Kenmica Auto & Hardware (2004) Ltd v Esmail & another (Administrators of Estate of Kutbudin Esmail Adamali) (Environment and Land Appeal E046 of 2022) [2023] KEELC 22328 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22328 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E046 OF 2022

LN MBUGUA, J

DECEMBER 14, 2023

BETWEEN

KENMICA AUTO & HARDWARE (2004) LTD .... APPELLANT

AND

YASMIN KUTBUDIN ESMAIL & NAJMUDIN ESMAIL (ADMINISTRATORS OF ESTATE OF KUTBUDIN ESMAIL ADAMALI) .... RESPONDENT

JUDGMENT

1. In the case before the tribunal, the Respondent was the Land Lord while the Appellant was the Tenant in respect of the suit premises situated at Kutub house on L.R. No. 209/136/91. The Respondent had issued a notice dated 30.11.2017, which was to take effect on 1.2.2018, seeking to alter and increase the rent from Ksh.52 400 to 173,895 per month.
2. In response, the Appellant filed the reference before the BPRT of which the matter was heard by way of filing of valuation reports and written submissions.
3. In the valuation report (at page 41 of the Record of Appeal), availed by the appellant before the tribunal, the rent was assessed at Ksh 82 672 per month.
4. In their submissions before the tribunal, the appellant contended that it was mutually agreed by the protagonists that the premises in question occupied a space of 1,101.11 square feet comprising of a shop (816.75 square feet), Tea room (14.57 square feet), workshop space (255.84 square feet) and a toilet (13.98 square feet).
5. It was submitted that the proposed rental increment was not justified because there was no basis for such an increase, and that the comparables used by the valuers of the Land lord were not accurate.

6. For the Respondent the valuation report availed before the tribunal (at page 54 of the Record of Appeal) pegged the rental value at sh. 173 895 per month). In their submissions they argued that the valuation was done on fair market value and that the tenants valuation had missed out on important details on comparables, while their own report had nine comparable premises.

7. In the judgment delivered on 25.5.2022, the computation on valuation made by the Respondent was upheld, with a discount of 40 % for the Tea room, Workshop and Toilet area. The new rates were to take effect from the date of 1.2.2018. The respondent was also awarded costs of the suit before the tribunal.

8. The tenant was aggrieved by the above decision, hence this appeal filed via the Memorandum of Appeal dated 10.6.2022. In summary, the appellant contends that the tribunal decision was wrong as the respondent's assessment of Ksh.157 per square foot was based on premises that are not similar to the suit premises, that the valuation report was from their (Respondent's) collecting agent, and that the current rent was sh. 52 400 of which, they had made a reasonable proposal of sh. 82 674.14. They further contended that the proposed increase was driven by malice as was evident from the numerous cases between the parties that is; BPRT Case No. 355 of 2012 and 817 of 2015. They also averred that there was a covid-19 pandemic which ought to have been factored.

9. The respondent issued a letter to the appellant dated 7.6.2022 demanding the unpaid rent from 1.2.2018 amounting to Ksh. 5,335,928. Three days later, the appellant lodged the appeal contemporaneously with an application, both dated 10.6.2022. In the application, the appellant was seeking an order for stay of execution of the tribunal judgment, of which that application was presented before me on 13.6.2023. The court gave a conditional stay directing the appellant to deposit the sum mentioned above in court within 14 days.

10. On 6.10.2022, counsel for the appellant informed the court that the appellant was unable to comply with the conditional stay. It also emerged that the tenant had vacated the suit premises.

11. This appeal was heard by way of written submissions. The submissions of the appellant are dated 20.5.2023 where they have more or less rehashed their case before the tribunal as well as the grounds of appeal, adding that the tribunal did not provide clarity on what was the actual subject area.

12. The submissions of the Respondent are dated 14.10.2023, where they have similarly regurgitated their case before the tribunal. They added that in order to get the rent payable, the fall back is the joint measurement report to be found at page 111 of the Record of Appeal.

13. I find the tenant has since left the premises during the subsistence of this appeal.

14. In their current submissions, the appellant contends that there was no clarity on the subject area. However, in their submissions before the tribunal, they concede that the subject area was mutually agreed upon, of which their own particulars relating to space and measurements are in tandem with the joint measurement report to be found at page 111 of the record of appeal.

15. In the circumstances, I find that the issue for determination is whether the rent as assessed by the tribunal was improper and contrary to the law.

16. I find that paragraph 16, 17 and 18 of the tribunal judgment gives the reasons as to how the decision was arrived at. In particular, the tribunal considered that the valuation of the respondent also factored in comparables within the same premises as the subject rooms. The Appellant's valuation report did not have such details, thus the respondent's report was found to be the better one. To this end, the tribunal relied on the case of *Tala Investment Limited v Greenspot Limited*, Civil Appeal No. 269 of 1993.

17. In the case of *Karibu House (1973) Ltd v Travel Bureau Ltd* [1976-80] KLR 152 the court held that;

> "An Appeal court can interfere, it was agreed, with the Tribunal's assessment, if it were reached by any mistake of law, disregard of principle, misapprehension of fact, A consideration of the irrelevant matters, Lack of exercise of discretion, Obviously unjust method, Disregard of relevant matters or Undue regard for some factors and not enough for others, or a combination of all these eight points".

18. In the case of *Tropical Footwear Centre Ltd & 2 others v Guled Housing Company Limited* [2019] eKLR, the court had this to say in matters "rent assessment";

> "In assessing rent one does not look at the percentages. What is considered is the location, the rent comparable in other nearby premises among other factors. The Act was meant to prevent exploitation by landlords on tenants. The landlords should also be protected in the sense that they should get value for their investments, considering the location of the suit premises."

19. I find that that the tribunal reached an informed decision where it considered all the relevant factors in determining that the proper rent assessment was as presented by the respondent.

20. I note that the appellant never tried to mitigate the situation by offering to be paying the old rent of Sh.52,400 or even the sum it thought was reasonable, Sh.82,674 during the subsistence of the tribunal and the appeal cases. The tenant simply stopped paying rent for the last 6 or so years until he moved out when the court put a condition for the rent to be deposited in court.

21. In the end, I find that the appeal is devoid of any merits, the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Shabano for the Appellant

Kangata for Respondent

Court Assistant: Eddel