

THE APPLICABILITY OF THE DOCTRINE OF CONSTRUCTIVE TRUST IN LAND TRANSACTIONS IN KENYA



SCENARIO

A purchases land from B vide a sale agreement dated 30/3/1978. Upon paying the purchase price, A is granted vacant possession and continues to live in the property having not procured a transfer of title. Years later, B passes away and his family initiates the succession process in secrecy and upon confirmation, they sell the property and transfer the title to C who seeks to evict A and his family from the subject land.

The question that arises is how the law protects A and his family from eviction?

A.How is a constructive trust created?

Trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Where it is not expressly stated, the trust may be established by operation of the law which leads to creation of constructive trusts. A constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

B. Are Constructive Trusts applicable in Kenya?

Vide Section 3(1) of the Judicature Act, Cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. In that light, the doctrine of Constructive Trust has been recently reinforced by a number of decisions mostly emanating from the Environment and Land Court as well as the Supreme Court.

C.What have the Courts said regarding Constructive Trusts?

In *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR)*, the Supreme Court held that **a constructive trust can be imported into a land sale agreement to defeat a registered title.**

It further stated that 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 the other party a beneficial interest in the property acquired.

This will be so where there was a common intention that both parties should have a beneficial interest in the property and 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.

D.What issues does the Court consider?

1.Whether there was any agreement, arrangement or understanding reached between them that the property is to be shared beneficially?

When it exists, 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 instalment, will readily justify the inference necessary to the creation of a constructive trust.

2.The claimant must show that he acted to his detriment in reliance on the agreement.

This is after common intention has been established, whether by direct evidence of common agreement or by inference from conduct.

3.The final question to determine is the extent of the respective beneficial interests.

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3.The final question to determine is the extent of the respective beneficial interests.

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E. Is failure to procure a land control board consent fatal?

Where a constructive trust arises, the failure to obtain an LCB consent is not fatal. This position was restated by the Court of Appeal in *Maina & 87 others v Kagiri (Civil Appeal 6, 26 & 27 of 2011 (Consolidated)) [2014] KECA 880 (KLR) (22 January 2014) (Judgment)* which held that a constructive trust relating to land subject to the Land Control Act is enforceable. The court reiterated the need to be guided by the Overriding Objectives of the Court and the need to dispense substantive and not technical justice.

F.Does the Limitation of Actions Act apply?

Where a constructive trust has been established, the suit cannot be barred on account of limitation of time by virtue of **Section 20 (1)(a) and (b)** of the Limitation of Actions Act which excludes actions in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy. This position was upheld by the Environment and Land Court (Nairobi) in Mbote v Mbote & another (Environment and Land Case 182 of 2019) [2026] KEELC 605 (KLR) (9 February 2026) which stated thus;

“The claim is founded on a constructive trust, to which the limitation periods under Sections 4 and 7 of the Limitation of Actions Act do not apply by virtue of Section 20(1)(b) of the Act. Consequently, the Defendants’ plea of limitation fails.”

G. Conclusion

The doctrine of constructive trust is particularly valuable in cases where one party attempts to gain unjust enrichment by denying the rightful or aggrieved party their ownership of property. In such circumstances, the courts will intervene to fulfill their obligation to uphold equity.



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