Yegon v Yator & 3 others (Sued as Administrators of the Estate of the Late David Kiptikigen - Deceased) (Environment and Land Appeal 10 of 2023) [2024] KEELC 1458 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1458 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KABARNET

ENVIRONMENT AND LAND APPEAL 10 OF 2023

L WAITHAKA, J

MARCH 20, 2024

BETWEEN

SAMUEL CHERUNGE YEGON ..... APPELLANT

AND

DAVID CHEPYEGON YATOR ..... 1ST RESPONDENT

MATHEW KENDAGOR ..... 2ND RESPONDENT

MATHEW KIBET KIPTIKIGEN ..... 3RD RESPONDENT

JOHN KIPLAGAT ..... 4TH RESPONDENT

SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE DAVID KIPTIKIGEN - DECEASED

(Being an appeal from the Ruling of Hon. J. Wanjala C.M in Kabarnet ELC No. 3 of 2017 delivered on 11th May, 2023)

JUDGMENT

1. This appeal is in respect of the ruling/decision of Hon. J. Wanjala CM delivered on 11th May, 2023 in Kabarnet ELC Case No.3 of 2017-Samuel Cheruge vs. David Chepyegon Yator & 2 others.

2. The ruling appealed from is in respect of the appellant's notice of motion dated 27th February, 2023 in which the appellant inter alia sought review, variation or an order to set aside the judgment entered in favour of the 3rd defendant (now 3rd respondent) and himself on 24th January, 2023.

3. The application was premised on the grounds that the applicant (now appellant) had discovered new and important evidence which after the exercise of due diligence was not within his knowledge or could

not be produced by him at the time when the decree was made. In that regard, the applicant informed the trial court that a certificate of lease had been issued in his favour in respect of the suit plot.

4. Urging that it was in the interest of justice that the court considers the said evidence and reviews its judgment in his favour, the applicant maintained that he was not aware of the progress of registration of the suit property in his favour at the time of filing the suit and at the time the suit came up for hearing. He asserted that he learnt about the certificate of lease issued in his favour after judgment had been entered.

5. The application was opposed by the 3rd defendant /respondent on the grounds that it is a non starter, defective, frivolous, vexatious and waste of precious judicial time; that the applicant had not established grounds to warrant review of the judgment of the court; that the applicant had not sought an order for re-opening of the case and that the applicant had not shown any exceptional circumstances to enable the court to review its earlier judgment.

6. The 3rd defendant/respondent contended that there was no discovery of important matter of evidence which, after exercise of due diligence, was not within the applicant's knowledge or that could not be produced by the applicant before the parties closed their case. The 3rd defendant /respondent argued that the lease sought to be produced in evidence could not have emanated miraculously as the applicant must have applied for it.

7. The 3rd defendant/respondent further contended that the application had been overtaken by events as he had already taken occupation of plot No. 113B which the applicant alleged is part of the land leased to him in the certificate of lease sought to be produced in evidence and that allowing the application would be prejudicial to him as it would expose him to serious losses and prejudice.

8. The 3rd defendant/respondent further contended that introduction of the document sought to be introduced in evidence would not change the outcome of the case as it will not defeat the letters of allotment issued to David Kiptikigen (deceased) in 1990s which the applicant failed to successfully challenge.

9. In dismissing the application, the learned trial magistrate observed/held:-

> " I have considered the application and the response from the Applicant. The Plaintiff wants this court to review and set aside a judgment that was delivered on 24.1.2023 and a decree that has already been issued. The main ground for making the application is that the applicant was called by the land Registrar to go and collect the lease. That he was not aware of the lease until he was called. I have looked at the said certificate of lease. The lease was issued in the year 2018. The Plaintiff/Applicant signed for it in the year 2016. He filed this case in the year 2008. The case was heard and parties closed their case in March 2020. Judgment was fixed for 21st December 2020 but the same was delivered on 24/1/2023. The plaintiff had sufficient time if he had exercised due diligence to find out that the lease had already been issued in 2018 before pleadings closed and evidence closed. Since the plaintiff/applicant had signed for a lease in 2016 and the lease was issued in 2018, he has not indicated what efforts he made to find out whether the lease was issued or not. It is only on 27th January 2023 that he was called by the land Registrar to go and collect the certificate of lease. He did not make any effort to go and find the status of the lease he had applied for...
>
> While I consider the certificate of lease important for this case, the plaintiff/applicant has not proved that he exercised his due diligence to look for crucial evidence to assist him in his case before hearing of the case was finalized and judgment was delivered. ...

> The plaintiff had all the time to look for the lease that he had applied for before the case was finalized. He waited until he was called to collect the lease in January 2023 after judgment had been delivered. He has not shown how he exercised due diligence to look for this lease that was crucial to him....
>
> This case was handled by another magistrate who heard the witnesses and wrote the judgment. He was transferred to another court. We would not know what he considered before arriving at the decision. He visited the scene and made his observations. The plaintiff had the right to appeal against the judgment when it was delivered which he had not done. To review the judgment and accept the new document as evidence will amount to reopening the case again. Had the plaintiff exercised due diligence and looked for the lease he would have used it before judgement was rendered because it was issued in 2018. He waited until he was called to collect it in January 2023. It is my view that he did not exercise due diligence to be able to rely on order 45(1)(i) of the Civil Procedure Rules about discovery of new and important evidence. The lease is a crucial document but he did not exercise due diligence to warrant review or setting aside of the judgment or decree. I proceed to dismiss the application with costs."

10. Aggrieved by the decision of the learned trial magistrate the plaintiff/applicant appealed to this court on the grounds that the learned trial magistrate erred by:-

    1. Failing to set aside and review the judgment considering the new and crucial evidence brought forth;

    2. Failing to take into account the certificate of lease which indicates that the appellant is the registered owner of the suit parcels;

    3. Failing to fully analyze and evaluate the new evidence on record thus reaching a wrong decision;

    4. Failing to find that the new evidence was not within the appellant's knowledge during trial which goes to the substratum of the said suit thus causing miscarriage of justice;

    5. Failing to appreciate that a certificate of lease is a crucial document in determining land ownership.

11. The appellant prays that the appeal be allowed and the ruling delivered on 11th May, 2023 be set aside and/or quashed. The appellant further prays that costs of the appeal be in cause.

12. Pursuant to directions given on 26th October 2023, the appeal was disposed off by way of written submissions

13. In his submissions filed on 14th November, 2023 the appellant has basically reiterated the grounds on which the appeal is premised and submitted that he met the conditions for review set out in Section 80 of the *Civil Procedure Act* as read with Order 45 Rule (1) of the Civil Procedure Rules.

14. Based on the decision in the case of Khalif Sheikh Adan V. Attorney General (2019) e KLR, where the court allowed an application for review based on discovery of new and important evidence which despite exercise of due diligence could not be produced during hearing of the case, the appellant urges this court to allow the appeal.

Analysis and determination

15. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of of reaching my own conclusion on it. I have reminded

myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see Selle & another vs. Associated Motor Boat Co. Ltd (1968)E.A 123 and Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR and Kiruga vs. Kiruga & Another (1988)KLR 348.

16. As pointed out herein above, the appellant sought review of the judgment delivered by the lower court on the ground that he had discovered new and important evidence which despite exercise of due diligence he could not produce during hearing of the case.

17. The new evidence sought to be produced is a certificate of lease whose existence the appellant deponed that he got to know after the judgment sought to be reviewed was delivered.

18. The evidence adduced before the lower court shows that the certificate of lease existed at the time the suit was heard as it was registered in 2018.

19. Whilst the plaintiff/appellant claimed that he was not aware of the existence of the lease during hearing of the case, he never demonstrated that he exercised any due diligence to find out the status of the lease yet there is evidence that he had applied for it.

20. The question to answer, in the circumstances, is whether the plaintiff/applicant satisfied the legal requirement for review of judgment, decree or order of court based on discovery of new and important evidence which despite exercise of due dilligence could not be produced.

21. My answer to that answer is negative. That is so because, the plaintiff/appellant did not demonstrate that the evidence sought to be produced could not be produced during hearing despite exercise of due diligence.

22. In any event, the evidence sought to be relied on could not on its own, form a basis for granting the orders sought. It merely called for re-opening of the plaintiff's case for admission of the evidence in the usual way. The defendant/respondent would still be entitled to oppose its admission in evidence and if admitted in evidence, to cross examine on it, if need be.

23. Having failed to satisfy the court that the document could not be produced in evidence even after exercise of due diligence as by law required and further having failed to move the court for re-opening of the case to allow for admission of the alleged new evidence, I find and hold that the learned trial magistrate properly directed herself on the issues of fact and law raised in the application.

24. The upshot of the foregoing is that the appeal has no merit. Consequently, I dismiss it with costs to the respondent.

25. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 20TH DAY OF MARCH, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms. Nyaribo holding brief for Mrs. Cheptinga for the appellant

Mr. Kipkoech holding brief for Ms. Lelei or the 2nd respondent

Mr. Matoke for the 3rd respondent

Court Asst.: Christine