



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 22 OF 2018**

**SUTTON HOLDINGS LIMITED.....PLAINTIFF**

**-VERSUS-**

**ERIC OPON NYAMUNGA.....DEFENDANT**

**RULING**

Sutton Holdings Ltd in application dated 5/8/2019 prays that this court reviews its ruling of 26/6/2019 dismissing the Plaintiff's application dated 27/4/2019 with costs. The applicant prays for costs of the application.

The application is based on grounds that this Honourable Court delivered a Ruling on the 26<sup>th</sup> of June, 2019, to the Plaintiff/Applicant's notice of motion dated 27<sup>th</sup> April, 2018. The Plaintiff/Applicant is aggrieved with said ruling because the Defendant/Respondent continues to construct on the suit property pending the hearing and determination of the suit herein and the Plaintiff/Applicant stands to suffer irreparable loss and damage.

On or about the 13<sup>th</sup> of February 2019 the Plaintiff/Applicant caused to be done a search of records at the Lands Registry in Kisumu in respect of the suit property herein.

As a result of the said search, a Certificate of Search dated 13<sup>th</sup> February, 2019 was issued by the Land Registrar, which indicates that Sutton Holdings Limited, the Plaintiff/Applicant herein, as the proprietor of the suit property.

The Plaintiff/Applicant further caused to be done an Application for a Certified Copy of the Green Card at the Lands Registry in Kisumu, in respect of the suit property herein.

As a result of the said Application for the Certified Copy of the Green Card to the suit property, the Plaintiff/Applicant herein was issued with a copy of the Green Card Certified on the 14<sup>th</sup> of February, 2019, which indicates Sutton Holdings Limited, the Plaintiff/Applicant herein, as the bonafide and duly registered proprietor of the suit property.

The court determined the Plaintiff/Applicant's motion dated 27<sup>th</sup> April, 2019 and delivered the said Ruling without having the benefit of considering the said copies of the Certificate of Search and Certified green card.

The said documents are new and/or additional information which are absolutely necessary and critical to the fair and just determination of the Application dated 27<sup>th</sup> April, 2018.

The Plaintiff/Applicant attempted to have on record the said documents by swearing a Further Affidavit and making attempts to file an Application for leave to have the said further affidavit, to no avail.

In the foregoing, the Plaintiff/Applicant desires to have considered the Certificate of search dated 13<sup>th</sup> February, 2019 and copy of Green Card certified on the 14<sup>th</sup> February, 2019 in the determination of the Application dated 27<sup>th</sup> April, 2018.

In the circumstances, it is in the interest of justice that this court does review its Ruling issued on the 26<sup>th</sup> June, 2019.

This Application is brought in good faith and it is in the interest of Justice that this Application is heard and determined on a priority basis.

The Plaintiff/Applicant herein will suffer irreparable loss and damage if the Application herein is not allowed.

No prejudice will be occasioned on the Defendant/Respondent if this Application is allowed.

The said Certified of search and certified copy of the green Book of the Plaintiff/Applicant's intended further affidavit are necessary in the Just determination of the Application dated 27<sup>th</sup> April, 2018.

It is in the interest of justice that this Application be allowed for the purpose of determining the real question in controversy between the parties in the motion dated 27<sup>th</sup> April, 2018.

The respondent filed grounds of opposition whose import is that the application is an abuse of court process and that the plaintiff has failed to meet the threshold for review and that the application is incompetent and frivolous.

Section 80 of the Civil Act provides:

**“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

Order 45 of the Civil Procedure Rules provides:

**“1. (1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or 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 passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

The evidence sought to be introduced by the Plaintiff was available during the hearing of the application and nothing prevented the applicant from introducing the same before hearing. The applicant has not demonstrated that he exercised due diligence in availing the documents to court by writing to the registrar

The applicant was given the opportunity to canvass his case but did not introduce all the desirable evidence to the court during hearing. The application was canvassed through written submissions. It was going to be highly irregular to introduce the evidence after hearing of the application by way of written submissions.

The plaintiff ought to have carried out a search before the hearing of the application.

I do find that the plaintiff did not exercise due diligence as required by Order 45 of the Civil Procedure Rules and therefore the application is disallowed. Costs to the Respondent.

**DATED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**