REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 180 OF 2016

VITAL PLANTATION LEASE COMPANY LIMITED

VITAL BIO ENERGY (KENYA) LIMITED……..PLAINTIFFS

VERSUS

FRESCO BUSHLANDS (K) LIMITED.....1ST DEFENDANT

AGRICULTURAL DEV. CORPORATIO....2ND DEFENDANT

RULING

1. This a Ruling on a Notice of Motion application dated 13th July 2016. The Plaintiffs/Applicants are seeking for orders:-

1. …….

2. …….

3. THAT pending hearing and determination of this matter, the Defendants/Respondents by (themselves), (their) officers, employees, servants and/ agents or otherwise howsoever be restrained from :

a. Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running and operation of the (suit) property.

b. Harassing, intimidating, threatening or in any other way whatsoever interfering with the smooth running and operation by the 1st and 2nd Plaintiffs/Applicants, their employees, dealers, servants, agents, assigns and/or licensees at the property.

4. ……..

5. THAT this Honourable Court do issue a mandatory injunction restraining the Defendants by themselves, their agents and/or servants from accessing, trespassing, demolishing buildings, wasting, alienating, constructing, building, fencing, taking over possession, evicting and/or in any way dealing with the portion of land known as KULALU PLANTIATION measuring

approximately 70,000 acres, excised under the Lease dated 8th September 2008 from all that piece or parcel of land measuring 96,919.06 hectares known as Land Reference 14248 delineated per the Survey Plan No. 258160 annexed to the Grant registered in the Land Titles Registry at Mombasa as No. CR 44203/1 pending the determination of the proposed Arbitration.

6. THAT the costs of this application be awarded to the Plaintiffs/Applicants.

2. The application is supported by an Affidavit sworn by the 2nd Plaintiffs Operations Director –one Eric Mwashigadi on 13th July 2016 and is premised on a number of grounds summarized on the body thereof as follows:-

i. That by a lease dated 8/9/2008, the Defendant/Respondent granted to the 1st Plaintiff/Applicant a renewable leasehold interest for 16 years;

ii. That the Plaintiffs have observed the terms of the Lease;

iii. That the Defendants/Respondents have trespassed upon the leased property and despite constant demands for them to vacate and return to their property, they have continued to interfere with the 1st and 2nd Plaintiffs quiet possession and enjoyment of their property; and

iv. That unless the orders sought herein are granted, the Plaintiffs will suffer irreparable loss and damage

3. The application is opposed. In a Replying Affidavit sworn on 3rd February 2017, the 1st Defendant's Manager at its Kulalu Ranch one Bare Mohammed depones that the application is incompetent, misplaced and amounts to a blatant attempt by the Plaintiffs to misguide the court into granting unfounded, baseless and non- existing reliefs which they list as follows:-

a. That there is no arbitration agreement between the Plaintiffs and the 1st Defendant as alleged;

b. That this court had in ELC No 95 of 2014; Vital Plantation Company Limited & Another –vs- Agricultural Development Corporation found that the 2nd Plaintiff did not have any entitlement, right and/or interests on LR 14248;

c.That the High Court in Civil Case No 123 of 2013 Fresco Bushland (K) Ltd –vs- Agricultural Development corporation made a finding and restrained the 2nd Defendant from acting in any way contradictory to the interests of the 1st Defendant in the suit property and referred the dispute between them to arbitration;

d. That the Honourable court made orders restraining the 2nd Plaintiffs hired hooligans, hoodlums and acolytes from interfering with the rights and/or interests of the 1st Defendant in the suit property since January 2015 upto September 2016 in ELC Case No 5 of 2015; Fresco Bushlands)(K) Ltd –vs- Warsame Mohammed Issak & Others;

e. That in fact, the instant application was an attempt by the Plaintiffs to water down the substratum in Malindi Civil Appeal No. 107 of 2016; Fresco Bushlands (K) Ltd –vs- Warsame Mohamed Issak & Others which is pending hearing and determination before the court; and

f. That the Plaintiff have vide the instant application commenced a process of embarrassing the court by ensuring that it grants orders contrary to the previous ones already issued. Thus this application is likely to draw the court and the judiciary into disrepute, public opprobrium and/or odium.

4. The 1st Defendant proceeds to give a breakdown of the dispute the parties have had since they entered into a Lease agreement with the 2nd Defendant on 26th May 2010 and concludes that the Plaintiffs are guilty from ignoring previous court orders arising from the said disputes and urges that this application be dismissed with heavy penalties being imposed upon the Plaintiff for what they term as blatant abuse of the court process.

5. The 2nd Defendant is equally opposed to the application. In a Replying Affidavit sworn by the Corporation Secretary Anthony Ademba on 6th February 2017, the 2nd Defendants aver that the 2nd Plaintiff Vital Bio Energy (Kenya) Ltd –is a stranger to the contract or lease entered into between the 1st Plaintiff and themselves on 8th September 2008. It is their case that while indeed they entered into the Sale Agreement, the 1st Plaintiff is in breach of the same by failing to pay the annual rent as agreed and that the same was in arrears of Kshs 59,385,000/= as at 30th August 2016. It is further their case that even the 1st Defendant with whom they have been sued is in breach of the lease agreement dated 26th May 2010 and is in arrears of rent of Kshs 66,900,000/= as at May 2017.

6. The 2nd Defendant contends that the 1st Plaintiff is only utilizing 200 acres of the entire portion leased to them and that the adjoining portions of LR No. 14248 have been leased to other entities. It is their case that they did a survey and marked the suit property clearly indicating areas covered by the leases granted to various lessees. In spite of various communication made to both the 1st Plaintiff and the 1st Defendant to stop encroaching upon each other's portions, the calls have gone unheeded by both.

7. The 2nd Defendants equally conclude that the suit is an abuse of the court process as the maters raised are already pending before this and other courts for hearing and determination and they therefore urge that this application be dismissed with costs.

8. I have considered the application and the Affidavits in reply. I have equally considered the oral and written submissions by the parties as well as the authorities placed before me by the Learned Advocates representing the parties herein.

9. The 1st and 2nd Plaintiffs who describe themselves as associated limited liability companies incorporated under the Companies Act Cap 486 of the Laws of Kenya have sought injunctive reliefs against the Defendants pending the hearing and determination of this suit. Prayer No. 5 of the application as we have seen urges this Court to issue a mandatory injunction restraining the defendants from interfering with the suit property pending the determination of what is termed "the proposed Arbitration."

10. I have looked and re-looked at the Plaint filed herein on 14th July 2016 upon which this application is based but I was unable to find anywhere wherein the suit is referred to the said arbitration. Indeed while the Prayers in the Plaint are sought pending the referral of the matter to the proposed arbitration, there is no prayer in the reliefs sought seeking to refer the matter to any arbitration. Arising from the foregoing, it can only be inferred that the Plaintiffs are seeking the injunctive reliefs sought pending the hearing and determination of the issues raised in the Plaint.

11. As was stated by Spry V.P. in the reknowned case of ***Giella –vs- Cassman Brown & Company Ltd (1973) EA 358***;

"the conditions for the grant of an interlocutory injunction are now well-settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it

will decide an application on the balance of convenience."

12. It is therefore incumbent upon this court to first and foremost consider whether the Applicant has established a "prima facie" case with a probability of success. In ***Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR,*** the court stated that:-

"a prima facie case include but is not confined to a "genuine and arguable case". It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

13. In ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR (Civil Appeal No. 77 of 2012),*** the Court of Appeal stated that:

"….the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.."

14. In the matter before me, the Plaintiffs contend that by a lease dated 8th September 2008, the Defendants granted them a renewable interest for 16 years over a portion of land measuring 70,000 acres excised from all that parcel of land known as L.R. No. 12248 owned by the Defendants. The Plaintiffs contend that the Respondents have trespassed upon the leased property and continue to interfere with their quiet possession and enjoyment of the property. A clear look at the pleadings herein reveals that the lease in actual fact executed was between the 1st Plaintiff and the 2nd defendant. The 1st Defendant is itself a Lessee from the 2nd Defendant of an adjacent portion of land courtesy of a lease agreement executed on 26th May 2010.

15. While the Plaintiffs contend that the 1st and 2nd Plaintiffs are affiliated companies conducting business and other activities, as a result of which the 2nd Plaintiff has vested legal interests in the disputed parcel of land, nothing was placed before me to demonstrate the said affiliation and/or the vested interest that the 2nd Plaintiff has in the suitland and that would entitle it as an entity to bring this application against the Defendants on the basis of the Lease Agreement dated 8th September 2008.

16. From the pleadings and annexures filed herein, it is apparent that as at the time the 1st Plaintiff and the 1st Defendant executed their respective lease agreements with the 2nd Defendant, there had been no clear demarcation of the boundaries of the various portions of land known as LR No. 14248 which, it is stated measures approximately 239, 389 acres. While the 2nd Defendant apparently did set out the coordinates of the respective leases, it was not until sometime in April 2016 that the 2nd Defendant gave specific details of the acreage and boundaries of all investors within the said Kulalu Ranch. The late provision of details on the acreage must have precipitated the disputes between the parties herein as each one of them tried to adjust to the specifications.

17. In the meantime the 1st Defendant Fresco Bushlands (K) Ltd went to court against the 2nd Defendant in High Court Civil Case No. 123 of 2013 and obtained orders barring the 2nd Defendant form disturbing their rights and interests as envisaged in the leases executed on 26th May 2010. It is evident that the orders of the High Court have neither been discharged nor set aside.

18. Given that the said orders remain valid, it is clear that this Court cannot be asked to issue a contrary injunction whose effect would be to require the 2nd Defendant to violate the existing orders of the Court.

19. In any event, it is clear from the pleadings filed herein that the 1st Plaintiff filed Malindi ELC Case No. 95 of 2014 against the 2nd Defendant wherein the dispute between itself and the 2nd Defendant was referred to arbitration. That order was made in recognition of the fact that the Lease Agreement between the 1st Plaintiff and the 2nd Defendant dated 8th September 2016 makes reference to arbitration as a means of solving any disputes arising as between the parties. Those orders for arbitration have not been discharged and the dispute herein similarly touches on the contents of the Lease dated 8th September 2008.

20. It is indeed possible that the proposed Arbitration referred to in the pleadings filed herein are the proceedings the court ordered in the said ELC No. 95 of 2014. Even if that were so, this court would still be greatly constrained to grant either an interlocutory or a mandatory injunction in the terms sought herein. Section 6 of the Arbitration Act bars the court from delving into the merits of a dispute that has been referred to arbitration and this Court would therefore not have been able to interrogate the chances of success of the Plaitnff's application.

21. The upshot of the above is that I do not find merit in the application dated 13th July 2016. The same is accordingly dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 27th day of July, 2017.

J.O. OLOLA

JUDGE