Wanjiku & 7 others v Kamau & 2 others (Civil Appeal 41 of 2018)
[2022] KEELC 14415 (KLR) (22 September 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL 41 OF 2018

JO MBOYA, J

SEPTEMBER 22, 2022

BETWEEN

MARION WANJIKU & 7 OTHERS ..... APPELLANT

AND

KENNETH N KAMAU & 2 OTHERS ..... RESPONDENT

JUDGMENT

Introduction and Background

1. Vide memorandum of appeal dated and filed on the August 20, 2018, the appellants have challenged the judgment and decree of the Business Premises Rent Tribunal dated the July 20, 2018.

2. Pursuant to the memorandum of appeal under reference, the appellant have raised various grounds of appeal. For clarity, the grounds of appeal are as hereunder;

    a. The learned chairman of the Business Premises Rent Tribunal erred in law and in fact in allowing a 100% rent increment, which increment was done abruptly without considering the prevailing applicable rents in the local arears.

    b. The learned chairman of the Business Premises Rent Tribunal erred in law and in fact in acting on a defective and illegal notice whilst there was another reference pending.

    c. The learned chairman of the Business Premises Rent Tribunal was biased, not forthright and highhanded in dealing with the appellants.

    d. The learned chairman of the Business Premises Rent Tribunal erred in law and in fact in not considering at all the original agreement between the appellants and their landlords and their legitimate expectations as a result of such tenancy agreement.

e. The learned chairman of the Business Premises Rent Tribunal erred in law and in fact in disregarding the tenants report.

f. The learned chairman of the Business Premises Rent Tribunal erred in law and in fact in considering that Nimi House was on Ronald Ngala Road, whilst the main entrance is facing Sheik Karume Road.

g. The decision is against the weight of the evidence adduced.

h. The learned chairman of the Business Premises Rent Tribunal erred in law and in fact in punishing the appellant for their advocates omission.

i. The learned chairman of the Business Premises Rent Tribunal erred in law and in fact in leaving an open-end judgment against the appellant which subjected the appellant to unforeseen hardship and was tantamount to indirectly ordering the tenant to vacate the premises.

3. Upon the filing of the subject appeal, same was placed before the judge for purposes of necessary admission and further directions. Suffice it to note, that the appeal was duly admitted and thereafter directions were given.

4. On the other hand, the honourable court with concurrence of the parties, directed that the appeal be canvassed and disposed of by way of written submissions.

Submissions By The Parties

a. Submissions by the appellants':

5. The appellants herein filed written submissions dated the December 18, 2019 and in respect of which, counsel for the appellants raised various, albeit numerous issues for consideration.

6. First and foremost, counsel for the appellants contended that the learned chairman of the tribunal proceeded to and entertained the reference and thereby granting judgment, even though there was no valid notice to increase rents and if there was any such notice, then same was not effectively communicated to the lay litigants (read appellants).

7. Premised on the foregoing, counsel for the appellants further submitted that in the absence of a valid notice to increase rent and coupled with the fact that the appellants were protected tenants, the tribunal acted without the requisite jurisdiction.

8. In this regard, counsel for the appellants have thus submitted that the entire judgment rendered by the chairman of the tribunal was therefore illegal, unlawful and void.

9. Secondly, counsel for the appellants submitted that the respondents herein, who were also the landlords of the suit property, had previously issued and served a notice to increase rents against the appellants and that the said notice to increase rents remained alive and subsisting up to and including the March 7, 2016, when same was marked as withdrawn.

10. To the extent that the respondents had issued a previous notice to increase rents, which remained in existence, counsel for the appellants submitted that no further notice to increase rents ought to have been issued and or acted upon, prior to lapse or expiry of two years from the date of determination of the previous notice.

11. Owing to the foregoing, counsel for the appellants therefore submitted that the subsequent notice to increase rent, which was filed by the respondents and which formed the basis of the proceedings before

the tribunal were thus expressly barred by the provisions of section 9 (3) (a) of the *Landlord & Tenants (Shops, Hotels & Catering Establishment) Act*, Chapter 301.

12. Thirdly, it was contended by counsel for the appellants that the chairman of the tribunal erred in fact and in law, in finding and holding that the suit property, namely, Nimi House, is situated along Ronal Ngala Road, whereas in reality, the suit property is situated on Sheik Karume Road.

13. Based on the foregoing, it was contended by the counsel by the appellants that the said mis-direction and erroneous finding was prejudicial and thus led to the erroneous adjustment of rents in respect of the demised premises.

14. Fourthly, counsel for the appellants submitted that the chairman of the tribunal erred in law in completely disregarding the valuation report filed by and/or on behalf of the tenants, whilst on the other hand exclusively relying on the valuation report filed on behalf of the respondents.

15. Further, counsel for the appellants contended that by disregarding the valuation report filed by the appellants, the chairman of the tribunal committed a serious blunder and thereby condemned the appellants to pay exorbitant rents, contrary to rents payable by tenants in comparable premises within the neighborhood of the suit property.

16. Fifthly, counsel for the appellants also submitted that the chairman of the tribunal also erred in law in backdating the increase on rents to the date of issuance of the notice to alter the terms of tenancy, contrary to all established and to known principles of the law.

17. According to counsel for the appellants, increment of rents is futuristic in nature and therefore same looks unto the future and cannot be backdated, in the manner done by the learned chairman of the tribunal.

18. At any rate, counsel for the appellants has contended that by backdating the date of increment of rents, the appellants herein have now been condemned to pay colossal amounts of money, based on the backdated decisions, which is contrary to law.

19. In view of the foregoing submissions, learned counsel for the appellants has therefore submitted that the chairman of the tribunal acted contrary to the *Constitution*, 2010 and hence the impugned decision, is not only unlawful, but illegal and hence the appeal ought to be allowed.

20. Suffice it to note, that learned counsel for the appellants has neither cited nor relied on any case law and/or decision, to fortify various submissions which have been alluded to.

b. Submissions by the respondents':

21. On their part, the respondents filed written submissions dated the October 14, 2021.

22. In respect of the said submissions, the respondents have raised four pertinent issues. Firstly, the respondents have submitted that the notice filed by and or on behalf of the landlord and which was dated the October 28, 2015, was lawful and valid.

23. In any event, counsel for the respondents has submitted that following the issuance and service of the notice to increase the rents, the appellants herein proceeded to and filed a reference to the tribunal but nevertheless, the appellants did not challenge the validity of the notice to increase rents.

24. Further, counsel for the respondents have submitted that if the appellants were of the view that the notice to increase rents was invalid and illegal, same ought to have filed a suitable application to challenge the validity of the notice to increase rents, which was not the case.

25. At any rate, counsel for the respondents has also contended that the issue of illegality and invalidity of the notice to increase rents, was similarly not raised nor ventilated before the tribunal.

26. Secondly, counsel for the respondents have also submitted that the appellants herein did not tender nor produced before the tribunal any written tenancy agreement. In this regard, it has been submitted that the contention that the chairman of the tribunal ignored and/or disregarded the tenancy agreement between the parties, is also not well founded.

27. Thirdly, counsel for the respondents submitted that pursuant to the notice to increase rents, the respondents/landlord had indicated that the increment would take effect from the January 1, 2016.

28. Further, it was submitted by counsel for the respondents that having indicated the date of increment of the rents, the chairman of the tribunal did not commit any error in law, by ordering and/or directing that the rent increment be backdated to the date of the notice lodged by the respondents.

29. In any event, the counsel for the respondent further submitted that the issue has to the commencement date of the rent increment is statutorily provided for by dint of section 9 (1) of the *Landlord & Tenants (Shops, Hotels & Catering Establishment) Act*, chapter 301.

30. Premised on the foregoing, counsel for the respondents therefore supported the backdating of the rent increment to the date contained in the notice which was issued and served by the respondents.

31. Fourthly, counsel for the respondents submitted that during the course of the proceedings before the tribunal, the respective parties agreed to canvass the reference on the basis of the valuation reports to be filed by the various experts and also to file written submissions.

32. It has further been submitted that pursuant to the agreement between the parties, which was duly endorsed by the tribunal, the respondents counsel proceeded to and duly filed the written submissions.

33. Contrarily, it has been pointed out that despite being privy and or party to the directions by the honourable tribunal, counsel for the appellants herein, who were the tenants before the tribunal, failed and/or neglected to file their written submissions.

34. Nevertheless, it has further been submitted that despite the failure by the appellants to file and serve their written submissions, the chairman of the tribunal was still enjoined to and indeed delivered his judgment.

35. Based on the foregoing submissions, counsel for the respondents has pointed out that the appellants herein cannot now be heard to condemned the chairman of the tribunal to having proceeded to and rendered a judgment, despite the failure by the appellants to file written submissions.

36. Notwithstanding the foregoing, counsel for the respondents has also submitted that the crafting and delivery of the judgment by the chairman of the tribunal, despite the failure to file written submissions by the appellants, does not amount to condemning the appellants for the failure of their advocates.

37. Be that as it may, learned counsel for the respondents has further added that it was however incumbent upon the appellants, as the originators of the reference before the tribunal, to act with diligence and to obey all the directions of the court, which was not the case.

38. In support of the foregoing submissions, learned counsel for the respondents has quoted and relied on various decisions, inter-alia, *Sandu & another v Vadgama Garage & another* (1975) EA, page 31 *In The Matter of The Estate of Syevose Mukulu (Deceased)* 2012eKLR, *Kenya Credit Traders Ltd v James Kahungu Kuria* (2002)eKLR, *Kenya Litrecher Burau v Johnes Maithia Muhindi T/a Umanyi Auction and Suppliers* (2021)eKLR and *Savings & Loans Kenya Ltd v Odongo* (1997) K R 294.

39. In a nutshell, learned counsel for the respondents has contended that the subject appeal is devoid of merits and same ought to be dismissed.

General Directions:

40. The memorandum of appeal dated the August 20, 2018, has raised various albeit numerous grounds, but same can be dealt with or clustered according to the thematic issues raised.

41. Based on the foregoing, I propose to deal with the grounds of appeal as hereunder;

    i. Grounds 1 and 5 to be addressed together.

    ii. Ground 2 to be addressed singularly.

    iii. Ground 3, 4, 6 & 7 to be addressed together.

    iv. Ground 8 and 9 to be addressed together.

Analysis And Determination:

Cluster 1

Grounds 1 and 5 of the memorandum of appeal:

42. In respect of the 1st and the 2nd grounds of appeal, the appellants herein have complained that the chairman of the tribunal erred in law in granting and/or allowing a 100% rent increment and which was done abruptly, albeit without considering the prevailing applicable rents in the local arrears.

43. On the other hand, the appellants have also complained that the chairman of the tribunal erred in law in disregarding the valuation report filed by the appellants, who were the tenants before the tribunal.

44. In dealing with the two grounds of appeal herein, it is appropriate to recall that following the filing of the reference by the appellants herein, the respective advocates agreed to appoint own valuers, with a view to undertaking a valuation exercise in respect of the demised premises and thereafter to have the valuation reports filed before the tribunal.

45. Besides, following the agreement to appoint and/or engage own valuers, either party indeed engaged separate valuers, who thereafter conducted the valuation exercise, prepared the requisite valuation report and filed same before the tribunal.

46. Other than the foregoing, the record of the tribunal shows that the advocates for the respective parties thereafter entered into a further consent that the two valuers were also to inspect the demised premises and to prepare a joint report as pertains to lettable area. For clarity, a joint report was thereafter filed, in accordance with the consent.

47. Subsequently, the advocate for the respective parties entered into a further consent on the February 6, 2017, whereupon same agreed to have the reference before hand canvased and disposed of by way of written submissions, to be filed and exchanged, within stipulated timelines.

48. Suffice it to mention that the counsel for the respondents herein, indeed proceeded to and filed his written submissions. However, counsel for the appellants, neither filed nor lodged his written submissions or at all.

49. Be that as it may, the chairman of the tribunal was under legal duty and/or obligation to consider the totality of the evidence, documents and submissions on record.

50. In regard to the foregoing, the chairman of the tribunal duly evaluated the two sets of valuation reports, namely, one filed by the appellants valuer and the other filed by the respondents valuer.

51. Having duly considered and evaluated the two sets of valuation reports, the chairman of the tribunal proceeded to find and hold as hereunder;

> " The suit premises are along Ronald Ngala Street and the applicable comparable should be from the immediate neighbors starting with rents payable by other tenants in the same building.
>
> The tenants valuer took comparable from other streets other than Ronald Ngala.
>
> The tribunal does not with due respect to the tenants valuer, find their report of any assistance to the tribunal.
>
> The landlords valuers comparable are from the Suit premises and from Ronald Ngala Street, which is the immediate neighborhood street.

52. Further, the chairman of the tribunal proceeded and observed as hereunder;

> " The tribunal adopts the landlord valuation report to assess the open market trend. It is noted that the tribunal cannot increase rents to more that what is sought in the landlords notice"

53. From the foregoing, it is evident and/or apparent that the chairman of the tribunal duly and appropriately considered the valuation report that was filed by and/or on behalf of the appellants and after due consideration, it was found and/or observed that the comparables that were used and/or relied upon by the appellants valuer, were not obtained from the same street where the suit property is situated.

54. On the other hand, the chairman of the tribunal also established that indeed the appellants valuer did not even obtain any comparable from the said property, even though there were tenants occupying similar or near similar premises, within the suit property.

55. Having made the foregoing observation, the chairman of the tribunal found and held that the valuation report, filed and/or relied on by the appellants, whose comparables were obtained from other streets, other than Ronal Ngala Street, were of no assistance to the tribunal.

56. Before making a finding on whether not the chairman of the tribunal was right in making of the observations, I have personally reviewed the report filed by Fortune Realtors Ltd and dated the July 29, 2016. For clarity, it is evident that the comparables used and/or relied upon were from Mfangano/ Sheikh Karume Road and Menengai Street, respectively.

57. To the contrary, the suit property, wherein the appellants are tenants is situated and or located along Ronal Ngala Street, Opposite Ronald Ngala Post office, within the central business district of Nairobi.

58. To the extent that the demised premises, are situated on a property based along Ronal Ngala Street, it would be prudent and justifiable that in ascertaining comparable rents, one would take comparable from premises situated along the same road and not otherwise.

59. However, the valuer appointed and or engaged by the appellants took it upon himself to proceed to different streets, far from the locality of the suit property and procured comparables therefrom.

60. Nevertheless, it is appropriate to point out that despite the appellants valuer having acknowledged at clause 4.0 of the report, that the suit property is situated along Ronald Ngala Street, same has however

not provided any explanation in the body of his report as to why he did not procure any comparables from premises located/situated along Ronald Ngala Street.

61. Having failed to procure and/or obtain any comparables from the premises situated along Ronald Ngala Street and there being no explanation at all for such omission, failure and/or neglect, one cannot fault the finding and holding by the chairman of the tribunal that the impugned valuation report was indeed of no assistance at all.

62. Respectfully, the chairman of the tribunal gave and/or offered a plausible reason and/or basis for disregarding and/or discrediting the valuation report filed by the appellants valuer. For clarity, the reason is not only lawful, but same is similarly legitimate.

63. Premised on the foregoing observations, the complaint by the appellants that the learned chairman of the tribunal disregarded the tenants report, is not only misconceived, but devoid of any credible basis.

64. At any rate, it is appropriate to state that though courts of law as well as judicial tribunals are obliged to consider expert evidence and/or opinion, it must be noted that such expert evidence opinion, are not binding on the honourable court, but must be considered and evaluated alongside the other evidence tendered and/or placed before the honourable court.

65. Suffice it to state, that after evaluating the expert evidence alongside the totality of the evidence tendered and/or availed, the honourable court is then at liberty to form an opinion based on the totality of the evidence.

66. Additionally, in the course of evaluating the totality of the evidence, the honourable court is at liberty to disregard expert evidence, if same is not well grounded and/or where such expert evidence is discredited by another expert evidence, which has similarly been availed and/or submitted to the court.

67. Respectfully, the observation by the Court of Appeal *vide* the case of *Kagina v Kagina & 2 others* (civil appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), suffices.

68. For coherence, the court stated and observed as hereunder;

> 42. In *Shah and another v Shah and others* [2003] 1 EA 290 wherein Ombija, J expressed himself on this issue, inter alia, as follows:"
>
> One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...
>
> The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...
>
> However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...
>
> The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...

> If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...
>
> Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

69. Further, the jurisprudential position that an expert evidence and/or opinion is not exclusively binding on the court but must be looked at and evaluated against the totality of the other evidence available was also underscored in the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* civil appeal No 203 of 2001 [2007] 1 EA 139;

70. For clarity, the court in the decision Supra observed as hereunder;

> " That a court is entitled to reject expert opinion if upon consideration of such an opinion in conjunction with all other available evidence on the record, there is proper and cogent basis for doing so, and secondly, that a court must form its own independent opinion based on the entire evidence before it and such evidence must not be rejected except on firm grounds"

71. Based on the foregoing settled legal position, the learned chairman of the tribunal was within the parameters of the law, when he found and held that the valuation report filed on behalf of the appellants was of no assistance, based on the recorded reasons.

72. As concerns the rent increment, which was sanctioned by the learned chairman of the tribunal, it is my finding and holding that same were lawful and well grounded.

73. Nevertheless, I wish to add that even after the learned chairman of the tribunal had evaluated the valuation report filed by Paragon Property Valuers Limited and dated the March 29, 2016, the chairman of the tribunal still retained and exercised discretion before awarding the rent increment.

74. To my mind, the rent increment was properly made, taking into account the proposals contained *vide* the valuation reports by Paragon Valuers Ltd and after due discretion by the chairman of the tribunal.

75. In my considered view, I come to the observation that the manner in which the learned chairman of the tribunal dealt with the valuation report filed by the respondents accords with the established and hackneyed practice.

76. In this regard, I adopt and endorse the dictum and holding in the case of *Tala Investments Ltd v Green Spot Limited* civil appeal No 269 of 1993 where Honourable Justice Shah, (as he was), stated and observed as hereunder:

> " 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 criterion."

77. In a nutshell, it is my finding and holding that grounds 1 & 5 of the memorandum of appeal, which have been addressed hereinbefore, are devoid of merits.

Cluster 2

Ground 2 of the memorandum of appeal.

78. In respect of ground 2 of the memorandum of appeal, it is worthy to note that the appellants herein are complaining about a defective and illegal notice, which was issued allegedly during the pendency of another reference.

79. It was the appellants contention that by the time the respondents herein filed and/or issued the notice to increase rents, over and in respect of the suit property, there was indeed a pending reference.

80. Further, counsel for the appellants has further submitted that the said pending reference was only determined on the March 7, 2016, when same was withdrawn.

81. Be that as it may, it is imperative to recall that after the filing of the subject reference by the appellants, counsel for the appellants and the respondents, respectively, agreed to engage own valuers to carryout valuation exercise and thereafter file the resultant valuation reports.

82. Subsequently and following the filing of the valuation reports by the respective valuers, the advocates for the appellants and the respondents further agreed to have the reference, to be disposed of by way of written submissions.

83. Pursuant to the agreement to have the reference to be disposed of by way of written submissions, counsel for the respondents proceeded to and indeed filed his set of written submissions.

84. However, it is worthy to recall that counsel for the appellants failed and/or neglected to file his set of written submissions and indeed the matter before the tribunal was disposed of, without written submissions by and/or on behalf of the appellants.

85. Suffice it to state, that having not filed any written submissions before the tribunal, the issue pertaining to the validity of the reference herein, was not placed before the learned chairman of the tribunal, to warrant his determination one way or the other.

86. At any rate, to the extent that the issue of the validity and/or illegality of the notice to increase rents was not raised before him, the chairman of the tribunal therefore had no occasion or opportunity to pronounce himself on the said issue.

87. Nevertheless, to my mind the issue having not been raised before the chairman of the tribunal, for his determination, the raising of same for the first time *vide* the subject appeal, is therefore an after thought and must be frowned upon.

88. However, even assuming that the issue pertaining to the validity or otherwise of the notice to increase rents was available for determination before me, I would still have found that no evidence was placed before this court to show that there was indeed a pending reference as at the time when the notices to increase rents were filed on the October 28, 2015.

89. For clarity, it is important to state that a reference is duly defined pursuant to the provisions of section 2 of the *Landlord & Tenant (Shops, Hotels & Catering) Act*, chapter 301, which provides as hereunder;

> " reference" means a reference to a tribunal under section 6 of this Act;

90. Premised on the foregoing, if the appellants were keen to established and/or prove to the honourable court that there were indeed an existing reference, other than the ones culminating into the subject rent increment, it behooved the appellants to place before the court as part of the record of appeal such pending reference.

91. Sadly, no evidence of any pending reference, as known to law, was placed before the honourable court.

92. Consequently, in the absence of any evidence of a pending reference being availed to the honourable court, it is my finding and holding that the appellants herein have not discharged the burden of proof placed upon same, to warrant a positive finding in their favor.

93. Though elementary, it is worthwhile to reiterate that the burden of proving any allegation and/or contention lies on he/she who makes the assertion. In this regard, the assertion of a pending reference was made by the appellants and hence same were obliged to discharge the burden of proof.

94. Similarly, I found no merit in respect of ground two (2) of the memorandum of appeal and same is hereby dismissed.

Cluster 3

Ground 3, 4, 6 & 7 of the memorandum of appeal

95. As concerns the grounds of appeal enumerated herein before, it is appropriate to start the address by clarifying that the totality of the proceedings that were carried out and/or undertaken before the chairman of the tribunal, do not show and/or exhibit any bias and/or any high handiness against the appellants.

96. Indeed, if there was any bias and or high handiness by the chairman of the tribunal, in the manner alleged vide ground three of the memorandum of appeal, the appellants were at liberty to file and/or mount an appropriate application for recusal or disqualification of the said learned chairman.

97. To the extent that no such application was ever filed and/or mounted, it is evident that there was no bias and/or high handiness, either in the manner alleged or at all.

98. Further, one will notice that even though the reference was filed by the appellants herein, it is the appellants herein who displayed lack of diligence, slovenliness and apathy, towards the expeditious hearing and disposal of the reference before the tribunal.

99. In fact, despite the lack and/or want of diligence, the chair person of the tribunal exercised patience and variously accommodated the advocate for the appellants herein when their own valuer had failed to file own report, within the agreed timeline.

100. For clarity, the appellants counsel was the beneficiary of the discretion of the tribunal on the July 13, 2016, March 1, 2017 and March 9, 2017.

101. Premised on the foregoing observations, it cannot be said that the learned chairman of the tribunal was biased and highhanded as against the appellant. If anything, the learned chair of the tribunal was extremely accommodative and lenient to the appellants.

102. In respect of the complaint that the learned chairman of the tribunal failed to consider the original agreements between the appellants and their landlords and thereby breached the appellants legitimate expectations, it is appropriate and expedient to state that the proceedings before the tribunal were premised on the valuation reports filed by the valuers, appointed by the respective parties and no oral evidence was tendered before the tribunal.

103. In the absence of oral evidence, it is common knowledge that no documents other than the valuation reports, were placed before the chairman of the tribunal. In this regard, the question then is; where were this original agreements and when were they tendered before the tribunal.

104. To my mind, no such documents were tendered and/or placed before the learned chairman of the tribunal and same cannot therefore be faulted for not having considered, that which was not placed before him in the first place.

105. In any event, it is also appropriate to observe that the alleged original agreement, which are contended not to have been considered by the learned chairman of the tribunal, have also not been placed before the honourable court.

106. For the avoidance of doubt, no such agreements formed part of the record of appeal dated the February 11, 2019 and which relates to only eight (8) stipulated items and no more.

107. In respect of ground six (6), namely, the complaint that the learned chairman of the tribunal was in error in finding and holding that the suit property is situated along Ronald Ngala Street, yet in actual sense same is situated along Sheikh Karume Road, it is imperative to take cognizance of three pertinent documents.

108. First and foremost, the notice to alter the terms of the tenancy dated the October 28, 2015 and which was served upon the appellants herein clearly described the suit property as LR No 209/785/16, Ronald Ngala Street and not otherwise.

109. Secondly, upon being served with the impugned notice to alter the terms of the impugned tenancy, the appellants herein filed reference by tenants to the tribunal and as pertains to the details of the suit property, the appellants confirmed that the suit property is situated along Ronal Ngala Street.

110. For completeness, that conformation is evident on the face of all the references filed on behalf of the appellants.

111. Thirdly, the appellants own valuer, namely, Fortune Realtors Limited have confirmed at clause 4.0 as hereunder;

> " The subject property is situated along Ronald Ngala Street within Nairobi county. It is identifiable as Nimi House and allocated to the opposite of Ranald Ngala Post Office. Shops and stores under our assessment are on the 1st and 2nd floors"

112. Premised on the foregoing documents, can the finding and holding by the learned chairman of the tribunal that the suit premises are situated along Ronald Ngala Street, be faulted.

113. In my considered view, the complaint by the appellants at the foot of grounds six (6) of the memorandum of appeal amounts to approbating and reprobating at the same time.

114. Clearly, the appellants complaints herein is not only frivolous but same is vexatious.

115. In a nutshell, the grounds of appeal, which were clustered herein are similarly devoid of any legal basis and same are also worthy of dismissal.

Cluster 4

Ground 8 and 9 of the memorandum of appeal

116. Other than the grounds of appeal, which have hitherto been canvased and addressed *vide* the preceding paragraphs, the appellants herein have also contended that the learned chairman of the tribunal also proceeded to punish the appellants for their advocates omission.

117. It is not clear what informs the complaints and/or allegation that the chairman of the tribunal punished the appellants on the basis of their advocates mistakes.

118. Similarly, it is also not clear what constitutes the alleged punishment, which is said to have been meted against the appellants herein.

119. Be that as it may, I am still called upon to discern whether there was any evidence or scintilla of punishment, meted out against the appellants, either as alleged or at all.

120. Nevertheless, having perused the entire record and the proceedings taken before the learned chairman of the tribunal, as well as the judgment of the tribunal, there is no evidence of any punishment that was meted out to the appellant herein.

121. In any event, even though the counsel for the appellants and by extension the appellants herein failed and/or neglected to file written submissions either in line with the directions issued on the February 6, 2017 or at all, the chairman of the tribunal still considered the contents of the valuation report filed by and/or on behalf of the appellants.

122. On the other hand, having duly considered and evaluated the contents of the respective valuation reports, the chairman of the tribunal observed that the valuation report by the appellants was of no assistance, premised on the fact that the comparables were obtained from a separate and distinct street other than the street in which the suit property was located.

123. However, assuming that the punishment stems from the award of costs in favor of the respondents, it is appropriate to disabuse the appellants of that notion, insofar as costs follow the events.

124. In respect of the references that were filed and/or lodged by the appellants, same were found to be wanting in merit and consequently same were dismissed.

125. Contrarily, the notices to increase rents/alter the terms of the tenancy filed by and/or on behalf of the respondence, were found to be meritorious.

126. Simply put, the event arising out of the proceedings before the tribunal was that the respondents were successful and premised on that success, same were entitled to costs of the proceedings, subject only to the discretion of the tribunal.

127. To vindicate the foregoing observation, it is expedient and apt to take cognizance of the dictum in the case of *Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR (civil appeal 85 of 2006) the court stated *inter alia*, that:

> " Costs of any action, cause or other matter or issue shall follow the event unless the court of judge shall for good reason otherwise order ... thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles.
>
> Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

128. Before concluding on the subject appeal it is imperative to observe that the appellants herein had also submitted that the learned chairman of the tribunal erred in law in backdating the increment of rent to the date of the notice to increase rents, which backdating was contended to be illegal and unlawful.

129. In fact, the counsel for the appellants contended that rent increment is futuristic and hence same should be forward looking and not otherwise.

130. According to the appellants, the decision having been made on the July 20, 2018, the rent increment could only take effect from the July 20, 2018 and not otherwise. Consequently, the backdating of the rents by the learned chairman of the tribunal was impugned for being illegal.

131. However, though submissions were made in this regard, I must point out that there was no ground of appeal that explicitly sought to challenge the backdating of the rent increment or at all. In this regard, it is common knowledge that an appellant cannot raise and/or ventilate a ground of appeal, which was not contained in the body of the memorandum of appeal.

132. To fortify the foregoing observation, it is apt to quote and refer to the provisions of order 42 rule 4 of the *Civil Procedure Rule 2010*.

133. For convinience, the said provisions states as hereunder;

Grounds which may be taken in appeal [order 42, rule 4]

> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

134. Premised on the foregoing on provision, it was not open for counsel for the appellants and by extension the appellants to canvass and ventilate the issue of backdating of the rent increment to the date of the notice, insofar as no such ground had been pleaded in the memorandum of appeal.

135. Consequently and on the basis of the foregoing, the challenge and/or complaint pertaining to the backdating of the rent increment to the date of the notice filed by the respondents, would fail.

136. Notwithstanding the foregoing, it is also appropriate to state that when dealing with a notice to increase rent or alter the terms of the tenancy, which ever is applicable, the chair person of the tribunal is mandated and/or authorized to allow the notice either in its entirety or subject to such amendments, variation and/or alteration, as may be deemed just, expedient and reasonable, taking into account the obtaining circumstances.

137. To appreciate the extent and scope of the jurisdiction of the chair person of the tribunal, it is appropriate to take cognizance of the provision of section 9(1) (a), (b) & (c) of the *Landlord & Tenants (Shops, Hotels & Catering Establishment) Act*, chapter 301, which provides as hereunder;

9.	Decision of tribunal and effect thereof	
	(1)	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) order that the tenancy notice shall be of no effect;

(c) and in either case make such further or other order as it thinks appropriate.

(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) order that the tenancy notice shall be of no effect; (c) and in either case make such further or other order as it thinks appropriate.
(1)	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)	order that the tenancy notice shall be of no effect;
		(c)	and in either case make such further or other order as it thinks appropriate.
(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)			order that the tenancy notice shall be of no effect;
(c)	and in either case make such further or		

	other order as it thinks appropriate.

138. Other than the foregoing, the extent and scope of the jurisdiction of the chairman of the t ribunal, whilst dealing with a notice in terms of section 9 (1) (supra), was subject of deliberation before the court in the case of the *Estate of In The Matter of The Estate of Syevose Mukulu (deceased)*[2012] eKLR, where the court stated and observed as hereunder;

> The date of the notice was October 9, 2006. It was received in the tribunal on December 13, 2006. The appellant desires that the effective date should have been the date of the judgment i.e September 18, 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.

139. Based on the foregoing observation, which accords with the provisions of section 9(1) of the *Landlords & Tenants (Shops, Hotels & Catering Establishment) Act* supra, I would similarly find and hold that the backdating complained of was lawful and legal.

140. Put differently, even if the complaint herein had been sufficiently pleaded by the appellants (which was not the case), i would still have dismissed the complaint.

Final Disposition

141. Having reviewed all the grounds of appeal that were enumerated in the memorandum of appeal and whose details were captured at the onset of this judgment, it is now appropriate to render the final and dispositive orders.

142. To my mind, in the course of addressing and/or dealing with the various clusters/grounds of appeal, I made succinct observations and/or conclusions.

143. From the various conclusions, which are evident and apparent from the body of the judgment herein, it is evident that the appeal mounted by and/or on behalf of the appellants is devoid of merits.

144. In the premises, I come to the inescapable conclusion that the entire appeal is a candidate for dismissal and same be and is hereby dismissed.

145. The respondents herein have succeeded in respect of the subject appeal. Consequently, same are entitled to costs on account of the provisions of section 27 of the *Civil Procedure Act*, chapter 21 Laws of Kenya.

146. In short, costs be and are hereby awarded to the respondents and same shall be agreed upon or taxed by the taxing officer of the honourable court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

In the Presence of;

Kevin Court Assistant

Mss. Kerubo for the Appellants.

Mr. Thuranira for the Respondents.