought in 2008 and developed out of his earnings, loans, and savings as a public servant with Kenya Power and Lighting Company. He denied that the land was family or ancestral, which he was entitled to use and do business with. He denied that the appellant made any contributions towards its acquisition or developments.
11. DW 1 relied on a letter of consent application or the land control board consent, transfer forms, certificate of approved developments, policy schedule, Barclays Bank clearance, marriage certificate, transfer forms, sale agreement, bankers cheque, transfer application or consent, and SMS text as D. Exh No's. 1-12, respectively.
12. Similarly, DW 1 said that all the improvements and renovations to his properties were done out of his savings and loans and through the purchase of L.R No. xxxx by Cephaz Chege Kamau following the subdivision of L.R No. xxxx, into two portions with the knowledge of the appellant. DW 1 said that after the appellant placed a caution on a title to the land, she was summoned by the land registrar four times, only for her to walk out hurling insults to the officer, who proceeded to remove the caveat and issued him with the two title deeds.
13. DW 1 said that he was capable of meeting the needs of the minors, for he had a residence in Kakamega; hence, there was no need to jointly register the land with the appellant, whom they had separated with and was now cohabiting with someone else on parcel L.R No. xxxx. He sought vacant possession for the children who were in boarding schools.
14. In cross-examination, DW 1 confirmed that the minors were day scholars under the custody of their mother and that there was a child matter pending before the children's office. DW 1 admitted that the appellant came to occupy the suit premises as a friend "mpango wa kando." He denied that the children would be rendered shelter less or that he intended to dispose of the land. DW 1 admitted that they were running a joint account as per D. Exh No. (6) which was solely being operated by the appellant for the benefit of afro-lines. DW1 denied that the proceeds from the account out of business profits were utilized during the construction of the suit land.
15. He denied breaching any of the appellant's rights, similarly though the two had been cohabiting since 2007. D.W. 1 denied that they married under Ameru customary laws, for he never paid any dowry. DW 1 said that his 1<sup>st</sup> marriage was under Muslim law, and his wife and daughter contributed part of the funds used to acquire L.R No.xxxx.
16. The trial court rendered its judgment on 10.2.2021, triggering this appeal. By a memo of appeal dated 29.1.2022, the trial court is faulted for:
  - i. Not finding that the plaint was on behalf of the appellant and her children.
  - ii. For not finding that there was an intended trust.
  - iii. For finding that the respondent was exercising parental responsibility hence no trust for the two lands was available.
  - iv. For not appreciating that the parties had lived under the same roof on L.R No. Ntima/Igoki/xxxx and its resultant subdivision as a family together with her children.
  - v. For failing to appreciate the nature of the appellant's claim.



- vi. For finding that trust could only arise over LR No. xxxx since L.R No. xxxx had been sold without appreciating that the subdivision was done without the knowledge of the appellant and her children, who had been in actual possession and occupation of the two parcels of land.
- vii. For misapplying the law on customary trust and failing to consider her evidence in its entirety.
17. With the leave of the court, this appeal was canvassed through written submissions which the court has considered. A first appellate court has to re-appraise the lower court record and come up with independent findings as to law and facts while taking into consideration that the trial court saw and heard the witnesses, including their demeanor. See *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2001) eKLR, *Gitobu Imanyara & others v. A.G. & others* (2016) eKLR, *Selle v Associated Motor Boat Co. Ltd* (1968) E.A 123.
18. In this appeal, the appellant's cause of action was based on a breach of trust over L.R No. Ntima/Igoki/xxxx later subdivided with L.R No. Ntima/Igoki/xxxx and xxxx. She averred that they jointly bought and developed the land during the subsistence of a husband/wife relationship from 2007 to 2015 when the relationship resulted into two issues of marriage.
19. The appellant had pleaded that she has been in full possession and occupation of the suit land yet the subdivisions and transfer were done without consulting her and her children and in breach of the existing trust. She prayed for a declaration of the suit parcels of land as family and registration in the joint names in trust for the trust and a permanent injunction.
20. The respondent denied the claim. He averred that he solely acquired the land with the assistance of his elder daughter and with no intention or creation of a trust in a come-we-stay arrangement since he was legally married in 2001 before befriending the appellant in 2007. The respondent denied that the appellant was capable of making any contribution towards the acquisition and development of the suit land.
21. In addition, the respondent termed the affair as a secret that was severed in 2013, though blessed with two children whom he was taking care of through various investments elsewhere and which children's claim should not feature in land matters. He averred that he acquired and developed the suit land through bank loan personal savings and earnings as an employee and an investor. The respondent denied the land was ancestral or family, and as his sole acquired property he could do business and investments with it.
22. The appellant had not brought the suit in her capacity and as a next friend of CA and CA. She, however, pleaded in paragraph 5 of the plaint that she and the children were in possession and occupation of the suit land held in trust, and that it was a matrimonial home that the respondent had exclusively left her in total control and exclusive utilization of the property and breach in those rights, the respondent was dealing with the land contrary and oblivious of their accrued interests and rights based on family trust.
23. While admitting the possessory and occupation rights or interest of the suit land the respondent termed the come-we-stay arrangement between him and the appellant as illegal and the issue of the rights of the children inconsequential as far as the solely acquired and developed the suit land where was no intended or envisaged trust. The appellant testified that that there was a marriage in line with Kimeru customs while the respondent denied it.
24. Evidence of living together on the suit land is not disputed at all. Evidence of children out of the relationship is equally undisputed, going by admission by the respondent, the birth certificates, insurance cover, and parental responsibility he had taken up. The regularity and intensity of the



- relationship was also demonstrated in the joint account operated by the two parties. All this evidence shows that the relationship had blossomed into that of a married couple, and whom the family allowed to live on his land since the alleged breakup in 2015 up to the filing of the suit.
25. In *Christopher Nderi Gathambo & another Samuel Muthui Munene* (2003) eKLR, the court cited Bromley Family Law 5<sup>th</sup> Edition page 64, that if a man and a woman cohabit and hold themselves out as husband and wife that itself raises a presumption that they are legally married and the burden lies on who is challenging it, to prove otherwise. The court cited Piphson on Evidence 5<sup>th</sup> Edition PP 44 on the presumption of fact and law being consequences expressed by law to particular facts and inferences drawn by mind from given facts irrespective of their cause. Additionally, the court cited Contran in Resestate of African Law on the essentials in African customs as ceremonial indicators of cohabitation.
  26. Moreover, the court cited *Eve v Eve* (1975) 3 ALL ER 697 on constructive trust that it requires no intention of the parties and where the rights could be inferred by comparing it with a married state and assimilating cohabitants to the state of marriage.
  27. The appellant had testified that she was more than in a come-we-stay status. She produced documentary evidence that the respondent allowed her to occupy the suit land left them entirely to utilize the suit land together with the children between 2007 and 2015. She took care of the rehabilitation, renovation, and construction of both the dwelling house and the rental buildings. PW 1 also testified that the respondent had opened for her some businesses.
  28. The respondent, on the other hand, said that he was married to FA under Muslim law, and hence the appellant was not a wife. There was no pleading or evidence tendered that the respondent could not contract another marriage in 2007. Indeed, judicial notice can be taken that a Muslim can contract other marriages up to four.
  29. Be that as it may, what is essential, however, in this appeal and relevant in drawing the line is whether a cohabitee is entitled to constructive trust. In *Shah & 7 others v Mombasa Bricks & Ltd and 5 others* (Petition 18 E020 of 2022 (2022) KESC 106 (KLR) (28<sup>th</sup> December 2023) (Judgment), the court was looking at the definition of the scope, purpose and circumstances to establish constructive trust and its application in land sale agreements to defeat a registered title to land. The court observed that the *Trustee Act* (Cap 167) defines trust and trustee as extending to implied and constructive trusts. It also cited Black's Law Dictionary 9<sup>th</sup> edition that trust was a right enforceable solely in equity for 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). Further constructive trust is defined as an equitable remedy that a court imposes against one who has obtained property by wrongdoing as per Halsbury's Law of English and 4<sup>th</sup> Edition Vol 48 paragraph 690 as arising where one party conducts himself that it would be inequitable to allow him to deny the other party a beneficial interest in the property acquired to the detriment in the belief that by so acting he was acquiring a beneficial interest, the relevant intentions being manifested through words or conduct of the parties.
  30. The court cited *Seulos v Korkontzilas* (1997) 2 SCR 217 that constructive trust is not only a remedy against unjust enrichment but also prevents one from retaining a property that, in good conscience, they should not be permitted to retain. Further, the court cited *Murdoch v Murdoch* (1997) 1 SCR 423, where ordinarily constructive trust arises without regard to the intention of the person who transferred the property and was a formula through which the conscience of equity finds expression.
  31. The court said that, drawn from the case law, constructive trust arises automatically when a person who is already a trustee takes advantage of his position for his benefit. The court cited *Kiebia v M'Lintarii*



- (2014) eKLR that trusts are part of our laws by virtue of Sections 3 (1) of the Judicature Act and Section 28 (g) of the Land Registration Act. Additionally, the court cited Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & others (2015) eKLR, Macharia Mwangi Maina and 87 others v David Mwangi Kagiri (2014) eKLR, Willy Kimutai Kitilit v Michael Kibet (2018) eKLR, that equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land, subject to the circumstances of the case.
32. Applying the case law to the facts of this appeal the respondent had not pleaded that the appellant and her two children were trespassers or strangers to the suit land, with no legal or equitable rights or interests. In D. Exh No's. 7, 8, 9, 10 & 11, the respondent failed to attach any spousal consents from Faith Amboka. The sale agreement was silent on who was in occupation of the suit land.
  33. What triggered the appellant's claim was a notice to vacate the land dated 15.1.2018, issued to Eng. Patrick Mwenda Kibiti and the appellant. In the said notice, the respondent stated that the plot and the house the appellant had been occupying had changed ownership, so she should vacate the house and compound in three months for a new owner to move in. The notice was copied to EACC and the Registrar of land. In Obuba v Nyabwatana Civil appeal 30 of 2019 (2023) KECA 1425 (KLR) (16<sup>th</sup> December 2022) (Judgment), the court cited William Kipsoi Sigei v Kipkoech Arusei & another (20190 eKLR, that equity is one of the national values and principles under Article 10 (2) (b) of Constitution of Kenya, which courts have to apply in exercising judicial authority.
  34. In this appeal, the appellant has sought aid from the doctrines of equity to step in and for the court to find that she purchased land in 2008 and made developments therein as a matrimonial home; entry into occupation and possession of the house, even after parties separated in 2015 to the filing of the suit five years after, constituted trust. In Kivindu & another v Musa & others, Civil Appeal No. 233 of 2020 (2020) KECA 1015 (KLR) (28<sup>th</sup> July 2023) (Judgment), at issue was whether the appellant was a legal and beneficial owner of the land and whether a common intention existed to found a trust. The issue of possessory acts had been raised. The court cited Halsbury's Laws of England 4<sup>th</sup> edition Vol. 16 (2) paragraph 5089, that proprietary estoppel usually arises when the representations consist of a promise of an interest in the land and where the owner of the land (A) knowingly allows his rights to be infringed by another (B), who expends money on the land with the mistaken belief that the land belongs to (B), in which case (A) would not afterward be allowed to assert his title to the land.
  35. In this appeal, there is no dispute that the respondent, after 2015, acquiesced on his possessory and occupation rights to the suit land. He knew that their relationship with the appellant was no more. The respondent knew his rights to the land but allowed the sharing with the appellant and issues of their relationship. Prior to 2018, the respondent had not issued any notice to the appellant and the minors to vacate his land. The respondent kept silent between 2013 and 2018 and allowed the appellant to stay on the land unperturbed till 2018. Even while aware of this, there is evidence to show that the appellant was involved in the subdivision and transfer of L.R No's. 4805, 9588, and 9589 and the disposal of one portion. The purchaser of the land should have done due diligence and established who was in possession of the land.
  36. The appellant pleaded that it was the respondent who put her into possession and occupation of the land with a promise that it was for her benefit and that of the issues of their relationship. The respondent did not rebut that pleading and evidence of constructive trust. In Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (supra), constructive trust was said to be based on common intention, which is an agreement or understanding actually reached between the parties, relied on and acted on by the claimant. It acts as the conscience of the legal owner to prevent him from acting in an unconscionable manner, by defeating the common intention.



37. The respondent failed to call his wife, Faida, or the daughter to advance his claim that the land belongs to the wife and the daughter. In *ZMM v BAN* (2015) eKLR, the court took judicial notice that Muslim marriages are potentially polygamous. In this appeal the respondent created a legitimate expectation that the suit property is and remains as the homestead for the interests of the appellant and her children. The court takes judicial notice that the best interests of a child are paramount. Article 45 of the [Constitution](#) of Kenya declares equality of rights between parties to a marriage. Those rights apply to all marriages.
38. It is not the intention of the law to deny parties rights or interests acquired before, during, and after the dissolution of their marriages. As indicated above, Section 3 (1) of the [Judicature Act](#), as read together with Article 10 of the [Constitution](#), requires this court to apply the doctrines of equity. See [NWK v JKM](#) (2013) eKLR.
39. Drawing from the conduct of the parties to this appeal, in the course of their relationship between 2007 and 2015 and up to the filing of the suit, the irresistible conclusion is that they were sharing the house and managing their affairs together. The respondent intended the appellant and children to have a beneficial interest in the suit land. The respondent made the appellant adjust her life or after her affairs in reliance of the promises, express or otherwise made to her by allowing her unlimited entry, access, use, control and management of the suit properties. Those acts gave rise to constructive trust.
40. It would, therefore, be inequitable for this court to allow or aid the respondent to deny the appellant and her children the beneficial interests that have accrued in the property. The intention to found a trust is manifested in the words and conduct of the respondent for over ten years, without ejecting the appellant from the suit land. See [Geoffrey Githere v George Kagia & others](#) (2008) eKLR.
41. The subdivision, registration, and disposal of a portion of the land to a third party was subject to overriding rights or obligations as a trustee under Section 28 of the [Land Registration Act](#). The upshot is that I find merits in the appeal. The same is allowed with costs to the appellant.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19TH DAY OF JUNE, 2024**

In presence of

C.A Kananu

Muthuri for Mugo for appellant

Miss Otieno for the respondent

**HON. C K NZILI**

**JUDGE**

