



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 222 OF 2012(O.S)**

MARK M.MUKUT..... APPLICANT

**VERSUS**

KAKAI OLE MASANKA..... RESPONDENT

**RULING**

1. What is before me is the Applicant's application dated 30<sup>th</sup> January, 2013. The same was brought under Order 51 rule 1 and Order 37 rule 16 of the Civil Procedure Rules. The application sought two(2) principal prayers namely; directions on how this suit which has been brought by way of originating summons should be disposed of and an order of prohibition to prohibit any transfer, charge, sale or any dealing with the suit property namely, **LR No. Transmara/Moita/548** pending the hearing and determination of this suit. The first prayer dealing with directions was disposed of by consent when the application came up for hearing before me on 19<sup>th</sup> April, 2013. This left the prayer for prohibition to be determined by the court. The application was supported by a brief eight (8) paragraph affidavit sworn on 31<sup>st</sup> January, 2013 by Elizaphan Mokaya Bogonko, advocate, who is acting for the Applicant in this suit. Mr. Bogonko stated in his affidavit in support of this application that the applicant herein is claiming land by adverse possession and that the respondent has already filed and served a replying affidavit in response to the originating summons. It was therefore necessary for the court to give directions on how the hearing of the originating summons should proceed. He stated further in the said affidavit that the applicant is seeking an order for the maintenance of the status quo pending the hearing and determination of this suit. In his submission in support of this limb of the application that sought an order of prohibition, Mr. Bogonko, advocate for the applicant argued that the said order should be granted so as to maintain the status quo prevailing at the moment pending the hearing and determination of this suit. Counsel submitted that it is necessary to maintain that status quo because the applicant is in possession of the suit property while the title thereof which the applicant is claiming by adverse possession is in the name of the respondent. It would therefore serve the interest of justice if the property is preserved to avoid the same being disposed of by the respondent to third parties during the pendency of this suit. Counsel submitted that the respondent stands to suffer no prejudice if the order sought is granted. On the objection to the application, counsel submitted that the respondent in his grounds of opposition raised merely technical issues which the court should ignore for the sake of substantive justice. He submitted further that the order sought is aimed at preserving the subject matter of the suit and as such the court can even grant the same *suo moto* without a formal application by any of the parties. Counsel submitted that the applicant is apprehensive that the suit property may be interfered with before the hearing and determination of this suit and as such the order sought should issue.
2. The applicant filed similar applications in Kisii HCCC Nos. 224, 227, 228, 229, 230, 233, 235, 236, 239, 241, 245, 248, 251 and 253 all of 2012. It was agreed by consent of the parties that this suits should be heard together. The ruling in this application will therefore apply to the applications pending in the aforesaid suits. The respondent herein did not file grounds of opposition or replying affidavit to the applicant's application. Mr. Ochwangi, advocate who appeared for the respondent however adopted and relied on the grounds of opposition dated 16<sup>th</sup> March, 2013 that was filed by the respondent in response to a similar application in Kisii HCCC

No. 133 of 2012 which is being heard together with the present application. In summary, the respondent's objection to the applicant's application was that the application is misconceived, incompetent and devoid of any merit. Mr. Ochwangi argued in his submission in opposition to the application that the applicant who is not the registered proprietor of the suit property has no basis for seeking to prohibit the respondent from dealing with its property. Counsel submitted that the issue as to whether or not the applicant is in possession of the suit property is a matter for the trial court to determine and that the issue cannot be determined through the present application. Counsel submitted that the order sought if granted would offend the provisions of sections 23, 24 and 25 of the Land Act, 2012 which protects a registered owner of land. Counsel submitted further that no material had been placed before the court on the basis of which the court could grant the order sought. Counsel took issue with the affidavit in support of the application. He submitted that Mr. Bogonko, advocate, who swore the said affidavit, was not competent to do so as he is not a party to these proceedings. Counsel submitted that the affidavit filed in support of the application offends the provisions of order 19 rules 2 and 3 of the Civil Procedure Rules. Counsel submitted that these are not mere technical issue which can be ignored by the court pursuant to the provisions of Article 159 (2) (d) of the Constitution of Kenya for the sake of substantive justice. Mr. Ochwangi submitted further that the application herein is an abuse of the process of the court as no evidence of whatsoever nature has been placed before the court to show that the suit property is in danger of being interfered with or to justify the applicant's apprehension of possible interference. In response to these submissions, Mr. Bogonko submitted that, a mere apprehension on the part of the applicant was sufficient to warrant the granting of the order sought. Counsel submitted further that the existence of a dispute over the suit property would also justify the preservation of the suit property which what the order sought is intended to do. On the competence of his affidavit in support of the application, Mr. Bogonko submitted that he had instructions from the applicant to swear the same and that he did not depose to any contentious fact. In conclusion, he submitted that any defect in the affidavit can be cured under order 19 of the Civil Procedure Rules.

3. I have considered the applicant's application and the opposition thereto. This is the view that I take of the matter. The applicant is seeking an order to prohibit any transfer, charge, sale or any dealing with the suit property pending the hearing and determination of this suit. It is not very clear from the applicant's application under which provisions of the law the jurisdiction of the court is being invoked to grant this order. As I have mentioned at the beginning of this ruling, the applicant's application has been brought under Order 51 rule 1 and Order 37 rule 16 of the Civil Procedure Rules. Order 51 rule 1 deals generally with the procedure of instituting applications while
4. Order 37 rule 16 deals with the giving of directions in cases instituted by way of originating summons. None of these provisions of the Civil Procedure Rules confer upon the court the jurisdiction to grant an order of prohibition sought herein by the applicant. Save in cases where the court is exercising its supervisory power over inferior tribunals or bodies through judicial review when the court may grant orders of certiorari, prohibition and mandamus, I am not aware of any other instance when this court can grant an order of prohibition. This court is given power under The Land Registration Act, 2012 to restrain any dealing with registered land through an order of **inhibition**. See section 68 of the Land Registration Act, 2012. If the applicant wanted to restrict any dealing with the suit property pending the hearing and determination of this suit and did not wish to do so through an order of injunction, the only other remedy that was available to him was to seek an order of inhibition under section 68 of the Land Registration Act, 2012 aforesaid. An inhibition is a preservation order which this court has jurisdiction to grant in the interim or permanently under section 13 (7) (a) of The Environment and Land Court Act, 2011. The court is not conferred with jurisdiction under The Environment and Land Act, 2011 aforesaid to grant an interim order of prohibition. Due to the foregoing, I am of the view that the order sought by the applicant is not available to him. The application herein is therefore misconceived and on this ground alone, the same should fail. In the event that I am wrong in the conclusion that I have arrived at herein above, I am of the view that the applicant's application would also fail on other grounds. As submitted by the respondents advocate, the applicant failed completely to lay a basis

for the order sought. Even if it is assumed for argument sake that the court could grant the order sought as one of the preservation orders that the court is empowered to grant, such order cannot be granted as a matter of right. An applicant for a preservation order must give good reasons to warrant the issuance of the order. The applicant's advocate in his affidavit in support of the application did not give any reason or justification for the order. The only relevant portion of his affidavit reads as follows; **"6. That in the meantime, we pray that the status quo be maintained pending the hearing and determination of this case"**. I don't think that this statement is sufficient to justify an order which would prohibit a registered owner of land from dealing with his land. In his submission, the applicant's advocate had submitted that an apprehension on the part of the applicant that the suit property may be interfered with and the fact that there is a dispute over the suit property are sufficient factors to warrant the grant of the orders sought. To start with the second argument, I am of the view that the mere existence of a dispute over land cannot entitle a party to such dispute to an automatic order prohibiting the registered proprietor of such land from having any dealing with the same. If that were to be the case, the legislature would have stated so expressly in the land statutes. I find no merit at all in this argument. With regard to the alleged apprehension by the applicant of a possible interference with the suit property while this suit is pending, there is no averment in the applicant's advocate's affidavit in support of the application that the applicant is apprehensive that the suit property may be interfered with while this case is pending hearing. This was a mere statement from the bar. Even if such a statement was to be contained in the applicant's advocate's affidavit, I doubt whether it would have been given any weight by the court because; first, an apprehension by the applicant as a matter of fact would not have been within the applicant's advocate's knowledge which he could have deposed to and secondly, whether such apprehension existed was a contentious matter which an advocate is not allowed to depose to on behalf of a client. Under Order 19 rule 3 (1) of the Civil Procedure Rules, an affidavit is supposed to be confined to matters within the deponent's own knowledge and where it contains statements of information, the sources of such information must be disclosed. On the other hand, rule 9 of the Advocates Practice Rules restricts affidavits by advocates in contentious proceedings to formal or non-contentious matters of fact only. The applicant failed therefore to lay any basis for the order sought in his advocate's affidavit in support of the application. The applicant's attempt to fill this void during his submissions equally failed because the submissions were made in vacuum, no basis having been laid for the same in the affidavit in support of the application.

5. Due to the foregoing I am persuaded by the submissions by the respondent's advocate that the applicant's application dated 30<sup>th</sup> January, 2013 has no merit. The same is hereby dismissed. This order will apply to the Notice of Motion applications dated 30<sup>th</sup> January, 2013 filed in Kisii HCCC Nos. 224, 227, 228, 229, 230, 233, 235, 236, 239, 241, 245, 248, 251 and 253 all of 2012 with the consequence that the same shall stand dismissed. Due to the fact that only the application filed in this suit was argued, I will award costs to the respondent herein only. The costs of the applications in the other cases shall be in the cause.

**Dated, signed and delivered at KISII this 19<sup>th</sup> day of July, 2013.**

**S.**

**OKONG'O,**

**JUDGE.**

**In the presence of:-**

Mr. Bogonko for Applicant

Miss. Sagwa holding brief for Oguttu for Respondent

Mobisa Court Clerk.

S.

OKONG'O,

JUDGE.

E&LCC.NO.222 OF 2012(O.S)