Amuga v Ripple Matrix Properties Limited (Environment & Land Case E005 of 2023) [2024] KEELC 6664 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6664 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E005 OF 2023

MD MWANGI, J

SEPTEMBER 24, 2024

BETWEEN

PAUL AMUGA ..... APPELLANT

AND

RIPPLE MATRIX PROPERTIES LIMITED ..... RESPONDENT

JUDGMENT

1. The appeal herein is against the ruling and order of the Business Premises Rent Tribunal (BPRT) issued on 21st December, 2022 in BPRT case No. 912 of 2020. The Appellant in his Memorandum of Appeal dated 20th January, 2023 has listed 10 grounds of appeal against the said ruling. He prays that his appeal be allowed and that the order of the Tribunal assessing the rent payable at Kshs. 36,360/- per month with effect from 1st December, 2020 be set aside and in its place thereof be substituted with an order assessing the rent payable per square foot at Kshs. 74.21 or such other amount as this court deems reasonable for the lettable area of 304 square feet. He further prays that the order on escalation of rent every 2 years be set aside and that each party bears its own costs.

2. The BPRT's ruling was in regard to the Appellant's reference in opposition to the Landlord's notice dated 21st September, 2020. The Landlord's notice was proposing to alter the terms of tenancy with the Appellant with effect from 1st December, 2020 by increasing rent for from Kshs.66,068 plus VAT per quarter to Kshs.145,440/- plus VAT per quarter, to correspond with the market rate and cover the increased cost of services.

Court's Directions

3. The Court's directions were that the appeal be heard by way of written submissions. Both parties complied. The Appellant filed submissions dated 25th April, 2024 and supplementary ones dated 25th April, 2024. the Respondent's submissions are dated 3rd April, 2024. The parties had occasion to highlight the submissions before the court on 20th June, 2024.

Submissions by the Parties

4. In his submissions dated 30th January, 2024, the Appellant at paragraph 10 of his written submissions asserts that the dispute before the Tribunal centered on only two issues; the lettable area, and the rent payable for that lettable area. The Appellant was the Tenant whereas the Respondent was the Landlord.

5. The Appellant submits that the Respondent in its evidence relied on its valuation report dated 30th April, 2021 which had stated the lettable area to be 404 square feet. This was in spite of the fact that the Tribunal had on 25th August, 2021 ordered the parties to carry out a joint measurement of the lettable area. Pursuant to the said order a joint measurement was done by valuers proposed by either party and a report dated 13th October, 2021 filled in court. The joint valuation was to the effect that the lettable area was 304 square feet.

6. The Respondent on his part insisted that the Tribunal was justified in assessing the lettable area as it did based on the international property measurement standards for office buildings. The international standards guide Property professionals in taking such measurements on buildings. That is the justification for apportionment of common areas to occupants.

7. On the rate of rent payable per square foot, the Respondent stated that both parties submitted comparable(s) for the Tribunal's consideration. The Tribunal used the comparables closest to the suit property. Finally, on the escalation of rent, it was the Respondent's submissions that the question was properly before the Tribunal. The Respondent urged the Court to dismiss the appeal.

Issues for determination

8. Having considered the grounds of appeal and the submissions by the parties the issues for determination are:

    i. Whether the Tribunal erred in its assessment of the lettable area.

    ii. Whether the learned Vice-chair of the Tribunal erred in assessing rent payable at Kshs. 90/- per Square foot.

    iii. Whether the Tribunal erred in backdating the rent payable and issuing an order of rent escalation of 10% every two years.

    iv. What orders should issue on costs.

Analysis and Determination.

9. The law is well settled on the duty of the 1st Appellate court.

10. As Mativo, J (as he then was) stated in the case of *Mursal & Ano vs Manese (suing as the legal administrator of Dalphine Kanini Manesa){2022} (Civil Appeal E20 of 2021*) KEHC 282 (KLR)(6 April 2022) (Judgement),

> " A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

11. The same position was enunciated in the case of Selle & another v Associated Motor Boat Co. Ltd & others [1968] E.A 123, where the court stated that:

> " .... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court....is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

12. I will proceed to reconsider the evidence, evaluate it and draw my own conclusions.

A. Whether the Tribunal erred in its assessment of the lettable area.

13. I note from the record of appeal that on 24.3.2021, the Hon. Vice-chair of the Tribunal ordered both parties to file valuation reports. The Landlord was to file and serve first. Again on 25th August, 2021, the Hon. Vice-chair directed parties to carry out joint measurements of the letter area. This was after the Appellant's advocate, Mr. Ongegu brought to his attention that the lettable area was in dispute.

14. On 21.10.2021, both advocates confirmed before the Hon. Vice-chair that the joint easements had been filed. The proceedings of the day indeed quote Ms. Mbabu Advocate for the Landlord stating that the lettable area is "304 square feet" exclusive of the common areas.

15. The joint measurements report is dated 13th October, 2021 and is signed on behalf of Tysons Limited and COG Consultants Ltd. The lettable area is 304 square feet in the description part, at item 5 is the "reception appointment to Amunga & Co. Advocates" of 62 square feet.

16. It is apparent from the proceedings of the Tribunal that the Hon. Vice-chair of the Tribunal ordered for the joint measurement of the lettable area after the parties submitted contradicting measurements. The reasonable expectation was that the joint measurement report was to form the basis of the Tribunal's determination on the lettable area since it was a joint report of valuers representing both parties. it was duly signed by both valuers.

17. In that regard the Tribunal erred by ignoring the joint measurements' report and going on a frolic of its own without any basis when it increased the lettable area by a whopping 100 square feet to make it 404 square feet on the basis that the Tenant had a shared reception and other common areas like lift et al. The joint report clearly had taken care of the common areas by apportioning the reception apportionment to Amunga & Co. Advocates. The lettable area inclusive of the common areas was therefore 304 square feet. The Tribunal had no basis for increasing for finding that the lettable area was 404 square feet.

B. Whether the learned Vice-chair of the Tribunal erred in assessing rent payable at Kshs. 90/- per Square foot.

18. In the assessment of rent payable per square foot, the learned Hon. Vice-chair of the Tribunal explained the basis of the assessment. He stated that,

> " During the hearing, the Tenant's expert admitted that the comparables used had a huge variance, and as such, the Tribunal is inclined to rule that the same did not constitute the best comparables"

19. The Hon. Vice-chair considered the time lapse and the annual inflation thereby determining that the open market rental value 'shall be the rent as stated to be paid by Prominence Capital Ltd and Amana Insurance Brokers Ltd in the demised premises as well as Ombunga and Ongeri Advocates and Fly Beyond Africa both on Queensway House as put forth in the Landlord's report'. The action of determining the rent payable per square foot was an exercise of discretion on the part of the Hon. Vice-chair of the Tribunal.

20. An appellate court should not interfere with an exercise of judicial discretion unless it can be shown that some error was made in the exercise of that discretion or that the court acted on a wrong principle or allowed extraneous or irrelevant material to guide or affect its decision.

21. In the case of United India Insurance Co. Ltd v Eat African Underwriters (Kenya) Ltd 1985) EA, Madan JA (as he then was) stated that,

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

22. Having carefully considered the Appellant's submissions, none of the above maters has been established in regard to the Tribunal's assessment of the rent payable per square foot. I find no reasons to fault the Tribunal's assessment of the rent payable at Kshs. 90 per square feet.

C. Whether the Tribunal erred in backdating the rent payable and issuing an order of rent escalation of 10% every two years.

23. After determining the two issues that were before it, the Tribunal in its final disposition backdated the rent payable to 1st December, 20220. The ruling was delivered on 21st day of December, 2022. It further made a provision for rent escalation by ordering an escalation clause of 10% every 2 years to cover for 'inflation and time value for money' from the date of the ruling.

24. The Appellant protests that there was no such prayer before the Tribunal for consideration. Further that in making the escalation clause rent by 10%- every two years, and backdating the rent payable, the Tribunal did not explain its basis.

25. The reference by the Appellant before the Tribunal was in response to the Landlords' notice dated 21st September, 2020. The Landlord's notice proposed to increase rent from kshs. 66,058.00 plus VAT per quarter to Kshs. 145,440 plus VAT per quarter. This, as per the notice, was to be with effect from the 1st December, 2020. The issue before the Tribunal therefore was whether the Landlord was justified to increase the rent as proposed with effect from the 1st December, 2020.

26. In determining the issues proposed in the Landlord's notice, the Tribunal was expected to determine, first, the lettable area and secondly, the rate payable per square foot as it actually did. It was also upon the Tribunal to determine when the 'altered" rent was to take effect.

27. Clearly, the Tribunal was within its mandate to determine the question when the adjusted rent was payable from. The Landlord had proposed to alter the tenancy conditions with effect from the 1st December, 2020. The Tribunal agreed with the Landlord.

28. I therefore find no error in the Tribunal's determination that the adjusted rent was to be paid with effect from the 1st December, 2020. Apparently, the Tenant overlooked the issue and did not submit on it in its submissions before the Tribunal. It has only itself to blame since the issue was before the Tribunal. The Landlord in its submissions before the Tribunal at paragraphs 31 and 32 thereof had highlighted the issue.

29. On the aspect of periodic escalation of rent, the issue was not before the Tribunal. The Landlord's notice had not notified the Tenant of any intention to escalate the rent every 2 years. Indeed, as the Appellant clearly submits, the issue was not even canvassed before the Tribunal. I further note that the Vice-chair of the Tribunal did not bother to explain his basis of determining the escalation rate at 10% every two years. This amounted to an arbitrary exercise of discretion. He did not account for the exercise of that discretion. Consequently, the order on escalation of rent was given without any basis as it was not prayed for neither was its legal or factual basis explained.

30. The appeal therefore succeeds on two aspects only. On the aspect of the finding on the lettable area and on the aspect of the inclusion by the Tribunal of the escalation clause of 10% every two years.

31. The Appellant has invited this court to exercise its authority under Section 15(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301 to determine this case between the Appellant and the Respondent with finality without referring the matter to the Tribunal for re-trial.

32. Section 78 of the *Civil Procedure Act* too grants this court, in exercising its appellate jurisdiction, the power to amongst other things; determine a case finally.

33. I will accept the invitation to determine this case finally having already made a finding on the lettable area and upheld the Tribunals finding on the rate payable per square foot. This is in line with the overriding objective of facilitating just, expeditious and affordable resolution of disputes.

34. Therefore, the court finds and holds that the rent payable in respect to the demised premises is to be reassessed at 304 square feet at the rate of Kshs.90/- (per square foot), with effect from the 1st December, 2020. The Tribunal's order on the escalating clause of 10% every two years is hereby set aside.

35. On the issue of costs, since the appeal only succeeds partially, I find it appropriate and just that each party bears its own costs on both this appeal and the reference before the BPRT. The order by the BPRT awarding the Landlord costs of Kshs. 20,000/- in regard to the Reference is hereby set aside.

    It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ongegu for the Appellant

Mr. Chindi h/b for Mr. Simiyu for the Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE