REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL 321 OF 2010

KERICHO NURSING HOME LIMITED.....APPELLANT

VERSUS

RAEL LANGAT.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru (Magara, J.)

dated 15th April, 2008

in

H.C.C. A. NO. 112 OF 2002

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JUDGMENT OF THE COURT

The litigation resulting in this appeal was sparked off when the respondent **Rael Langat (Rael**) in her capacity as the landlady for the rental premises located on Plot **No. 631/1V/42** (the suit premises), **Kericho** sought to increase the rental payable on the above property then occupied by the appellant and other tenants, which move the appellant resisted. This prompted **Rael** to file a Notice of Motion under **Sections 3(2) (b)** and **5 (1) (a)** of the Rent Restriction Act Cap. 296 of the Laws of Kenya (revised 2012, 2015) in the Rent Restriction Tribunal at Nakuru, directed at the Appellant, Kericho Nursing Home Limited (the nursing home) and five (5) others. In it, **Rael** sought an order for the revision of the standard rent upwards in comparison to similar rentals within the locality. The application was grounded on the grounds in the body of the application and the supporting affidavit. In summary, **Rael** deposed that the rental return the suit premises were yielding then was much lower than the going rates for similar premises, hence the need to revise these upwards; the premises had been in existence since 1st January, 1981 and had been kept in a good structural repair condition; there had been a previous rental revision upward; she had done substantial improvements on the premises since the last increment to warrant the intervention sought; she had unsuccessfully made a personal approach to the tenants for an amicable proposed increment and lastly that the going rate for the comparables in the locality was in the range of Kshs. 4,000/- and Kshs. 6,000/- monthly for single and double bed roomed flats respectively.

The application was opposed through grounds of opposition and a replying affidavit by **Dr. M. B. Patel** Director of the Nursing Home. In summary, the appellant contended that **Rael** had no *locus standi* to

institute the proceedings then under review; the premises were old and yielding economical rent previously illegally increased by **Rael**; **Rael** was guilty of non-disclosure of material particulars that the premises had been assessed in 1975 at the rate of Kshs, 2,330/- with the appellant being adjudged to pay only Kshs.845/- monthly for the area occupied, which **Rael** illegally revised upwards to Kshs.2,800/- for the period before 1994 and then subsequently to Kshs.4,000/- for the period beginning 1995. The Appellant conceded that the buildings were in existence as at 1st January, 1981 but denied that these had been kept in a good structural repair and condition as deposed by **Rael**. Instead, **Rael** had littered the compound with numerous temporary structures which she had rented to various persons at unknown value thus making the premises overcrowded and also dangerous in the event of any fire.

The Preliminary Objection on **Rael's** lack of *locus standi* was heard on its merit and dismissed, paving the way for the merit disposal of the application for rental increment. The assessment by the tribunal was preceded by a report filed by a duly appointed Assessment Officer in which the following observations were made:-

> "**My efforts to get the date of construction of the premises in Kericho Municipal Offices on 18th September, 2001 yielded nothing. A search in the Land's Registry in Kericho on the same day showed that all information regarding the property was in Nairobi. I left it then to the applicant/Landlady to look for those details.**
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> **On 7th March 2002, the applicant/Landlady had done nothing (had not gone to Nairobi) and I told her to give me the purchase documents latest by Monday, 11th March, 2002. The same was not brought but her agent, a Mr. Kibinge rung and told me he would be bringing them on Wednesday, 13th March, 2002.**
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> **On 13th March 2002 at 11.45 a.m. Mr. Kibinge came and told me the house (sic) was bought at Kshs. 500,000/-. Since he had no documents to proof (sic) the allegations, I could (sic) and I told him, not use the figure.**
>
> **Also, I learned from the Applicant/Landlady that the premises were bought in mid 1970's and so there were tenants on 1st January 1981 but she could not remember the rents paid then.**
>
> **To that end, I find that my hands are tied. The purchase price can be obtained somehow possibly from the green Card in Nairobi. If this were availed, it is then I could see if the return is economical or uneconomical and then use comparables.**
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> **At that point, I humbly leave the matter to the Honourable Chairman of the Rent Restriction Tribunal for further directions or determination of the case."**

The learned Chairperson (Chairman) of the Tribunal upon receiving representations on the assessors report set out above made the following observations:-

> "**The report indicates that the premises are on Hospital Road within the central business district. That the accommodation offered are (4) 2 bedroomed self-contained flats and 4 single bedroomed self-contained flats. That however, the sitting rooms in the former are larger and the bedrooms in the latter are larger.**

From the current rents payable, only the following tenants fall under the purview of the Tribunal.

1. **Lily Cheruiyot whose rent is Kshs. 2,000/-**

2. **Kericho Nursing Home has 2 units at a rent of Kshs. 2,000/- per unit.**

> **Charles Maiyo attended but I now note that his rent is Kshs.3000/-. The Tribunal therefore has no jurisdiction over his premises. I shall presume that the 2 bedroomed**

premises are the 867sq. feet and the 1 bedroomed premises are the 658sq. feet.(sic)

The rent for the 658sq.ft premises are between Kshs.3,000/- and 3,500/-. Indeed I now note that Charles Ochieng who sent a representative to say his rent is Kshs,3,000/- and he is not complaining lives in a 658sq.ft house i.e one bedroomed. These premises are in the heart of Kericho town. The tenants did not file any report to counter the Tribunal Assessors findings as regards the kind of accommodation offered as well as the rent payable".

She then rendered herself thus:-

"**Accordingly therefore I shall assess the rents as follows:-**

- **Lily Cheruiyot 867sq.ft. Kshs. 4,000/- p.m.**
- **Kericho Nursing Home 2 x 658sq.ft. 3,500/- p.m. per flat.**

These rents shall be exclusive of services and are to be with effect from 1st July, 2002. "

The appellant was aggrieved and he filed Nakuru Civil Appeal No. 112 of 2002 raising various grounds. The appeal was dismissed by **Maraga, J.** (as he then was) on the 1st day of April, 2008. The appellant is now before us on a second appeal. He has raised four (4) grounds of appeal. In summary it is its contention that the **Hon. Mr. Justice D. K. Maraga, J**. (as he then was) erred in law:-

- **in upholding an assessment that was devoid of merit and not in compliance with the requirement of assessment of increasing rent under the Business Premises Rent Act and thereby arrived at a wrong conclusion.**
- **in upholding an assessment by the tribunal for rent increment despite the fact that no sufficient comparables were offered at the trial while the respondent Land lady made no provision for costs of construction or rent chargeable as at 1st January, 1981 thereby arriving at a wrong conclusion to the prejudice of the appellant.**
- **in dismissing the Appellant's appeal having found that the rent increased was excessive and yet upheld the increment to the prejudice of the appellant.**
- **Considering the relevant law, rent increment by the tribunal that was upheld by the superior Court cannot be supported in law and hence should have been rejected unless and until proper assessment is carried out."**

Mr. Kimatta learned counsel for the appellant urged us to allow the appeal on the grounds that the assessment upheld by the learned Judge was not based on any law; basic material such as the cost of construction and the rent payable as at 1st January, 1981 were not availed; valuation reports were not also availed to the tribunal; and the comparables used by the assessor should not have been used as comparables since the tenants occupying those premises had also objected to the rental increment. There was also no indication as to whether the chosen comparables had ever been assessed and if so when so assessed.

In response to **Mr. Kimatta's** submissions, **Mr. F. O. Orege** holding brief for **Mr. Rodi** for the respondent urged us to dismiss the appeal on the grounds that the appellant never offered any alternatives to guide the assessor in the assessment or seek permission to carry out any valuation on its own. The assessor in the circumstances had no alternative but to use the comparables availed to him which action was properly affirmed by both the tribunal and the first appellate Court.

In reply to **Mr. Orege's** submissions, **Mr. Kimatta** reiterated his earlier stand that no proper parameters were provided for the assessment of the revised rent; maintained that the appellant was not given a fair

deal as it was not given an opportunity to provide a valuation report.

This is a second appeal. By dint of **section 72(1)** of the Civil Procedure Act Cap. 21 laws of Kenya, only issues of law fall for our consideration (see The case of **Maina Versus Mukuria (1983) KLR 78** for the holding inter alia that:-

> **"On a second appeal, only matters of Law may be taken".**

We bear in mind and consider the totality of the record in the light of the rival arguments set out above. In our view, only one issue falls for our determination, that is whether the tribunal acted within its mandate when it arrived at the assessment upheld by the learned Judge.

In declining to find for the appellant the learned Judge reasoned and delivered himself thus:-

> "**I have carefully considered these rival submissions and read the lower court record. It is common ground that the landlady did not provide the Tribunal with the cost of construction of the premises, its purchase price or the rent it fetched as at 1st January 1981. This is because as the Chairlady of the Tribunal observed in her ruling, the landlady is a widow who is operating in the dark. The premises were previously managed by her late husband who apparently did not keep any records. She did not therefore have the information on the cost of construction, the purchase price or the rent as at 1st January, 1981. The assessor sent by the Tribunal to the premises requested for that information to no avail. In the circumstances I agree with the Tribunal that it was left with no option but to assess the rent based on that payable in respect of comparable premises. The question is: which are the comparable premises?**
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> **Mr. Kimatta submitted that the Tribunal did not specify the comparable premises referred to in the ruling and that the ones mentioned were those of the tenants who were themselves parties in that Tribunal case although they are not appellants in this appeal. According to him those tenants having challenged the proposed increment, their premises could not be used for comparison purposes.**
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> **I do not agree with that contention. One of those tenants was Charles Ochieng whose rent for a one bedroomed flat with a space of 658 sq ft was Kshs. 3,000/- and he was not complaining. The other one was Charles Maiyo who occupied a two bedroomed flat occupying a space of 867 sq ft. As the two tenants' respective rents were more than Kshs. 2,500/-, the Tribunal correctly held that it had no jurisdiction to assess the rent for their flats and used their flats as comparable premises.**
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> **The appellant, Lilly Cheruiyot's rent for a two bedroomed flat was increased from Kshs. 2,000/- to 4,000/- per month. That of Kericho Nursing Home for a one bedroomed flat was raised from Kshs. 2,000/- to 3,500/- per month. Although I would myself have not raised the rents that much as an appellate court should not substitute my own view for that of the trial court unless the increment is so inordinately high as to represent an entirely erroneous estimate- Butt vs Khan (1982-88) 1 KAR 1. For premises of those sizes in the Central Business District of Kericho Town, I do not think that that increment was unreasonable. In the circumstances I do not find any merit in this appeal and I accordingly dismiss it with costs".**

The Jurisdiction of the Rent Restriction Tribunal to intervene was invoked under section **3 (2) (b)** and **5 (1) (a)** of the Rent Restriction Act Cap 296 of the Laws of Kenya (now revised) which provide as follows:-

> "**3(2) (b) where the tribunal is satisfied that it is not reasonably practicable to obtain sufficient evidence to enable it to ascertain:-**

i. **the rent at which the dwelling-house was let; or**

ii. **the cost of construction; or**

iii. **the market value of the land, at the material date, the tribunal may determine the standard rent to be such amount as it considers fair having regard to the standard rent of comparable dwelling-houses.**

5 (1) (a) The tribunal shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in particular shall have power

(a) to assess the standard rent of any premises either on the application of any person interested or of its own motion"

In our view the operative words in **section 3 (2) (b) (iii)** of the Rent Restriction Act (Supra) are:-

"The tribunal may determine the standard rent to be such an amount as it considers fair having regard to the standard rent of comparable dwelling house"

While those in **section 5(1) (a)** are:-

"the tribunal shall have power to do all things which it is required or empowered to do by or under the provisions of this Act …....."

Among the powers donated to the tribunal by the above provision is the power to assess the standard rent of any premises either on the application of any person interested or of its own motion. This power is expressed in the following words: "**Shall have power**" (emphasis added). This court in **Sony Holdings Ltd versus Registrar of Trade Marks & Another (2015) eKLR** made the following observation on the use of the word "shall":-

"Whether the words "shall" or "may" convey a mandatory obligation or are simply permissive will depend on the context and the intention of the drafter. The Supreme Court in its advisory opinion in the matter of the principle of gender representation in the National Assembly and the Senate Application No. 2 of 2012 found that the use of "shall" in Article 81(b) of the Constitution the Gender Equality rule as used in the context incorporates the element of management discretion on the part of the responsible Agency or Agencies"

In the instant appeal, there is no doubt that **section 3 (2) (b)** of the Act donated a discretion in the management Agency, the Rent Restriction Tribunal

"to determine the standard rent to be such an amount as it considers fair having regard to the standard rent of comparable dwelling-houses"

In the exercise of its mandate donated by the Act, the Tribunal mandated the assessor to carry out the assessment before it could take action. There has been no submission from the appellant that the tribunal overstepped its boundary of the power donated to it by so doing. The assessor filed his report which was availed to the parties. There was no submission either before the Tribunal or the learned Judge that the sentiments expressed by the said assessor were baseless.

The tribunal went ahead to allow parties to be heard on the said report. The Assessor left it to the Tribunal to use the available comparables on the same premises as comparables, an advice the Tribunal heeded and in doing so it made observations that no other alternatives were offered. It is therefore not true as contended by **Mr. Kimatta** that no proper parameters were employed by the tribunal in arriving at the rental value adjudged as payable by the appellant. It is also not correct as submitted by **Mr. Kimatta** that the appellant was not given a fair deal.

As observed above by the chairperson of the tribunal, neither party offered any alternative comparables or a valuation report. Neither has **Mr. Kimatta** asserted that his client offered such information and the same was turned down by the tribunal.

It is against the above background that the appellant has invited us to interfere with the leaned Judge's discretion in affirming the Tribunal's decision. In deciding either way we have to bear in mind the caution given by the court in the case of **Maina versus Mugiria (1983) KLR 79** when the Court held inter alia that:-

> "**The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in same matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice"**

In the light of the record before us, the reasoning of both the chairperson of the Rent Restriction Tribunal and the learned Judge as well as the applicable provisions of law reflected above, we find no justification in interfering with the learned Judge's exercise of his discretion in rejecting the appeal at that level.

In the result we find no merit in this appeal. The same is dismissed with costs to the respondent both on appeal and the Court below.

Dated and delivered at Nakuru this 14th day of July, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR