



REPUBLIC OF KENYA



**Bet (alias KIPTIONY ARAP BET) v Barngetuny & another (Environment & Land
Case 29 of 2021) [2022] KEELC 13501 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 29 OF 2021**

**MN MWANYALE, J
OCTOBER 12, 2022**

BETWEEN

**JOHN KPTIONY BET PLAINTIFF
ALIAS KIPTIONY ARAP BET**

AND

**JOSEPH KIPTOO BARNGETUNY 1ST DEFENDANT
PHILIP BARNGETUNY 2ND DEFENDANT**

(FORMELY ELDORET ELC CASE NO. 61 OF 2014)

JUDGMENT

1. John Kiptony Bet alias Kiptiony Arap Bet filed a plaint dated February 25, 2014 seeking interalia;
 - i. Declaration against the 1st and 2nd defendants as trespassers in his parcels of land known as Nandi/lelmokwo/440 and Nandi/lelmokwo/441.
 - ii. Eviction of the two defendants from the said parcels of land.
 - iii. Damages for loss incurred by the 1st and 2nd defendants action.
 - iv. Costs of the suit and interest thereon.
2. Simultaneous with filing of the plaint, the plaintiff took out a notice of motion seeking injunctive orders against the defendants, their agents, servants.
3. An *Ex parte* Injunction was issued on March 16, 2017, pending hearing and determination of this suit.
4. An application for contempt of court was equally filed with the result that a notice to show cause and subsequent committal to civil jail of the defendant's was issued.



5. The defendants made an application to set aside the *ex parte* orders, and in a ruling dated July 2, 2018, all the *ex parte* orders were set aside, and the defendants granted leave to file their defence within 15 days.
6. The matter partly proceeded before Eldoret ELC [Odeny L. J.] before establishment of this court, where upon parties took directions for typing of proceedings and suit to proceed from where it had reached.
7. The defendant had equally filed a notice of preliminary objection but later on abandoned the same and decided to proceed with the suit and file their submissions on the issues raised in the preliminary objection together with their submissions on the suit.

Plaintiff's Case and Evidence: -

8. It was the plaintiff's case that the 2nd defendant trespassed into his property and has since refused to vacate the said property and that the defendants had destroyed about 150 wattle trees in the two properties and had embarked on construction activities without his consent on the two parcels of land.
9. The defendants' actions had thus jeopardized his rights as the sole and legal owner of the two parcels of land in question but had also restricted him from carrying out any meaningful activities in his own parcels of land thus causing him untold loss and damage.
10. He thus sought for the reliefs set out in paragraph 1 of this judgment.
11. The plaintiff testified as the sole witness in support of his case. It was his testimony that the two defendants are his nephew's sons to his late brother Bundotich Bargetuny, who used to live in Moi's bridge.
12. He further adopted his witness statement, it was his testimony that he had acquired a parcel of land in Moi's Bridge in late 1964 and that he exchanged the same with his late Bundotich Bargetuny, so that the 12 acres that his brother Bundotich was entitled to was gifted to him, while the brother took up the parcel in Moi's Bridge.
13. That he thus registered the 12 acres in Nandi gifted to him in his name while his late brother took up the property in Moi's Bridge.
14. It was his testimony that the two defendants moved into his property at the time their dad was ill in 1998 and have stayed thereon. The 1st defendant is occupying 19 acres on Nandi/Ielmokwo/440 while the 2nd defendant was occupying 2 hectares on Nandi/Ielmokwo/440.
15. It was his testimony that he had offered each defendant 1 acre but they had refused, hence he prayed for judgment as prayed for in the plaint.
16. In cross examination the plaintiff stated that the property originally belonged to his late father who had gifted him. That the defendant had moved into the property in 1998.

Defendants Case And Evidence: -

17. In the joint statement of defence and counterclaim, the 1st and 2nd defendants aver that the registration of Nandi/Ielmokwo 440 and Nandi/Ielmokwo 441 was in trust for them since the same was family land.
18. That they had not trespassed on the property and that the suit ought to be dismissed with costs for being time barred, scandalous, frivolous, vexatious, and outright abuse of the court process.



19. By way of the counterclaim, the defendants stated that the suit properties were registered in the plaintiff's name so as to be held in trust for them, hence they had beneficial interests in the suit properties.
20. The plaintiff had dishonoured the trust agreement by family members and the defendants sought a declaration that the suit properties to wit, Nandi/Lelmokwo 440 and Nandi/Lelmokwo/441 were being held in trust for the defendants.
21. The defence called 4 witnesses. DW1 was the 1st defendant, who adopted his witness statement dated 5/7/2018 as part of his evidence in chief. It was his testimony that the plaintiff was his uncle and that Nandi/Lelmokwo 440 and 441 belonged to his late grandfather who had 4 sons.
22. That after the demise of his grandfather the 4 sons were to undergo succession which they did not do. The grandfather died in 1982. Nandi/lelmokwo 441 was registered to the plaintiff on 30/4/1982 while Nandi/lelmokwo/440 was registered to the plaintiff on 24/9/1979.
23. That at the time of registration, the defendants father Bundotich Bargentuny was in Moi's Bridge. That in 1997 his late father came to claim his share of his father's property and was shown the property and he died afterwards in 1998, and the defendants are still on the property.
24. After the demise of their dad a dispute arose and the elders gave him and his brother a part of their father's share. The defendant stated that the trespass started in 1998 but suit filed in 2014 after lapse of 12 years. The sit property ought to have been registered in trust for them.
25. In cross – examination, the DW1 stated, that the property was ancestral land, both Nandi/lelmokwo/440 and Nandi/lelmokwo 441. They belonged to Kibet Chesarur Barngetuny. He died in 1982, but he had no death certificate. That his late father had a share in both 440 and 441, in 440 his late father's share was 5 acres and in 441, he had 7 acres.
26. After being shown the green card of Nandi/lelmokwo/440, DW1 confirmed that the first registration thereof was in respect of Kipthioth arap Yego, and his grandfather's name was not on the property. First registration was on 3/12/1979, and current owner is John Kiptiony Bet.
27. In response to green card for 441, DW1 stated in cross – examination that the first registration was in respect of his grandfather Kibet Arap Chesarur, whose other name Barngetuny was omitted. It was thereafter registered in the name of the plaintiff.
28. He was not aware of the agreement dated 26/6/1990 for exchange of the properties although he was aware of the witnesses who signed the same.
29. In re-examination, he stated that his grandfather died in 1982, and that there was no succession in respect of his late grandfather's estate.
30. That the first registration was meant as a trust for everyone, since the property was bought by the grandfather.
31. DW2 Philip Barngetuny the 2nd defendant equally testified. It was his testimony that the two title deeds ie Nandi/lelmokwo/440 and 441 were family property that belonged to Bargentuny Kibet arap Chesarur. That no succession in respect of his grandfather's property had been done.
32. That he had been living on the property in 1998 and case was filed on 2014.
33. In cross – examination, he stated that he was born in Moi's bridge where his late father had 24 acres. It was his testimony that of the 10 siblings it was him and his two brothers who moved to Nandi from



- Moi's bridge. He was not aware of any succession done in respect of his grandfather's property. He was not aware of the exchange between his late father and the plaintiff. The claim was for 7 acres from Nandi/Lelmokwo 441 and 5 acres from Nandi/Lelmokwo/440. The combined acreage of 440 and 441 is 24 acres.
34. In re-examination, it was the DW2 response that his late father who came to claim his share of his late grandfather's property which was 48 acres and divided by 4 sons, each son was to get 12 acres that the family had agreed to their father getting 12 acres.
 35. It was DW3's testimony that he is a brother to the plaintiff and the defendants are his nephews. He started further that Nandi/Lelmokwo 440 and 441, belonged to his late father. He was given 12 acres by his late father who had given all his sons 12 acres each. The property given to Bundotich Bargetuny was taken by the plaintiff.
 36. It was his further testimony that the defendant were living on the suit property since 1998. That there was a dispute that the elders resolved in terms that Bundotich Bargetuny was to stay in both properties. Bundotich was buried in the 7 acres which is in Nandi/Lelmokwo/ 441.
 37. In cross – examination, the witness indicated that he had initially written a witness statement in favour of the plaintiff on 25/2/2014 but had since denounced the same on account of threats by the defendants.
 38. He indicated that on the green card of Nandi/Lelmokwo/440 the name Kibet Chesarur was not indicated. The plaintiff was registered on 24/12/79 while his late father died in 1982.
 39. At time plaintiff was registered in 1979 as proprietor of Nandi/Lelmokwo/440 the late Kibet Chesarur, who was the plaintiff's father was still alive. There was no complain by the late Kibet Chesarur about the plaintiff having registered Nandi/lelmokwo 440 to himself.
 40. The witness stated in further cross – examination that he was not aware of the exchange agreement between the plaintiffs. That the late Bundotich Barngetyuny lived in Moi's Bridge and returned to Nandi when he was sick, his other children remained in Moi's Bridge.
 41. It was his further testimony in cross – examination that he was given 12 acres in the lifetime of his father, his other brother Kimaru arap Ngetich was also given 12 acres. Kimaru arap Ngetich property was registered on 30/4/1982 as Nandi/lelmokwo/448; which was the same day that he was given his property.
 42. In re-examination he stated that his father died in 1982 and the dispute before the elders was in 1997.

Issues for Determination: -

43. The court has analysed the pleadings, the evidence on record as well as the submissions by the parties, filed pursuant to the court directions ad frames the following as issues for determination;
 - i. Is the plaintiff's suit, time barred as pleaded by the defendants.
 - ii. a) if answer to (i) above is in the affirmative, has the defendant proved entitlement to Nandi/lelmokwo/440 and Nandi/lelmokwo441 by virtue of customary trust?
 - b) if answer to (i) above is in the negative has the plaintiff proved ownership and his case on balance of probabilities?
 - iii) Have the defendants proved their case on a balance of probabilities?
 - iv) What reliefs ought to be issued?



- v. Who bear the costs of the suit?

Analysis and Determination:-

44. With regard to issue number 1 whether the plaintiffs suit is time barred. It is on record that the entry by the defendant on the suit property was in 1998 when their late father was sick and was being nursed by the plaintiff. The entry in 1998 forms the basis of trespass as submitted by the defendants. The plaintiff submissions on this are silent.
45. The defendants submit that the entry and the action of trespass herein took place in 1998 and the suit was filed in 2014, hence it is time barred by dint of section 4,7, and 8 of the Limitation of Actions Act; in this regard the defendant's place reliance on the decision in the cases of Rawal vs Rawal 1990 eKLR, Mesback Abok alias Kura wage vs Ernest Ondoro Juma (2019) eKLR and John Maritime Florence and Another vs Cabinet Secretary for Transport and Infrastructure and 3 others (2015) eKLR and urge the court to dismiss the plaintiff's suit.
46. The evidence on record indeed confirms the entry by the defendant to the suit property as 1998. This was confirmed by all the defence witnesses. The entry on the suit property in 1998, was occasioned by the fact that the defendant's father Barngetuny Bundotich a sibling to the plaintiff was sick and eventually died on the suit property.
47. Thus the entry by the defendants on the suit property in 1998, was by virtue of their father who was living on the suit property. That entry could not have been trespass but it was pursuant to an implied permission from the plaintiff to the defendants and to visit and nurse their sick dad. Trespass began once the implied permission was expressly withdrawn.
48. In arriving at this, the court is guided by the decisions in the cases of Wairimu Mburu vs Chege Thaiya as well as Japheth Barua Kirori vs Jonathan Wabala & Another 2013 eKLR.
- In the Wairumu Mbaru (supra) the court held that "a person who occupies as licensors cannot claim land by dint of adverse possession." This was settled in Hughes vs Griffin All ER 460 where it was held that "a licensee or tenant at will does not have time running in his favour for a claim of adverse possession."
49. It follows therefrom by virtue of parity of reasoning that time does not equal run for purposes of trespass on a licensee or an occupier who has the express or implied permission from the land owner until the permission is expressly withdrawn.
50. In this regard, the plaintiff expressly withdrew his through the demand letter dated 30/9/2013 (P Exhibit 5) hence the cause of action accrued to the plaintiff on 30/9/2013 when he expressly withdrew his permission.
51. As the suit was filed in 2014, it was filed well within time, and the court finds that the suit is not time barred thus on issue number 1 the court finds that the plaintiff's suit is not time barred.
52. Having answered issue number 1 in the negative, the next issue to be considered by the Court, is whether the plaintiff has proved ownership and his case on a balance of probabilities.
53. The plaintiff in his evidence he stated that he was the *bonafide* owner of parcels number Nandi/lelmokwo/440 and Nandi/lelmokwo/441.
54. In his testimony, he produced copies of the titles in respect of the two parcels as well as copies of the registers [green card].



- In respect of the green card of Nandi/lelmokwo/440, show that the property was first registered on 30/12/1979 to Kipthiom Arap Yego and registered to the plaintiff on 31/12/1979.
55. The copy of the green card for Andi/lelmokwo/440 was produced as P Exhibit 1 a, and a copy of Land Certificate [P exhibit 2a] and a search thereof P exhibit 3 (a).
 56. With regard to Nandi/lelmokwo/441, the plaintiff produced a copy of the green card as P exhibit (1b), a copy of the land certificate as P exhibit (2a) and a search thereof P exhibit 3 (a) as exhibits. P exhibit 1 (a) the green card indicates that the first registered person was Kibet arap Chesarur registered on 4/5/1979 and entry number 2 reveals a gift to Kiptiony Bet Kibiwot made on 30/4/1982.
 57. The plaintiff equally exhibited an affidavit showing his change of name to John Kiptiony Bet as P exhibit 4.
 58. From the foregoing, the plaintiff became the registered owner of Nandi/lelmokwo on 31/12/1979 and become the owner of Nandi/lelmokwo/441 on 30/4/1982.
 59. It is the defendants submission that the two parcels belonged to their late grandfather Kibet arap Chesarur and that no succession in respect of his Estate was ever done. That the registration of the plaintiff was this as a trustee on their behalf.
 60. In respect of the Nandi/lelmokwo/440 the late Kibet arap Chesarur was not recorded as having been an owner thereof, but the first owner was Kiptiom arap Yego.
 61. With regard to Nandi/lelmokwo/441. The 1st registered owner was indeed Kbet arap Chesarur the plaintiff's father and the grandfather to the defendant.
 62. Entry number 2, reveals a gift to the plaintiff, made on 30/4/1982. In the testimony of the DW3 he stated that he was equally gifted 12 acres by his father on the same date 30/4/1982, which was in lifetime of the plaintiff's father as DW3 and the plaintiff are brothers.
 63. Further DW3 indicated that his other brother Kimaru Ngetich was also gifted 12 acres by their father on 30/4/1982.
 64. It follows therefrom that on 30/4/1982 the late Kibet arap Chesur was alive and made gifts *intervivos* to his 3 sons leaving out the defendant's father. Consequently Nandi/lelmokwo/441 was transferred to the plaintiff during the lifetime of the late Kibet arap Chesarur and the late Bundotich Bargetuny, as a gift to the plaintiff, Nandi/lelmokwo 441, could not have formed part of the Estate of Kibet Chesarur for succession purposes as claimed by the defendant.
 65. Being the registered owner of Nandi/lelmokwo/440 and 441, the plaintiff has demonstrated ownership of the same as well as acquisition of the same, and is proprietorship as evidenced in the title deeds, which are prima facie evidence of ownership as per sections 24 and 25 of the [Registered Land Act](#).
 66. The court this finds that the plaintiff has proved ownership of Nandi/lelmokwo/440 and 441 and on a balance of probability has proved his case, and answers issue No 3 in the affirmative.
 67. The defendants in the counterclaim have pleaded that the registration of Nandi/lelmokwo/440 and 441 in trust for them and are claiming customary trust of the property.
 68. As has been noted elsewhere in this judgment, Nandi/lelmokwo/440 was never registered and/or owner by Kibet arap Chesarur, and the defendants claim on it based on customary trust therefore fails.
 69. With regard to Nandi/lelmokwo/441 this property initially belonged to the defendants grandfather, Kibet arap Chesarur, who gifted the plaintiff during his lifetime and the lifetime of Bundotich



Bargetuny and as has been held elsewhere in the judgment, it therefore did not form part of the estate of Kibet arap Chesarur.

70. The defendants claim is that the same belongs to them on the strength of customary trust. The issue of Customary trust of what constitutes was settled in the case of *Isack M'inanga Kiebia vs Isaaya Theuri Mlitari & Another* 2018 eKLR, where the Supreme Court laid the elements to be proved on customary trust. The elements are;
- i. The land in question was before registration family, clan and/or group land.
 - ii. The claimant belongs to such family clan or group
 - iii. The relationship of the claimant to such family, clan or group is not so remote or tenuous so as to make his/or her claim idle or adventurous.
 - iv. The claimant could have been entitled to be registered as an owner or beneficiary of the land but for some intervening circumstance.
 - v. The claim is directed against the registered proprietor who is a member of the family clan or group....”
71. Applying the 5 elements in the *Isaya Kietia* case to the present case, the court finds by dint of registration of Nandi/lelmokwo/441 as a gift *intervivos* to the plaintiff, that the defendants late father Bundotich Bargetuny and the defendants herein were not entitled to be have been registered as owners thereof.
72. The court finds that the defendants claim to Nandi/lelmokwo/441 based on customary trust untenable in view of the gift from the plaintiffs father to the plaintiff and his brothers all made on 30/4/1982 during the lifetime of the defendant's father Barngetyuny Bundotich and the late Kibet Chesarur.
73. Having found the customary trust raised by the defendants claim untenable, the inescapable finding is that the defendants have not proven their case on a balance of probability.

Disposition: -

74. The court has found that the plaintiff has proven his case on balance of probability and the defendants have failed to prove their case.
75. The defendants would have benefitted from the one acre that the plaintiff was ready to give them but they refused and insisted the matter be decided in court.
76. Accordingly, I enter judgement for the plaintiff in terms that;
- i. A declaration be and is hereby issued that both the 1st and 2nd defendants, and their families are trespassers in the plaintiff's lands namely Nandi/lelmokwo/440 and Nandi/lelmokwo/441.
 - ii. An eviction order is hereby issued evicting the 1st, and 2nd defendants from Nandi/lelmokwo 440 and Nandi/lelmokwo/441.
 - iii. The costs of the suit are hereby awarded to the plaintiff; the court declines to award damages for loss as no evidence was led on this.
77. Judgment accordingly.

DATED AT KAPSABET THIS 12TH DAY OF OCTOBER, 2022.



HON. JUSTICE M. N. MWANYALE

JUDGE

In the presence of;

Mr. Songok for the plaintiff

Mr. Kagunza for the Defendant

