REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.68 OF 2016

BETWEEN

SUPA DUKA NAKURU LIMITED ……...APPELLANT

AND

BARINGO UNITED COMPANY LIMITED …..RESPONDENT

JUDGMENT ON APPEAL

(Appeal from a decision of the Business Premises Rent Tribunal; Tribunal faced with two varying valuation reports from the landlord and tenant regarding what should be paid as rent; Tribunal taking the average of the two as the rent payable; Tribunal also backdating rent to the time the reference was filed; Award set aside as no reason given as to why the Tribunal thought it fit to assess rent based only on the average of the two valuations; backdating of rent; when such order ought to be made; not fair to have awarded costs to the landlord as the landlord did not succeed in having rent assessed in the amount that it had imposed on the tenant; appeal allowed; court to assess the rent payable)

1. The appellant in this matter is the tenant of the respondent in a built up premises known as Kenya House situated in the land parcel Nakuru Municipality/ Block 5/ 22 which is owned by the respondent. The appellant operates a shop known as Supa Meat Shop and has been a tenant in this premises from the year 1974. The premises is located along Umardin Road (which also seems to be referred to as Inder Singh Road), off Kenyatta Avenue in Nakuru Central Business District and directly opposite Inder Singh Building. The premises is a double storey building and the appellant is a tenant on part of the ground floor.

2. The genesis of the matter is that on 24 September 2012, the respondent, as landlord, served the appellant with a tenancy notice, seeking to increase rent from the monthly sum of Kshs. 24, 244/= to the sum of Kshs. 130,900/=. On 6 November 2012, the appellant protested the proposed rent increment by filing a "Reference by Tenant" to the Business Premises Rent Tribunal (BPRT) created under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya. Before the matter proceeded for hearing at the Tribunal, both parties filed separate valuation reports, with their experts giving opinion on what ought to be the reasonable rent for the premises. The landlord had already engaged Prime Valuers who had prepared a report on 14 May 2012, whereby they gave opinion that the rent payable ought to be Kshs. 112,880/= per month. The same valuers gave a second valuation on 28 May 2015, whereby they advised that the rent payable ought to be the sum of Kshs. 152, 570/= and they justified the variation by stating that in their earlier valuation, they had not taken into account a Mezzanine Floor occupied by the tenant. On the other hand, the appellant's valuers, M/s Githaiga & Company, prepared a report on 16 September 2013, whereby they valued the rent payable at Kshs.

39,000/= and in their report, no Mezzanine Floor was considered.

3. Both Mr. Joseph Mungatai Inoti of Prime Valuers and Mr. Paul Mbatha Githaiga of Githaiga & Company testified to justify their reports. Given the wide discrepancy in the valuations, the Chairman of the Tribunal, asked the two valuers to visit the premises together and prepare a joint valuation report. A joint report was then prepared whereby Prime Valuers revised their opinion on the rent payable downwards from the sum of Kss. 152, 570/= to the sum of Kshs. 108,247/= using the rate of Kshs. 85/= per square feet for the main shop and Kshs. 42.50/= per square feet for the workroom, cold room, suspended storage space and "balcony store" (what was earlier described as a Mezzanine Floor). Githaiga & Company on the other hand revised their rent upwards from the sum of Kshs. 39,000/= to Kshs. 56,628/= using the value of Kshs. 52 per square feet for the main shop and Kshs. 26/= per square feet for the workroom, cold room and suspended storage space. Mr. Githaiga ignored the balcony store which he considered to be an improvement by the tenant and ought not to be factored in the rent.

4. Both parties also gave evidence before the Chairman and it emerged in evidence that the rent that the appellant was paying was Kshs. 28,000/= per month inclusive of VAT.

5. In his judgment rendered on 27 May 2016, the Chairman considered the reports of the two valuers, and decided that the rent payable ought to be the average between the two proposed rents, i.e the mid-point between the two opinions, which gave the sum of Kshs. 74, 596/= per month exclusive of VAT. The Chairman also ordered that the rent be back paid from 1 December 2012 and awarded costs to the landlord.

6. In its Memorandum of Appeal, the tenant has raised the following grounds being :-

> *(i) The learned Chairman erred in law when he came to the conclusion that the rent for the premises should be Kshs. 74,596/= without the basis for such a conclusion.*
>
> *(ii) The learned Chairman erred in law by using an inappropriate cost per unit as the basis for assessing the monthly rent payable.*
>
> *(iii) In all the circumstances of the case the decision was against the weight of evidence.*
>
> *(iv) The learned Chairman erred in law by failing to take into account the submissions filed by and/or on behalf of the tenant before writing his judgment.*

7. The tenant has asked that the judgment be set aside and replaced with an order reassessing the rent payable in a manner consistent with the law and the evidence adduced, and varying the commencement date of the new re-assessed rent, to the date of the judgment.

8. In his submissions, Mr. Okeke, learned counsel for the appellant, submitted inter alia that what the Chairman simply did was to merely take the average of the rent proposed by the landlord's valuer and that proposed by the tenant's valuer as the basis for assessment of rent. He faulted this method employed by the Chairman. He referred me to the provisions of Section 9 (2) of Cap 301. He submitted that both valuers were agreed that the appropriate rent should be fixed by surveying what was payable by tenants occupying comparable premises and neither adverted to the possibility of taking the average of two varying valuations as an alternative method of assessment. He pointed out that the landlord's valuer in his valuation did not have rents paid by tenants along the Inder Singh Road yet the tenant's valuer did so. He submitted that the duty of the Chairman was to determine who has applied the method of rent assessment correctly. He submitted that it is the tenant's valuer who used rent for premises in similar location whereas the landlord's valuer did not. He submitted that the Chairman ought to have accepted the tenant's valuer's assessment of Kshs. 56, 628/= per month. He also faulted the Chairman for ordering the rent to take effect retroactively. He referred me to the case of ***Shah & Shah vs Kagunda (1976-80) 1 KLR 1534***. He submitted that back dating the rent payable ended up favouring the landlord which was not the intention of CAP 301. He further submitted that the Tribunal never took into account the tenant's submissions which he submitted are conspicuously missing from the judgment.

9. On the other hand, Mr. Simiyu learned counsel for the landlord, submitted inter alia that it was "Solomonic wisdom" for the Chairman to set rent as he did. He further submitted that an issue of discretion cannot be appealed against unless it causes injustice. He submitted that a tenant cannot dictate what to pay the landlord as rent and if a tenant is not happy with a landlord's charge, the tenant should vacate the premises. He submitted that the aim of CAP 301 is not to protect tenants but to strike a balance between the landlord and tenant. He asked that the appeal be dismissed with costs.

10. I have considered the matter and the above submissions of counsels for the appellant and respondent. It is apparent from the record that the Tribunal faced two widely varying expert reports on what ought to be the rent payable. Initially the two experts were poles apart in their valuations, but narrowed down their differences in the joint report, not that they were anywhere near each other. There is also no doubt that what the Chairman of the Tribunal did was to take the average of the two opinions in the joint report and determined it as the rent payable by the appellant, only disregarding the "balcony store" which he stated was an improvement by the tenant and therefore not chargeable for rent. The Chairman was also of the view that the rent payable should be backdated to December 2012.

11. I have combed through the judgment of the Tribunal and I have not found any reason why the Chairman thought that the proper rent payable should be the average of the two opinions of the valuers. The Chairman in his judgment stated as follows :-

> *"The tribunal upon perusal of the valuation reports by both parties is satisfied that the open market rent in respect of the suit premises of the average between the rate of Kshs. 85/= and 52/=. That is (upon calculation) Kshs. 68.5/=. The tribunal will apply the rate of Kshs. 68.50/= per square feet for the main shop and have rate of Kshs. 34.35 per square feet per month in respect of the other lettable area."*

12. I note that this sum of Kshs. 34.35 per square feet for the other areas is also an average of what the two valuers gave in their joint report.

13. One of the powers given to the Tribunal under Section 12 (1) (b) is *"to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof."* The statute does not prescribe any method to be employed by the Tribunal in order to determine the rent payable. It follows that the Tribunal has wide discretion over this aspect of its mandate.

14. It will be seen from the above that all that the Chairman said is that he was "satisfied" that the rent payable ought to be the midpoint between the two valuations. He did not give any reason as to what was wrong with the valuation of the landlord, or the tenant, or why both ought to be disregarded. He never said that any valuer had employed a correct or wrong method in their assessment of rent. Neither did he give any reason as to why he thought that the best way to have the rent assessed is to take the average of the two valuations.

15. I agree with Mr. Okeke that the Chairman's opinion was not accompanied by any reasons. He needed to give reasons as to why he thought neither valuation ought to be followed and also give reason as to why he thought the rent is best assessed by an average of the rent given in the joint valuation report. In as much as the Tribunal has wide discretion, like all other discretions, the same must be exercised judiciously and not capriciously. I am guided by the principles laid down in the case of ***Mbogo vs Shah*** (***1968) EA 93*** with regard to when an appellate court can disturb the exercise of discretion of a lower court. It was said in the said case that the appellate court ought not to interfere with the exercise of such discretion unless the appellate court is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.

16. In the instance of this case, I am persuaded that the Chairman misdirected himself and as a result arrived at a wrong decision or otherwise occasioned injustice. There was absolutely no reason why the Chairman was of the view that the rent ought to be the average of what was given in the two valuation reports. For that reason, the judgment assessing rent at Kshs. 74, 565/= is hereby set aside.

17. While I am on this point, it was submitted by Mr. Okeke that the only method of assessment ought to be what is payable for comparable premises. On this point, I do not agree with Mr. Okeke. As I pointed out, there is no method specified in statute directing the Tribunal on what factors to consider when assessing rent. All that the statute provides is that regard must be given to all circumstances. The Tribunal as I have mentioned, has wide discretion in the method that is thought best to employ, so long as that method is justified. This is indeed the position as affirmed by the Court of Appeal in the case of ***Shah & Shah vs Kagunda (supra)***, where Simpson J, stated at page 1536 as follows :- *"It is I think generally accepted that the tribunal has discretion which must be exercised judicially having regard to the evidence before it."*

18. The use of averages is not outlawed and neither can it be said that it is the law that what is paid for comparable premises is what must guide the Tribunal. It is not for this court to inform the Tribunal on what method to employ; the Tribunal is free to apply whichever method is thought best in the circumstances of each particular case. In our case, there may indeed have been nothing wrong in taking averages, if the reason for doing so was given, and reason also given as to why the Tribunal did not deem it fit to follow either of the party's valuations. It is for failure to do that, which is the basis of my conclusion that the Tribunal erred, and it is the reason why I have set aside the judgment of the Tribunal as I have explained above. I have not set aside the judgment of the Tribunal on the sole reason that the "averages method", if I am to call it that way, was applied but on the basis that the Tribunal did not establish why it thought that this is the best method to have the rent assessed.

19. The other issue raised by the appellant is the back dating of the rent to the period that the tenancy notice was served. Again, the Tribunal has wide discretion. Section 12 (1) (e) empowers the Tribunal *"to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits*, (emphasis mine) *which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy."*

20. In the instance of this case, no reason whatsoever was given as to why the Tribunal thought it best that rent be backdated to the date that the tenancy notice was given. In fact, the back dating of rent was only mentioned for the first time when making the final orders. In my view, the reasons why the Tribunal was of opinion that the rent needed to be back dated ought to have been given and failure to do that was an error on the part of the Tribunal.

21. I hold the view that a cautious approach is needed before an order for back pay on rent is made, for the simple reason that this is a cost that was never budgeted for by a tenant, and was never taken into account by the tenant when operating his business. It can be a huge burden which can lead to the crippling of one's business especially because it now has to be paid in one lumpsum covering a significant span of years. If I am to take this case as an example, the demand for rent was from the year 2012. The rent that was paid by the tenant was Kshs. 24,244/=. The order of the Tribunal was that the tenant should pay the sum of Kshs. 74,560/=. This is a difference of Kshs. 50, 316/= per month, and if back paid, say for four years, the total sum is Kshs. 2, 415, 168/= which cannot be said to be small change.

22. There needs to be justifiable reason as to why rent should be back paid which was not given in this case.

23. Finally, is the issue of costs. The Chairman directed the tenant to pay the costs of the suit at the Tribunal. I do not think that there was any basis for that. I would probably have upheld that decision if the Chairman had found on all fours that the rent demanded by the landlord was proper. But in this instance, what the Tribunal ordered to be paid was almost half of what was being demanded by the landlord. The tenant cannot therefore be faulted for referring the dispute to the Tribunal and it was unfair to penalize him with an order to pay costs of the suit. In fact, it can be argued that he actually succeeded in having the rent reduced from the Kshs. 130,000/= which the landlord had demanded in its tenancy notice, to what the Tribunal ordered, which was Kshs. 74,596/= ,and that the landlord failed in sustaining his demand for rent at Kshs. 130,000/=. Given the fact that the parties had very divergent views on what ought to be paid as rent, and none succeeded in having affirmed their position, the best order to have made was for each party

to bear their own costs.

24. I however find nothing wrong in the Chairman's decision to exclude the "balcony store" from the rent. He indeed did explain in his judgment that this was an improvement by the tenant and given the provisions of Section 9 (2) (iii) of Cap 301, the same required to be disregarded in arriving at the rent payable for it was not an obligation of the tenant to create a balcony store. There is indeed no cross-appeal from the landlord regarding this position.

25. What then should be done given the circumstances herein ? Pursuant to Section 15 (2) of CAP 301, this court has the powers of the BPRT when hearing appeals. Thus, the court has an option of either determining the appeal on points of law, and/or fact, or referring the matter back to the Tribunal for the determination of a question of fact, or proceeding to determine for itself what ought to have been determined by the Tribunal. Instead of remitting the matter back to the Tribunal, I opt to finalize it myself.

26. In the circumstances of this case, in my view, it will be best if the two valuers are directed to go back and find out what rent is payable for comparable premises. Comparable premises would be what is paid by other tenants in the same street as that where the suit premises is situated, that is other premises along Umardin Road (or Inder Singh Road as also described). Comparable values of what is paid in other streets may also be taken, but account must be given, depending on whether the streets are in a more prime or less prime location, or whether such buildings are comparable to what is in issue in this case. The valuers should proceed forthwith jointly and file their report within 30 days for consideration. On receiving the report, I will make a final decision on what the appellant should pay as rent.

27. The only issue left is the costs. I have already mentioned that in my view, there ought to have been no order on the costs before the Tribunal, and I make that order. I think it is also best that I make no order as to costs regarding this appeal.

28. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr. Okeke for the appellant

Mr. Simiyu for the respondent

Court Assistant : Toroitich

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU