



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 25 OF 2018

NEFF AUTOSPARES LIMITED.....APPELLANT

-VERSUS-

1. RAMNBHAI G. PATEL

2. NAVNIT M. PATEL

3. RAMABHAI T. PATEL

(As Trustees of the Patel Samaj Mombasa)..... RESPONDENTS

JUDGMENT

1. The appeal herein arises from the judgment of the Honourable Chairman of the Business Premises Rent Tribunal, Mr. Mbichi Mboroki, delivered on 16th November, 2018 at Mombasa in BPRT Case No. 42 of 2016 in which it was ordered that the rent payable by the tenant (now the Appellant herein), be assessed at Kshs.54, 413.00 for each shop, excluding VAT, if payable, with effect from 1st May, 2016 plus costs.

2. In the Memorandum of Appeal dated 5th December, 2018, the Appellant has set out the following grounds of appeal:

1. The learned Chairman erred in law in failing to conclude that the demised premises was one shop and not four separate shops and failed to apply relevant case law to the circumstances of the matter.

2. The learned Chairman misdirected himself and failed to apply the Tenant's Valuer's Valuation report and comparables.

3. The learned Chairman failed to take into account relevant evidence produced by the Tenant showing that the alleged Landlords who issued the notice were not registered proprietor of the demised premises.

4. The Chairman misdirected himself by increasing rent to over 50% without any real justification and failed to take into account that rent was increased by 100% just 2 years prior.

5. The Chairman misdirected himself by basing the judgment on assumption and allowed himself to veer away from the application of the law.

6. The learned Chairman did not exercise his discretion in a just and fair manner and acted in a manner that was biased.

3. For those reasons the Appellant prayed that this Appeal be allowed and that the Landlord's Notice for increase dated 12th February, 2016 be dismissed with costs to the Appellant, or alternatively that this Honourable Court do vary the rent by reasonable increment.

4. Counsel for the Appellant and for the Respondent both filed written submissions for and against the appeal herein. The Appellant's counsel, M/s K. A. Kasmani & Company Advocates filed their submissions on 21st June 2019 and further submissions on 30th August, 2019 while M/s N. A. Ali & Company Advocates for the Respondent filed theirs on 22nd August 2019.

5. In their submissions, the Appellant contended that the Tenant's valuation report by Maina Chege shows the premises as having a total area of 220.20 metres square and that comparables of similar size were taken to arrive at the true market value of the rent in the

neighbourhood at approximately Kshs.595.85 per metre square. That the Tenant's evidence was that there was only one shop on the premises with one entrance, one exit, one cash register, and therefore the premises were used for only one sole business. That the Landlord's Valuer, Anthony Khaemba conceded that the 4 doors of the premises were specially opened for him to measure, thereby confirming that they were not in use all the time. That he also confirmed that the total lettable area of the shop was 220 metres square, but that his comparables were taken of shops on average size of 60 metres, thereby artificially raising the market rental of the premises to Kshs.1,042 per metre square, which was more than 50% over and above the rent recommended by the Tenant's valuer. The Appellant submitted the previous notice issued by the landlord showed that the premises were considered and let out as one shop. Counsel for the Appellant submitted that the Chairman completely ignored the Tenant's submissions and authorities and relied on the case of **Trikam Maganlal Gohil & Another –v- John Waweru Wamai (1983)KLR; Ritz Cleaners –v- West Middlesex Assessment Committee (1971)2 KB 642, 671; and Panesar –v- Balbir (1972)EA 208** on the nature of occupation of the premises and submitted that he same was used as one shop at the date of the hearing. It was submitted that the test is the actual user and that the Honourable Chairman misguided himself by assuming that potential user has relevance, that he premises could have been used as four shops had the tenant desired to. Counsel for the Appellant submitted that in this matter it is uncontroverted that the nature of occupation at the date of hearing was use as one shop and therefore the rent should have been assessed for one large shop measuring 220.20m². That the landlord's valuation report which assessed rent based on smaller comparables should have been struck out for being based on dissimilar and diverse comparable, arguing that the effect of the impugned judgment is that the market rent is distorted. That rent based on 1/3rd the size of the premises have been used to artificially elevate the rent of the demised premises.

6. The Appellant further submitted that the persons who issued the Landlord's notice to increase rent were not the Registered Trustees and that they were strangers who had no locus, and therefore the notice they issued was null and *void ab initio*. The Appellant's counsel relied on the case of **Maurice Ooko Otieno –v- Mater Misericordiae Hospital HCCC No. 607 of 1999 (unreported)**. The Appellant's counsel faulted the learned Chairman for ignoring this glaring fact despite evidence produced to the contrary. The Appellant urged the court to allow the appeal with costs.

7. M/s N. A. Ali & Company Advocates submitted that the photographs produced by the Appellant do not in any way show that the subject premises is one and not four shops. It was the Respondents' submissions that an order in **BPRT Case No. 93 of 1998** and letter dated 23rd August 1985 showed that the Appellant leased more than one shop. Further, that the site visit conducted by the Tribunal and the Appellants own valuer who visited the premises for purposes of valuing the same in order to determine the rent payable indicated in his report that the subject premises consisted of four shops. Counsel for the Respondents relied on the cases of **Magnate Ventures Limited –v- Alliance Media (K) Limited & Other (2015) eKLR**. It was counsels' submission that the Tribunal correctly made its decision on the basis of the evidence tendered before it by correctly applying the legal requisite standard of proof. That the Tribunal properly decided that the subject premises consisted of four shops. The Respondents counsel added that even if the Tribunal were to decide otherwise, this still did not change the lettable area of the premises hence the rent assessment would not have been affected.

8. On the Appellant's submission that the notice for increment of rent was incompetent, the Respondents' counsel submitted that the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301, stipulates that notice to terminate or alter the terms of a tenancy is issued by a landlord and that it does not state that it should be a registered proprietor. Counsel referred to the definition of a Landlord under the said Act and submitted that a Landlord within the meaning of the Act is one who is entitled to rent. Further that the issue was not raised during the trial at the Tribunal. The Respondents counsel relied on the case of **Ramadhan Mohammed Ali –v- Hashim Ghanim (2015)eKLR** and submitted that the case of Maurice Ooko Otieno relied on by the Appellant is distinguishable from the facts and circumstance of the current case as that case involved a members club which was not registered as a trustee or a corporation, while in the current case, the registration of Patel Samaj Trust is not in dispute. That the issue about who is or who is not a trustee does not concern or prejudice the Appellant who in any case is the one who instituted the Reference. The Respondents counsel urged the court to disregard this issue in favour of adjudicating on the substantive issues in the matter. It is the Respondents submission that the appeal is not merited and urged the court to have the same dismissed with costs.

9. I have perused and considered the Record of Appeal, the grounds of appeal and the submission by the parties. This being a fist appeal, I am conscious of the court's duty and obligation to evaluate, re-assess, and re-analyse the evidence on record to determine whether the conclusions reached by the learned Chairman of the Tribunal were justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

a. Whether the notice for increment of rent was incompetent.

b. Whether the subject premises consists of one or four shops.

c. Whether the decision of the Tribunal was against the weight of the evidence.

10. Regarding the first issue, it is the Appellants' submission that the notice to increase rent issued by the Respondents was incompetent because none of them is the registered trustees. The Respondents submit otherwise. The Landlord notice to terminate or alter terms of tenancy dated 12th February 2016 were issued by Ramanbhai G. Patel, Navnit M. Patel and Ramanbhai T. Patel as Trustees to the Patel Samaj. The notice sought to increase the rent payable by the Appellant from Kshs.140,000 per month to Kshs.266,4000.00 with effect from 1st May 2016. The Appellant did not wish to comply with the notice and filed reference in the Tribunal being Tribunal Case No. 42 of 2016, NEFF Auto Spares and Hardware Limited and RAMANBHAI G. PATEL, NAVNIT M. PATEL and RAMANBHAI T. PATEL being trustees of PATEL SAMAJ MOMBASA. According to the certificate of official search dated 9th June, 2016 which was produced by the Appellant as Exhibit 3, the registered proprietors of the demised premises are ANANDRAD CHATURTBHAI PATEL, SHASHIKANT CHANDUBHAI PATEL, CIERNDRRA VALLAVBHAI PATEL and HARSHIBHAI BECHARBAHI PATEL as Trustees of Patel Samaj. The Appellant's argument is that the persons who issued the notice to increase rent, not being the registered owners of the suit property, had no capacity to issue notice to the Appellant.

11. Under Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, a landlord is defined as:

“In relation to a tenancy, means the person for the time being entitled as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy.”

And Section 4(2) of the said Act provides –

“(2) A landlord who wished to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in , or of any right or service enjoyed by the tenant under such tenancy, shall give notice in that behalf to the tenant in the prescribed form.”

12. Ramanbhai Patel testified on behalf of the Respondent and stated that he was the trustee of the Respondents and has been such trustee for more than 10 years. There is no dispute that as trustees, the Respondent was in relation to the payment of rent, the Appellant’s landlord, AND from the evidence before the Tribunal they were the persons who were entitled to rents and profits from the suit property. It is common knowledge that the suit property is registered in the name of a trust. Whereas the trust may be perpetual, no doubt trustees keep changing. Moreover, the main issue before the Tribunal was about the rent payable I do not think that ownership of the suit property was an issue in the case. The submissions by counsel for the Appellant that the Respondent had no locus have no basis and must therefore fail.

13. The other issue is whether the subject premises consists of one or four shops. Harshil Patel, who is a director of and testified on behalf of the Appellant, stated that he has one shop in the suit premises. He testified that the suit premises has a lettable area of 220M² and that the shop has only one entrance which also served as an exit. He further testified that the Appellant has only one cash register and operates one business. He denied that the premises consists of four shops. The proceedings indicate that when the said witness was cross-examined by Mrs. Ali, learned counsel for the Respondent, he maintained that the Appellant was let one shop which it has occupied for the last 25 years. He added that the Appellant only received one receipt for rent.

14. The Appellant’s second witness was Maina Chege, a valuer who prepared and produced a valuation report dated 6th December, 2016 and filed on 21st March, 2018. The valuer also testified that the Appellant operated one shop in the suit premises with a lettable area of 220.20 square metres. He added that the suit premises are partitioned into four rooms, but with one entrance. That the partitions are permanent.

15. Ramanbhai Patel who testified on behalf of the Respondents testified that according to the records of the Respondent, the premises leased to the Appellant were 4 shops which were leased separately and that each shop has its entrance. He conceded that the Appellant does one business in the suit property. He confirmed that the Appellant has been in the suit premises since 1985. The record shows that when cross-examined by Mrs. Moolraj, learned counsel for the Appellant, the witness, stated that he did not know the number of doors the Appellant or its customers use. Herman Kivunira a valuer and the second witness called by the Respondent testified that the Appellant had four shops and that each shop had its own entrance and/or door.

16. After evaluating the evidence and upon inspecting the premises, the Tribunal made the following findings at page 6 of the judgment.

1. That the tenant carries a single business in the suit premises.

2. That the suit premises which fronts Haile Selassie Avenue comprises of 4 distinct shops with permanent partitions and which can be used independently depending on the choice of the tenant.

3. There are invoices for rent on record and ample correspondences from the Landlord’s agent which clearly establishes that the tenant was leased 4 shops.

4. That each shop has a mezzanine floor. That the tenant is using the 4 shops for one business is a choice by the tenant and should not be construed that the suit premises comprises of one large shop.

5. The Tribunal administers substantive justice and the issue of whether the suit premise is a single shop or 4 distinct shops would have been verified by an inspection of the premises as the Tribunal did or by production of approved plans for the suit premises.

The Tribunal is satisfied and it has no doubt in its mind that the suit premises comprises of 4 independent shops as per the Landlord valuation report.”

The Tribunal then proceeded to assess the open market rent on the basis that the suit premises comprise 4 shops.

17. It is clear from the evidence on record that the evidence by the Appellant and that of the Respondents were conflicting. Whereas the Appellant insisted that there was one shop in the suit premises, the Respondent on the other had maintained that there were 4 shops. In its judgment, the Tribunal found that the Appellant carried on a single business in the suit premises. The Tribunal further found that the suit premises “comprises of 4 distinct shops with permanent partitions and which can be used independently depending on the choice of the tenant.”

The question that arises is, whether the premises were used as 4 shops or one shop? From the Tribunal’s own finding, it appears the Tribunal was not certain whether the four rooms were used as one shop or 4 distinct and independent shops. As a matter of fact, the Tribunal stated that the premises “can be used independently depending on the choice of the tenant”. The Tribunal inspected the premises. However, from the above finding, the Tribunal seems to imply that, yet there was one shop but the same can be used independently as 4 distinct shops depending on the choice of the tenant. In my view, this is not the same as stating with certainty that there were 4 shops. On the contrary and from the Tribunal’s finding, it is admitted that there was one shop at the time of inspection.

18. The Tribunal also relied on invoices of rent and correspondence to arrive at a finding that the Appellant was leased 4 shops. I have perused the said invoices. Whereas it is true that they refer to rent for 4 shops, the same are dated between 18th August 2016 and 2nd November 2017. The reference was filed on 27th April 2016. It is therefore apparent that the invoices relied on by the Tribunal were issued several months after the filing of the reference and when the proceedings were already in progress. It is quite curious that no invoices issued prior to the filing of the reference, if any, were produced. In my considered view, the documents that were produced and relied on by the Tribunal could not be a correct representation of the true facts of the case. They could as well have been prepared to suit the Respondents' case. In my view, the Tribunal erred in relying on the said documents. It is not in dispute that the Appellant has been a tenant in the suit premises since 1985. No invoices were produced for the 25 years the Appellant was a tenant. It cannot be that only documents issued when the case was on-going were available.

19. Besides the invoices, the Tribunal also relied on some correspondences. I have perused the said correspondences, in particular the letters dated 23rd August 1985 and 27th March 2014. I note that the two letters are contradicting each other. Whereas the former refers to 2 shops, the latter refers to 4 shops. Further the order in Tribunal case No. 93 of 1998 does not make reference to the suit property **PLOT NO. MOMBASA BLOCK XX/4**.

20. It is my view that based on the evidence that was adduced before the Tribunal, and having found that the Appellant is using the suit premises for one business, the Tribunal was not justified in arriving at a decision that the suit premises comprises 4 shops. Accordingly, the Tribunal erred in assessing the rent on the basis that the suit premises comprises 4 shops and not one shop and certainly arrived at a wrong decision.

21. In the result, I allow the appeal, set aside the judgment of the Tribunal dated 16th November 2018, and substitute an order directing the Deputy Registrar of this court to deputize a valuer to assess the open market rent on the basis that the suit premises comprises one shop and for parties and to submit on the report. The circumstances of this case call for an order that each party shall bear their own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Chebukaka holding brief for Mrs. Moolraj for Appellant

Abubakar for Mrs. Ali for Respondents

Yumna Court Assistant

C.K. YANO

JUDGE