

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Case 287 of 2002

TOM BOAZ OKWEDORO
PLAINTIFF

VERSUS

1. BARRACK YOMBA OMAYO

2. AMOS AMBUNDO OMUYEKA.....DEFENDANTS

RULING

In their application dated 3rd February, 2003 **Barrack Yomba Omayo** and **Amos Ambundo Omuyeka** the defendants seek an order for a dismissal of suit filed by **Tom Boaz Okwengo** the plaintiff against them on the ground that it does not disclose a cause of action and is an abuse of the process of court for being based on an alleged illegal contract. The application which was brought under Order V1 rule 13 of the Civil procedure Rules and section 6 of the Land Control Act and section 3A of Civil procedure Act is supported by an affidavit of **Barrack Yomba Omayo** the 1st defendant. The plaintiff opposes the application relying on a replying affidavit Mr. Julius Motanya his counsel who is in conduct of the case.

In his submission **Mr. P. J. Otieno** stated that the basis for the suit is an alleged illegal contract that there was no consent of Land Control Boards, and that the parcel of land **No. East Gem/Jino/196** was alleged to have been brought from one **Cleophas Otieno Obara** on 1st February, 1990 for Kshs.20,000/- when the said Obara has never been the registered owner of the land; that the said **Cleophas Otieno Obara** is not a party to this suit; that there are no privity of contract between the plaintiff and the defendants and there is relationship between **Cleophas Otieno Obara** and the defendants.

In response Mr. Motanya submitted that the land was registered in the name of the 1st defendant as a trustee, that the vendor has never lived on the suit property, that there are triable issues.

In paragraph 3 of the amended plaint the plaintiff pleaded that on 1st February, 1990 he bought the suit land from ancestral owner one **Cleophas Atieno Obara** for Kshs.20,000/-. However the defendants denied the claim. The green card which was put in as exhibit indicates that the land was first registered in the name of the 1st defendant on 22nd August, 1979, after land adjudication process. I was also disclosed that the 1st defendant acquired the land from the late **Omayo Opiyo** his father who had acquired from Philip Obara Odwa in 1956. The said **Cleophas Atieno Obara** does not appear to have been the ancestor of the 1st defendant. There is also no evidence that the 1st defendant was a brother of the said **Cleophas Atieno Obara** so that the issue of whether the 1st defendant held part of the land in trust for him could be considered.

It was incumbent upon the plaintiff to demonstrate that there is even one triable issue between the parties to persuade me to permit the plaintiff to agitate it at the trial.

I find that this is a case where from the pleadings between the parties it is so plain and obvious that the plaintiff does not have any cause of action against the defendants.

Accordingly I strike it out with costs to the defendants.

Dated and delivered on 25th July, 2005

B. K. TANUI

J U D G E

In the presence of : Mr. Olel for Motanya for the Plaintiff.

B. K. TANUI

J U D G E