



**Barsolay v Tiony (Environmental and Land Originating Summons
E007 of 2021 & Environment & Land Case 52 of 2019 (Consolidated))
[2023] KEELC 20237 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2021
& ENVIRONMENT & LAND CASE 52 OF 2019 (CONSOLIDATED)**

**EO OBAGA, J
SEPTEMBER 28, 2023**

BETWEEN

BRADLEY KIPCHIRCHIR BARSOLAY PLAINTIFF

AND

PETER KIBIEGO TIONY DEFENDANT

JUDGMENT

Introduction

1. By an amended plaint dated March 1, 2021, Peter Kibiego Tiony the plaintiff in Eldoret CMC E&L Case No 52 of 2019 filed a suit against Bradley Kipchirchir Barsolay in which he sought the following reliefs:-
 - a. A declaration that the plaintiff is the absolute owner of all the parcel of land known as Moiben/Kapsumbere Block 2(Tachasis)/95 and damages for trespass.
 - aa) An order of eviction against the defendant herein and a permanent injunction restraining him, his agents and/or servants from interfering with the plaintiff's quiet possession of his share in land parcel known as Moiben/Kapsumbere Block 2(Tachasis)/95.
 - b. Costs and interest of this suit.
 - bb) Any other or further relief that this honourable court may deem fit to grant.
2. The defendant filed a defence and raised a counter-claim in which he sought to be declared as having acquired a portion of 13 acres on Moiben/Kapsumbere Block 2(Tachasis)/95 by way of adverse possession. The counter-claim was however withdrawn on April 16, 2021 paving way to filing of E & L Case No E007 of 2021 (OS) in which he sought determination of the following issues:-



- a. Whether a declaratory order should issue holding that the plaintiff has acquired ownership of 13 acres of land parcel number Moiben/Kapsumbere Block 2(Tachasis)/95 by operation of doctrine of adverse possession.
- b. Whether an order should issue compelling the defendant to excise 13 acres comprised in land parcel number Moiben/Kapsumbere Block 2(Tachasis)/95 and transfer the same in favour of the plaintiff.
- c. Whether an order of permanent injunction should issue restraining the defendant from interfering with the plaintiff's 13 acres comprised in land parcel number Moiben/Kapsumbere Block 2(Tachasis)/95.
- d. Who will bear the costs of this summons.

Background;

3. The plaintiff in E & L case No E007 of 2021 Bradley Kipchirchir Barsolay (Barsolay) is the son of James Barsolay (deceased). In the 1990's the deceased who was a friend of Peter Kibiego Tiony (Tiony) purchased 10 acres out of Tiony's land which was about 75 acres. He later obtained title in respect of the 10 acres.
4. In or around 1997, Tiony's son was involved in an accident. Tiony approached the deceased who gave him a total of Kshs 500,000/= which he used to treat his son. Though there was no written sale agreement, Tiony agreed to give the deceased 12 acres to cover the amount given to Tiony. The deceased then purchased one acre from Vincent Kechem who had purchased the same from Tiony. The 13 acres which were adjacent to the 10 acres which the deceased had purchased were then fenced and the deceased and his family started utilizing the 13 acres in addition to their 10 acres for which they have title.
5. Sometime in 2013, Tiony approached the deceased and informed him that he wanted to relocate him from 13 acres which were next to his homestead to another location within his land. the deceased was agreeable to Tiony's suggestion. Tiony and the deceased appeared before the office of the District officer Moiben Division where a re-location agreement was signed before the District Officer. The re-location did not however materialize as Tiony changed his mind.
6. The deceased died on October 29, 2018. On March 19, 2019, Tiony's lawyers wrote to Barsolay and informed him that Tiony was taking back the 13 acres on grounds that Barsolay was unable to pay lease amount of Kshs 2,000,000/= On March 15, 2019 Barsolay's lawyers wrote back and told Tiony's lawyer that there was no lease in place as alleged and that Barsolay did not owe Tiony the Kshs 2,000,000/= being claimed. In a letter dated February 18, 2019 (which was obviously a mistake) as it referred to the one dated March 15, 2019, Tiony's lawyer told Barsolay's lawyers that the lease had been rescinded and that Tiony will not allow Barsolay to utilize the 13 acres.
7. On April 2, 2019, Tiony filed a suit against Barsolay. It is this suit that prompted Barsolay to withdraw the counter-claim which he had filed hence the filing of the originating summons in E&L case No E007 of 2021.

Barsolay's Case;

8. It is Barsolay's case that the deceased had given Tiony Kshs 500,000/= upon which Tiony gave him 12 acres. The deceased purchased one acre from Vincent Kechem making a total of 13 acres. The purchase



was between 1996/1997 and that since then the family of the deceased had been utilizing the 13 acres which are clearly fenced on the ground.

9. Barsolay further stated that there was nothing like a lease agreement. The issue of lease came up for the first time in March 2019 when Tiony's lawyers wrote to him and claimed that he owed lease arrears of Kshs 2,000,000/= He stated that the only issue which Tiony had raised was on re-locating them to a different area of his expansive land.
10. Barsolay further testified that the deceased's family utilized the 13 acres from 1997 until 2006 when the deceased handed over the 13 acres to him to use. After the death of the deceased, the family agreed that it was him and one of his sisters who were to be registered as owners of the 13 acres on behalf of the family of the deceased.

Tiony's Case;

11. Tiony testified that the deceased was his close friend. sometime in 1994, the deceased approached him with a view to leasing part of his land. He agreed and leased to him 40 acres. The deceased used to pay him in cash. In the year 1997, his son was involved in an accident. He approached the deceased who gave him Kshs 200,000/=. He later went to the deceased who gave him an additional sum of Kshs 300,000/=. The two of them verbally agreed that the deceased was to utilize the 12 acres until 2005 when he was expected to have exhausted his Kshs 500,000/=
12. After 2005, the deceased did not move out of the 12 acres. in 2013, his wife started asking why the deceased was still utilizing the 12 acres yet his lease had long expired. He asked the deceased to stop ploughing but he was adamant. After the passing on of the deceased, Barsolay brought in about 70 members from his Keiyo home to come and discuss the issue. There was no agreement reached.

Analysis And Determination;

13. The parties were directed to file written submissions. Tiony's submissions were filed on July 5, 2023. The submissions on behalf of Barsolay were filed on July 10, 2023. The counsel for Barsolay submitted that Tiony's case which was filed before the lower court but was later transferred upon being consolidated is statute barred and should be dismissed with costs. He relied on the case of *Joseph Odira Ombok v South Nyanza Co Ltd* (2018) eKLR and the case of *Sobanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* (2021) eKLR
14. As regards the originating summons, Barsolay's lawyers submitted that Barsolay had acquired the 13 acres through adverse possession as he has been in exclusive possession on his own right since 2006 when the deceased handed over the 13 acres to him. He relied on the case of *Kasuve v Mwaani Investments Limited & 4 others* IKLR 184 and the case of *Wilson Njoroge Kamau v Nganga Mucheru Kamau* (2020) eKLR
15. On his part, Tiony through his lawyer submitted that Barsolay had not proved the ingredients of adverse possession as known in law. He relied on the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* (2018) eKLR, *Gabriel Mbui v Mukindia Maranya* (1993) eKLR and *Mtana Lewa v Kabindi Ngala Mwagandi* (2015) eKLR
16. I have carefully gone through the evidence of both parties herein as well as their submissions. The following are the issues which stand out for determination: -
 - a. Whether Tiony's case is statute barred.



- b. Whether the transaction between Tiony and the deceased in respect of 12 acres was a lease or a sale.
- c. Whether Barsolay has proved that he is entitled to the 13 acres by way of adverse possession.
- d. Which order should be made on costs.

A. Whether Tiony’s case is statute barred;

- 17. Assuming that the transaction between Tiony and the deceased was a lease, Tiony’s evidence is that he leased the land whichever its acreage, this is because in his witness statement, he claims to have leased out 40 acres; in his replying affidavit to the originating summons, he says it was 10 acres; in his amended claim he claims it was 10 acres; yet in his evidence in chief in court, he stated that he leased 20 acres. The variance in acreage notwithstanding his evidence is that the lease was to expire in 2005. The cause of action in favor of Tiony therefore accrued in 2005.
- 18. Evidence on record which is uncontroverted is that the deceased gave Barsolay the disputed 12 acres in 2006. If Tiony was seeking to recover the 12 acres, he should have filed his suit against Barsolay in 2018. Section 7 of the *Limitation of Actions Act* states as follows:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

It is therefore clear that as at the time of filing this suit against Barsolay in 2019, the suit was already time barred.

B. Whether The transaction between Tiony and the deceased in respect of 12 acres was a lease or a sale;

- 19. Tiony claims that the transaction between him and the deceased was a lease. There is no doubt that the transaction was not reduced into writing. This may be because of the cordial relationship between Tiony and the deceased. In order to ascertain whether the transaction was a lease or a sale, the evidence adduced must be examined.
- 20. Barsolay called PW4 Christopher Kipkorir who was an Assistant Chief of Moiben sub-location. The witness testified that when the deceased purchased 12 acres in 1997 from Tiony, he was involved. He stated that he was the one involved in marking the boundaries of the 13 acres which the deceased had purchased as he was a surveyor before he became an assistant chief. He stated that the deceased bought 12 acres from Tiony and one acre from Vincent Kechem who had bought the one acre from Tiony.
- 21. When Tiony testified, he stated that he had no issue with the one acre which the deceased purchased from Vincent Kechem. PW4 further stated that in 1995, he was involved in a transaction where the deceased purchased 10 acres from Tiony for which he has title.
- 22. On November 6, 2013 the family of Tiony and the family of the deceased appeared before the district officer where they signed a re-location agreement in respect of 12 acres. This agreement clearly shows that the deceased family was being requested to relocate to another area from the 12 acres which he had purchased. When Tiony’s wife testified, she stated that she is the one who signed the agreement. Her sons too signed the agreement. It is therefore not true for Tiony’s wife to claim that the re-location was in respect of the 10 acres which are not in dispute and for which the deceased obtained title in 2016.
- 23. When Tiony’s wife was cross-examined, she tried to claim that the issue which took them to the district officer’s office was the issue of trespass of the deceased’s cows which had trespassed to their portion of



land. Tiony's wife and her two sons were not illiterate. They cannot therefore claim that they did not know what they were signing.

24. The claim that the 12 acres were on lease basis has no basis. The testimony over the alleged lease was contradictory. The acreage leased kept on changing. This was the case with the amount of lease money. Tiony claimed that he used to lease for 8,000/= whereas his wife claimed that the lease amount was Kshs 5000/= per year.
25. It is clear from the letter of March 11, 2019 that Tiony was laying ground to allege that the 1997 transaction was a lease. This is because he instructed his lawyer to demand a sum of Kshs 2,000,000/= being outstanding lease amount. When Tiony and his wife testified, they claimed that they were not aware of any such a demand. Tiony filed this suit 21 days after demanding the Kshs 2,000,000/=. During his testimony in court, he stated that he could not even remember who his previous lawyers were. The plaint was later amended where it was alleged that Barsolay entered the suit property in 2013 after the death of the deceased. This is conduct which was clearly meant to have the court believe a certain narrative when the evidence does not support the lease theory.
26. Barsolay called PW6 Silas Tumo who is a surveyor by profession. This witness testified on how he went to the disputed portion which he found clearly fenced. On taking measurements, he confirmed that the acreage was 13 acres. This witness is not the one who demarcated this portion. His duty was to confirm the acreage. The demarcation had been done early on by PW4 who was previously a surveyor but had become an assistant chief.
27. PW3 Benjamin Kimeli Chesire was an acting Chief of Moiben location in 2019 when police officers from Moiben Police station referred a dispute to him regarding Tiony and Barsolay. On February 26, 2029, he convened a meeting whereby Tiony insisted that Barsolay's family re-locates to an alternative site on his land. The parcels in issue were the 10 acres which the deceased had purchased including the 12 disputed acres as well as the one acre which was not disputed. The total was 23 acres. The resolutions were reduced into writing and were signed. This witness testified that there were no disputes regarding the 12 acres prior to 2019.
28. From the analysis of the evidence adduced and documents produced, it is clear that the transaction in respect of the 12 acres was a sale and not a lease.

C. Whether Barsolay has proved that he is entitled to the 13 acres by way of adverse possession;

29. Barsolay testified that he is claiming the 13 acres in his own right. He is not claiming the land as administrator of the estate of the deceased. The evidence on record is that Barsolay was the one who was cultivating the 13 acres even before the demise of the deceased. The one acre which is not disputed by Tiony was purchased by the deceased on December 24, 1996. The 12 acres were purchased in 1997.
30. Barsolay and his deceased father including his siblings have been in exclusive possession of the 13 acres since 1997. In 2006, the deceased handed over the 13 acres to Barsolay. Barsolay has been in exclusive possession of the 13 acres until 2013 when Tiony's family asked them to re-locate to another site on their land. The only time when there was a demand that Barsolay moves out of the land was in 2019. This is after the demise of the deceased. A suit was then filed against Barsolay in 2019 seeking his eviction.
31. As at the time the suit was being filed, Barsolay had been in continuous, peaceful and open use of the 13 acres for 13 years. The title of Tiony had been extinguished. The action taken in 2013 by the family of Tiony could not stop time from running. The Tiony family was merely seeking to have Barsolay re-locate to a different site. Even the demand letters written in 2019 could not stop time from running.



- When the police from Moiben Police Station sought to stop Barsolay from cultivating the land in 2019, already the title to Tiony's land had already been extinguished.
32. The deceased had cleared paying for the 12 acres in 1997 after he gave Tiony Kshs 300,000/= being the last of the two instalments which Tiony required for treatment of his son who had been involved in an accident. I have already found that the transaction between Tiony and the deceased was not that of lease. Even if for argument's sake, the transaction was a lease which was not the case, then the same expired in 2005 in Tiony's own evidence. Time would then start running from 2005 when the alleged lease expired. The lease would not be revived by a mere letter written in 2019 alleging that Barsolay was in arrears to the tune of Kshs 2,000,000/= which arrears Tiony and his wife were not aware of or even the advocate who made the demand.
33. In the case of *Kasuve v Mwaani Investments Limited & 4 others* IKLR 184, the Court of Appeal held as follows:-
- “And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after disposing the owner or by discontinuation of possession by the owner on his own volition.”
34. The Court of Appeal in the *Kasuve case* (supra) held that the identification of the land in possession of an adverse possessor is an important and intergral part of the process of proving adverse possession. In the instant case, there is evidence that the boundaries of the 13 acres on the ground were set out by PW4 Christopher Kipkorir who was a surveyor. In proving the exact location of the 13 acres Barsolay called PW6 a surveyor who confirmed that the 13 acres were fenced on the ground. Barsolay therefore proved that he has been on a specific parcel within Tiony's land.
35. In *Gabriel Mbui v Mukindia Maranja* (1993) eKLR, it was held as follows:-
- “The occupation of the land by the intruder who pleads possession must be non-permissive use, i.e without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession.”
36. In the instant case, Barsolay was not a licensee of Tiony. His father the deceased purchased the 12 acres from Tiony and one acre from Vincent Kechem. The deceased completed payment for the 12 acres as well as the one acre from Vincent Kechem. Barsolay was not a licensee. He was on the land peacefully, openly and without interruption for 12 years which is the statutory period required in Kenya.

Disposition;

37. From the analysis, it is clear that Tiony's case is statute barred. The same is dismissed with costs to Barsolay. On the other hand, I find that Barsolay has proved that he has acquired a portion measuring 13 acres out of LR No Moiben/Kapsumbere Block 2 (Tachasis)/95. Consequently, I enter judgement in favour of the plaintiff in E&L case No E007 of 2021 as follows:-
- a. The plaintiff has acquired a portion measuring 13 acres comprised in LR No Moiben/Kapsumbere Block 2 (Tachasis)/95 by way of adverse possession.



- b. The defendant is holding 13 acres comprised in LR No Moiben/Kapsumbere Block 2 (Tachasis)/95 in trust for the plaintiff.
- c. The trust in (b) hereinabove is terminated and an order made that the defendant do excise a portion measuring 13 acres from LR No Moiben/Kapsumbere Block 2 (Tachasis)/95 and have the same registered in the name of the plaintiff.
- d. If the defendant does not comply with (c) above, the Deputy Registrar of this court is empowered to sign all necessary conveyancing documents to ensure that a portion of 13 acres is registered in the plaintiff's name.
- e. A permanent injunction is issued against the defendant, his servants or agents from interfering in any manner with the 13 acres to be excised out of LR No Moiben/Kapsumbere Block 2 (Tachasis)/95.
- f. The defendant shall pay the costs of this suit to the plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 28TH day of SEPTEMBER, 2023.

E. O. OBAGA

JUDGE

