



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 989 of 2007

MOSES KAMATU.....APPELLANT
VERSUS
ROBERT KIBE KIGURU.....1ST
RESPONDENT
JOHN MUTUNGA NJOROGE.....2ND
RESPONDENT

(An appeal from the ruling of the Chairman, Business Premises Rent Tribunal Case No. 7 of 2005 (Thika))

J U D G M E N T

1. This appeal arises from a consolidated ruling delivered in respect of two references filed in the Business Premises Rent Tribunal Cases Nos.7 and 11 of 2005. Moses Kamatu (hereinafter referred to as the appellant), was the applicant/landlord in both references. Robert Kibe Kiguru (hereinafter referred to as the 1st respondent) was the respondent/tenant in Business Premises Rent Tribunal Case No.7 of 2005 and John Mutunga Njoroge (hereinafter referred to as the 2nd respondent), was the respondent/tenant in Business Premises Rent Tribunal Case No.11 of 2005.

2. The respondent in each case served the appellant with a notice under Section 4(3) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301, for reassessment of rent with a view to reduction of the monthly rent, on the grounds that the rent the appellant was charging was excessive considering the space and the market rate. The appellant filed a reference to the Tribunal under Section 6 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301, in each case objecting to the notice for reassessment of rent, and requesting the Tribunal to investigate the matter and determine the issues involved.

3. The respondents filed a joint valuation report together with two other tenants who are not party to this appeal. The report which was dated 10th May, 2005 was prepared by Liska Properties. The appellant also filed a valuation report which was prepared by Zanconsult. Following an agreement between the parties, written submissions were duly filed and the Tribunal invited to determine the issues based on the submissions and the valuation reports.

4. In the judgment delivered on 14th November, 2007, by the Tribunal Chairperson, the Tribunal noted that the valuation report submitted by the landlord contained comparables in respect of premises which were either too big

or too small, as compared to the premises rented out to the respondents. Except for comparable No.2, the Tribunal rejected all the comparables referred to in the landlord's valuation report. With regard to the respondents' valuation report the Tribunal found comparable No. 2 and 4 to be relevant, as they were from a building which was adjoining the suit premises and therefore suitable for purposes of comparison of the market rent.

5. Using the 3 comparables, the Tribunal assessed the rent in respect of the shop rented out to the 1st respondent at Kshs.15,800/= per month (thus reducing the rent from Kshs.20,000/=). The rent in respect of the shop rented by the 2nd respondent was assessed at Kshs.10,300/= (thus reducing the rent from Kshs.15,000/=). The Tribunal did not however give any directions regarding the effective date.

6. Being aggrieved by that judgment, the appellant moved to this court and filed a memorandum of appeal on 3rd December, 2007 raising 6 grounds as follows:

- (i) The learned chairperson erred in law and fact in failing to consider that the comparables of premises presented by the valuer of the tenants had all been gotten from building housing this comparable which is very old and whose rents were historic not current ones. The subject matter of the suit is a new building constructed in the years 2002 to 2004 after demolition of the building which were of the similar age with those buildings cited by the tenants.
- (ii) The learned chairperson erred in law and fact in summarily dismissing the comparables presented by the landlord's valuer as too big or too small in size. She failed to appreciate the fact that the critical factor is rent/rate per unit area
- (iii) The learned chairperson erred in law in not taking into account that for hearing the advocates for the parties had forwarded written submission in place of *viva voce* evidence by the parties. In her judgment, the learned chairperson completely ignored the said submissions wholly and only relied on the valuation reports.
- (iv) The learned chairperson by wholly ignoring the submission filed, failed to take into account the age of the subject matter of this case. She also failed to consider the fact that the two tenants had entered into the premises as first tenants and had negotiated the proper payable rent with the landlord thus arriving at conscionable rent. This agreed rent was even embraced in the lease agreement freely entered by the tenants before occupying the premises.
- (v) The learned chairperson erred in law in adopting the measurements given by the valuer of the tenants and not noticing that they differed in sizes given by the valuer of the landlord. No reason is given in the judgment as the basis of wholly ignoring the shops sizes given by the valuer of the landlord and adopting sizes given by the valuer of the tenants.
- (vi) The whole proceedings disclose a mistrial. There was no order for consolidation of the suits yet the suits were treated as consolidated and a joint valuation report admitted for even of tenants who were not parties to the suit whose net effect was to create bias and prejudice against the landlord.

7. On 13th December, 2007, the appellant filed a notice of motion seeking an order for stay of execution of the Tribunal Order, pending the hearing and final determination of his appeal. On 28th December, 2007, the motion was compromised through a consent order in the following terms:

- (i) That the respondent shall pay the new rents determined by the Business Premises Rent Tribunal with effect from 15th November, 2007 and shall continue to pay the same until disposal of the appeal.
- (ii) The issue as to when the rents take effect (i.e. whether it is from the date of notices to reduce rent or the date of judgment) shall be referred to the Business Premises Rent Tribunal for determination.
- (iii) The respondent shall not pursue any claims for refund of excess rent paid pending determination of the issue No.(ii) above and any appeal therefrom.
- (iv) The notice of motion dated 11th December, 2007 is disposed of upon the above terms with costs in the cause.

8. Thereafter the respondents moved the Tribunal by way of a notice of motion under Section 9(1), 12(i) & (k) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, and Section 3A of the Civil Procedure Act for orders:

- (a) That the Tribunal be pleased to vary the order of 14th November, 2007 to include the effective rate of rent reduction.
- (b) That the Tribunal be pleased to vary the order of 14th November, 2007 to include costs of the reference.

9. The application came up for hearing before the Tribunal Chairman on 25th March, 2008. The parties agreed by consent to have the judgment of the Tribunal reviewed. Counsel for the respondent argued that the reduction of rent should be effective from the date of the notice, whilst counsel for the appellant argued that unless there were special circumstances the effective date of rent increment ought to be the date of notice but, in cases of reassessment of rent, the reassessment is effective from the date of determination. Counsel for the appellant argued that since the rent was negotiated rent, it would be unfair to backdate the accrued rent to the date of notice. Counsel further argued that since the parties did not address the court on the issue of the effective date, the same was left to discretion of the court.

10. On the issue of costs, counsel for the respondents submitted that except for good reasons to be recorded, costs should be awarded to a party who has substantially succeeded. Counsel maintained that the respondent had substantially succeeded in their quest for reduction of rent, and they should therefore be entitled to costs. For the appellant it was argued that the respondent's victory was not substantial as the reduction was only marginal. The court was therefore urged to order each party to bear their own costs.

11. In her ruling, the Tribunal chairman, found that there was an error on the face of the record which justified review. The Tribunal Chairman ruled that the respondent did not substantially succeed in having the rent reduced. She therefore ordered each party to bear his own costs. The Tribunal further ordered the effective date of the reduction of rent to be the date of the notice.

12. During the hearing of the appeal, counsel for the appellant submitted that the Tribunal erred in the way it handled the valuation report. He noted that each valuation report had 5 comparables but the Tribunal only picked one comparable from the appellant's valuation report and 2 comparables from the respondent's valuation report, hence the ridiculous finding by the Tribunal. Counsel pointed out that all the comparables relied upon by the respondents did not disclose the effective date of the rent. Counsel maintained that that omission was critical because, under Section 9 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301, rent is reviewable after every 2 years. He submitted that if the rent paid was more than two years old, then it was not a good guide.

13. With regard to the appellant's valuation report, counsel for the appellant submitted that comparable No.1 (b) and No.2 showed the effective date of the rent. Counsel pointed out that the record of the appeal showed that the date of completion of the building subject of the respondents' tenancies was January, 2004. Referring to *HCCA.No.328, 342 of 1999 and 6 & 65 of 2000 (consolidated), Jan Mohamed Investment Ltd vs A-Z Shah t/a Fashion Spot*, it was argued that the Tribunal ought to have proceeded under Section 9(2)(a) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301 and addressed all the relevant issues. It was maintained that the Tribunal failed to consider the written submissions which were filed by the parties. It was further argued that the Tribunal ignored the law by stating that the effective date was always the date of the notice. The Tribunal therefore did not look at the circumstances. The court was therefore urged to allow the appeal.

14. For the respondents, it was submitted that the appeal before the court was defective as separate appeals ought to have been filed against each of the respondents. Further, it was submitted that the issue of the effective date and costs were not captured in the grounds of appeal. It was maintained that the appellant ought to have amended the memorandum of appeal to include these as new grounds.

15. With regard to the valuation report, it was pointed out that the appellant's comparables suffered the same defects of not having the effective dates of the rent indicated. It was noted that only two comparables out of five had their effective dates indicated. It was also pointed out that the respondents' valuation report also had two effective dates out of five, in respect of the comparables indicated. It was submitted that the Tribunal was right in rejecting the comparables submitted in the appellant's valuation report as comparable No.1 (a) and (b), were from the same building rented by the respondents. Therefore it was not an independent comparable.

16. Comparable No.2 submitted by the appellant was faulted on grounds that it did not indicate the distance between it and the suit premises, whilst comparables No.3 & 4 were rejected as unsuitable comparables as they related to surface area which was much smaller than that of the suit premises. Comparable No.5 was also submitted to be an unsuitable comparable because it was an exhibition hall. It was maintained that the comparables given by the respondent were more appropriate. It was pointed out that comparable No.1 and 2 related to buildings which were near the subject premises, and the surface area of the comparables was almost like that of the subject premises.

17. On the issue of submissions it was noted by the respondents that submissions were not a way of

conducting hearings. The court was urged to distinguish the case of *Jan Mohamed Investment Ltd vs A-Z Shah t/a Fashion Spot* (supra), as in that case, the court found that it would be oppressive to use the notice date unlike the present case where no such oppression would arise given the date of the judgment. The court was therefore urged to dismiss the appeal.

18. We have carefully reconsidered the proceedings which were before the Tribunal. We have also given due consideration to the judgment of the Tribunal, the grounds of appeal, the submissions made before us and the authorities cited. We find that the issues which emerge for determination are as follows:

- (i) Whether there was a mistrial in hearing the two references together and delivering one judgment, in the absence of an order for consolidation.
- (ii) Whether the appeal is properly before the court.
- (iii) Whether the Tribunal used or did not use appropriate comparables in assessing the rent, and whether the Tribunal took into account all relevant factors.
- (iv) Whether the Tribunal erred in not taking into account, the written submissions made by the parties.
- (v) Whether there is any appeal before this court against the ruling of the Tribunal regarding the effective date and the issue of costs.

19. In considering the first issue, we do note that the reference filed by each of the respondents was each subject of a separate suit i.e. Tribunal Case No.7 of 2005 and Tribunal Case No.11 of 2005. We have keenly perused the record of the proceedings before the Tribunal. We have not however come across any order for consolidation of the two suits. Reference to the separate suits was made on the 25th May, 2006 when the Tribunal was informed in BPRT Case No.7 of 2005, that the two references were the only suits pending for hearing. Both counsel for the appellant and the respondent indicated their concurrence that the valuation reports be filed and admitted in evidence without calling the valuer, and that counsel do file written submissions to assist the Tribunal in assessing rent. The Tribunal Chairman granted that prayer. Those proceedings are contained in BPRT No.7 of 2005. No such proceedings were recorded in BPRT No.11 of 2005, nor were any orders made for consolidation.

20. Nevertheless, in its judgment, the Tribunal dealt with the two references together and reassessed the rent for the premises occupied by the two respondents in the same judgment. In the absence of an order for consolidation of the two suits, the hearing of the references together and delivering of one judgment was wrong.

21. The question is whether the error is a fundamental error which vitiates the judgment of the Tribunal. We find the omission to make a formal order for consolidation of the two suits was really an error of procedure. The landlord was the same and the premises occupied by the two respondents, though separate, were in the same building. It was therefore convenient that the two references be dealt with together. The omission to make a formal order for consolidation did not cause any prejudice to any of the parties. The Tribunal did in fact consider the references in respect of each respondent and determined the issues which were raised. Indeed the appellant, who is now raising this issue, never raised the issue before the Tribunal. Having been party to the commission of the error he is estopped from raising the issue at this stage.

22. With regard to the second issue, we find that the respondents' suits were separate suits. Ideally the appellant ought to have filed separate appeals against each respondent. However, the judgment delivered by the Tribunal was a consolidated judgment in respect of both respondents. Therefore, the appeal against the two respondents jointly was proper and nothing turns on that ground.

23. As regards the written submissions, the parties agreed, with the blessings of the court, to file written submission and to have the reference determined on the basis of those submissions and the valuation reports without calling any witnesses. The Tribunal was therefore bound to consider and address the arguments raised in the written submissions as if they were oral arguments made before the Tribunal. In the judgment the Tribunal only made reference to the valuation reports. It did not address any of the issues or arguments raised in any of the written submissions which were filed on behalf of either party. This was an error on the part of the Tribunal.

24. We have carefully perused the submissions which were filed by both parties. We do note that in the appellant's submissions, apart from addressing the valuation report and the comparables raised, the appellant's advocate pointed out that the suit premises was a new building occupied in the year 2004, and that the respondents who were the first tenants in the premises, had the opportunity to directly inspect the premises before agreeing to occupy it. It was also pointed

out that the rent was consensual having been negotiated and agreed at the time of signing the tenancy agreement. It was therefore argued that the Tribunal could not be brought in to revise what the parties had consciously agreed to. A lease agreement dated 3rd November, 2003, showing the agreed rent at Kshs.15,000 per month was exhibited.

25. It was further submitted for the appellant, that the attempt to have the rent reviewed downwards after the respondents had taken possession of the premises, would amount to an act of trickery. It was pointed out that the suit premises was in the Central Business District of Thika and was in a good structural condition. Finally, it was submitted that the comparables referred to in the respondent's valuation report related to old premises and old tenancies. The comparables did not therefore provide an appropriate comparison with the suit premises which were relatively new premises.

26. In the submissions for the respondents, it was argued that the rent for the suit premises was higher than the average permissible rent for an area of a similar size in similar premises based in Thika. It was contended that the suit premises were not fronting the road but had to be accessed through an arcade-like structure. It was also pointed out that the premises occupied by the respondents do not have windows at the back, and that the windows at the front do not open but are fixed. That the ventilation and lighting system was thus highly limited, and this should affect the rent downwards. The respondent's submissions also addressed the comparables in the respective valuation reports, and urged the Tribunal to reject the comparables given in the appellant's valuation, as they do not assist in finding the proper rent to be assessed. The Tribunal was urged to follow the comparables given in the respondent's valuation as they were more accurate.

27. We find that the submissions filed by the appellant raised a pertinent issue, which was not addressed by the Tribunal. The issue was whether there was justification for the Tribunal to reassess or review the rents payable by the respondents. The appellant's contention that the monthly rent paid by the respondents was consensual, having been agreed to in the lease agreements, was not denied by the respondents. In fact, a copy of the lease agreement was exhibited showing that the rent payable was agreed to by the parties, and that the appellant was not to increase the rent within the lease period which was five years. That being the position, could the Tribunal intervene and review the rents either upwards or downwards?

28. Under Section 4(3) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, a tenant who wishes to obtain an assessment of rent of a controlled tenancy, has to give notice to the landlord in the prescribed form. Upon receiving such notice, the landlord who wishes to oppose such a notice, has to refer the matter to the Tribunal under Section 6 of Landlord and Tenant (Shops, Hotels and Catering Establishment) Act. In this case it was common ground that the premises occupied by the respondents are controlled premises under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, and that appropriate notices were served and references filed.

29. Therefore, the Tribunal had powers to make an inquiry and establish the justification for the required reassessment of the rent before embarking on the reassessment or review of the rent. Such justification did not just depend on an inquiry as to the comparable rents of similar premises, but had to take into account all the circumstances surrounding the particular tenancy and the need for review. In this case, the appellant took possession of the suit premises when the premises were new. They had the opportunity to examine the premises, its ventilation, access, and the surface area as well as the location, before agreeing to take up the tenancy.

30. Issues such as the building not being in a conspicuous place, or not fronting the main road or the ventilation not being adequate were not issues which could justify the need for reassessment of rent as they were circumstances prevailing at the time the tenancy was entered into and the rent agreed. The issue of the rent in the suit premises being higher than the average permissible for an area of similar size, was also not a genuine issue. Firstly, because the respondents had the opportunity to consider that factor before entering into the tenancy, and secondly, because the premises occupied by the respondents were relatively new.

31. We find that in failing to address the issue of the justification for assessment or review of rent, the Tribunal wrongly proceeded to review the rent downwards, when there was no justification for the review. In the absence of any subsequent intervening circumstances, the respondents were not justified in seeking the protection of the Tribunal with regard to rent which they had freely negotiated and agreed to. We find that the Tribunal wrongly exercised its jurisdiction in reviewing the rent downwards without making a proper inquiry. It is also our view that in the absence of an illegality, we should not interfere with the contracts of lease between the appellant and the respondents.

32. Further, the appellant filed his memorandum of appeal on 3rd December, 2007. In the memorandum of appeal it is indicated that the appellant is appealing against the whole of the judgment, and all the orders emanating therefrom. Nevertheless, all the six grounds in the memorandum of appeal relate to the judgment in respect of the

reassessment of rent only. Therefore, notwithstanding the fact that the parties addressed us on the issue of the effective date and costs, following the ruling of the Tribunal subsequent to the judgment, there was no issue raised before us in the memorandum of appeal regarding the effective date of reduction or the costs of the suit in the Tribunal. Effectively therefore, there is no appeal before us against the subsequent ruling on the effective date and costs. In that regard, the appellant would have failed in challenging the subject ruling. However, since we come to the conclusion that the assessment and the Judgment delivered on 14th November, 2007 by the Tribunal cannot stand, because there was no proper justification for the reassessment of the rent, the ruling on the effective date and costs must also be set aside as that ruling is anchored on the reassessment of the rent.

33. Accordingly, we allow this appeal, set aside the judgment of the Tribunal delivered on 14th November, 2009 together with all subsequent orders, and substitute thereof an order rejecting the respondents' notices for reassessment or review of rent. The appellant shall have costs of this appeal and costs of the suits in the Tribunal. Those shall be the orders of this court.

Dated and delivered this 16th day of April, 2010

H. M. OKWENGU

JUDGE

R. N. SITATI

JUDGE

In the presence of: -

Mboroki for the appellant

Kaburu for the respondents