REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 102 OF 1990

HERMUGILD DE'SOUZA.....APPELLANT

VERSUS

KHOLI & 2 OTHERS.....RESPONDENT

JUDGMENT

This is an appeal from a determination of the Rent Restrictions Tribunal (under, the tribunal) made on 10th August, 1990, in its Case No 28 of 1988.

The matter started in 1988 by the filing before the tribunal a notice of motion dated 15th January, 1988. The applicant therein described himself as Canute Hermugild De' Souza, the residuary owner of plot No 209/2535/1, Limuru Road, Parklands, Nairobi, and as owner of flats Nos 1, 2, 3 and 5 which then, and we believe, still stand on the property. In effect the application sought the review upwards of the standard rent of each of the four flats. Two grounds were cited for bringing the application. Firstly, that the rents which were being paid then did not yield a fair capital return on the cost of construction and the value of the land as at the 1st of August 1981. Secondly that the comparable flats in the same locality commanded a monthly rent of Kshs 3,000/= per flat.

The application first came for hearing on 28th March, 1988, but was not proceeded with. The tribunal expressed the view that the application could not properly be grounded on comparables when, as had been conceded by the applicants counsel on record then, the standard rent had not been determined for the respective flats.

Flats Nos 1, 2, 3 and 5 were not the only premises on the property. There were in all nine flats all apparently the same size, set up and finish. The evidence before the tribunal revealed that assessment of standard rent had been done on some of the flats to wit flats Nos 4A and 4B under Tribunal Case No 37 of 1984, and was fixed at Kshs 2,000/= in or about April 1985. That was done at the request of the applicant in notice of motion of 15th January, 1988. He is the appellant in the matter before us. For some reason not apparent to us, the appellant did not request that the rents for the four flats be upped to accord with the assessed standard rent for flat Nos 4A and 4B. However, considering the manner in which the prayer for the review of rent is worded, it is clear to us that he would be content if the tribunal fixed the rent for the 4 flats, at a figure of at least Kshs 2,000/=.

In support of the 1988 application the appellant filed an affidavit which was sworn by him on 17th February, 1988, the date the application was filed before the tribunal. To that affidavit a valuation report by Panorama Estates, dated 22nd August, 1984 was annexed. It would appear to us even though there is no clear and conclusive proof of it that the assessment in Tribunal Case No 37 of 1984, was based on the same report. Our surmise is based on the fact that the report was prepared during the pendency of that case, and before the assessment of the rent which was done in or about April 1985.

On the receipt of the 1988 application the tribunal did not seem to be aware or if it was aware it did not seem to attach any significance to the earlier assessment of rent of part of the premises on the subject plot. On its own motion it caused its valuer to visit the property and he, thereafter prepared a valuation report as to what would be the reasonable standard rent for each flat. The report is on record and is dated 8th November, 1989. It is signed by one A Wamburu. In his view a reasonable standard rent for each of the 9 flats would be Kshs 2595/= per month exclusive of light and water charges. The Panorama Estates Report we alluded to earlier on had recommended a figure of Kshs 2722/= per flat per month.

There is no record in the tribunal file as to what happened to the 1988 application. The tribunal's ruling, which is the subject matter of this appeal is silent on the matter. Nor do we have any indication as to what happened to an application for review dated 23rd April, 1990, which was filed in Rent Restriction Case No 37 of 1984. In that application the present appellant as applicant sought an order of review of the tribunal's order in that case which was made on 1st April,1985, fixing the standard rent of two of the 9 flats at Kshs 2,000/=. The appellant wanted the same amount of rent to be fixed as the standard rent for flat Nos 1, 2 and 3.

The appellant was not content to have that application determined first before filing any other application respecting the same premises. On the same day he filed the application for review he filed another application in Rent Restriction Case No 28 of 1988 praying, in effect, for the review of standard rent of each flat from Kshs 2,000/= to Kshs 2,736/= per month.

What evidence did the tribunal have before it for consideration regarding the matter? There was first its valuation report we alluded to earlier. There were also the valuation report by Panorama Estates, and Mathu & Associates. The report by Mathu and Associates was filed by the tenants. Each of those three valuation reports had a different plinth area. The tribunal resolved the disparity by ordering a joint inspection of the premises by the authors of the respective reports. They did so and came up with an agreed plinth area of 9623.3 square feet. That was the area the tribunal used in fixing what it considered to be a reasonable standard rent for each flat, namely Kshs 2,400/= per month. The landlord was aggrieved, and hence this appeal.

The memorandum of appeal raises substantially five complaints. Firstly, that the tribunal did not address itself to the locality of the premises, nor did it consider the rent payable for comparable premises. Secondly, that the tribunal used the figures recommended by Mathu & Associates instead of those which were recommended by Panorama Estates. Thirdly, that the tribunal should have but did not use the cost of construction of the premises as it stood in 1981. Instead it used the cost of construction as was or was supposed to be in 1958. Fourthly that the tribunal used a wrong plinth area. Lastly, that the effective date of the enhanced rent should have been but was not made effective from the date of the application it was dealing with.

Mrs Ameka, advocate urged the appellant's case both before the tribunal and before us. She submitted *inter alia*, that the tribunal was enjoined by the provisions of the Rent Restrictions Act, (under the Rent Act), to consider all circumstances of the case, which, in her view, would include the locality of the premises, in determining a reasonable rent.

Mr Wati, advocate, appeared for the respondent. His view was that the location of the suit premises was not a relevant consideration. In his view it becomes a relevant factor where the Court has before it insufficient evidence for ascertaining the cost of construction of suit premises and the value of the land on which it stands. We do not consider it essential to set out here the other submissions by learned counsel.

This is a first appeal. We are, therefore, enjoined to look at the evidence which was adduced before the tribunal, evaluate it and draw our own conclusions without in any way overlooking the ruling and conclusions of the tribunal. We are at liberty to differ from those conclusions provided there is a basis, legal or otherwise, or both legal and factual, for doing so. Our duty is in the nature of a re-hearing of the matter (See *Selle v Associated Boat Co* [1968] EA 123; *Peters v Sunday Post* [1958] EA 424).

We must first consider the issue of jurisdiction to entertain this appeal. Mr Wati does not think this Court

has jurisdiction to entertain and hear this appeal. In his view no legal issue is raised in the appeal as to bring it within the purview of the provisions of s 8(2) of the Rent Act. With due respect to him that is not so. The appellant has raised the legal point that the tribunal overlooked certain essential matters which it was under a legal duty to consider, *viz* the location of the suit premises. S 3(2) of the Rent Act enjoins the tribunal to consider, *inter alia*, the locality of the suit premises when considering whether or not the standard rent payable for use of premises yields uneconomic rent. The contention of the appellant both before the tribunal and before us was that the rent he was receiving from the respondents, amongst others, for the suit premises was not yielding economic return for his investment. That the appellant complains that the tribunal did not address certain essential matters, a legal question is raised. Certain issues of fact are also raised. Consequently the appellant was entitled to bring this appeal. Whether or not the points raised are valid does not go to jurisdiction. Having come to that conclusion, we must now proceed to consider the appeal, on the merits.

The suit premises were constructed before 1960. The actual cost of construction is unknown; and so is the rent which was chargeable as at the 1st January, 1981. There is evidence on record that as at the 23rd April,1990, standard rent respecting some of the 9 flats had not been fixed. The appellant was aware of that. Hence his application in Tribunal Case No 37 of 1984, for an order that standard rent which had been fixed for only some of the flats be declared to be the standard rent for all the 9 flats. We have no evidence that that application was heard and determined. In absence of such evidence prayer (a) of the application dated 23rd April, 1990, which was filed in Tribunal Case No 28 of 1988, would not lie. Such a prayer presupposes that standard rent had been fixed.

Moreover, although the appellant included prayer (a) in his application, the affidavit in support proceeds on the basis that what the appellant was seeking was an order fixing the standard rent for flat Nos 3 and 5, and at the same time reviewing the rent which was being paid respecting flat No 4A to accord with whichever figure the tribunal would fix for the first two flats, above. It should be recalled that standard rent for flat No 4A had been fixed at Kshs 2,000/= under Tribunal Case No 37 of 1984.

In light of the foregoing the tribunal could not proceed to deal with the matter as provided for under C 3(2) of the Rent Act. That being the conclusion we came to, the issue of location of the suit premises was an extraneous matter to the application the tribunal was handling. We, therefore, agree with Mr Wati that the matter of rents for comparable premises did not arise for consideration by the tribunal. It was called upon to fix rents for flats Nos 3 and 5 and upon doing so adjust the rent which was payable respecting flat No 4 to the same figure. The tribunal was therefore obliged to proceed to fix the standard rent as provided under the definition of " Standard Rent" in s 3(1) of the Rent Act.

The tribunal treated the application before it as if it was entirely an application for review of standard rent. In it's ruling, however, it proceeded to deal with the matter as though it had been asked to assess and fix the standard rent for the premises.

The approach adopted was, to our minds, the correct one even though the tribunal was in error to have regarded the application as being one for review.

The appellant, however, complains that a wrong plinth area, and therefore an improper figure on the cost of construction was used by the tribunal in its computations. We have considered this matter and we think there is no merit in that complaint. The valuation report by Panorama Estates was produced before the tribunal at the instance of the appellant. It gives the value of the land on which the suit premises stand as being Kshs 264,000/=. There was an attempt later by the appellant to vary the figure upwards. In his affidavit sworn on 23rd April, 1990, in support of his application he has given the figure of Kshs 500,000/= as the value of the land. The tribunal thought the figure was not realistic and rejected it in favour of Kshs 264,000/= above. It was justified in doing so. There was no material to justify the variation of the figure upwards.

The cost of construction of Kshs 840,000 which the tribunal used was the figure the appellant himself had stated in his affidavit in support of his application. He should not be heard to complain. The relevant year for that cost was also given by him as 1960. It is the year the tribunal used. Any year taken is relevant to

determine the permitted percentage increase to the cost of construction to get the cost of construction as at the 1st of January, 1981. The percentage increase permitted under s 3 of the Rent Act is the same for premises constructed between 1955 and 1962. The appellant's complaint with regard to the year the tribunal applied has, therefore no basis at all. He would get no advantage whichever year the tribunal would have chosen between 1955 and 1962.

It is also quite obvious to us that the appellant's complaint with regard to the plinth area is misconceived. The tribunal having accepted the cost of construction which the appellant gave, the plinth area became irrelevant. Our understanding is that the plinth area is used to work out the cost of construction. So that although the tribunal had said it would use the Mathu & Associates Valuation reports, it actually used the figures the appellants had given in his affidavit. There is therefore no basis to fault the tribunal in what it did.

Then there is the issue which the appellant raised concerning the effective date of the standard rent the tribunal determined. It was his view that it should have been ordered to take effect from the date of application for review. The application was filed before the tribunal on 23rd April, 1990. The rent which the tribunal assessed was ordered to take effect form 1st October, 1990. The ruling fixing that rent was delivered on 10th August 1990. There is no explanation on the tribunal record as to why it preferred 1st October,1990, as the effective date and not any other date before it. The tribunal had the discretion to fix the effective date. It was not obliged to back-date it to the date of the application as the appellant contends. The effective date could not have properly, been ordered to be in the middle of the month. Rent was payable on a monthly basis. Therefore, whatever date it would have fixed was supposed to be either in the beginning or the end of a given month.

The effective date should not be an arbitrary date. S 5(1)(b) of the Rent Act enjoins the tribunal to exercise its discretion in that regard in accordance with the requirements of justice. The tribunal having not indicated the basis upon which the effective date was post-dated to 1st October, 1990 we are of the view that it erred. It would appear to us that the tribunal thought s 13(2) of the Rent Act applied to the facts of this case. However we do not think that is so. The section talks about permitted increases in rent. It must be read together with s 11 of the Act, which deals with permitted increases in rent. The increase in rent which was ordered by the tribunal does not fall within the purview of s 11, above. Consequently s 13(2) above is inapplicable to this case. Considering all the facts and circumstances of this case, we are of the view that the effective date should have been ordered to be 1st September, 1990.

The appeal succeeds to the limited extent stated above.

As regards costs, the appeal substantially failed. Consequently we would order that the appellant bears 75% of the costs, to be taxed if not agreed upon. Orders accordingly.

Dated and delivered at Nairobi this 8th day of October 1992

S.E.O BOSIRE **R.C.N KULOBA**

JUDGE **JUDGE**