



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND CASE NO. 48 OF 2017**

KABUKI WOMEN GROUP suing through its officials

CECILIA NALIANYA Chairlady.....1<sup>ST</sup> APPLICANT/PLAINTIFF

JANET MALAMBA Treasurer.....2<sup>nd</sup> APPLICANT/PLAINTIFF

FATUMA MUNYENOD Secretary.....3<sup>rd</sup> APPLICANT/PLAINTIFF

VERSUS

ELIZABETH WEYA MWAURA.....DEFENDANT/RESPONDENT

**RULING**

**INTRODUCTION**

This ruling is in respect of an application dated 9<sup>th</sup> February 2017 brought by the plaintiff by way of a Notice of motion for orders:

1. That the service of this application be dispensed with in the first instance and the same be certified as urgent.
2. That the Honourable court be pleased to issue preservative and/or temporary injunction restraining the defendant/respondent, her agents, servants, relatives and/or assignees from tilling, cultivating, transferring, alienating, commencing and/or continuing with any form of construction building and/or structures on all the plaintiff's parcel of land known as UASIN GISHU COUNTY/ELDORET MUNICIPALITY/KAHOYA ESTATE PLOT NO.21/1778 measuring 1 acre pending the hearing and determination of the instant application and eventually the main suit.
3. That the costs of this application be borne by the defendant.

This matter was brought under certificate of urgency on 9<sup>th</sup> February 2017, when the court ordered that the application be served for inter parte hearing on 23<sup>rd</sup> February 2017. The same was served and the Counsels for the parties agreed to canvass the application by way of written submissions. The defendant filed the submissions but the plaintiff failed to file submissions as agreed. I will therefore base my findings from the pleadings, supporting affidavit and the defendant's submission.

From the pleadings on record, I notice that the plaintiff has not attached any documentary evidence to show that they are the legal owners of the suit plot. The share certificate attached in the name of Huruma Farmers Company does not help much as no explanation was offered to link the suit land with it.

I have also considered the replying affidavit and the submissions by the defendant's Counsel and notice that many issues have been raised including limitation of actions and locus standi. I notice that at one point the defendant's Counsel acted for the plaintiff whereby they wrote a demand letter dated 10<sup>th</sup> January 1990 to the late Mary Wambui Mwaura that she was in wrongful occupation of land belonging to Kabuki Company Ltd but the land reference number was never indicated. This is an indication that even though the defendant denies any wrong doing, there might be need for the case to proceed to full hearing so that this can be ascertained.

Counsel for the defendant submitted that the administrators of the estate of the late Mary Mwaura distributed the estate upon confirmation of grant. He submitted that the deceased built residential houses which are currently occupied by tenants and that an order for injunction would amount to an eviction.

Counsel earlier submitted that the Plaintiff's claim is untenable in law for want of locus standi and relied on Section 10(2) of the Limitation of Actions Act which provides that, if the person entitled to the proceeding estate or interest, not being a term of years absolutely was not in possession of the land on the date of determination of the estate or interest, no action may be brought by the person succeeding the estate or interest after the end of twelve years from the date on which the right of action accrued to the person entitled to the preceding estate of interest. It was Counsel's submission that the matter was brought after 27 years. He further relied on two authorities namely Joseph Migere Onoo vs AG HCC P No. 424 of 2013 and Ochieng Kenneth K'ogutu vs Kenyatta University and 2 others HCC P No. 306 of 2012 to support the position on limitation of actions.

Counsel therefore urged the court to dismiss the plaintiff's application as it has not met the threshold for granting temporary injunctions.

### **Analysis and Determination**

I have considered the application, the supporting documentation and the submissions of the defendant's counsel and state that this is an application for injunction. The principles of granting injunctions are well settled. The question to ask is whether the plaintiff has fulfilled these principles. Has a prima facie case been established with a probability of success, Will the plaintiff suffer irreparable injury which cannot be adequately compensated by an award of damages? If the court is in doubt, will it decide on a balance of convenience?

The plaintiff filed this application but did not file written submissions as had been agreed by consent. As earlier stated, the plaintiff did not attach any documentary evidence to establish that they are the rightful owners of the suit land. No agreement for purchase of the suit land was annexed to give weight to the case. There is nowhere in the annexures that mentions the suit land having been allocated to the plaintiff. In the absence of this crucial evidence I am left with no option but to find that no prima facie case has been established with a probability of success.

As for the two limbs of the threshold for granting temporary injunctions, I wish to state that this is a matter involving land ownership, if the plaintiff proves that the defendant has trespassed on their land then they can be compensated by way of damages. The plaintiffs are not in occupation as per the evidence on record. This is reinforced by the letter by the defendant's counsel informing the defendant that she is in unlawful occupation of land belonging to the plaintiff. The land Reference number was however not indicated. In the circumstances, I would also find that the balance of convenience does not tilt in favour of the plaintiff. I will not delve into the other issues regarding limitation of actions at this juncture as the same can be canvassed at the hearing of the suit.

I accordingly find that this application lacks merit and is therefore dismissed. The costs shall be in the cause.

Parties to comply with order 11 within 30 days and fix the matter for hearing.

**Dated and delivered at Eldoret this 19<sup>th</sup> day of September, 2017.**

**M.A ODENY**

**JUDGE**

**Read in open court in the presence of:**

Miss Odwa for the defendant

CC: Koech

No appearance for the Plaintiff