



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. 537 OF 2017**

**TROPICAL FOOTWEAR CENTRE LTD.....1<sup>ST</sup> APPELLANT**

**K. SILA AND RICHARD KIMEU.....2<sup>ND</sup> APPELLANT**

**PHYLLIS MUKAMI GICHURU.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**GULED HOUSING COMPANY LIMITED.....RESPONDENT**

**(Appeal from the Judgment of the Chairperson Business Premises Rent Tribunal, Nairobi**

**by Hon. D. Mochache (Mrs.) delivered on 11<sup>th</sup> February, 2011**

**in BPRT Case No. 893 of 2009).**

**JUDGMENT**

**Background**

1. Initially there were three Appellants namely; Tropical Footwear Centre Limited, Appellant in BPRT 893 of 2009, K. Sila & Richard Kimeu, Appellants in BPRT 928 of 2009 and Phyllis Mukami Gichuru, Appellant in BPRT 968 of 2009. The latter two appeals were settled by consents filed in Court on 3<sup>rd</sup> August, 2018 and 21<sup>st</sup> February, 2018 respectively which consents were adopted by the Court on 18<sup>th</sup> September, 2018. This appeal therefore relates only to the appeal by Tropical Footwear Centre Limited (Appellant).

2. The Appellant is occupying shop No. 2 on the ground floor of premises on LR No. 209/798 at the junction of Mfangano and Ronald Ngala Streets in Nairobi. The premises which house shop No. 2 (suit premises) is owned by the Respondent. On 31<sup>st</sup> August 2009, the Respondent gave notice to the Appellant that with effect from 1<sup>st</sup> November, 2009 the monthly rent was to be increased from Kshs.17,400/= to Kshs.126,000/=. On 2<sup>nd</sup> November 2009, the Appellants Advocates wrote to the Respondent intimating that the Appellant was not going to comply with the intended increase of rent.

3. The Appellant subsequently filed a Reference at the Business Premises Rent Tribunal, being BPRT No. 893 of 2009 objecting to the proposed increment of rent. The Appellant and the Respondent were then directed to file their respective valuation reports. The Appellant filed its report through Gimco Limited whereas the Respondent filed theirs through Ark Consultants Limited. After a full hearing, the Chairperson delivered a judgment in which rent was increased from Kshs.17,400/= to Kshs.109,340/=. Being aggrieved with the Judgment of the Tribunal, the Appellant filed this Appeal to the High Court where it was filed as Appeal No. 70 of 2011 but when it was transferred to the Environment and Land Court, it was assigned ELC No. 537 of 2017.

**The Appeal**

4. The Appellant raised eleven (11) grounds of appeal namely:-

**1. The Learned Chairman erred both in law and fact by assessing the rent payable by each of the Appellants from the current Kshs.17,400/= (for 1<sup>st</sup> Appellant), Kshs.46,400/= (for 2<sup>nd</sup> Appellant) and Kshs.29,000/= (for 3<sup>rd</sup> Appellant) respectively to Kshs.109,340/= for each of them without considering adequately and/or at all the Appellants' joint valuation report, the evidence and submission tendered on behalf of the Appellants.**

2. **The Learned Chairman erred both in law and fact in awarding the Respondent an outrageous rent increment of 628.5% in respect of the 1<sup>st</sup> Appellant, 377% for the 2<sup>nd</sup> Appellants and 235.6% for the 3<sup>rd</sup> Appellant respectively in total disregard of the Appellants' expert evidence**
3. **The Learned Chairman erred both in law and fact by making a finding that all three of the suit premises occupied by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants are stalls whereas the evidence adduced before her indicated that only the suit premises occupied by the 3<sup>rd</sup> Appellant is a stall.**
4. **The Learned Chairman erred both in law and fact in adopting the Respondent's comparables 1, 4 and 5 of the valuation report of Ark Consultants Ltd whereas the same were beyond the accepted 20% range difference as testified by both the valuer for the Appellants and the valuer for the Respondent and thus arriving at an outrageous and erroneous assessment.**
5. **The Chairman's judgment and in particular her adoption of the Respondent's comparables contained in the valuation report of Ark Consultants Ltd in assessing the rent payable was not only biased but the same was also contrary to the undisputed expert evidence tendered before her that the accepted comparables in determining the rent payable should be within a range of 20% in terms of size with the suit premises.**
6. **The Learned Chairman misdirected herself and thus erred when she made a finding that it was undisputed fact that Cianda Marker (the subject premises) has lately been partitioned into stalls which are then let out for various businesses whereas there was no sufficient and/or adequate evidence tendered before her to warrant such a finding.**
7. **The Learned Chairman erred in both law and fact by adopting wrong and erroneous formula in assessing the new rent payable while almost completely disregarding the Appellant's valuation report.**
8. **The Learned Chairman considered in her judgment matters which were neither raised by the Appellants nor the Respondent and thereby entering into the arena of the proceedings before her as if she was a party and thus arriving at an erroneous decision.**
9. **The Learned Chairman erred in both law and fact when finding that the principles governing assessment of rent were either misinterpreted or side stepped by both the Appellant's and Respondent's valuers respectively while the expert evidence of both the Appellants and Respondent was unanimous on the principles to be followed in assessing the rent payable.**
10. **The judgment of the Learned Chairman is fatally wrong and against the law in that she used comparables contained in the Respondent's valuation report in assessing the rent payable whereas those comparables were too small in size and in different locality from that of the suit premises and thus arriving at grossly exaggerated rent which the Appellant's respective businesses cannot be able to economically sustain.**
11. **The Learned Chairman erred in both law and fact by awarding costs to the Respondent whereas there was no sufficient and/or adequate evidence to warrant such an award.**

5. The parties to this appeal were directed to file Written Submission the basis upon which this appeal is to be decided. The Appellant filed its submissions on 27<sup>th</sup> November, 2018. As at the time the date for judgment was set, the Respondent had not filed its submissions. The Respondent's Advocate undertook to file submissions by close of business following the date when judgment date was set. As at the time of writing this judgment, no submissions are in the file. I therefore assume none were filed.

6. I have gone through the Appellants submissions. The Appellant's Counsel Mr. Kimondo has clustered the grounds of appeal into 5 groups. Group 1 comprises grounds 1, 3, 4, 5 and 6. Group 2 comprises grounds 2 and 7. Group 3 has grounds 8 and 10. Group 4 has ground 9 and group 5 has ground 1.

7. I have gone through the record of appeal and the submissions by the Appellant *vis a vis* the grounds of appeal. This being a first appeal to this Court and in view of the provisions of Section 15 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act (the Act) I have to evaluate the evidence and reach my own conclusions but of course giving allowance to the fact that I did not see the witnesses testify.

8. The Tribunal Chairperson has been faulted for not applying the principles for assessment of rent, not taking into consideration the valuation report by the Appellant, descending into the arena of the litigation, applying an erroneous method of assessment, giving an exorbitant increase of rent and finally awarding costs to the Respondent when there was no justification to do so. with this in mind the issues which fall for determination in this appeal are as follows:-

- (a) **Whether the Chairperson properly applied the principles governing assessment of rent.**
- (b) **Whether the Chairperson considered any matters which were never raised by the parties.**
- (c) **Whether the rent increase was outrageous.**
- (d) **Whether the Chairperson adopted an erroneous formula in arriving at the rent increase.**

(e) **Whether the Chairperson was wrong in awarding costs to the Respondent.**

**Whether the Chairperson properly applied the principles governing assessment of rent**

9. In addressing this issue I would address grounds 1, 3, 4,5,6,9 and 10 in the Memorandum of Appeal. The Principles guiding assessment of rent are found in Form G under the Regulations which the Tribunal Chairperson reproduced in her Judgment at page 2. They are 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.**

10. In assessing rent, the Tribunal largely depends on valuation reports compiled by the valuer for the tenant and the Landlord who in this case are the Appellant and the Respondent respectively.

The Appellant filed its valuation report through Gimco Limited. Justin Macharia was called to give evidence on the report. The Respondent filed its valuation report through Ark Consultants Limited. Timothy Saruni was called to give evidence. In ground one, the Tribunal Chair is being faulted for not considering the Appellant's valuation report. I have gone through the Judgment. The Chairperson tackled all the comparables in the report and gave reasons why they were not suitable. In her assessment, she only adopted number one.

11. In ground three, the Chairperson is being faulted for making a finding that the suit premises was a stall when the only stall was shop No. 4 which was occupied by Phyllis Mukami. I have gone through the proceedings and the Judgment and cannot find anywhere where the Tribunal Chairperson made a finding that the suit premises was a stall.

All through the proceedings and in the judgment, the suit premises is described as a shop occupying 420 sq. ft. Related to the contention in ground three is the Appellant's contention in ground six that the Tribunal Chairperson made a finding that Cianda Market where the suit premises fall had been portioned into stalls which had been let out for various businesses. There is nothing on record to show that such a finding was made by the Tribunal Chairperson in relation to the suit premises.

12. Cianda Market had a total of 157 shops according to the report by Ark Consultants Limited. Reference to Cianda market in the context in which the Chairperson stated did not refer to the suit premises. The suit premises is just but one shop within Cianda Market.

13. Under ground 4, 5 and 10 the Tribunal Chairperson is being faulted for assessing rent based on comparables which were not suitable; that she was biased by relying on comparables by Ark Consultants Limited and that as a result of this bias, she arrived at a grossly exaggerated rent. From the proceedings and the submissions by the Appellant, it is clear that a lot of energy was put into the issue of comparables. I have carefully evaluated the two reports and the respective evidence by the authors who were extensively cross examined. There was intense cross-examination particularly on the witness by the Respondent.

14. What clearly emerged is that a lot of emphasis was put on comparables, at the expense of other guiding principles which led to the Tribunal Chairperson remarking that the valuers had ignored all the other principles. I will shortly address the basis of the Tribunal Chairperson's remarks. The Appellant submitted that the comparables used in arriving at the rent increase were not appropriate and the despite the witness from the Respondent's side admitting that the comparables he used were out of the acceptable range of between 10% and 20% , the Tribunal Chairperson went ahead to use the same.

15. It is true that while under cross-examination, the witness admitted that the comparables were outside the range of 20%. The witness was however categorical that whereas the comparables he used may not be good in terms of size they can be good in other factors. On the Appellants argument that stalls fetch higher rent than shops, the Respondent's witness stated that there is no difference between a shop and a stall when it comes to valuation. The Appellant's witness was also clear that it is not material that a stall fetches higher rent than a shop. He stated that the principle that the higher the space the lower the rent can only be applicable in go downs which usually fetch lower rents but spaces are bigger.

16. The Tribunal Chair fairly analysed the comparables presented in the two reports and dropped them one by one before accepting comparable Nos 1, 4 and 5 in the report by Ark Consultants. The Tribunal Chairperson disallowed the comparables which were given by Gimco Limited and gave reasons for that. The Tribunal Chairperson was alive to the reality on the ground in the area where the suit premises are situated and why she had to accept stalls as comparables. She could not allow to use comparables from far away from the suit premises. She correctly observed that the area around the suit premises is surrounded by stalls and that is why she accepted the explanation given by the witness of the Respondent. There was therefore no bias on the part of the Tribunal Chairperson.

17. The Tribunal Chairperson was right in observing that the valuers had either misinterpreted the principles for assessment of rent or they side stepped them. As I said hereinabove, there was so much emphasis on comparables at the expense of the other principles. 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.

This is the context in which the Tribunal Chairperson made her remarks. I have perused the two reports and cannot see anywhere where those three key considerations are mentioned.

18. The valuers only mentioned the Principles in passing but they did not even make any inquiry as to when the building known as Tusker House where the suit premises is situated was built. They did not even bother to give even a rough estimate of the value of the land on which the suit premises stand. In the case of *Karibu House [1973] Ltd –Vs- Travell Bureau Ltd [1977] eKLR* which was cited by the Appellant's Counsel, Justice Kneller (as he then was) observed that the Tribunal in the case had appointed the firm of Wairagu & Company to discover the original cost of construction of the building in issue, its age, the market value of the land on which it lay, the improvements to it, their cost etc.

At least in this case, the valuers were able to ascertain that the building was 20 years old. This is unlike in this case where the two valuers could not even bother to inquire from the owners how old the building was. I therefore find no merit in grounds 1, 3, 4, 5, 6, 9 and 10.

#### **Whether the Chairperson considered matters which were never raised by the parties.**

19. The Chairperson is being faulted for her remark at page 2 of the judgment in which she stated thus:-

***“The use of commercial premises as stalls is a modern global trend that has developed in the recent past and the trend is being adopted by many property owners especially in the developing countries. Kenya has not been left behind. The property owners realized that it is easy to get tenants for smaller premises and secondly, smaller premises fetch higher rent. I am aware that most of the properties situated around Cianda Market have not been converted to stalls. This can be seen in most of the shops along Tom Mboya, Moi and Kenyatta Avenue, Ronald Ngala Street all the way to Gikomba Market. This has in turn increased human traffic along these areas.”***

The Tribunal Chairperson also went on to state as follows:-

***“Whereas the property is not situated at the heart of the CBD, it is within the second tier of the CBD which according to a recent survey by Nairobi City Council enjoys more human traffic than the central CBD. It is for this reason that parking rates were only recently increased by Nairobi City Council for the first tier where there is more vehicular traffic.”***

20. The Appellant contends that by the Tribunal Chairperson making the remarks in paragraph 19 hereinabove, she descended into the arena of the proceedings and introduced matters which were neither raised by the Appellant nor the Respondent. The Appellant therefore argues that by doing this, the Tribunal Chairperson took charge of the conduct of the Respondent's case. I do not see any problem with these remarks. These are remarks which portray a Judicial Officer who is alive to her surroundings and the modern trends in business not only in Kenya but globally. The remarks were made in the context of the area where the suit premises are located and was a justification for what is to be considered in determining the market rent in relation to the location of a business. As early as the 70's as can be seen from the Karibu House Case (Supra) Justice Kneller (as he then was) did not fault the Tribunal in that case where the Tribunal was quoted as follows:-

***“However, we think that this 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.”***

21. Justice Kneller did not fault the Tribunal for their remarks but he instead commended them by saying at page 5 of the decision that that was the proper thing to do as the Tribunal was considering the open market rent.

22. In the instant case, the Tribunal Chairperson should not be faulted. Instead she should be commended for being abreast with the current developments in the market and for being aware of other developments which impact on what is before her like the increase of parking rates within the area of the suit premises, a factor which directly impacts on the location of the business and is relevant when considering rent increase. I therefore do not find merit in ground 8.

#### **Whether the rent increase was outrageous**

23. The Appellant argues that the rent was increased by 628.5% and that this was outrageous. The Appellant was paying rent of Kshs.17,400/= per month. The rent was increased to Kshs.109,400/=.

In assessing rent one does not look at the percentages. What is considered is the location, the rent comparable in other nearby premises among other factors. The Act was meant to prevent exploitation by landlords on tenants. The landlords should also be protected in the sense that they should get value for their investments, considering the location of the suit premises. I do not think that the increase is outrageous. I therefore do not find merit in ground 2.

#### **Whether the Tribunal Chairperson adopted an erroneous formula in arriving at the rent increase**

24. The Appellant contends that the formula used by the Tribunal Chairperson was erroneous. There is nothing erroneous in the formula used. The Chairperson had picked comparable No. 1 from the Appellant's report by Gimco Ltd and comparables Nos. 1, 4, and 5 from the Respondent's report by Ark Consultants Ltd.

To get the average rental analysis the following is the way to go:-

$$333+312.50+293+102.86 = \underline{1,041.46}$$

4

$$= 260.365 \times 420$$

$$= 109.353$$

There is an apparent typing error in the figures in the judgment. This is however is not a big deal because it is clear how the average rental analysis was arrived at. I therefore find no merit in ground 7.

**Whether the Tribunal Chairperson was wrong in awarding costs to the Respondent**

25. The Appellant contends that there was no basis for awarding costs. Costs normally follow the event. It is the Appellant who took the Respondent to the Tribunal. It is the Respondent who emerged the victor. It therefore follows that the victor get the costs. The Tribunal Chairperson was therefore right in awarding costs to the Respondent. I therefore find no merit in ground 11.

**Conclusion**

26. From the above analysis, I find that the Appellant's appeal has no merits. The appeal is dismissed with costs to the Respondent.

**Dated, Signed and delivered at Nairobi on this 26<sup>th</sup> day of August, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of M/s Agwata for Mr Issa for Respondent and

M/s Mukami for Mr Kimondo for appellant.

Court Clerk : Hilda

**E.O.OBAGA**

**JUDGE**