



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 162 OF 2012**

**ALI ASGAR**

**REHAN MOLU**

**MOHAMED BAFAGY T/A AMO PROPERTIES**

**ZEDCO RADIATORS & COOLING SYSTEMS LIMITED.....APPELLANTS**

**-VERSUS-**

**MUSLIM ASSOCIATION OF MOMBASA..... RESPONDENT**

**JUDGMENT**

**(Being an appeal against the Judgment of Hon. Mochache D. Chairperson of BPRT in Tribunal Case Nos. 264, 265, 268 and 270 of 2011 )**

1. Each of the above Appellants are tenants of the Respondent on a building on **MOMBASA/BLOCK XVII/11**. In the month of September, 2011 the Landlord issued to each of the tenants a Notice in accordance with Section 4 (2) of the (Shops, Hotels and Catering Establishment) Act, Cap 301. The Notice was to inform the tenants of the Landlord's intention to increase their rent. Each of the tenants filed References; which are represented by all the Tribunal matter the subject of this appeal; as provided under Section 6 of Cap of 301 intimating their intention to oppose the Landlord's Notice to alter the rent.
2. Both the tenants and the Landlord filed their respective valuation reports. The Learned Chairperson delivered her judgment by increasing the rent of each tenant. It is that decision which is the subject of this appeal. The tenants have presented the following grounds of appeal:
  1. **That the Tribunal erred in law in arriving at the rental Increments without considering comparables as per the Tenants Assessment Report.**
  2. **That the Tribunal erred in law in disregarding the market rates while arriving at its Decision to increase Rent**
  3. **That the tribunal erred in law in increasing the Rent by over 26% without any valid or reasonable grounds.**
  4. **That the tribunal erred in law in using the average rent in calculating the rent when the Landlord's Assessment report was clearly baseless therefore inapplicable.**
  5. **That Tribunal erred in law by arriving at its Decision without any valid reasons.**
  6. **That the Tribunal erred in increasing the rent to unconscionable and exorbitant rates when the old rent had been increased in 2009.**

**7. That the Tribunal's Decision is against the express provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301.**

3. The Appellants/Tenants in their written submission submitted on all those grounds collectively. Indeed all those grounds of appeal can be collapsed to one ground, that is; is there a basis for this court to disturb the Tribunal's finding?
4. The tenants submitted that there was no valid ground for the increase of rent as per the Tribunal's judgment. That increase was over 200% which increase was contrary to cap 301. That the tenant's cautioned the use of the comparables on the ground that the comparables were smaller in size and were in densely populated area. The tenants faulted the chairperson for what they termed as her failure to consider the size and location of the comparables and failure to consider the quantum allowance of 30% suggested by their valuer. It was submitted that the alleged failure on the part of the chairperson resulted in a serious? which had the effect of arriving at high rent which it was submitted occasioned the tenants substantial injustice. The tenants relied on the case; Mombasa CIVIL APPEAL NO. 45 of 1996 CHAMPA GOHIL & ANOTHER Vs MATWAHAR AHMED DAHMAN where Justice Waki (as he then was) stated:

**“...The complaint is that the Tribunal misconstrued the tenant's Valuation Report and also failed to consider the appropriate commencement date for the new Rent. The complaint is certainly factually valid that the tribunal got the mathematics of the differential in the new rents recommended by the two Valuers wrong and also stated erroneously that there were no comparables in the Tenant's Report. It was because of those reasons that the Tribunal decided to adopt, without change, the Landlord's Valuation Report.**

**It seems to me that the factual findings, which are erroneous, operated on the Tribunal's mind in arriving at that decision. It further seems to me that if the Tribunal had found, as it should have, that the difference between the two valuations was kshs.1,576/= and not 376, and if it had examined the comparables stated in the tenant's Report in assessing the rent at kshs.2,500/=, it may well have come to a different decision. This is one of the factors above that entitle this court to interfere with the Tribunal's discretion. Although the Tenant's Valuer did not testify there is no reason why Report should be considered at per with the Landlords Report. I would take a middle ground between the two valuations and determine the new rental at kshs.3,238/= the decision of the Tribunal in that respect is set aside.”**

5. The Respondent began in its submissions by pointing out that the tenants failed to file their valuation despite being given several extensions and that they filed their valuation after the tribunal Chairperson had reserved her judgment. That despite their late filing the chairperson nevertheless considered their valuation in determining the new rent payable. The Respondent emphasis in its submission that the chairperson considered both valuation reports and hence how the chairperson was able to work out the average rent of the comparables in both valuation reports. Respondent submitted that in any case the comparables of both valuation reports were “almost similar” and that their margin of difference was too small and negligible. To that end Respondent argued there was no violation of Cap 301 in the Tribunal's judgment.
6. In considering a reference in regard to alteration of rent of a controlled tenancy the Tribunal is guided by the provisions of section 9 (2) of Cap 301. That section is in the following terms:

“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 threat of 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.”**

7. The rent paid by the tenants previously before the Tribunal’s determination were as follows:

• **ALI ASGAR**

**Shop - 47.52**

**Store – 13.20      rental 6,500/=**

• **REHAN MOLU**

**Shop – 47.52**

**Store – 13.20      rental 8,500/=**

• **MOHAMED BAFAGY t/a AMO PROPERTIES**

**Shop – 47.52**

**Store – 13.20      rental 9,000/=**

• **ZEDCO RADIATORS CODING SYSTEM LTD**

**Shop – 142.56**

**Store – 39.60      rental 32,000/=**

8. The Tribunal by its Judgment used the comparables in both the valuation report in order to arrive at the average rental analysis. Appellants/tenants have agreed that the tribunal fell in error in not considering that the comparables were situated in a densely populated area, as stated by their valuers.

9. We have considered both valuations and noted that the comparables were of premises on the road as the subject premises. They are all on Gatundu Road, Mombasa. If that be so the valuer failed to explain why there is more dense population where the comparables are and not where the subject property is situated. We have looked at the map attached to each valuation and have noted from the valuer’s coloured markings that the comparables are indeed very close to the subject property. In our considered view the Learned Chairperson did not err in failing to consider the alleged population density of the comparables because the valuer failed to explain that anomaly. In our view the Learned Chairperson did no more than what she was required to do under section 9 (2) of Cap. 301. We also reject the tenant’s submissions that the Chairperson erred because the increased rent in her judgment was over 200% increase from the old rent. There was no error. Section 9 (2) of Cap 301 allows the Chairperson to make determination on the rent having regard to the reasonable expected rent in the open market. The chairperson in reaching her conclusion considered comparables provided.

10. We therefore reject appellants/tenants prayer that we disturb the finding of the Learned

Chairperson. We find that there is no merit in the appeal and the same is hereby dismissed with costs to the Respondent.

**DATED and DELIVERED at MOMBASA this 9<sup>TH</sup> day of JULY, 2015.**

**ANYARA EMUKULE**

**JUDGE**

**MARY KASANGO**

**JUDGE**

Coram

Before Justice Mary Kasango

C/A Kavuku

For Appellant:

For Respondent:

Court

Judgment delivered in their presence/absence in open court

**MARY KASANGO**

**JUDGE**