



REPUBLIC OF KENYA



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**Embu Mission Church v Njeru & 4 others (Environment and Land Appeal
2 of 2020) [2022] KEELC 14955 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14955 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 2 OF 2020
A KANIARU, J
NOVEMBER 15, 2022**

BETWEEN

EMBU MISSION CHURCH APPELLANT

AND

SALAFIN J NDUNGU 1ST RESPONDENT

JOHNSON NJERU 2ND RESPONDENT

JOSPHAT M NGUNGURU 3RD RESPONDENT

DICKSON WACHIRA 4TH RESPONDENT

VAJESLAUS M JORAM 5TH RESPONDENT

(Appeal from the ruling/order of the Chairman Business Premises Rent tribunal, case No. 19 of 2019 Embu before Hon. Mbichi Mboroki-Chairman (as he then was) dated 17.1.2020)

JUDGMENT

1. This appeal arises from the judgement of Hon Mbichi Mboroki, chairman, Business Rent Tribunal, in Tribunal case No 19 of 2019, Embu. The appellant - Embu Mission Church - was the tenant/Applicant in the suit while the respondents - John Njeru, Salafin J Nduru, Josphat M Ngunguru, Dickson Wachira & Vajeslaus M Joram - were the landlords/respondents in the case before the tribunal.
2. The dispute before the tribunal emanated from a notice dated January 14, 2019, issued by the respondents to the appellant pursuant to Section 4(2) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap, 301. In the notice, the respondents sought to alter the terms of the tenancy and they proposed to increase the rent from Kshs 20,000/= to Kshs 40,000/= monthly for the reason that the current rent was too low compared to the market rate of the area and further that the premises could fetch much more in the open market. The appellant objected to the increase and filed a reference dated March 18, 2019 opposing the notice to alter the terms of the tenancy pursuant to



the provisions of Section 6 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap, 301.)

3. The matter was set down for inter parties hearing on April 2, 2019 and the tribunal directed the parties to file their respective valuation reports so that the matter could proceed for hearing on December 17, 2019. On the date of hearing, the tribunal confirmed that the parties had each filed their respective valuation reports. A date for judgment was then given. In the ensuing judgment dated January 17, 2020, the tribunal, in determination of the reference, considered the valuation reports. With regard to the respondents valuation, the tribunal was of the view that the report was more credible taking into account the comparables and noted that in the report the recommended monthly rent was Kshs 53,100/=. The tribunal however took note of the fact that the respondents in their notice had sought to increase the rent to Kshs 40,000/= monthly. It went ahead to order that the rent payable be as per the notice given by the respondents. As for the tenant's report, the tribunal was of the view that the valuer's report was meant for rent dispute in BPRT No 82/2018 and could therefore not be used to assess the market rent in respect of the suit premises.
4. The appellant was therefore ordered to pay rent in the sum of Kshs 40,000/= monthly, exclusive of service charge with effect from April 1, 2019. He was to pay the respondents costs of the reference; pay also the arrears of rent arising out of the judgment within 6 months from the date of judgment in default whereof the respondents to levy distress; and finally that costs be agreed or taxed by the tribunal. It is that decision that the appellant is aggrieved with and he therefore preferred the present appeal before this court.
5. The appeal has six (6) grounds, which are as follows:
 1. That the Learned Chairman of the Business Premises Rent Tribunal erred in law and fact in finding and awarding the landlord/respondent a 100% gain of the landlord's valuation report before allowing the tenant a hearing or opportunity to interrogate the landlord's valuation report.
 2. That the learned Chairman of the Business Premises Rent Tribunal erred in law and in fact by finding no merit to the tenant's valuation report as presented without interrogating the two valuation reports.
 3. That the learned Chairman of the Business Premises Rent Tribunal erred in fact and in law in failing to properly evaluate and interrogate the valuation reports filed and presented by both parties by not allowing the valuers presenting the report to be cross examined by the lawyers and representatives.
 4. That the learned Chairman of the Business Premises Rent Tribunal erred in fact and in law by failing to order service to the Appellant/Tenant to appear in court on January 17, 2020 for final judgment to the reference dated on the January 14, 2019.
 5. That the learned Chairman of the Business Premises Rent Tribunal erred in fact and in law in failing to appreciate the fact that the landlords/respondents refused or declined to serve the appellant/tenant with the landlords valuation report as ordered vide Tribunal orders dated April 2, 2019 thereby denying the appellant/Tenant reasonable opportunity to make an informed application to the tribunal before the determination of the reference.
 6. That the learned Chairman of the Business Premises Rent Tribunal erred in fact and in law in assessing payable rent at a figure exactly as demanded by the landlords/respondents as per their notice dated January 14, 2019 prior to institution of the



Tribunal matter and it can only be summarized by the appellant/tenant that under the circumstances the Chairman Business Premises Rent Tribunal was biased in favour of the landlords/respondents.

REASONS WHEREFORE, the applicant prays that:

- a. The appeal be allowed.
- b. The decision of the Chairman, Business Premises Rent Tribunal dated January 17, 2020 be set aside and the matter be referred back to the tribunal for the valuation reports interrogation for further orders.
- c. Any other orders that this honorable court finds necessary.
- d. Costs for this appeal.

SUBMISSIONS

6. The parties canvassed the appeal by way of written submissions. The appellant filed his submissions on October 17, 2022. He gave a background of the dispute and summarized the grounds of appeal into one issue, which is whether the landlords/respondents were justified to increase the rent payable and whether the landlords/respondents had proven their case on a balance of probabilities.
7. He submitted that the Business Premises Rent Tribunal draws its powers to determine or vary the rent payable from the provisions of Section 12(1) (b) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301) which states thus: “To determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all circumstances thereof.” He submitted that the act does not prescribe the method to be used by the tribunal in order to determine the rent payable and submitted that the tribunal has wide discretion in relation to this. According to him, such discretion should be exercised judiciously to ensure that the ends of justice are met. To support this, he relied on the case of *Shah & Shah vs Kagunda* 1978 KLR, 35 where it was stated thus: “It is I think generally accepted that the tribunal has discretion which must be exercised judicially having regard to the evidence before it.”
8. The appellant further submitted that he had been issued with a notice for increase of rent to Kshs 40,000/= from Kshs 20,000/= and feeling that he did not wish to comply with the notice, he filed a reference in the Tribunal in accordance with Section 6 of the *Business Premises Rent Tribunal Act*. He submitted that both parties in the case filed their respective valuation reports but the tribunal had failed to allow the valuers to present their views in regard to the reports. It was said that at the tribunal judgment had been entered in favour of the respondents and the tribunal had assessed the rent as the respondents had demanded. To that end, the chairman was termed as biased for having favoured the respondents. The appellant also contended that the chairman failed to adhere to the guidelines as set out in Form G of the attendant regulations.
9. Lastly, the appellant was of the view that he was entitled to the reliefs sought as the Chairman had been biased in favour of the respondents. He therefore urged the court to allow the appeal and set aside the orders of the Business premises Tribunal dated January 17, 2020.
10. The respondents on their part filed submissions on May 24, 2022. They too gave a background of the case. They argued grounds 1, 2 and 3 of the memorandum of appeal jointly. They submitted that the tribunal was correct in assessing the rent gain at 100% on a commercial property situate in Embu’s CBD. They were of the view that the parties had agreed to have valuation reports filed, which were



expert-reports by professional in that specific area. The tribunal was said to have made a fair decision after considering the valuation reports before it.

11. With regard to ground 4 of the memorandum of appeal, they stated that the appellant was present in court on the day the judgment date was set and termed the appellant as untruthful and one who had approached the court with unclean hands. The court was therefore urged to dismiss that ground.
12. As for ground 5 of the memorandum of appeal, the respondents stated that they had duly effected service of the valuation report to the appellant in compliance with the orders of the tribunal issued on April 2, 2019. They argued that the appellant had failed to prove that they had not been served.
13. On ground 6, they submitted that the tribunal had been correct in assessing the figure after considering the economic parameters prevailing at the time. They maintained that rules and customs demand that prices will always go up and they contended that the same principle applies to rent in a commercial premises situated in a town. They were of the view that the appellant had failed to prove its appeal on a balance of probabilities and that the trial court had relied on documents by both parties in arriving at its decision. The court was urged to dismiss the appeal with costs to the respondents.

ANALYSIS AND DETERMINATION

14. I have considered the appeal as filed, the pleadings, the submissions by the parties, and the proceedings before the tribunal. This being an appeal from the Tribunal, I wish to state my duty as an appellate court as stated in the court of appeal in the case [*Abok James Odera T/A A J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates*](#) [2013] eKLR where it was stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”.

15. The landlords, who are the respondents in this appeal, had issued a notice to the appellant who was a tenant, seeking to increase rent from Kshs 20,000/= to Kshs 40,000/=. The appellant, who did not wish to comply with the notice, then filed a reference disputing the rent amount pursuant to the provisions of Section 6 of the relevant law (Cap 301). In the decision by the tribunal, the Chairperson allowed an increase of the rent as prayed by the respondents. The appellant, being aggrieved by this decision, filed the present appeal wherein he raised six grounds. I shall determine each of the grounds of appeal as filed. Grounds 1 and 3 can be determined as one and so will grounds 2 and 6 while the rest of the grounds can be determined separately.
16. The legal provision that grants the courts mandate to determine the rent payable upon filing of a reference is Section 9(2)(a) of the [*Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act*](#). The said section provides that,
 - “(2) 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 thereof of the trade, business or occupation of the tenant or any such predecessor;
- iii. any effect on rent of any improvement carried out by the tenant or any such predecessor otherwise than in pursuance of an obligation to the immediate landlord”

17. Further, the court in discussing the duty of the tribunal in determination of a reference in the case of *Margaret Wanjugu Nduma & 3 others v James Gichuki Gathura* [2020] eKLR, stated as follows:

“The duty of the court in determining a fair rent in a case like this is to ensure that the tenant is not put off the business because of unbearable rent and at the same time ensure that the landlord gets his fair of the deal”.

18. As earlier stated, the appellant raised six grounds of appeal. In the first and third grounds of appeal, the appellant faulted the chairman of the tribunal for awarding the respondents a 100% increase without allowing it an opportunity to interrogate the respondents’ valuation report and also for not allowing the valuers to be cross examined by the lawyers and the parties representatives.
19. The appellant is of the view that the tribunal failed by awarding the respondents 100% gain without allowing the parties or their representatives to interrogate the reports. I have carefully looked at the proceedings before the tribunal. The parties first appeared before the tribunal on April 2, 2019 and the tribunal directed them to file and serve their respective valuation reports within 60 days. The respondents were present, or at least one of them was present in person as captured in the proceedings, while the appellant had a representative, one Daniel Waithaka, listed as coordinator for the appellant. The parties then appeared before the tribunal on December 17, 2019. The tribunal ascertained that the valuation reports had been filed and proceeded to issue a date for judgment.
20. From the records, the parties were present on both occasions and did not inform the court that they needed to interrogate the valuation reports filed. I find that the grounds raised have no merit as no reservations or protest or request to make submissions was made whatsoever. It is clear that the appellant had no problem with the mode of conduct of the proceedings. Courts and tribunals have autonomy to conduct proceedings as they wish provided they do not prejudice any party. In this matter, I find that no prejudice was occasioned by the court in the mode of conduct of the proceedings. The court treated both sides equally in relying on the valuation reports. The respondent’s side was not given any advantage. The reports were prepared by experts who have relevant expertise in their work and if the tribunal found the reports to be elaborate enough to assist it in its determination, then no prejudice whatsoever would be occasioned to any party in placing reliance on the reports without calling upon the makers of the documents. As pointed out earlier, the appellant did not seek to interrogate the valuation reports or submit on them.
21. The other issue raised was that the tribunal erred by failing to order service of the appellant to appear before the tribunal on January 17, 2019 for final judgment. As already stated, the appellant was represented by the coordinator Daniel Waithaka all through the proceedings. The said Daniel Waithaka is recorded as having been present at the tribunal on December 17, 2019 when the tribunal made orders



with regard to the judgment date. I find that the appellant was duly aware of the date of judgment and that ground of appeal too fails.

22. The tribunal is also faulted for failing to appreciate that the respondents refused or declined to serve the appellant with the respondents' report, hence denying the appellant an opportunity to make an informed application to the tribunal before the determination of the reference. The respondents have duly denied this allegation. If anything, they insist that the appellant was served and puts the appellant to strict proof. I find that the appellant has not proved that it was not served with the valuation report. Again I find it curious that the appellant did not protest prior to the court delivering its judgment if at all the respondents had failed to effect service of the valuation report as ordered by the court. The appellant, I believe, also had an option to seek for more time to consider the report and seek for the court to defer its judgment. All this was not done and I am not convinced that the appellant was not served with the valuation report as alleged.
23. The remaining issues are grounds 2 and 6 which show the tribunal being faulted for finding no merit in the appellant's valuation report as presented without interrogating the two valuation reports and further too that the tribunal was biased in assessing rent at a figure exactly as demanded by the landlords/respondents as per their notice. I have looked at the judgment delivered by the tribunal. The chairperson indeed considered and interrogated the two reports filed by the parties. However, he expressed reservations with regard to the report submitted by the appellant. He observed that the said report was the subject matter for consideration in BPRT 82/2018 and could not be used to assess the open market rent in respect of the suit premises. The appellant has submitted that the court erred in relying on the valuation report by the respondents only without interrogating both reports. As already stated, the tribunal interrogated both reports. However, it is indeed true that the tribunal had reservations regarding the appellant's valuation report but it gave reasons for it.
24. I note that among the grounds listed, the appellant has not complained against the decision by the court not to rely on its report based on the fact that the valuation report presented was meant for another case - BPRT 82/2018. No rebuttal has been made specifically with regard to the unsuitability of the report. It appears that the court's failure to rely on the report is valid and seemingly acknowledged by the appellant. Needless to state, the valuation reports filed by parties are not necessarily binding upon the court but serve to guide the court in making its determination. I find that the court was not biased in failing to rely on the appellant's report. The report was apparently tailor-made for case No BPRT 82/2018, not for the matter before the tribunal.
25. Lastly, did the court err in assessing rent at a figure exactly as demanded by the respondents? The guiding principle of the tribunal in assessing rent was well stated in the case of *Margaret Wanjugu Nduma & 3 others v James Gichuki Gathura* [2020] eKLR cited with approval by the Court of Appeal case in the case of *Cleaners Limited vs Barclays Bank DCO* [1972] EA 188. It was held that:

“It is the reasonableness of the rent that must be in the forefront 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.”



26. Further Form G of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* also sets out the guiding principles to be considered in assessing of rent. It is stated thus:

“Whereas it is deemed desirable for the purpose of this case that the value and reasonable rent of premises known as be ascertained, you are hereby authorized to enter the said premises and evaluate as follows— “ You are directed to ascertain—

- (i) the original cost of 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 cost 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?)

You are required to suggest the rent you think proper having regard to the market rent.

27. From the above, it appears the tribunal has a wide range of guiding factors in assessing the rent payable. Further, it should be noted that the tribunal has a wide discretion and is not necessarily bound to consider all factors provided it gives reasons for relying on specific factors in determining the rent. Justice M Sila in *Supa Duka Nakuru Limited v Baringo United Company Limited* (2017) eKLR stated that”

The use of averages is not outlawed and neither can it be said that it is the law that what is paid for comparable premises is what must guide the Tribunal. It is not for this court to inform the Tribunal on what method to employ; the Tribunal is free to apply whichever method is thought best in the circumstances of each particular case. In our case, there may indeed have been nothing wrong in taking averages, if the reason for doing so was given, and reason also given as to why the Tribunal did not deem fit to follow either of the party’s valuation.

28. In the case at hand, the tribunal relied on comparative variables as a necessary factor in assessment of rent. The respondents’ report gave an assessment of rent payable in five buildings. The location of the buildings was said to be neighboring that of the appellant’s premise. The area was said to be within the Embu CBD, hence resulting in high and competitive demand for properties. The valuer noted that other premises let out at an average of Kshs 45.33/= per square foot but he recommended that the rent payable be Kshs 30/= per square foot. The rent recommended was therefore Kshs 53,000/=. The appellant has not for instance protested that the premises considered were of higher value or in better condition than the premises he currently occupies. His contention is that the tribunal granted the rent as exactly prayed for by the respondents. I see no conflict in the valuation report that could warrant the tribunal not to rely on its contents. The tribunal, while taking into consideration the report, noted that the respondents had issued a notice seeking to increase the rent to Kshs 40,000/=. I find no fault in this considering that the rent recommended in their report was much higher than the amount awarded by the tribunal.
29. In the circumstances, I am satisfied that the tribunal duly discharged its mandate in determination of the rent payable. I am see no need to interfere with the tribunal’s decision. I accordingly uphold the determination. The upshot of the foregoing is that the appeal herein is dismissed with costs to the respondents.



JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF NOVEMBER, 2022.

In the presence of Mwinja for Njeru Ithiga for respondent and Sankale (absent) for appellant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

15.11.2022

