



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC APPEAL NO. 10 OF 2015**

SALEH S. BAWAZIR.....APPELLANT

-VERSUS-

CONSOLATA I. MAINGI.....1<sup>ST</sup> RESPONDENT

AGNES M. MUGUTI.....2<sup>ND</sup> RESPONDENT

ANNA K. NDAMBUKI.....3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

1. The appellant has appealed against the assessment of rent made by the Business Premises Tribunal Court delivered on 19<sup>th</sup> June 2015. He listed 7 ground in his memorandum of appeal dated 17<sup>th</sup> July 2015.

2. The parties agreed to argue the appeal by filing of written submissions. The appellant who is the tenant submitted on the valuation presented by the valuers before the tribunal and also on the joint report. He submitted that section 9 (2) (a) of Cap 301 requires the tribunal to have regard to the terms and the reasonable rent that may be expected from the premises in the open market. That the assessment of rent from Kshs 3000/= to Kshs 33000/= was excessive and unreasonable and this Court ought to interfere with it.

3. The appellant referred this Court to the case of **Mburu Dry Cleaners Ltd vs Barclays Bank DCO (1972) E A 188** where the Court of appeal found that, *“it is the reasonableness of the rent that must be in the fore front of the tribunal’s investigation and determination.”* It must be the concern of this Court too. The appellant also referred to the case of **Karibu House (1973) vs Travel Bureau Ltd (1977) eKLR** where the Court held that *“the open market rent is not the only matter to be considered because if that rent was automatically reasonable rent to be paid under new tenancy, open market rent would be forced up to a point which exceeded all reason and the object of legislation would be in a great measure defeated.”*

4. It’s the appellant submissions that the tribunal did not take into account the prevailing circumstances revealed by both reports and therefore arrived at an assessment that was oppressive, speculative, unreasonable and unrepresentative of the premises. He also contend that the Tribunal erred in back dating the effective date to 1.8.2014 whereas it had discretion to make what is the effective date. He urged the Court to allow the appeal and proceed to interfere with the rent assessed, assess the same at Ksh 16500 and also fix the judgement date as the commencement date of the new rent. He also prayed for

costs of this appeal and in the tribunal.

5. The Respondent in opposing the appeal submitted that the tenancy notice contained the effective date of the increment as required by Cap 301. The Respondent also states that the appellant never pleaded with the Tribunal to exercise discretion while setting the effective date therefore it is absurd to accuse that Court of backdating the effective date. The Respondent submits that if the penant choose to delay the matter before the Tribunal then they were doing so at their risk.

6. In regard to the provisions of sections 9 (2) (a) of Cap 301, the Respondent, submitted that the Tribunal gave both parties opportunity to engage their own valuers and further a joint report was filed. That in any event, the Tribunal relied wholly on the report by the appellant's valuer. That the grounds upon which this appeal is based is hollow and superfluous as there is no basis for the request for 50%. That there was no evidence presented that the subject shop is reduction on the loading lane. He urged the Court to dismiss the appeal.

7. Taking the pleadings filed and the submissions rendered I find that the lettable area was agreed at 58.18 m<sup>2</sup> as per the joint report filed before the tribunal Court. The appellant does also not have any problem with the amount of rent assessed per square area being Kshs 533.71 me<sup>2</sup> per month. The only dispute he has and which is for my determination is :

**i) The date (effective date) when the new rent was to be applied.**

**ii) Whether the rent assessed should be reduced by 50% taking into account the conditions of the subject shop.**

8. The Tribunal Court give the effective date as 1.8.2014. The appellant filed the reference before the Tribunal on account of the notice to increase rent served on him by the Respondent. The notice gave the effective date when the new rent was to apply as 1.8.2014. The appellant was aggrieved with this decision and accused the Tribunal of not exercising its discretion to give its judgement date as the effective date. The appellant cited the case of **Mutema Uuki Wines & Sirits Distributors Ltd vs Thomas K. Mwangi & others (2004) eKLR** to urge this Court to vary the effective date to the date of judgement of the tribunal.

9. In the Mutema case, the Court of appeal held that changing of the effective date is a discretionary exercise but which is also given to an appellate Court under section 15 of the Act. In referring to the decision of **Shah & Shah vs Kagunda (1978) KLR 35** where the Judges of Appeal stated at page 37 that *"it is an attractive argument (effective date as date on tenancy notice) until one considers the delays which occur between the signature of the notice and the decision of the tribunal which delays can be deliberately created."*

10. The Tribunal here did not give post date of commencement. I have looked at the proceedings for purpose of considering whether the Tribunal exercised its discretion judiciously. After the Tribunal ordered for the filing of the reports, both parties filed theirs by 10.12.2014. The joint report was filed by 15.12.14 and the Tribunal set the hearing date for 9.6.2015. Both parties filed written submissions by 15.6.2015 and the Tribunal gave its judgement on 19.6.2015. Delay therefore cannot be apportioned by any of the parties. The reference was also concluded within one year of its filing. In the circumstances I find no reason why I should interfere with the Tribunal's exercise of discretion. I say so because the only appropriate dates that the tribunal had to choose from was either the date of the notice or the date of the judgement. There was no need to have thorough scrutiny of the commencement date as there was no inordinate delay in concluding the matter. Consequently this ground of appeal fails.

11. The second issue is whether there has been a basis laid for the rent assessed to be reduced by 50%. The valuer of the appellant gave the market rental rate of the comparables @ Kshs 533.71 P.S.M per month. He said the subject premises is situated along a loading lane, the premises is a fairly old building compared to the comparables. The valuer said the best suitable use of the premises is storage therefore they decided to treat it like a store and by rule of thumb commands 50% of the rental rate applicable for

shop premises.

12. However as pointed out by the Respondent, the shop is not being used as a store. It is being used as a shop irrespective of its location and the state of the building. I have also perused the valuation report of the Respondent. The comparables in No (2) & (3) situated along the same road was given @ Kshs 35,000/= and 25000 respectively and the lettable area is 60 M<sup>2</sup> slightly bigger than the suit premises.

13. Taking the argument of the valuer of the appellant that the comparables are being used as a store yet the rent chargeable is equivalent to what he has recommended. The inference drawn is that if the same were to be used for shop business then the rent charged would have been multiplied by two. But I have noted from the comparables in the valuation report of the Respondent that the market rate from the equivalent lettable area ranges from Kshs 25000 to 35000/= per month. Consequently I find no justifiable reason why the rent assessed should be reduced by half.

14. Having considered the above I will however take into account the decision of the **Karibu House (1973) Ltd supra** that open market rate should not be the only issue to be considered in assessing rent. The tenant has been paying a monthly rent of Kshs 3000/= in assessing rent. The rent assessed by the tribunal of Kshs 33000= is 11 times the old rent. If left as it is, the sudden & wide increment may push the tenant out of business. The tenant seems willing to pay Kshs 16500. He cannot have it his way all the time.

15. Therefore in determining the reasonable new rent, I will lessen the assessed open market rate by 25% to take into account the issues of age of the building and improvements undertaken by the appellant. I will reduce the assessed by 25% thus the new rent is  $75/100 \times 33000 = 24,750 =$  rounded off gives Kshs 25,000=. Consequently the appeal succeeds in part that the rent is reduced to Ksh 25,000=. The appellant to pay the Respondent costs of the reference as ordered by BPTC while the costs of this appeal to be borne by each of the parties.

**Dated and delivered in Mombasa this 17<sup>th</sup> day of February 2017.**

**A. OMOLLO**

**JUDGE**