



**Muley v Kipchumba (Environment & Land Case 3 of 2020)  
[2023] KEELC 16982 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16982 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 3 OF 2020  
MN GICHERU, J  
APRIL 26, 2023**

**BETWEEN**

**NOORMESEYIEK NAIBOR MULEY ..... PLAINTIFF**

**AND**

**EMILY KIPCHUMBA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff seeks the following reliefs against the Defendant.
  - a. Eviction of the Defendant from L.R. Kajiado/Dalalekutuk/2924, suit land.
  - b. Costs.
2. The Plaintiff's case is as follows. She is the registered owner of the suit land. She allowed the Defendant to occupy the suit land for a while but she has now refused to vacate. This is the reason why she filed this suit so that an order of eviction may be issued by this court.
3. In support of her case, the Plaintiff filed the following.
  - i. Her own witness statement dated 29/1/2020.
  - ii. Copy of title deed for the suit land dated November 17, 2010.
4. In her written statement of defence dated 12/3/2021, the Defendant avers that she is entitled to occupy the land as a daughter in law of the Plaintiff. It is her case that she has lived on the land since the year 1980 as the wife of Joseph Naibor who is a son of the Plaintiff. Her husband died recently and the move by the Plaintiff to evict her from the suit land is driven by greed as the value of land has recently appreciated. She prays for the dismissal of the Plaintiff's case.
5. In support of her case, the Defendant filed the following evidence.



- i. Witness statement dated 23/2/2022.
  - ii. Three photographs showing six adults and five children, a grave and some houses.
  - iii. An obituary for Joseph Ncharo Ole Naibor.
  - iv. A certificate of death for Ncharo Ole Labuny who died on 14/4/2014.
  - v. Certificates of birth for Naomi Sision, Julius Kiplangat, John Kulankash and Joyce Tito all of whom are children of the Defendant and Naibor Labunyi, Ncharo Naibor, Naibor Labunyi and Joseph Naibor Njaro.
  - vi. Copy of minutes of a meeting held on 1/5/2014.
  - vii. Copy of letter to the Deputy Commissioner Kajiado dated 1/12/2014 written by the Plaintiff.
6. At the trial on 16/11/2022, the two parties testified by adopting their witness statements and documents as their evidence. They were then cross-examined by adverse counsel.

Counsel for the parties were to file and serve written submissions by 28/2/2023. Only the Plaintiff's counsel complied with this timeline. As I write this judgment in the month of April, I have not received the Defendant's Counsel's written submissions.

7. I have carefully considered the evidence adduced by the two parties in this case including the witness statements, documents, oral evidence at the trial, the submissions and the case law cited therein.

In his written submissions, the Plaintiff's counsel has urged that the Defendant has not proved the existence of a trust. He has also cited the case of *Mumo v Makau* where it was held that a trust must be proved because it is a fact to be proved by evidence. He urges that the Defendant did not allege any trust let alone proving it.

Secondly, counsel has urged that a child cannot force his parents to subdivide and distribute their assets as per the holding in the case of *Muriuki Marigi v Richard Marigi Muriuki and 3 others*, Civil Appeal No. 189 of 1996.

8. I find that there is only one issue for determination in this case.

- i. Whether the defendant can lawfully be evicted from the suit land?

The Defendant cannot be evicted from the suit land for the following reasons.

Firstly, from the evidence adduced in this case, I find that she is a wife of the deceased Naibor Labunyi also known as Ncharo Naibor also known as Joseph Naibor Njaro.

It is not disputed that the Defendant is in occupation of the suit land. That is why the Plaintiff seeks to evict her. The Plaintiff has not stated when the Defendant occupied the land. The Defendant says that she did so in 1980s. I believe this evidence. It is corroborated sufficiently by the documentary evidence in form of buildings on the land and birth certificates for children born between 1982 and 1990.

Secondly, under both the *Registered Land Act* (Cap 300) and the *Land Registration Act*, a person in occupation of land enjoys an overriding interest which is superior to the title deed.

9. Section 30 (g) of the *Registered Land Act* (now repealed) provided as follows –

30. “Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted or the register –



(g) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

10. This provision is couched in almost similar words with Section 28(b) of the [Land Registration Act](#) which provides as follows –

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted or the register –

c. Trusts including customary trusts”.

11. While I agree with the Plaintiff’s counsel’s submissions that the Plaintiff cannot be compelled to distribute the suit land in her lifetime, I also find that she cannot deal with it the way she wishes because those in lawful occupation including the Defendant enjoy rights which override the title and the register. The Plaintiff cannot therefore wake up one morning and order her children or their wives and their children to vacate the land. I find that she holds the land in trust for them.

12. In the case of [Isack M’Inanga Kiebia v Isaya Theuri M’Lintari and another](#) Petition No. 10 of 2015, the Supreme Court of Kenya had occasion to consider the question of overriding interests. It had this to say at paragraph 58 of the judgment.

“...It is now clear that Customary Trusts, as well as other trusts, are overriding interests. These interests, being overriding interest are not required to be noted in the register... The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30(g) of the [Registered Land Act](#), have now been subsumed in the “Customary Trusts under Section 25 (b) of the [Land Registration Act](#). Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land”.

13. For the above stated reasons, I find no merit at all in the Plaintiff’s suit against the Defendant and I dismiss it.

14. As for costs, and to foster a healthy relationship between mother and daughter in law who will have to co-existent on the suit land, I order that each party bears its own.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF APRIL, 2023.**

**M.N. GICHERU**

**JUDGE**

**HON. JUSTICE M.N. GICHERU**

