REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 174 OF 1987

BIRINDELLI SIGHNS LIMITED :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

THE PIONEER GENERAL ASSURANCE SOCIETY ::::: RESPONDENT

JUDGEMENT

The background information gathered from the record herein, is that there existed a tenant and landlord relationship between the appellant and the Respondent, with the Respondent taking the position of the landlord and the appellant that of the tenant. The proceedings were sparked off by the Respondent issuing the statutory notice under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap.301 Laws of Kenya. The purport of the notice was to alter the terms of the tenancy, by raising monthly rental value to Ksh. 30,000/= per month free from all deductions whatsoever. In addition to that, the tenant was required to pay his share of the site value tax and all other outgoings. The rental value was payable in advance. The reason given for the increase was because the current rental value then was much below what could reasonably be expected to be obtained in the open market where as the other charges were alleged to be in keeping with the trends on the open market.

The appellant, tenant became aggrieved by that move and filed a reference to the Business Premises rent Tribunal Vide Tribunal Case number 1995 of 1986 in opposition to the Statutory notice issued and the reference was to request the tribunal to investigate the matter. Parties were heard by the tribunal on the basis of valuation reports, filed, written submissions by either sides and evidence from each side witness duly tested on cross-examination. After due consideration of the totality of the evidence as well as the documentations tendered before it the learned chairman as she then was made findings on the matter.

The property is described as L.R.NO.209/2546 city centre Nairobi, leasehold by Pioneer General Assurance Limited for the residue of a term of 90 years from 1st September 1986. It is a stone building reinforced with R.C. Columns and beams. It was 25 years old then and its current rent then was shs 4,811/=. The tribunal adopted the landlord's measurements as hereunder:-

- Workshop 135.7 meter square

- Basement 135.9 m^2 but area of tenancy as workshop was 86.21 m^2 , approximate shop 49.42 ^{m}

with W.C. with W.H.B. 135.82 square meters. There was additional toilet facility outside.

At page 2 of the ruling the learned chairman (lady) made the following observations:-

1. That the tribunal had used the landlord's measurements because of lack of measurements in some parts of the premises by the tenant's valuer.

2. There is no mention of a shop in the tenant's valuation report as the valuation talk of a workshop and basement.

3. That they had done the valuation analysis in both reports with the tenant valuer opining that shs 9,640.40 should be the fair market rent with no mention of outgoings at site value tax.

4. That the tenants valuers contention that the subject premises is not a shop could not hold as the tenants reference to the tribunal was based on the contention that the tenancy was controlled.

5. That the tribunal sent an inspector to the premises whose report said that there was a shop on the premises.

At page 3 of the ruling the learned chairlady made further observations that after due consideration all the evidence, valuation reports, and submissions it was inclined to make a determination of what fair rent should be in accordance with Section 12 (1) (b) of the Act. The Tribunal noted that the Act protects tenants from exploitation but according to it, it was not exploitation when a Landlord gives a tenant a notice under Section 4 (2) of the Act and then the tribunal acts in accordance with Section 12(1) (b).

Tribunal took into consideration the parties recommendations of the new proposed rent being 22,000/= by the landlord and 9,640.40 by the tenant as against the rent asked for initial of shs 30,000.00. Also noted that the difference in area measurements was 39 m, that the manner in which the tenant wishes to use the premises for was his own choice, but that was not to be used to deprive the landlord revenue in terms of rent. The tribunal then proceeded to assess rent as here under:

"*New rent is now assessed as follows:-*

Shop 49.42 m^2 @ 100 p.m.^{2} per month = 4310.3

Workshop 86.21 m^2 @ shs 50 p.m.^{2}

Per month = 4310.3

Basement 135.82 ^{2} @ 25/= p.m.

Per month = 3,995.5.

Total 12,648/=.

New rent is ordered to be shs 12648/= with effect from 1st May 1986 payable monthly in advance and excludes site value tax and all other out goings which the tenant will bear in appropriate manner taking into consideration all the other circumstances ….. Each party to bear own costs as regards the reference".

The appellant became aggrieved by those orders and filed the appeal subject of this judgment. 14 grounds were put forward:-

1. In assessment of the monthly rent of the shop at shs 4,942/= per month, workshop at shs 4,310.50 per month and basement at shs 3,395.50 per month having regard to the valuation reports, entire evidence

adduced and submissions at the hearing the tribunal exercised its discretion un judicially and on wrong principles.

2. The tribunal erred and misdirected itself in failing to be guided by the valuation report by Nairobi Homes Ltd who were engaged by the Tenant/appellant and thus arriving at an erroneous conclusion and ruling.

3. The tribunal assessment of the monthly rent is ridiculously high and this reflects a poor assessment and appreciation of the applicable law.

4. The tribunal assessment of monthly rent is too high and runs counter to law and the range of evidence adduced at the hearing.

5. The tribunal mis-directed itself and erred in fact in the assessment and evaluation of evidence and thus arriving at an erroneous conclusion and ruling.

6. The tribunal erred on both law and fact in drawing conclusions that were not supported by the evidence before it and this arriving at an incorrect ruling.

7. The tribunal erred both in law and fact in determining the effective date of the monthly rent and thus arriving at an incorrect ruling.

8. The tribunal misdirected itself in failing to come to the conclusion that the present rent being paid by the appellant had been yielding a fair return on capital outlay in respect of the suit premises rented to the Appellant and thus arriving at an incorrect conclusion and ruling.

9. The Tribunal erred and misdirected itself in ordering that the appellant should bear a proportionate manner in the site value tax and other outgoings which are payable by the Respondent and thus arriving at an incorrect ruling.

10. The tribunal erred and misdirected itself in failing to arrive at a finding that the comparables by the Appellants valuer were better than those of the Respondent in view of the locality of the suit premises and thus arriving at an erroneous ruling.

11. The tribunal erred in both law and fact in failing to arrive at a finding that the Respondents' suggested rent, in his reference was for much higher than the figure in its valuation reports and thus arriving at an incorrect ruling.

12. The tribunal erred in failing to arrive at a finding that the valuation report by the Respondent was made before the filing of its application and thus arriving at an erroneous conclusions and ruling.

13. The tribunal erred and misdirected itself in ordering that the appellant should bear in an appropriate manner all other outgoings which were ambiguous as they were not specified in the Respondents application and thus arriving at an incorrect ruling.

14. The tribunal erred and misdirected itself in law by refusing to award the appellant costs and disbursements on this suit.

In consequence thereof the appellant sought:-

(a) That the monthly rent by the lower court be reduced by this honourable court as it may deem fit and just in the unique circumstances of this matter.

(b) That the effective date of the assessed rent be determined by the Honourable Court.

(c) That the Respondent should bear the site value tax and other out goings.

(d) That the appellant be granted the costs of this suit in the lower court.

(e) That the costs of the appeal be awarded to the appellant.

In his oral submissions to court Counsel for the appellant reiterated the grounds of appeal and then stressed the following points:-

1. The appeal is against the entire order of the Tribunal of 7.10.86 whereby the rent increase was back dated to 1.5.86 which rent was exclusive of site value tax and other outgoings. The appellant objects to:

i. rent increase.

ii. the rent increase

iii. ability to pay site value tax and other outgoings.

2. The terms of the tenancy agreement in operation at the time the landlord, served notice to increase the rent, did not include payment of site value tax and other outgoings. Without any written agreement between the parties, the responsibility of paying site value tax and other outgoings was that of the respondent as per the provisions of Section 3(2) of Cap.301 Laws of Kenya. They contend that the order compelling him to pay the said dues was:-

(a) illegal

(b) unjustified

(c) and onerous

They should not have been imposed by the tribunal.

3. On the increase of rent, they content that an increase from 4,811.00 p.m. to 12,648.00 was unreasonable and too exorbitant as it was increased at 500%. In doing so, the tribunal failed to balance the interests of both parties in order to reach at a just decision. Neither did the tribunal uphold the spirit of Cap.301 which is to protect the tenants against exploitation by landlords.

4. The tribunal did not consider the weight of the evidence on the record, especially the valuation reports of the appellant's valuer. The comparables relied upon by the tribunal should not have been relied upon as they were on different streets and were also enjoying passing trade as opposed to the subject of the proceedings which was disadvantaged.

5. It is their stand that since the suit premises were 25 years old, not at a strategic position, facing a car park, enjoying very little passive trade, the comparables suggested by the valuer for the appellant were the most appropriate as they were along the same street. Rent is assessed according to the street locations.

6. On costs, the appellant should not have been penalized to pay costs as the Respondent sought shs 30,000.00 but succeeded dismally and so the landlord should have been ordered to pay costs as he dragged the appellant to the tribunal for nothing.

7. By back dating the commencement date of the tribunal order from 7.10.86 to 1.5.86 the tribunal contravened Section 12(1) of Cap.301 Laws of Kenya. In pursuance of which the chairman had no powers to make.

In response Counsel for the respondent opposed the appeal on the following grounds:-

(1) That the orders sought will be issued in vain as the appellant vacated the premises on 15.10.92

with arrears to the tune of Kshs 373,151.00.

(2) Under the powers conferred to the tribunal by Section 9 of the Act, the tribunal has power to approve the terms of the notice or subject to such amendments or alterations as the tribunal thinks just having regard to the circumstances of the case. The tribunal was therefore entitled to increase the rent from shs. 4,811.00 to shs. 12,648.00.

(3) The tribunal was also entitled to order the payment of site value tax and other outgoings as that is what the landlord asked for. The express powers in section 9(1) (a) of Cap.301 is not taken away by implied conditions.

(4) That site value tax and other outgoings was rightly ordered to be paid by the tenant because the tenant had inherited the tenancy from another tenant who had been paying the same annually. It is a small amount over and above the usual rent payable. That these were payable as per the agreement in force when the appellant inherited the tenancy. The appellant was already bound by virtue of the said agreement.

(5) They submit that the amount of rent assessed by the tribunal was not exorbitant or unreasonable because the tribunal had power to vary the rent as per Section 12(1) (b).

(6) The assessment was proper as the tribunal considered the valuation reports and evidence of a member of the tribunal who visited the premises. The appellants own valuer recommended shs. 9,640.00 while the tribunal gave shs.12,648.00. The difference in between cannot be said to be exorbitant.

(7) The assessment made in the ruling by the tribunal balanced the interests of both parties and arrived at a fair decision, just both parties.

(8) The tribunal considered both valuation reports and gave reasons as to why she preferred the landlord's report as opposed to that of the appellant, which reasons are on record. The comparables of the landlord were in the same locality.

(9) Costs, usually follow the events, and there was no basis upon which the appellant could have been given costs as against the Respondent landlord. The power to give costs is donated to the tribunal by Section 12(k). They do not state that costs must be given to the tenant under whatever circumstances.

(10) As regards the effective date of the orders made by the tribunal the counsel stated that the orders usually relate back to the date when the notice was issued. No authority was given to court as proof that the tribunal had no power to back date the orders made.

In responsible Counsel, for the appellant reiterated the earlier submission, and added that there is no proof that the appellant ever paid site value tax and other outgoings. It is their stand that although the tribunal has power to increase rent, the power has to be exercised judiciously in conformity with the terms of the tenancy.

These proceedings being an appeal the powers of the court in relation to determination of the competing interests herein are set out in Section 78 of the Civil Procedure Act. These give this court power:-

(b) to determine a case finally.

(c) To remand a case.

(d) To frame issues and refer them for trial.

(e) To take additional evidence or to require the evidence to be taken.

(f) Order a new trial.

(g) Vide sub rule 2, perform as nearly as may be the same duties as are conferred, and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.

These powers are to be employed in the determination of issues which have arisen for determination in this appeal. These are:-

(1) Whether determination of this appeal is an exercise in futility.

(2) Whether the tribunal had jurisdiction to back date the effective date of the orders granted.

(3) Whether the tribunal had both the power and justification and jurisdiction to award the landlord site value tax and other outgoings over and above the rent increment. Alternatively is there obligation on the appellant tenant to pay the said site value tax and other outgoings either legally or otherwise.

(4) Was the tribunal justified in ordering each party to bear own costs.

(5) Did the tribunal act judiciously when it arrived at the decision on the rent increment. Was it exorbitant, unjustified, unreasonable and without basis and therefore it warrants being upset on appeal.

(6) What are the final orders of this court.

We have given due consideration of the above self drawn issues in the light of the documentations on the record as well as submissions of both Counsels already set out in this ruling and we shall accordingly proceed to answer each of them separately.

As regards whether the determination of the appeal is an exercise in futility our stand is that it is not. Reason being that a determination by court in respect to any litigation before it serves two purposes namely.

(1) To resolve the dispute between the disputants and determine it finally; and

(2) To generate judicial jurisprudence on similar issues. We note that, the statement, that the applicant left the premises on 15.10.92 has been brought to our attention from the bar and although we do not doubt the sincerity of the Respondents Counsel, who might be having first hand information on the issue, we are minded to hold that this statement alone is not heavy enough to sway us or sweep us off the radar of procedural requirements and considerations w hen such representations arise. Ours is to take note that we are exercising an appellate jurisdiction and also to be alive to the fact that when exercising this jurisdiction, the court is supposed to confine itself to the documentations on record and the case law that may be brought to its attention in support of each sides argument. We further note that courts do not own proceedings. These are owned by the litigants. It is up to the litigants to withhold proceedings from court or allow the proceedings to be determined on merit by the court. Where a litigant has not withheld and or withdrawn his/her right to litigation, it is evidence of his/her desire to be heard and receive a pronouncement on the determination of the same. This being the case if this court were to decline or with hold a decision on the appeal on its merits, it will amount to a wrong exercise of both the courts discretion and jurisdiction. A proper request should have been by way of a withdrawal or compromise of appeal by the parties themselves which this court has not been asked to do. On back dating of the effective date of the orders granted by the tribunal, we note that the tribunal as a creature of statute, is expected to operate within the powers donated to it by the creating statute which is Cap.301 Laws of Kenya. Since the appeal arises out of a determination of the tribunal, this falls under section 9 of the said Act. Section 9(1) (a) states "*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".

We have also been referred to the case of ***SADHU AND ANOTHER VERSUS VADGAMA GARAGE AND ANOTHER (1975) E.A.31.*** In this case the Business Premises Tribunal assessed certain rents and ordered that they take effect almost a year after the dates given in the notice. It gave as a reason the fact that preparation of a valuation had been delayed by a change of the tribunal's valuer. On appeal it was argued among others, that the tribunal had no power to alter the date given in the notice for the new rent to take effect and should not have altered the date. It was held:

(1). The tribunal has power to vary the terms of a tenancy notice including the date from which it takes effect.

(2). Delay in hearing a reference is not sufficient ground for altering the effective date of the notice which should normally be the date in the notice..

Applying the foregoing to the submission of both Counsels, on the issue of backdating of the orders, it is clear that the notice of the landlord was requested to have effect on 1.5.86. The objection did not suggest any other effective date should the reference fail. The tribunal allowed the rent increment although not to the tune of the amount requested. In the absence of another suggested effective date, the Tribunal had no alternative but to go by the date requested for by the landlord. A reading of Section 9(1) (a) of the Act shows that the tribunal has discretion to allow the effective date to be the one requested or any other. Nothing has been suggested to us to show that this was a wrong exercise of discretion.

The authority cited to us confirms that the tribunal did the right thing. Though it is a High Court decision it bears a correct interpretation of Section ((1) (a) of the Act. As such we are persuaded by it and on that account we dismiss this Objection.

As for the award of site value tax, and other outgoings, we turn to the law for assistance. Section 12(1) (d) provides:-

"*where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge"*. Item (ix) of the Terms and conditions to be implied on tenancies states:

"*the lessor shall pay all rates, taxes and similar outgoings unless; the lessee is responsible therefore under any written agreement"* .

These two previsions show clearly that site value tax and other outgoings, besides rent, are a preserve of the landlord or lessor. The responsibility to meet the same shifts to the tenant, if there is an agreement to that effect. It is on record that Counsel for the Respondent submitted that these are contained in an agreement between the landlord and the tenant from whom the appellant inherited the tenancy. This agreement was not produced before the tribunal as there is no reference to it in the proceedings. It is not one of the exhibits in the record of appeal. On the basis of this, we are satisfied that in the absence of an agreement between the landlord and tenant, that the tenant do pay the same, there was no basis for the tribunal imposing the same to be paid by the appellant. This was contrary to the regulations promulgated under the parent Act and same disallowed as the tribunal had no power, justification and jurisdiction to award the same.

As for the order on costs Section 12(1) (k) gives the tribunal power to award costs in respect of references made to it, which costs may be exemplary costs where the tribunal is satisfied that a reference to it is frivolous or vexatious. The framing of the section gives the tribunal discretion to decide who to award costs as it deems fit. There is no requirement that reasons be given for an award of costs to any party. In the absence of proof that costs should not have been awarded the way they were, there is no basis for upsetting that order. In fact it is the Respondent who should have complained as he was the victorious party as he was awarded an increment of rent though not to the extend of the amount initially asked for. This complain is therefore dismissed.

As for the assessment of the rent which is alleged to have been unreasonable and exorbitant, it is on

record that two valuation reports were filed. Both sides also gave evidence. The learned tribunal notes on the record that the learned chairlady considered both reports and gave reasons why she opted for the landlords valuers reports because the valuer of the appellant had left out some measurements of the premises which was mandatory to be taken into account. We have revisited that issue. We have meticulously gone over the same information comprising the valuation reports, the evidence in support of each side, the assessment of the learned chair lady and we have come to the conclusion that the assessment was proper. We note the appellants own valuer recommended an increase of Kshs 9,640.40 while that of the landlords valuer was Kshs 22,000/=. The analysis is shown at page 3 of the ruling. The learned tribunal chairlady worked out the figures and arrived at a figure of Kshs 12,648/= down from Kshs 30,000.00 that the landlord asked for and Kshs 22,000.00 that the landlords valuer recommended. It is our view that the assessment as well as the figure arrived at is fair, reasonable and not exorbitant in our view. We accordingly reject that argument.

The final orders of the court are:-

(1). The determination of the appeal on merit is not an exercise in futility as it is going to finally determine the dispute between the appellant and the Respondent and at the same time generate judicial jurisprudence on the subject.

(2) The back dating of the effective date of the tribunal orders was proper as the same was within the discretion of the tribunal firstly and secondly it tallied with the date in the landlords notice which the tribunal had a discretion to vary or not to vary. We find nothing wrong in the exercise of that discretion and we accordingly decline to interfere with the same.

(3). The order for payment of site value tax and other outgoings was not based on any agreement as stipulated by the Regulations. It was therefore Ultra Vires the Act and we accordingly quash it.

(4). The award of costs was within the tribunals' discretion and accordingly we confirm it.

(5). The assessment of new rent was properly done, based on evidence before the tribunal which we have gone over and confirm that it was correctly taken into consideration. The amount arrived at is less than half of what the landlord had asked for in the notice and much less than what the landlord valuer recommended. But slightly higher than what the applicants own valuer recommended. We do not find this to be unreasonable, exorbitant or extremely high. The same is fair, reasonable and in line with rent for other comparables in the area and so we confirm it.

(6). The appeal is therefore allowed only on the issue of payment of site value tax and other outgoings whose order we have quash. The appeal is dismissed on the issue of back dating of the effective date of the tribunal's orders, costs and assessment of the new rent which grounds we dismiss.

(7). The appellant has succeeded on only one item of his appeal out of four we awarded ¼ one quarter of costs on appeal against the Respondent.

DATED, READ AND DELIVERED AT NAIROBI THIS 15TH DAY OF February 2007.

1. J.L.A. OSIEMO

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JUDGE

2. R.N. NAMBUYE

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JUDGE