

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.21 OF 2010

ANTONY AMUO MURUNGA.....PLAINTIFF

VERSUS

JULIUS ODHIAMBO CHAPA.....DEFENDANT

RULING

The plaintiff filed an application by way of notice of motion pursuant to the provisions of **Order 2 Rule 15(1)(b) and (d)** of the **Civil Procedure Rules** and **Sections 1A and 1B** of the **Civil Procedure Act** seeking orders from this court to strike out the defence filed by the defendant and thereafter enter judgment in favour of the plaintiff as prayed in the plaint. The grounds in support of the application are stated on the face of the application. The plaintiff contends that the defence that was filed by the defendant was frivolous, vexatious and an abuse of the due process of the court. The plaintiff further states that the defendant was in contempt of the orders of the court and was therefore not entitled to be heard. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The defendant filed grounds of opposition. He also filed a replying affidavit in opposition to the application. In the response, the defendant stated that the plaintiff was not entitled to the orders sought in his application. He deponed that he had no dispute with the plaintiff concerning the suit parcel of land. It was his case that his defence raised issues which could only be determined after the case had been heard on its merit.

At the hearing of the application, this court heard oral rival submission made by Mr. Wanyonyi for the plaintiff and by Mr. Okutta for the defendant. This court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a suitable case for this court to strike out the defence filed by the defendant. The dispute between the plaintiff and the defendant is over a parcel of land. Whereas the plaintiff contends that the defendant had trespassed into his parcel of land, the defendant on his part argues that he has no dispute with the plaintiff because he had not at any time trespassed into the plaintiff's parcel of land.

Reading between the lines, it became apparent to this court that there exists a dispute between the plaintiff and the defendant regarding a specific portion of land on the ground. It appears as if the plaintiff and the defendant have not agreed on the boundaries of their respective parcels of land. This is a real dispute which cannot be resolved by the court in an application. The only way that the dispute can be resolved is by the court hearing *viva voce* evidence from both the plaintiff and the defendant together with their respective witnesses, if any. The application before the court therefore cannot be allowed. It is inappropriate for the resolution of cases involving the determination of ownership of land. The plaintiff has not met the threshold which will enable this court strike out the defence filed by the defendant on the grounds that the same was filed with a view to frustrating the plaintiff from the seat of judgment. If the plaintiff formed the view that the defendant was in contempt of the orders of this court, he is at liberty to institute contempt of court proceedings instead of applying to this court for the defendant's defence to be struck out.

The upshot of the above reasons is that the plaintiff's application lacks merit and is hereby dismissed with costs.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 30TH DAY OF JULY, 2013.

F. TUIYOT

JUDGE