REPUBLIC OF KENYA

IN THE HIGH CORUT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 722 OF 2001

MUTEMA UUKI WINES & SPIRITS DISTRIBUTORS LTD
……..APPELLANT

VERSUS

THOMAS K. MWANGI & OTHERS …… RESPODENTS

JUDGEMENT

This is an Appeal against the decision of the Business Premises Rent Tribunal (hereinafter the "Tribunal") at Nairobi which was made on 9. 09. 2001. Before that Tribunal the Appellant here was the Applicant (hereinafter the "Tenant"). The Respondents here and below will hereinafter be referred to as "the Landlord."

The Tenant occupies business premises on Plot LR 209/697/38 otherwise known as KAGONDO BUILDING on Sheikh Karume/River Road Junction in Nairobi. It is a double storey commercial building with several occupants, but the Tenant occupies a space measuring approximately 170 Sq feet (approximately 15.6 sq. m) for its wines and spirits shop business.

The dispute arose in 1995 when the Landlord served on the Tenant a Notice under Section 4 (2) of cap 301, altering the terms of the tenancy. The Notice was dated 30. 03. 1995 and it sought the increase of rent from Shs.600 per month to Shs.8,000 per month with effect from 01. 06. 1995. The reason given was that the present basic rent was below market value and was uneconomical. As we shall see shortly it was not the only notice served on the tenants in that Building by the Landlord.

The notice required the tenant to intimate compliance but the tenant invoked section 6 for the Act and referred the matter to the Tribunal on 03. 05. 95. The reference was however not determined until 19. 09. 2001 when the Tribunal delivered its Judgment determining the new rent at Shs.4,700/= per month with effect from 01. 06. 1995. In arriving at that conclusion the Tribunal relied on valuation Reports filed by respective valuers of the parties and applied the average rate for all the comparables referred to in the said reports. The written submission of the Tenant which was the only one filed, was also considered. Each party was to bear its own costs.

The Tenant was aggrieved by that decision and therefore filed an Appeal challenging it on 12 grounds as follows:

> "1. The Tribunal erred in backdating the assessment of rent of Kshs.4,700/= to 1st June, 1995 being the date specified in the notice.
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> 2. The Tribunal in backdating the effective date of the increased rent to 1st June, 1995 (and thereby in backdating the increased rent by a period of 6 years) erred in so doing and in thereby imposing

on the Tenant an undue and harsh burden.

3. The Tribunal erred in backdating the increased rent by a period of more than 6 years and in failing to vary the effective date to the date of its ruling or some other date and the Tribunal erred in failing to observe and to hold that the Landlord had fai led or neglected to diligently to prosecute its notice.

4. The Tribunal erred in failing to observe and to hold that the Landlord had:

a). Delayed in filing its valuation Report and /or

b). Delayed in prosecuting its notice and filing or adducing its ex pert evidence and /or

c). Caused delays on several occasions by failing to be ready to continue with the case for the hearing of the case on hearing dates fixed before the Tribunal.

5. The Tribunal erred in assessing the rent at the rate of Kshs.4,700 /= per month and awarding to the Landlord an amount higher than that assessed by its in respect of other tenants in the same building.

6. The Tribunal's assessment of rent went against the weight of the evidence before it.

7. The Tribunal erred in faili ng to give any or any adequate or sufficient regard to the Tenant's valuers report and the Tribunal erred in disregarding the expert opinion of the Tenant's valuer.

8. The Tribunal erred in failing to dis - regard the Landlord's Valuer's Valuati on Report which contained defects.

9. The Tribunal erred in giving undue regard to the Landlord's Valuers Valuation report and failing to observe that in giving regard to the Landlord's Report the Tribunal was in effect awarding a speculated increase of rent.

10. The Tribunal erred in failing to observe that the other comparables in the Landlord's Valuer's report were unreliable.

11. The tribunal erred in failing to award costs to the Tenant in any event.

12. The Landlord's notice had sought to increase the rent of Kshs.600/= to Kshs.8,000/= per month and the Landlord's Valuer had come to a recommendations of kshs.6,710/= per month, the Tenant's Valuer had recommended Kshs.3,400/= and the Tenant by its submission had offered kshs.4,215/= per month thereby illustrating that the Tenant who was offering Kshs.4,218/= per month had won the cause. The Tribunal in failing to award costs to the Tenant erred in failing to follow the principle that costs follow the event."

In arguing the Appeal however, Learned Counsel for the Tenant Mr. Rach condensed them into three grounds covering three areas namely:

1. The costs in the Tribunal covering grounds 11 and 12.

2. The effective date of the rent increase: covering grounds 1 -4.

3. The quantification of the Rent assessed: covering grounds 5 -10.

On the first of the three grounds Mr. Rach submitted that the Tenant had virtually succeeded in opposing the rent increase demanded by the Landlord and the costs of the reference should therefore have followed the event as the law requires. That is because the landlord sought an increase upto Shs.8,000 per

month. The tenant in submissions filed in Court on 3. 9. 2001 offered to pay Shs.4,215 and the Tribunal assessed it at Shs.4,700/=. It was a virtual success for the tenant since the difference is negligible.

For his part Learned Counsel for the Landlord Mr. Kihara did not think the order made on costs was being challenged on any serious ground. That is because upon being served with the Notice of rental increment, the tenant did not make any offer of any other amount of rent. Instead he refereed the matter to the tribunal to asses the rent. The first time an indication was given on acceptance of any rent higher than Shs.600/= was in the Tenant's valuers report which recommended Shs.3,400 per month. That was on 30.11.99 when the report dated 6. 8. 99 by M/S Metrocosmo Valuers Ltd (Metrocosmo) was filed. It was 4 years after the Notice. It took another 2 years for the tenant to say anything about higher rent when the figure of Shs.4,215/= was mentioned in submissions filed on 03. 09. 2001. That, Mr. Kihara submitted, was not an offer. At any rate it came at a late hour. In his view, it was indeed the Landlord who was substantially successful in his claim by having the existing rent of Shs.600/= increased to Shs.4,700/= which was a substantial increment. In similar cases arising out the same premises, but decided earlier by a different Tribunal coram, the same order for the parties to bear their own costs was made. The irony is that the decision was introduced in this Appeal and is relied on by the Tenant to challenge other findings of the tribunal! The tenant, he submitted, should not blow hot and cold at the same time.

On this aspect of the matter there is no quarrel on the legal requirement that the costs of litigation should follow the event unless, for reasons to be recorded, the court thinks otherwise. The Tribunal in this matter made an order for each party to bear its own costs without giving specific reasons for it. In the circumstances of this case however we do not think it was necessary, simply because there was no successful party. The landlord did not obtain the rent he sought but succeeded to a large extent. We do not accept that the Tenant had made an offer of rent increment similar to that ultimately determined by the Tribunal. There was no offer made in the report dated 06. 8. 99. There was no offer made in the Tenant's submissions filed on 3. 9. 2001. They would have made no difference even if they were made because the Tribunal was still duty bound to assess the rent. In the end of each party won to some extent and the fairest order on costs in such event was for each party to bear its own costs. Afortiori, in an earlier decision made by the same Tribunal on the same premises, which decision the Tenant supports, a similar order was made. We see no sufficient reason to complain about the order and therefore that ground of Appeal is dismissed.

On the second ground Mr. Rach submitted that the Tribunal grossly erred in back-dating the effective date of the increment by 6 years. That is from 1. 6. 95 to 15. 9. 2001 when the decision was made. It would be an undue burden on the tenant considering the multiplier effect. Mr. Rach conceded that the Tribunal had the discretion to backdate the commencement date but submitted that the discretion was not exercised judicially.

The reason given by the Tribunal for so deciding was that the tenant had failed to prosecute the reference expeditiously. But that, Mr. Rach submitted, was a misconception of the law. The Tenant had nothing to prosecute and therefore no duty to pursue the matter to its conclusion. Under Cap 301 Section 2 there is a definition of a "Requesting Party" as the person who gives the tenancy Notice. It is the Landlord. It also defines the "receiving Party" who is the tenant and imposes a duty on the tenant to file a reference, in default of which he suffers the consequences of Section 10 of the Act. The tenant does not initiate anything and cannot be equated to a Plaintiff. Once the reference is filed, it is upon the Tribunal to make inquiries and decide on it. That is Section 9 of the Act. The Inquiry is made on the Landlord's Notice and it would be the Landlord who benefits there-from. It is for the Landlord therefore to pursue the matter and if he delayed it, he should not have a backdated commencement date.

The Court record shows that the proceedings commenced on 6. 7. 95 when the parties were directed to file reports and take dates. The Landlord filed the report on 15. 7. 99 and the Tenant on 30. 11. 99. Nothing was done thereafter until the year 2000 and the Landlord was to blame for it. He made allegations on rent increment and it was his duty to prosecute the reference. It was erroneous therefore to condemn the tenant for the delay. The commencement date, according to Mr. Rach should have been the date the Landlord filed his report or the date of Judgment.

Responding to that issue Mr. Kihara found no legal basis for claiming that the Landlord has the onus of prosecuting a reference to the Tribunal. The valuation report filed by the Landlord had been prepared on 5. 12. 94 before the Notice of increment was served on the tenant. It was not speculative. The Tenant did not seek to discuss the proposal but opposed the Notice by filing a reference on 03. 05. 95. It was not merely the duty of one party to prosecute the reference. The Landlord was keen on prosecuting and did indeed prosecute all other references filed at the same time using the same valuation report and the judgment was delivered on 29. 6. 98. There were attempts made to set this matter down for hearing after it was discovered that it had been left out. But the Tribunal sits for half a year and it means for 5 years it would only sit for 2 years or so. The apparent delay was not long. At any rate, Mr. Kihara submitted, the effect of backdating the order would be minimal considering that the Tribunal did not award any interest and damages as it has the power to do under Section 12 (1) (k) of the Act. The order made simply declared the rent payable if the matter was decided as soon as the reference was filed.

For our part, we have given this issue anxious consideration.The starting point is the one conceded on both sides that the Tribunal has the discretion to set the commencement date after determining a reference. It was better put in the authority relied on by the Tenant. HCCC 269/93 TALA INVESTMENT LTD VS GREEN SPOT LTD. where Shah J (as he then was) stated after reviewing several authorities:

> "The ratio decided of all the said appeals is that the normal order for
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> effective date would be that the date specified in the tenancy notice would
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> be proper but the Tribunal has in proper circumstances discretion to alter the
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> effective date and that such discretion must be exercised judicially.
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> In Shah & Shah vs Kagunda 1978 KLR 35 Simpson and Chesoni J.J (as they then were) say at page 37:
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> "It is an attractive argument until one considers the delays which
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> occur between the signature of a notice and the decision of the Tribunal,
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> delays which can be deliberately created (underlining mine). The Tribunal
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> is given power in the Act to approve the terms of a notice either in their entirety
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> or subject to such amendment or addi tion as it thinks just, having regard to
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> all circumstances of the case (underlining mine). Thus it is given a wide discretion
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> as to the effective date, which of course should be exercised judicially. In the present
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> case, although it might have been desir able to give reasons, I can see nothing wrong
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> with making the order effective from the date specified in the tenant's notice, (underlining mine)
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> indeed I think that it is the appropriate date in all circumstances."
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> So the position is that Tribunal has discretion. It was not quite proper for the
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> chairman to give no reasons to post -date the effective date. But that is not fatal,
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> as Shah & Shah vs Kagunda decides."

The Tribunal in this matter saw no reason for post-dating the commencement date which was stated in

the Notice. The reason it gave for that as stated earlier was that the Tenant had delayed the hearing of the matter. The argument by Mr. Rach that the tenant is under no duty to prosecute a reference is on the face of it ingenious. We think however that both parties have an equal duty to pursue the determination of a reference filed before the Tribunal. They have an equal stake in the outcome. The tenant; the stake that the proposed rental increment be rejected and if accepted the commencement date in the notice, which would normally apply, does not prejudice him. The Landlord; the urge to obtain an economic return for his investment, and if confirmed then the Tribunal has no reason to post-date the commencement date stated the notice. Where the Tribunal is at fault and causes the delay or where the Landlord does it, then of course there is no reason to maintain the date on the Notice.

In this matter it is evident that the Landlord had filed the valuation report dated 5. 10. 94 by 26. 9. 95. It was for use in determining revised rentals for all tenants in their premises. There were 10 of them including the Tenant in this case. All the tenants filed references but there was consolidation of all the references filed except this case. The reasons for leaving out this tenant have not come out clearly and we think it may well have been a careless omission by the Landlord. Had all the cases been consolidated they would have been determined on 29. 6. 98 and the issue of the commencement date would have been arisen. When the parties were ordered to file valuation reports on 6. 7. 95, the Tenant did not file any until 30. 11. 99. We think again that delay is not sufficiently explained by the Tenant. Coupled with the faults of both parties is the Tribunal's sitting schedules in Nairobi which are not regular.

With think, with respect, that the Tribunal did not subject the commencement date to thorough scrutiny to determine whether it was desirable or not to post-date it. This Appellate Court has not only the same powers as the Tribunal has under Cap 301 but also other powers that may be conferred on it by or under any written law. Section 15 of the Act says so. We are at liberty to interfere with the commencement date.

There was a delay of about 3 years and 4 months between the date of determination of the other references on 29. 6. 98 and the decision herein on 19. 9. 2001. As we think both parties were equally culpable we think the period of delay should be shared equally. Accordingly the Landlord shall give up the period of 1 year and 7 months which postdates the commencement date to 1. 1. 1997. That ground of Appeal succeeds to that extent only.

Finally, the third ground that challenges the quantum assessed. The submission by Mr. Rach was that there already existed a decision by the same Tribunal on the rents payable by other tenants on the same premises. There was no reason given for departing from it. The rate per square metre was determined at Shs.280.59 in the earlier references but in this case it was determined at Shs.300. It should have been the same. We did not record Mr. Kihara as seriously attacking that submission. His quarrel was rather that the tenant was ready to accept the earlier ruling on that assessment but reject the same ruling on the commencement date and order for costs.

On this issue we find no sufficient reason for determining different rates per square metre on the same building in references filed at the same time. True it is that there were two different chairman sitting over the matter. But the Tribunal was the same and there was an existing decision which had not been challenged. There was mention that the submissions of the tenant were considered but there was no mention of the earlier decision which was contained in those submissions or at all. In all probability the Tribunal was oblivious of that decision. In the event we allow the appeal on that issue and determine the rate of rent per square metre at Shs.280.59. The lettable area is not in dispute. In both valuation reports it is approximately 170 square feet or 15.39 square metres. The rent therefore works out at Shs4,318.28, but say Shs.4,320 per month. We adopt the rent accordingly.

As the Tenant has succeeded on two issues in the Appeal he will have 2/3 of the costs of the Appeal.

Dated this …… day of …….. 2002.

D. K. S. AGANYANYA

JUDGE

P. N. WAKI

JUDGE