



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCC NO.202 OF 2011**

**ERICK OPON NYAMUNGA.....PLAINTIFF**

**VERSUS**

**SUTTON HOLDINGS LTD.....DEFENDANT**

**RULING**

1. This ruling follows filing of submissions on the application dated 11/11/2011 and filed on the same date. The application is a Notice of Motion brought under Sections 3A and 63 of Civil Procedure Act (Cap 21) and Order 40 Rules 1 and 2 of Civil Procedure Rules and other applicable provisions of law.
2. The application has 3 prayers. They are as follows:

**Prayer (1):** That the court be pleased to certify the application urgent and hear it exparte in the first instance.

**Prayer (2):** That pending hearing and determination of the application interpartes, or further orders of the court, there be a temporary injunction against the defendant, its employees, agents, representatives assigns or any other person acting through its direction from trespassing, building upon or in any other way dealing in or interfering with the plaintiff's land Parcel Number **KISUMU/KORANDO/1973**.

**Prayer 3:** That costs of this application be provided for.
3. I have set out the prayers because the determination of the application is going to depend on the way prayer 2 is formulated.
4. When prayer 2 is looked at carefully, it is apparent that the court is being asked to issue an injunctive order against the 1st defendant – **SUTTON HOLDING LIMITED** – to run until the application is heard and determined. Under prayer 2 also, the court has the option to issue further orders. The court cannot issue the injunctive order and further orders at the same time. It is either one or the other and that is why the word “**OR**” is used in the prayer.
5. When the application was filed on 11/11/2011, a restraining order was granted as prayed in prayer 2. That prayer therefore became spent. There is no prayer made to run until hearing and determination of the suit. That is where the problem lies.
6. The plaintiffs has submitted and the defendants have responded as if there is precisely such a prayer. In fact I have read the application, replying affidavit and the supplementary affidavits

filed. I have read the submissions too. All of them are well articulated and loaded with vital information. **BUT** they all amount to nothing because the prayer they purport to be referring to is lacking.

7. I don't intend to delve into the contents of the material laid before me in support or against the application. It would be an exercise in futility to do so bearing in mind the problem I have pointed out.

8. Bearing all this in mind, the application herein cannot stand and I hereby dismiss it with costs.

**A.K. KANIARU – JUDGE**

**21/1/2014**

**21/1/2014**

Before A.K. Kaniaru – Judge

Diang'a George – Court Clerk

No party present

Interpretation: English/Kiswahili

Ngala Awino for Ojoro for applicant

M/s Sichele for Menezes for 3rd respondent

**COURT:** Ruling on application dated 11/11/2011 and filed on the same date read and delivered in open **COURT.**

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**21/1/2014**