



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.555 OF 2000

WILLIAM MBUGUA KAMAU & ANOTHER APPELLANTS

VERSUS

WILSON WIATHAKA GITAU & PARTNERSRESPONDENT

J U D G E M E N T

Wilson Waithaka Gitau and Partners own plot No.62 in Ruiru Town. Various portions of it are let and occupied by William Mbugua Kamau, Peter Kahura Kagia and Ann Njoroge Ninga for business purposes.

Prior to the reference to the Business Premises Tribunal, Kamau was paying Kshs.3,500/= for his premises as rent while Kagia and Ninga paid Kshs. 1,800/= and Kshs.3,500/= respectively for theirs.

On 1st March, 2000, Waithaka and Partner (herein referred to as “the landlord”), issued notices to Kamau, Kagia and Ninga (hereinafter referred to as the tenants”) intending the alter terms of the tenancy as regards monthly rent.

With effect from that date, the first tenant was to pay Kshs.28,000/= for his portion as rent per month, while the second and third tenants would pay Kshs.35,000/= and Kshs.27,000/= as monthly rent respectively.

The tenants thought the intended new rents were too exorbitant and filed references to the Business Premises Tribunal. They were reference Nos. 50 of 1999, 51 of 1999 and 2 of 2000. They were all consolidated and heard as Tribunal case number 2 of 2000.

The Landlord and tenant counsels filed and relied on valuation reports and written submissions.

The landlord valuer took 5 comparables while the tenant’s valuer took 2 comparables which the learned Tribunal Chairman found suitable and applied their average to the lettable area to determined the new rents.

The learned Chairman in his judgement dated 13th October, 2000, noted the lettable area given by the landlords valuer as follows:

BPRT 50/99 - Shop 20.12m²

First floor room 15.37m²

Rear yard room 7.07m²

BPRT 51/99 - Shop 21.75m²

Store 38.17m²

Rear store 21.09m²

BPRT 2/2000 Shop 20.7m²

Store 9.09m²

Two rooms 21.29m²

The learned tribunal chairman considered and noted there were minor discrepancies in the areas given by the two valuers which he disregarded and used the landlords measurements which in some instances were lower than the tenants' measurements.

Learned Chairman took the average rate for the landlords' seven comparables to be Kshs.300/= per square metre and applied this rate to the main shop and ½ rate to the other areas.

And using this analysis he proceeded to assess and determine the new rents as follows:

- BPRT 50/99 Kshs.10,690/=

BPRT 51/99 Kshs.15,400/=

BPRT 2/2000 Kshs.10,700/=

That the new rates would take effect from the date in the notices. Each party was ordered to bear his/her/their own costs.

This decision did not go down well with two tenants, namely William Mbugua Kamau and Peter Kahura Kagia, who then lodged this appeal in a memorandum of appeal filed herein on 25th October, 2000 which listed eight (8) grounds of appeal; namely that the trial Magistrate (Chairman) applied wrong principles in assessing the new rents on the appellant's premises, that he misdirected himself in accepting the respondents comparables irrespective of their inappropriateness in the circumstances, that the new rents assessed by the trial Magistrate (Chairman) were clearly excessive and disregarded economic realities; that the judgment of the trial Magistrate (Chairman) was at variance with the evidence and submissions before the trial court; that the trial Magistrate (Chairman) ignored or disregarded the appellant's evidence and submissions that the five comparables cited in the respondent's valuation report were located in modern, recently constructed buildings; that the trial Magistrate (Chairman) applied a mechanistic analysis in assessing the new rents for the premises let by the appellants; that the trial Magistrate (Chairman) erred in refusing to award the appellants the costs of the reference to the extent of their success and that despite the factual contradictions between the valuation reports filed by the appellants and the respondents respectively, the trial Magistrate (Chairman) elected to resolve the variance without calling independent testimony or subjecting the valuers to cross examination.

The appeal was placed before a bench of 2 judges for hearing on 11th July, 2002 when counsel for the parties appeared to submit on it.

Mr. Kurauka for the appellants told the court that though the respondents' comparables were inappropriate and disputed by the appellants' replying affidavit, they were, nevertheless accepted.

That the premises in the first respondents' comparable were constructed in the 50's when the appellants' premises (in the comparable) were constructed in the 40's/ That also the premises in the respondents comparables had recently been renovated and more modern while the appellants premises were old and in need of renovation.

That the respondent's comparables were new or under construction at the time of the replying affidavit while those in comparables 3 and 5 were not shops.

According to counsel, the evidence of the replying affidavit though undisputed, was not considered and that though the appellants succeeded to a large extent, costs were not awarded to them.

Counsel complained that the assessment was excessive as the rent went up more than twice. That the assessment did not take into account the prevailing economic realities.

Counsel prayed for the appeal to be allowed with costs.

Mr. Mboroki for the respondent opposed this appeal and said the assessment was based on open market rents payable for similar premises in similar localities, advantages and businesses.

That counsel for the respondent submitted both parties agreed to rely on valuation reports and written submissions and the matter was left for the judgment of the chairman.

That the chairman considered the valuation reports which contained 2 comparables for the appellants and 5 for the respondent and arrived at a reasonable figure of Kshs.300/= per square metre.

That he applied the rate to the areas occupied by the appellants which was far below what the respondents had asked for.

Counsel submitted that the tribunal looked at open market rent payable.

That the appellants were entitled to a fair return for their investment and that the judgment was fair in the circumstances.

According to counsel, the replying affidavit was irrelevant as it purported to challenge the experts' valuation and it was properly rejected by the tribunal.

Counsel for the respondent submitted that the order on costs was appropriate and prayed that the appeal be dismissed with costs.

It has been said time and again that there are no provisions in the Civil Procedure Rules for parties to file written submissions in proceedings and that parties in any proceedings should be heard in their submissions before the court; which connotes oral submissions in such proceedings.

We, however, note with satisfaction that though there were written submissions filed in the case subject to this appeal, the learned chairman appeared to have ignored them and written his judgement entirely depending on the valuation reports and the comparables contained therein.

In our view, assessment of rent for any premises by the tribunal is not dependent on the average taken between the landlord and tenant valuation reports.

It, however, has all to do with a fair return the landlord should get for his/her investment regard being had to the open market rent payable for premises similar to that occupied by the tenant, situate in same locality and the nature of the business.

The premises in the case subject to this appeal is situated at Ruiru, considered a first growing light industrial town, relatively close to Thika, another first growing industrial town.

The landlord had increased rent 17 sold for the 3 tenants but the learned chairman, doing the best he could and in regard to the available comparables awarded increased for the appellant William Mbugua (BPRT No.50/99) from Kshs.3,500 to Kshs.10,690/=, Peter Kahura Kagia (BPRT No.51 of 1999) from Kshs.1,800/= to Kshs.15,400/= and Ann Njoroge Ninga (BPRT No. 2 of 2000) from Kshs.3,500/= to

Kshs.10,700/=.

We note that the tenant Ann Ninga Njoroge did not appeal.

Considering the areas covered by the suit premises and that the respondent had asked for much higher rents than those awarded by the Tribunal, we are of the view that these awards were reasonable, there being no submissions to persuade us to interfere.

And as neither party completely won his claim at the Tribunal, the order made regarding costs thereat was also reasonable and we have no reason to interfere either.

We dismiss this appeal with costs.

Delivered this 19th day of September, 2002.

D.K.S AGANYANYA

JUDGE

P. WAKI

JUDGE