1. Civil appeal
2. Subject:
    a) The landlord and Tenant (Shops, Hotel and Catering Establishments) Act Cap. 301 Laws of Kenya in Business Premises Rent Tribunal.
3. Memorandum of Appeal
    a) Jurisdiction of the tribunal
        i) Dispute pending in the High Court on same issue does Tribunal have jurisdiction to proceed and determine same and or similar dispute?
    b) Procedure of trial
    c) Assessment on rent
        i) Two reports discredited
        ii) Failed to inspect suit premises
        iii) New assessment disputed as being "exorbitant and exploitative."
4. Respondent
    a) Appellant no longer in the premises
    b) No irregularity as to the hearing of the tribunal case
5. Held:-
    a) Jurisdiction of tribunal
        The tribunal has jurisdiction
    b) Procedure of trial
        This was irregular
    c) Assessment of rent
        This was arrived at irregularly
        Appeal allowed with costs to the appellant.
6. Case law
7. Advocates:-
    Masore Nyangau & Co. Advocates for appellant

    Rayani Rach Advocate for the Respondent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Appeal 539 of 2001

JOSEPHAT THUO GITHACHURI

T/A KIARIGI BUILDING CONTRACTORS ……...APPELLANT

VERSUS

PARKVIEW PROPERTIES LIMITED ……..……RESPONDENT

(Being an appeal from the judgment of Mr. G.K. Mwaura, Chairman, Business

Premises Rent Tribunal, delivered on the 19.9.2001 in BPRTC No.301 of 2000)

1: PROCEDURE

1. Traditionally where an appeal lies from a decision of a tribunal under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap.301 Laws of Kenya Two judges of the High Court are appointed. The reason for this is that the High Court is the final Court of appeal. It does not mean though that a single judge cannot hear such an appeal. Indeed they can. In this appeal the appellant requested for a Two Bench Judge (Visram J 26.2.04). In September and October 2005 Ang'awa J and Mutungi J were assigned by the Hon. The Chief Justice to hear Two Judge bench cases on Thursdays only.

II: BACKGROUND

2. Josephat Thuo Githachuri (the appellant herein) is a businessman trading as KIARIGI Building Contractors. He occupied offices premises in Krishna Mansion LR 209/2635 and LR 209/2636 which is situated along Moktah Daddah Street overlooking the Jeevanjee Garden within the Nairobi Central Business District. The building is a winged five storey commercial building and the plot rectangular shaped. Mr. Githachuri occupied 3 offices on the third floor being:-

2(i) Officer No.67 ……. rent Ksh. 730/- per month

2(ii) Office No.65 …… rent Ksh. 1,500/- per month

2(iii) Office No.66 …… rent ksh.1,500/- per month

3. He made payments by cheque and would pay ½ yearly rent of Ksh.22,380/-. In the year 1992 he issued cheques to the agents of his landlords (the landlord being Parkview Properties Ltd.) the rspondent herein. The agents of the landlord were known as J. Ruparel.

4. Unknown to the appellant M/s J Ruparel failed to bank the cheque. The reasons was given that one of the brother in the proprietorship forgot the cheques in a drawer. By the end of April 1995 the rent that accumulated to Ksh.126,820/- something that the appellant could not afford to pay in one installment. Business was bad. He then negotiated with the respondents agent which agreement was reached on the 31 July 95 that ["he would surrender to the landlord offices No.65 and 66]. He would retain office 67.

> "It was further agreed that "all the improvements he had made to the offices would be computed by the appellant and he would then be credited the value of the improvements."

5. The improvements to the office was valued at Ksh.80,280/05 by the appellant. He was to surrender the two offices 65 and 66. On the 4 August 95 he was contacted by the agents who invited him to sign a lease for office No.67. When the appellant went to sign the lease he discovered that the rent had been increased from Ksh.730/- to Ksh.7,000/-. He refused to sign stating that the rent was excessive. He instead waited to know from the landlord the issue of the credit due to him and thereafter would he surrender offices 65 and 66.

6. Whilst awaiting this response, on the 2 September 95, M/s Rosam Enterprises Auctioneers auctioned him and distress all his goods in the total value of Ksh.232,164/-. He had already paid arrears of rent of Ksh.44,780/- and had issued a cheque No.919644 for Ksh.22,380/- as the first installment to clear the rent arrears. He saw this action as being malicious as he was ready to pay rent. On 5.8.95 he surrendered back the offices.

7. It is now well established (Shah J as he then was) that Tribunals do not have powers to issue an injunction. This lies with the High Court. It was then on 5 September 1995 that the appellant filed a suit in the High Court together with an application seeking an injunction. The suit prayed for:-

> "A declaration that the defendants, M/s Parkview Properties Ltd, acted maliciously and unlawful".

He prayed also for a:-

> "7(ii) Prohibitory injunction restraining the defendants from alienating or the premises known as office 65,66 and 67 7(iii) A mandatory injunction restoring and reinstating full and unconditional possession of the suit premises 7(iv) General Damages."

8. Bosire J gave an interim injunction prohibiting the defendant/respondent from alienating the premises. The defendant/respondents proceeded to let out all the three offices. On the 4.9.95 they filed a defence through M/s P.J. Kakad & Co. advocates whereby they stated the premises were let out on 2 September 95 to M/s Remar Network Services. That the said firm had taken all the three office premises and executed a lease on 4 September 1995. They also claimed that the appellant can now retain office No.65, not 67 subject to the new rents. The offices 65 and 67 having been surrendered at the end of June 1995.

9. At the inter parties hearing the court (Mwera J) ordered by his ruling of 29.9.95 that:-

> "The plaintiff be reinstated to office No.65. That the attached goods be returned to him. That the plaintiff should enjoy possession of that office [65] according to the terms the two would agree."

The defendant/respondent did not immediately comply. The appellant attached the defendants goods. The defendant/respondent after consulting with the tenants now already in possession with considerable persuasion were able to remove them from office 65 by 4.12.95 about 3 months after the order was given. The court was to decide the terms of the rent.

11. The defendant returned to court on 7.12.95 and confirmed to the judge that the courts orders had now been obeyed. As a result, the need of any further orders on the matter was not necessary. 12. If we recollect well in the year 1996 Mwera J was transferred out of Nairobi to the High Court at Machakos. The main suit never proceeded to hearing to date. This file Hccc2802/1995 is still pending.

13. Five years later on the 25 July 2000, the defendants/respondent sent the appellant a notice stating that he had outstanding rents as follows:-

1995	1 month	Kshs. 5,900/-
1996	12 months	Kshs.70,800/-
1997	12 months	Kshs.70,800/-
1998	12 months	Kshs.70,800/-
1999	12 months	Kshs.70,800/-
2000	7 months	Kshs.41,300/-
Total rent due		Kshs.330,400/-

14. The appellant filed reference as a tenant to the landlord and Tenants (Shops, Hotels, and Catering Establishment) commonly known as the business Premises Rent Tribunal Cap.301 Laws of Kenya in which he opposed the notice and further sought leave to have the same filed without reference to the Landlord/defendant.

15. On the 1 October 2000 the rent was raised to Ksh,9,000/-. By a notice of motion dated 9.10.00 and filed 11.10.00 the tenant/appellant sought a declaration from the tribunal that the said suit in the tribunal was subjudice through High Court case No.2802/95. That the increase of rent from Ksh.730/- to Ksh.9000/- was indeed unreasonable. The landlord on the other hand noted that the terms of the tenancy to be altered to compare the open market rent at Ksh.9,000/-.

16. Two valuers filed the assessment reports: M/s Mwaka Musau Consultants whereby the premises occupied by the appellant was assessed at Ksh.7,550/- being 117sq ft at 64.50 per sq ft per month.

17. The chairman G.K. Mwaura Esq. of the Tribunal (Business Premises Rent Tribunal) assessed the rent at Ksh.5,900/- with effect from 1 October 1998. His judgment was dated 9.6.00.

18. By an earlier application the applicant/tenant tried to state that the whole proceeding were subjudice due to the pending case Hccc2802/95 (Mwera J). He nonetheless did forward his valuation from the City Valuers dated 4 September 2001 being 290 per sq meter per month. Thus 10.68 sq meters at 2901 = Ksh.3,100/-.

19. When the parties appeared before the chairman G.K. Mwaura it was agreed by consent of the parties that the "Reference was properly before the tribunal"

20. An application was to be therefore filed under seciton 9 (1) of the Act whereby a reference to a tribunal may, after such inquiry as may be required " . . . make such further or other order as it thinks appropriate".

21 The respondent brought it to the chairman's notice that the High Court had no powers to assess the rent but it may make a declaration and award damages.

22. On the 29.6.01 G.K. Mwaura the chairman of the tribunal dismissed the application stating that the tribunal was subjudice. He assessed costs against the appellant at Ksh.3,000/-.

23. On 19.9.01 the chairman of the tribunal assessed the net payable at Ksh.5,500/-. The appellant appealed. It is the issues raised in the Memorandum of Appeal which is the subject matter of this judgment.

II APPEAL

24. The appellant tenant being dissatisfied with the ruling of Mr. G.K. Mwaura Chairman of the Business Premises Rent Tribunal (BPRT) delivered on 29.8.01 appealed to the High Court of Kenya on 23.10.01. The appeal was admitted to hearing (Ransley J 25.11.03). 25. The Memorandum of appeal in summary stated and dealt with:-

25 (I) Locus of the Tribunal

25.(i) That the Chairman proceeded to hear and dispose of the reference when there already was a dispute pending in the High Court of Kenya at Nairobi in Case No.2802/95. According to the appellant between the High Court and the tribunal it is the High Court which ought to have heard the said reference

PROCEDURE

(Appeal ground 2,3,4,7,9 and 10) The procedure in which the trial was conducted was not properly done according to law (Order 17 Civil procedure Rules). The chairman determined the reference without hearing the landlord, the tenant and or their witnesses. Reports were tendered in without calling the markers. As such there in fact was no hearing.

25(iii) ASSESSMENT (Ground 5)

There were two valuation reports submitted. The chairman discredited both reports, yet relied on them to come up with an assessment. What the tribunal chairman should have done is to engage a separate and independent valuer. 25(iv) It was also an error, the appellant argued, to have the chairman order rent be at Ksh.5,500/- with effect from 1 October 2000. The notice was back dated to the tenant. There required to be at least 2 months notice to the appellant (namely 1.12.00 or

1.1.01) before it could come into effect.

ARGUMENTS BY THE RESPONDENT

26(i) In reply, the respondent is that the valuation of the two reports reflected a very small difference. As such this was the chairman of the tribunal who accepted the area in question as belonging to the appellant.

26(ii)PROCEDURE

The respondent saw that the tribunal was given powers under seciton 9 of the act may do or make further orders as it thinks appropriate or deems necessary. If it is seem that the procedure of holding trial was irregular it serves no purpose now as the appellant has already vacated the premises.

26 (iii) On the courts jurisdiction, with the tribunal, it is the appellants who have filed the reference and not the respondent. As such they are the one who invoked the tribunal jurisdiction. Nonetheless, Mwera,J gave a clear direction that the reinstatement to room 65 was to be agreed on terms agreed by the parties. It is clear he stated, that the only person to determine rent is the tribunal

26(iv) Assessment reports on the rent.

It is common practice, it was argued, that parties filed their respective reports. A full trial would not normally be heard. In this case submission had been put in by the appellant tenant. (His advocate failed to attend court and the hearing proceeded on. There was no application to set aside the proceeding as requied by law where the parties are absent.)

26(v) In doing the valuation report, the valures are to take the comparable rents going three years back. The appellants valuation report did not disclose how old the comparable rents were. They could have been, infact, 20 years old.

Finding of the court

27. From the three files before us, namely Civil Appeal 539/01 Nairobi, Original file tribunal case No.301/00 and Hccc2802/95, the genesis of this matter began in the High Court of Kenya by way of an injunction. As stated earlier the tribunals do not have access and or jurisdiction to determine and issue orders for injunction. This lies wholly with the High Court.

28. It has also been established that the appellant/Tenant is a protected tenant as prescribed in the Landlord Tenant (Shop, Hotels and Catering Establishment Act).

"Controlled tenancy" means

"A tenancy of a shop, hotel on catering establishment

28(a) Which has not been reduced into writing; or

28(b) Which has been reduced into writing and which

28(i) is for a period not exceeding five years or

28(ii) Contains provisions for termination, otherwise that for breach of covenant within five years from the covenant thereof or

28 (iii) Relates to premises of a class specified under subsection (2) of this section (2). Provided that no tenancy to which the Government, the community or a local authority is a party whether as landlord or as a tenant, shall be controlled tenancy."

29. “Shop” – Means premises occupied wholly or mainly for the purposes of retail or wholesale trade or business or for the purpose of rendering services for money or money’ worth.”

30. To our understanding the appellant was and had always been a protected tenant and would therefore fall under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap.301 Laws of Kenya.

This act is:-

> “An act of Parliament to make provisions with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”

31. The task of the tribunal is to establish whether the tenant is being exploited or evicted. The tribunal would then use its utmost powers to protect such tenant.

32. In this case the tenant appellant feels he has not been well protected. He was not given a fair trial at the assessment hearing. He felt that the High Court decision would have been used to influence this case at the tribunal. He therefore appeals for justice. 33. The respondent on the other hand feels that the only issue left herein is that of costs. The reasons being that the tenant has already been evicted. 34. It is a right of every party to be heard. We wish to just state that the fact that the tenant has since been evicted and or left the suit premises – perhaps under undue pressure or otherwise, does not mean that such tenant forgoes the right to be heard. Further, a tenant who has left the premises but still persues his right noting that he was a tenant when the reference was being filed is described as a constructive tenant.

35. The question that is before us is whether the High Court has jurisdiction over the tribunal more so where a suit has been filed in the High Court? There are certain remedy that the tribunal cannot give to the tenant. One of them is that the tribunal has no power to give damages, and an injunction. The tenancy may get an award for good will. In these areas the High Court has jurisdiction and as such it was up to the tenant to pursue these claims.

36. For instance the High Court suit 2802/95 when the plaintiff sought a declaration, injunction and prohibitory orders from evicting him, his prayers, through interlocutory application was granted. What the tenant failed to pursue was the issue of General Damages for the wrongful eviction and pursuing to full hearing of the main suit. Instead the tenant waited almost 4 to 5 years later to think about this suit which he did not diligently pursue. The landlord instead filed a notice upon him of increasing the rent to Ksh,9,000/-. This figure fluctuated to Ksh.7,000/- then to Ksh.5,900/- when the tenant then filed a reference to establish the rent required, it was established at Ksh.5,500/- The appellant, tenant appealed against this rent on grounds that it was erroneously arrived at and it was excessive.

37. We would find that the High Court case 2802/95 does not in anyway over ride the Tribunal. That case was dealing with injunction, prohibitory and mandatory to safeguard the tenant from being evicted. Infact the High Court reinstated the appellant/tenant back into the premises.

38. The tribunal has powers to assess the rent and not the High Court unless the matter comes to it by way of an appeal.

Was the chairman of the tribunal correct in the method that he assessed the rent? To our understanding of a tribunal is “a body established to settle certain types of disputes” (Concise Oxford English dictionary 10th Edition 2002). This certain type of disputes are those arising between the Landlord and Tenant of a Business Premises. At the time the notice on the rent was served on the tenant intending to raise the rent. The notice dated 26.7.00 stated that:-

> “The Parkview Properties Ltd the Landlord of the above mentioned premises hereby give you notice altering the two/condition of your tenancy with effect from 1st October 2000.

The proposed alternations being;-

(i) Your rent be raised to Ksh.9,000/-

(ii) You should bear and pay in addition you share of the site value tax land rent, light, water charges and all other outgoing and service charge.

The grounds in which we seek the alterations are:-

"The present rent is much below what would be reasonably be expected to be obtained in the open market for the said premises and facilities enjoyed by you. The other charges claimed are also in keeping with the tenant on the open market."

39. One month as of 29.9.00 was given to the appellant to notify whether the defendant accepted the same or not.

39. The tenant did not wait the 30 days but instead filed the reference in question in which he asked the tribunal to investigate.

40. The said landlords also demanded arrears of rent and tentatively came up with a rent of Ksh. 5,900/-. Of course the tribunal must indeed intervene and be able to assess the correct rent between the parties. This to our mind is not the task of the High Court.

41. The advocate for the appellant tenant participated in the assessments of rent. He stated though, he consented the tribunal had jurisdiction it did not mean that in reality the tribunal had jurisdiction. We rule that the tribunal did have jurisdiction to hear the issue of assessment of rent after due notice to the appellant/tenant was given.

42. The question arises as to whether the due process to arrive at the said decision was correct? In a tribunal there is always a chair and members. There seems to be no members herein. It is imperative that the chairman makes decision with members duly appointed by the Minister to assist the chairman and the vice chairman to come to its conclusive decisions.

43. Secondly, the Act provides that the application of the Civil Procedure Act Cap.21 applies in the following cases.

Rule 16:-

"The Tribunal shall have the same parties as are vested in a court when trying a suit under the Civil Procedure Act in respect of the following matters.

a) Appearance of parties and consequences of non-appearance

b) Enforcing the attendance of any person and examining him on oath or affirmation

c) Compiling the production of a document

d) Issuing commission for the examination of a witness and any proceeding before the Tribunal shall be deemed to be a judical proceeding. Thus any one committing perjury, gives false evidence or destroys documents and or evidence falls under judical proceeding (Penal Code Cap.63 Section 108 –109, 112 – 116- 121).

44. It is thereafter the duty of the Tribunal for the chairman to record the decision. It is mandatory to:-

42.(a) Record the date of the reference

42. (b) Names of the applicants and respondent

44.(c) Record the evidence

44.(d) Date of hearing and whether the premises were …….. or not.

44.(e) Composition of the Tribunal and

44.(f) The application and any other documentary exhibits shall be attached to the record."

(Emphasis supplied)

At the conclusion, the determination or order of the tribunal shall be served on those effected by the decision.

45. From the proceeding of the lower court (tribunal) it is clear that the advocate for plaintiff conceeded to the jurisdiction of that court. He then failed to appear for the hearing of the assessment of the rent. The defendant stated he ought to have set aside the proceeding and request to be heard but did not.

46. We would point out that unless the parties agree to put in the documentary evidence in by consent and without calling the maker, in which case both parties would submit, there ought to be a trial and full hearing of the issues in question. In this case, the plaintiff ought to give evidence why he objects to the increased rent together with evidence from his valuer why he would find the rent being excessively high. This would be supported by the evidence of the landlord and his valuer. The tribunal has assessors attached to the tribunal who may also give their finding. The chairman has powers, where he rejects both reports, to employ an independent valuer to come up with a reliable, independent, valuation. Section 12(3) of the Act, refers. In either way the rules of procedure must be adhered to.

47. A tribunal is meant to be less formal than a court of law in conducting its trial but where there are highly contentious litigants it is advisable to ensure that the composition of the bench are three, and the procedure of a full trial be based according to the Civil Procedure Rules.

48. "Submissions" was infact not an agreed method of trial. The assessors must appear to court, be sworn and cross examined on their report. Thereafter the parties submit to expand the reports that is required to prove to the tribunal is most agreeable. We would hold the method and procedure used in arriving at the assessed rent is irregular and would accordingly set aside the decision arriving at the rent of Ksh.5,500/-. We hold that a fresh assessment be undertaken by independent valuers before a different bench in the tribunal.

49. As to the actual assessment of rent, this rent having not been subject to cross examination by parties (who had not put in the reports by consent and without calling the markers) cannot be relied on.

50. The court understands that the appellant has left the suit premises. If this is true and if the litigant/applicant wishes not to pursue the suit then the issue of exemplary damages can only arise in the suit Nairobi Hccc2802/95 already filed earlier and seeks the same prayers, to be duly amended and persued.

51. The appeal hereby succeeds.

The rent assessed by the tribunal is set aside with costs to the appellant

Dated this 10th Day of November 2005 at Nairobi.

M.A. ANGA'WA

JUDGE

O.K. MUTUNGI

JUDGE