



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
Civil Suit 58 of 2009**

**AGRICULTURAL DEV. CORP. LAND
LTD.....PLAINTIFF.**

VERSUS

PETRO CHAKALI

BENJAMIN KITIYO

.....DEFENDANTS/RESPONDENTS.

MR. MUTHUINE

R U L I N G.

By a chamber summons application dated 23rd April, 2009, pursuant to the provisions of sections 3, 3A, 63(c) and (e) of the Civil Procedure Act, Order V Rule 17, OXXXXIX Rules 1, 3 and 8 and Order L Rule 1 of the Civil Procedure Rules, the applicant seeks orders:-

- (a) THAT, this application be certified as urgent and that service in the 1st instance be dispensed with.
- (b) THAT, this honourable court be pleased to order substituted service of the Summons, plaint and the orders made by this honourable court, upon the respondents/defendants to be by way of an advertisement in the Daily Nation.
- (c) THAT, while pending the interpartes hearing of this application and the suit, this honourable court be pleased to issue a temporary injunction to restrain the respondents/defendants their agents, servants or anybody claiming under them from entering, trespassing, cultivating, weeding, wasting or committing any other acts of waste upon the land comprised in L.R. no. 8028 and which solely belong to the 2nd applicant/plaintiff.
- (d) THAT, a mandatory injunction be issued ordering the immediate removal and or destruction of the commercial maize crop planted by the respondents/defendants in L.R. No. 8028 within the 200 meter isolation distance, from the applicants/plaintiffs seed maize crop.
- (e) THAT, the costs be borne by the respondents/defendants.

The application is based on the grounds:-

- (1) THAT, the 2nd plaintiff/applicant which is a subsidiary company owned by the 1st plaintiff/applicant is the registered owner of L.R. No. 8028.

(2) THAT, the 1st plaintiff/applicant has been contracted by both Kenya Seed Co. Ltd. and Western Seed Co. Ltd. to grow seed maize in 200 hectares.

(3) THAT, an isolation distance of 200 meters is required by the seed growing contracts in order to ensure that the seed crop is not contaminated by other maize pollen.

(4) THAT, the defendants/respondents who are strangers to the applicants, with no proprietary interest whatsoever in L.R. No. 8028, have forcefully ploughed and planted buffer zone, left unploughed by the plaintiffs/applicants, with a commercial maize crop.

(5) THAT, the identity and addresses of the defendants/respondents is unknown to the plaintiffs and the names were furnished by the tractor drivers.

(6) THAT, the commercial maize crop planted in the 200 meters isolation buffer zone shall unless destroyed and or removed therefrom definitely result in the cancellation of the seed growing contracts, and thereby subjecting the applicants to irreparable damage.

(7) THAT, the respondents are trespassers in the applicants L.R. No. 8028.

The application is predicated upon the annexed affidavit of Beatrice Kosgei sworn on 23rd of April, 2009.

The applicant has also made an undertaking to pay damages in terms of order XXXIX rule 2 (2) of the Civil Procedure Rules should it turn out that a mandatory injunction issued in favour of the applicant against the said respondent would be unjustified and unmerited.

The application was served on the firm of Esther Chege & Co. Advocates who failed to comply with the provisions of order L Rule 16 (3) of the Civil Procedure Rules. The replying affidavits of the respondent was thus expunged on application of the applicant. In effect the application thus proceeded ex-parte so to speak.

On behalf of the applicant, it was argued that the 2nd applicant is the sole registered owner of L.R. No. 8028. A current search certificate is exhibited as "BK 1". By entry No. 10 dated 17th September, 1968 the land comprised in L.R. No. 8082 was transferred to the 2nd applicant herein. To date the land is owned by the 2nd applicant.

That the 1st applicant/respondent has been contracted by both Kenya Seed Co. Ltd. and Western Seed Co. Ltd to grow 200 hectares of seed maize. A seed growing contract is exhibited as "BKR II". A photocopy of a letter written by the Regional officer Kenya Seed Co. Ltd ascertaining the acreage contracted in every farm for seed growing for the year 2009 is exhibited as "BK 3".

That after planting the seed maize in the 200 hectare portion, the applicant left unploughed a portion of about 16 hectares to provide an isolation distance required by the seed maize companies.

That the applicants were desirous of planting pasture in the buffer zone/isolation zone but unknown to the applicants, the respondents acting through some tractor drivers entered into the sixteen (16) hectares buffer zone/isolation zone without notice of the people in the farm, and ploughed and planted the same with a commercial maize crop.

That the respondent have absolutely no proprietary interest whatsoever over L.R. No. 8028 and hence are outright trespassers. As proof of the extent of the trespass the applicant annexed exhibit "BK 4 and 5"- photographs showing the fence marking the extent of the land ploughed for seeds growing and the unploughed buffer zones as well as the germinated seed maize crop. Equally enclosed and marked Exhibit "BK6 and 7" are photographs showing the buffer zone/isolation zone that was ploughed by the respondent and the commercial maize crop that had started to germinate, just next to the applicant's seed maize.

Against that background, it was contended by the applicants that if the commercial maize crop planted by the respondents is allowed to grow the seed maize contract shall be cancelled since there will be no isolation zone/buffer zone.

That the cancellation of the seed growing contracts shall subject the plaintiffs to irreparable damage that cannot be adequately compensated by an award of damages.

By reason of the foregoing the commercial maize planted in the isolation/buffer zone ought to be cleared and or removed in the interest of justice.

I am grateful to counsel for the applicant for his erudite presentation. I have carefully analysed the evidence adduced before me. I have married the law to the evidence.

I am alive to the law that where the act complained of has already been done, as in this case, the order of injunction sought must be mandatory in nature and capable of compelling him to undo it. A mandatory injunction is restorative in effect and directs the defendant to take positive steps to undo what he has already done in breach of the contract. It is equitable in the sense that it is valid in equity and distinct from law. Equitable remedies are essentially discretionary and are granted to applicants by equity to redress wrongs where damages would be inadequate.

I am equally alive to the law that orders of injunction, temporary or mandatory, whichever is the case, will only be granted if it is established to the satisfaction of the court that it is the only means by which the parties can be fairly and justly be restored to the position in which they were prior to the commission of the act or omission complained of.

It must be a case in which:

One, an award of damages without more would result in injustice against the innocent party.

Two, the applicant must show that denial of justice would result in irreparable loss that cannot be redressed by an award of damages.

Three, the applicant must establish, where an interlocutory injunction is sought, a prima facie case with a probability of success at the trial of the substantive suit.

Applying the principles aforequoted to the facts of this case, it is clear to me that the applicant has made out a prima-facie case with a probability of success at the trial of the substantive suit. Denial of injunctive orders would result in irreparable loss that cannot be compensated by an award of damages.

In the disclosed circumstances of this case, borne out of the available evidence, the respondent ought to be directed, as I hereby do, to take positive steps to uproot all their maize plants planted in the buffer zone or isolation zone of plot No. L.R. 8028.

In the event it turns out, at the end of the day, that the granting of mandatory injunction was not justified or merited the respondent shall be entitled to enforce the undertaking herein given by the applicant.

In the meantime each party will bear his/its own costs.

Dated and delivered at Kitale this 28th day of May, 2009.

N.R.O. OMBIJA.

JUDGE.

Mr. Kiarie for plaintiff.

N/A for defendants.

The two defendants – Petrol Chakali

Benjamin Kitiyo) present in court.