REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

APPEAL NO. 7 OF 2020

CAREENAS HOLDINGS T/A DIGITEC CYBER.....APPELLANT

-VERSUS-

NAWAB MOHAMED HAJI MIRDOR.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Mbichi Mboroki, Chairman,

Business Premises Rent Tribunal delivered on 30 January 2020

in Mombasa BPRT No. 18 of 2019)

JUDGMENT

(Appellant being tenant of the respondent; respondent wishing to increase rent; appellant challenging the rent increase before the Business Premises Rent Tribunal; parties providing two varying valuation reports at the Tribunal; Tribunal of opinion that the tenant's report was not of comparable premises and disregarding it; Tribunal of view that two of the premises cited in the Landlord's report are of comparable premises; Tribunal proceeding to get an aggregate of the two premises said to be comparable in the landlord's report and then adding this to the mean in the tenant's report and proceeding to assess rent on that basis; no good reason for Tribunal to proceed to use the Tenant's valuation, if it thought it to be unacceptable; tenant's report containing a comparable that was in the same building as the disputed premises; no good reason why the Tribunal disregarded this comparable despite it being in the same building; appeal allowed; matter remitted back to the Tribunal for re-assessment of rent)

1. The appellant is a tenant of the respondent (landlord) in a building constructed on Mombasa Block XXI/595 (hereinafter referred to as "the suit premises"). The building is a three storey structure and the tenant occupies the ground floor. The building is at the junction of Mohdhar Mohamed Road and Moi Avenue in Mombasa Island. The landlord/respondent wished to increase rent and proceeded to serve the appellant with a notice dated 14 January 2019 seeking to increase the rent payable from Kshs. 25,000/= to Kshs. 81,400/= per month with effect from 1 April 2019. The tenant did not agree with the increment and filed a reference, being BPRT Case No. 18 of 2019, at the Business Premises Rent Tribunal (the Tribunal).

2. At the Tribunal, the Chairman directed the parties to file their respective valuation reports for the Tribunal's consideration. The tenant's valuation report was done by Musyoki & Associates. According to the report, the suit premises comprises of a shop and a store that are 38 square meters and 18 square meters respectively. He outlined what he considered to be paid in comparable neighbouring premises, and formed the opinion that fair rent would be Kshs. 807/= per square metre for the shop and Kshs. 404/= per square metre for the store. In total, he proposed rent at Kshs. 37,900/= per month exclusive of VAT and services. The landlord's valuation was done by WESCO Property Consultants. He recommended rent at Kshs. 1,719.706/= per square metre for the shop and Kshs. 159.853 per square metre for the store, hence a total monthly rent of Kshs. 81,309.848/= exclusive of VAT and other taxes.

3. The Tribunal considered the valuation reports by the parties and made the following findings:-

> "The comparable in the tenant's valuation report comparable 1,2, and 3 are on Mohdhar Mohamed Road and do not enjoy the frontage of Moi Avenue as the suit premises. The comparables do not have the same advantages of the suit premises. Comparables from the suit premises is not a good comparable taking into account that the Landlord is seeking to increase rent in the same building. The rent payable by the tenant in the same could also be rent which is due for review. The tribunal has serious doubts on the credibility of the information in comparable No. 4 which puts the analysis at Kshs. 434/= per square meters which is below the rate currently being paid by the tenant.
>
> Landlord's comparable No. 1 and 2 enjoy more or less the same advantages as the tenant in the suit premises. The average of the two comparables is… Kshs. 1,717.319/= per (square) meter per month.

The tribunal does not consider the landlord's comparables 3 and 4 very suitable.

The tribunal notes that the suit premises comprises of a 3 storey convenient property consisting of shops and stores on the ground floor. The valuers of both parties have not given any credible reason why the rent payable by other tenants were not properly interrogated. The tribunal also notes that the suit premises is adjacent to many other plots. The valuers have not given any credible reasons why they ignored the rent payable in the adjacent plots.

In light of the above very unsatisfactory findings by the tribunal, it is the tribunal's considered view that the average between the landlord's comparable no. 1 and 2 and the rate recommended by the tenant's valuer of Kshs. 807/= per month yields a fair open market rent… which is Kshs. 1262.159/= per square meter for the main shop and half rate of Kshs. 631.079 per square meter in respect of the store. Therefore the rent payable for the tenant to be Kshs. 59,500/= per month for both the shop and the store…

Orders :

1. The rent payable by the tenant is assessed at Kshs. 59,500 plus VAT with effect from 1 April 2019.

2. The tenant shall pay the arrears of rent arising out of this judgment within 6 months from the date of judgment in default the landlord shall be at liberty to record the same way of distress.

3. The tenant shall pay the landlord costs of the reference.

4. Costs shall be agreed or shall be taxed by the tribunal in the next session."

4. Aggrieved, the tenant, filed this appeal. His Memorandum of Appeal, filed on 19 March 2020, contains the following grounds :-

1. THAT the tribunal erred in law and fact in valuing and assessing rent payable at Kshs. 59,500 exclusive of VAT which is excessively high compared to the valuation of the premises in the said area.

2. THAT the tribunal erred in law and fact in finding that the applicant should pay costs of the suit.

3. THAT the tribunal erred in law and fact in backing dating the rent arrears to 1 April 2019.

4. THAT the tribunal's findings were against the weight of the evidence.

5. The appellant seeks the following orders:-

a. That the rent be valued at Kshs. 37,938 and the same be paid from the date of delivery of the judgment of the Appeal.

b. That the said judgment delivered in the tribunal be set aside and be substituted with orders that each party to pay its own costs of the suit. In the alternative, the respondent to pay costs.

c. That this appeal be allowed, and the respondent do pay cost of this appeal.

6. Counsel filed their written submissions to argue the appeal.

7. Ms. Oweya, learned counsel for the appellant, submitted that when assessing rent, regard must be given to all circumstances. She submitted that the Tribunal has a wide discretion to use a method that it thinks best, as long as the method is justifiable. Counsel submitted that the Tribunal decided to take the average of the two valuations given, but no good reason was given as to why the Tribunal decided to take the average, and not follow either of the parties' valuation reports. She thought that the Tribunal did not apply the proper principles governing assessment of rent and instead largely depended on the valuation reports compiled by the valuers. To support her argument, she relied on the cases of Karibu House Ltd vs Travel Bureau Ltd (1976-80) KLR 152 and Margaret Wanjugu Nduma & 3 others vs. James Gichuki Gathura (2020) eKLR, where the courts gave some guidelines on assessment of rent. Counsel further submitted that the Tribunal ordered the tenant to pay cost of the suit yet there was no basis for doing so as rent had been varied by the Tribunal from the proposed Kshs. 81,400/= to Kshs. 59,500/= which was a big difference. Her view was that in the circumstances, it was best that each party bear his/her own costs. She relied on the case Supa Duka Nakuru Limited vs. Baringo United Company Limited (2017) eKLR. Counsel also attacked the Tribunal for backdating rent to 19 April 2019. She thought that no good reason had been given for this and pointed out that it is not discussed anywhere in the judgment. Counsel yet again referred me to the decision in the *Supa Duka* case (supra) which discussed the question of backdating of rent. Counsel submitted that the Tribunal did not consider the overwhelming evidence produced by the appellant while making its decision. She submitted that there were several documents that were produced by the appellant but the Tribunal only squared its decision on the valuation reports. Counsel submitted that it was not clear what was discussed at the Tribunal and neither was the tenant given an opportunity to be heard as envisioned by the Constitution.

8. For the respondent, Ms. N.A. Ali, learned counsel, inter alia submitted that the appellant has not advanced any reason to show that the Tribunal's reasoning was flawed. She thought that the Tribunal was correct in the manner in which evaluated the comparables in the valuation reports. She did not see any problem with the Tribunal taking the average of what was suitable premises in the landlord's valuer's report, and the appellant's valuer's assessment . She was of opinion that this yardstick is permissible in Section 9 (2) (a) of The Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, (CAP 301) as the Tribunal is mandated to determine rent inter alia having regard to the rent at which the premises might reasonably be expected to be let in the open market. On the issue of the costs of the

proceedings, counsel submitted that the respondent issued a notice seeking to increase rent from Kshs. 25,000/= to Kshs. 81,400/=. She submitted that the appellant sought to have the same only increased to Kshs. 37,900/= but the Tribunal assessed the rent at Kshs. 59,500/= which was a win for the respondent. Counsel submitted that the appellant filled a reference and made the respondent incur costs of the proceedings, especially the expensive cost of filing the valuation report and legal fees. She submitted that costs follow the event and the same is therefore to be paid by the appellant. Counsel submitted on the issue of backdating the rent and referred me to the case of Mutema Uuki Wines & Spirits Distributors Ltd vs. Thomas K. Mwangi & Other (2004) eKLR. She thought that the appellant had caused delay in the prosecution of the case. She also reasoned that where the Tribunal increases the rent, then it means that the rent prior to the notice was not representative of the market value, hence compelling reason must be given, if the commencement date of the increment is not going to be the date of the notice. She submitted that apart from the valuation reports, the appellant did not indicate any intention to adduce additional evidence and the allegation that the appellant was not afforded an opportunity to be heard is thus unfounded.

9. I have considered the record from the tribunal and the rival submissions of counsel for the appellant and respondent. I have also considered the case law provided and thank counsel for their industry. I take the following view.

10. It is apparent from the record that the Tribunal faced two widely varying valuation reports on what ought to be the rent payable. What the Tribunal proceeded to do in order to assess the rent payable, was to take an average of two premises that it thought comparable lifted from the report of the valuer of the landlord, and then got a mean after adding it to the opinion of the tenant's valuer. It is this second mean that the Tribunal now set as the rent payable. For the appellant, it is argued that no good reason was given by the Tribunal why this method was thought fit and that no proper reason was given why the Tribunal did not deem fit to follow either party's valuation report. For the respondent, it is urged that there is wide discretion in determining rent and I was referred to Section 9 (2) (a) of Cap 301.

11. The assessment of rent is one of the powers given to the tribunal by Section 12 of CAP 301, which provides where relevant that :-

12. (1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power –

(b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof.

12. It will be seen that the statute is not specific on the actual matters that the Tribunal is supposed to consider. All it says is that the Tribunal is empowered to determine rent, and in doing so, it ought to have *regard to all the circumstances thereof*. There is indeed wide discretion given to the Tribunal and the Tribunal will take into account what it considers to be *relevant circumstances* in arriving at its decision. One of the key acknowledged relevant circumstances is what is payable in comparable buildings. It is considered relevant because it presents what others are paying for more or less similar premises and can thus be taken to be reflective of the market value. Another approach that I have seen the tribunal taking is what I call "the average method", that is, where the Tribunal takes the aggregate of all, or several, of the valuation reports presented before it. I held, in the case of *Supa Duka vs Baringo Group (supra)*, that though there is nothing wrong in using "the average method" good reason must be given in resorting to the said method. I stand by that reasoning. I do not think that all it takes to assess rent is to take the mean of two valuation reports. There is good reason for this, for individuals can abuse the process by simply hiring valuers who are going to give them the highest or lowest rent, depending on what spectrum they are at, when there is really no good basis for such valuations. There must be more to assessing rent rather than simply taking an aggregate of valuations, not that there is anything wrong with it, if good reason is given. Matters such as the state and condition of the building, the facilities in the building, the age of the building, what is paid by other tenants in the same building, and what is paid in other buildings within the vicinity of that in issue, may be relevant, and need to be taken into account.

13. In our case, I am not persuaded that the Tribunal was correct in merely assessing rent using the average method. I have already mentioned that the Tribunal took two premises from the valuation of the landlord, which it thought were properly comparable, then got the average of the two, after which it added to this average, the proposal of the tenant's valuer, then got the mean. I disagree with the Tribunal's approach because firstly, the Tribunal itself, had considered as inappropriate, the comparable premises given by the tenant's valuer. The tenant's valuer had given 4 premises all of which were not considered comparable by the Tribunal. Now, if the Tribunal was of opinion that what the tenant had provided were not appropriate, why then did the Tribunal proceed to use the same for purposes of assessing rent ? If in the opinion of the Tribunal, the tenant's valuation report was wrong, then it should have been completely disregarded and not used to assess the rent payable.

14. But, I am not even convinced that the Tribunal had good reason to disregard the comparables given by the tenant's valuer. The tenant's valuer had a comparable number 4, which was said to be of premises that is in the same building as the suit premises. The rent payable in it was said to be Kshs. 434/= per square metre. The Tribunal thought that this cannot be true. It stated that it had serious doubts on the credibility of this information. Why the Tribunal had serious doubts is not mentioned. There was indeed no contradictory evidence from the landlord to dispute this finding. Nobody came before the Tribunal and said that what was presented therein was not true, and I think the Tribunal was capricious in dismissing this comparable. If it was in the same building as the suit premises, why was it not considered appropriate for use to assess the rent payable by the tenant ? I think there was serious misdirection by the Tribunal in dismissing this comparable. The only way that the credibility of this information would have been tested was if the valuer testified and was cross-examined; better still, if all parties and their valuers had testified before the Tribunal.

15. I think it is time that the Tribunal became alive to the reality that it is not in all circumstances that rent can be assessed merely by directing the parties to file rival valuation reports.

16. It is clear to me that the Tribunal used the wrong principle in assessing rent. No good reason was given why the Tribunal was using an aggregate method. No good reason was given why the aggregate method was being used for a report considered inappropriate. Moreover, as I have mentioned, the Tribunal was wrong in disregarding a key comparable, that of premises said to be in the same building.

17. What should I do in the circumstances herein. I am unable to enter judgment as prayed by the appellant who wishes to have rent assessed at Kshs. 37, 938/=. I do not have sufficient evidence that this has been proved to be the proper rent so that I can affirm it.

18. I think the best order to make in the circumstances is to remit the matter back to the Tribunal for the Tribunal to rehear the matter and undertake a fresh assessment of the rent, this time, taking into account all considerations and factors.

19. The only thing left is costs. In my discretion, I will order each party to bear their own costs of this appeal and also of the matter before the Tribunal. Upon rehearing the case, the Tribunal will be at liberty to award costs that will be incurred during the rehearing.

20. Judgment accordingly.

DATED AND DELIVERED THIS 6TH DAY OF OCTOBER, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA