REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO. 60 OF 1976

KARIBU HOUSE (1973) LTD .....APPELLANT

VERSUS

TRAVEL BUREAU LTD.....RESPONDENT

JUDGMENT

Karibu House (1973) Ltd, the appellant, is aggrieved by the assessment of rent by the Business Premises Rent Tribunal on 16th June 1976, at Shs 4000 a month for part of its premises along University Way in this city let to the respondent, Travel Bureau Ltd, which is (presumably) content with this figure for there has been no cross-appeal.

Some of the relevant background is this. The appellants are the landlords of this shop, a long narrow chamber, which faces the central police station and is bounded by the College Grocers on the one hand and Simba Crafts on the other, with a yard and service lane at the rear. The respondent is the tenant and, as its name suggests, owns a travel agency for tourists and residents.

The building is over twenty years old and the appellants have not improved it in any way. It is not right in the city centre, but close to it, reasonably convenient for pedestrians from some of the hotels tourists frequent, but nightmarishly inconvenient for anyone in a vehicle for it is just round a bend along a road used by a great deal of traffic from the city and its two or three shopping areas and there are no car parks within, say, half a mile or so.

At one time the respondent paid Shs 3100 a month rent in advance to the appellant which paid the site value tax, water, conservancy and other charges. On 26th March 1975, however, the appellant sent the respondent a notice under section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act heralding a change in the terms and conditions of the tenancy whereby the respondent would pay in advance from 1st June 1975, Shs 8000 a month net, free of any deductions whatsoever, its share of the site value tax, water, conservancy and all other outgoings.

The grounds for altering the terms and conditions were (a) the rent of Shs 3100 a month was much below what the appellant might reasonably expect to obtain for the premises in the open market; and (b) the other charges were in keeping with the trends of the open market. The respondent opposed this and, on 26th May 1975, referred the issues involved to the tribunal to investigate and determine.

The tribunal heard no evidence because the parties offered none. It resolved to visit the premises, but it is not clear whether it did so. It pondered three valuation reports and produced a judgment on 16th June 1975. The rent went up to Shs 4000 from 1st June 1975 (and not to Shs 8000) and there was no reference

to the respondent having to pay its share of the site value tax, water, conservancy and all other outgoings, so that part of the issues were not investigated or determined in favour of the appellant or at all; and it is unclear still whether the appellant or respondent pays it or them and in what proportion, but probably the only change in the terms was the rent.

The tribunal selected valuers, estate and managing agents (called Wairagu & Co) to discover the original cost of the construction of this building, its age, the market value of the land on which it lay, the improvements to it, their cost, the amenities or services provided by the landlord, the rent at which the premises were let for the past three years and any other factor. It also asked Wairagu & Co to suggest the rent which it thought proper, having regard to the market rent of comparable premises in the district.

The appellant had some surveyors, valuers and estate agents, called Martin Heymann & Co, who are "wholely" (sic) owned by Investors Kenya Property and Investment Co Ltd; and they provided a report and some additional matter in a letter. The respondent obtained a valuation from Milligan & Co Ltd, surveyors and valuers from 1912, and it provided more in a letter as well.

The rent suggested by Wairagu & Co was Shs 5080, Martin Heymann & Co Shs 5629 and Milligan & Co Ltd Shs 3400 a month.

The approaches differed. Wairagu & Co found the suit premises were a part of over twenty years old building, the appellant had not repaired it but provided running water and a lavatory or two. College Grocers next door paid Shs 1500 a month, and had done so for some years, for a 44·1 square metres shop and 20 square metre store which, on analysis, came to Shs 27/70 and Shs 13/85 a square metre a month. Wairagu & Co went on to the south corner of Muindi Mbingu Street and University Way and found Belco Hardwares Ltd, which paid Shs 2970 a month for its 64.5 square meters shop from 1st February 1975, and Shs 2700 a month before that date, which worked out at Shs 46 a square metre a month. Wairagu & Co measured the respondent's premises and they were 169·47 square metres and settled on Shs 30 a square metre which made the rent Shs 5084·10 or rounding off at Shs 5080 a month.

Martin Heymann & Co noted the property was on the outskirts of Nairobi city centre. It was in a five storey building of reinforced concrete construction, which appeared to be in good condition. The window of the shop or office was 20 feet wide but the depth of the premises was out of proportion; so not all of it could be used as an office or shop. There was a canopy over the pavement outside it. The interior had plastered and painted walls and ceilings. The front had plate glass windows in alloy frames and folding doors of the same material., The floor was terrazo. The lettable floor space was 1732 square feet (that is 160·908 square metres or about 8 square metres less than Wairagu & Co had found). It was discovered that the lease expired some time before this. The rent covered the cost of the water charges and only a share of the lavatory and kitchen in the yard.

The respondent was responsible for the internal decoration. and increases in the rates. It had also put in cupboards and partitioning. Later in the letter, Martin Heymann & Co furnished an analysis of what DT Dobie and Co (Kenya) Ltd on the corner of University Way and Koinange Street paid for its 8065 square feet (749·263 square metres) ground floor premises over the past three years which was Shs 2/37 a square foot a month. Tropical Pets Shop in ground floor premises of 932 square feet (86.586 square metres) paid Shs 3/25 a square foot a month and had done so for some time. It is on Muindi Mbingu Street nearer the city centre opposite the city market for fruit, vegetables, fish, meat and flowers. So Martin Heymann & Co's suggested rent of Shs 5629 a month for 1732 square feet is at the rate of Shs 3/25: the same rate as that for the Tropical Pets Shop. This is about Shs 33 a square metre.

The respondent's surveyors and valuers split the respondent's premises into three zones and called them A, B and C beginning at the front entrance for 25 feet, along a narrow chamber for the next 25 feet and further down it and out into the yard for the last 35 feet. The width was 21·5 feet for zone A and zone B and 2·5 for zone C. Milligan & Co Ltd then converted the zones into square, metres and produced a separate rent for each third:

Zone A 50 square metres at Shs 37 = Shs 1850

Zone B 50 square metres at Shs 18/50 = Shs 925

Zone C 69’5 square meters at Shs 9/25 = Shs 644

Shs 3429

or Shs 3400 a month.

Milligan & Co Ltd noted the odd proportions of the respondent’s premises; 21.5 feet wide and 85 feet in length. It was concerned about Simba Crafts next door because it produced curios for tourists and what it did with its machines and animal skins caused the respondent’s premises to quake and their customers’ sense of smell acute discomfort in hot weather. Simba Crafts paid Shs 4000 a month for its premises. It zoned in the same way the premises occupied by College Grocers and Belco Hardware which Wairagu & Co had investigated and analysed. College Grocers’ premises were all zone A, being only 26 feet in width; so it worked out at Shs 27/78 a square metre for the shop and Shs 13/85 a square metre for the store. This agrees with Wairagu & Co’s valuation. Belco premises had the same depth, was all zone A as well and had an advantage in its being on two streets, University Way and Muindi Mbingu Street, with the latter being used by more people. This worked out at Shs 46 a square metre. This was Wairagu & Co’s figure.

Milligan & Co Ltd thought that the respondent’s premises had a poor trading frontage and should be only 80 percent of the rate for each square metre. This came to Shs 37 a square metre for zone A only, Shs 18/50 for zone B and Shs 9/25 for zone C. Wairagu & Co settled on Shs 30 a square metre all round or the length and width of the shop. Milligan & Co Ltd did not support this for, on its zoning system, this would work out at Shs 55 a square metre for the front of the office, Shs 27/50 for the next part and Shs 13/60 for the long dark tunnel and yard. It also compared the rent a square metre for shops and/or mezzanine areas in the more fashionable Muindi Mbingu Street for Kibo Travel and Masaba Travel, all zone-Aonly premises, and their rents of Shs 1200 and Shs 1300 a month supported its zone A average rent of Shs 37 a square metre each month.

So much for the material before the tribunal. There was plenty of it and all of it helpful. What did the tribunal make of it? It wrote this:

> The property in question is situated at the University Way on the outskirts of Nairobi city centre which is not a particularly busy area for business. Besides, one property is about twenty years old and as Mr Mbuu of Wairagu & Co points out there are no improvements effected by the [appellant].
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> However, we think that there is a good case for increasing rent for the suit premises considering that rent has gone up everywhere in the Republic due to various factors.
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> In this connection we are of the opinion that the rent of Shs 3419 a month as recommended by Milligan & Co Ltd is too low compared with rent being paid for similar premises in the adjacent area. On the other hand, we consider the rent recommended by Wairagu & Co as well as that of Martin Heymann & Co to be on the higher side for similar reasons.
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> Our duty in determining a fair rent in a case like this is to ensure that the tenant is not put off business because of unbearable rent and at the same time ensure that the landlord gets his fair deal …

Earlier on it declared it had considered all the reports. It concluded by alighting on Shs 4000 a month as a fair rent from June 1975.

The law of this begins with the preamble of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. It states that that Act is an Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for

matters connected therewith and incidental thereto. The tribunal is to have regard, according to section 9(2)(a), to the rent at which the premises concerned might reasonably be expected to be let in the open market. This does not mean, however, that the open market rent is the only matter, to be considered because, if that rent was automatically the reasonable rent to be paid under a new tenancy then (if there were conditions of scarcity) the open market rent would be forced up to a point which exceeded all reason and the object of this legislation would be, in a great measure, defeated; see *John Kay Ltd v Kay* [1952] 1 All ER 813.

This Kenya Act contains the words "reasonably to be expected to be let" and some meaning must be given to them as Wicks J said in *Mbuni Dry Cleaners Ltd v Barclays Bank DCO* [1972] EA 188, 190. It is the reasonableness of the rent that must be in the forefront of the tribunal's investigation and determination. It must be the concern of this Court, too. The average rates per square foot or metre 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.

The tribunal has a discretion in all this which must, as usual, be exercised in a judicial fashion. So has this Court. When hearing appeals under this Act it has all the powers conferred on the tribunal by the Act, in addition to any other powers conferred on it by or under any other written law; see section 15(2). One of the matters to take into account in both places is the protection of the tenant from eviction or exploitation and another is ensuring that the landlord has a fair return for his investment in and expenditure on his building. The Act does not preclude a fair result in this dispute between the parties sometimes resulting in an increased rent (in favour of the landlord) as in this one.

I have studied the reports of the valuers. I know the premises from the outside. I have set out the relevant law. On all this and the circumstances of this tenancy and its history, weighing one thing with another, I would probably have accepted Milligan & Co Ltd figures and assessed the rent at Shs 3400 a month. The tribunal put it at Shs 4000 a month. The respondent accepted that and supported it. The appellant asked for it to be set aside and, instead, the rent to be raised to Shs 5629 or other fair figure from a specified date. That was in its memorandum of appeal of 15th July 1976. There was an application fifteen months later, when we heard the appeal on 28th October 1977 for this to be amended to Shs 7915/80 which was strenuously resisted. This figure is based, I believe, on the fact the Belco Hardwares Ltd shop rent was Shs 46 a square metre a month.

An appeal court can interfere, it was agreed, with the tribunal's assessment if it were reached by any (i) mistake of law; (ii) disregard of principle; (iii) misapprehension of fact; (iv) a consideration of irrelevant matters; (v) lack of exercise of a discretion; (vi) obviously unjust method; (vii) disregard of relevant matters; or (viii) undue regard for some factors and not enough for others; or a combination of some or all these eight points.

The parties agreed the tribunal's assessment would be the rent payable from 1st June 1975. They said so on 26th February 1976, or eight months later. The tenancy had lapsed some time before Martin Heymann & Co submitted its report on 11th November 1975. The other reports were on 27th August 1975 (Wairagu & Co), 1st December 1975 (Martin Heymann & Co's letter), 1st November 1975 (Milligan & Co Ltd's report), and on 24th February 1976 (Milligan & Co Ltd's letter). The appellant's notice to the respondent was dated 26th March 1975, and the reference to the tribunal was on 26th May 1975. The tribunal's judgment was delivered on 16th June 1976, which was about one year later. The tribunal's assessment should normally be related to the date on which it is made, in my view, since it is not supposed to prophesy nor is it required to fix a figure retrospectively, although the parties may agree that the tribunal's figure is the new rent from some past date, as they did in this case. So 1st June 1975 became the date for "having regard to the rent at which the premises concerned might reasonably be expected to be let in the open market" (section 9(2) (a)). It should not be the hearing date which, we were told, might be two or three years later.

The reports included between them some of the terms of the earlier tenancy. These are relevant: section 9(2)(a). They included all the relevant circumstances: see section 9(1)(a). One of these was the remark by Milligan & Co Ltd that the respondent's office was on University Way which is a poor trading frontage.

The appellant attempted to describe it as the hub of the city, its major hotels, the car spare-parts and carpet trades; but I do not accept it is the Mayfair, Chicago or Isfahan quarter of Nairobi just because it is a narrow, awkward, short road where one or two of those hotels or shops or trades are found.

It was noted in some of the reports that no improvements had been made by the appellant but that the respondent had put in partitioning and cupboards. Section 9(2)(a)(iii) makes this a relevant point to consider.

The tribunal claimed it had considered each report. I am sure it did. It also referred to recent increases in rent in the Republic. This must be a reference to the rent at which the premises concerned might reasonably be expected to be let in the open market (section 9(2)(a)), which was a proper thing to do.

Comparable premises and trades or occupations in nearby streets were investigated by the valuers, and, therefore, the tribunal; and at the relevant time (1st June 1975) chosen by the parties and tribunal, one was Shs 46 a square metre but others, including two travel agencies in a busier street, were let at Shs 37 a square metre. The tribunal assessed the rent for this long chamber of a shop at Shs 4000 a month, which was about Shs 30 a square metre. The total rent in the end is, as I have remarked, more than I would have selected had I been dealing with the case. I was impressed by the zoning system of Milligan & Co Ltd (See also articles 87, 88, 89, chapter 8, in Bean and Lockwood's *Rating Valuation Practice* (1969) (6th Edn), pages 169 to 186) .

It is at any rate an award which is not unjust to one or the other of the parties and I am disinclined to interfere: see Willmer L J in *The Bosworth* [1960] 1 Lloyd's Rep 173, 197.

We are obliged to deal with all the material before us, balancing that for the appellant against that for the respondent and paying due regard to the existing decision of the tribunal (which is very experienced in these references and entrusted with them by Parliament): cf Edmund Davies L J in *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 All ER 1441, 1457.

Having done so, I would hold that the appellant had failed to establish to my satisfaction that the tribunal erred in any one of the eight ways set out earlier. So I would reject the application to amend because it would have availed the appellant nothing and I would dismiss the appeal with costs.

Chesoni J agrees and it is so ordered.

Appeal dismissed.

Dated and delivered at Nairobi this 14th day of 14th December 1977.

A.A KNELLER

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JUDGE

Z.R. CHESONI

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JUDGE