



Lowdan Exporters (Epz) Limited v Export Processing Zones Authority (Environment and Land Case Civil Suit 127 of 2017) [2022] KEELC 3945 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 127 OF 2017**

NA MATHEKA, J

JULY 28, 2022

BETWEEN

LOWDAN EXPORTERS (EPZ) LIMITED PLAINTIFF

AND

EXPORT PROCESSING ZONES AUTHORITY: DEFENDANT

JUDGMENT

1. At all material times to this suit the plaintiff has been the lessee of title MN/V1/4797, MN A1/4798 & MM/VI/4799 (suit property) which lease were executed on August 8, 2013 for a term of 50 years and the leases duly registered as required in Law. The plaintiff avers that on or around the January 27, 2017, it received a lease termination notice from the defendant which termination notice expires in April 2017 and which termination is illegal and unlawful in the circumstances. The plaintiff avers that the lease was for purposes of developing a cereals bagging plant targeting the export markets and which project and/or development has not yet commenced due to the fact that there are negotiations ongoing with the National Land Commission with regard to acquisition of the suit properties for purposes of expansion of trunk routes into the Kilindini Port Area by the Kenya Ports Authority. The plaintiff avers that the negotiations are at an advanced stage which information is well within the knowledge of the defendant and the lease termination notice is meant to frustrate and deny the plaintiff its rightful compensation. The plaintiff avers that if the termination is allowed to pass through it risks facing great damage and consequences not limited to loss of business only since it planned to invest heavily but its project has been derailed by the governments intended acquisition of the suit property. The plaintiff prays that judgment be entered against the defendant for:-
 1. Mandatory injunction against the defendants, agents and/or anyone acting on their instructions or otherwise from terminating, altering or any adverse dealings with the lease executed on August 8, 2013 in relation to title MN/VI/4797, MN/V1/4798 & MN/VI/4799.



2. Mandatory injunction against the defendants, agents and/or anyone acting on their instructions or otherwise interfering with the ongoing compensation negotiations between the plaintiff and the National Lands Commission.
 3. Costs of the suit.
 4. Any other relief that this honourable court may deem fit to grant,
2. The defendant states that the plaintiff in the main suit violently breached an agreement it had entered into with the defendant with respect to the suit property upon which its cause of action is founded and in the disclosed circumstances, the entire suit does not meet even the barest and or minimum thresholds as far as the principles of granting injunctions are concerned. Under provisions of the [Export Processing Zones Act](#), Cap 517 of the Laws of Kenya, the defendant in the suit is a body corporate with perpetual succession and a common seal and possessing such corporate capacity, it is mandated by section 3(2) of the aforesaid act to among other things take, purchase, or otherwise acquire, hold, charge and dispose of moveable and immovable property. On August 8, 2013, the defendant and the plaintiff in the main suit entered into leases over parcels of land known as LR Nos MN/VI/4797, MN/VI/4798 and MN/VI/4799; the defendant being the lessor and the plaintiff being the lessee respectively. The leases were to run for a term of fifty (50) years effective from June 1, 2013 as provided for under clause 2 of the same. The demised premises were particularly defined under the first schedule as all that parcel of land at Kipevu Export Zone at Mombasa Municipality of the Republic of Kenya and which also provided that the rent would be paid per annum as well as in advance every year starting on June 1, 2013. One of the undisputed terms of all the subject leases was to the effect that the lessee accepted the lease subject to the covenants, agreements, conditions, restrictions and provisions set forth therein. It is the defendant's in the main suit further averment that the fourth schedule in the subject leases provided for building guidelines and paragraph 5 thereto specifically provided for a development period of twenty four (24) months. Consequently, the plaintiff in the main suit was expected to complete the envisaged development of buildings within the period of twenty four (24) months.
3. The plaintiff completed and submitted an Environmental Impact Assessment (EIA) project report made on April 16, 2014 to the National Environment Management Authority (NEMA) on April 25, 2014. That the plaintiff was required under the lease to have completed construction of a perimeter fence, warehouses and office block by the August 1, 2015 which it did not; thereby violently breaching the term of the leases as set out in paragraph 5 of the fourth schedule to the leases. Over and above failing to complete construction within two (2) years as contractually required, the plaintiff refused, failed and or neglected to pay rent as stipulated under the leases, thereby entitling the defendant to terminate the leases. Meanwhile, the Kenya Ports Authority expressed intention to acquire the parcels of land which were the subject of the leases to expand trunk routes into Kilindini Port Area. As a result, Kenya Ports Authority approached the defendant for a land swap to enable them expand the road leading to the port. The expression to acquire the subject parcels of land by Kenya Ports Authority remained an intention and has never been actualized to date. Kenya Ports Authority has never acquired the land as alleged by the plaintiff. The negotiations are on-going and notwithstanding the negotiations, the plaintiff has a legal obligation to comply with the terms of the leases including paying due rent.
4. Provisions of clause 19 of the first schedule to the leases provided that the lessee would conform to all the laws, rules and regulations and requirements of the customs and excise department and/or the commissioner of customs and excise and the provisions of the [Export Processing Zones Act](#) and all other relevant laws and regulations. The leases were exempt from tax on the representation that the plaintiff had leased the demised premises with an intention to set up an export processing zones business. However, the plaintiff was required to pay the license fees pursuant to the leases and the



Export Processing Zones Act, which it failed to pay contrary to the express provisions of section 19 of the aforesaid act. The leases were only exempt from stamp duty pursuant to provisions of section 29(2)(e) of the Export Processing Zones Act which provides that export processing zone developers and operators would be exempt from stamp duty on the execution of any instruments relating to the business activities of an export processing zone enterprise. Following the plaintiff's breach of the terms of the leases, by firstly refusing to develop the properties, secondly, refusing to pay the license fees and thirdly, not paying the due rent, the defendant wrote to the plaintiff giving it a three (3) months' notice of termination of the leases as stipulated in the leases. The defendant issued the termination notices after the plaintiff failed to perform its obligations under the leases relating to payment of rent as well as development of the demised premises within the time provided for. After being served with the notices of termination of leases, the plaintiff rushed to make some payments in very bad faith because, this action was in preparation to file this suit as well as to take advantage of the interest shown in the suit property by Kenya Ports Authority. If the discussions between the defendant and Kenya Ports Authority end up successfully, the greater Kenyan public as well as international community will reap huge benefits in terms of enhanced efficiency at the port and in the circumstances disclosed herein above, it is evident that if the plaintiff succeeds in procuring the injunctive reliefs sought, the public as well as international interests will suffer big loss and harm.

5. The plaintiff is guilty of material non-disclosure for not telling this honourable court the whole truth and or bringing to its attention all the facts about the background of the case in order to put the honourable court in a position that would make it arrive at a just and well considered decision and or conclusion. The plaintiff has evidently not established a prima facie case with any probability of success as to warrant procuring an injunction. As if that is not enough, damages would be an adequate remedy in the unlikely event that it succeeds at the end of the matter. Finally, the huge public, as well as international interest element in this matter as opposed to the plaintiff's unsubstantiated allegations clearly makes the balance of convenience lie in the defendant's favour. The defendant in the main suit and plaintiff in the counterclaim and or cross suit prays that the suit against it be dismissed with costs and for judgment to be entered in favour of the defendant in the main suit and plaintiff in the counterclaim against the plaintiff in the suit and defendant in the counterclaim as specifically prayed in the following terms:
 1. The plaintiff's claims against the defendant in the main suit (and plaintiff in the counterclaim) to be dismissed with costs.
 2. A declaration be issued to the effect that the leases entered into between the parties herein with respect to parcels of land known as LR Nos MN/VI/4797, MN/VI/4798 and MN/VI/4799 stand terminated upon expiry of the termination notice dated January 27, 2017;
 3. This honourable court do issue a mandatory injunction requiring the plaintiff in the main suit and defendant in the counterclaim to vacate from parcels of land known as LR Nos MN/VI/4797, MN/VI/4798 and MN/VI/4799;
 4. Alternatively, this honourable court do issue an eviction order against the plaintiff in the main suit and defendant in the counterclaim to vacate from parcels of land known as LR Nos MN/VI/4797, MN/VI/4798 and MN/VI/4799.
 5. The officer commanding police station (OCS), Mombasa and or any other nearest police station as well as any other authorized officer to ensure compliance with the aforesaid orders as well as ensuring that peace prevails.
 6. A mandatory injunction directing the plaintiff in the main suit and defendant in the counterclaim to execute the surrender of lease documents in respect of the parcels of



land known as LR Nos MN/VI/4797, MN/VI/4798 and MN/VI/4799 belonging to the defendant in the main suit and plaintiff in the counterclaim within a period of fourteen (14) days from the date of service of an appropriate court order accompanied by the said surrender of lease documents;

7. This honourable court do make an order that in default of signature of the surrender of lease documents by the plaintiff in the main suit and defendant in the counterclaim in respect of the parcels of land known as LR Nos MN/VI/4797, MN/VI/4798 and MN/VI/4799 belonging to the defendant in the main suit and plaintiff in the counterclaim within a period of fourteen (14) days and upon expiry of that period, the Land Registrar or Deputy Land Registrar, Mombasa Lands Office, Executive Officer of the Chief Magistrates Court, Mombasa and or the Registrar or Deputy Registrar of the High Court of Kenya, Mombasa, and or any other authorized officer of the government of Kenya, do and are hereby directed to execute and or sign the surrender of lease documents and other related documents on behalf of the plaintiff in the main suit and defendant in the counterclaim with a view of facilitating registration thereof in the appropriate land registry;
 8. This honourable court be pleased to issue any other orders and or reliefs as it may deem fit and appropriate in the interests of justice and fairness.
 9. The costs of this suit to be borne by the plaintiff in the main suit and defendant in the counterclaim.
6. This court has considered the evidence and submissions therein. On May 23, 2022, the court dismissed the plaintiff's case for non-attendance despite service of the hearing notice of the last adjournment granted by court. The court proceeded to hear the defendant's counterclaim, and the same is determined on its merit as undefended by the plaintiff.
7. The lease agreement dated August 8, 2013 for MN/VI/4797, stipulated that the plaintiff was to pay annual rent of USD 5,465 payable in advance every year on the 1st June, starting on June 1, 2013 and an annual service charge amounting to 15% of the rent, USD 819.75 payable in advance on the same day with, but separately from the annual rent. Plaintiff was also obligated to pay all rates and outgaining in relation to the property. The defendant has produced, in their list of documents dated August 15, 2017, a statement of accounts for MN/VI/4797 dated January 25, 2017. It indicates that the plaintiff the annual rent, for year 2014 and 2015 which amounted to USD 10,390.00.
 8. The lease agreement dated August 8, 2013 for MN/VI/4798, stipulated that the plaintiff was to pay annual rent of USD 3,791 payable in advance every year on the 1st June, starting on June 1, 2013 and an annual service charge amounting to 15% of the rent, USD 569 payable in advance on the same day with, but separately from the annual rent. Plaintiff was also obligated to pay all rates and outgaining in relation to the property. The defendant has produced, in their list of documents dated August 15, 2017, a statement of accounts for MN/VI/4798 dated January 25, 2017. It indicates that the plaintiff paid for the annual rent, for year 2014 and 2015 which amounted to USD 7,582.00.
 9. The lease agreements dated August 8, 2013 for MN/VI/4799, stipulated that the plaintiff was to pay annual rent of USD 6,267 payable in advance every year on the 1st June, starting on June 1, 2013 and an annual service charge amounting to 15% of the rent, USD 940 payable in advance on the same day with but separately from the annual rent. Plaintiff was also obligated to pay all rates and outgaining in relation to the property. The defendant has produced, in their list of documents dated August 15, 2017, a statement of accounts for MN/VI/4799 dated January 25, 2017. It indicates that the plaintiff paid the annual rent for the annual rent, for year 2014 and 2015 which amounted to USD 12,534.00.



10. On January 27, 2017 the defendant issued to the plaintiff a lease termination notice for the three leases on the ground on non-payment of rent and non-development of the plots within 24 months. They issued a three months notice of terminating the lease and demanded the clearance of outstanding arrears. It was followed with a demand letter dated February 27, 2017, demanding the rent arrears for the three suit properties as well as for the EPZ licence of USD 33,046.00. On March 30, 2017, the defendant wrote to the plaintiff to confirm receipt of cheques deposited on March 27, 2017 totalling to USD 33,046.00, which covered annual rent for MN/VI/4797, 4798 and 4799 for the year 2016 and 2017 as well as the enterprise licence for the year 2016 and 2017.
11. The reason advanced by the defendant that they terminated the lease for non-payment of annual rent and license by the plaintiffs cannot stand. After the defendant issued the plaintiff with a lease termination notice on January 27, 2017, they accepted payment from the plaintiff on March 27, 2017 and wrote a letter on March 30, 2017 confirming receipt of the annual rent of 2016 and 2017 together with the licence renewal. When the defendant continued to receive rent despite the breach, they waived their right to terminate the lease on the ground of non-payment of rent and non-renewal of the licenses.
12. On the issue of development of the property, all the three lease agreements for MN/VI/4797, 4798 and 4799 it was a term that plaintiff was obligated to erect buildings on the property within 24 months from the date of the lease. It included to obtain all consents, commence and complete the works within the stipulated period. The defendant claimed that the plaintiff was required under the leases to have completed construction of a perimeter fence, warehouse and office block by August 1, 2015. The plaintiff failed to adhere to the same, therefore breached a term of the lease. The defendant further claimed that Kenya Ports Authority made an offer for a land swap of the suit properties to enable them expand a road leading to Kilindini Port area. However, the same has never materialised since the negotiations have never been concluded and the same cannot be the basis for non-payment of rent.
13. The defendant has produced an undated draft memorandum of understanding between EPZA and KPA. The purpose of the MOU was to propose an exchange of land of equal value between EPZA and KPA. Where EPZA would surrender land, parcel held and registered in its name to KPA for road expansion and be compensated by KPA in form of land of equal market value. Annex 1 of the MOU indicated that only MN/V1/4798 and 4799 were earmarked for transfer to KPA.
14. To get a wholesome idea of what led to the negotiations, the court has to refer to the plaintiff's documents. On December 15, 2014 the plaintiff wrote to KPA through the defendant to inquire on the compensation of MN/V1/4798 and 4799 earmarked for road expansion. The defendant wrote back to the plaintiff requesting them to produce documents in support of their claim in order to be considered for compensation, which the plaintiff did on January 5, 2016. The defendant then wrote to the National Land Commission on August 25, 2016, requesting the commission to ascertain the claims of its investors (including the plaintiff) who would be affected by the proposed land transfers. The letter clearly indicated that Lowdan Exporters (EPZ) Ltd had not commenced developments on their plots.
15. From the MOU, the court can ascertain that indeed there were pertinent issues on MN/V1/4798 and 4799 that may not have enable the plaintiff to commence development on the two suit properties immediately they were leased out. The offer to land swap interrupted the plaintiff's peaceful and quiet possession of the leases as provided by clause 22 of the leases. It states that the lessee shall peacefully hold and enjoy the premises during the term of the lease without any interruptions by the lessor or any person lawfully claiming under or in trust for it. The same has been stated in section 65 of the [Land Act](#), which connotes an implied covenant binding the lessor to provide the lessee with peaceful and quiet possession of the land during the term of the lease without interruptions.



16. In the case of *Flex Construction Solutions Limited vs Verandel Court Limited (2012) eKLR*, while granting an interlocutory injunction, Odunga J held that:

'In other words, the mere fact that a tenant is in default in payment of rents does not deny him his right to quiet possession of the premises unless the default amounts to a breach of covenant which thereby entitles the landlord to a right to re-entry. In this case, it is contended that the fact that the defendant has continued to receive rents is an indication that it has waived its right to exercise the said option. Whether or not the rents received are in respect of rent arrears is a matter that will require evidence. Suffice to say that if the defendant pursuant to its undoubted right to distress for rent in event of default in payment thereof locked the premises, the said action was unjustified and would constitute a prima facie case for the purposes of an interlocutory injunction.'

17. The plaintiff is in the business of export and import, this kind of business can only be conducted in zones created and established by the defendant under the *Export Processing Zone Act. In Aroko vs Ngotho & another (1991) KLR* it was held that:

'The applicant is in physical possession of the premises. He has raised serious issues of law and fact which will have to be determined. It should be remembered that a lease is an interest in land and if the applicant is evicted, he may not be able to get a house in a similar estate at the same rent. It is well known that there is a serious shortage of houses in Nairobi and damages in that case may not be the appropriate remedy.'

18. For these reasons the court therefore finds and holds that the plaintiff in the counterclaim has not proved their case on the required standard of probabilities. Consequently, the court disallows all the orders sought in counterclaim. Each party is to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JULY 2022.

NA MATHEKA

JUDGE

