Said v Trustees of King Feisal Trust of Kenya (Environment and Land Appeal E008 of 2022) [2025] KEELC 1220 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1220 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E008 OF 2022

SM KIBUNJA, J

MARCH 12, 2025

BETWEEN

ISLAM AHMED SAID ..... APPELLANT

AND

TRUSTEES OF KING FEISAL TRUST OF KENYA ..... RESPONDENT

(Appeal against the Ruling and Order of the Chairman of the Rent Restriction Tribunal Hon. Hillary K. Korir delivered on the 24th day of January 2022 in RRT Mombasa Case No. 39 of 2009 Trustees of King Feisal of Kenya v Islam Ahmed Said)

JUDGMENT

1. The appellant instituted this appeal through the memorandum of appeal dated 17th February 2022, raising four (4) grounds that:

    a. The learned chairman erred in law and fact by making a decision without giving reasons for that decision, contrary to Order 20 Rule 4 of Civil Procedure Rules, 2010 as read with Regulation 11 of the Rent Restriction Regulations.

    b. The learned chairman erred in law and fact in considering irrelevant issue of ownership of the premises, which issue was not in dispute, to hold that it has jurisdiction.

    c. The learned chairman erred in law and fact in failing to consider the issue of the "dominant user" which was the major issue for consideration before him.

    d. In dismissing the appellant's application subject of this appeal, i.e, notice of motion dated 12th May 2010, the learned chairman erred in law by going against the requirement of section 5(1)(a) of the *Rent Restriction Act* chapter 296 of Laws of Kenya, which places assessment on the entire premises and not on individual units occupied by an individual tenant.

2. The appellant seeks for the following prayers:

a. The appeal to be allowed.

b. The order dismissing the application dated 12th May 2010 be set aside, and in its place thereof, the respondent's Rent Restriction Assessment Case No. 39 of 2009, be dismissed with costs.

c. Award the appellant the costs in this appeal.

The appellant also filed the record of appeal dated 22nd December 2023.

3. The appeal was admitted on 16th October 2024, and directions on filing and exchanging submissions issued. The learned counsel for the appellant and respondent filed their submissions dated 6th December 2024 and 27th January 2025 respectively, which the court has considered.

4. The issues for the determinations by the court in this appeal are as follows:

a. Whether the appellant has proved any misapprehension and or misapplication of the law on the part of the tribunal.

b. Who pays the costs.

5. The court has carefully considered the grounds on the memorandum of appeal, submissions by the two learned counsel, superior courts decisions cited thereon, and come to the following conclusions:

a. This is a first appeal, and the court will consider the evidence adduced before the tribunal, evaluate it afresh, and draw its own conclusions. In the case of Kenblest Kenya Limited v Musyoka Kitema [2020] eKLR the court held that:

> " As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' This was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:
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> "We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic,[1984] KLR 729 and Susan Munyi v Keshar Shiani,Civil Appeal No. 38 of 2002 (unreported)."

b. The record of appeal confirms that appellant's application dated 12th May 2010, sought for orders that the tribunal reopen the proceedings, revoke ex-debito justitiae all its decisions, orders and/or rulings made so far, and thereafter strike out the entire suit. The application was opposed by the respondent through the notice of preliminary objection dated 11th June 2010, raising two grounds that the tribunal did not have jurisdiction to hear and determine the said application, and that the application was res judicata. The proceedings in the record of appeal confirms that the application was heard on 1st September 2010, when the learned counsel for both parties made their submissions for and against the preliminary objection.

c. The tribunal delivered its ruling on 7th September 2010, upholding the preliminary objection on jurisdiction, and dismissed the application dated 12th May 2010 with costs. The ruling is at pages 58 to 59 of the record of appeal, and reads as follows:

> "For the 2nd time, the tenant applicant is seeking to reopen the proceeding herein through an application dated 12th May 2010. A ruling was made on the earlier application dated 17th November 2009 where the same was disallowed on the strength of a Court of Appeal authority Civil Appeal No. 62 of 1974 which stated that the tribunal ceases to have jurisdiction once the premises have been decontrolled... Given that the facts and circumstances leading to the filing of this and previous applications have not changed, there's no justification for a shift of position. Accordingly, I reiterate that the tribunal has no jurisdiction over the premises that it had decontrolled. Consequently, the application dated 12th May 2010 is dismissed with costs."

d. From the copy of the ruling of 24th January 2022, that is at pages 93 to 94 of the record of appeal, which is also subject matter of this appeal, the ruling delivered on 7th September 2010 was appealed against before the High Court *Islam Ahmed Said v Trustees of King Faisal of Kenya (Civil Appeal No. 215 of 2010)* [2016] eKLR where the court on 16th February 2016 deliberated on the issue as to whether or not the Tribunal has jurisdiction to open its proceeding to challenge its decision, after the premises have been decontrolled. The High Court found that the tribunal had jurisdiction to entertain the application to reopen the proceedings, even if there had been an order assessing rent beyond the statutory sealing of kshs.2500/=. However, the court found that the appeal was not competent because the ruling on a preliminary objection is not one of the orders from which an appeal has a right, and for that reason struck out the appeal. That ruling was latter set aside on 20th June 2017, upon a review application by the appellant which was found merited. The court then ordered set aside its earlier order and referred the application dated 12th May 2010 back to the tribunal for hearing.

e. The application was heard and the impugned ruling delivered on 24th January 2022. The tribunal inter alia held that:

> "Having considered both parties written submissions and authorities cited, the tribunal finds the application to be without merit and orders it dismissed with costs."

In the application dated 12th May 2010 that was brought under Section 5 (1)(m) of the *Rent Restriction Act* Chapter 296 of Laws of Kenya, the appellant had sought for the following orders:

i. That the honourable tribunal be pleased to reopen the proceedings herein and revoke exdebito justitiae all decisions, orders and/or rulings made so far.

ii. That upon grant of prayer 1 above, the honourable tribunal be pleased to strike out the entire case.

iii. That costs of this application and of the main case be provided for.

The appellant claimed that he appeared in person in the proceedings and was not aware of the legal technicalities, hence the prayer to reopen the proceedings and strike out the entire

suit. The appellant stated that the tribunal had no jurisdiction to determine the application for reassessment dated 11th June 2009, since the suit premises comprised both residential and business, with business as the dominant user. Further to that, the appellant argued that the entire suit was incompetent as there was no trust deed to establish the nature of the subject trust and no certificate of incorporation was produced to demonstrate that the landlord could sue or be sued in their own. The tribunal was said to have increased the rent unilaterally from Kshs.4,500/= to Kshs.20,000/= which was over 200%.

f. In this appeal, the appellant submitted that the tribunal's decision to reject the application as without merit meant that it lacked validity, substance, or reasonable basis. The tribunal, therefore, should have given reasons why the application was unmerited. The appellant argued that the proceedings before the tribunal were reduced to a dispute over ownership as opposed to an issue of ascertainment of the dominant user. It was submitted that it is trite law that assessment must be conducted on the entire premises not on individual tenant's premises. That rental income accruing from the business side must be ascertained to enable the tribunal to determine the dominant user to ascertain which category the property falls under. The appellant contended that the tribunal ought to have considered the mixed nature of the tenancy and inquired into the issue of the dominant user to ascertain whether it had the power to assess rent on the premises. The appellant argued that the dominant user is business, hence the assessment of rent payable is attached to the premises and not an individual tenant, and the right tribunal ought to be the Business Premises Rent Tribunal. The court was urged to find that the Rent Restriction Tribunal was in error when it assessed rent on a premise of this nature without first ascertaining the dominant user and allow this appeal. The respondent submitted that the tribunal is not bound to comply with Order 21 Rule 4 of the Civil Procedure Rules, which requires the contents of a judgment to include the reasoning behind it. Rulings are governed by Order 51 of the Civil Procedure Rules, which requires the court to makes an order, where an application has been made, and submitted it is not necessary for the reasons behind the orders to be given. The respondent further submitted that the tribunal officers who visited the premises confirmed that it was being used as a residence, and it was therefore proper for it to be assessed for residential and not commercial purpose. In addition, the said assessment of rent was conducted in the presence of the appellant and he did not object to the same, and the court should therefore dismiss the appeal with costs.

g. Having considered the factual materials presented before the tribunal, it is a fact confirmed from the record of appeal that on 9th October 2009, the respondent/landlord made an application for assessment of standard rent based on costs of construction and the rates. The Counsel for the respondent informed court that the property is comprised of 13 shops on the ground floor and 2 flats on the 1st floor, with the appellant occupying one of them. The flat was said to consist of 2 bedrooms, sitting room, kitchen, bathroom and toilet, with rent payable of Kshs.2,470/=. The respondent's counsel argued that the rent was uneconomical and did not yield a fair return on investment, and prayed for its assessment. The appellant who appeared in person told the court that he had no job, and had lived in the flat for many years. He also told the court that the respondent would have summoned him to agree on the rent. The tribunal then allowed the application dated 11th June 2009 and assessed the standard rent at Kshs.4,500/= per month exclusive of service, with effect from 1st December 2009. On 12th March 2010, the respondent's counsel wrote to the appellant notifying him to pay rent of Kshs.20,000/= with effect from 1st May 2010.

h. The jurisdiction of this court in this matter is as an appellate. The court should therefore not interfere with the discretion of the tribunal, unless where it is shown the discretion has been exercised injudiciously or on wrong principles. Order 20 Rule 4 of the Civil Procedure Rules on contents of judgement provides that:

> "Judgements in defended suits shall contain a concise statement of the case, points for determination, the decision thereon, and the reasons for such decision."

The court has perused the entire ruling delivered on 24th January 2022, and indeed found no reasons were given for the decision thereof that I have reproduced herein above. Where the tribunal does not give reasons for its decision, the appellate court will interfere if satisfied that the order made thereof is wrong. The court will also interfere where the reasons given are not sufficient for the order made. The Court of Appeal in the case of JMM v GNJ (Civil Appeal (Application) E014 of 2022) [2023] KECA 99 (KLR) (3 February 2023) (Ruling) held that:

> "Therefore, discretion is that freedom or power to decide what should be done in a particular situation. The general meaning of the word "discretion" includes analysis, appraisal, assessment, choice, consideration, contemplation, designation, determination, discrimination, distinction, election, evaluation, examination, free decision, free will, freedom of choice, liberty of choosing, liberty of judgment only to mention but some. Judicial discretion then is the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. Every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. There is no hard and fast rule as to the exercise of judicial discretion by a court because if it happens then, discretion will become fettered.
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> There is always the need for a court exercising discretion to give reasons in justification of the exercise. There can hardly be any justifiable reason for exercising discretion upon imprecise facts. It is the nature and strength of facts made available to the court that provide the tonic for the proper exercise of discretion. Admittedly, the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case. But that will not necessarily affect the justness of the exercise of the discretion, so long as the facts are available and reasonably appreciated."

Applying the above principle in this case, I find that the tribunal did not offer any reasons why it exercised its discretion in the manner it did, and disallowed the appellant's application dated 12th May 2010. The tribunal ought to have given its reasons as to why it found the application unmerited, as argued in the above decision. Since there were no reasons given by the tribunal justifying why it exercised its discretion as it did, the same ruling of 24th January 2022 should be set aside.

i. Having set aside the said ruling, the court will now proceed to consider the application dated 12th May 2010 afresh and come to its own conclusions, so that it can bring to a closure this matter that has been pending in courts for about fifteen (15) years. The appellant has not denied he is a tenant at the respondent's premises on Plot No. Mombasa/Block/ XVI/ 212 & 211, which comprises of 13 shops on the ground floor, and 2 flats on the 1st floor. The appellant occupies one of the flats on the 1st floor which comprises 2 bedrooms, a sitting

room, a dinning room, kitchen, a bathroom and a toilet. Before the respondent sought the tribunal's intervention, the appellant was paying a rent of Kshs.2,470/=. However, the rent was assessed at Kshs.4,500/= and on 12th March 2010 the respondent notified the appellant to pay Kshs.20,000/= per month. The respondent in his application dated 11th June 2009 before the tribunal, established that on 30th January 2009, he paid to the County Government of Mombasa Land rate for Plot No. Mombasa/Block/ XVI/211 and 212 as Kshs.29,971.19 and 29,955.21 respectively. In addition, the respondent produced before the tribunal a valuation report dated 23rd September 2009, which proposed a rent of Kshs.9,000/= per month.

j. Section 13 (2) of the *Rent Restriction Act* allows for rent increment subject to a valid notice. The section provides that:

> " Notwithstanding any agreement to the contrary, where the rent of any premises is increased, no such increase shall be due or recoverable until, or in respect of any period before, the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent."

It has not been disputed that on 12th March 2010, the respondent notified the appellant that he had increased the rent to Kshs.20,000/= with effect from 1st May 2010. In my view, that notice by the respondent as landlord, to increase the rent complied with the applicable provisions of the law and I find it lawful.

k. The appellant has not demonstrated to the court that he has ever challenged the rent increase before the tribunal. It has been fifteen (15) years since the appellant was notified by the respondent of the monthly rent increment to Kshs.20,000/=. There is nothing presented before the tribunal and this court to suggest that the premises' monthly rent has been increased again ever since, despite the period that has lapsed and the increase in general market rates that has been on an upward trend over years. However much the appellant is entitled to legally challenge the increment, his maneuvers to delay the day of reckoning would amount to as it were, burying his head in the sand. I therefore find no merit in the prayer to strike out the respondent suit. To do so would also mean setting aside the assessed rent, which in my view is inconsequential, and should not arise as the respondent/landlord has already increased the rent beyond that which was assessed by the tribunal. Throughout the time the suit was before the tribunal, the appellant did not seek to have valuers to value the suit premises and file a report before the tribunal for consideration. On the other hand, the respondent if anything has been reasonable in charging the appellant a monthly rent of Kshs.20,000/= for over fifteen (15) years and for that the appellant should be grateful. In conclusion, I find that the appeal before me is unmerited for the reasons set out above.

l. That under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event, unless where otherwise ordered for good reasons. I do not find good cause to deviate from that edict and the respondent shall have costs.

6. Having come to the conclusions set out above, the court finds and orders as follows:

a. That the appellant's appeal has no merit and is dismissed in its entirety.

b. The appellant to pay the respondent's costs in the appeal.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF MARCH 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellant : M/s Matava for Odongo

Respondent : Mr. Hassan

Shitemi – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.