



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. APPEAL CASE NO. 5 OF 2014

NJOROGE NDURUGU & OTHERS

(T/A NGAMINI BAR & RESTAURANT)..... APPELLANT/RESPONDENT

VERSUS

ALYKAH INVESTMENTS LIMITED.....RESPONDENT/APPLICANT

JUDGMENT

The Appellants are tenants of the Respondent in premises located along Munyu Road, Nairobi being L.R. No. 209/2413 (hereinafter referred to as the “premises”). The Respondent issued a notice to the Appellants on 28th December 2010 to increase rent for the premises from Kshs. 74,000/- to Kshs. 284,877/-. The Appellants objected to the said notice and filed a reference in the Business Premises Rent Tribunal (herein the “Tribunal”) on 24th February 2011 being **BPRT No. 147 of 2011**. This is an appeal from the judgment of the Tribunal delivered on 23rd March 2012 on the following grounds of appeal:

1. That the Learned Chairperson of the Tribunal erred in law and in fact in awarding excessive rent assessment contrary to the principles of law governing such rent assessments.
2. That the Learned Chairperson erred in law and in fact in stating that none of the submissions of the parties asked her to disregard any comparable when in fact the Appellant did exactly that by stating that the Respondent’s comparables were, inter alia, unreasonable and unrepresentative of the open market rents for that type of premises, of that age, of that size and of that locality and consequently should have been ignored or rejected completely in the assessment of the new rent.
3. That the principle of average rental used by the Learned Chairperson went against the correct principles for determination of what might be a reasonable open market rent for premises of that type, age, size and locality and ended in assessing a speculative, unjustified, uneconomical, oppressive, unreasonable and unrepresentative rent of that type of premises.
4. That having held that smaller spaces attract higher rents, the Learned Chairperson should have rejected the Respondent’s comparables and used the Appellant’s comparables to arrive at what should have been a just and reasonable open market rent for the premises.
5. That the award was manifestly high as to represent an entirely erroneous estimate.
6. That the Learned Chairperson exercised her discretion injudiciously in assessing rent which did not represent a fair return to the Respondent for its investment in the premises thereby leading to making it unreasonable and unbearable to the Appellant to the extent of pushing them out of business and leading them to suffer immeasurable and substantial loss in the nature of their

business.

7. That the Learned Chairperson erred in fixing the due date of the rent as at 1st day of September 2011 instead of as from the date of judgment.

For the above reasons, the Appellant sought for the following:

1. That the assessment made on 23rd March 2012 be reviewed and re-assessed to arrive at a reasonable and fair Open Market Rent for the premises.
2. That the Respondent be ordered to pay the Appellant's costs of this Appeal and of the case in the Tribunal.

Parties canvassed this appeal by way of written submissions. The Appellant in his submissions highlighted the contents of both valuation reports. He cited the case of **Mbuni Dry Cleaners Ltd -vs- Barclays Bank DCO [1972] EA 188** where the Court held that the enactment of the **Act [Cap 301]** was to protect the sitting tenant from being forced out of the premises and being compelled to pay an inflated rent for their existing premises. The Appellant further submitted that the Tribunal did not have due regard to the law on the matter and the principles involved in assessing the new rent and therefore the assessment being the average rent analysis formula was not reasonable and exceeded all contemporary open market values. The Appellant also objected to the zoning used by the Respondent and stated that valuation of rent is not done on a zoning basis but on the occupation of the premises as a whole based on the locality of the premises. The Appellant also disputed the 60% discount used by the Tribunal stating that it was an arbitrary and unreasonable figure. Counsel for the Appellant also asked the court to disregard the Respondent's valuation report for the reasons that it referred to smaller rental spaces. The Appellant further submitted that their valuer did represent a fair return to the Respondent for its investment having in regard the fact that the Appellants maintain the premises themselves by paying for its redecoration, repairs, water, electricity, city rates and no improvements have been carried out by the Respondent since it bought the premises from the previous owner. On that basis, the Appellant prayed that the appeal be allowed with costs.

The Respondent filed its submissions on 18th June 2014 stating that every investor would want to reap maximum rent from his business while taking into consideration the prevailing rent in the neighborhood. The Respondent further submitted that all the surrounding buildings have been turned into small stalls fetching high rents which it is not enjoying as it had let out the premises as a whole measuring 2,400 Sq Ft. The Respondent's counsel contended that the Appellant had sublet the premises and highlighted a reference between the Appellant and a subtenant in **Nairobi BPRT No 763 of 2011** where the subtenant pays Ksh 8,000/= for 15ft per month as opposed to the rate the Appellant is claiming in the present suit and prays that the appeal be dismissed with costs.

I have considered the memorandum of appeal, the proceedings of the Tribunal and the written submissions. The issues that require determination are:

1. Whether the rent assessment of Ksh 154,370/= per month made on 23rd March 2012 by the Tribunal should be reviewed and re-assessed to arrive at a reasonable and fair Open Market Rent for the premises.
2. When the payment of the reviewed and re-assessed rent should commence.

The law under **section 9(2)(a)** of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act gives the Tribunal the mandate to determine rent payable in instances where the landlord and tenant disagree as in this case. This section provides that,

“(2) Without prejudice to the generality of this section, a Tribunal may, upon any reference –

(a) determine or vary the rent to be payable in respect of the controlled tenancy, having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market, and disregarding –

- i. *any effect on rent of the fact that the tenant has, or his predecessors in title have, been in occupation of the premises*
- ii. *any goodwill attached to the premises by reason of the carrying on thereof of the trade, business or occupation of the tenant or any such predecessor;*
- iii. *any effect on rent of any improvement carried out by the tenant or any such predecessor otherwise than in pursuance of an obligation to the immediate landlord”*

The Tribunal is to have regard to the rent at which the premises might reasonably be expected to be let in the open market but this does not however mean that the market rent is the only matter to be considered. Other considerations in reaching a reasonable rent are the age of the building, market locality and premises with similar trade. In **Cleaners Limited –vs. - Barclays Bank DCO [1972] EA 188** the Court of Appeal held that, ***“It is the reasonableness of the rent that must be in the forefront of the tribunal’s investigations and determination. It must be the concern of this court too. The average rates per square foot or meter of a number of nearby buildings on ground floor premises in which similar trades are exercised are among other things relevant to assessing the rent that would reasonably be expected in the open market.”***

Both parties were asked by the court to file their valuation reports so that the Chairperson of the Tribunal could determine the rent for the premises that would reasonably be expected in the open market. Similar premises and trades or occupations in nearby shops were investigated by the valuers. The Appellant’s valuer, Oleander Limited, filed a valuation report dated 19th February 2011. Their general remark was that they had made a comparison of the premises with similar old buildings and arrived at a rent of Ksh 50/- per square foot per month. The Respondent’s valuer, Standard Property Services, filed their valuation report dated 28th September 2010. Their general remark was that the new buildings within the neighborhood of the premises have superior finishes and better services hence attracting very high rentals adding that most buildings within the neighborhood have been subdivided in their ground floor shops into small stalls to attract higher rent. Their opinion on the rent achievable was Ksh 140/= per square foot per month. Though there initially was a difference of opinion on the total lettable square feet in the premises in both valuation reports, the parties agreed that the total lettable space was 2,400 square feet. In its decision, the Tribunal stated that it used the average rental analysis to reach a rent of Kshs. 385,920/=. The Chairperson then made the following remarks in her judgment in reference to the comparables presented by the Respondent:

“They are very small. None of them is in fact half of the size of the suit premises. Adopting them without applying any discount will lead to market distortion. I would therefore apply a discount of 60%.”

Following that, the Chairperson applied a discount of 60% to the rent of Kshs. 385,920/- to arrive at the rent of Kshs. 154,370/- per month.

The duty of the court in determining a fair rent in a case like this is to ensure that the tenant is not put off the business because of unbearable rent and at the same time ensure that the landlord gets his fair of the deal. This being an appeal, the court keeps in mind the fact that the general principle is that a Court of Appeal should be very slow to interfere with the exercise of discretion by a Judge or judicial officer. The case of **Mbogo & Another vs. Shah (1968) EA 93** gave reasons where the court can interfere with the discretion of the judge and held that, ***“A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice.”*** In cases of appeals from the Tribunal, the court in **Karibu House (1973) Ltd –vs.- Travel Bureau Ltd [1976-80] KLR 152** 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”***.

In this appeal, I take issue with the method used by the Tribunal in arriving at the open market value rent for the premise. The issue of taking the average of comparables was discussed in **Tala Investments Ltd. vs. Green Spot Limited Civil Appeal No. 269 of 1993** where Shah J, held that, ***“In dealing with principles upon which a Tribunal should act in assessing rent, its duty is to consider all the reports properly before it. The Tribunal must go into individual comparable to decide which is a better report rather than merely arrive at a mean figure, that is mean figure of the landlords and tenant valuer’s reports. That is not a proper criteria.”***

I am persuaded by this decision primarily because it is obvious that in presenting their valuation reports before the Tribunal, the tenant opposing the rent increment will invariably give the lowest rental rates possible while the landlord will present the highest rental rates possible, knowing that the Tribunal shall merely take the average of all the comparables presented by both sides. That appears to me to be simplistic and impractical. I agree with the above cited decision that the Tribunal should consider each individual comparable carefully in assessing whether it represents an open market rent of the premises and decide which is a better report.

Further to the above, the decision taken by the Tribunal to apply a 60% discount was no doubt meant to tone down the high differentials between the comparables presented by the tenant and those presented by the landlord. Again, I must comment here that applying a discount rate of whatever magnitude is totally unguided by any known principle and is an arbitrary figure that can be challenged as has happened herein. I find that this discount was meant to reduce what emerged to be a very high rent arrived at after obtaining the average of the comparables presented by both sides. It is my opinion that the Tribunal having realized that the two valuation reports had serious disparities ought to have employed the services of a valuer to carry out the valuation of the rent payable on this premises under **section 12(3) of CAP 301** which states that, ***“A Tribunal may employ officers, valuers, inspectors, clerks and other staff for the better carrying out of the purposes of this Act: Provided that, where a Tribunal has deputed a valuer, inspector, officer, or other person to inspect or view any premises, any report made in that behalf shall be communicated to the landlord or tenant or both”***. In the circumstances, the rent arrived at by the Tribunal cannot be allowed to stand and goes to show that using the average of the comparables is not always the best way to proceed in assessing the open market rent for the premises. The same is hereby quashed.

The Appellant also raised the issue that the Tribunal erred in fixing the due date for the reassessed rent as at 1st September 2011 instead of the date of the judgment. I note that the Respondent first issued its notice to the Appellant to increase rent on 22nd December 2010 and gave a new date for the payment of the rent as 1st March 2011. In its judgment, the Tribunal gave the effective date for the payment of the new rent as 1st September 2011 because the Respondent filed its valuation report in court on 9th August 2011 therefore the delay would be construed against it. Shah J. in **Tala Investment Ltd Vs Green Spot Ltd. (Supra)** stated that, ***“The ratio decidendi of all the said appeals is that the normal order for effective date would be that the date specified in the tenancy notice would be proper but the Tribunal has in proper circumstances discretion to alter the effective date and that such discretion must be exercised judicially.”*** The Tribunal gave its reasons for the said date by stating that the Respondent took long to file its valuation report. In **Shah & Shah vs. Kagunda 1978 KLR 35** the court held that, ***“The Tribunal is given power in the Act to approve the terms of a notice either in their entirety or subject to such amendment or addition as it thinks just, having regard to all circumstances of the case. Thus it is given a wide discretion as to the effective date, which of course should be exercised judicially. In the present case, although it might have been desirable to give reasons, I can see nothing wrong with making the order effective from the date specified in the tenant’s notice; indeed I think that it is the appropriate date in all circumstances.”*** Going by these decisions, it would appear that the Tribunal has discretion in deciding the effective date for the payment of the assessed rent. The reason given by the Tribunal as to the reason why it required for the assessed rent to be payable from the date of the valuation report appears to me to be plausible and I do not see any good reason in interfering with it.

In light of the foregoing, I remit this matter back to the Tribunal for a reassessment of the rent to be paid by the Appellant for the premises. Each party shall bear their own costs of this Appeal.

DELIVERED AND SIGNED IN NAIROBI THIS 22ND DAY OF MAY, 2015.

MARY M. GITUMBI

JUDGE