REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 123 OF 2008

SAYED ABDALLA……APPELLANT/TENANT

VERSUS

1. MUSTAFA EBRAHIM JEE
2. RUKYABAI LUKMANI
3. GULAMABAS EBRAHIM JEE

TAIBALI EBRAHIM JEE……...……..RESPONDENTS/LANDLORDS

(Being an appeal from the Judgment of The Hon. Chairman in Rent Restriction Tribunal dated 30th April, 2008 in Cause No. 31 of 2006 at Mombasa)

JUDGMENT

This appeal is filed against the decision of the Rent Restriction Tribunal which is set up under the Rent Restriction Act Cap 296. The respondents are the owners of plot No. 137/XVI/M. I Jomo Kenyatta Avenue Mombasa. The respondents filed an application dated 8th March 2007 before the Tribunal for an order for the standard rent of the premises to be determined. The rent for those premises was Ksh. 690. The tribunal by its ruling reviewed and fixed the standard rent for those premises at Ksh. 12,000 exclusive of services. In response to the respondent's application for determination of standard rent, an affidavit was filed by *Abdulrehman Sayed*. He described himself as the nephew of *Sayed Abbdallah* the tenant of the premises. He deponed that *Sayed Abdallah* died in 1995. He further deponed that the 'controlled' tenancy had devolved upon him after the death of his uncle and that he was the tenant of the premises. In his affidavit, before the tribunal he stated that the standard rent was Ksh. 690 and there was no basis for the tribunal to determine the standard rent as requested by the Landlord. There are five grounds of appeal presented by the appellant in this appeal. They are:

"1. That the learned Tribunal erred in law and in fact in assessing standard rent at Kshs 12,000/= without due consideration to the provisions of the law.

2. That the learned Tribunal erred in law in fact in increasing rent from Kshs. 690 to Kshs. 12,000/= which is an increment of 1739% which increment was excessive in the circumstances.

3. That the learned Tribunal erred in law and in fact in relying on the report of the assessor when he was neither called to give evidence and be cross-examined nor gave any documentary basis for the alleged comparable rent.

4. That the learned Tribunal erred in law and in fact by disregarding the Appellants evidence and

submissions.

5. That the learned Tribunal erred in law and in fact in proceeding to enter Judgment against a deceased person when the fact had been brought to the Tribunal attention."

The written submissions of the appellant considered all the above grounds together. In those submissions it is argued that the tribunal erred in failing to confine itself to section 3 (2) (a) (IV) of Cap 296. That section provides:

"Notwithstanding anything contained in the definition of 'standard rent' –

(a) Where the tribunal is satisfied that the standard rent would yield an uneconomic return to the landlord because –

(i) ……

(ii) ……

(iii) ……

(iv) The fact that it does not yield a fair capital return on the costs of construction and market value of the land as at 1st January, 1981 or that, in the absence of any indication that the purchase price paid by the landlord was excessive it does not yield a fair capital return on the purchase price,

the tribunal may determine the standard rent to be such amount as, in all the circumstances of the case, it considers fair; and…."

The appellant argued that the tribunal could only increase rent on cost of construction and market value of the land in 1981.

The quotation of the whole of section 3 (2) (a) (IV) shows that the tribunal is given discretion in determining or reviewing standard rent. The section as can be seen above permits the tribunal to determine the standard rent considering what is fair, having regard to comparable dwellings. The tribunal had before it a report by the Rent Assessment Officer dated 17th November 2006. That report considered comparable standard rent of three properties. One of those properties was at Old Town in Mombasa and the rent was Ksh. 12,000 per month. The second property was situated in Ganjoni in Mombasa and the rent was Ksh. 12,500 per month. The third was situated at Tononoka in Mombasa. The rent for that property was Ksh. 17,000 per month. The tribunal confirmed in its ruling that it also made a site visit of the subject premises. In its determination of the standard rent, the tribunal stated:

"taking all the circumstances of the case, and being mindful of the increase of cost of maintenance, rates as well as the prime locality of the premises, standard rent is reviewed and fixed (sic) Ksh. 12,000 exclusive of services."

The appellant has criticized that finding on the basis that section 11 of cap 296 permits the landlord to increase the rent where amongst other circumstances the rates payable by the landlord increase. It is correct that section 11 does make that provision. However, the fact that the tribunal mentioned rates as a reason for increase does not justify the setting aside of its determination. This is because, we find that the tribunal has discretion given to it by section 3. Section 3 (2) (b) provides further that the tribunal in assessing standard rent may consider the standard rent of comparable dwelling houses. The tribunal not only considered the comparables presented to it by the rent assessment officer but went further and visited the subject premises. The tribunal did not therefore err in considering the comparables nor in carrying out the site visits. As stated before section 3 affords the tribunal the discretion of determining the standard rent. That discretion is not limited as the appellant seeks to argue. The court of appeal in the case **MRS PHOEBE NDUNDA & OTHERS VS MWAKINI RANCHING CO. LTD & ANR CVL APPL 448 OF 2001 NRB** considered under what circumstances an appellate court would interfere with the trial

court's discretion and stated as follows:

"In **AFRICAN AIRLINES INTERNATIONAL LTD. VS. EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK [2003] KLR 140** at p. 143 this court said:-

"since the grant of the extension is discretionary, this court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of ***Mbogo v. Shah*** *[1968] EA 93 which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang VP said at page 94:-*

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

We cannot in our judgment find that the tribunal was wrong in exercising its discretion or that it misdirected itself or that it had taken into consideration matters it should not have taken or that it failed to consider certain matters causing it to arrive at a wrong conclusion. All that the tribunal considered, that is the comparables and the site visits were in our view proper in the exercise of its discretion. The respondent purchased the subject premises for Ksh. 140,000 in 1952. The appellant has argued that the tribunal should have limited itself to consideration of the construction cost or purchase price of the premises in assessing the standard rent.

In our view and considering what we have stated in this judgment above, the tribunal's discretion is not limited as submitted by the appellant. It is also immaterial that the respondents' application for determination of standard rent quoted section 3 (2) (a) (IV). That reliance did not defeat the application. The section does in any case provide discretion to the tribunal for the tribunal to consider what is fair. Much more it does not escape our attention that although the purchase price paid by the landlord was Ksh. 140,000 which purchase took place in 1952, the value of money was much higher then than now. The value of that amount is incomparable to the same amount today. That is why we reject the appellant's argument and his reliance on the case **THAKKAR AND ANOR VS JERAM AND ANOTHER [1973] EA 133**. It should however be noted that the section of the Act were renumbered and the section quoted in that case THAKKAR (supra) is now section 3 (2) of the Act. In that case the High Court in considering an appeal from the Rent Restriction Tribunal stated as follows:

"Referring to s. 4(2)(a)(iv) of the Act the tribunal decided that a landlord is entitled to get a fair return on his capital investment and in this case his investment is the price paid by him and not the cost of construction. Looking at the provision the tribunal must be satisfied 'that the standard rent would yield an uneconomic return to the landlord". The factor is personal to the landlord. Three instances are then given which are not personal to the landlord in this case, and we come to the fourth. In this instance, two classes of landlord are provided for, the first is the developer whose capital was "the cost of construction and market value of the land as at 1st January 1965". This does not apply to the landlord in the case before us for the reason that he did not bear the capital expenditure which was the cost of construction, nor was the land his at the time of construction. The second is the return on the purchase price. This does apply to the landlord in the case before us for the reason that he did pay a purchase price, and this is his capital on which he is entitled to a fair return. Looked at another way it would not be 'fair' that a landlord should receive a return based on the cost of construction which cost he did not bear and on the value of the land at the time when he did not own it; it is 'fair' that, as a purchaser, he should receive a return based on the purchase price that he in fact paid."

We respectfully do not agree with that finding of the High Court. In the light of our holding above about the decline in the value of money we find that the Tribunal's determination cannot be faulted. Moreover section 3(2) (iv) provides that in determination of the standard rent the Tribunal would consider the market value of the land as at 1st January, 1981. The value of the land therefore, which the Tribunal was

to consider was not as at 1952 as submitted by the appellant. The tribunal considered the facts placed before it and rightly exercised its discretion in arriving at the standard rent for the premises. As stated before, *Abdulrehman Sayed* in his affidavit deponed that the original tenant *Said Abdallah* passed away in 1995. The tribunal in considering that evidence stated as follows in its ruling:

"No exhibit in the form of a death certificate or even a burial permit was produced as proof of death. While proof of the respondent's (Sayed Abdullah) death would have automatically led to the dismissal of the application, I am hesitant to order so because the fact of death has never been disclosed to the applicants (landlords) who has continued to issue receipt in the names of the alleged deceased tenant."

If indeed *Sayed Abdullah* was dead it is then inconsistent with the fact that the rental receipts for as far back as the year 2008 were issued in his name and yet the landlords were not alerted. If indeed *Sayed Abdullah* was dead evidence of his death should have been laid before the tribunal. The tenancy in our view has therefore not devolved to *Abdulrahman Sayed* since no rent receipt was issued in his name. On the converse if the original tenant *Sayed Abdallah* is dead, then *Abdulrahman Sayed* has no ***locus standi*** in this matter. On the whole, we find that there is no basis in this appeal which would justify any interference with the tribunal's ruling.

For that reason we hereby dismiss this appeal with costs being awarded to the respondents.

DATED and **DELIVERED** at **MOMBASA** this **15*th*** day of ***March, 2012.***

MARY KASANGO
JUDGE

R. MWONGO
JUDGE