



**Emily Nyambu, Ramesh Meghji Shah & Devidnder Kumar Bhalla t/a Tulips
Commercial Institute v Meru North Co-operative Union (Environment and Land
Appeal E128 of 2022) [2023] KEELC 21624 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E128 OF 2022
EK WABWOTO, J
NOVEMBER 2, 2023**

BETWEEN

**EMILY NYAMBU, RAMESH MEGHJI SHAH & DEVIDNDER KUMAR BHALLA
T/A TULIPS COMMERCIAL INSTITUTE APPELLANT**

AND

MERU NORTH CO-OPERATIVE UNION RESPONDENT

*(Being an Appeal from the Judgment of Hon. Patricia May delivered on
5th December, 2022 in BPRT No. 967 of 2019 Emily Nyambu & 2 others
T/A Tulips Commercial Institute vs. Meru North Co-operative Union)*

JUDGMENT

1. The Appeal arises from the decision of the Business Premises Rent Tribunal (herein after referred to as the Tribunal) which upheld the Landlord's notice for rent increment dated 20th September, 2018 was and directed it to take effect from 1st December, 2018. The Tribunal's decision was rendered on 5th December, 2022.
2. Vide a Memorandum of Appeal dated 21st December 2022, the Appellant being aggrieved appealed against the Tribunal's decision on the following grounds:
 - i. That the Learned Vice Chairlady erred in law and fact by failing to judiciously analyze the appellants' submissions on record as well as the authorities cited and filed thereof hence arriving at a finding that was not supported by evidence and thus untenable and unjust to the appellant.
 - ii. That the Learned Vice Chairlady failed to appreciate the fact the respondent/Landlord had indicated that a market valuation was done before issuance of the rent increment notice dated



20th September 2018, yet no valuation report was ever produced by the Respondent/Landlord as evidence of the same.

- iii. That the Learned Vice Chairlady failed to appreciate the fact that the purported lease agreement was never formally issued to the appellant herein and therefore should not have been relied on.
 - iv. That the Learned Vice Chairlady erred in law and in fact by making findings against the appellant that were not supported by concrete evidence by the respondent herein as to justify the Respondent's Notice of Increment of Rent.
 - v. That the Learned Vice Chairlady erred in law and in fact in upholding the respondent's inconsistent and unjustifiable reasons for increment of rent adduced by the respondent/landlord thereby failing to consider the law and the appellant's/tenant's evidence before making the impugned orders.
 - vi. That the Learned Vice Chairlady failed to appreciate the fact that the Tenant had established goodwill on the premises having been in occupation for a long period thereby making it difficult to get alternative premises.
 - vii. That the Learned Vice Chairlady failed to decide the Reference based on the weight of evidence on record.
 - viii. That the learned Vice Chairlady failed to appropriately consider, evaluate rival facts which were presented before her by the parties and make a determination as to which of the facts he believed to be true and thereby arrived at a demonstrably wrong decision.
 - ix. That the learned Vice Chairlady's evaluation of the appellant's submission and facts before it was perfunctory.
3. Thus, the Appellant have sought the following orders:
- i. That the appeal be allowed and the order be set aside.
 - ii. That the Appellant be awarded the costs of the appeal.
4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 3rd June, 2023 through Agnes Kirigo & Company Advocates while the Respondent filed written submissions dated 25th September, 2023 through C.B. Mwangela & Company Advocates.
5. The Appellant submitted on the following issues:
- i. Whether the Tribunal used or did not use appropriate methods in assessing the rent and whether the Tribunal took into account the relevant factors?
 - ii. Whether there was an exorbitant increase in rent?
 - iii. Whether the back-dating of the rent to the period that the rent increment notice was served was justiable?
 - iv. Whether the Respondent stands to be prejudiced if the orders sought are granted?
 - v. Whether the Appellant is entitled to the reliefs sought?
6. The Appellant submitted that the Tribunal erred in law and in fact in upholding the Respondent's inconstant and unjustifiable reasons for increment of rent adduced by the Respondent thereby failing to consider the law and the Appellant's evidence before making the impugned orders.



7. It was contended that the Tribunal failed to appreciate the fact that the Respondent/Landlord had indicated that a market valuation was done before issuance of the rent increment notice dated 20th September, 2018 yet no valuation report was ever produced by the Respondent as evidence of the same. Reliance was placed to the cases of *Supa Duka Nakuru Limited v Baringo United Company Limited* [2017] eKLR and *Margaret Wanjugu Nduma & 3 others v James Kariuki Gathura* ELC Case No 32 of 2015.
8. It was further contended that the Respondent had not indicated any economic factors as reasons for rent increment and further that the Tribunal had failed to rely on the principles guiding assessment of rent which are laid down in form G under the *Landlord and Tenant (Shops, Hotels and Catering Establishment Tribunal) (Forms and Procedures) Regulations 1966*.
9. It was further submitted that the Appellant herein has been in occupation of the suit premises since 1970 and has been apprehensive that the Respondent is on the verge of implementing and enforcing the terms of the judgment having tabulated and made a demand for the payment of the decretal sum. It was submitted that the renovations done were made to 12 low level toilets in the suit premises and painting of the main walls. No improvement was done nor has since been made to room numbers 16, 17, 21, 23, 24 and 25 at Nyambere House which have been rented by the Appellant herein. It was also submitted that the Tribunal erred in law and in fact in failing to appreciate the evidence that was adduced by the Appellant herein that the rooms rented are in a deplorable condition not attributable to the Appellant's occupancy of the premises but as a result of not having been renovated for years.
10. The Appellant further submitted that the Tribunal erred in law and in fact by awarding a manifestly high award of Kshs 1,084,800 which was backdated from November, 2018. The Appellant submitted that they will suffer substantial loss if directed to pay the lump sum of Kshs 1,084,800 owing to their insufficient means of income.
11. The Court was urged to find merit in the appeal and allow the same with costs.
12. The Respondent in its submissions dated 24th September, 2023 submitted that the increment in rent herein was done after a period of (4) years. During this period, the Respondent demonstrated that it has carried out renovations and paint works that improved the market value of the premises.
13. It was argued that the amount increased was reasonable being a difference of Kshs 3,350 and further that the Appellant is still in arrears of rent accruing from 2018 till today. Counsel for the Respondent concluded the submissions by urging this Court to dismiss the Appeal.
14. Having perused the entire record of appeal and further having considered the submissions filed by the parties and the grounds of appeal, the following issues are the key issues for determination herein:
 - i. Whether the Tribunal properly applied the principles governing assessment of rent?
 - ii. Whether the Tribunal erred in backdating the rent increment from 1st December, 2018?
15. This being a first Appeal, this court is required to re-evaluate the evidence tendered before the Tribunal and make its own findings and conclusions as was held in the case of *China Zbongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR and also *Selle v Associated Motor Boat Company Ltd* [1968] EA 123. The High Court in the *China Zhongxing Construction Company Ltd case* (*supra*) cited the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing



the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas (1)*, [1947] A.C. 484.”

16. From the foregoing, I just wish to reiterate that the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.
17. Before I proceed to determine the aforementioned issues, this Court shall address a Preliminary issue raised by the Respondent on whether the Appeal should be struck out for non-compliance with the directions issued by this Court. Vide an application dated 15th August, 2023, the Respondent had urged this Court to struck out the appeal with costs for the reasons that the record of appeal is incompetent and defective because it did not contain all pleadings that were filed before the Business Premises Rent Tribunal.
18. In considering his issue, I have perused the Court record and it is clear that the Respondent while raising an objection to the appeal, proceeded to file a Supplementary record of appeal dated 25th September, 2023 which included the following documents that were missing in the appellant’s record; Landlord’s list of witness, witness statement of Henry Kobia, Landlord’s list of documents, Landlord’s submissions and Landlord’s Replying Affidavit and in view of the foregoing, this Court cannot accede to the Respondent’s application seeking to strike out the record since no prejudice has been suffered by the Respondent.
19. In respect to whether the Tribunal properly applied the Principles governing assessment of rent, Counsel for the Respondent argued that the decision of the Tribunal was Section 9(2) of the [*Land Lord and Tenant \(Shops, Hotels and Catering Establishment\) Cap 301*](#) stipulates as follows: -
 - “without prejudice to the generality of this section, a Tribunal may upon any reference –
 - a. determine or vary the rent to be payable in respect of the controlled tenancy, having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market and disregarding-
 - i. any effect on rent of the fact that the tenant has, or his predecessors in title have been in occupation of the premises.
 - ii. any goodwill attached to the premises by reason of the carrying on threat of the trade, business or occupation of the tenant or any such predecessors.
 - iii. any effect on rent of any important carried out by the tenant or any such predecessor otherwise than in pursuance of any obligation to the immediate landlord.
 - (b) terminate or vary any of the terms, or conditions of the controlled tenancy or any of the rights or services enjoyed by the tenant, upon such conditions, if any as it deems appropriate.”



20. In support of the Appellants' case, Counsel also referred to the [Landlords and Tenants \(Shops, Hotels and Catering Establishment \(Tribunal\) \(Forms & Procedure\) Regulations 1966](#) which provides for the principles governing assessment of rent to include: -the original cost of construction and building, the age of the building, the market value of the land on which the premises are built, the improvements and costs of such improvements, amenities or services provided by the Landlord and the rent at which the premises were let for the past (three years).
21. One of the powers given to the Tribunal under Section 12 (1) (b) is "to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof." The statute does not prescribe any method to be employed by the Tribunal in order to determine the rent payable. It follows that the Tribunal has wide discretion over this aspect of its mandate. In the case of *Mbogo v Shah* (1968) EA 93 with regard to when an appellate court can disturb the exercise of discretion of a lower court. It was said in the said case that the appellate court ought not to interfere with the exercise of such discretion unless the appellate court is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.
22. In the judgment delivered by the Tribunal on 5th December, 2022, the Tribunal stated that the rent increment was done after a period of close to 4 years and the amount was increased by Kshs 3,350 per room and which was reasonable in the circumstances, considering other economic factors such as inflation.
23. Having carefully reviewed the evidence that was tendered and the record of appeal, together with the Supplementary Record filed, it is the finding of this Court that in the instant appeal, the Tribunal properly exercised its discretion in determining an increase of rent payable. The Tribunal cannot be faulted for the assessment done and I have no reasons to interfere with the same.
24. On the issue of whether or not the Tribunal erred in backdating the rent increment, the Appellant argued that backdating the rent payable may end up favoring the landlord which was not the intention of the Act. It was also argued that the Tribunal did not give any reasons as to why the rent was backdated from November, 2018 to December, 2022 amounting to Ksh 1,084,800.
25. The Appellant challenged the Tribunal's decision in backdating rent from 1st December, 2018 and relied on the decision of Munyai Sila, J in [Supa Duka Nakuru Limited v Baringo United Company Limited](#) [2017] eKLR in which the judge stated that one needs to exercise caution in making an order for backdating rent payment. The Judge dealt with a scenario where rent was backdated for four years which he noted would be a huge financial burden not anticipated with the tenant.
26. In the instant appeal, the landlord's notice for increment of rent was issued on 5th September, 2018 which was to take effect on 1st December, 2018. The Appellant herein did not comply with the same but waited until 1st October, 2019 when they filed reference opposing the landlord's notice dated 5th September, 2018. In the case of [Mohammed Noor & 23 others v Seif Binsaid Properties Ltd](#) [2020] eKLR which was also considered by the Tribunal, it was stated that a Tenant ought not to benefit from any delays that the landlord suffered while the tenant was prosecuting the case. Having considered the foregoing, it is the finding of the Court that the Tribunal gave its valid reasons as to why it allowed the backdating of the rent and this Court shall proceed to uphold the same. I do not see any reason to fault the Tribunal in backdating the rent payable.
27. On costs, looking at the circumstances herein and considering the long-term landlord tenancy relationship between the parties, this court directs each party to bear own costs of the Appeal.



28. In conclusion, it is the finding of this court that the appeal lacks merit and the same is dismissed with no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2023.

E.K. WABWOTO

JUDGE

In the virtual presence of:

Ms. Kirigo for the Appellant.

Mr. Mwangela for the Respondent.

Court Assistant: Caroline Nafuna.

