REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 398 OF 2000

GATAKANI INVESTMENTS LIMITED ……APPELLANT

VERSUS

MIDTOWN LODGE LIMITED ……RESPONDENT

J U D G E M E N T

On 17th February, 1999 the appellant issued a notice to the respondent to alter terms of a tenancy between them over the premises No. 209/476/4 situated in Nairobi effective 1st May, 1999. The alteration entailed increasing rent from Kshs.34,740/= to Kshs.162,000/=.

On receipt of this notice, and before the expiry of the effective date, the respondent filed a reference No. 138 of 1999 to the Business Premises Rent Tribunal on 29th April, 1999 to oppose the notice.

This dispute came before the Chairman of the Tribunal (Mr. G.K. Mwaura), on 8th February, 2000 when parties agreed to put in valuation reports.

It was in fact reported that the appellant had already filed its valuation report on 17.6.99, which was to be served upon the respondent.

The respondent filed its report on 12th April, 2000 but these reports did not agree on lattable area of the suit premises.

On 19.4.2000 the appellant and the respondent agreed to take joint measurement of the lattable area and the joint report was filed at the Tribunal on 2nd June, 2000.

Counsel for the parties appeared before the chairman on 30th June, 2000 and submitted on this matter making references to the comparables in their respective valuation reports.

The chairman wrote and delivered his judgement on 27th July, 2000 in which he ordered that the appellants notice would be of, no effect and that the respondent's reference was allowed. The appellant was to pay costs to the respondent for the reference.

This decision displeased the appellant who lodged this appeal to this court on 8th August, 2000. In a memorandum of appeal dated 7th August 2000 with 8 grounds of appeal.

The grounds were that the chairman of the Tribunal erred in both law and fact in declining to assess rent payable by the respondent from Kshs.34,740/= to Kshs.162,000/= or such reasonable rent on flimsy and legally untenable grounds. That he erred in not considering all the factors that go into the valuation of a business premises for the purpose of ascertaining the rent payable; that he erred in ignoring the comparables in the appellants valuation report which were more reliable than those supplied by the respondents appointed valuers. That the learned chairman of the Tribunal erred in law in holding that the

appellant had failed to prove its notice and that no evidence had been offered, though the appellant had filed its valuation report in support of the notice to increase rent, that he erred in failing to consider the comparables given by the appellant valuer on the grounds that the comparables were for uncontrolled premises against the weight of evidence and misrepresenting Section 9(2) of Cap 301 of the Laws of Kenya, that he erred in law in failing to consider the comparables given in the appellant's valuation report on the grounds that the premises were smaller than that occupied by the respondent, that the learned chairman of the Tribunal erred in law in failing to consider that the monthly rent of Kshs.34,740/= paid by the respondent was below the market rent payable for similar premises, that he erred in law in allowing the reference by the respondent and that he erred in law in awarding costs to the respondent.

In this court on 27th February, 2003 counsel for the parties submitted on this appeal. Counsel for the appellant referred to the appellant's valuation report which recommended a rent increase to kshs.162,000/= while that of the respondent recommended a rise to Kshs.42,800/=.

He stated that though both valuers agreed that the rent was due for an increase, they did not agree on how much to raise the rent by.

That in the appellant's valuation report, 5 comparables were referred to while the respondent's report had 3.

That though the chairman considered reports of both the appellant and respondent's valuation, he allowed the latter and refused the former.

According to counsel, the chairman was wrong in holding that the Tribunal cannot use rates for uncontrolled tenancies to controlled ones.

That the best evidence were comparables in the same building as that occupied by the respondent and yet this is what the chairman disregarded.

That comparables from both sides were professional and the Chairman should not have disregarded them but instead should have taken them seriously.

Counsel submitted that by the respondents valuation report recommending rent of Kshs.42,800/= confirmed that the previous rent was not market rent.

Counsel stated that the Chairman did not exercise his discretion properly in dismissing the appellant's notice and that the appellate court should assess reasonable rent and that the effective date should be that indicated in the notice. She also prayed for costs of the appeal.

Counsel for the respondent, Mrs Ndungu opposed the appeal stating that there was no justification for the appeal court to interfere with the decision of the Tribunal.

That on the effective date, the Tribunal had a wide discretion. That the Chairman exercised his discretion properly as there was no evidence to support the notice.

Counsel submitted that since the notice was of the appellant he was bound to prove it and show that the rent being paid was uneconomical and far below the market rent having regard to the facilities being enjoyed by the respondent and the locality the premises was situated.

That the appellant had to call a valuer to show what was special about the facilities being enjoyed by the respondent and the locality the premises is situated.

That the appellant had the onus of proving his notice in view of the peculiar nature of the claim and to show why rent should be increased.

Counsel submitted that these premises were not situated in the central business district of the city.

That appellant did not give any of the conditions required for the assessment of rent and to show he was entitled to Kshs.162,000/= as rent or that Kshs.34,740/= the rent being paid, was below market value.

According to counsel the Chairman gave reasons for arriving at his decision after considering the valuation reports. That he was right in saying comparables in uncontrolled tenancies cannot be used for assessment of rent for controlled tenancies.

That for various reasons given by the Chairman, the comparables given to him were not useful. That he looked at valuation reports in regard to the notice before him and did not find them useful hence his right to dismiss the notice.

That he carefully and properly exercised his discretion in disallowing the appellants notice and there was no justification for this court to interfere with the Tribunals decision.

Counsel prayed for the dismissal of this appeal with costs.

These are submissions of counsel for the parties in this appeal. We have considered them as well as perusing the Tribunal record of proceedings and judgment.

No evidence was adduced at the Tribunal by the parties to this dispute and they relied on their respective valuation reports. This is the accepted practice in most Tribunal cases. Hardly is evidence adduced.

In the case subject to this appeal, after the appellant filed his valuation report on 17.6.99 and served it upon the respondent, the latter also filed its report on 12th April, 2000. The two reports did not agree on the lateable area occupied by the tenant and the parties agreed to file a joint report which was done on 2nd June 2000.

Then after this counsel for the parties agreed to make submissions on 30th June 2000 which they did orally.

With this kind of record, we find it strange that counsel for the respondent should complain of no valuer being called to testify about the special facilities enjoyed by the respondent or the locality in which the suit property was situated to warrant an increment in rent. This is a complaint, if any, which should have been raised at the tribunal

. The parties to this appeal engaged their respective valuers. The appellants engaged Landmark Valuers while the respondent engaged Dantu Investments Valuer.

These valuation reports did not agree on the lattable area of the premises thus necessiting a joint report by the parties which gave the lattable area as follows:-

Bar and Resturant - 85m2

Office - 10m2

Rooms - 175.61m2

Kitchen - 20m2

Store - 10m2

This made a total of <u>300.6/m2.</u>

But in consideration of the whole case the learned Chairman fell back on the two reports which did not agree on the lattable area and considered the comparables selected by each as the basis of his judgment.

He does not seem to have applied the joint report which was only important on lattable area measurements.

The appellant's valuer had chosen 5 comparables of the first comparable, Ad plast Ltd. the Chairman said that this was an uncontrolled tenancy hence unsuitable as a comparable for a controlled tenancy.

Of the second comparable, Gender Plaza, the Chairman said it could not be an appropriate comparable because its size had not been indicated.

The third comparable Charinda Center along Tom Mboya Street was also disregarded by the Chairman because its size had not been given.

The fourth comparable, Kimani Shoe Repair was also disregarded because its size was a small faction of the suit premises while the fifth comparable was disregarded because it was not indicated whether the rent given of Kshs.15,000/= was for the offices on 2nd and 3rd floor and/or whether it was one letting.

The respondents valuer gave three comparables, citizen Cinema Corporation at Meru South House – along Tom Mboya Street,. A.G. Mungai & Co. Advocates on 1st floor of Lakhani building on Moi Avenue and V.M. Patel Advocates at Braidwood house along Tom Mboya Street.

The Chairman said nothing about the first respondent's comparable.

Of the second respondent's comparable he said its size was a more fraction of the suit premises while the third was disregarded but no reason was given.

In rejecting the application of comparables of uncontrolled tenancies to the suit premises, the Chairman applied the decision of the late Justice Chesoni – as he then was in the case of South Africa Mutual Life Assurance Society V Air Zaire – Civil Case No. 224/81 where he said:-

> ***"These two comparables - - - like the other remaining seven were not in respect of controlled tenanci es, a matter that Mr. Shah did not dispute. All the comparables by Lloyd Masika Ltd are therefore, of no useful guidance, and are not worth any consideration."***

We wish to associate ourselves with this persuasive proposition because, as is well known, in uncontrolled tenancies parties agree on payable rent and that the question of control and/or assessment of such rent does not arise.

It is true in a case of this nature the onus is on the landlord who issues the notice to show he/she is entitled to the increase of rent.

This, we believe, is true where the tenant clearly disputes the increase of rent in its entirely. In that case, we think, the dispute would go to full hearing with the tenant taking the witness stand to dispute such increase.

But where parties opt for valuation reports then we take it that they both agree on the need for rent increment save that they cannot agree on the figure and are looking for guidance from the valuers to determine that figure.

In that case, it would be a misdirection for the Chairman to insist that the landlord prove the notice as he did in the case subject to this appeal.

In fact in the case subject to this appeal, the respondent confirmed there was need for the increase of rent by authorizing his valuer to suggest a figure of Kshs.42,800/= instead of the Kshs.162,000/= suggested by the appellant.

In our view what was in dispute in the case subject to this appeal between the parties was by how much should the rent be increased and not whether or not the rent should be increased.

In such situation, and though the Chairman had disregarded all the valuation reports, he still had room to apply Section 9 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act to call for fresh valuation reports for the determination of the rent increase, after all, all this would have been in exercise of his wide discretion.

Or better still the Chairman would still have used the accepted joint measurements from Royal Valuers Ltd and rates given in the two valuations reports of the appellant and the respondent to work out the amount of the increase.

The agreed measurement for the lattable area came to 300.61 square metres but it would appear since the Chairman dismissed the notice, he saw no need to work out the rates per square metre of the intended increase in rent. But since we feel convinced there was sufficient evidence to make out a case for notice to increase rent by the appellant, given the period the respondent had been in the premises without such increase, (see Section 9(3) of the Act) it is only fair and just that the matters be remitted back to the Chairman to work our by how much the rent should be increased and the effective date as well as the order on costs.

This shall be the orders of this court.

Delivered this 13th day of March, 2003.

D.K.S. AGANYANYA

JUDGE

E.M. GITHINJI

JUDGE