REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

APPEAL NO. 33 OF 2019

HAJI NOOR MOHAMED.....APPELLANT

VERSUS

JEILANI MOHAMED MUDHAR.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of the Honourable Mbichi Mboroki, Chairman, Business Premises Rent Tribunal delivered on 5 July 2019 in the case BPRT No. 195 of 2018, Haji Noor Mohamed vs Jeilani Mohamed Mudhar)

(Appellant being landlord and appealing against the decision of the Tribunal which declined to increase rent according to the valuation of the landlord's valuer but only increased it marginally following a valuation report of the tenant; Tribunal holding that the valuation of the landlord was for premises on a different street from the suit premises whereas the valuation report of the respondent presented premises on the same street; Tribunal assessing rent following what was payable in the same plot; appellant arguing that comparable premises does not have to be on the same street and faulting the Tribunal for disregarding his valuation; cross appeal by respondent on the increase of rent as his valuation was for much less rent; whether cross-appeal allowable and if so when it can be filed; no provision for cross-appeal to the High Court or Environment and Land Court; a person aggrieved thus needs to file an appeal within 30 days and not later; no law providing that a cross-appeal can be filed within 30 days of service of the appeal; what comparable premises comprises; not always that comparable premise will have to be on the same street; comparable premises could as well be in a different street; but explanation needs to be provided as to why the rent on the same premises is different, which was not provided in this case; no error on the part of the Tribunal in assessing rent based on what another tenant is paying on the same plot; both appeal and cross-appeal dismissed)

1. The appellant is owner and landlord of the Plot No. Mombasa/Block XVII/275 (the suit premises) which is situated along Makawi Road in Mombasa, whereas the respondent his tenant. The appellant, as landlord, wished to increase rent from KShs. 45,834/= to KShs. 91,500/= with effect from 1 February 2019 and issued the requisite notice to the respondent. The respondent was not agreeable and filed a reference to the Business Premises Rent Tribunal (the Tribunal). The Chairman directed parties to file valuation reports, as is usually the case, so as to be guided by them in determining the dispute. The landlord had a valuation report prepared by Wesco Property Consultants who held the opinion that the rent payable should be KShs. 91,500/=. The tenant on the other hand presented a valuation report by Fairlane Valuers Limited who thought the sum of KShs. 39,200/= should be the reasonable rent. The Chairman after evaluating the two valuation reports held the view that the landlord's valuer compared the suit premises with others very far from it and did not consider those comparables to be suitable. He pointed out that it did not have a single comparable premise from Makawi Road where the suit premises are situated. He thought the valuer deliberately avoided the shops along Makawi Road. The Chairman further noted that the valuer of the tenant had three comparable premises from Makawi Road and he was of opinion that one of the premises noted (comparable No.2) was most suitable where the rate payable was KShs. 761 per square metre. He thus applied this rate for the main shop and a rate of KShs. 380.50/= for the mezzanine floor and calculated the rent payable at KShs. 46,728/= (exclusive of VAT and service charge) with effect from 1 February 2019. Aggrieved, the landlord filed this appeal through a Memorandum of Appeal filed on 2 August 2019. Inter alia, it is presented in the Memorandum of Appeal that the Chairman failed to assess rent in accordance with the standards required by Section 9 (2) (a) of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, Cap 301, Laws of Kenya (hereinafter "CAP 301") and also failed to consider all relative and relevant circumstances and arrived at an erroneous rent assessment.

2. On 3 September 2019, the tenant filed a cross-appeal. He avers that the Chairman erred in increasing the rent from KShs. 45,834/= to KShs. 46,728/= and that the rent should be reassessed at KShs. 45,834/=.

3. Counsel agreed to dispose of the appeal and cross-appeal through written submissions.

4. In her submissions, Mrs. N.A Ali, learned counsel for the appellant, inter alia submitted that the cross-appeal should be struck out as it was filed out of time beyond the 30 days given to appeal, provided in Section 79G of the Civil Procedure Act. On her client's appeal, she referred me to Section 9 (2) (a) of CAP 301. She submitted that rent ought to be assessed depending on the market value and that market value cannot be confined to rent that is paid for premises on the same street. She submitted that the assessment should cover the whole "area" where the

premises is located, and since the definition of area is length multiply by width, this would comprise of any roads that are perpendicular, parallel, and adjacent to the premises. She submitted that limiting a valuation to one road or street is not a proper reflection of the market value. She submitted that her client's valuation report covered streets adjacent, and next, to Makawi road, and should not have been disregarded. She submitted that the last rent was payable from 1 November 2015 and following Section 9 (3) (a) of CAP 301, rent is assessed after two years. She submitted that logically, comparables ought to have been for rent above KShs. 45,834/= yet the tenant's valuation was for premises attracting less rent. She pointed out that the tenant's valuation assessed rent at KShs. 39,200/= lower than what was assessed in 2015, and thus such valuation was wrong and ought not to have been considered. She asked that rent be reassessed following the appellant's valuation report.

5. For the respondent, Mr. Mohamed, learned counsel, inter alia submitted that the parties had a previous dispute which went before the Tribunal in the year 2015 and the Tribunal assessed rent at KShs. 45,834/=. On the competency of the cross-appeal, he submitted that Section 79G does not expressly address the time for filing cross-appeals, but the courts have held that a cross-appeal may be filed within 30 days of service of the Memorandum of Appeal. He referred me to the case of *Kenya Bus-Rapid t/a Kenya Bus Services Management Co Ltd vs Patrick Irungu Gichure (2018) eKLR*. He submitted that in this instance, the cross-appeal was served on 6 August 2019 and the cross-appeal filed on 3 September 2019, which was a period of 29 days, and therefore the cross-appeal is not out of time. On the principles of assessing rent, he referred me to the decision in the case of *Njoroge Ndurugu & Others t/a Ngamini Bar & Restaurant vs Alykah Investments Limited (2015) eKLR*. He submitted that if we look at the valuation report filed in BPRT No. 118 of 2015 (a previous rent dispute that the parties had), and the current valuation reports, it will be found that the rents for comparable premises have remained constant since 2016 to date. He therefore submitted that the Chairman was wrong in making an increment of KShs. 894/= and that the previous rent should be maintained.

6. I have considered the matter. The first thing that I need to address is whether the cross-appeal has been filed out of time. Appeals from decisions of the Business Premises Rent Tribunal are governed by Section 15 of CAP 301, which states as follows :-

> 15. Appeal to court
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> (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:
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> Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.
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> (2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.
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> (3) Deleted by Act No. 2 of 1970, s. 13.
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> (4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:
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> Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.

7. Although both Mrs. Ali and Mr. Mohamed referred me to Section 79G of the Civil Procedure Act, I think it is Section 15 of CAP 301, above, which is operative. But either way, Section 15 of CAP 301 is not radically different from Section 79G of the Civil Procedure Act, which is drawn as follows :-

> 79G. Time for filing appeals from subordinate courts
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> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
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> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

8. We also have Section 16A of the Environment and Land Court Act, which relates to appeals from subordinate courts. It is drawn as follows :-

> 16A. Appeals from subordinate courts
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> (1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
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> (2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

9. It is clear from the above, whether you refer to Section 15 of CAP 301, or Section 79G of the Civil Procedure Act, or Section 16A of the Environment and Land Court Act, that a party has 30 days within which to file his appeal to this court from a decision of the subordinate court. There is of course power to extend time but that is not what we are dealing with here. The question before me is whether a cross-appeal (if any) can be filed before this court, and if so, when such cross-appeal needs to be filed. I have not seen and I have not been referred to any explicit provision in either CAP 301 or the Civil Procedure Act, or the Environment and Land Court Act, which relates to cross-appeals. What we have, is a provision which says, that if you are aggrieved by a decision of the subordinate court, then file your appeal within 30 days. There is no provision for a cross-appeal unlike in the Court of Appeal which has Rule 93, Court of Appeal Rules, relating to cross-appeals which is drawn as follows :-

> 93. Notice of cross-appeal
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> (1) A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make, or to make in that event, as the case may be.
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> (2) A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal or not less than thirty days before the hearing of the appeal, whichever is the later.
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> (3) A notice of cross-appeal shall be substantially in the Form G in the First Schedule and shall be signed by or on behalf of the respondent.

10. I am unable to import the provisions of the Court of Appeal Rules, to either the Environment and Land Court Act, or the Civil Procedure Act, or CAP 301. My interpretation of the law is that if one is aggrieved by a decision of the subordinate court, it is upon that person to file his Memorandum of Appeal within 30 days. He has no licence to wait and see if the other party is going to file an appeal so that he can file a cross-appeal, for there is no provision for a cross-appeal. If it ends up that both parties file Memoranda of Appeals, then the two can be consolidated for hearing. I was referred to the decision of the High Court in the case of *Kenya Bus-Rapid t/a Kenya Bus Services Management Co. Limited vs Patrick Irungu Gichure* where the court (Sergon J) stated as follows :-

> "Under Section 79G of the Civil Procedure Act, a party who wishes to file an appeal may do so within 30 days. The court may extend time for filing of an appeal upon sufficient reason(s) being given… I hold the view that Section 79G Civil Procedure Act provides any party who is aggrieved by the decision of the subordinate (sic) to file an appeal within 30 days from the date of delivery of the decision. However, I am of the view that as regards cross-appeals, time i.e 30 days being (sic) to run from the date of service of the memorandum of appeal."

11. The above decision is not binding on me, and on my part, I respectfully disagree with the view taken. I have pointed out to the law, and to me, it is clear that there is no provision for filing a cross-appeal before this court from a decision of the subordinate court. It follows that if a party is aggrieved, it is upon that party to file a Memorandum of Appeal within 30 days. If there is to be any cross-appeal, and I have not seen a provision addressing it, then it will still have to be covered within the 30 days period of the decision, and not 30 days of service of the Memorandum of Appeal. I have seen no law upon which to import the provision for filing a cross-appeal, and doing so within 30 days of service of the Memorandum of Appeal. My view therefore is that this cross-appeal is incompetent and it is hereby struck out. I will thus restrict myself to the appeal.

12. The issue here is on increase of rent and it does appear that the parties before me are ever incapable of agreeing on rent. I have been referred to a previous dispute that they had, being BPRT Case No. 118 of 2015. During that dispute, the landlord and tenant presented valuations of the same valuers. The landlord's valuer, M/s Wesco Property Consultants, presented a valuation report dated 8 July 2015, and proposed that rent payable be KShs. 91,542.58/=. The tenant in that case presented a valuation report prepared by M/s Fairlane Valuers Ltd dated 8 December 2015, wherein rent was proposed at KShs. 33,000/= per month. In the subject suit under appeal, BPRT Case No. 195 of 2018, the landlord's valuer (same firm of valuers) presented a valuation report dated 15 November 2017, and assessed rent at the same figure as proposed in their valuation report of 8 July 2015, that is KShs. 91,542.58/=. The tenant's valuer increased their valuation of rent from KShs. 33,000/= to KShs. 39,200/= per month. The Tribunal considered the reports and thought that the comparables of the landlord's valuer were far from the suit premises and did not deem them suitable. I have looked at the report and indeed what it contains is rent payable within Biashara Street, with two premises cited paying KShs. 1,867 per square metre and KShs. 1, 310.91 per square metre. Another premises cited is at George Morara/Biashara Street paying KShs. 1,373.94/= per square metre, and at George Morara Road at KShs. 1,410 per square metre for a shop and KShs. 705.22 for a store. For the tenant, the valuer gave 4 comparables. One was of a shop within the same building where the tenant is located, and the rent payable is KShs. 761.00 per square metre. The other comparables were of premises within the same Makawi Road where the rent payable ranged from KShs. 636/= to KShs. 480/= per square metre.

13. Assessment of rent is within the jurisdiction of the Tribunal and guidance is given in Section 9 (2) of CAP 301 which provides as follows :-

> (2) Without prejudice to the generality of this section, a Tribunal may, upon any reference—
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> (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—
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> (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;

14. What the Tribunal needs to take into consideration is *"regard to the terms thereof and to the rent at which the premises concerned might reasonably be expted to be let in the open market."* Thus the Tribunal is supposed to first look at the terms of the contract of the parties, then take into consideration what such premises might reasonably be expected to fetch in the open market. So that the Tribunal may know what is reasonably expected to be fetched in the open market, it is common for the Tribunal to ask for valuation reports, which guide the Tribunal. That is why rent paid for comparable premises is a prime guiding tool.

15. I agree with the argument of Mrs. Ali, that comparable premises, is not limited to premises along the same street. In fact, it is possible to have no comparable premises within the same street. You could indeed have a very new and unique building, with modern facilities, which other premises along the street do not have. For example, it may be probable that a new building has a dedicated underground parking, and security, which other buildings in the same street do not have. It may also be located in a site, though on the same street, but offering unique views. There may therefore be good reason to depart from looking at what is payable within the same street, for comparable premises may actually be in the next street. Alternatively, one can look at what is payable in the same street, and factor the differences in facilities within the different buildings, and arrive at different rent. These are matters of evidence to be presented by the parties where a landlord or tenant can justify what he should charge or be charged.

16. But one thing that can be difficult to run away from is what other tenants are paying within the same building. It will require good explanation for a landlord to justify why one shop should pay radically more than another shop within the same building or plot. The landlord must give reason why the rent should not be within the same range, because you would reasonably expect that similar shops, within the same building or plot, would be charged the same or almost the same rent. The tenant's valuer in this case provided KShs. 761/= per square metre as rent payable by a shop within the same plot as the suit premises. No evidence was offered by the landlord as to why the tenant herein ought to pay KShs. 1,490/= per square metre, which is close to twice what the other shop in the same plot pays. I think it needed the landlord to present oral or affidavit evidence as to why he needs to depart from this rate. Without there being any explanation offered, I am unable to fault the Chairman for being guided by this figure of KShs. 761/= per square metre in assessing the rent payable by the respondent herein. That is precisely what he took as payable for the shop, and he considered a half rate for the mezzanine floor, of which I see no fault, because even the landlord's own valuer rated the mezzanine floor at half the rate of the main shop.

17. At the end of the day, it ended up being a minor increase of rent by the sum of KShs. 834/=. I do not see any issue with this, because sometimes, the prevailing economic factors may decrease the rate of increase of rent, and in fact in some instances, you may even have a negative rate, the effect of which would be to either have the actual rent static or lowered. That in fact is what one can pick when looking at the landlord's valuer's report. His own report in the year 2015 proposed the same rent as his report prepared two years later in the year 2017. It means that there was none, or no significant increase in the rent payable, between those two years. The marginal increase of KShs. 834/= is thus within the reasoning of the landlord's own expert.

18. I really see no reason within which to set aside the decision of the Tribunal. I think the Chairman properly considered the evidence before him and all other surrounding factors and arrived at a reasoned and fair decision. I therefore see no merit in this appeal and it is hereby dismissed.

19. I make no orders as to costs as I have dismissed both the appeal and the cross-appeal.

20. Judgment accordingly.

DATED AND DELIVERED THIS 18 DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA