



Wellchem Pharmaceuticals Limited & 59 others v Gikomba Business Centre (Environment and Land Appeal E008 of 2022) [2022] KEELC 15053 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E008 OF 2022
EK WABWOTO, J
NOVEMBER 21, 2022**

**BETWEEN
WELLCHEM PHARMACEUTICALS LIMITED & 59 OTHERS APPELLANT
AND
GIKOMBA BUSINESS CENTRE RESPONDENT**

JUDGMENT

1. This appeal arises from the decision of the Business Premises Rent Tribunal (herein after referred to as the Tribunal) which made a finding to the effect that the rent payable by the appellants be Kshs 300/- per square foot per month for the ground floor shops and Kshs 250/- per square foot for the first floor shops and Kshs 250/- per square foot per month for basement shops all being exclusive of service charge.
2. The Tribunal decision was rendered by honourable Cyprian Mugambi on February 1, 2022.
3. By a memorandum of appeal dated February 23, 2022, the appellants being aggrieved parties appealed the tribunal's decision on the following grounds: -
 - a. That the honourable Chairman erred in law and in fact in holding that not much evidence was lead depicting the state of the common areas while in fact the appellants had attached photos in their valuation report depicting the deplorable state of the common areas and further to that one of the appellants testified as to the deplorable state of the suit premises.
 - b. That the honourable Chairman erred in law and in fact in holding that the new rent assessment should be exclusive of service charge, without considering that the previous rent paid by the appellants was inclusive of service charge.
 - c. That the honourable Chairman erred in law and in fact in holding that the comparables used by both the appellants and respondent are around the same location with the suit premises,



while in fact the one comparable used by the respondent is not within the same location as the suit premises. The respondent's valuer stated that the suit premises is located in Gikomba while the appellants Valuer stated that the suit premises is located on Digo road. That the suit premises is located on Digo road within the outskirts of Gikomba Market in Pumwani Area which does not have a lot of business as compared to Gikomba Market. That businesses at the suit premises are not that booming as compared to the ones inside Gikomba Market.

- d. That the honourable Chairman erred in law and in fact in holding that:
 - i. the ground floor rent is assessed at Kshs 300/- per square feet per month for shops exclusive of service charge.
 - ii. the first floor shops is assessed at Kshs 250/- per square feet per month for exclusive of service charge.
 - iii) the basement shops is assessed at Kshs 250/- per square feet per month for exclusive of service charge.
- e. That the honourable Chairman erred in law and in fact in failing to consider each individual comparable carefully in assessing whether it represents an open market rent of the premises and decide to simply calculate the rent payable by merely taking an average of both reports and assessed a general rent per floor. The honourable Chairman did not clearly state the formula they used to arrive the assessed rent.
- f. That the honourable Chairman erred in law and in fact in failing to consider the comparables of other buildings in the area with the same use, age and structure where new buildings in the same area go for sKhs 150/- per square foot on average and older buildings such as the suit premises go for Kshs 125/- per square foot.
- g. That the honourable Chairman erred in law and in fact in failing to consider that some of the premises under consideration have small letttable areas and thus cannot be considered as stalls/ shops since they can be let out independently from the rest of the shops.
- h. That the honourable Chairman erred in law and in fact in failing to consider that the ground floor spaces are let out as shops while the basement and first floor internal spaces are utilized either as shops or storage spaces or both.
- i. That the honourable Chairman erred in law and in fact in failing to consider that the respondent did not adduce sufficient evidence to support its grounds of rent increment of the Tenants/appellants of the Business Premises.
- j. That the honourable Chairman erred in law and in fact in failing to give reasons as to how he had arrived at Kshs 300 per square feet per month for ground floor shops and Kshs 250/- for the first floor shops and basement.
- k. That the honourable Chairman erred in law and in fact in arriving at a decision that was wholly against the weight of the evidence that was adduced.
- l. That the honourable Chairman erred in law and in fact by taking into consideration extraneous and irrelevant issues while determining and making decisions favour of the respondent herein.
- m. That the honourable Chairman erred in law and in fact in relying on the respondent's valuation report which was not a comprehensive report that could warrant court to be persuaded by it.



- n. That the honourable Chairman erred in law and in fact in failing to consider that the respondent's valuation report did not consider the general overview of the suit premises and that the comparables used by the respondent valuer were unconscionable and unrealistic were not comparables with the same locality.
 - o. That the honourable Chairman erred in law and in fact in considering the respondent's valuation report, as the said report did not explain how they arrived at the rate adopted by them at Kshs 613 per square feet for spaces on ground and first floor and Kshs 517.00 per square feet for the basement.
4. Thus the appellants have sought the following orders: -
- a. That this appeal be allowed.
 - b. That this honourable court do set aside the ruling and subsequent order delivered and given on 1st February 2022.
 - c. The references filed by the appellants at the Business Premises Rent Tribunal be allowed.
 - d. That the appellants be granted the costs of this appeal and the trial court.
 - e. Any further order/relief that the honourable court may deem fit to grant.

Court's Directions.

5. On July 6, 2022, with the consent of the parties, this court directed that the appeal be canvassed by way of written and oral submissions. Both parties complied and filed their written submissions and also made oral submissions on September 28, 2022.

The Appellant's Submissions.

6. The appellant's filed written submissions dated July 5, 2022 through Anyango Opiyo & Co Advocates. Counsel for the appellant outlined six issues for consideration by the court: -
- i. Whether the honourable Chairman properly applied principles governing assessment of rent.
 - ii. Whether the honourable Chairman used or did not use appropriate comparable in assessing the rent.
 - iii. Whether the honourable Chairman took into account the relevant factors in assessing the rent payable.
 - iv. Whether the honourable Chairman erred in law and in fact in holding that the new rent assessment should be exclusive of service charge, without considering that the previous rent paid by the appellants was inclusive of service charge.
 - v. Whether the honourable Chairman erred in law and in fact in failing to state the formula he used to arrive at the assessed rent and reasons for assessing such rent as such.
 - vi. Whether the rent assessed by the honourable Chairman was harsh and unconscionable.
7. On the first issue, the appellants submitted that the *Landlords and Tenant (Shops, Hotels and Catering Establishments (Tribunal) (Forms and procedure) Regulations* 1966 provides for the principles governing assessment of rent. These principles are expressly stated in Form G of the said regulations and include: -



- i. The original cost of the construction of the building.
 - ii. The age of the building.
 - iii. The market value of the land on which the premises are built.
 - iv. The improvements and costs of such improvements.
 - v. Amenities or services provided by the Land Lord.
 - vi. The rent at which the premises were let for the past (three years)
8. It was contended that the Tribunal did not take into consideration those circumstances. Counsel cited the case of *Njoroge Ndungu & others (T/A Ngamini Bar & Restaurant) Vs Aly Kah Investments Limited* (2015) ELC appeal Case No 5 of 2014 in support of this position.
 9. It was also submitted that the tribunal failed to consider the fact that the building was not in a good condition especially in common areas Counsel cited the case of *Cleaners Limited Vs Barclays Bank DCO* (1972) EA 188 where the court of appeal held that,

“It is the reasonableness of the rent that must be in the fore front of the Tribunal’s investigations and determination. It must be the concern of this court too. The average rates per square foot or meter of a number of nearby buildings on ground floor premises in which similar trades are exercised are among other things relevant to assessing the rent that would reasonably be expected in the open market”
 10. On whether the honourable Chairman used or did not use appropriate comparable in assessing the rent, Counsel made reference to the case of *Tala Investments Ltd Vs Green Sport Limited* Civil appeal No 269 of 1993 and stated that it has been judiciary settled that the rent for comparable premises is a prime guiding tool in assessment of rent payable. Counsel also cited the cases of *Supa Duka Nakuru Limited Vs Baringo United Company Limited* (2017) eKLR and *Margaret Wanjugu Nduma & 3 others Vs James Gichuki Gathara* (2020) eKLR in support of the said position.
 11. On whether the honourable Chairman erred in law and in fact in holding that the new rent assessment should be exclusive of service charge, without considering that the previous rent paid by the appellants was inclusive of service charge, Counsel submitted that the Chairman erred in fact and law in holding that the new rent assessment should be exclusive of service charge without considering that the previous rent paid by the appellants was inclusive of service.
 12. On whether the Chairman erred in law and in fact in failing to state the formula he used to arrive at the assessed rent and reasons for assessing such rent as such, Counsel submitted that the Chairman simply took the average of the proposed rent by the landlord’s valuer and that proposed rent by the appellants valuer as the basis for assessment of rent and no reasons were given as to what was wrong with the valuation reports.
 13. On whether the rent assessed by the honourable Chairman was harsh and unconscionable, Counsel submitted in the affirmative and went ahead and outlined the rent payable by each tenant vis a vis the new rent as proposed by the Landlord which the court had considered.
 14. During the plenary hearing of the appeal, Counsel for the Appellant reiterated the contents of the appellants’ written submissions and further added that the issue of the subject property being a commercial property was not raised by the respondent during the proceedings before the Tribunal and hence the same should not be considered by this court at his stage.



15. Counsel concluded the appellants submissions by urging the court to allow the appeal with costs.

The Respondent's Submissions.

16. The respondent filed its submissions dated August 23, 2022. Counsel submitted that the tenants/ appellants were served with notices to increase rent dated January 31, 2020 and February 25, 2020 respectively.
17. It was submitted that it was not the responsibility of the Chairman to address the issue of common areas because it was not an issue before the Tribunal. Counsel also submitted that no complaint had been filed by any of the tenants complaining of the alleged deplorable state of the building or any charges brought by Public Health Department of Nairobi County Government.
18. Counsel also submitted that no service charge was apportioned to any tenant and thus the said issue has no basis in law and fact.
19. Counsel also submitted that the Landlords witness Geoffery Chege, considered buildings of similar construction, age, location, type of finishes within a radius of 300 metres. It was further submitted that Tribunal considered several factors before making its decision. Counsel argued that the Tribunal decision was governed by section 9(1) and (2) of the *Land Lord and Tenant (shops, hotels and Catering Establishment* cap 301 Laws of Kenya.
20. In his oral submissions, Counsel for the respondent submitted that the appellants had been in the premises for over 5 years without any increase on rent. Counsel also reiterated the contents of his written submissions and urged this court to dismiss the appeal with costs.

Analysis and Determination.

21. I have considered the references before the Tribunal, the evidence tendered before it, the decision of the Tribunal appealed against, the grounds of appeal and the written and oral submissions filed and made in respect to this appeal together with the relevant statutes and jurisprudence on the key issues in this appeal. In my humble view, the main issues for determination are as follows: -
- i. Whether the Tribunal properly applied the principles governing assessment of rent.
 - ii. Whether the Tribunal erred in law and in fact in holding that the new assessment should be exclusive of service charge without considering that the previous rent paid by the appellants was inclusive of service charges.
 - iii. Whether the rent assessed by the Tribunal was harsh and unconscionable.
22. These issues address all the grounds raised in the appellants memorandum of appeal. I will handle the same sequentially.
23. This being a first appeal, this court is required to re-evaluate the evidence tendered before the Tribunal and make its own findings and conclusions as was held in the case of *China Zhongxing Construction Company Ltd vs Ann Akuru Sophia* [2020] eKLR and also *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123. The High Court in the China Zhongxing Construction Company Ltd case (*supra*) cited the Court of appeal for *East Africa in Peters vs Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing



the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt vs Thomas* (1), [1947] AC 484.”

24. From the foregoing, I just wish to reiterate that the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.
25. In the instant appeal, the appellants consistently submitted that the Tribunal did not properly apply the principles of assessment of rent as established. Counsel for the respondent argued that the decision of the Tribunal on that issue was within the law and the Tribunal did not err in any way when it rendered its decision.
26. Section 9(2) of the *Land Lord and Tenant (Shops, Hotels and Catering Establishment* Cap 301 stipulates as follows: -

“without prejudice to the generality of this section, a Tribunal may upon any reference –

- a. determine or vary the rent to be payable in respect of the controlled tenancy, having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market and disregarding-
 - i. any effect on rent of the fact that the tenant has, or his predecessors in title have been in occupation of the premises.
 - ii. any goodwill attached to the premises by reason of the carrying on threat of the trade, business or occupation of the tenant or any such predecessors.
 - iii. any effect on rent of any important carried out by the tenant or any such predecessor otherwise than in pursuance of any obligation to the immediate landlord.
 - (b) terminate or vary any of the terms, or conditions of the controlled tenancy or any of the rights or services enjoyed by the tenant, upon such conditions, if any as it deems appropriate.”
27. In support of the appellants’ case, Counsel also referred to the *Landlords and Tenants (Shops, Hotels and Catering Establishment (Tribunal) (Forms & Procedure) Regulations* 1966 which provides for the principles governing assessment of rent to include: -
 - i. The original cost of construction and building.
 - ii. The age of the building.
 - iii. The market value of the land on which the premises are built.
 - iv. The improvements and costs of such improvements.
 - v. Amenities or services provided by the Landlord.



- vi. The rent at which the premises were let for the past (three years)
28. In the ruling delivered by the Tribunal on February 1, 2022, the Tribunal held that it was faced with two valuation reports which were wide apart in their recommendations and that both reports were prepared by valuers who are qualified and experts in their fields; in the circumstances, the Chairman had no option but to harmonize the reports while having regard to the comparables used in arriving at the said figures.
29. One of the powers given to the Tribunal under section 12 (1) (b) is "to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof." The statute does not prescribe any method to be employed by the Tribunal in order to determine the rent payable. It follows that the Tribunal has wide discretion over this aspect of its mandate. In the case of *Mbogo vs Shah* (1968) EA 93 with regard to when an appellate court can disturb the exercise of discretion of a lower court. It was said in the said case that the appellate court ought not to interfere with the exercise of such discretion unless the appellate court is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.
30. Having carefully reviewed the evidence that was tendered and the record of appeal that was filed, it is the finding of this court that in the instant appeal, the Tribunal properly exercised its discretion in assessing the rent payable and the Chairman cannot be faulted for the assessment done. I have no reasons to interfere with the same.
31. On the issue of the service charge, Counsel for the appellant faulted the Tribunal's decision of not, including the same on the rent payable while Counsel for the respondent submitted that the Tribunal did not apportion any service charge to any tenant.
32. The Tribunal in its ruling held that the assessment of the rent was exclusive of service charge but did not give any reasons in respect to the said decisions.
33. Section 2 of the *Land Lord and Tenant (Shops, Hotels and Catering Establishments)* cap 301 of the Laws of Kenya defines "service charge" as a charge for any services rendered. The entire act is also silent on how the same is to be assessed. In the circumstances, the court is obligated to consider the lease agreement between the parties as to what is stipulated in respect to service charge and specifically as to whether or not the same should be inclusive of rent payable. I have perused the entire record of appeal and I note that no copy of the lease was availed which would have guided the court. However, Counsel for the appellants submitted that the previous rent/current rent was being paid inclusive of service charge. This issue was not controverted by Counsel for the respondent and in the circumstances it is the finding of this court that the Tribunal erred in holding that the rent payable after its assessment should be exclusive of service charge. On the basis that the previous rent was inclusive of charge, I will equally direct that the assessed rent be inclusive of service charge.
34. On whether or not the assessed rent was harsh and unconscionable, Counsel for the appellants submitted that the proposed rent was exorbitant and way above the market price of the said area.
35. I have painstakingly gone through the assessed rent by the Tribunal and the previous rent and considered the parties submissions on the issue and it is the finding of this court that the Tribunal exercised its discretion properly and took into consideration the relevant factors in arriving at the rent payable save for the exclusion of service charge.



36. In the end it is the finding of this court that the same was not harsh and unconscionable. Reference is made to the case of *United India Insurance Co Ltd Vs East African Underwriters (Kenya) Ltd* [1985] EA 898 it was held that:

“The Court of appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong.”

37. On costs, I am guided by the provisions of section 27 (1) of the *Civil Procedure Act* (cap 21) and the decision in *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the court has the discretion in awarding such costs. In the present cases, looking at the circumstances herein and considering the existing landlord and tenant relationship between the parties, I will direct that each party bear own costs of this appeal.

Final orders

38. For the foregoing reasons, the appeal partially succeeds and I make the following disposal orders:

- a. That the assessment of the Tribunal in respect to the rent payable is upheld to the extent that it shall be inclusive of service charge.
- b. Each party shall bear own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022.

E.K. WABWOTO

JUDGE

In the presence of:-

Ms. Odhiambo h/b for Ms. Opiyo for the appellants.

Ms. Mwale h/b for Mr. Narangwi the respondent.

Court Assistant – Caroline Nafuna.

E.K. WABWOTO

JUDGE

