



Mbarak Salim Jumaan (Suing in his Capacity as the Legal Representative and Administrator of the Estate of Salim Mbarak (Deceased) t/a Bismilahi Lengut Hotel & 6 others v Hasham Lalji Properties Ltd (Environment and Land Appeal 1 of 2018) [2025] KEELC 150 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELC 150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 1 OF 2018**

**JM ONYANGO, J
JANUARY 23, 2025**

BETWEEN

**MBARAK SALIM JUMAAN (SUING IN HIS CAPACITY AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF SALIM MBARAK (DECEASED) T/A BISMILAH I LENGUT HOTEL 1ST APPELLANT
JANE JELAGAT KOSKEI T/A TACHASIS WHOLESALERS 2ND APPELLANT
GEOFFREY MUCHIRI T/A BIBATO WHOLESALERS 3RD APPELLANT
DANIEL CHEPKONGA T/A MAROBON WHOLESALERS 4TH APPELLANT
RAMESH JIVRAJ GOSTANI T/A RAMESH GOSRANI SHOP .. 5TH APPELLANT
JAYDIP SHAH T/A SATISH SHAH SHOP 6TH APPELLANT
ABRAHAM KIPTANUI T/A KINOIYO FOOTWARE 7TH APPELLANT**

AND

HASHAM LALJI PROPERTIES LTD RESPONDENT

JUDGMENT

1. This Appeal emanates from the decision of Hon. Mbichi Mboroki, Chairman of the Business Premises Rent Tribunal delivered on 4th November, 2016 in Eldoret BPRT Cases No. 82 - 88 of 2016. Aggrieved by the said decision, the Appellants lodged the instant Appeal against the entire decision vide a Memorandum of Appeal dated 1.02.2018 and Amended on 7th December, 2021 pursuant to leave of the court granted on 7/12/2021. The grounds of Appeal are that: -



- i. The Learned Chairman of the Business Premises Tribunal erred in law and fact in failing to notify the appellants of the delivery of the judgment prior to 4.11.2016
 - ii. The Learned Chairman of the Business Premises Tribunal erred in law and fact in failing to appreciate that rent increment in a subsisting tenancy ought to operate upon judgment but not in retrospect which error has occasioned the appellants hardship.
 - iii. The Learned Chairman of the Business Premises Tribunal erred in law and fact in applying the wrong principles while determining the rent payable by the tenants/ appellants and as a result arrived at an erroneous assessment which is both punitive and oppressive to the appellants.
2. Consequently, the Appellants sought the following Orders: -
- a. The honourable court set aside the award of the Business Premises Tribunal of 4.11.2016
 - b. To replace the decision with the assessment proposed by the appellants in their valuation report dated 14.12.2015.
 - c. Costs of the appeal and costs in the Tribunal.
3. A brief background to bring the Appeal into perspective is that vide a Notice dated 12th October, 2015, the Respondent (landlord) expressed his intention to increase the Appellants' monthly rent by diverse amounts w.e.f. 1st January, 2016, on the ground that the rent at that time was way below the prevailing market rate. Consequently, the Appellants objected to the said notice and filed their respective References at the Business Premises Rent Tribunal.
4. The References being BPRT Causes Nos. 82 – 88 of 2015 were considered together and the hearing of the claim was through Valuation Reports and rival submissions filed by the parties. The Appellants instructed the firm of M/S Keriasek & Co. Ltd to determine the proper market rent at the time. They physically surveyed and inspected the premises and subsequently prepared a Valuation Report dated 16/11/2015.
5. The tenants' valuer analyzed 7 comparable premises, which were similar in construction, age, condition and are located a few meters from the suit premises and made a recommendation that the average rent that should be paid for the suit premises was Kshs. 617/= per square meter per month. They urged the court to adopt the recommendation made by their valuer in assessing the rental increment.
6. The Respondent/Landlord on the other hand appointed the firm M/S Chrisca Real Estates, who physically surveyed and inspected the premises and prepared a Valuation Report dated 17th June, 2015. The respondent's valuer used comparables such as size, location, age and condition of the property, construction material used to build and subdivide the property, comparable lettings and 5 comparable premises on Oloo Street, Kenyatta Street and Uganda Road all of which were within close proximity to the suit premises.
7. After analyzing the said comparable premises the landlord's valuer gave a recommendation for the average rent for the suit property as Kshs. 917/= per square meter per month and the rent for the stores, kitchen and temporary premises as Kshs. 459/= per square meter per month. The respondent submitted that he had not reviewed rent since the year 2013 and maintained that there was no arbitrary increase in rent without carrying out a valuation of rental income. They urged the court to adopt the recommendations made by their valuer.



8. The BPRT Cause Nos. 82 – 88 of 2015 were determined vide a judgment of the Tribunal dated 4th November, 2016 whose effect was to partially allow the Respondent’s case by increasing the rent payable by the appellants hence the instant Appeal.
9. The Appeal was canvassed by way of written submissions. However, from the Court Record, only the Appellants filed their rival submissions which I have read and considered.

Appellants’ Submissions

10. Counsel for the Appellants gave a brief background of the dispute between the parties and the proceedings before the BPRT. It was his submission that the Hon. Chairman agreed with the Respondent and increased the rent by 236% for the 1st Appellant, 190% for Ramesh Gosrani, 200% for Marobon Wholesalers, 237% for Tachasis Wholesalers, 166% for Bibato Wholesalers and 348% for Satish Shah, which would take effect from 1.1.2016 without an explanation or justification for the massive increment.
11. He further submitted that the Tribunal ignored and failed to consider important factors such as the period of tenancy, the type of businesses carried out and the current rents payable. It was his contention that no oral testimonies were taken and that the tenants were condemned unheard against the tenets of Article 10, 47,48 and 50.
12. They thus urged the court to set aside the decision of the Hon. Chairman of the BPRT delivered on 4/11/2016 and that the matters Nos. 82 – 88 of 2015 be remitted for retrial before another Chairman for retrial. They prayed that the appeal be allowed with costs.

Analysis and Determination

13. I have critically looked at the grounds in the Memorandum of Appeal, Record of Appeal filed and the Appellants’ submissions in totality and it is my considered view that the main issue arising for determination is whether this Court should interfere with the Tribunal’s findings and exercise of discretion by setting aside its judgment and decree. I will proceed to address the grounds of appeal on account of: -
 - a. Whether the failure to issue a notice of delivery of judgment invalidates the judgment.
 - b. The principles to be considered in determining and assessing the rent payable.
 - c. When the rent increment should take effect.
14. This court’s jurisdiction as a first Appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate does not however entail taking on board new issues which were never brought to the trial court’s attention or matters that were not subject of the trial court’s consideration or tribunal as in the instant case. See the Court of Appeal decision in *Oi Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR.
15. The Appellants’ main issue is that the Tribunal used the wrong principles in determining and assessing the rent payable and the resultant increase in rent is abnormal, astronomical and exorbitant and as a result is unconstitutional, unwarranted, questionable and oppressive. They maintained that the Tribunal did not take into account important factors.
16. It is not in dispute that there exists a Landlord – Tenant relationship between the Appellants and the Respondent in respect to the business premises comprised in Title No. Eldoret Municipality Block



6/31 and consequently, the tenancy created a controlled tenancy. I will now proceed to consider the issue.

Whether failure to issue a Notice of delivery of Judgment invalidates the judgment

17. The Appellant has taken issue with the fact that the Chairman of the Tribunal delivered his judgment without issuing a notice of delivery of judgment to the parties contrary to the provisions of Order 21 Rule 1 of the Civil Procedure Rules. From the proceedings of the Tribunal, the judgment was scheduled to be delivered on 22.7.2016. The judgment was not delivered as scheduled. The proceedings of the said date are missing and it is not clear whether the new date was fixed in the presence of the parties or their advocates. There is also no indication that a notice was issued. What is clear from the judgment is that the judgment was delivered in the presence of only the Respondent's advocate. The question that arises is how counsel for the Respondent learnt of the date of delivery of judgment.
18. Assuming that both advocates were present on 22.7.2016 when the judgment was initially supposed to be delivered it would be unnecessary to issue a notice as the new judgment date was fixed in their presence. Since the Appellant has not disclosed whether he or his advocate were present on 22.7.2016 it would be unjust to fault the Chairman of the Tribunal for failing to issue a notice of delivery of judgment. In the circumstances I am of the view that the failure to issue the said notice does not invalidate the judgment.

Principles to be considered in determining and assessing the rent payable and increment

19. The law under section 9 (2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* gives the Tribunal the mandate to determine the rent payable in the event of a disagreement between the landlord and the tenant. In considering a reference in regard to alteration of rent of a controlled tenancy the Tribunal is thus guided by the provisions of the said section as follows: -
 - “(2) 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;
 - i. Any goodwill attached to the premises by reason of the carrying on threat of trade, business or occupation of the tenant or any such predecessor.
 - i. Any effect on rent of any improvement carried out by the tenant or any such predecessor otherwise than in pursuance of an obligation to the immediate landlord;.....”
20. Both parties filed their respective Valuation Reports as aforementioned and included the relevant attachments and drawings. It is the duty of a Tribunal in assessing rent payable to consider all the reports presented before it, carefully looking at the individual comparables in the various reports.



21. The Chairman of the BPRT carefully analysed both Valuation Reports filed by the parties and made the following observations in his judgment, which I seek to reproduce in part as follows: -

“...The Tribunal considered the rival Valuation Reports from both the Landlord and the Tenants and made the following observations;

That the Landlord’s Valuer’s comparables are from Eldoret Central Business District and are in respect of premises which are more superior than the suit premises. The rent in the landlord’s valuer’s report shows the trend of the rent in the Eldoret Central Business District. The comparables do not also disclose the effective dates of the rent.

The Tenants’ Valuer’s report comparables are from Oloo Street, the same street as the suit premises. The comparables do not disclose the effective dates of the rents. That the rents may be due for review in the absence of effective dates.

The tribunal is of the considered view that the average between the rate of the landlord’s valuer’s and that of the tenant’s valuer will yield a fair open market rent in respect of the suit premises. The tribunal thus took $917 + 617 = 1534$ divided by 2. = 767.

The tribunal thus applied the rate of Kshs. 767 per square meter per month in respect of the main shops.

And half rate Kshs. 383.5 in respect of other lettable areas

That in the absence of the joint report on the lettable areas, the tribunal will adopt the Tenants Valuer’s report in

respect to the lettable area to avoid any exploitation....”

22. I have critically looked at the information comprised in the valuation reports, the assessment of the Hon. Chairman of the Tribunal, particularly on the fact that landlord’s valuer used comparables from the Eldoret Central Business District and was in respect to premises which are more superior and the rent showed the trend in the Central Business District.

23. . Further, both valuation reports failed to disclose the effective dates of the comparables rents relied upon. This is my view, is an important aspect especially where there is a possibility of the said rent being up for review, it may not be a true reflection of the current market rates at the time. In this regard, I agree with the Hon. Chairman of the Tribunal.

24. In Cleaners Limited –vs. - Barclays Bank DCO [1972] EA 188 the Court of Appeal held that:-

“It is the reasonableness of the rent that must be in the forefront of the tribunal’s investigations and determination. It must be the concern of this court too. The average rates per square foot or meter of a number of nearby buildings on ground floor premises in which similar trades are exercised are among other things relevant to assessing the rent that would reasonably be expected in the open market.”

25. The assessment of new rent payable was properly done in my opinion based on evidence before the tribunal, taking into consideration all the important factors. Other than the effective dates for rent of the comparables, both reports touched on key factors such as the size, location, age, condition, construction material used and the relevant comparables within the proximity of the suit premises. The appellants’ argument and submission that the Chairman erred because the increased rent as assessed in his decision was by 236% for the 1st Appellant, 190% for Ramesh Gosrani, 200% for Marobon



Wholesalers, 237% for Tachasis Wholesalers, 166% for Bibato Wholesalers and 348% for Satish Shah increase from the old rent does not hold water for the reasons earlier discussed.

26. Thus, even though the amount arrived at by the Tribunal is slightly higher than what the tenants/Appellants' valuer recommended, the said amount is less than what the landlord had asked for in the notice and what the landlord's valuer recommended. Consequently, I do not find this to be unreasonable, abnormal, exorbitant or astronomical as alleged by the Appellants. The same is fair, reasonable and in line with the open market rent. This ground of appeal fails.

When the rent increment should take effect

27. It is the Appellants' claim that the Tribunal erred in ordering that the rent increment should take effect as from 1st January, 2016. It is their contention that the said increment ought to operate upon delivery of judgment and that the same cannot be applied retrospectively.

28. Shah J. in Tala Investment Ltd Vs Green Spot Limited in Civil Appeal No. 269 of 1993 stated that:

“The ratio decidendi of all the said appeals is that the normal order for effective date would be that the date specified in the tenancy notice would be proper but the Tribunal has in proper circumstances discretion to alter the effective date and that such discretion must be exercised judicially.”

29. Guided by the above, I find no fault on the part of the Tribunal in ordering that the rent increment should be with effect from 1st January, 2016 as that is the same date specified in the Tenancy Notice. The Tribunal exercised its discretion judiciously in deciding the effective date for the payment of the assessed rent. Delay in hearing and determining a reference is not sufficient ground for altering the effective date of the notice which should ideally be the date in the tenant notice. It is therefore my finding that this ground of appeal lacks merit.

31. In addition, I have noted that the Appellants in their submissions averred that they were denied their right to a fair hearing as enshrined in *the constitution*. In my opinion, the Appellants cannot allege that they were condemned unheard when in fact they were represented by counsel and parties mutually agreed that the cases would be determined by way of a valuation report and written submissions, both of which were filed on their behalf. They were at liberty to prosecute their claim wholly by giving all the details that they wished to be considered by the tribunal including their period of tenancy, the type of businesses they carried out but they chose not to.

32. In view of the foregoing, I find no reason to interfere with the decision of the Hon. Chairman of the Tribunal; the decision was arrived at judiciously, taking into consideration all the statutory provisions and relevant factors and principles in assessing the rent payable.

Conclusion

33. In the premises, I accordingly find that the Amended Appeal dated 12.04.2023 is not merited and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF JANUARY 2025

J. M ONYANGO

JUDGE

In presence of; -



Mr R. M Wafula for the Appellants

No appearance for the Respondents

Court Assistant – Hinga

