



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 180 OF 2009**

SALEH AWADH SALIM as administrator of the Estate of  
HASSAN AWADH.....APPELLANT  
  
VERSUS  
  
ABDALLA S. BARAKAT.....RESPONDENT

**J U D G E M E N T**

**Coram:** Mwera, Mwongo JJ  
Mwakisha for Appellant  
Omwenga for Respondent

This appeal arose from the ruling of Hon. D. Mochache delivered on 18<sup>th</sup> September, 2009 in MBA BPRT Case No. 180/2006. The tenant, Hassan Awadh, filed a reference in the tribunal on 13<sup>th</sup> December, 2006 opposing a notice dated 9<sup>th</sup> October, 2006 by which the landlord Abdalla Barakat, the present respondent/landlord sought to increase rent from Shs. 6,000/= per month to Shs. 10,000/= in respect of business premises situated on Plot No. II/XVII/MOMBASA ISLAND. During the submissions we were told that the rent being paid was Shs. 6,500/= per month and not Shs. 6,000/=. That difference formed a ground in this appeal. We will revert to it presently.

After hearing arguments, the tribunal ruled that following examining and appreciating the valuation reports from either side, the new rent payable was Shs. 10,000/= with effect from the date of the notice. An order was extracted on 20<sup>th</sup> April, 2009. The same was served, provoking the present appeal. During the pendency of the tribunal's decision, the applicant Hassan Awadh died and his legal representative took over the matter – Saleh Awadh Salim, the present appellant.

The four (4) grounds in the memorandum of appeal were that:

- (i) the chairman of the tribunal wrongly exercised her discretion when she ordered that the effective date of the new rent was the date of the notice yet that notice bore fatal defects;
- (ii) reliance was placed on the landlord/respondent's valuation report while disregarding that of the tenant/appellant;
- (iii) when setting the effective date, the chairman set the effective date of the new rent at 1<sup>st</sup> January, 2007 without considering relevant circumstances like the tenant having died while outside Kenya; he had

to be substituted and that contributed to the delay in finalizing the proceedings, circumstance attributable to neither party; and

(iv) that the chairman failed to take into account relevant factors and applied wrong principles to arrive at the assessed rent of Shs. 10,000/= per month.

Directed to submit, the appellant argued grounds 1 and 3 separately and grounds 2 and 4 together.

Regarding defects in the notice filed on 13<sup>th</sup> December, 2006 in ground 1, Mr. Mwakisha submitted that the notice was incompetent because even as it stated that the rent being paid and due for increase was Shs. 6,000/= per month, the actual rent being paid was Shs. 6,500/= per month. The appellant considered the anomaly a material defect which the tribunal disregarded and therefore proceeded to arrive at a wrong conclusion.

Ground 3 touched on the effective date and we were told that section 9 (1) of the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act (Cap 301), the Act, required the tribunal to approve terms of tenancy notice as it thinks just having regard to all circumstances of the case. Our attention was drawn to the fact that the tenant died during the pendency of the proceedings and had to be substituted. That this ought to have been borne in mind so as not to set the effective date of the new rent from the date of the notice because the delay to conclude the proceedings could not be attributed to the tenant who died. That another reason contributing to the delay in final determination of the matter before the tribunal, was that even after filing their separate and differing valuation reports, the parties had to agree on a joint report regarding the lettable area. Accordingly, the learned chairman did not properly exercise her discretion under the said section 9 (1) (a) of the Act.

Ground 2 and 4 taken together focused on the tribunal's treatment of the valuation reports. The appellant maintained that its report was disregarded while that of the respondent was taken in wholesale. Further, that the chairman appeared prejudiced against the appellant when she remarked in her decision that the appellant's valuation had relied on comparables that were three times the size of the subject premises in order to distort the market value. That there was no evidence for the learned chairman to make such a finding or arrive at such conclusion. That the conclusion prejudiced the tenant/appellant. Then the submission went on to remark on the age of the premises under review and those used as comparables.

On his part the respondent urged the court to view the discrepancy between the rent in the notice – Shs. 6,000/= per month actually being paid against - Shs. 6,500 as a minor clerical error that did not prejudice the appellant. The respondent sought to raise rents to Shs. 10,000/= per month. He made out his case and the tribunal allowed it.

As regards the appellant's comparables being larger than the suit premises, we were told that as a principle, larger premises fetch lower rents than smaller ones. That the appellant's comparables were three times larger and so the chairman properly rejected them. And that in any event the chairman looked at the parties' separate valuation reports before making her decision.

Coming to the effective date, we were urged to look at section 4 of the Act which provides for such and that the tribunal did not fall in error here at all. No valid reasons/circumstances were placed before the tribunal to change or vary the effective date as per the notice. And finally that the tribunal's judgment bears no wrong principle or did not exclude any proper and relevant basis to order that the rent payable was Shs. 10,000/= per month. One valuation had even stated that Shs. 15,101/97 was to be taken as the market rent, yet the tribunal gave only what the respondent had asked – Shs. 10,000 per month.

After going over the arguments that went on before the tribunal upon which the judgment herein was given, the two valuation reports, the provisions of the Act cited as well as the contents of the said judgment itself, hereunder follows our determination.

Beginning with the anomaly in the rent sum quoted in the notice filed by the respondent, Shs. 6,000/= and the sum that was actually being paid, Shs. 6,500/=, we have this to say.

From the landlord/respondent's submission placed before the tribunal, nothing is said about the aspect of rent. But on behalf of the tenant/appellant it was submitted:

**“Our first submission is as to the priority and/or competence of how the landlord's reports when looked at against the valuer's reports and especially the common acceptance that in fact the rental presently payable is Kshs. 6,500/= per month and not Kshs. 6,000/= as stated in the notice. On this point, we submit that the notice is incompetent with the true state of facts obtaining as at the date of issuance; it is by that very fact rendered incompetent and ought to be dismissed. Even assuming that the notice was good, do the valuation reports support the proposed increment? For the tenant we submit that the increment proposed by the landlord is well on the higher side having regard especially to the relevant circumstances.”**

In the tribunal's judgment, it appears that the discrepancy Mr. Mwakisha, for the appellant, raised was not determined, reference having been made only to the sum of Shs. 6,000/= in the notice and the intended increment. We, as required when exercising our appellate jurisdiction, have a duty to go over all that was placed before the tribunal to arrive at our own findings. Such finding may agree or deviate from what the tribunal found or did not find. Here the tribunal made no finding as to the rent payable as at the time of the notice to increase rent dated on 9<sup>th</sup> October, 2006. It went by what was in the notice. On the other hand the appellant did not at any time either by its reference of 13<sup>th</sup> December, 2006 or during the proceedings before judgment, point out that the sum in the notice was wrong, until the submissions. It is not suggested that the notice sum was calculated to do prejudice to the appellant or that in fact it did prejudice the appellant. The suggestion that the anomaly in the rent sums made it invalid or incompetent is not based on any authority. Accordingly, we dismiss this ground. The error of Shs. 500/= was not of such a nature as to have the effect the appellant claims.

Regarding the effective date of the new rent, section 9 (1) (a) of the Act was cited:

**“9(1)(a) Upon a reference a Tribunal may, after such inquiry as may be required by or under this Act, or as it deems necessary –**

**(a) approve the terms of the tenancy notice concerned, either in its entirety or subject to such amendment or alteration as the Tribunal thinks just having regard to all the circumstances of the case; or**

**(b) .....**

**(c) .....**

**(2).....**

**(3) .....”**

After hearing both sides on the reference, the learned chairman gave judgment adding:

**“.....effective date to be the date of the notice.”**

The date of the notice was 9<sup>th</sup> October, 2006. It was received in the tribunal on 13<sup>th</sup> December, 2006. The appellant desires that the effective date should have been the date of the judgment i.e. 18<sup>th</sup> September, 2009 and not as per the notice because when the tenant died and had to be substituted and also that it became necessary to file the joint report, those factors contributed to the delay that saw the proceedings take longer to conclude. The appellant should not bear the burden, as it were, to pay new rents backwards. The law says that the chairperson of the tribunal has a **discretion** in deciding the effective date. It can be in the entirety of the tenancy notice or she/he can vary that date as the justice of the case demands, having all circumstances in regard. The learned chairman exercised that discretion and approved the effective date as per the tenancy notice in its entirety. She had considered all the

circumstances because the proceedings recorded contain the moves to substitute the deceased tenant and the need to file a joint report. And much more, no party even the appellant brought to her attention issues likely to affect the effective date. The tribunal did not blame any side for all the time it took to complete the proceedings. Or that it attributed the order as to the effective date, to any irrelevant reason/bases. If the appellant had such aspects regarding the effective date, he should have stated so in his submissions at the tribunal.

Finally, exercise of a discretion is a thing that a court sitting on appeal should be very slow to interfere with unless it is shown that that exercise was not judicial or judicious. Or that the exercise has resulted in such gross breach of justice that it ought to be interfered with. It has not been shown to us that the discretion the chairman exercised under section 9 (1) (a) of the Act warrants intervention. Accordingly, we shall not interfere with the effective date as ordered in the judgment.

Before we leave the provisions of the Act cited to us, we are obliged to remark that the respondent's submission referred to section 4 of the Act and we thought we could address it in context. The reference to that provision was in regard to effective date of the notice of tenancy. However, section 4 falls under the head:

**“Termination of, and alteration of terms and conditions in controlled tenancies.”**

We were unable to place in what context the respondent referred to section 4 and having dealt with the effective date under section 9, we let the matter rest.

Finally, grounds 2 and 4 – treatment of Valuation Reports: The claim was that the chairman disregarded the appellant's valuation report and applied wrong principles in appreciating comparables in matters of rent as the case was here. At the offset, we should say that the reports – individual or joint, placed before the tribunal were perused and considered. Otherwise, the learned chairman could not have remarked that:

**“The parties valuation reports are prepared by Maina Chege for the tenant and Fair lane for the landlord respectively. The tenant's valuer has relied on comparables that are substantially longer (larger?) than the suit premises. It is a general principle that larger principles (premises?) attract lower rent than smaller premises. The use of comparables that are well over three times the size of the subject premises may well have been a calculated move by the tenant's valuer to distort the market. Accordingly, all the tenant's comparables are rejected.**

**From the landlord's valuation report, I will reject comparable number 1 of which like those used by the tenant's valuer is well over three times the area of the suit premises. The rest of the comparables therein are relatively closer to the size of the suit premises, hence I proceed to adopt them for purposes of assessing the rent.”**

The chairman went on to assess the rent yielding Shs. 15,101/97 per month. But she only proceeded to grant Shs. 10,000/= as per the notice.

We see absolutely no fault with this part of the judgment. The chairman began by looking at the respective parties' valuations. She gave reasons why first she rejected the appellant's comparables then went on to reject one by the respondent. The same reason for so rejecting those comparables from both sides is that they were three times well over the suit premises. But she was convinced that the other comparables by the respondent were closer to what she was dealing with. That means to us that the learned chairman assigned reasons to her decision to move one way or another. We see nothing wrong with that for she was entitled to do so. There has been no suggestion that that course was influenced by whim, caprice or ulterior motive. None at all. And in any event even after finding that the comparables used yielded Shs. 15,101/= per month, she still exercised her discretion and gave what was asked for – only Shs. 10,000/=per month.

All in all, we find no merit in this appeal and it is dismissed with costs.

Delivered on 24<sup>th</sup> April, 2012.

**J. W. MWERA**

**JUDGE**

**R. M. MWONGO**

**JUDGE**