REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 32 OF 2015

MARGARET WANJUGU NDUMA.....1st APPELLANT

KARANJA MUCHEMI.....2nd APPELLANT

JOHN MAHUGU NJOGU.....3rd APPELLANT

NAPHTALIL MAHEMA.....4th APPELLANT

-VERSUS-

JAMES GICHUKI GATHURA.....RESPONDENT

(Appeal arising from the Judgment and order of the Chairman of the Business Premises Rent Tribunal

Nos 25, 22, 24, & 26B/2015 at Nyeri by Hon. Mbichi Mboroki delivered on the 17th July 2015)

JUDGEMENT

1. The instant Appeal seeks to challenge the decision of the Business Premises Rent Tribunal (hereinafter referred to as **'The Tribunal'** where the Chairman Hon. Mbichi Mboroki on **the 17th July 2015** awarded a rate of Ksh. 64.75 per square feet as the average comparable to be used by the Landlord/Respondent and the Tenants/Appellants in making the following determination.

i. Rent payable by Tenant in BPRT 22/2015 assessed at Ksh. 20,000/=

ii. Rent payable by Tenant in BPRT 26B/2015 assessed at Ksh. 14,300/=

iii. Rent payable by Tenant in BPRT 21/2015 assessed at Ksh. 20,400/=

iv. Rent payable by Tenant in BPRT 24/2015 assessed at Ksh. 14,800/=

2. By a Memorandum of Appeal dated 29th July 2015 in the record of Appeal of 6th September 2018, and filed on the 7th September, the Appellants Appealed against the Tribunal's decision on the grounds that :-

i. THAT the learned Chairman and members of BPRT erred in law and misdirected themselves in failing to give the Appellant a fair hearing contrary to Article 50 (1) of the Constitution and contrary to rules of natural justice.

ii. THAT the learned Chairman and members erred in law and misdirected themselves in failing to consider the Appellant/ Tenant's valuation report which gave comparable of premises in the immediate neighborhood, whereby the rent is taken to be fair price that can be obtained by the premises being valued being in a low class street neighboring Majengo Slums where they fetch their customers.

iii. The learned Chairman and members erred in law and misdirected themselves in unilaterally relying on the Respondent/Landlords valuation which did not contain valuation methodology and relied on comparable or rental premises on the opposite high class storied commercial properties along Kimathi Street in Nyeri Town while the premises to be valued are situated on the opposite street adjacent to Majengo Slums while the comparable premises have newly been developed and are served by a service land alongside Kimathi Street.

iv. The learned Chairman and members erred in law and misdirected themselves in failing to take into consideration and due cognizance of state of dilapidation, neglect of maintenance, repair, leaking roofs, poor state of toilets and urinals, lack of exit doors, land lord has not carried out any repairs or painting for the last ten years and the steel doors and floor tiles have been done by tenants.

v. The learned Chairman erred in law and misdirected himself in failing to give the Appellants an opportunity to be herd and explain the horrible state of disrepair and the general conditions of the landlords failure to carry out repairs, renovations and maintenance despite the tenants numerous complaints which fall in deaf ears and prompts the tenants to carry out the landlords repair in order to obtain health certificate to enable them to renew their trading licenses.

vi. The Chairman and members erred in law ordering exorbitant increase of rents as follows;

i. BPRT No. 21/2015 – Margaret Wanjugu Ndumia from 8,800 to Kshs.20,400/- without V.A.T. 16%.

ii. BPRT No. 22/2015 – Karanja Gachemi from Kshs.8,800/- to Kshs.20,000/- without V.A.T. 16%.

iii. BPRT No. 24/2015 – John Mahugu Njogu from Kshs.7,200/- to Kshs.14,800/- without V.A.T 16%.

iv. BPRT No. 26B/2015 – Naftary Mahenia from Kshs.8,000/- to Kshs.14,300/- without V.A.T. 16%.

3. The Appellant/tenant's valuer had recommended the following increases which were reasonable and the tenants had complied, and had there had been already an increased rent amount from the previous rent as follows;

i. BPRT No. 21/2015 – Wanjugu Ndumia –new rent is Kshs.14,334/- inclusive of V.A.T.

ii. BPRT No. 22/2015 – Karanja Gachemi – new rent is Kshs.14,105/- inclusive of V.A.T.

iii. BPRT No. 24/2015 – John Mahugu Njogu – new rent is Kshs.10,400/= inclusive of V.A.T.

iv. BPRT No.26/2015 – Naftary Mahenia new rent is Kshs.10,055/- inclusive of V.A.T.

4. **REASONS WHEREOF** the Appellant sought for orders;

i. That this Appeal be allowed.

ii. That the judgment and orders of BPRT be lifted and set aside.

iii. That the orders of BPRT be substituted with the increase of rent recommended by the Appellants in paragraph 7 above.

iv. That the Appellants be awarded with costs of this court and the BPRT court.

v. Any other orders court deems fit.

5. By consent, parties agreed to dispose the Appeal by way of written submissions.

Appellants' submission

6. It was the Appellant's submission that in the Judgment read, delivered and dated 17th day of July, 2015 in the presence of the landlord, that the learned Chairman did not consider the locality of the comparable premises in the landlord's valuation prepared by Highland Valuers Ltd that the properties subject of this case were situated along Kimathi Street on the side adjacent to low Majengo Estate which were old buildings in a slum area whose inhabitants are very poor.

7. The rental incomes on the suit premises on the Majengo Slum area along Kimathi Street could not be compared with the properties on the opposite side which was a high class area where the buildings therein were occupied by the Nyeri affluent class of people who were well to do business men and employed tenants, unlike the hustles on the opposite side in Majengo Slums.

8. That the Chairman at page 2 of his judgment criticized the landlord's valuation report as not being a suitable comparable and yet relied on the same at the rate of Kshs.84/= per square foot per month.

9. That on the other hand, the Chairman had approved the Tenants' comparable as good comparable in terms of lettable area. The tenants' valuer recommended a rate of Kshs.45.50/= per square foot per month.

10. The Appellants faulted the Chairman's findings that the average between the rates of landlord of Kshs.84.00 per square foot would give an objective open market rate at Kshs.64.75/= per square ft.

11. It was further their submission that The tenants' valuers report had recommended rent increase which was reasonable increment and the

tenants had agreed to comply and to remit the new rents as follows;

i. BPRT. 22/2015 Karanja Gachemi from kshs.8,800/- per month to Kshs.14,105 per month from 1st May 2015

ii. BPRT. 26B/2015 Naftali Mahenia from Kshs.8,000/- per month to Kshs.10,055/- per month from 1st May 2015

iii. BPRT. No.21/2015 Charity Hotel from Kshs.8,800/- per month Kshs.14,335/- per month from 1st May 2015

iv. BPRT No.24/2015 John Mahugu Njogu from Kshs.8,000/- per month to Kshs.10,400/- per month from 1st April 2015.

12. The Appellant sought for the Appeal to be allowed and orders made in accordance with the rents herein above agreed on, together with costs of the suit in this Appeal and lower court.

Respondents' Submission

13. In response to the Appellants' Appeal and in opposition thereto, the Respondent framed his grounds of determination as follows:

i. Whether the Tribunal used or did not use appropriate comparable 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 Appellant were given an opportunity to be heard.

14. On the first issue for determination, as to whether the right mode of assessment had been used, it was the Respondents' submission that Comparable premises was defined by Justice M. Sila in **Supa Duka Nakuru Limited v Baringo United Company Limited (2017) eKLR** as**:**

> "*Is what would be what is paid by other tenants in the same street as that where the suit premises is situated, that is the other premises along. Comparable values of what is paid in other streets may also be taken, but account must be given depending on whether the streets are in more prime or less prime location, or whether such buildings are comparable to what is in issue.*

15. That as per the assessment report prepared by Highland Valuers Ltd, the suit property was located along Kimathi Street which was a populated area in terms of human traffic and traders thus the demand of rental premises within this area is high.

16. That the Appellant's report prepared by Adn Advisory Valuers, listed 4 properties but did not name the properties or where they are located thus using them as a point of comparative rental analysis would have proved irregular as the information was not clear.

17. It was his submission that the Chairman in his judgment had analyzed the assessment reports produced by both the Appellants and the Respondent and chose to take an average of both the rate presented therein and therefore the Appellants could not claim that the Chairman had failed to consider their valuation

18. That in his Judgment, the Chairman had stated as follows:

> "*The Tribunal is satisfied that the average between the rate of landlord of Kshs.84 per square foot and Kshs.45.50 per square foot would give an objective open market rent that is (84.00=45.50) ÷= 129.5÷2=64.75 per sq."*

19. That this was a clear indication that in delivering its judgment, both the valuation reports by the Appellants and Respondent had been considered.

20. Further submission was that the Chairman had indicated the disparities in the rates presented by both the Appellant and the Respondent in distinguishing why in each valuation report some of the comparable tabulated by the parties had not been suitable.

21. That specifically with reference to the Appellant's comparable, the Chairman had state that *the effective date of the rents payable in respect of the comparable had not been disclosed.* The Chairman had thus made valid observation of both valuation reports in considering the rent.

22. On the second issue as to whether the increase in rent was exorbitant, it was the Respondent's submission that one of the powers given to the Tribunal under Section 12 (1)(b) was:

> "*to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof."*

23. That the statute did not prescribe any method to be employed by the Tribunal in order to determine the rent payable and therefore it followed that the Tribunal had wide discretion over the aspect of its mandate.

24. That there was no method specified in statute directing the Tribunal on what factors to consider when assessing rent. All that the statue provided was that regard ought to be given to all circumstances. The Tribunal therefore had wide discretion in the method it chose to employ, so long as the same was justified. To buttress his submission the respondent relied on the Court of Appeal case in **Shah & Shah vs Kagunda 1978 KLR 35**, where Simpson J, stated as follows:-

> *"It is I think generally accepted that the Tribunal has discretion which must be exercised judicially having regard to the evidence before it.*

25. That Furthermore, Justice M. Sila in **Supa Duka (Supra)** held as follows

> *The use of averages is not outlawed and neither can it be said that it is the law that what is paid for comparable premises is what must guide the Tribunal. It is not for this court to inform the Tribunal on what method to employ; the Tribunal is free to apply whichever method is thought best in the circumstances of each particular case. In our case, there may indeed have been nothing wrong in taking averages, if the reason for doing so was given, and reason also given as to why the Tribunal did not deem fit to follow either of the party's valuation.*

26. That although the Appellant alleged that the Chairman and members had erred in law in ordering exorbitant increase in rent, rather in determining whether assessment was inordinately excessive, the Court should consider whether such determination was arrived at by;

i. Mistake of law

ii. Disregard of principle

iii. Misapprehension of fact

iv. Consideration of irrelevant matters

v. Lack of exercise of discretion

vi. Obviously unjust method

vii. Disregard of relevant matters

viii. Undue regard for some factors

27. In the present case, the Tribunal using the rate of Kshs.64.75 per sq ft. calculated the estimated rent to be effected as from 1 st May, 2015. The comparable used were indicators of the existing market rates, the area of the premises involved in the references subject to this Appeal, the Chairman gave reasons as to what was wrong with the valuation of the landlord and the tenant, he gave his standing on whether a certain valuer's report or their method of assessment was incorrect and that the best way to have the rent assessed was to take the average of the two valuation.

28. That renting out premises qualified as an investment by the Landlord which is expected to make a fair return at the end of every month. The suit properties are located at a prime location where their demand is high and the return in terms of income is expected to be reasonable too. The amount of rent awarded by the Tribunal was reasonable as per the prevailing market rent and location of the premises. The Tribunal had thus considered all principles of law and used a just method at arriving at its decision.

29. On the last issue as to whether the Appellant's were given an opportunity to heard, it was the Respondent's submission that Section 15 (1) and (2) of the Landlord and Tenant (shops, Hotels, and Catering Establishments) Act (Cap 301) which enjoins Order 42 rule 13(4) of the Civil Procedure Rules governs the procedure for Appeal s. In particular, the Appellant failed to comply with the requirements of Order 41 Rule 13(4) by failing to file their pleadings and the notes of the trial magistrate made during the hearing. That the failure to attach the said proceedings would therefore in turn limit the Honorable Court in re-evaluating the decision rendered by the Tribunal in determining whether the Appellants were denied the opportunity to be heard and thus frustrate the Respondent in proving that the Appeal was not merited. This was a bid to mislead the Court.

30. That be that as it may, it was the Respondent's submission that parties had proceeded via the valuation reports. The Appellants had not sought for the matter to proceed by way of viva voce evidence as their application dated 13th February, 2015 by notice of motion only addressed limited issues. None of these issues had concerned the state of disrepair and the general conditions of the landlord's failure to carry our repairs.

31. It was therefore the Respondent's submission that the Appeal by the Appellants was just but a drowning man's clutch on straw. That the same was not merited therefore ought to be dismissed with costs.

Analysis and Determination

32. I have considered the tenor and import of the reference before the Tribunal, I note that there was no evidence tendered before the Tribunal, and rather parties had filed their valuation reports upon which the Judgment of the Tribunal was based. I have also considered the grounds of Appeal in this Appeal, and the parties' respective submissions in the Appeal. I have also considered the relevant legal framework and jurisprudence on the key issue in this Appeal .

33. This being a first Appeal, the court is required to re-evaluate the evidence tendered and make its own findings and conclusions. Exercise of that appellate jurisdiction is guided by well-established principles. The appellate court will ordinarily not interfere with the trial court's findings of fact unless it is demonstrated that the findings are based on no evidence or on a misapprehension of evidence or the trial court acted on wrong principles in reaching the findings. See **Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu (1982) IKAR 278.**

34. The reference giving rise to this Appeal was provoked by the respondent's statutory notice to terminate or alter the term of the tenancy issued to the Appellant under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The ground on which the notice was issued was as follows:

a) 'The current rent has been uneconomically too low and does not match the market trends

b) 'The Landlord pays land rent and land rates.'

35. I have considered the grounds of the Memorandum of Appeal, the judgment of the Tribunal and the written submissions. The Tribunal Chairperson has been faulted for not failing to give the Appellants a fair hearing and chance to be heard, not taking into consideration the valuation report by the Appellant, applying the principles for assessment of rent, relying on the Respondent's valuation report which did not contain a valuation methodology, relying on comparable or rental premises on the opposite high class storied commercial properties along Kimathi Street in Nyeri Town while the premises to be valued are situated on the opposite street adjacent to Majengo Slums, failing to take into consideration of state of dilapidation of the building where the Landlord had failed to carry out any repairs or painting for the last ten years and , giving an exorbitant increase of rent.

36. With this in mind the issues which fall for determination in this Appeal are as follows:-

i. Whether the Chairperson properly applied the principles governing assessment of rent.

ii. Whether the rent increase was outrageous.

iii. Whether the Chairperson adopted an erroneous formula in arriving at the rent increase

37. On the first issue for determination as to whether the Chairperson properly applied the principles governing assessment of rent, the Principles guiding assessment of rent are found in Form G under the Regulations as follows:-

a) Ascertaining the original cost of construction of the building.

b) The age of the building.

c) The market value of the land on which the premises are built

d) The improvements and cost of such improvements.

e) Amenities or services provided by the Landlord.

f) The rent at which the premises were let for the past three years.

38. In assessing rent, the Tribunal largely depended on valuation reports compiled by the valuer for the tenant and the Landlord, parties to this Appeal respectively.

39. The Appellants filed its valuation report through Adn Advisory Valuers while the Respondent filed its valuation report through Highlands Valuers Ltd. None of the parties and/or valuers were called to testify but the Chairman considered the filed reports and went straight away to tackle the comparable in the report giving reasons why some were not suitable.

40. The Chairman in his judgment then went to find that the average between the rate given by the Appellant's valuers and that given by the Landlords' valuers would give an objective to the open market rate with any difference in the lettable area being resolved in the favour of the Appellants.

41. From the grounds herein adduced in the Memorandum of the Appeal , more so ground No. 3, 4 and 5 where the Appellants faulted the Tribunal Chairman for not considering the locality of the comparable premises in the landlord's valuation prepared by Highland Valuers Ltd that the properties subject of this case were situated along Kimathi Street on the side adjacent to low Majengo Estate which were old buildings in a slum area whose inhabitants are very poor and the building was dilapidated, I find that the Tribunal Chairperson was not alive to the reality on the ground contrary to the provisions of Section12 (1)(b) of the Act.

42. There was so much emphasis on comparable at the expense of all the other principles herein above mentioned. For instance there was no mention about the age of the building, the market value of the land on which the suit premises is built and the improvements and cost of those improvements etcetera even when both valuers attempted to remark on the deplorable condition of the premises.

43. Section 9(2)(a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act gives the Tribunal the mandate to determine rent payable in instances where the landlord and tenant disagree as in this case. This section provides that,

"*(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"

44. In the decided case 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*."

45. In **Tala Investments Ltd. vs. Green Spot Limited Civil Appeal No. 269 of 1993** where Shah J, held that,

"*In dealing with principles upon which a Tribunal should act in assessing rent, its duty is to consider all the reports properly before it. The Tribunal must go into individual comparable to decide which the better report is rather than merely arrive at a mean figure, that is mean figure of the landlords and tenant valuer's reports. That is not a proper criteria."*

46. The Tribunal ought to have considered each individual comparable carefully in assessing whether it represents an open market rent of the premises and decide which is a better report and not take the simplistic way of merely taking the average of all the comparable presented by both sides.

47. The duty of the court in determining a fair rent in a case like this is to ensure that the tenant is not put off the business because of unbearable rent and at the same time ensure that the landlord gets his fair of the deal.

48. On the issue as to whether the rent increase was outrageous, I find that the rent was increased as per the table below;

i. BPRT No. 21/2015 – Margaret Wanjugu Ndumia from 8,800 to Kshs.20,400/- without V.A.T. 16%.

ii. BPRT No. 22/2015 – Karanja Gachemi from Kshs.8,800/- to Kshs.20,000/- without V.A.T. 16%.

iii. BPRT No. 24/2015 – John Mahugu Njogu from Kshs.7,200/- to Kshs.14,800/- without V.A.T 16%.

iv. BPRT No. 26/2015 – Naftary Mahenia from Kshs.8,000/- to Kshs.14,800/- without V.A.T. 16%.

49. The Appellant argues that the rent increase was exorbitant outrageous. In assessing rent, what is to be considered herein is the location, the rent comparable in other nearby premises among other factors. Having have found herein above that the Chairman placed so much emphasis on comparable at the expense of all the other principles herein above mentioned, I find that the rent arrived at by the Tribunal cannot be allowed to stand.

50. In the case of **Karibu House (1973) Ltd –vs.- Travel Bureau Ltd [1976-80] KLR 152 the court** held that, "

An Appeal court can interfere, it was agreed, with the Tribunal's assessment, if it were reached by any mistake of law, disregard of principle, misapprehension of fact, A consideration of the irrelevant matters, Lack of exercise of discretion, Obviously unjust method, Disregard of relevant matters or Undue regard for some factors and not enough for others, or a combination of all these eight points".

51. S**ection 12(3) of the Act provides as follows;**

"*A Tribunal may employ officers, valuers, inspectors, clerks and other staff for the better carrying out of the purposes of this Act: Provided that, where a Tribunal has deputed a valuer, inspector, officer, or other person to inspect or view any premises, any report made in that behalf shall be communicated to the landlord or tenant or both".*

52. The Tribunal, having realized that the two valuation reports had serious disparities ought to have employed the services of a valuer to carry out the valuation of the rent payable on this premises. I therefore find that by relying heavily on the formula of comparable, the Chairperson adopted an erroneous formula in arriving at the rent increase In light of the foregoing, I remit this matter back to the Tribunal for a reassessment of the rent to be paid by the Appellants for the premises. Each party shall bear their own costs of this Appeal.

Dated and delivered at Nyeri this 5th day of March 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE