



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 46 OF 2018**

**STEPHEN ATALLO NYAMANGA.....APPELLANT**

**VERSUS**

**ANCHOR INVESTMENT LIMITED.....RESPONDENT**

**JUDGEMENT**

*(Being an appeal from the Judgment of the Chairperson Business Premises Tribunal Hon. Mochache D made on 8<sup>th</sup> February, 2013 in BPRT Case No. 443 of 2012)*

**Introduction**

By a Memorandum of Appeal dated the 22<sup>nd</sup> February, 2013, the Appellant appeals against the whole of the Judgment issued on the 8<sup>th</sup> February, 2013 by the Chairperson of the Business Premises Tribunal. The genesis of this appeal is the Judgment of the Chairperson Hon. Mochache D in BPRT Case No. 443 of 2012 where she dismissed the Appellant's Reference dated the 22<sup>nd</sup> June, 2012 in which the Appellant had opposed a one month notice altering conditions of tenancy dated the 24<sup>th</sup> April, 2012 served by Anchor Investments Limited, the Landlord in respect of Fatima Court Flat No. 38 on LR No. 1/822 Argwings Kodhek Road, Nairobi for increase of rent from Kshs. 25,000/= to Kshs. 55,000/=.

The appellant being dissatisfied by the Judgment filed an appeal at the Environment and Land Court of Kenya in Nairobi on 22<sup>nd</sup> February, 2013.

The Memorandum of Appeal contained the following grounds;

1. That the learned Chairperson erred both in law and fact in not taking into account the laws governing the writing of judgment.
2. That the Learned Chairperson erred both in law and fact in not taking into account the Appellant's submissions and valuation report when writing the judgment.
3. That the Learned Chairperson erred both in law and fact in coming up with her own rent estimates as opposed to the figures proposed by the Valuers of the Appellant and Respondent.
4. That the Learned Chairperson erred both in law and fact by not appreciating the exact location of the Business Premises which formed the basis of the proceedings in the Tribunal.
5. That the Learned Chairperson erred both in law and fact by ordering a retrospective application of her orders.
6. That the Learned Chairperson erred both in law and fact by allowing 57.4% increment in rent contrary to the law.

The Appellant prays that:

- a) That the said judgment delivered on 8<sup>th</sup> February, 2013 be set aside and the Appellant's Reference be allowed with costs.
- b) In the alternative the Appeal be allowed and this Honourable Court to make its own findings as it may deem just.

The Appeal was canvassed by way of written submissions.

## Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Learned Chairperson erred both in law and fact in coming up with her own rent estimates as opposed to taking into consideration the figures proposed by the Valuers of the Appellant and Respondent.
- Whether the Learned Chairperson erred both in law and fact by ordering a retrospective application of her orders.
- Whether the Appeal is merited.

As to whether the Learned Chairperson erred both in law and fact in coming up with her own rent estimates as opposed to taking into consideration the figures proposed by the Valuers of the Appellant and Respondent.

The Appellant in his submissions contended that he was not given a fair hearing as his report was criticized as badly prepared without giving any reason for the same. Further, that the Tribunal proceeded to assess rent payable with complete disregard to the Valuation Reports and stated that the rent is assessed on what the comparable lettings are fetching in open market. He insisted the judgment was not based on any provision of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as there is nothing in the said Act that allows the Chairperson to come up with an average of the rent proposed by two different valuers. He claims the Chairperson should have directed the two Valuers to prepare a joint report or ask the parties to consent on an Independent Valuer. He relied on the case of: **Nakuru Civil Appeal No. 68 of 2016 Supa Duka Nakuru Limited and Baringo United Company Limited** to buttress his arguments.

The Respondent in its submissions insisted that the Appellant cannot dictate how the Chairperson is supposed to make her decision. Further, that the Chairperson as a judicial officer exercised her discretion to use an average from both reports and arrived at the standard rent which they accepted. It explained that the Appellant was at all times given an opportunity to advance his claim and cannot claim to be condemned unfairly. Further, that the Chairperson explained in her judgment that the rent assessed was based on comparable lettings which are fetching in open market thus the Appellant's averments that no reason was advanced in the judgment is misconceived. It relied on sections 9 and 12(1) (b) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as well as the decisions of **Hassan Awadh Vs Abdalla S Barakat – 180 of 2009; Birindelli Signs Limited Vs Pioneer General Assurance Society – 174 of 1987 – eKLR; and East African Seeds Company Limited v Kaushik M. Shah & Another ( 2019) eKLR** to support its averments.

From a perusal of the Judgement which is the subject to this Appeal, I note that the Chairperson clearly stated that the rent was based on what comparable lettings were fetching in the market. From the Valuation report dated the 14<sup>th</sup> December, 2012 presented by Standard Property Services on behalf of the Tenant, I note there were no comparable lettings indicated therein but he proceeded to state that in his opinion the monthly rent payable should be Kshs. 28,000/= inclusive of services but upon repairs the same could be revised to Kshs. 34,000/= inclusive of services. As per the Valuation Report dated the 8<sup>th</sup> August, 2012 presented by Value Zone on behalf of the landlord, it highlighted four comparable premises in the area before arriving at a monthly rent of Kshs. 48,000/=. I note in the two reports there is no dispute on the lettable area. From the Judgment, the Chairperson in her judgment proceeded to consider the proposed rents indicated in the aforementioned valuation reports before arriving at her average figure of Kshs. 41,000/= which is the subject of the Appellant's contention. Section 12 (1) (b) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act gives the Tribunal Power to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof. In the current scenario, I note the Chairperson proceeded to exercise her discretion in accordance with section 12 (1) (b) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) by using the average of the proposed rent between the Landlord and the Tenant after taking into account the valuation reports. In the case of **East African Seeds Company Limited v Kaushik M Shah & another [2019] eKLR** where Obaga J held that: ' **The Tribunal Chair analysed the comparables in the report by the Appellant and the report by the Respondents. The Chairperson gave reasons why he picked on comparable No. 9 and No. 3 on the Respondent's report. In arriving at the stand rent he took an average between the Appellant's findings and the Respondent's findings.12. The Tribunal Chairperson was alive to the fact that the previous rent was Kshs.290,480/=. The Appellants proposed rent was Kshs.290,300/=. On the other hand the Respondents' proposed rent was Kshs.445,500/=. The Chairperson took an average between the two using the comparables given and arrived at rent of Kshs.381272/=. In arriving at this figure, the Tribunal chair took into account the guiding principles in assessment of rent.**'

In associating myself with the said decision, I find that the Chairperson exercised her discretion properly as enshrined in the law by proceeding to consider the average between the Landlord and the Tenant's proposal. To my mind, the proposed rent was not exorbitant based on the comparables within the area as evident in the Value Zone's Valuation report and she hence did not err in law or fact in arriving at her decision. I further find that the Appellant's averments are hence misconceived.

As to whether the Learned Chairperson erred both in law and fact by ordering a retrospective application of her orders. This ground touches on the effective date of the notice. I note the Appellant did not address the issue of the effective date in his submissions. The Respondent contended that the effective date should be the date of the notice. It relied on section 9 (1) (a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and the decisions of **Shah & Shah V Kagunda 1978 KLR 35; Sadhu & Another Vs Vadgama Garage & Anor ( 1975) EA 31; Hassan Awadh Vs Abdalla S Barakat – 180 of 2009; and Birindelli Signs Limited Vs Pioneer General Assurance Society – 174 of 1987 – eKLR** to buttress this argument. Section 9 (1) (a) of the **Landlord & Tenant (Shops, Hotels & Catering Establishments) Act (Cap 301)** provides that: ' **Upon a reference a Tribunal may, after such inquiry as may be required by or under this Act, or as it deems necessary—(a) approve the terms of the tenancy notice concerned, either in its entirety or subject to such amendment or alteration as the Tribunal thinks just having regard to all the circumstances of the case;**'

As regards the effective date, I note in the Judgment the Chairperson stated as follows: ' **The new rent shall be effective 1<sup>st</sup> September, 2012. The reason being that though the Landlord's notice was issued in April, the Landlord's report was filed in August. The delay to file the report must be construed against the Landlord.** '

Based on the evidence before me and in associating myself with the decision of **Sadhu & Another Vs Vadgama Garage & Anor ( 1975) EA 31 where the Court held that the Tribunal has power to vary the terms of the tenancy notice including the date from which it takes effect**, I find that the Chairperson did not err but indeed took into consideration the circumstances at hand before arriving at her decision on the effective date. Accordingly, I find that learned Chairperson properly exercised her discretion in accordance with section 9 (1) (a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

It is against the foregoing that I find the Appeal unmerited and will proceed to dismiss it with costs to the Respondent.

**Dated Signed and Delivered via email this 6<sup>th</sup> day of May, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**