



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 70 OF 2010

JOSEPH ABONGO

**PLAINTIFF
VERSUS**

MOSES ODOYO NYAOKE

**.....DEFENDANT
AND**

DICKENS AYUB ODHIAMBO

.....APPLICANT

RULING

The plaintiff's application dated 4th November 2010 prays that the defendant's statement of Defence dated 3rd June 2010 be struck out and judgment be entered for the plaintiff against the defendant as prayed in the plaint. He further prays for costs. The same is supported by the affidavit of the plaintiff sworn on 4th October 2010. The defendant did file a replying affidavit sworn on 25th January 2011. From the on set it has always been held and indeed it's a trite law now that striking out a pleading and in this case a defence should be done carefully and sparingly. In every circumstances an opportunity should be accorded to an individual to ventilate his case even when the same is frivolous but with an iota of merit

I have read carefully the rival affidavits together with the submissions filed by both counsels. I would agree with the plaintiff counsel that his client is the current registered owner of the suit property. That alone entitles him to claim an overriding right over any other person including the defendant. Nevertheless I have read the defendant defence dated 3rd June 2010. In my opinion the same raise triable issues.

One of them include the fact that there seems to be a boundary dispute which has been existing between the parcels of land namely **KISUMU / KOGUTA / 170** and **KISUMU / KOGUTA / 165**. The same is unresolved. This is buttressed by the annexures of the defendant in his replying affidavit, namely the minutes of Upper Nyakach Land Control Board.

Further there is an issue regarding succession proceedings which led the plaintiff obtain title. There is an allegation of fraud allegedly purportedly by the plaintiff.

As stated earlier on this are issues which need adduction of evidence. They can't be done in a summary manner. The land Registrar in my opinion need to shade some light. Being a land issue I think its worthy that the same goes to full trial. The upshot of this is that I disallow the plaintiff's application and the cost shall be in the main suit.

Orders accordingly.

Dated, signed and delivered at Kisumu this 11th day of November 2011.

**H. K. CHEMITEI
JUDGE**

HKC/aao