



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

MOMBASA

ELC CIVIL APPEAL NO. 131 OF 2016

ROSHANALI SHERALI JIVRAJ.....APPELLANT

VERSUS

MUVAVARA A. GULAMHUSSEIN.....1ST RESPONDENT

MUZAAFFAR A. GULAMAMHUSSEIN.....2ND RESPONDENT

MOIZ A. GULAMHUSSEIN.....3RD RESPONDENT

JUDGEMENT

1. This is an appeal from the decision of the Rent Restriction Tribunal. The tenant now appellant being unhappy with the tribunal's decision reached on 18th May 2015 filed a memo on the following grounds:

- 1. The Learned Chairman erred in law in failing to deal with the lack of authority on the part of the 1st tenant to proceed;**
- 2. The Learned Chairman erred in law and on fact in neglecting to find that the Landlord's application was defective and did not disclose cost of construction;**
- 3. The Learned Chairman erred in law and on fact in disregarding the Tenant's Valuer's evidence in chief and report in its entirety, without disclosing any reasons for the same**
- 4. The learned Chairman erred in law in relying entirely on the High Court Authority HCC 123 of 2008 Sayed Abdalla – v – Mustafa Ebrahimjee & others despite the said authority being based on different circumstances and being distinguishable.**
- 5. The Learned Chairman failed and neglected to follow the principles of Cap. 206 in arriving at his judgement.**
- 6. The Learned Chairman failed to see the errors in the Tribunal's valuation report, which was not based on the true cost of construction.**

2. The parties advocates agreed to proceed by way of written submissions which were highlighted on 31st January 2017. The Appellant submits that the 2nd Respondent lacked authority to act on behalf of the 1st & 3rd Respondents before the tribunal. Consequently the chairman erred when he failed to make a

finding on this as the 2nd Respondent had failed to comply with the provisions of Order 1 Rule 13 (2) of the Civil Procedure Rules. The appellant submits that the Respondents' application dated 22.9.2012 was fatally defective.

3. The appellant continued that the Tribunal erred by relying on the valuation report of the Respondents while ignoring the report produced by the Appellant. Further that the Tribunal erred in relying wholly on the case of **Sayed Abdalla vs Mustafa Ebrahimjee & others HCC 123 of 2008** which case was distinguishable from this case. That the Tribunal failed to follow the guidelines & principles set under the RRA Cap 296. For these reasons he urged the Court to allow the appeal, set aside the order of the Tribunal and dismiss the Respondents application with costs of the application and this appeal being provided for. The appellant relied on the cases of :

1. HCCC NO. 142 OF 2005 – NAIROBI

NDUNGU MUGOYA & 473 OTHERS –VS- STEPHEN WANFOMBE & 9 OTHERS.

2. HCCA NO. 107 OF 2000 – MOMBASA

SHAUKAT M. KASSAM –VS- SAID BIN SEIF PROPERTIES LTD. EKL.R.

4. The Respondents in opposing his appeal submitted that the appellant's advocate now on record did not comply with the requirements of Order 9 rule 9 of the Civil Procedure Rules; consequently the notice of change of advocate filed on 18th January 2016 and the submissions herein by Ms G. A Okumu & Co are invalid. The Respondents cited the case of **Maurice Nabikiliki Wata vs Anna Nekesa & 5 others (2015) eKLR** to buttress this submission.

5. The Respondents submit further that the 2nd Respondent had authority to act as the title deed annexed in the application of 28.9.13 shows all the three respondents are registered proprietors of the suit property. Further that the application for assessment of rents was signed by the three (3) Respondents/Landlords. Lastly that section 5 (1) (a) gives the Tribunal powers to assess rent on its own motion. The Respondents contend that assessment of rent is in rem and not persona since rent is assessed in respect of residential premises. The Respondent also picked issue with the appellant referring to the 2nd Respondent as the 1st tenant in ground 1 of the memo of appeal.

6. The Respondents continued that the costs of construction was argued before the Tribunal and that the case of **Sayed Abdalla supra** was relevant in so far as it quoted section 3 (2) (a) iv of Cap 296 which gives the Tribunal discretion in determining or reviewing standard rent which discretion the Respondent vouches is not limited. The Respondents submit that both the valuations were considered and they questioned the credibility of the appellant's valuation report which recommended the rent to remain the same as it was 31 years ago. It is their contention that section 3 (2) of Cap 296 was adhered and accordingly this appeal should be dismissed with costs.

7. In determining his appeal, I will first thrust out the technical objections raised by both sides. The 1st is whether the firm of Ms G. A Okumu & Co. advocates are properly on record. My answer is yes because the judgement was entered in the Tribunal Court. This appeal is yet to be determined therefore the requirement of Order 9 rule 9 cannot be called to play. An appeal cannot be treated as part of proceedings after judgement has been entered since the appeal process is independent of the previous proceedings. The case of **Maurice Nabkiliki** referred to by Respondent is distinguishable from the instant case as the application was made in the same cause in which judgement had been granted.

8. The second technical objection raised by the Appellant is whether the 2nd Respondent had capacity/authority to proceed before the Rent Tribunal. In support of this averment, he cited the case of **Ndungu Mugoya & 473 others vs Stephen Wangombe & 9 others Nakuru Civil Case No 141 of 2005**. In this case the verifying affidavit was sworn by Ndungu Mugoya for the rest of the 473 plaintiffs which the defendants submitted was done without a written authority as is required under Order 1 Rule 12

of the Civil procedure Rules. The trial Judge agreed with them that this requirement was mandatory. In the instant case, the Respondents submitted that all of them signed the application. Secondly, the 2nd Respondent is co – registered alongside the 1st & 3rd Respondents of the suit property. I have perused the record and it is indeed true that the application filed before the Tribunal having a Court stamp of 2.10.1012 has three signatures of persons designated as Landlords. In paragraph 1 of the application it is worded thus:

We, 1) MUNAVAR A. GULAMHUSSEIN

2) MUZAFFAR A. GULAMHUSSEIN

3) MOIZ A. GULAMHUSSEIN

9. Further in the valuation report of the Respondents, the valuer in his introduction stated thus *“Duly instructed by the above landlords, I have inspected the above premises for the purpose of determining the standard rent.”* The fact of the title deed being in the three names of the Respondents was brought to the knowledge of the Appellant as it was annexed in the application dated 28th September 2012. From the foregoing, in my opinion and I so hold what constituted the claim that was presented before the Tribunal was signed by all the three Respondents. The fact that all the three are joint registered owners of the property make this case distinguishable from the **Ndungu Mugoya** case. The provisions of Order 1 rule 12 was not necessary by virtue of the fact that the three Respondents signed the initial claim. Consequently I find this objection to be without merit and also dismiss it.

10. On the merits of the decision of the Tribunal, section 3 (2) of Cap 296 sets the grounds for assessing standard rent. Section 3 (2) provides that “notwithstanding anything contained in the definition of *“Standard rent”* -

(a) Where the tribunal is satisfied that the standard rent would yield uneconomic return to the landlord because of the reasons given in sub – paragraph (i) – (iv)

The Act says the tribunal while determining standard rent and it is not reasonably practicable to obtain sufficient evidence to enable it to ascertain:

a. Rent the dwelling house was let

b. Cost of construction or

c. The market value of the land at the date, it may determine standard rent be such amount as it considers fair having regard to the standard rent of comparable dwelling houses.

11. My reading of this section is that the tribunal is given discretion in determining the standard rent as long as the discretion is exercised within the guidelines set under section 3 (2) (b) above. It is therefore not true as submitted by the Appellant that the Tribunal could not exercise discretion in determining the rent. The tribunal was presented with two reports to use in assessing the rent. In reaching its decision, the tribunal relied on the case of **H.C.CA No 123 of 2005 of Sayed Adalla vs Mustafa Ephrahim Jee & 3 Others** and adopted the respondent’s valuation report of 31.10.2012 as the new rent to take effect from 1st June 2015.

12. The valuation report dated 31.10.2012 (by the Respondents) gave the cost of construction and the value of the land as at 1.1.1981 in reaching his assessment. The valuation report dated 18.4.2013 (by the Appellant) also relied on the cost of construction of the buildings and the open market value as at 1981 plus the allowed statutory increase in determining the standard rent. He stated thus ***“We concede that the standard rent recommended is lower than the market rate of similar premises. However we are bound by the dictates of Cap 296.”*** He therefore opined that the standard rent should remain the same.

13. The Appellant's valuer may have been bound by the dictates of Rent Restriction Act whose sections he did not specify but the same Act allowed the Tribunal to determine the rent where the yield is found to be uneconomical to the land based on the reasons provided. On the basis of the admission by the appellant's valuer that the standard rent they were recommending was lower than the market rent of similar premises I find no fault on the Tribunal in adopting a report that gave an improved rent. The Tribunal in the circumstances acted within the provisions of section 3 (2) of the Rent Restriction Act and there was nothing wrong in their following the decision of **Sayed Abdalla supra** which merely amplified the provisions of the section 3 (2) above.

14. In conclusion, I find no merit in all the grounds of appeal listed. The appeal fails and I uphold the Tribunal's decision. The appeal is hereby dismissed with costs to the Respondents.

Dated, signed & delivered at Mombasa 25th day of May 2017

A. OMOLLO

JUDGE