REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

LAND CASE NO. 123 OF 2013

FRESCO BUSHLANDS (K) LTD ....PLAINTIFF

=VERSUS=

AGRICULTURAL DEVELOPMENT CORPORATION...................DEFENDANT

R U L I N G

Introduction

1. What is before me is the Plaintiff's Application dated 6th May 2013 filed pursuant to the provisions of Section 7 (1) of the Arbitration Act, 1995, Section 1A, 1B and 3A of the Civil Procedure Act and Article 159(2) of the Constitution.
2. The Applicant is seeking for the following reliefs from the court.

(a) That an injunction be issued restraining or prohibiting the Defendant whether by itself, its agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from evicting the Plaintiff, its agents, employees assigns, advocates, servants or any other persons from Kulalu Ranch Land Reference Number 14248 pending the Arbitration and Award pursuant to clause 9 of the Lease Agreement.

(b) That an injunction be issued restraining or prohibiting the Defendant whether by itself, its agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from selling, charging, disposing, alienating, transferring, stopping, or in any manner intermeddling with the Plaintiff's developments on Kulalu Ranch Land Reference Number 14248 pending the Arbitration and Award pursuant to Clause 9 of the Lease Agreement.

(c) THAT the Plaintiff/Applicant be at liberty to apply to the Honourable Court for such further directions and orders for purposes of meeting the ends of justice.

(d) THAT the cost of this Application be provided for.

3. The Application is supported by the Affidavit of the Plaintiff's director.

The Applicant's case:

4. The Plaintiff's director has deponed that by the Lease Agreement dated 26th May, 2010, the Plaintiff became the lessee of Land Known as Kulalu Ranch L. R. No. 14248 Kilifi measuring approximately 95,000 acres. The Plaintiff was to engage in the business of cultivating Jathropha carcus plant on the suit property and pay rent to the Defendant.
5. It is the Applicant's deposition that under the lease, the Plaintiff was obligated to obtain irrigation rights and mine for water after seeking approvals from the Government and meet the costs relating to the land survey to establish the boundaries of the suit property; that the Plaintiff was given a moratorium of twelve months to set up its base and that the Plaintiff was required to pay a deposit of Ksh.3,000,000 which was paid on 4th June 2010.
6. However, after a report was prepared by the consultants on the agricultural and economic viability of the project on the suit property, it was established that the harsh environment of the area where the suit property is situated coupled with the lack of power supply ruled out bio-fuel production from the Jathropha carcus plant; that the Plaintiff commenced negotiations with the Defendant to amend the lease agreement which amendments were agreed upon by the parties.
7. After going through the process of acquiring permits from the Water Resources Management Authority, the Plaintiff's director has deponed that he held a meeting with the Defendant's director and discussed the possibility of partnering with the Defendant in a Ranching business on the suit property. However, in June 2012, the Plaintiff concluded that it would not be financially sound to proceed with the partnership and the Plaintiff proceeded to purchase hundreds of livestock which he brought on the suit property.
8. However, on 24th October 2012, the Defendant issued to the Plaintiff a notice stating that it would terminate the lease on the ground that the Plaintiff had failed to undertake any tangible progress on the suit property and that the Plaintiff had failed to pay up the rent due. The said notice, according to the Plaintiff, is in contravention of clause 3 of the Lease which required the giving of a 12 months' notice period to remedy the alleged breach.
9. It is the Plaintiff's deposition that it has made immense investments in the suit property; that clause 9 of the Lease Agreement requires that all disputes arising from the Agreement be referred to arbitration and that the Plaintiff has declared a dispute and intends to refer the matter to arbitration in accordance with clause 9 of the Lease Agreement.
10. The Plaintiff's director finally deponed that the Application seeks interim protection to preserve the assets of the company including the livestock in order to avoid wastage and disposal of assets pending the intended arbitration process.

The Respondent's case:

11. The Respondent filed its Grounds of Opposition and Replying Affidavit on 24th May, 2013. The Respondent's Managing Director deponed that as from 1st July 2011, the Plaintiff should have paid to the Respondent at least Kshs.4,000,000 as rent as per the terms of the lease which it has not been done to date; that as at 1st July 2012, the Plaintiff should have paid to the Respondent Kshs.8,000,000 as rent for the 25th to the 36th month and that this amount has also not been paid.
12. According to the Respondent, for a period of about one year since the lease commenced, the Applicant totally failed to proceed to the site to commence work and that the Respondent even allowed the Plaintiff to enter into a joint venture with Fresco Bio Farm BVT of India for the production of Jathropha.
13. Although the Plaintiff promised to move on site on 2nd February 2012, and 15th February 2012, the Plaintiff did not move on the site to commence the project on the said dates. The Respondent's director has deponed that vide its letter dated 24th October 2012, it gave the Applicant until 20th November 2012 to remedy the breaches whereupon the lease was to stand forfeited; that on 21st November 2012 the lease stood forfeited and that at no time did the Applicant ever take actual possession of the leased property.
14. It is the Respondent's case that in December 2012, the Respondent received a written request for lease of the Kulalu Ranch from Super Grow Ltd; that the Defendant accepted the request on 13th December 2012 and that a lease was prepared and signed between the Defendant and Super Grow Ltd. According to the Respondent's director, the said Super Grow Ltd has already taken possession and commenced its project as per the lease.

15. The Respondent's Managing Director has disputed that the Respondent orally agreed to the change of user of the suit property in 2011 to allow for cattle ranching and the photographs annexed on the Plaintiff's Application clearly indicate further breaches of the lease on the part of the Applicant and that the Applicant has not shown the immense investment it has allegedly sunk into the property that cannot be compensated by way of an order of damages.

Submissions:

16. The Plaintiff's advocate filed his submissions on 23rd January 2014 while the Defendant's advocate filed his submissions on 17th February 2014.
17. The Plaintiff's Advocate submitted that the Defendant has breached the Lease Agreement and the only avenue for settling the dispute is arbitration as contemplated under clause 9 of the Agreement. Counsel relied on the provisions of **Section 7 (1) of the Arbitration Act, 1995** and **Article 159 (2) (c) of the Constitution** and submitted that the substratum of the intended arbitration should be protected by this court by allowing the Application. Counsel relied on the case of **Blue Limited Vs Jaribu Credit Traders Ltd (2008) e KLR** and **Gramet Ltd Vs Mohamed Hassan Maalim & 2 others (2013) e KLR.** In the latter case, it was held that **the moment the parties recognise that there is a dispute , the status quo has to be preserved in terms of preserving that which is in contention.**
18. The Defendant's advocate submitted that as 1st July 2012, the Plaintiff was in arrears of rental payment of Kshs.9,000,000 which sum was demanded on 26th June 2012 but was never paid. Consequently, it was submitted, the Respondent was in order to enforce the forfeiture clause as contained in the Lease Agreement.
19. It is the Defendant's Counsel’s submission that the dispute in this matter arose on 24th October 2012 when the Respondent served upon the Plaintiff a termination notice and that the issue should have been referred to arbitration within 21 days from that date.
20. Counsel finally submitted that the Plaintiff has not shown that it has a prima facie case with chances of success and that the Plaintiff has not demonstrated that damages will not be sufficient remedy if indeed it incurred costs for taking possession and any other developments on the suit property.

Analysis and findings

21. Section 7 (1) of the Arbitration Act, cap 49 provides that a party may request the High Court, before or during arbitral proceedings, an interim measure of protection. The powers to protect the suit property pending the hearing and determination of a dispute by arbitration is donated to the High Court by the provisions of the Arbitration Act and not the Civil Procedure Act and Rules. In the case of **Lagoon Development Ltd Vs Beijing Industrial Design and another, Civil Application No. 327 of 2009,** the Court of Appeal held as follows:

> **“An interim measure of protection such as in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.”**

22. Before granting an interim order of protection, the court must be satisfied firstly that there is a valid arbitration agreement and secondly that the subject matter of the arbitral proceedings is in danger of being wasted.
23. In determining whether a party has satisfied the said two principles, the court ought to take into consideration all the relevant matters in question without making a final determination on the issues which have to be dealt with by the arbitrator.
24. The issues for determination in this Application, as correctly captured by the Plaintiff's counsel are as follows:

(I) Whether the arbitral clause in the agreement dated 26th May, 2010 can be

invoked in the circumstances of the case and

(ii) Whether the interim orders of protection pending arbitration can be granted.

25. It is not in dispute that on 26th May 2010, the Plaintiff entered into a Lease Agreement with the Defendant in which the Plaintiff agreed to lease to the Defendant 95,000 acres of the Kulalu Ranch for the cultivation of Jathropha carcus Plant for an initial term of sixteen (16) years from 1st June 2010.
26. Clause 4 of the Lease Provided that the Lease was for sixteen (16) years (revisable) subject to the payment of the annual rent payable in advance, the first of such payments being due and payable on the execution of the lease.
27. The Plaintiff was supposed to make an annual lease payment of Kshs.200 per acre payable in advance at the beginning of every lease year with escalation of 10% after every five years.
28. The Plaintiff was granted a moratorium for a period of 12 months from 1st June 2010 to 30th May 2010 whereafter the Defendant was to make payments for 20,000 acres on the 13th month. The Plaintiff was to make payments for the whole parcel of land on the 49th month.
29. The Plaintiff was further required under the Lease to make a deposit of Kshs.3,000,000 upon execution of the Lease and if the Defendant did not wish to continue with the Lease after one year, the deposit would be forfeited. The said deposit was however supposed to be credited to the second year's rent if the Plaintiff opted to proceed with the Lease.
30. The Lease then enumerated in detail the obligations of the of the Plaintiff which included to obtain irrigation rights from the Government, to mine for water, to carry out agricultural study of the soil and the environment, to meet costs relating to the land survey to establish the boundaries, to cut down trees and bushes amongst others. The other obligation of the Plaintiff which is relevant in these proceedings is provided at clause 2(h). It states as follows:

> **"Subject as set out above to use the land, should the above lessee (Plaintiff) desire to use the land for any other purpose stated in this lease, he should first notify the lessor and obtain the Lessor's (Defendant's) consent in writing which consent shall not be unreasonably withheld."**

31. In the event of breach of non-performance or non-observance by the Plaintiff of any covenant, the Defendant in the first instance was required to provide notice identifying the breach complained of and give the Plaintiff a period of twelve months to rectify the breach.
32. Clause 9 of the Lease provides for Arbitration of any dispute as follows:

> **"In the event of any dispute (save for the payment or non-payment of rent reserved and legal and registration costs herein) arising between the parties hereto such disputes or difference shall within 21 days of such dispute or difference be referred to a single arbitrator agreed upon by the parties or in default of agreement to a single arbitrator to be appointed by the chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators whose award will be final and binding upon the parties."**

33. Upon signing of the Lease on 26th May 2010, the Plaintiff paid to the Defendant the deposit of Kshs.3,000,000 on 4th June 2010.
34. On 9th July 2010, the Plaintiff wrote to the Defendant complaining that the suit property had not been identified and stated that the project required a river frontage for installation of an irrigation pumping station, project offices and accommodation. The Plaintiff requested to be allowed an additional 10 acre piece of land fronting the river which it had identified. The Plaintiff's request was allowed by the Defendant vide its letter dated 2nd September 2010. However the Plaintiff was to pay for the additional 10 acre piece of land.
35. It would appear that the Plaintiff did not respond to the Defendant's letter dated 2nd September 2010, in which the Defendant offered the Plaintiff 10 acres of land fronting the river on condition that the Plaintiff pays Kshs.50,000 per month. Instead, the Plaintiff commissioned two consultants

to conduct an agricultural study of the soil under the Lease. The consultants established that the suit property was not ideal for Jathropha plant. They instead recommended that the suit property be used to plant vegetables, aloe vera leaves, passion fruits and citrus.

36. The Plaintiff then requested in writing for the change of user of the land and the incorporation in the Lease of another partner who was willing to finance the new project which included the planting of cashewnuts, sugarcane, vegetables and maize under irrigation.
37. The Defendant responded to the Plaintiff's undated letter vide its letter dated 6th April 2011 and agreed to the change of user of the land as suggested by the Plaintiff. However, the Defendant expressed the displeasure at the fact that the Plaintiff had not commenced any activity on the suit property.
38. By its letter dated 20th April 2011, the Plaintiff informed the Defendant that it will commence its activities by beginning of June 2011. The Plaintiff thus proceeded to carry out further feasibility studies, made payments to the Water Resources Management Authority for a water permit which was granted.
39. On 28th October 2012, the Defendant wrote to the Plaintiff and stated as follows:

> **"We note with a lot of concern that this is the 28th month of the Lease yet you have neither moved to the site nor done any tangible progress on the ground. In addition you are also not up to date in your rent payments as per clause 4. TAKE NOTICE that unless you remedy the breaches herein by 20th November 2012, we shall have no other alternative but to cancel the Lease without any further reference to you.**

40. The Plaintiff's advocate responded to the Defendant's advocate letter by way of a letter dated 15th April 2013. In the said letter, the Plaintiff was of the view that it had complied with the terms of the lease and that in any event the notice period was shorter than the 12 months' notice provided for under clause 3 of the Lease.
41. The Plaintiff has annexed copies of the photographs on its Supporting Affidavit showing the cattle and goats that are on the suit property.
42. The Lease between the Plaintiff and the Defendant was for a period of 16 years. The Defendant agreed to the change of user of the suit property from the planting of Jathropha plant to that of planting vegetables amongst other crops. I have not come across any letter showing that the Defendant agreed that the Plaintiff may rare cattle and goats on the suit property. Indeed, under the Lease, the Defendant is required to consent in writing for the change of user of the suit property.
43. The Lease Agreement did not provide the time within which the Plaintiff was required to commence its project. However, the moratorium of twelve months was given to the Plaintiff for the purpose of paying rent to the Defendant.
44. Notwithstanding the fact that the Plaintiff had not commenced the project on the suit property, the Plaintiff was required to pay to the Defendant the annual lease rent in terms of the Lease.
45. According to Clause 4(b)(i) of the Lease, the Plaintiff was required to pay to the Defendant Kshs.4,000,000 on the 1st July 2011, which was the 13th month from 1st June 2010 when the Lease came into force.
46. The Lease Agreement at clauses 2(0) provides that in the event the Plaintiff defaults in the payment of the rent within 90 days from the date when the same was due, the Plaintiff was required to pay interest at the rate of 5% per annum on the rent so outstanding. It would appear that the Lease Agreement contemplated the late payment of the rent provided for consequences thereof.
47. In the event of breach of the Lease or non-observance or non-performance on the part of the Plaintiff, the Defendant was required to give to the Plaintiff at the first instance a notice identifying the breach complained of and give the Lessee a period of twelve months to rectify the same.
48. In its letter dated 24th October 2012, the Defendant identified the breaches that the Plaintiff had committed which included the fact that the Plaintiff had not moved to the site and it had not made any payment towards rent as per the Lease. The Defendant informed the Plaintiff to remedy the

breaches by 20th November 2012, one month from the date of the notice, or the Lease would be cancelled.

49. The notice of one month that was issued to the Plaintiff by the Defendant requiring him to move on the site and pay the rent is shorter than that provided for in clause 3 of the Lease Agreement.
50. The issue of whether the Plaintiff should have been given a notice of 12 months to pay the rent and move on the site or not is a dispute which must be determined with finality by the arbitrator pursuant to the provisions of clause 9 of the Lease.
51. Although the amount invested in the suit property by the Plaintiff is ascertainable, the Lease provided that the Plaintiff shall utilise the suit property for sixteen (16) years. The returns that the Plaintiff would have obtained from the usage of the property for a period of sixteen (16) years, which was renewable three times was likely to be immense. The suit property should therefore be preserved in its current status pending the hearing and determination of the dispute by way of arbitration.
52. Although the Defendant has stated that the arbitration process should have commenced within 21 days from the date when the Defendant issued to the Plaintiff the notice to terminate the Lease dated 24th October 2012, the Defendant has not shown the prejudice it has suffered for the delay of five months. Before the court can deny a party to pursue its rights in a recognised forum because it has not met the time-lines set out in an agreement like the Lease before me, the court is obliged to look at the issues before it in a holistic manner. Rules of procedure have to be liberally interpreted and applied by the courts to ensure that parties are not kept out of courts or arbitral processes. Consequently, I find that the Defendant's objection is unmeritorious because no prejudice has been occasioned by the Plaintiff’s delay in initiating the arbitral process.
53. Although the Defendant has alleged that it has already entered into another Lease Agreement with a third party over the same suit property, it is not clear from the documents before me when the said Lease was entered into. The Lease attached on the Defendant's Application is not dated. It is not even clear whether the Lease is in respect to the same suit property considering that the Defendant owns approximately 99,164 Ha (approximately 247,910 acres). The Plaintiff’s Lease is in respect to 95,000 acres.
54. For the reasons I have given above I find that the Plaintiff has established that there is an arbitration agreement between the parties which should be invoked and the suit property should be preserved. I therefore allow the Plaintiff’s Application dated 6th May, 2013 in terms of prayer numbers 4, 5 and 6.

Dated and delivered in Malindi this **4th** day of **April, 2014**

O. A. Angote

Judge