A.H.Adams Investment Ltd v Television Sales & Rental Ltd (Environment and Land Appeal 58 of 2019) [2022] KEELC 15573 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15573 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 58 OF 2019

JO MBOYA, J

NOVEMBER 10, 2022

BETWEEN

A.H.ADAMS INVESTMENT LTD .... APPELLANT

AND

TELEVISION SALES & RENTAL LTD .... RESPONDENT

JUDGMENT

Introduction and Background

1. On or about the 28th October 2008, the Landlord, who is the Appellant herein took out, issued and served a Notice to alter the terms of the tenancy relationship between herself and the Respondent, who is the tenant in the suit premises.

2. Upon the issuance and service of the Notice to alter the terms of the tenancy, the Respondent herein filed and lodged a Reference before the Business Premises Rent Tribunal, whereby same challenged the proposed alteration of the terms of the tenancy and essentially, the proposed increment of rents.

3. Arising from the filing of the Reference, the Chairman of the Business Premises Rent Tribunal proceeded to and entertained the Reference culminating into the delivery of a Judgment which was rendered on the 26th July 2019.

4. Upon the rendition and delivery of the Judgment, the Appellant herein (who is the Landlord) felt aggrieved and dissatisfied. Consequently, the Appellant lodged and mounted the subject Appeal.

5. For completeness, the appeal under reference was lodged vide Memorandum of Appeal dated the 23rd August 2019 and in respect of which the Appellant has raised various Grounds of Appeal.

6. For convenience, the Memorandum of Appeal has enumerated the following grounds;

i. The Chairman erred in fact in holding that the basement area attracted rent equivalent to half rent for a store or a quarter rent of the shop when the evidence was clear that the basement was used as a store and should have attracted rent commensurate to that of the stores being half of the Shop rent.

ii. The Chairman erred in fact in holding that the basement area attracted rent equivalent to half rent for a store or a quarter rent of the shop when the evidence was clear that the basement was used as a store and should have attracted rent commensurate to that of the stores being half of the Shop rent.

iii. The Chairman erred in fact and in law by not awarding any rent at all for the yard contrary to evidence that the tenants have been paying rent for the same and the Respondent's valuer had in fact quantified a rent for it.

iv. The Chairman erred in law in holding that no rent is payable for the yard for the reason that the previous tenant had constructed a roof over it some thirty years prior.

v. The Chairman erred in fact and in law by taking an average of the two valuation reports prepared by the Appellant and Respondent's respective valuers even though the same were at great variance and should have accepted the comparative values paid by other tenants in the same premises or at least order for a new valuation with set parameters.

vi. The Chairman erred in law by back dating the assessed rent to 1st January 2017 instead of the Landlord's Notice effective date of 1st January 2009.

vii. The Chairman erred in law by giving the Respondent twelve months to liquidate the arrears of rent which is unreasonably long time and the reasonable period should have been thirty days.

viii. The Chairman erred in law by awarding the costs of the Tribunal reference to the Respondent when both parties had partly succeeded and each party should have born its own costs at the very least.

7. The subject appeal thereafter came up for directions, whereupon the parties agreed to have the appeal canvased and disposed of by way of written submissions. In this regard, directions were therefore issued relating to the timeline for the filing and exchange of written submissions.

Submissions by the Parties:

a. Appellant's Submissions:

8. The Appellant filed written submissions dated the 30th September 2022, and same has highlighted and amplified Four (4)pertinent issues for consideration.

9. First and foremost, counsel for the Appellant has submitted that the honourable chairperson erred in fact and in law in failing to grant the terms of the Notice to alter the tenancy as sought, despite the Appellant tendering sufficient and credible evidence to vindicate the proposed increments.

10. Further, counsel for the Appellant has added that the learned chairperson of the Business Premises Tribunal also adopted an erroneous approach and method in arriving at and reaching the final figures, which were ultimately awarded as the assessed monthly rents over and in respect of the suit premises.

11. Secondly, counsel for the Appellants has submitted that the learned chairperson also erred and misdirected himself in finding and holding that the basement area did not comprise of or constitute basement shops. In this regard, counsel implored the court to adopt and rely on the valuation report

which was crafted and prepared by the Appellants valuer and which clearly demonstrated that the basement area constituted and comprise of basement shops.

12. Thirdly, counsel for the Appellant has also submitted that the honourable chairperson of the tribunal also erred in law in failing to order and direct payment of rents over and in respect of the yard, which also comprised of the lettable area.

13. In any event, counsel for the Appellant added that the yard had been converted to and was being used by the Respondent as a store and hence same ought to be chargeable, contrary to the findings and holding by the tribunal.

14. Fourthly, counsel for the Appellant submitted that the chairperson of the tribunal fell in error when same took it upon himself to use and rely on an average arising from the two valuation reports prepared by the valuers for the respective Parties. For clarity, counsel pointed out that it behooved the chair of the tribunal to calibrate on the two sets of reports and thereafter to discern the one that was most appropriate and relevant in the obtaining circumstance.

15. On the other hand, counsel for the Appellant also submitted that the chairperson of the tribunal also erred in law in backdating the assessment of rents to the 1st January 2017 instead of backdating same to the 1st January 2009. For clarity, counsel reiterated that it was incumbent upon the chair of the tribunal to abide by and be bound by the terms contained at the foot of the Notice to alter the terms of the tenancy.

16. In the premises, counsel for the Appellant contended that the chairman of the tribunal ought to have backdated the rent increments to the 1st January 2009, being the Date of the Notice to alter the terms of the Tenancy and not otherwise.

17. Finally, counsel for the Appellant also submitted that having reached an award and proceeded to assess the current rents, the honourable chairperson of the tribunal erred in law in granting to the Respondent a duration of 12 months within which to liquidate, settle and pay the outstanding arrears. In this regard, counsel has contended that by giving the Respondent 12 moths, within which to clear the arrears, the learned chairperson acted unreasonably and to the detriment of the Appellant.

18. Premised on the foregoing, counsel for the Appellant has therefore invited the Honourable court to find and hold that the impugned Judgment of the chairperson of the tribunal was colored with error and hence warrants review, variation and setting aside.

19. Suffice it to point out that the Learned counsel for the Appellant herein neither cited nor referred to any authority or case law.

b. Respondent's Submissions:

20. The Respondent filed written submissions dated the 13th October 2022 and same has raised five issues for consideration and determination by the Honourable court.

21. The first issues raised and canvased by counsel for the Respondent relates to the descriptions of the demised premises, which were let out to and in favor of the Respondent.

22. To this end, counsel for the Respondent submitted that the demised premises comprised of One shop, two rear stores, basement and an open yard.

23. On the other hand, counsel for the Respondent has added that as pertains to the basement, same were being used as stores and hence it was erroneous for the Appellant to have clustered the basement as

shops, which was contrary to and at variance with the obtaining circumstances and purposes for which the premises were being used.

24. Nevertheless, counsel for the Respondents has submitted that the learned chairperson of the tribunal reached and arrived at the correct decision and finding when same held that the basement area did not comprise of the basement shops, but were otherwise stores.

25. Secondly, counsel for the Respondents has submitted that in finding and holding that the yard could not attract payment of rents, the learned chairperson of the tribunal correctly applied and interpreted the provisions of Section 9(2) of the Landlord and Tenant (Shops, Hotel & Catering Establishment) Act Chapter 301 Laws of Kenya.

26. Other than the foregoing, counsel for the Respondents further submitted that the yard upon which the Appellant herein had demanded rents had been improved by the tenant and based on the improvement by the tenant, the Appellant herein, could not demand to receive any rental benefits arising therefrom without reimbursing the Respondent the cost of improvements.

27. Essentially, counsel pointed out that the chairman of the tribunal was therefore right in finding and holding that the yard did not comprise of the lettable area and hence no rents were payable therefrom.

28. Thirdly, counsel for the Respondent submitted that the learned chairperson of the tribunal was right and within the law in adopting and applying the law of averages, in ascertaining and arriving at the relevant rents in respect of the demised premises.

29. Further, counsel for the Respondents added that in adopting and applying the law of averages, the learned chairperson of the tribunal exercised feasibleness and hence same did not fall in error.

30. The fourth issue that was raised by counsel for the Respondent relate to the backdating of the rents assessment to the 1st January 2017 and not the 1st January 2009.

31. According to counsel for the Respondent, the delay in hearing and determining the Reference before the tribunal was caused and substantially occasioned by the Appellant and her counsel.

32. To the extent that the Appellant and her counsel were responsible for the delay in the hearing and determination of the reference, it would be punitive and unjust to decree that the increment be backdated to the date of the Notice to alter the terms of the tenancy, in the manner proposed by the Appellant or at all.

33. In any event, counsel for the Respondent added that the learned chairperson of the tribunal had a discretion in determining and assigning the effective date of the increment. Consequently, having exercised his discretion, same ought not to be disturbed and interfered with.

34. Finally, counsel for the Respondent submitted that the learned chairperson of the tribunal similarly had discretion to order and direct the manner in which the accrued and accumulated rents were to be liquidated, paid or settled.

35. Premised on the foregoing, counsel added that having ordered and directed that the accrued and accumulated arrears be liquidated and settled over a period of 12 years, it cannot be said that the chairperson acted unreasonably and out of proportion.

36. Be that as it may, counsel reiterated that even the order relating to the scheme of payment of the outstanding rents was based on exercise of discretion of the chairperson of the tribunal.

37. Similarly, counsel for the Respondent has neither cited nor relied on any case law or authority, whatsoever.

Issues for Deteremination:

38. Having reviewed the Memorandum of Appeal, the proceedings and the exhibits which were tendered before the Tribunal and having similarly considered the written submissions filed by the Parties, the following issues are pertinent and thus worthy of determination;

    i. Whether the Chairman of the Tribunal erred in finding and holding that the Basement area should attract rent equivalent to half rent for a Store, yet there was clear evidence that the Basement area was indeed being used as a store.

    ii. Whether the Chairperson of the Tribunal erred in finding and holding that no Rents were due and payable in respect of the yard yet the Tenant had been using same as a store and therefore ought to have paid rent in respect thereof.

    iii. Whether the Chairperson erred in law in adopting and applying the law of averages and essentially averaging the proposed increments contained at the foot of the two conflicting Valuation Reports.

    iv. Whether the Chairman of the Tribunal erred in backdating the assessed rents to the 1st January 2017 instead of directing that the assessed rents be payable effective the 1st January 2009.

    v. Whether the Chairperson of the Tribunal erred in granting and affording the Respondent a duration of 12 months to liquidate the rents arrears.

    vi. Whether the Chairperson of the Tribunal erred in awarding costs of the Reference to and in favor of the Respondent.

Analysis and Determination

Issue Number 1 Whether the Chairman of the Tribunal erred in finding and holding that the Basement area should attract rent equivalent to half rent for a store, yet there was clear evidence that the basement area was indeed being used as a store.

39. There is no dispute that the Appellant herein is the registered proprietor and owner of the premises known as L.R No. 209/405/1, located at Adams Arcade, along Ngong road within the City of Nairobi.

40. On the other hand, it is also common ground that the Appellant herein leased or demised to and in favor of the Respondent a designated portion of the suit property, including of a shop, 2 stores, basement and a yard.

41. It is also imperative to state that arising from the demise, the Respondent herein has been variously paying rents to and in favor of the Appellant.

42. In particular, evidence was tendered that the Appellant herein has been generating and issuing two sets of invoices to the Respondent, over and in respect of rents for the designated premises.

43. For coherence, it was pointed out that one set of invoice relates to rent for the shop. In this regard, evidence was adduced that rents for the shop has been in the sum of Kshs.8, 218/=, exclusive of service charge. For clarity, the rents for the shop are payable quarterly in advance.

44. On the other hand, evidence was also tendered that the other invoice relates to rents for the store/ basement. For clarity, the Respondent pointed out that the rent for the store/basement has been Kshs.36, 000/= Only, per month excluding service charge.

45. Similarly, it is important to observe and state that the rent for the basement and Stores has also been payable quarterly in advance.

46. Be that as it may, a dispute arose as to whether the basement area, which is being used as a store, should attract half rent for a store or should attract rent commensurate to that payable on account of a store.

47. According to counsel for the Appellant, the basement area, which is being used as a store should attract rent in the same measure as rent for a store. In this regard, counsel has therefore submitted that in finding and holding that the basement area shall attract half rent of a store, the learned chairperson therefore erred in law and gravely misdirected himself.

48. Nevertheless, before resolving whether or not there was an error on the part of the chair person, it is important to state that the Appellant herein had indeed tendered evidence and contended that the basement comprised of basement shops and not stores.

49. Further, it was the contention of the Appellant that being basement shops, the two basement areas which were rented out and which were being occupied and used by the Respondents should therefore attract rents commensurate to those payable for shops and not otherwise.

50. To this end, it is important to recall the evidence tendered by the landlords valuer, Mr. E. W Lupao.

51. For convenience, the witness stated as hereunder;

> "The approved plans show that there is a shop, two stores, basement shop No. 786 and an open yard"

52. Other than the foregoing, the Appellant's witness also fronted the position that the basement was comprised of shops and not stores.

53. Nevertheless, the chairperson of the tribunal had occasion to visit the demised premises and arising therefrom, same confirmed and authenticated that the basement area was used as stores and not shops.

54. Having come to the conclusion that the basement area was used as stores, the learned chairperson of the tribunal was thereafter obliged to resolve and address the applicable formula for determining rents for the basement area.

55. To be able to reach and arrive at the relevant rent payable, the Chairperson of the tribunal applied and relied upon the established principle for assessment of rents for the basement area which was laid before the tribunal by the Respondent valuer. For clarity, the applicable scheme for assessment of rents for shops, stores and basement area was alluded to and delineated vide the valuation report placed before the court on behalf of the Respondent.

56. In any event, the established practice and scheme for assessment of rents for the various cadre of premises was neither challenged nor impeached by the Appellant.

57. To the extent that the established practice underlines and underscores that rent for basement is ascertained and assessed on the basis of either half of the rent for the store or a quarter of the rent for the shop, the learned chairperson of the tribunal therefore did not err in ordering and directing that the basement area shall attract rent being or commensurate to a quarter of the assessed rents for the shops.

58. Premised on the foregoing observation, it is my finding and holding that in arriving at and concluding that the basement area shall attract rent commensurate to a quarter of the assessed rent for the shop, the learned chairperson of the tribunal did not misdirect himself, either in the manner alluded to or at all.

59. Consequently and in the circumstances, I would not disturb the scheme or formula that was applied and adopted for ascertaining rents payable in respect of the Basement area.

Issue Number 2 Whether the Chairperson of the Tribunal erred in finding and holding that no rents were due and payable in respect of the yard yet the tenant had been using same as a store and therefore ought to have paid rent in respect thereof.

60. The Appellant herein had also demanded that rent be assessed and awarded in respect of the yard area, which was similarly being occupied and used by the Respondent as a store.

61. On the other hand, the Respondent had contended that no rent ought to be charged or levied in respect of the yard. In this regard, the Respondent had contended that it is herself, who had raised and erected the roof to the yard and therefore made same habitable.

62. Further, the Respondent has submitted that having made the improvement over and in respect of the yard area, the landlord could only charge and levy rents, upon refund to the Respondent of the monies spent and incurred on the basis of the improvements.

63. Having considered the respective submissions made on behalf of the Parties, the learned chairperson of the tribunal came to the conclusion that no rents were due and payable over and in respect of the yard area.

64. According to the chairperson the yard area had been improved by the tenant and the cost of such improvement had not been refunded and reimbursed to the Tenant/Respondent.

65. Based on the foregoing, the chairperson of the tribunal found and held that the Appellant herein could not demand rents and by extension rent increases/ increments, over and in respect of the yard area.

66. To this end, the chairperson of the tribunal invoked and relied upon the provisions of Section 9(2) (iii) of the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act Chapter 301 Laws of Kenya.

67. Having reviewed the import and tenor of the provisions of Section 9(2) (iii) of the said Act, I come to the conclusion that for as long as the improvement to the yard area was undertaken by the Tenant/ Respondent, then the Appellant/Landlord, cannot demand and attract rent increment thereto, until and unless same has reimbursed to and in favor of the Tenant the costs of the impugned improvements.

68. In respect of the issue herein, I therefore come to the conclusion that the learned chairperson of the tribunal was within the law in finding and holding that the Appellant was not entitled to rent and rent increases, over and in respect of the open yard, as claimed or at all.

Issue Number 3 Whether the Chairperson erred in law in adopting and applying the law of averages and essentially averaging the proposed increments contained at the foot of the two conflicting Valuation Reports.

69. Upon the filing of the Reference by and on behalf of the Respondent herein, the Parties agreed to retain and engage own valuers, with a view to carrying out valuation exercise and thereafter filing their respective valuation report.

70. Pursuant to the foregoing, it is common ground that the valuers engaged by the various Parties indeed undertook the valuation exercise and thereafter filed their respective reports. For clarity, the Appellant's valuer prepared and filed a report dated the 13th October 2008.

71. On the other hand, the Respondent's valuer prepared and filed a report dated the 9th September 2009.

72. Other than the valuation reports, which have been alluded to in the preceding paragraphs, the chairperson of the tribunal also directed the two parties to direct their valuers to file a Joint report relating to the lettable area. In this regard, a Joint report was thereafter filed showing the extent of the lettable area.

73. For completeness of record, the Joint report relating to the lettable area was forwarded to the Tribunal at the foot of the letter dated the 26th September 2011.

74. Premised on the two sets of Valuation reports, which had been filed by the various valuers, the learned chairperson of the tribunal was expected to calibrate on the said reports and thereafter arrive at a determination pertaining to and concerning the applicable rents over and in respect of the demised premises.

75. It must be observed that the valuation reports which were filed before the Tribunal are Expert opinion and hence same are meant to assist the Tribunal to form an opinion in respect of the reasonable rents over and in respect of the demised premises.

76. Nevertheless, it must be recalled that despite being expert opinion, the honourable court/ Tribunal is not bound by the proposal contained and enumerated therein.

77. On the other hand, it is also appropriate to underscore that the expert opinion, premised and predicated on the valuation report must also be calibrated and evaluated against the totality of the evidence placed before the Honourable court/ Tribunal.

78. In a nutshell, it behooves the Tribunal to consider and evaluate the opinion evidence alongside the rest of the evidence (whether oral or documentary) and thereafter to make an informed determination/ decision.

79. To this end, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros versus Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] 1 EA 139; where the court stated and 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"

80. Additionally, it is also appropriate to reiterate and adopt the holding the Court of Appeal in the case of *Kagina versus Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), where the Court stated and observed as hereunder;

> 42. In *Shah and Another vs. 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."

81. Duly guided and informed by the applicable principles, espoused and enunciated vide the foregoing decisions, it is now appropriate to interrogate whether the learned chairperson of the tribunal properly dealt with the two sets of valuation reports that were placed before him.

82. Be that as it may, it is worthy to note that confronted with the two conflicting and contradictory valuation reports, the learned chairperson of the tribunal resorted to applying the law of averages.

83. Put differently, what the learned chairperson of the tribunal did was to add the proposed recommendations contained at the foot of the Valuation report filed on behalf of the Appellant to the recommendation at the foot of the Valuation report filed by the Respondent and thereafter adopted the average thereof as the basis for determining the rent increments.

84. In this regard, it may be appropriate to reproduce the pertinent aspects of the impugned decision. For clarity, same are reproduced as hereunder;

> " In light of the above findings, the tribunal is satisfied that the average rates between the landlord valuation recommendation of kes.140.40/= only per square foot and the tenants valuer valuation of kes.56.55/= only per square feet yield a fair open market rent.
>
> That is; kes.140.41 + kes.56.55 / 2 = kes.98.48/= only
>
> The tribunal will use the rate of kes.98.48 per square feet for the main shop and half rate of kes.49.24 for the store and kes.24.62 for the basement".

85. From the foregoing excerpt, what the learned chair person of the tribunal did was to apply the law of averages and thereafter arrived at what same deemed to be reasonable and representative of fair open market rent.

86. In my considered view and being guided by the Dictum handed down vide the decisions alluded to hereinbefore, concerning the manner of dealing with Expert Evidence, it was not open for the chairperson of the tribunal to engage in averages, with a view to arriving at the appropriate and relevant rent increments.

87. To the contrary, what the learned chairperson of the tribunal ought and should have done was to calibrate on the two-conflicting report, consider same and thereafter form an opinion on which of the two reports was reflective of the correct and obtaining circumstances, taking into account the individual comparables relied upon and utilized by each valuer.

88. In respect of the foregoing observation, it is appropriate to adopt and endorse the holding of the Honourable Court in the case of *Tala Investments Ltd. versus 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."

89. Having made the foregoing observation, it is now appropriate to review the two sets of valuation reports which were filed by and on behalf of the Parties.

90. To start with, the Respondent's valuer, namely, M/s Liska Properties filed a valuation report dated the 9th September 2009. In this regard, the said valuer relied on comparables which were all located at Hurlingham Area within the City of Nairobi.

91. To the contrary, the Appellant's valuer, namely, M/s Real Appraissal Ltd filed a Report dated the 13th October 2008 and same relied on comparables obtaining within the suit property and located at Adams Arcade. For clarity, the comparables relied upon by the Appellant's valuer were obtaining within the same locality/location.

92. To my mind, the comparables relied upon and utilized by the Appellant's valuer, were relevant, appropriate and applicable to the dispute beforehand. Simply put, the said comparables were apt and succinct for purposes of assessments.

93. Conversely, the comparables which were relied upon and used by the Respondent's valuer related to a completely different area, quite distinct from the locality of the suit premises.

94. In view of the foregoing, the appropriate and relevant valuation report that ought to have been applied and adopted for purposes of ascertainment of the rent increment was the valuation report filed on behalf of the Appellant and not otherwise.

95. On the other hand, I have also pointed out that it was not within the mandate of the chairperson of the tribunal to engage and indulge in the game of averages, either in the manner espoused vide the Judgment or at all.

96. Based on the foregoing, I come to the conclusion that the mechanism and scheme that was applied by the chairperson of the tribunal, in ascertaining and arriving at the rent increment, was erroneous, mistaken and bad in law.

97. Having come to the foregoing conclusion, the next critical issue that requires to be addressed relates to be relevant and applicable rents due and payable in respect of the designated premises.

98. In this respect, it ought to be recalled that the Respondent is occupying three separate and designated spaces, namely;

    i. One shop

    ii. Two stores

    iii. Basement area

99. Consequently and applying the formula which was discussed in respect of issue number one hereof, the applicable rents shall therefore be as hereunder;

a. The shop

292. 95 square feet x 140.40 = 41, 130.18

b. First store

185.54 square feet x 70.20 = 13, 024.91.

c. Second store

185.54 square feet x 70.20 = 13,024.91

d. Basement area 2, 342.42 square feet x 35.10 = 82, 218.94

100. Premised on the foregoing calculations, the relevant and appropriate rents in respect of the demised premises would work to Kshs.149, 398.03/= only.

Issue Number 4 Whether the Chairman of the Tribunal erred in backdating the assessed rents to the 1st January 2017 instead of directing that the assessed rents be payable effective the 1st January 2009.

101. In the course of crafting the impugned Judgment, the learned chairperson of the tribunal observed that the reference before the tribunal had taken along time prior to and before same could be heard and determine.

102. For the avoidance of doubt, the chairperson observed that though the reference was lodged in the year 2008, same could not be heard and disposed of expeditiously, for various reasons which were beyond the control of the tribunal.

103. Be that as it may, after taking into account the duration and extent of delay, the chair person of the tribunal held that same would backdate the rent increment to the 1st January 2017.

104. Having found and held the effective date to be the 1st January 2017, the counsel for the Appellant has now contended that the decision to backdate the effective date to 1st January 2017 was erroneous and bad in law.

105. According to counsel for the Appellant, the learned chairman of the tribunal ought to have decreed the effective date to correspond with and accord to the duration stipulated and named at the foot of the notice to alter the terms of the tenancy.

106. Simply put, the counsel for the Appellant was of the view that the effective date ought to have been 1st January 2009 and not otherwise.

107. However, it is important to note that in designating the effective date, the chairman of the tribunal is conferred and bestowed with a discretion. Consequently, the chairperson of the tribunal can in the exercise of his discretion designate the effective date to be the one named in the notice or such other date as may be deemed appropriate, just and expedient, taking into account the obtaining circumstances.

108. To my mind, the chairman of the tribunal correctly exercised his discretion in designating and naming the 1st January 2017, as the effective date.

109. To appreciate the extent and scope of the Jurisdiction of the chairperson 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.

110. Other than the foregoing, the extent and scope of the Jurisdiction of the chairman of the Tribunal, 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 9th October, 2006. It was received in the tribunal on 13th December, 2006. The appellant desires that the effective date should have been the date of the judgment i.e. 18th September, 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”.

111. 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 find and hold that the backdating complained of, was not only within the mandate of the chairperson of the tribunal, but same was similarly lawful and legal.

112. In the premises, I am not disposed to disturb the designation and naming of the 1st January 2017 as the effective date for rent increment.

Issue Number 5 Whether the Chairperson of the Tribunal erred in granting and affording the Respondent a duration of 12 months to liquidate the Rents arrears.

113. Other than the complaint pertaining to and concerning the naming of the effective date for the rent increment, the Appellant herein has also complained that the learned chairperson of the tribunal also erred in granting the Respondent a duration of twelve (12) within which to pay the rent arrears.

114. It is my considered view, that in the course of exercising his/her jurisdiction, the chairperson of the tribunal is conferred and vested with discretion over and in respect of various matters, inter-alia , whether any amount found due and payable ought to be payable in one lumpsum or otherwise.

115. As pertains to the rent arrears arising from and premised upon the increment, the learned chairperson found that same was substantial and hence decreed that same be paid over a duration of 12 months.

116. I must say, that in granting and directing that the ensuing rent arrears be paid within a duration of 12 months, the learned chairperson of the tribunal was exercising a discretion bestowed and conferred upon him by the Law.

117. In my considered view, the exercise of such discretion can only be interfered with and varied, if it has been shown that the chairperson of the tribunal failed to take into account relevant factors, took into account extraneous issues/circumstances or arrived at a manifestly erroneous position, contrary to and in contravention of the established principles of law.

118. In the absence of proof that the learned chairperson of the tribunal committed any such error, the 1st Appellate court must exercise deference and due circumspection. For clarity, the first appellate court must be reluctant to interfere with the exercise of discretion, unless the stablished principals are proven and satisfied.

119. To vindicate the circumstances in which the 1st Appellate court can interfere with the findings of the trial court and more particularly, the exercise of discretion, it is appropriate to take cognizance in the case of *Mbogo versus Shah* (1968) EA, where the court stated as hereunder;

> " I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

120. Premised on the foregoing observation, I must state that the decision to allow the rent arrears to be settled and liquidated within 12 months, was fair, just and reasonable, taking into account the obtaining circumstances.

121. In a nutshell, I find and hold that the Appellant herein has neither established nor proved the basis to warrant interference with the exercise of the discretion by the chairperson of the tribunal.

Issue Number 6 Whether the Chairperson of the Tribunal erred in awarding Costs of the Reference to and in favor of the Respondent.

122. The Appellant herein have also taken issue with the award of cost to and in favor of the Respondent.

123. According to the Appellant, each party had partially succeeded before the tribunal. For clarity, whereas the Appellant had sought for variation of the rent from the sum of Kshs.51, 293/- to Kshs.336, 500/- Only, per month, the tribunal adjusted the rents to the sum of kes.104, 766.28/- only.

124. On the other hand, the Respondent had opposed the Notice for rent increment and sought to have the rent in the premises retained in their current state. However, the position taken by the Respondent was not acceptable to the tribunal.

125. Essentially, each party won and lost. In this regard, the just and reasonable finding on cost ought and should have been that each Party do bear own costs of the Reference.

126. Notwithstanding the evident draw before the tribunal, the honourable chairperson proceeded to and awarded costs to the Respondent.

127. To my mind, the order pertaining to and awarding costs in favor of the Respondent was erroneous and colored with failure to comprehend the obtaining situation before the tribunal.

128. Consequently and in my humble view, the award of costs to and in favor of the Respondent constitutes improper exercise of discretion.

129. In the premises, I would be minded to interfere with the limb of the order of the Chairperson of the Tribunal, condemning the Appellant to pay the costs of the Reference.

Final Disposition:

130. Having reviewed the thematic issues that were highlighted and amplified in the body of the Judgment, it is now appropriate to render the final and dispositive orders.

131. Consequently and in the premises, I do find and hold that the Appeal is partially successful. For clarity, the Appellant has succeeded on one ground of appeal.

132. Premised on the foregoing, the final orders of the court are as hereunder;

    i. The Appeal be and is hereby allowed.

    ii. The Judgment and decree of the Business Premises Rent Tribunal rendered on the 26th July 2019 be and is hereby set aside and quashed.

    iii. The Judgment of the Tribunal be and is hereby replaced with the decision that the applicable and relevant open market rent for the demised premises is Kshs.149, 398.03/= only exclusive of VAT and service charges.

    iv. The Assessed rent, details in terms of paragraph (iii) shall be payable w.e.f 1st January 2017.

    v. The Respondent shall pay and clear the outstanding rent arrears arising from the Judgment herein within a duration of four (4) months from the date hereof.

    vi. In default to settle and liquidate the outstanding arrears, the Appellant shall be at liberty to levy Distress.

    vii. In respect of the initial assessed rents, which was payable within 12 months, it is deemed that same has since been paid, liquidated and settled.

    viii. Each party shall bear own costs of the Reference.

    ix. The Appellant shall be entitled to a Quarter costs of the appeal to be taxed and certified by the taxing officer of the Honourable court.

133. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Ms. Otieno h/b for Mr. Koech for the Appellant.

Mrs. Kingoo Wanjui for the Respondent.