



L.P Holdings Limited v Midway Butchery Limited & 3 others (Environment and Land Appeal E060 of 2023) [2024] KEELC 4975 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 4975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E060 OF 2023**

EK WABWOTO, J

APRIL 30, 2024

BETWEEN

L.P HOLDINGS LIMITED APPELLANT

AND

MIDWAY BUTCHERY LIMITED 1ST RESPONDENT

TRICHEM LIMITED 2ND RESPONDENT

GENERAL PACK LIMITED 3RD RESPONDENT

VALLEY VEGETABLE MARKET LIMITED 4TH RESPONDENT

(Being an appeal from the Ruling and order of the Vice Chair of the Business Premises Rent Tribunal Cases Nos. 219,220,221 and 222 of 2020(Consolidated under Case No. 222) Midway Butchery Limited & 3 Others vs. L.P Limited at Nairobi by Hon. Andrew Muma delivered on the 12th May 2023)

JUDGMENT

1. The appeal herein arises for the ruling and order of the Vice Chair of the Business Premises Rent Tribunal Cases No. 219,220,221 and 222 of 2020 (consolidated under case No. 222 of 2020) delivered by Hon. Andrew Muma on 12th May 2023. In the said Ruling the Tribunal issued the following orders:-

“The Tenants references dated 26th February 2020 are upheld in the following terms;

Tenants shall pay rent and service charge at the rate highlighted below from the month of June 2023 as and when it falls due more specifically as provided for in the Tenants Valuation for Rent and Landlords Valuation for service Charge purposes;

- i. Valley Vegetable Market Kshs.223,627.00 as rent and Kshs.42,315.00 as service charge



- ii. Trichem Limited Kshs.244,150.00 as rent and Kshs.45,045.00 as service charge.
- iii. General Pack Limited Kshs.206,037.00 as rent and Kshs 41,405 as service charge.
- iv. Midway Butchery Limited Kshs.182,539.00 as rent and Kshs.44,940.00 as service charge.
- v. Each party to bear out cost”

2. The Appellant being aggrieved by the said decision filed this appeal vide a memorandum of appeal dated 9th June 2023 wherein the following grounds were raised;

1. The Learned Vice Chairman erred in law and in fact by assessing the rent solely based on the Respondent’ valuation report and failing to take into consideration in his ruling the Appellant’s valuation report which detailed the condition of the premises and gave rates of rent for premises comparable to the subject premises.
2. The Learned Vice Chairman erred in law in in fact in holding that the Appellant’s valuation report did not reflect the true market value of the premises since it was done in 2018 and relied on the respondents’ valuation report. In doing so, the vice chairman disregarded the fact that though dated 20th January 2022, the Respondent’ valuation report was in material terms particularly on the comparables the same to the one used in Case Nos. 860-864 of 2018 where it was ordered that the same be used in subsequent references.
3. The Learned Vice Chairman erred in law and in fact by ordering and without laying any basis, that the effective date of the new rates applied from 1 June 2023 instead of 1st April 2020 being the date of issuing of the notices subject matter of the references to the Tribunal
4. The Learned Vice Chairman erred in law and fact in holding that the Appellant sought to increase rent at a rate of Kshs.330 per square foot in total disregard of the notices, the Appellant’s valuation report and submissions showing that the Appellant’s sought to increase the rent to a rate of Kshs220/= per square foot and Service Charge to Kshs. 35 per square foot which rate of rent was lower than those of comparable premises and close to the average rate of Kshs.247.05 per square foot paid by other non-controlled tenants on the subject premises that are on lease.
5. The Learned Vice Chairman erred in law and fact in holding that there were no improvements undertaken by the Appellant on the subject premises without considering the valuation report and submissions that the premises were modernized and good state of repair and maintenance.
6. The Learned Vice Chairman erred in law and fact in assessing and upholding rent proposed by the Respondents of Ksh.177 per square foot and in disregard of the Appellant’s valuation and submissions showing that the said rate is relatively low compared to the market rates in other comparable shipping malls.
7. The Learned Vice Chairman erred in law and fact and despite upholding the tenants proposed rent of Kshs.177/=, his final calculations were erroneous to wit;
 - a. Valley Vegetable Court indicated that they now pay Kshs.223,667 but the figure should be Kshs. 21,993



- b. Trichem-Court indicated that they now pay Kshs244,150 but the figure should be Kshs.227,799
 - c. General Park – Court indicated that they now pay Kshs.206,037 but the figure should be Kshs.209,39.
 - d. Midway –court indicated that they now pay Kshs.182,539 but the figure should be Kshs.227.268.
 8. The Learned vice Chairman erred in law and fact in failing to evaluate and consider in totality the submissions of the Appellant and the valuation report and thereby arrived at the wrong conclusions.
3. The Appellant thus sought the following orders in respect to the appeals:-
 - a. This appeal be allowed.
 - b. The ruling and Order by Hon. Andrew Muma in Business Premises rent Tribunal cases Nos 219,220,221 and 222 of 2020(Consolidated under case No. 222 of 2020) delivered on 12th May 2023 assessing rent payable by the Respondents at Kshs.177/- per square foot with final calculations there on and the effective date of 1st June 2023 be set aside.
 - c. The said ruling and orders of the Business Premises Rent Tribunal be substituted with an assessment of rent and service charge payable by the respective respondents at the rate recommended by the Appellant for rent at Kshs.220/- per square foot and such other rate as the Honourable court may deem fit and just.
 - d. The effective date for the new rent payable by the respondents be from 1st April 2020 being the effective date of the notices to alter rent.
 - e. The costs of the Appeal be awarded to the Appellant.
4. At the hearing of this appeal, parties took directions that the same be canvassed by way of written submissions. Both parties complied and filed their respective written submissions. The Appellant filed written submissions dated 31st January 2024 while the Respondents filed written submissions dated 11th March 2024.
5. The Appellant submitted on the following issues;
 - a. Whether the Learned vice Chairman of the Tribunal failed to take into account, correctly or at all, the Appellant’s valuation report and submissions in assessing the rent payable.
 - b. Whether the Learned Vice Chairman of the Tribunal erroneously assessed and calculated the rent payable by the Respondents.
 - c. Whether the new rent payable by the Respondents should take effect from 1st June 2023 being the first day of the month following the ruling of 1st April 2020 being date when the tenancy notices issued were to take effect.
6. Counsel submitted that the Tribunal completely disregarded the Appellant Valuation report in preference to the Respondent’s Valuation report. It was argued that no enquiry was made nor the Appellant’s submissions considered how the report was used in the proceedings, nor an analysis made on the respective reports of the parties in the year 2018 and neither the Respondents “new” valuation report compared to the contents of their earlier report.



7. Citing the case of *Careena's Holdings t/a Digitee cyber -vs- Nawat Mohamed Haji Mirdor*[2021] eKLR, it was contended that valuation reports are important in matters of reassessment of rent and require comprehensive consideration particularly on the issue of rates of rent in comparable premises.
8. It was further submitted that failure to consider the Appellant's valuation report was not sufficient in finding even after Tribunal acknowledged its validity, that it did not reflect the true market value due to passage of time. It was argued that the Respondent's Valuation report dated 20th January 2022 that was adopted wholesomely by the Tribunal was similar to the one dated 6th May 2019 that they had relied on in Nairobi BPRT Cases No. 860,861,864,865,925 and 926 of 2018 and only the date of the later valuation report had been changed from 6th May 2019 to 20th January 2022 to make them appear recent as can be seen in two reports set out at pages 29-59 of the Record of Appeal. It was further argued that the ruling was made on a misapprehension of the evidence before it and the case of *Mwangi -vs Wambugu*[1989], KLR 453 was cited in support.
9. The court was urged to consider and find reasonable the valuation report by the Appellant as well as the submissions made by the Appellant. It was argued that the Appellant's valuation report was comprehensive and took into account comparable rental rates of similar properties especially shopping malls within Nairobi City description of the subject property, status free of human and physical developments around it and the neighbourhood and its modernised state or repair and maintenance and its centrality of location. The court was urged to find that the rent rates of Kshs.177 per square foot proposed in the Respondents' valuation report wholesomely adopted by the Tribunal to be relatively low compared to the marked rates in other comparable shopping malls and urged the court to substitute the same with Kshs 220 per square foot.
10. On whether the Tribunal erroneously assessed and calculated the rent payable by the Respondents it was submitted that the Tribunal was wrong in applying the rate of Kshs 177 per square foot when the correct rate should have been the rate of Kshs.220 per square foot against the current lettable areas as set out above and in the valuation reports.
11. On whether the new rent payable by the Respondents should take effect from 1st June 2023 being the first day of the month following the ruling of 1st April 2020 being date when the tenancy notices were issued were to take effect, Counsel submitted that the Tribunal did not provide reasons for setting the commencement date of the new rent as "month of June 2023" and further the determination of the reference took 3 years during the entire period. It was submitted that the new rent payable by the Respondents should take effect from 1st April 2020 being the date noted in the notices issued on 30th January 2020 and not the month of June 2023. Reliance was placed in the cases of *Mohamed Noor & 23 others -vs- Serf Binsaid Properties Limited* [2023]eKLR and *Mutema Vuli Wines & Spirits Distributers Ltd -vs- Thomas K. Mwangi & others* [2004] eKLR.
12. Counsel submitted that the Appellant had made a case for the grant of the orders sought and that this court should substitute the ruling and orders of the Tribunal with an assessment of rent and service charge payable by the Respondents' at the rate of Kshs.220 per square foot or at such other rate as the court may deem fit and just to grant.
13. The Respondents' in their submissions dated 11th March 2024 submitted on the following single issue, whether the Learned Vice Chairman of the Tribunal failed to take into account correctly or at all, the Appellant's valuation report and submissions in assessing the rent payable. It was argued that the Tribunal correctly relied on Section 12 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* which states that the Tribunal has the power to determine or vary the rent payable in respect to any controlled tenancy having regard to all the circumstances thereto. It was submitted



- that the Tribunal exercised its discretion and assessed rent payable per square foot as Kshs.177 and service charge payable as Kshs.33.00/- on the aspect of discretion. Reliance was made to the cases of *Republic vs- Environment & Land Court, Exparte Shah & Shah* [2018] eKLR.
14. On why the Tribunal did not give reasons as to why the payment of the rent would begin in the month of June 2023, it was submitted that it is common and public knowledge that due to the Covid 19 pandemic which lasted from 2019 to 2023 all business were affected by the pandemic and it would be unjust or unreasonable to have rent payable as to when the tenants valuation report was filed.
 15. The Respondents' urged the court to dismiss the appeal.
 16. The court has considered the record of Appeal. The Court has also considered the Appellant's written submissions in this Appeal and the itemized grounds of appeal. In determining the issues raised in the Appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 cited with approval in *China Z Hogxing Construction Company Ltd -vs- Ann Akeru Sophia* (2020) eKLR.
 17. As has also been restated in the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* (1985) E.A a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case. This court sitting on Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the court failed to take account of considerations of which he should have taken account, or fifthly, that the court's decision, albeit a discretionary one, is plainly wrong.
 18. The court is of the view that the two key issues for determination which can dispose the appeal are as follows;-
 - i. Whether the Tribunal failed to take into account the Appellant's valuation report and submissions in assessing the rent payable.
 - ii. Whether the Tribunal erred in directing that the new rent payable should take effect for June 2023 and not 1st April 2020 when the tenancy notices were issued.
 19. In the instant appeal, the Appellant consistently submitted that the Tribunal erred in law and fact in failing to take into account the Appellant's valuation report and submissions in assessing the rent payable. The Respondents on the hand maintained that the Tribunal correctly relied on Section 12 of the Cap 301 and properly exercised its discretion in assessing the rent payable.
 20. Section 9(2) of the *Land Lord and Tenant (Shops, Hotels and Catering Establishment* Cap 301 stipulates as follows: -

“without prejudice to the generality of this section, a Tribunal may upon any reference –

 - a. determine or vary the rent to be payable in respect of the controlled tenancy, having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market and disregarding-
 - i. any effect on rent of the fact that the tenant has, or his predecessors in title have been in occupation of the premises.



- ii. any goodwill attached to the premises by reason of the carrying on threat of the trade, business or occupation of the tenant or any such predecessors.
 - iii. any effect on rent of any important carried out by the tenant or any such predecessor otherwise than in pursuance of any obligation to the immediate landlord.
 - b. terminate or vary any of the terms, or conditions of the controlled tenancy or any of the rights or services enjoyed by the tenant, upon such conditions, if any as it deems appropriate.”
21. One of the powers given to the Tribunal under Section 12 (1) (b) is "to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof." The statute does not prescribe any method to be employed by the Tribunal in order to determine the rent payable. It follows that the Tribunal has wide discretion over this aspect of its mandate. In the case of *Mbogo vs Shah* (1968) EA 93 with regard to when an appellate court can disturb the exercise of discretion of a lower court. It was said in the said case that the appellate court ought not to interfere with the exercise of such discretion unless the appellate court is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.
22. The [Landlords and Tenants \(Shops, Hotels and Catering Establishment \(Tribunal\) \(Forms & Procedure\) Regulations 1966](#) provides for the principles governing assessment of rent to include: -
- i. The original cost of construction and building.
 - ii. The age of the building.
 - iii. The market value of the land on which the premises are built.
 - iv. The improvements and costs of such improvements.
 - v. Amenities or services provided by the Landlord.
 - vi. The rent at which the premises were let for the past (three years).
23. In the Ruling delivered by the Tribunal on 12th May 2023, the Tribunal stated that Cap 301 does not give a formula for arriving at the rent payable and the Tribunal proceeded to set the rent at Kshs.177.00 and service charge of Kshs.33.00. The Tribunal also noted that the Tenants at the time of filing suit were paying rent of Kshs.171.00 and service charge of Ksh.35. The Tribunal in considering the Appellant’s Valuation report also noted that the Appellant had sought to have the rent increased to Kshs.330 with a service charge of Kshs.33.00. The Appellants’ report had been prepared in 2018 and it did not reflect the current market value.
24. Having carefully reviewed and considered the evidence that was tendered and the entire Record of Appeal, it is the finding of this Court that the Tribunal indeed considered the Valuation report filled by the Appellant in arriving at its decision. The Tribunal exercised its discretion properly in assessing the rent payable and the Learned Vice Chairman cannot be faulted for the assessment and setting the rent payable at Kshs.177.00 and service charge at Kshs.33.00. This Court has no reasons in interfering with the same.
25. In respect to whether the new rent payable ought to take effect from 1st April 2020 being the date when the tenancy notices issued were to take effect, it was submitted by the Appellant that no reasons were



- provided by the Tribunal for setting the commencement date of new rate as June 2023. It was further submitted that the reference took 3 years and during this period, the Appellant lost rental earnings that it would have gained from rental increase.
26. The Tribunal in its ruling held that the Respondents were to pay new rates as from June 2023 but did not give any reasons of the same.
 27. Munyao Sila J. in *Supa Duka Nakuru Limited –vs Baringo United Company Limited* [2017] eKLR stated that the court needs to exercise caution in making an order backdating rent payable. 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.
 28. In the case of *Mohamed Noor & 23 others –vs- Serf Binsaid Properties Ltd*[2020] eKLR, it was stated that a tenant ought not to benefit from any delays that the landlord suffered while the tenant was prosecuting the case.
 29. In the instant appeal, the Appellant served the Respondents with an alteration notice pursuant to Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments)* wherein increase for rent and service charge was to take effect on 1st April 2020. The Tenants being aggrieved by the same filed references dated 26th February 2020 challenging the said alterations. The Appellant was not successful in its quest in increasing the rent as per the Ruling of the Tribunal. The Respondents argued that due to the Covid 19 pandemic which lasted between 2019 to 2023 all businesses were affected and hence it was just and reasonable for new rate to begin in June 2023.
 30. The Tribunal delivered its Ruling on 12th May 2023 and no reasons were given as to why the current rate of rent was to start in June 2023. The Tribunal ought to have given its reasons for the same.
 31. In considering this issue, the court notes that the issue as to whether the business were affected by Covid 19 pandemic was neither pleaded nor raised by the Respondents anywhere during the proceedings before the Tribunal. The same was not considered nor addressed anywhere by the Tribunal and as such this court cannot consider the same at this stage. It is also evident that the Tribunal did not subject the commencement date through scrutiny to determine whether it was desirable or not to postdate it.
 32. This court has not only the same powers as the Tribunal has under CAP 301 but also has other powers that may be conferred on it by or under any written law. Section 15 of the *Act* says so. This court is at liberty to interfere with the commencement date.
 33. Looking at the Record of Appeal filed herein and having perused the entire proceedings before the Tribunal there was a period of about 3 years and 3 months between the date of filing and determination of the references. The references were filed on 26th February 2020 and the Ruling was delivered on 12th May 2023. The Court in ensuring fairness to the parties can only apportion the period equally. Accordingly, the Appellant shall give up nineteen months which is 1 year and seven months and the Tenants shall equally give up 1 year and seven months. This will lead to the commencement date being 1st November 2021.
 34. On the issue of costs. I am guided by the provisions of Section 27 (1) of the *Civil Procedure Act* (Cap 21) and the decision in *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs. In the present cases, looking at the circumstances herein and considering the existing landlord and tenant relationship between the parties, I will direct that each party bear own costs of this Appeal.



Final Orders

35. In conclusion, the Appeal partially succeeds and this Court makes the following disposal orders: -
- a. That the assessment of the Tribunal in respect to the rent and service charge payable is upheld.
 - b. The commencement date of the said rent and service charge is varied from 1st June 2023 and backdated to 1st November 2021.
 - c. Each party to bear own costs of the appeal.

Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF APRIL 2024.

E.K. WABWOTO

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JUDGE

