ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 95 OF 2014

VITAL PLANTATION

LEASE COMPANY LTD.....1ST PLAINTIFF/APPLICANT

VITAL BIO ENERGY (KENYA) LTD……..…2ND PLAINTIFF/APPLICANT

=VERSUS=

AGRICULTURAL DEVELOPMENT

CORPORATION……..DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. The Application before me by the Plaintiffs is the one dated 27th May, 2014 filed pursuant to the provisions of Section 7(1) of the Arbitration Act, Act No.4 of 1995 and Order 40 of the Civil Procedure Rules. The Application is seeking for the following orders;

a. **That this Honourable Court be pleased to refer this matter to Arbitration in accordance with Clause 13 of the Lease dated 8th September, 2008 (Lease).**
b. **That pending the hearing and determination of the proposed arbitration, the Defendant/Respondent by itself, its offices, employees, servants and/or agents or otherwise howsoever be restrained from;-**

I. **Closing down, suspending or in any other manner whatsoever interfering with or disrupting the smooth running and operations by the Plaintiff/Applicant, its employees, dealers, servants, agents, assigns and/or licensees of the portion of land known as KULALU PLANTATION measuring approximately seventy thousand (70,000) acres excised under the Lease dated 8th September 2008 from ALL THAT piece or parcel of land measuring ninety six thousand nine hundred and nineteen decimal naught six (96,919.06) hectares known as Land Reference 14248 delineated per the Survey Plan Number 258160 annexed to the Grant and registered in the Land Titles Registry at Mombasa as Number C.R. 44203/1(hereinafter "the property").**
II. **Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment,**

running and operation of the Property.

III. **Harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operation by the Plaintiff/Applicant, its employees, dealers, servants, agents, assigns, and/or licensees at the Property.**

c. **THAT this Honourable court do issue a mandatory injunction restraining the Defendants by themselves, agents and /or agents from accessing, trespassing, demolishing buildings, wasting, alienating, constructing, building, fencing, taking over possession, evicting and or in any other way dealing with the portion of land known as KULALU PLANTATION measuring approximately seventy thousand (70,000) acres excised under the Lease dated 8th September 2008 from ALL THAT piece or parcel of land measuring ninety six thousand nine hundred and nineteen decimal naught six (96,919.06) hectares known as Land Reference 14248 delineated per the Survey Plan Number 258160 annexed to the Grant and registered in the Land Titles Registry at Mombasa as Number C.R. 44203/1 pending the hearing and determination of the proposed Arbitration.**

d. **THAT the costs of the application be awarded to the Plaintiffs/Applicants.**

2. The Application is premised on the grounds that by a Lease dated 8th September, 2008, the Defendant granted the 1st Plaintiff a renewable Leasehold interest for sixteen years; that the Plaintiffs have made payments of rent in accordance with the terms and tenor of the Lease; that a dispute has arisen between the parties in the interpretation of the terms "actual land utilized" and that the Plaintiffs by their letter dated 5th May, 2014 issued a notice to refer the dispute to arbitration pursuant to the provisions of Clause 13 of the Lease.

The Applicants' case

3. The Plaintiffs' operations director deponed that the Plaintiffs are affiliated companies. It was deponed that by a Lease dated 8th September, 2008, the Defendant granted to the 1st Plaintiff a Leasehold interest for a renewable period of sixteen (16) years over portion of land known as KULALU PLANTATION measuring approximately 70,000 acres.
4. It is the 2nd Plaintiff's operation's director deposition that on 19th June, 2013, the Defendant demanded for rent amounting to Ksh.29,120,000 and US $ 14,175 and on 17th July, 2013 an alleged notice to terminate the Lease dated 11th July, 2013 was handed over to the deponent by the Defendant.
5. According to the Plaintiffs' director, the Plaintiff has paid rent to the Defendant up to and including December, 2013 and that by a letter dated 23rd April, 2014 the Defendant was claiming Ksh.28, 068,000/- from the Plaintiffs.
6. The 2nd Plaintiff's operations director finally deponed that the Defendant has refused to participate in the proposed arbitration and instead sent over armed GSU men to take over possession of the suit property. It is the Plaintiff's deposition that unless the injunctive order is granted, the Plaintiff will be deprived of the use of the property and stands to lose its investments worth US$4,000,000/-.

The Defendant's case

7. In response, the Defendant's Corporation Secretary deponed that the 2nd Plaintiff is a stranger to the contract entered into between the 1st Plaintiff and the Defendant on 8th September, 2008 for land measuring 70,000 acres being part of the parcel of land known as L.R.No.141248 (The Plantation Lease) and another contract known as the "Headquarter Lease".
8. According to the Corporation Secretary, the 1st Plaintiff owes the Defendant Ksh.29,120,000/- in respect of the Plantation Lease and US$ 14,175 in respect of the "Headquarter Lease". Consequently, it was deponed, the Defendant issued to the 1st Plaintiff a forfeiture notice dated 11th July, 2013 and that there is no dispute to be referred to arbitration.
9. The Defendant's Corporation Secretary further stated that once the Plantation Lease was signed,

the lessee was under an obligation to meet its rent payments as set out in the Lease and also utilize a given minimum acreage which was to increase periodically. When the Plaintiff failed to settle the outstanding rent arrears as set out in the forfeiture notice of 11th July 2013, it was deponed, the Defendant's Regional Manager re-entered the premises on 22nd May, 2014.

10. The Plaintiff filed a Further Affidavit which I have considered.

Plaintiffs' submissions

11. The parties' advocates filed their written submission which they highlighted.
12. The Plaintiffs' advocate submitted that indeed the 1st Plaintiff and the Defendant entered into two Lease agreements, namely the Plantation Lease and the Head quarter's Lease and that although the intended project was delayed, the 2nd Plaintiff made payments which were acknowledged in the Defendant's letter dated 23rd April, 2014.
13. After numerous meetings, the Plaintiffs' advocate submitted, the Plaintiffs invited the Defendant vide a letter dated 18th May, 2014 to appoint an Arbitrator in accordance with clause 13 of the Lease to resolve the issue of rent payable and that on 22nd May, 2014, the Defendant sent armed GSU men who took over possession of the property thus this suit.
14. The Plaintiffs' counsel further submitted that unless the orders the Plaintiffs are seeking are granted, the Plaintiffs will suffer irreparable damage to the tune of US$ 4,000,000 in terms of investment, loss of revenue of Ksh.193,200 per day, damaged crop plants valued at approximately Kshs. 7,500,000, damage to sapling nursery valued at 252,320, costs of delaying the developments of the plantation valued at approximately US$ 840,000,000 amongst other costs.
15. Counsel submitted that parties have been unable to agree on the definition of the term "actual land utilized" as used in the Lease which has an effect on the payable rent and that over the course of time, the 2nd Plaintiff has made payments amounting to Ksh.22,055,000 and that although the Defendant is claiming for Kshs.28,065,000, the Plaintiffs have made an overpayment of the rent by Ksh.5,919,276.75.

Defendant's submissions

16. The Defendant's advocate on the other hand submitted that the 2nd Plaintiff being a third party to the Lease that was entered into between the 1st Plaintiff and the Defendant has no locus standi to bring this suit.
17. The Defendant's counsel further submitted that clause 3.2 of the Lease sets out the method of calculating rent and that the 1st Plaintiff was required to utilize the land Leased and not to hoard it to the detriment of the Defendant.
18. According to counsel, the terms of the agreement are clear and that the Defendant has acted within the ambit of the agreement; that clause 7.2 of the Lease agreement gives the Defendant the right to issue a 60 days' notice to the tenant indicating its breach after which the Defendant was entitled to re-enter and re-possess the suit property.
19. Having re-entered the property, it was submitted, the Defendant effectively brought to an end the relationship that it had with the 1st Plaintiff and that there is no tenancy agreement capable of enforcement or legal action.
20. Counsel submitted that it is not the business of courts to rewrite contracts for parties and that the Plaintiffs have not met the thresholds for the grant of injunctive orders. Counsel relied on several authorities which I have considered.

Analysis and findings:

21. It is not in dispute that on 8th September, 2008, the 1st Plaintiff entered into a Lease agreement with the Defendant for the Lease of approximately 70,000 acres being a portion of land known as L.R.No.14248(Kulalu Ranch) for a renewable period of 16 years.
22. The payable rent was stated to be Kshs. 200 per acre leased which was to be increased by 10% after every five year period. The rent for the first four years was to be the rent per acre multiplied

by the amount of land utilized. The 1st Plaintiff was given a grace period of one year from the date of the Lease. The Lease acknowledged the payment of Kshs.6,000,000/- for the second year. The rent payable for the other years was particularized in the table that is part of the Lease.

23. The acreage of land that was to be utilized by the 1st Plaintiff for each year was also particularized in the table. In the first year the 1st Plaintiff was to utilize 30,000 acres while the 1st Plaintiff was required to utilize 50,000 acres, 60,000 acres and 70,000 acres in years 3, 4, and 5 respectively.

24. The 1st Plaintiff was also required to pay 3% of the net profits generated from the bio fuels business.

25. According to clause 7.1 of the Lease, if there was any breach or non-performance or no-observance by the 1st Plaintiff of any of the covenants and conditions in the Lease, then the Defendant was required to serve on the Plaintiff a written notice requiring the 1st Plaintiff to remedy the breach within 60 days failure to which the Defendant was to re-enter into the premises.

26. According to clause 13, all questions in dispute between the parties are to be referred to arbitration by a single arbitrator to be appointed by the Chairman of the Chartered Institute of Arbitrators.

27. The Lease was signed by the directors of the 1st Plaintiff. The 2nd Plaintiff neither signed the Lease Agreement nor was it mentioned in the body of the Lease. I would therefore agree with the Defendant's advocate's submissions that there is no privity of contract between the 2nd Plaintiff and the Defendant not withstanding that it is the 2nd Plaintiff who has been making payments for rent to the Defendant.

28. It is only persons who negotiated and signed the contract that are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms or have any burdens from that contract enforced against him **(see Nairobi Civil Application No. 194 of 2009, Aineah Likuyani Njirah Vs Aga Khan Health Services).**

29. The only exception to the privity of contract rule is where the contract is made for the benefit of the third party; where the contract expressly states that the third party has a right of enforcement and where it was the intention of the parties to give a third party a right to rely on a term of contract **(See Aineah Likuyani case-*supra*.)**

30. The 2nd Plaintiff in this case does not fall within those exceptions and consequently cannot enforce the terms of the Lease as between the 1st Plaintiff and the Defendant. It does not matter that the 2nd Plaintiff in the operation's company in the Plaintiff's Group of Companies or that it is the 2nd Plaintiff which actually paid to the Defendant the rent.

31. However the fact that the 2nd Plaintiff is non-suited is not fatal in view of the fact that indeed it is the 1st Plaintiff who entered into the Lease Agreement with the Defendant. Order 1 Rule 9 of the Civil Procedure Rules, 2010 provides that a suit cannot be defeated by reason of the mis joinder or non-joinder of persons. In the case of **Nita Ganatra suing as the Receiver Manager of Dawat Restaurant Ltd Vs Shimmers Plaza Limited & Another; H.C.C.C No. 1001 of 2001**, Visram J, as he was then, held as follows:

> **" The proper Plaintiff would, therefore, be the company under receivership and the Receiver Manager is merely an agent. However, in order to do justice to the parties herein, this court will decline to strike out the Plaint and instead invoke its powers under O VIA Rule 5 and direct that the Plaint and the Chamber Summons application dated 20th June, 2001, be amended by the removal of "Nita Ganatra" and in her place be put the name of the Company under receivership. I believe that the non-joinder of the company was a bona fide mistake deserving to be corrected under Order 1 Rule 10."**

32. In the circumstances of this case, the suit before me cannot be defeated merely because the 2nd Plaintiff does not have any proprietary interests in the suit property. At worst, the Plaint may be amended by deleting the name of the 2nd Plaintiff and the suit will proceed in the name of the 1st Plaintiff,

33. According to the 1st Plaintiff and from the correspondences annexed on the Supporting Affidavit,

there is a dispute on the interpretation of the word "land utilized". According to the letter dated 27th June, 2013, the 1st Plaintiff's agent quoted verbatim clause 3.1 and stated that the clause states that "land utilized" shall be calculated on the basis of actual amount of land utilized by the Tenant rather than the amount of land demised in clause 3.2 (a). The 1st Plaintiff's agent then goes ahead to state in the letter that since the Plaintiff actually utilized no more than 100 acres in year 3 and 4, then the Plaintiff has overpaid the Defendant in terms of rent.

34. In the 1st Plaintiff`s advocate letter of 18th May, 2014, the 1st Plaintiff stated as follows;-

> **"Our clients are having difficulty understanding the method applied/adopted by the undersigned via email on 5th May, 2014. This is regardless of whether they approach it using either ADC`s or Vital`s interpretation of the Lease dated 8th September, 2008……Kindly note that although both ADC and Vital are unable to agree in regards to the periods affected by the term "Actual Land Utilized" our clients are in agreement with ADC regarding the calculation of rent owed from year 7 onwards."**

35. In the same letter, the 1st Plaintiff's advocate referred the matter to Arbitration and then moved this court for an interim order of protection.
36. The Defendant found the interpretation by the Plaintiff on the payable rent weird, because, according to the Defendant's counsel, the schedule on how the rent was to be paid by the Plaintiff is clearly shown in the Lease. It is because of the clarity of the payable rent which the 1st Plaintiff was arrears that made the Defendant to terminate the Lease by giving the requisite notice and subsequently re-entered the land.
37. The Defendants position is that there is no question that should be referred to arbitration considering that the 1st Plaintiff has not paid the requisite rent as per the Lease. The Defendant is also of the view that because it has already terminated the Lease and made a re-entry on the land, there is nothing left for determination by the arbitrator.
38. The Defendant`s advocate, in his submissions stated that the Plaintiffs have not established a prima facie case with chances of success. On the other hand, the Plaintiffs' advocate submitted that an interim order of protection should issue pursuant to the provisions of section 7 (1) of the Arbitration Act because, firstly, the Plaintiffs have a prima facie case with chances of success and secondly that the Plaintiffs will suffer irreparable loss which will run into millions of dollars.
39. In the case of **Safaricom Limited -Vs- Ocean View Beach Hotel Limited & 2 Others (2010) e KLR,** the Court of Appeal held that the principles enunciated in the famous case of ***Giella -Vs- Cassman Brown (1973) EA 358*** should not be the basis while granting the interim measures of protection pursuant to the provisions of section 7 of the Arbitration Act.
40. While interpreting what the interim measures of protection entails, the court stated as follows:

> **"By determining the matters on the basis of the Giella principles, the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names..... whatever their description, however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings."**

41. The interim measures of protection by whatever description ought to be granted in light of the peculiar circumstances of each case. According to the Blacks' Law Dictionary, 8th edition, the term "interim measure of protection" has been defined as follows:

> **"An intentional tribunal order to prevent a litigant from prejudicing the final outcome of a law suit by arbitrating action before judgment has been reached. This**

measure is comparable to a temporary injunction in national law."

42. In the case of **CMC Holdings Ltd. & Another -Vs- Jaquar Land Rover Exports Ltd. (2013) eKLR** Kamau J held as follows:-

> **"The Measures are intended to preserve assets or evidence which is likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."**

43. In the case of **Seven Twenty Investments Limited -Vs- Sandhoe Investment Kenya Limited, (2013) e KLR,** Kamau J held as follows:

> **"Perusal of section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order of interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference."**

44. I am in agreement with the above decisions Indeed, I am bound by the decision of the Court of Appeal in the *safaricom* case. Where the court finds that an arbitral agreement between the parties exist, and there is a dispute that should be determined by an arbitrator, the court is obligated to grant an interim order of preservation to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings.
45. I have already found that the Lease between the 1st plaintiff and the Defendant has an arbitration agreement. According to clause 13 of the Lease dated 8th September, 2008, all questions in dispute between the parties which are not mutually settled and agreed upon are to be referred to arbitration.
46. It is not in dispute that there were many correspondences and meetings between the 1st Plaintiff's representative and the Defendant's representative on the basis of the rent payable.
47. I have looked at the schedule that provides how the rent is supposed to be paid. One of the columns shows the "land utilized in acres" in a particular year. For example, in year 3, the "land utilized in acres" is stated as 50,000 acres. The next column shows the rent payable per acre multiplied by land utilized.
48. According to the Defendant it does not matter whether or not the 1st Plaintiff utilized the whole land in a particular year. On the other hand, the 1st Plaintiff`s position is that it can only pay rent for the land it actually utilized in a particular period.
49. The question of what rent should the 1st Plaintiff pay can only be dealt by the arbitrator. Once that question arose, the Defendant should have submitted itself to the arbitrator before making a re-entry onto the leased property pursuant to the provisions of clause 7.1 of the Lease. In deed by the time the Defendant made a re-entry into the suit property on 20th May, 2014, the 1st Plaintiff`s advocate had already put in motion arbitration proceedings by her letter dated 18th May, 2014.
50. Even if the Defendant had not received the Plaintiff`s letter of 18th May, 2014 by the time it made a re-entry on the leased land on 20th May, 2014 it was premature for the Defendant to terminate the Lease in view of the numerous letters that had been exchanged between the parties on the issue of what rent was to be paid by the 1st Plaintiff. That issue was supposed to be settled by an

arbitrator first before the Defendant could invoke the clause for termination of the Lease.

51. The Defendant`s purported re-entry on the suit property was premature and was meant to steal a match on the 1st Plaintiff. Stealing a match on a party was defined by the Court of Appeal in the case of **Stephen Kipkebut t/a Riverside Lodge and Rooms Vs Ogola (2009) KLR 594** as follows:

> **"If a defendant attempted to steal a match on the Plaintiff, such as where, on receipt of notice that an injunction was about to be applied for, the defendant hurried on the work in respect of which complaint was made so that he received notice of interim injunction when it was completed, a mandatory injunction could be granted on an interlocutory application."**

52. That is what happened in this matter. The Defendant re-entered the land when it realised that an interim order of protection was likely to be granted by the Court if the matter was referred to arbitration.

53. The interim order of protection that should issue in this case so as to preserve the subject matter is the *status quo ante* the re-entry of the land by the Defendant considering that the Defendant should have awaited the decision of the Arbitrator before purporting to cancel the Lease. In the case of **Mucuna Vs Ripples Ltd (1990-1994) EA 388,** the Court of Appeal held as follows:

> **"Maintenance of status quo does not include the circumstances existing after an intruder's illegal acts but which existed before hand."**

54. The continued occupation and utilization of the suit property by the Defendant will change the nature of the suit property. Indeed, the Defendant is likely to Lease the suit property to a third party thus removing the subject matter form the province of the arbitrator.

55. In the circumstance, and for the reasons I have given above, I allow the Application dated 27th May, 2014 in the following terms:

a. **That this matter be and is hereby referred to Arbitration in accordance with Clause 13 of the Lease dated 8th September, 2008 (Lease).**

b. **That pending the hearing and determination of the proposed arbitration, the Defendant/Respondent by itself, its offices, employees, servants and/or agents or otherwise howsoever be restrained from;-**

i. **Closing down, suspending or in any other manner whatsoever interfering with or disrupting the smooth running and operations by the 1st Plaintiff/Applicant, its employees, dealers, servants, agents, assigns and/or licensees of the portion of land known as KULALU PLANTATION measuring approximately seventy thousand (70,000) acres excised under the Lease dated 8th September 2008 from ALL THAT piece or parcel of land measuring ninety six thousand nine hundred and nineteen decimal naught six (96,919.06) hectares known as Land Reference 14248 delineated per the Survey Plan Number 258160 annexed to the Grant and registered in the Land Titles Registry at Mombasa as Number C.R. 44203/1(hereinafter "the property").**

ii. **Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running and operation of the Property.**

iii. **Harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operation by the 1st Plaintiff/Applicant, its employees, dealers, servants, agents, assigns, and/or licensees at the Property.**

c. **THAT a mandatory injunction be and is hereby issued restraining the Defendant by itself, agents and /or agents from accessing, trespassing, demolishing buildings, wasting, alienating, constructing, building, fencing, taking over possession, evicting and or in any other way dealing with the portion of land known as KULALU PLANTATION measuring approximately seventy thousand (70,000) acres excised under the Lease dated 8th September**

2008 from ALL THAT piece or parcel of land measuring ninety six thousand nine hundred and nineteen decimal naught six (96,919.06) hectares known as Land Reference 14248 delineated per the Survey Plan Number 258160 annexed to the Grant and registered in the Land Titles Registry at Mombasa as Number C.R. 44203/1 pending the hearing and determination of the proposed Arbitration.

d. **THAT the costs of the application be awarded to the 1st Plaintiff/Applicant.**

Dated and Delivered in Malindi this **31st** day of **July,** 2014.

O. A. Angote

Judge