RREPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELCA NO. 24 OF 2018

MOHAMED NOOR & 23 OTHERS.....PLAINTIFFS

VERSUS

SEIF BINSAID PROPERTIES LTD.....DEFENDANT

JUDGMENT

(This judgment is in respect of an appeal from the decision of the Chairman of the Business Premises Rent Tribunal (the Tribunal) delivered on 16 November 2018).

1. The appellants are tenants of the respondent in the premises identified as Plot No. XXXVII/18 (the suit premises). The respondent, as landlord, wished to increase rent and on 24 July 2017, issued a notice to that effect to the appellants. The appellants contested the intended increase in rent and filed individual references to the Tribunal being BPRT Nos. 91/2017 to 109/2017 and No. 11/2017 to 114/2017. These references were consolidated and heard together under Mombasa BPRT No. 89 of 2017 and a consolidated judgment delivered. At the Tribunal, both parties called valuers to support their causes. Upon analysing the evidence, the Chairman adopted the valuation of the landlord, which was however more than the rent sought in the landlord's notice, and the Chairman thus allowed the respondent to increase rent only up to the amount indicated in the notice. The Chairman also ordered each tenant to pay the landlord costs of the reference at Kshs. 40,000/- and if not paid within 14 days would be recoverable by way of distress.

2. Aggrieved, the tenants filed this appeal. In the course of the appeal, the 1st, 4th, 5th, 6th, 7th, 8th, 9th, 14th, 16th, 17th, 18th, 19th, 21st, 22nd, 23rd and 24th appellants, settled the matter with the landlord and their appeals were marked as settled. I also encouraged the other appellants to try and settle the matter with the respondent and indeed adjourned the matter during the first hearing of the appeal, but it appears that the parties could not reach any agreement and proposed to argue the appeal.

3. In their memorandum of appeal, the appellants raise the following grounds :-

> *(i) That the learned Chairman erred in law and in fact by assessing the appellant's rent solely based on the respondent's valuer's report.*
>
> *(ii) The learned Chairman erred in law and in fact in failing to take into consideration in his judgment the appellants' valuer's report and evidence of the appellants.*
>
> *(iii) The learned Chairman erred in law and in fact by ordering the effective date of the new date*

(sic) (probably meant rent) to be 1 June 2018 instead of 1 December 2018.

(iv) The learned Chairman erred in law and in fact by ordering the appellants to pay costs of Kshs. 40,000/= each and that the same be paid within 14 days in default distress for rent be levied for the recovery of the same.

(v) The learned Chairman erred in law and in fact in failing to consider all the evidence and reports on record.

4. The appellants thus wish to have the judgment of the Chairman set aside and/or varied.

5. In his submissions, counsel for the appellants explained the role of the appellate court citing various authorities. He submitted that the Chairman ought to have taken into consideration the appellants' valuation report rather than base his assessment only on the respondent's valuer, which in his view, led to an assessment of rent that was exorbitant. He also faulted the Chairman for making an order that the effective date of increase be 1 June 2018 instead of 1 December 2018. He submitted that this was unreasonable since the judgment was delivered on 16 November 2016. He further submitted that the Chairman did not give any reason why costs ought to be at Kshs. 40,000/=.

6. For the respondent, it was submitted that the Chairman did not assess rent based solely on the respondent's valuer's report. On the order for when the new rent would be effective, counsel pointed out that the landlord issued his notice on 24 July 2017 and the tenants filed their references on 8 September 2017. He submitted that their references were filed outside the one month period provided for in Section 4 (5) of CAP 301. He submitted that from 24 July 2017, the appellants enjoyed the old rent and he argued that the landlord suffered the old rent for 24 months yet at the end of the day judgment was made in his favour. He did not see any fault in the Chairman giving 1 June 2018 as the effective date of the new rent. On costs, counsel submitted that the Chairman has discretion under Section 12 (1) (k) of CAP 301. He submitted that it has not been demonstrated how the costs are inordinate or high. He submitted that the costs were based on Schedule 8 of the Advocates Remuneration Order, 2014. He did not see any problem with the manner in which the Chairman exercised his discretion.

7. I have considered the matter. This is an appeal against the decision of the Tribunal vide which the Tribunal allowed the respondent to increase rent to the level that was contained in his notice issued on 24 July 2017. Going straight to the grounds of appeal, the appellants first claim that the Chairman erred in assessing rent based solely on the valuation of the respondent and failed to consider the valuation of the appellants. The power of the Tribunal while assessing rent is contained in Section 9 (1) and (2) of CAP 301 which provides as follows :-

9. Decision of Tribunal and effect thereof;

(1) *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; or

(b) order that the tenancy notice shall be of no effect;

(c) and in either case make such further or other order as it thinks appropriate.

(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;

(ii) any goodwill attached to the premises by reason of the carrying on thereat of the trade, business or occupation of the tenant or any such predecessor;

(iii) 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;

(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.*

10. It will be seen from the above that once a reference is submitted, the Tribunal is supposed to make an inquiry into it and make the orders that it deems fit. In respect of rent, the Tribunal is supposed to make a determination after "*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 the factors to be disregarded are listed. In making an inquiry into what rent is to be payable, the discretion of the Tribunal is thus wide but it will be noted that one important consideration is the rent that the premises would reasonably be expected to fetch in the open market. It is probably because of this that valuation reports are employed by the Tribunal as one would expect valuers to have an idea of what the premises ought to reasonably charge as rent.

11. In the instance of this case, both the appellants and the respondent availed valuation reports prepared by two different valuers. The appellants had a valuation prepared by M/s Basemark Valuers Limited whereas the respondent had reports prepared by M/s Wesco Valuers. I do not agree with the appellants that the Chairman only assessed rent based on the valuation report of the respondent's valuer. I have gone through his analysis and I have seen that the Chairman did consider both reports but was not convinced that the report by the appellants' valuer had considered rent paid by all comparable premises. He did in fact point out that the appellants' valuer had taken consideration of rent that is paid in premises from a different street which he thought not suitable. The Chairman in his judgment did state that the tenants' valuer deliberately avoided comparables from Kericho Road and Nehru road where the suit premises is located. It is for this reason that he was not convinced that the valuation by the appellants' valuer was appropriate in the circumstances of the case. Apart from the valuation reports, I have also taken note that the Chairman considered what other tenants within the premises were paying the respondent, and in his view, these tenants were paying not less than Kshs. 1,113/27 per square metre. He thus assessed the rent payable at Kshs. 1,113/- per square metre. I see absolutely nothing wrong in the manner in which the Chairman assessed the rent. He took into account both valuation reports and also the amount that current tenants were paying and I am not persuaded to hold that the Chairman exercised his discretion wrongly. I see no issue in the manner in which he assessed the rent payable and see no point of disturbing his assessment on rent.

12. The other ground of appeal is on the effective date of the new rent which the Chairman proposed to commence on 1 June 2018. The view of the appellants is that the new rent ought to have commenced on 1 December 2018 after the judgment. Again, the Tribunal has wide discretion on the effective date for the new rent. It will be observed that pursuant to Section 6 (1) of CAP 301, once a reference is filed, the notice is stayed until the determination of the Tribunal. The said law is drawn as follows :-

Reference to Tribunal

(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:

Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit,

permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.

(2) *A Tribunal to which a reference is made shall, within seven days after the receipt thereof, give notice of such reference to the requesting party concerned.*

13. Because of the above provisions, the landlord, in the event of a proposed increase in rent, cannot benefit from the new rent until the Tribunal makes its decision. If the Tribunal upholds the increase in rent, it is of course arguable that the landlord was correct all this time, and thus deserving of the increased rent from the time that he issued the notice to do so. It is also arguable that a tenant ought not to benefit from any delays that the landlord suffered while the tenant was prosecuting the case if at the end of the day the landlord ends up being successful. That is why, at times, the Tribunal in exercise of its discretion, makes an order to backdate rent to the time of the notice, or to such other time that it considers fair, taking into account all factors it considers relevant.

14. In our case, the landlord issued the notice on 24 July 2017 and he ended up being successful. I would on my part not even have faulted the Chairman if he thought it wise to backdate rent to this point in time. However, in exercise of his discretion, he gave the effective date of the new rent to be 1 June 2018. I think the appellants should celebrate that decision rather than try to fault it, as the result could have been much worse for them, without there being any fault. I see no error that the Chairman did in making an order for the new rent to commence on 1 June 2018 and I am not persuaded to disturb it.

15. The last issue is on costs. It is argued that it was an error on the part of the Chairman to issue an order of costs at Kshs. 40,000/= per tenant. I have gone through the submissions of counsel for the appellants and all he has quoted is Section 27 of the Civil Procedure Act, CAP 21, Laws of Kenya, which basically provides that costs will be in the discretion of the court and generally to follow the event. It is not pointed out what error the Chairman made in making an assessment of costs at Kshs. 40,000/= per tenant and neither is there any proposal on what ought to have been the correct amount as costs. I have not been pointed to any law that contradicts the Chairman's assessment on costs. Without any such submissions, I regret that I am unable to set aside the Chairman's discretion for it has not been demonstrated to me that it was made in error or that it was an unfair exercise of discretion.

16. I have dealt with all grounds of appeal and it will be seen that I find no merit in this appeal. The same is hereby dismissed with costs.

17. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of February, 2020.

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MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Parties and Counsel on record all absent.

Court Assistant; David Koitamet.