



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL APPEAL NO. 68 OF 2016

SUPA DUKA NAKURU LIMITED.....PLAINTIFF

VERSUS

BARINGO UNITED LIMITED.....DEFENDANT

JUDGMENT

(Appeal over assessment of rent by the Business Premises Rent Tribunal; held that assessment of rent was improper; rent assessed by court)

1. The appeal herein arose out of a decision of the Chairman of the Business Premises Rent Tribunal made on 27 May 2016. This decision arose out of a reference made by tenant, under the provisions of The Landlord and Tenant (Shops, Hotels, and Catering Establishments Act), CAP 301, Laws of Kenya. Essentially, the tenant, who is the appellant herein, was complaining over the proposed rent increase by the landlord (respondent). The Chairman, proceeded to determine rent, being the aggregate, between the valuation of rent given by the appellant's valuer, and that given by the respondent's valuer. Aggrieved by this determination, the appellant filed this appeal. I allowed the appeal, my reasoning being that the Chairman erred in determining rent based on an aggregate of two valuations, without giving reasons for this. I further held that to bring the matter to a close, once and for all, I will utilize my powers under Section 15 (2) of CAP 301, and determine the rent payable.

2. To assist me in arriving at a finding, I directed the valuers of the appellant and respondent to proceed and revalue the suit premises and file a joint report based on what most equivalent premises were paying. I was not too happy with what was filed, as first, the valuers were unable to agree to file a joint report, and secondly, they also proceeded to evaluate the premises based on what in my view, could not be referred to as equivalent premises. Each valuer selectively picked premises that would suit the cause of their client. I thus directed the Government Valuer to file a report and give his view on what would be a reasonable and appropriate rent taking all factors into consideration. The report was duly prepared and filed on 19 June 2018. I have considered this in arriving at my decision. I have also considered the submissions of Mr. Okeke, learned counsel for the appellant, and Mr. Simiyu, learned counsel for the respondent who made brief comments on the report of the Government valuer. The issue that Mr. Okeke brought forth is the failure by the valuer to give differential rates for different parts of the let premises.

3. What is in issue is a ground floor premises which is situated in Kenya House, which building is at the junction of Kenyatta Avenue and Umardin Street in Nakuru Town. The frontage of the suit premises is along Umardin Street and not Kenyatta Avenue. I will of course have to rely on the valuation reports on record, to determine the space occupied by the tenant, but what I have found interesting is that almost all valuation reports, even those done by the same valuer at different times, give different figures on the

space that has been let out.

4. However, when the appellant's and respondent's valuers filed a joint report before the tribunal, they agreed on the following as the lettable space :

i. Main Shop – 665 square feet;

ii. Workroom – 216 square feet;

iii. Cold room – 440 square feet;

iv. Suspended storage space – 212 square feet;

v. Balcony store – 212 square feet.

5. There was also consensus that the balcony store is an improvement by the tenant.

6. In his assessment, the Government valuer, was of the opinion that the lettable space is 1321 square feet, and he disregarded all of the mezzanine floor.

7. On my part, given that both the appellant's and the respondent appear to have been prepared to take into account all space, save for the balcony store, for which there was no consensus, the appellant arguing that the same is an improvement that he has made thus ought to be excluded, I am prepared to calculate the lettable space based on what is agreed between the landlord and tenant which is all space save for the balcony store. I will disregard this balcony store as it is an improvement by the tenant.

8. In his assessment, the Government valuer, gave opinion that the average payable rent per square feet, for more or less similar premises, is currently Kshs. 71/= per square feet, but these rents have been in existence for the last 5 years and are due for increase, to Kshs. 80/= square feet. He thus proposed that rent be paid at Kshs. 80/= square feet. On the other hand, in their valuations, the appellant's and respondent's valuers came to a consensus that the rent ought to be differentiated depending on the particular use of the space. They thus gave one rate for the main shop, and a different rate for the workroom, the cold room and the suspended storage, which in my calculation, appear to have been given half the rate for the main shop.

9. On my part, I am prepared to follow the differentiated rent, given that both landlord and tenant agree that the rent payable may be differentiated depending on the particular space.

10. On what should be paid by the appellant per square feet, I have set out above that the Government valuer mentioned, that what other tenants are paying as rent, averages Kshs. 71/= per square feet, but has noted that these are rents dating back about 5 years. He has mentioned that rent is proposed to be increased to Kshs. 80/= per square feet and he has thus proposed Kshs. 80/= per square feet, as the fair sum payable as rent. However, I do note that the appellant is a very old tenant, having come into tenancy in the 1970s. It is not uncommon to find old tenants, paying a lesser sum than new tenants, given their long standing relationship with their landlords. Thus, in as much as the Government valuer has proposed the sum of Kshs. 80/= per square feet, ,on my part, given that the appellant is an old tenant, I am ready to assess rent at what other persons are currently paying, which is Kshs. 71/= per square feet.

11. I will apply this rate of Kshs. 71/= per square feet for the main shop, and I have already mentioned readiness to give half rate for the other lettable space.

12. My assessment given the above formula, is therefore as follows.

i. Main shop – 665 sq feet @ Kshs. 71/= – Kshs. 47,215/=

ii. Workroom – 216 sq feet @ Kshs. 35.5/= – Kshs. 7,668/=

iii. Cold room – 440 sq feet @ Kshs. 35.5/= – Kshs. 15,620/=

iv. Suspended storage space – 212 sq feet @ Kshs. 35.5 – 7,526/=

v. Total payable – Kshs. 78,029/= per month.

13. I thus order that the monthly rent payable be Kshs. 78,029/= per month, which amount is not inclusive of VAT or other taxes that may be payable in addition to the same. This rent will become effective from the date of the month of October 2018 and will be payable in advance every month or quarterly in advance as the parties may find more convenient.

14. I further direct that, barring an agreement by the parties to the contrary, the said rent remain effective for at least the next 5 years, which is the period common in such tenancies, and after this period, the parties to embark on negotiations for the next five year or such other phase as they may find comfortable. I would also advise the parties to try and have a written contract on the rent payable and how and when it will be subject to increase, to avoid future litigation.

15. The only issue now left is costs. Given the longstanding tenant-landlord relationship that the parties have had, I think it is best that I make no orders as to costs.

16. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 19th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Okeke present for the appellant

Mr. Simiyu present for the respondent

Court Assistant :Nelima

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU