



REPUBLIC OF KENYA



KENYA LAW
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**Faki v Sulum (Environment and Land Appeal E030 of 2023)
[2024] KEELC 5102 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E030 OF 2023**

SM KIBUNJA, J

JULY 8, 2024

BETWEEN

IMRAN FAKI APPELLANT

AND

SWALEH ABDUN SULUM RESPONDENT

*(Being An Appeal From The Ruling Of Hon. Gakuhi Chege,
Chairperson Business Premises Tribunal, Delivered On 5th
October 2023 In Business Premises Tribunal Case No. Eo35 Of 2022)*

JUDGMENT

1. The appellant, being dissatisfied with the ruling/judgement of the Business Premises Tribunal in case No. E035 of 2022, delivered on 5th October 2023, filed this appeal through the memorandum of appeal dated the 16th October 2023 and lodged at the registry on the 18th October 2023, raising fifteen (15) grounds summarised as follows:
 - a. That the learned chairperson erred in law and in fact by raising the rent from the current Kshs.35,000 to Kshs.60,000 plus 16% VAT being Kshs.9,600 per month, thereby ignoring the tenant's offer of Kshs.42,989, and backdating it to take effect from 1st January 2023. [Grounds 1 to 3, & 6].
 - b. That the chairperson erred in law and in fact by relying on the two valuations reports presented by the landlord that were prepared by unqualified person, and failing to consider the age of the building thereby imposing a punitive rent increment and VAT on the tenant while it is ordinarily an obligation shouldered by the landlord. [Grounds 4, 5, 7 to 9].
 - c. That the chairperson erred in law and in fact by failing to appreciate that the tenant had been occupying the premises for over seven (7) years; the landlord had not faced increase in rates,



rent, and had done no renovations on the premises to warrant increase in rent and that the land lord was out to evict him for no plausible reason.[Grounds 10 to 13].

- d. That the learned chairperson erred in law and in fact by engaging in a sham rent assessment process and not considering the tenant's evidence and submission thereby arriving at a rederring decision.[Grounds 14 & 15].
2. The appellant seeks for the following prayers:
 - a. That the ruling/judgement delivered on the 5th October 2023 assessing the rent per month at Kshs.60,000 plus VAT be substituted with an order assessing the rent at Kshs.42989 as proposed by the tenant;
 - b. That the order backdating the increase⁴ to 1st January 2023 be set aside and substituted with an order the increase to take effect from the date of judgement;
 - c. That the order imposing VAT on the tenant to be set aside.
 - d. That the costs of the appeal to be awarded to the tenant.
 3. The learned counsel for the appellant and respondent filed their submissions dated the 15th March 2024 and 14th March 2024 respectively, which the court has considered.
 4. The following are the issues for determinations by the court in this appeal:
 - a. Whether the appellant has proved that the decision by the chairperson of the tribunal to increase monthly rent to Kshs.60,000 and allow 16% VAT, was in error of the law and fact.
 - b. Whether the chairperson of the tribunal considered the appellant's evidence and submission.
 - c. What orders to issue.
 - d. Who pays the costs?
 5. The court has carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. This being a first appeal, the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions on whether or not it would have come to different conclusions, bearing in mind it did not see or hear the witnesses testify. In the case of *Mursal & another versus Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), the court held as follows:

“A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968} EA 123 and in *Peters v Sunday Post Limited* {1958} E.A. page 424.”

The court further stated as follows:

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate



stage. Anything less is unjust. See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, Cap 21 Laws of Kenya, a court of first appeal can appreciate the entire evidence and come to a different conclusion.”

- b. That I have perused the proceedings before the tribunal that appears at pages 6 to 21 of the record of appeal and noted under the proceedings of 26th November 2022, at page 9, the learned counsel for the respondent applied orally to amend the notice to read Kshs.79,000 instead of Kshs.300,000. Though the learned counsel for the appellant opposed the same, the tribunal allowed “the landlord to amend and serve the notice within thirty (30) days.” That order has not been appealed against to date, and is not subject matter of this appeal.
- c. The respondent, his witness, the valuer, and the appellant testified on the 18th May 2023, as confirmed from the proceedings at pages 11 to 15 of the record of appeal. The respondent testified as PW1, *inter alia* that the rental premises is in a strategic area within Mombasa Island. That he had renovated the toilets serving the premises and repaired the canopy for the premises. That the appellant had extended the space for the shop by demolishing the staircase. That the rental rates for the premises in that area have improved. That he is ready to renovate the premises upon request by the appellant. The valuer testified as PW2 and told the court he had done a valuation for the premises on 10th January 2022, recommending rent of Kshs.300,000, and on 10th May 2022 prepared another recommending rent of Kshs.79,000, exclusive of VAT. He termed the first recommended rent of Kshs.300,000 to have been an error that he corrected through the second report. The appellant testified as DW1 *inter alia* that he was paying Kshs.35,000 per month up from the initial Kshs.25,000. That their lease agreement expired and the respondent served him with notice to increase rent to Kshs.300,000 which he objected to and used a lot of money defending. That the respondent had not done any renovation even though he had asked him verbally to do so. That he did not get permission to erect the timber mezzanine floor and was not ready to increase rent even by the amount proposed by his valuer. The appellant’s valuer testified as DW2 on the 17th July 2023 as seen in the proceedings at page 17 to 19 of the record of appeal. It was his testimony *inter alia* that using the comparable premises in the area, he recommended rent of Kshs. 42,307 per month, exclusive of VAT.
- d. The court has considered the testimonies by both parties, submissions filed before the tribunal dated 23rd August 2023 and 26th July 2023 by the learned counsel for the appellant and respondent respectively, perused the two valuation reports by Wesco Property Consultants prepared by PW2 and the one by Elite Africa Valuers Limited by DW2. I have also perused the tribunal’s judgement at pages 20 to 28 of the record of appeal and noted the appellant’s testimony and submissions were considered at paragraphs 10 to 16, 20 to 21 of the judgement contrary to the contestation by the appellant. After the tribunal considered the evidence presented by both parties as seen under paragraphs 22 to 26 of the judgement, it *inter* pronounced itself as follows;

“ 27. However, I tend to believe the landlord’s valuer as he relied on premises which are on the same locality and street with the suit premises and I shall exercise my discretion to set the rent for the suit premises at



Kshs.60,000/= exclusive of VAT and service charge down from the recommended figure of Kshs.79,000/= noting that the market rate has risen for the last over 7 years since the tenant occupied the premises. I shall make the effective date of increment to be 1st January 2023 instead of 1st April 2022 in line with section 9(1)(a) of Cap 301, Laws of Kenya. The tenant shall pay any arrears occasioned by the effective date of increment within a period of three (3) months from the date hereof.”

The tribunal then proceeded to order for the parties to meet their own costs at paragraph 28 and set out in summary the final orders at paragraph 29 of the judgement. Having considered the analyses by the chairperson of the tribunal of the evidence tendered before him, and the application of the law and the conclusions arrived at, I find the appellant has failed to show any misdirection on the part of the Hon. Chairperson that would warrant this court to interfere with his exercise of discretion. I therefore find the appeal to be lacking in merit and is hereby dismissed and the chairpersons orders confirmed.

- e. That the appellant having failed in the appeal will pay the costs of the appeal to the respondent, in terms of section 27 of Civil Procedure Act chapter 21 of Laws of Kenya.
1. That flowing from the above determinations, the court finds and orders as follows:
 - a. That the appeal has no merit and is dismissed.
 - b. The appellant to pay the respondent’s costs in the appeal.
 - c. The tribunal chairperson’s judgement delivered on 5th October 2023 in Mombasa BPRT Case No. E035 of 2022 is hereby confirmed.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 8TH DAY OF JULY 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of:

Appellant: Mr. Kenzi.

Respondent: Mr. Omwenga

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

