**Export Processing Zones Authority v Lowdan Exporters (EPZ) Limited (Civil Appeal E113 of 2022) [2024] KECA 864 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 864 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MOMBASA**

**CIVIL APPEAL E113 OF 2022**

**SG KAIRU, AK MURGOR & KI LAIBUTA, JJA**

**JULY 26, 2024**

**BETWEEN**

**EXPORT PROCESSING ZONES AUTHORITY ..... APPELLANT**

**AND**

**LOWDAN EXPORTERS (EPZ) LIMITED ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (N. A. Matheka, J.) delivered on 28th July 2022 in ELC Case No. 127 of 2017)***

## JUDGMENT

1. By a plaint dated 10th April 2017, the respondent, Lowdan Exporters (EPZ) Limited, sued the appellant, Export Processing Zones Authority, in the Environment and Land Court at Mombasa in ELC Case No. 127 of 2017 praying for: an injunction to restrain the appellant from terminating, altering or in any other way adversely dealing with the leases executed on 8th August 2013 in relation to title Nos. MN/VI/4797, MN/VI/4798 and MN/VI/4799 (the suit properties); an injunction restraining the appellants from interfering with the then ongoing compensation negotiations between the respondent and the National Land Commission (the NLC); costs of the suit; and any other relief that the court may deem fit to grant.

2. The respondent's case was that it was the lessee of the suit properties under and by virtue of leases executed on 8th August 2013 for a term of 50 years, and which were duly registered as by law required; that the leases were for the purpose of developing a cereals bagging plant targeting the export market; that the project/development was yet to commence awaiting conclusion of the then ongoing negotiations with the NLC with regard to acquisition by the Kenya Ports Authority (the KPA) for the purpose of expansion of trunk routes into the Kilindini Port, and that the negotiations were at an advanced stage; that, on or about 27th January 2017, the respondent received from the appellant notice to terminate the leases, which notice expired in April 2017; that the termination was unlawful in the

circumstances; that the appellant was aware of the negotiations between the respondent and the NLC, and that the notice aforesaid was meant to frustrate and deny the respondent its rightful compensation; and that, if allowed to take effect, the termination would occasion the respondent loss and damage not limited to loss of business since it planned to invest heavily, but for the derailing of its project by the Government's intended acquisition of the suit properties.

3. Reading from a transcript of the proceedings, the respondent filed a Notice of Motion dated 10th April 2017 together with the plaint. It is noteworthy that the Motion and the appurtenant affidavit in support (if any) are not contained in the record before us. However, a consent order was made on 24th April 2017 giving the appellant 21 days to respond to the application. The trial court also directed that, in the meantime, status quo be maintained subject to the respondent paying all rents and service charges then due.

4. In its defence and counterclaim dated 15th August 2015, the appellant confirmed having entered into the leases in issue with the respondent. It averred that the respondent accepted the leases subject to the covenants, agreements, conditions, restrictions and provisions therein set forth; that the 4th schedule to the leases provided for building guidelines, and that paragraph 5 thereof provided for a development period of twenty-four (24) months; that, consequently, the respondent was required under the leases to have completed construction of a perimeter fence, warehouses and office block by 1st August 2015, which it failed to do thereby breaching the terms of the leases as set out in paragraph 5 of the said schedule; that the respondent also refused, failed or neglected to pay rent as stipulated under the leases thereby entitling the appellant to terminate the leases; that the respondent had also failed to pay license fees pursuant to the leases and section 19 of the *Export Processing Zones Act*; that, in the meantime, KPA expressed its intention to acquire the suit properties to expand trunk routes to the Kilindini Port area; that, as a result, KPA approached the appellant for a land swap to enable them expand the road leading to the port; that the expression of interest by KPA to acquire the properties remained an intention, and had never been actualised to date; that KPA had never acquired the land, and that negotiations were still ongoing; that, notwithstanding the negotiations, the respondent was under a legal obligation to comply with the terms of the leases, including payment of the rent due; that, following the respondent's breaches of the leases aforesaid, the appellant wrote to the respondent giving three (3) months' notice of termination in accordance with the terms of the leases; that, upon service of the notice, the respondent rushed to make some payments in bad faith, and in preparation for the suit, as well as to take advantage of the interest shown in the suit properties by KPA; that the respondent had not established a prima facie case with any probability of success to warrant grant of the orders of injunction sought; that, in any event, damages would be adequate remedy in the unlikely event that the respondent succeeded in its suit; that the substantial public and international interest in the matter as opposed to the respondent's unsubstantiated allegations, made the balance of convenience to lie in favour of the appellant; that the respondent was seeking equitable remedies while it had come before the court with dirty hands on account of failure to disclose material facts about the nature and genesis of the facts surrounding the case and that, therefore, the respondent was undeserving of the remedies sought.

5. In its counterclaim, the appellant reiterated the averments contained in its defence and stated that those averments also formed the foundation upon which the counterclaim was premised. It prayed that the respondent's suit be dismissed with costs, and that judgment be entered in its favour on the counterclaim for:

   "(a) The Plaintiff's claims against the Defendant in the main suit (and Plaintiff in the Counterclaim) to be dismissed with costs.

b. A declaration be issued to the effect that the leases entered into between the parties herein with respect to parcels of land known as L.R NOs. MN/VI/4797, MN/VI/4798 and MN/VI/4 799 stand terminated upon expiry of the termination notice dated 27/01/2017;

c. 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 L.R NOs. MN/VI/4797, MN/VI/4798 and MN/VI/4799;

d. 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 L.R NOs. MN/VI/4797, MN/VI/4798 and MN/VI/4 799.

e. 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.

f. 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 L.R NOs. MN/VI/4797, MN/VI/4798 and MN/VI/4 799 belonging to the Defendant in the main suit and Plaintiff in the Counterclaim within a period of Fourteen (14)

Days from the elate of service of an appropriate court order accompanied by the said surrender of lease documents;

g. 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 the Counterclaim in respect of the parcels of land known as L.R Nos. MN/VI/4797, MN/VI/4798 and MN/VI/4 799 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;

h. This Honorable 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.

i. The costs of this suit to be borne by the Plaintiff in the main suit and Defendant in the Counterclaim."

6. It is apparent from the record as put to us that the respondent did not file any reply to defence or defence to the appellant's counterclaim which, to that extent, remains uncontested. It is noteworthy, though, that no application was made for default judgment in that regard.

7. When the respondent's Motion next came up for hearing on 29th January 2018, there was no appearance for both parties and, consequently, the matter was stood over generally. The application came up for mention later on 2nd February 2022 where counsel for the appellant confirmed that the appellant was served with the hearing notice in respect of the main suit. The hearing was rescheduled for 7th March 2022 and the appellant duly notified.

8. On 7th March 2022, counsel for the respondent raised an objection to the hearing on the ground that they no longer had instructions to appear for the respondent. Consequently, the court adjourned the hearing to 23rd May 2022 and directed that the respondent be formally notified of the new hearing date.

9. When the respondent's suit came up for hearing as scheduled on 23rd May 2022, it was dismissed for non-attendance, whereupon the trial court proceeded to hear and determine the appellant's counterclaim.

10. The appellant called one witness. Andrew Gichuki Njeru (DW1) (the appellant's Senior Property Officer), who testified and adopted his witness statement dated 15th August 2017 in evidence in support of its counterclaim, and which substantially replicated the facts pleaded in the appellant's defence and counterclaim dated 15th August 2015. In our considered view, no useful purpose would be served by reproducing those facts in this paragraph.

11. Suffice it to underscore the precis of the appellant's contention that it performed its obligations under the three leases, which were duly registered in favour of the respondent; that the respondent took possession of the suit properties, but that it acted in fundamental breach of the subject leases; that the appellant duly terminated the three leases; that the respondent was still in default of various amounts on account of rent and service charges due and payable thereunder; and that the respondent's suit and Motion were instituted in bad faith and merely calculated to defeat the appellant's right to facilitate acquisition by KPA of the suit properties to the effect of extinguishing its (the respondent's) own interests therein.

12. By a judgment and decree dated 28th July 2022, the ELC (N.A. Matheka, J.) dismissed the appellant's counterclaim. According to the learned Judge:

> "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 27th January 2017, they accepted payment from the Plaintiff on 27th March 2017 and wrote a letter on 30th March 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 leases on the ground of non-payment of rent and non-renewal of the licenses ....
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> ... ...
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> From the MOU, the court can ascertain that indeed there were pertinent issues on MN/ VI/4798 and 4799 that may not have enabled the Plaintiff to commence development on the two suit properties immediately they were leased out. The offer to land swap interrupted the Plaintiffs 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
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> lessor to provide the lessee with peaceful and quiet possession of the land during the term of the lease without interruptions ....
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> ... ...

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.'

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 orders sought in the counterclaim. Each party to bear its own costs."

13. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on appeal on an avalanche of 16 grounds that go against the grain of rule 88(1) of the Court of Appeal Rules, which enjoins litigants to ensure that a memorandum of appeal concisely sets forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying: (a) the points which are alleged to have been wrongly decided; and (b) the nature of the order which it is proposed to ask the Court to make.

14. In support of the appeal, learned counsel for the appellant, M/s. Wekesa & Simiyu, filed written submissions dated 26th May 2023, a list of authorities and case digest dated 31st May 2023. Counsel cited 14 judicial authorities the relevant ones of which include: Nakumatt Holdings Limited vs. Junction Limited [2017] eKLR; National Bank Of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and another [2002] 2 EA 505; and Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017]eKLR, for the proposition that a court cannot rewrite a contract between the parties; and that parties are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved; North Kisii Central Farmers Limited vs. Jeremiah Mayaka Ombui & 4 others [2014] eKLR; and Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014) eKLR, for the proposition that that a judgement must be based on issues arising from the pleadings; and that the court cannot formulate its own issues away from those pleaded; Sengendo vs. Attorney General [1972] 1 EA 140; David Kahuruka Gitau & another vs. Nancy Ann Wathithi Gitau & another [2016] eKLR; and Linus Nganga Kiongo & 3 others vs. the Town Council of Kikuyu [2012] eKLR, for the proposition that a party who fails to file his or her defence puts himself or herself outside the court and no longer has any locus standi to be heard; and evidence tendered on behalf of the plaintiff stands uncontroverted and therefore unchallenged.

15. On its part, the respondent did not file any submissions in opposition to the appeal. Notwithstanding the respondent's default, we are nonetheless bound to pronounce ourselves on the issues falling to be determined on their merits.

16. This being a first appeal, this Court's mandate thereon was espoused in Ng'ati Farmers' Co-Operative Society Ltd. Vs.Ledidi & 15 Others [2009] KLR 331 as follows:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make

due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. This mandate was also underscored in the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

18. We are, however, conscious as cautioned by the predecessor to this Court in Peters vs. Sunday Post Ltd [1958] E.A 424 that:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

19. On close scrutiny of the grounds on which the appeal is anchored, we find the following to be the 4 salient grounds worthy of serious consideration, namely that the learned Judge erred in law and in fact in: (i) failing to find that the appellant terminated the leases for valid reasons; (ii) rewriting the contract between the parties; (iii) in failing to find that the appellant's counterclaim was undefended; and (iv) in failing to appreciate the impact of failure to order and direct forfeiture of the leases as prayed in the counterclaim in respect of leases in which the respondent had lost interest, and for which it had not paid rent since January 2017.

20. On the 1st issue as to whether the appellant had valid reasons to terminate the subject leases, it was submitted that it terminated the leases on account of several breaches on the respondent's part, namely by: refusing, failing or neglecting to develop the properties; refusing to pay the license fees; and by failing to pay rent for a period of two years as contractually bound. According to the appellant, clause 21 of each Lease Agreement provides three options available to the appellant in terminating the Leases in issue. For instance, clause 21.1 empowered the appellant to terminate the Lease by serving 90 days' Notice of termination on the respondent, which it did.

21. Premised on its rights under the leases, the appellant submits that the learned Judge was at fault in, inter alia:

    a. concluding that receipt by the appellant of cheques deposited by the respondent on 27th March 2017 amounting to USD33,046.00 on account of the annual rent and enterprise license in respect of the suit premises for the year 2015 and 2016 covered the period between 2016 and 2017, and in failing to appreciate that no payments had been made for the year 2017;

    b. holding that receipt by the appellant of the sums paid as aforesaid on account of rent arrears and license fees for the period preceding the notice of termination of the leases operated as waiver of the appellant's right to terminate the leases;

c. failing to appreciate that the respondent was guilty of laches by not developing the suit properties within 24 months as mandated under paragraph 5 of the Fourth Schedule to the Leases;

d. disregarding the express terms of the Lease Agreements, and in placing reliance on the draft Memorandum of Understanding in reaching her decision;

e. rewriting the contract between the parties by concluding, in the absence of any evidence in that regard, that there were pertinent issues on MV/VI/4798 and 4799 that might have caused the respondent to fail to commence development as mandated under the leases;

f. by implying terms that did not exist in the leases;

g. by reading into the contract qualifications despite the finding that the respondent breached a term of the lease for failing to complete construction of a perimeter fence, warehouse and office block within 24 months;

h. concluding that negotiations of the offer to land swap interrupted the respondent's peaceful and quiet possession notwithstanding the fact that the alleged negotiations did not release the respondent from its obligations under the leases; and

i. in failing to appreciate that the negotiations aforesaid did not override the mandatory terms of the leases.

22. The appellant submitted further that its right to property guaranteed under Article 40 of *the Constitution* stood clogged until the three Leases were formally surrendered or forfeited as prayed.

23. Having considered the factual evidence adduced by the appellant in support of its counterclaim, we find nothing on record to contradict the testimony of Andrew Gichuki Njeru, the appellant's Senior Property Officer. Indeed, Mr. Njeru went to great lengths to narrate the foregoing factual background summarized in its pleadings. In particular, we take to mind the evidential documents comprised of the leases and the correspondence exchanged between the parties, which clearly demonstrate the veracity of the appellant's contention that it had the right to terminate the leases on account of, inter alia, the respondent's refusal, failure or neglect to undertake the developments conditional to which the leases were granted; the respondent's refusal, failure or neglect to pay rents for the period between 2013 and 2016; the respondent's outright breach of the mandatory terms of the leases; and the appellant's contractual right in any event to terminate the leases in terms thereof. In view of the foregoing, we do not agree with the learned Judge's conclusion that the admitted receipt by the appellant in 2017 of what turned out to be rent arrears for several years between 2013 and 2016 defeated the appellant's right to terminate the leases by notice as aforesaid. Contrary to the learned Judge's conclusion, the appellant terminated the leases on valid grounds.

24. On the 2nd issue as to whether the learned Judge rewrote the contract between the parties, suffice it to observe that the express terms of the leases made provision for termination with sufficient notice, not to mention the conditions appurtenant to the grant of the three leases of which the respondent was in breach. Neither did the appellant's demand for the accrued sums then in arrears defeat its right to terminate the leases. In any event, the MOU entered into by the parties did not by any means stand in the way of strict enforcement by the appellant of the terms of the leases, including the right to terminate by proper notice. To find otherwise was tantamount to the learned Judge rewriting the contract for the parties.

25. We form this view cognisant of this Court's holding in Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR where the Court stated as follows:

> " We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

26. On the 3rd issue as to whether the learned Judge was correct in disallowing the appellant's undefended counterclaim, the appellant submitted that, upon filing its case, the respondent did nothing to pursue its claim; that it failed to attend court to prosecute its suit, which was eventually dismissed for non- attendance whereupon the Learned Judge proceeded to hear and determine the appellant's Counterclaim, which proceeded undefended; that, notwithstanding the fact that the appellant's counterclaim was undefended, the learned Judge dismissed it all the same, and against the weight of evidence adduced at the hearing; that, in dismissing the appellant's counterclaim, the learned Judge relied on the respondent's bundle of documents, which were not formally produced in evidence; that, the respondent having elected not to file a defence to the counterclaim, it was disentitled to the right to adduce any evidence in the proceedings; that admission into evidence in its favour was tantamount to the trial court entertaining a non- existent defence in its favour; that the trial court effectively descended into the arena to make a case for the respondent; and that, by doing so, the learned Judge reached a decision informed by issues extraneous to the case before her.

27. We agree with learned counsel for the appellant that all the learned Judge needed to do was to confine herself to the issues raised in the suit before her, and to consider the evidence as adduced in support of the respective claims. To our mind, the fate of the appellant's counterclaim was dependent on the issues as raised in the pleadings and the evidence adduced before the trial court to the exclusion of suppositions and extraneous material not formally produced in evidence at the trial. Moreover, it is the parties who set the stage and the agenda within which the Judge is confined with little or no room for manoeuvre with intent to introduce extraneous evidential material to determine issues unknown to the pleadings.

28. This Court in Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR cited the Malawi Supreme Court of Appeal in Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in Current Legal Problems, [1960] at p.174 whereof the author had stated thus:

> " The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered

to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

29. Lord Denning in Jones vs. National Coal Board [1957] 2 QB 55 proceeded to quote Lord Green MR in Yuill vs. Yuill [1945] ALL ER 183 who had explained that -

> " Justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations for, by descending into the arena the judge is liable to have his vision clouded by the dust of conflict."

30. In view of the foregoing, the learned Judge was enjoined to determine the merits of the appellant's counterclaim on the basis of the pleadings on record and the evidence presented at the trial. The simple rule that no-evidence-no-finding should have guided the trial court towards a finding of no-defence to the appellant's counterclaim, unless the same was founded on fraud or other illegality.

31. Order 7, rule 14 of the Civil Procedure Rules, 2010 lays firm ground for determination of a counterclaim on its merits regardless of whether it is raised as a sword or a shield in defence of the plaintiffs claim. The rule reads:

> Judgment for balance
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> Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

32. Black's Law Dictionary 8th Edition defines a counter claim as a claim for relief asserted against an opposing party after an original claim has been made and especially a defendant's claim in opposition to or as a set off against the plaintiff's claim.

33. The High Court of India at Delhi in Gastech Process Engineering (India) Pvt. Ltd. vs. Saipem has observed that:

> "a counter claim is a weapon of defence and enables the defendant to enforce a claim against the plaintiff and is allowed to be raised to avoid multiplicity of proceedings."

34. On the 4th issue as to whether the learned Judge failed to appreciate the impact of failure to order and direct forfeiture of the leases as prayed in the counterclaim in respect of leases in which the respondent had lost interest, and for which it had not paid rent since January 2017, we form the view that the learned Judge was at fault as submitted by the appellant. The impugned judgment and dismissal of the appellant's counterclaim in its entirety left the appellant in limbo, and without further recourse.

35. Clearly, the issues relating to termination of the three leases is now water under the bridge in view of the fact that the respondent subsequently surrendered vacant possession of the suit premises leaving the only issue for determination being what remedies (if any) were available to the appellant as prayed in its counterclaim. Just so that we do not squander our precious judicial time and resources on what has since become a non- issue, we hasten to observe that the respondent having relinquished vacant possession of the suit premises, it cannot, with all fairness, continue to cling onto the three leases with the effect of allegedly holding the appellant at ransom and clogging its right to property guaranteed under Article 40 of *the Constitution* despite termination of the leases by notice dated 27th January 2017, and which notice expired in April 2017.

36. According to the appellant, the respondent's conduct is calculated to frustrate its efforts to facilitate acquisition of the properties by KPA for the intended expansion of trunk routes into the Kilindini Port. That, indeed, is the real issue. How the respondent intends to benefit from its current status as the registered lessee is not for us to judge. That said, we identify with the ratio decidendi in Chase International Investment Corporation & another vs. Laxman Keshra & 3 others [1978] eKLR where the Court underscored the principle that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit that prevents a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Simply put, the benefits of those leases as registered is not for the respondent to keep.

37. Having considered the record as put to us, the impugned judgment, the appellant's submissions, the cited authorities and the law, and the respondent having surrendered possession of the suit premises, we find that the appeal herein succeeds and, accordingly:

    a. we hereby declare that the leases entered into between the appellant and the respondent with respect to parcels of land known as LR Nos. MN/VI/4797, MN/VI/4798 and MN/VI/4 799 stood terminated as at the date of expiry of the termination notice dated 27th January 2017; and

    b. consequently –

        i. the Judgment and Decree of the Environment and Land Court at Mombasa (N. A. Matheka, J.) delivered on 28th July 2022 in ELC Case No. 127 of 2017 is hereby set aside;

        ii. A mandatory injunction be and is hereby issued compelling the respondent to execute all the requisite documents to facilitate surrender of lease in respect of the parcels of land known as LR Nos. MN/VI/4797, MN/VI/4798 and MN/VI/4 799 in favour of the appellant within thirty (30) Days from the date of service upon the respondent of the order hereby issued and accompanied by the relevant instruments of surrender of lease;

        iii. Failing compliance by the respondent with the order specified in paragraph (b) (ii) above within the specified period, the Deputy Registrar do execute the requisite instruments of surrender of lease and all necessary documents in place of the respondent to facilitate registration thereof in the appropriate land registry in favour of the appellant;

    c. The costs of the respondent's suit and of the appellants counterclaim in the superior court be borne by the respondent; and

    d. The costs of the appeal herein and of the due execution of the orders hereby issued be borne by the respondent.

    Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 26TH JULY, 2024.**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**