



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL NO. 71 OF 2016

MANSOFT LIMITED.....1ST APPELLANT

VERIZON LIMITED.....2ND APPELLANT

BASELINE ARCHITECTS LIMITED.....3RD APPELLANT

VERSUS

PROF. MUTUKU JOHN MUTINGA.....RESPONDENT

JUDGEMENT

This is an appeal against the decision of the Chairman of the Business Premises Rent Tribunal (BPRT), Nairobi made on 29/5/2013 in Tribunal Case Numbers 286, 287 and 294 of 2011. The grounds for the appeal are that the Chairman erred by taking into account the Respondent’s valuation after finding that it had not been properly filed before the tribunal; finding that the Appellant’s valuation report did not indicate the lettable area; assessing the rent without considering that the suit premises though residential in nature, had been let out as commercial premises; by failing to use the comparables which is one of the basis for rent assessment; using the rate of Kshs. 68.2 per square foot; and backdating the date of payment of the assessed rent to 30/1/2013 instead of assessing it from the date of judgement.

The dispute arose when the Respondent who is the Appellants’ landlord issued notices to alter the terms of the Appellants’ tenancies. The tenants filed the references opposing those notices before the Tribunal. The Chairman of the tribunal delivered her judgement on 24/5/2013 in which she made reference to the valuation reports filed for both the landlord and the tenants. The Chairman stated that she had not been urged to disregard any of the comparables and would follow the guidelines set out in Section 9(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. She noted that the landlord’s valuation report had not been filed. She disagreed with the tenants’ assertion that rent revert up to 70% was arbitrary noting that the tribunal is guided by the market in assessing the rent and that the tribunal looks at whether the comparables are within the same neighbourhood. The other factors to be considered were size, age and elegance of the premises. She reiterated that unless a party asked her to disregard any particular comparable, she would take this into consideration as she did in her determination of this dispute. She noted that the comparables adopted by the tenant neither highlighted the lettable area of the comparables nor did the comparables indicate the rent per square unit per month. She was unable to assess rent based on the report produced by the tenants. Not having been asked to disregard any of the landlord’s comparables as being unsuitable, she proceeded to adopt all of them in assessing the rent.

In their submissions, the tenants urged that the intended rent increment of 70% at once was not justified since there were no improvements on the property by the landlord. The tenants claimed the intended increment was arbitrary since it was done without consulting them. The tenants submitted that they had been in occupation from January 2005. The tenants in their submissions prayed that the rent the tribunal would assess be fixed for a certain period of time to make it predictable and reliable. They also sought to have the period for which the landlord could increase the rent and service charge predetermined to avoid what they termed as impulsive increases at unpredictable periods of time. At the conclusion of the submissions, the tenants urged the tribunal to disregard any submissions by the landlord with reference to a valuation report.

The court has looked at the tenants’ valuation report at pages 100 to 113 of the record of appeal. The approximate lettable areas are indicated as follows:

Apartment No. 3: 1161.5 sq. Ft.

Apartment No. 6: 830.9 sq. Ft.

Apartment No. 3: 1161.5 sq. Ft.

The report gave comparable rents for 3 bedroomed apartments situated on Likoni Lane which is off Dennis Pritt Road, Green Park

Apartment in Woodley, Muringa Court, Ole Odume Apartments and Wendo Apartments on Kirichwa Road. The rents indicated for these premises were Kshs. 42,000/=, Kshs. 35,000/=, Kshs. 50,000/=, Kshs. 60,000/ and Kshs. 40,000/= respectively. The rents for 2 bedroomed apartments in Belmont Court and Diocese of Meru Apartments were given as Kshs. 45,000/= and Kshs.37,500/= respectively. The sizes for the 2 and 3 bedroomed apartments were not provided. The report recommended rents of Kshs. 40,000/= for the 2 bedroomed apartments and Kshs. 50,000/= for the 3 bedroomed apartments. The report was prepared on 16/11/2011. The tenants' addendum report at page 112 to 113 recommended service charge of Kshs. 6000/= for the 3 bedroomed apartments and Kshs. 5500/= for the 2 bedroomed apartment. The report indicated that service charge for this type of building ranged from Kshs. 3000 to 10,000/= depending on the services that are to be paid for in the buildings. The report did not also differentiate between the apartments used for residential purposes and those used for commercial purposes even though they were situated in residential areas.

The valuation report prepared on behalf of the landlord is at pages 114 to 122 of the record of appeal. The report states that the apartments are in an office block. It gave the open rental market values of Kshs. 81,900/= for the 3 bedroomed units and Kshs. 58,450/= for the 2 bedroomed apartments. The report used comparable rents for the Kilimani Business Centre of Kshs. 90.6 per square foot; premises in Hurlingham area of Kshs. 86.10 per square foot; Golf Course Commercial Centre of Kshs. 60.00 per square foot; Egerton University on Mucai Drive of Kshs. 64.00 per square foot; and Bemuda Plaza on the junction of Mucai Drive of Kshs. 68.00- 91.00 per square foot.

Section 9 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act mandates the tribunal to determine or vary the rent payable having regard to the terms of the tenancy and the rent at which the premises concerned might reasonably be expected to be let in the open market. The factors to be disregarded include the fact that the tenant has been in occupation, the goodwill attached to the premises by reason of business carried on in the premises and the effect of any improvement carried out by the tenant.

Section 15 of the Act vests in the High Court (read the Environment and Land Court) the powers conferred on the tribunal under the Act or under any written law, when hearing appeals filed by parties aggrieved by the tribunal's determination.

In the tenancy notices dated 21/2/2011, the landlord had proposed to increase rent from Kshs. 38,500/= to Kshs. 55,000/= and service charge from Kshs. 4250 to Kshs. 8000 per month for the 1st Appellant; from Kshs. 47,500/= to Kshs. 81,900/= and service charge from Kshs. 4250 to Kshs. 11,700 per month for the 2nd Appellant; and from Kshs. 48,000/= to Kshs. 81,900/= and service charge from Kshs. 4250 to Kshs. 11,700 per month for the 3rd Appellant.

The Chairman of the tribunal used the comparables given in the landlord's report in arriving at the cost of Kshs. 68.2 per square foot. This was the average of the seven comparable rents in similar areas stated in the report. The Chairman assessed the rents based on the sizes of the apartments in terms of the lettable area at Kshs. 56,800/=, Kshs. 79500/= and Kshs. 79500/= per moth respectively for the 1st, 2nd and 3rd Appellants respectively.

Parties filed submissions which the court has considered. The issue for determination is whether the court ought to interfere with the decision of the Chairman of the tribunal with regard to the assessment of the rent payable for the suit premises. The question is, did the tribunal misdirect itself in some matter as a result of which she arrived at a wrong decision? Is it manifest from the case as a whole that the tribunal was clearly wrong in the exercise of its discretion and as a result there has been an injustice? The tribunal is required to have regard to the rent at which the premises concerned might reasonably be expected to be let in an open market.

Section 12 of the Act gives the tribunal powers including the power to determine or vary the rent payable and to fix the service charge where this is included in the tenancy. It can also make orders for the payment of arrears of rent. The provision gives the tribunal the discretion to determine the rent payable. The Chairman of the tribunal pointed out that the tenants' valuation report failed to take into consideration the cost per square foot in the comparables it submitted. The report also failed to distinguish between the rent payable for premises let for commercial purposes and rent for residential purposes. It is not in dispute that the Appellants were using the premises let for commercial purposes and not residential accommodation.

The tenants' valuer in the letter of 12/12/2012 stated that in general practice rental charges for apartments is normally based on accommodation and not on the size or intended use. This may not be so because a small apartment is expected to attract a lower rent than a bigger one. The use of the apartment would have an impact on the rent payable since commercial premises are expected to fetch higher rents than the residential ones.

The valuation report filed by the Appellants was not very helpful in calculating the rent payable. The Appellants' report recommended rent of Kshs. 40,000/= for the 2 bedroomed apartments and Kshs. 50,000/= for the 3 bedroomed apartments. The rents for the 2 and 3 bedroomed apartments at that time were Kshs. Kshs. 38,500/= and Kshs. 48,000/= respectively.

The determination of the tribunal was made on 24/5/2013 and it made the effective date for payment of the new rent 1/1/2013. The Appellants have challenged this urging that it should have been from the date of the determination. They relied on the decision of Munyao Sila J. in **Supa Duka Nakuru Limited v Baringo United Company Limited** [2017] eKLR in which the Judge stated that one needs to exercise caution in making an order for backdating rent payment. The Judge dealt with a scenario where rent was backdated for four years which he noted would be a huge financial burden not anticipated by the tenant. In this case the rent arrears would be for five months from the date of judgement which the court does not think is unreasonable.

The court is not satisfied that the Chairman misdirected herself in assessing the rent nor did she arrive at a wrong decision. The appeal has no merit and is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 30th day of August 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Opakas holding brief for Ms. Muigai for the Appellants

Mr. Owino holding brief for Akello for the Respondent

Mr. V. Owuor- Court