



REPUBLIC OF KENYA



KENYA LAW
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Nyambura & 2 others v Kenya African National Union (KANU) (Environment and Land Appeal E002 of 2021) [2023] KEELC 16381 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELC 16381 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E002 OF 2021
AK BOR, J
FEBRUARY 28, 2023

BETWEEN

ELIZABETH NYAMBURA 1ST APPELLANT

MOFFAT MUYA 2ND APPELLANT

TIMOTHY BUNDI 3RD APPELLANT

AND

KENYA AFRICAN NATIONAL UNION (KANU) RESPONDENT

JUDGMENT

1. The Appellants are tenants of the Respondent in the business premises known as Kenya African National Union (KANU) Building in Nanyuki town. The Respondent issued a notice to the Appellants on 9/5/2018 expressing its intention to increase the rent from Kshs. 7,000/= to 18,000/= for the 1st Appellant and from Kshs. 10,000/= to Kshs. 33, 000/= for the 2nd and 3rd Appellants, with effect from 1/9/2018. The reason given in the notice was that the market price had gone high.
2. Upon receipt of the notices, the Appellants wrote to the Respondent indicating that they did not agree with the proposal to increase rent in the notice and that they would be filing references before the Business Premises Rent Tribunal (BPRT).
3. The Appellants filed notices with the BPRT. The BPRT directed parties to file their respective valuation reports, which was done. In the judgment delivered on 12/11/2021, the Vice Chairperson of the BPRT, Hon. A. Muma directed the Appellants to start paying monthly rent at the rate of Kshs. 110 per square foot with effect from 1/12/2021. She observed that the Appellants were paying less rent compared to the tenants in the neighbourhood and doing the same nature of business including those in the same premises. Further, the Vice Chairperson took into consideration effluxion of time from the time the suit was filed in 2018 and the valuations done in 2019 and went with the recommendation made by the landlord's valuer on the rent to be paid by the Appellants.



4. Being aggrieved by the decision of the BPRT, the Appellants filed a memorandum of appeal in this court on 9/12/2021 in which they faulted the learned Vice Chairperson of the BPRT for assessing the rent payable based on the Respondent's valuation report and not on the landlord's notice which the Respondent had issued. Further, they faulted the learned Vice Chairperson for giving the reason that the current rents were below those of other tenants in the same building while ignoring the fact that those tenants chose to comply with the landlord's notice. They contended that the learned Vice Chairperson erred in making the finding that the Respondent's valuation and recommendations were more credible than the valuation which they presented.
5. They also faulted the learned Vice Chairperson for failing to assign sufficient reasons for her decision and for taking it upon herself to decide that the Respondent deserved higher rent than what it had asked for in the notice it issued to the Appellants. The Appellants pointed out that the Respondent's valuation report was flawed which was why at some point the Respondent moved the BPRT to order that an independent valuation be undertaken. They contended that the learned Vice Chairperson did not take this aspect into consideration when she reached her decision.
6. The appeal was canvassed through written submissions, which the court considered. The Appellants submitted that upon hearing the parties, the BPRT gave judgment vide which it increased the rent from Kshs. 7,000/= to Kshs. 34, 430/= for the 1st Appellant and from Kshs. 10,000/= to 87, 890/= in respect of the 2nd and 3rd Appellants yet according to the landlord's notice, the proposed rents were to be revised from Kshs. 7,000/= to 18,000/= for the 1st Appellant and from Kshs. 10,000/= to Kshs. 33,000/= for the 2nd and 3rd Appellants.
7. The appellants contended that it was not open to the learned Vice Chairperson of the BPRT to award the Respondent anything more than what it had asked for in the landlord's notice that it had issued. Further, that awarding sums above what was demanded in the notice was tantamount to giving a plaintiff a relief which he did not pray for. On this point, the Appellants relied on *Caltex Oil (Kenya) Limited V Rono Limited* [2016] eKLR where the court stated that a party must specifically plead and prove a prayer that it desires the court to grant because pleadings were a precursor for a party to lead evidence in satisfaction of the prayers sought.
8. The Appellants argued that the Vice Chairperson took into account extraneous and irrelevant considerations when awarding the Respondent the rent she did on the ground that the other tenants in the building were paying higher rents than the Appellants. They pointed out that the Respondent sought to increase their rent as per its notices and as it deemed appropriate. They contended that they did not have to comply with the landlord's notices purely because other tenants were paying higher rents.
9. The appellants contended that the Honourable Vice Chairperson contradicted herself when she stated that both valuation reports were merited but then went on to state that the recommendation by the landlord's valuer as to the rent payable was more credible than the tenants'.
10. The Appellants pointed out that it was noteworthy that while the judgment in the matter was pending, the Respondent entertained doubts regarding the credibility of its own valuation report and filed the application dated 18/1/2020 seeking an order for the revaluation of the suit premises by an independent or neutral valuer. It was deponed in the supporting affidavit that the valuation reports filed by the parties would not assist the BPRT to make a fair and just judgment. The Appellants contended that this must have been with regard to the valuation report prepared by the Respondent's valuer which proposed an astronomical rent increment of over 875% for the 2nd and 3rd Appellants



and 491% for the 1st Appellant. According to the Appellants, that must have been what pricked the conscience of the Respondent.

11. They pointed out that their own valuation report differed materially from the recommendations made by the Respondent's valuer while contending that the recommendation by their valuer appeared reasonable and generous in light of the existing rents. They argued that if the matter were to be decided on the basis of credibility, the balance would have tilted in favour of their valuation report.
12. The Appellants contended that by the Honourable Vice Chairperson justifying the rent increment on the basis of "time value for money in our current property market", the Vice Chairperson abrogated to herself expert knowledge of trends in the value of money yet such knowledge could not be invoked while sitting as a judicial officer. They maintained that that opinion was extraneous to the determination of the case.
13. The Appellants submitted that it was difficult to discern the credibility or otherwise of the two valuers who were called as witnesses and that on reflection, the BPRT should have sought a third opinion before setting down the matter for judgment. The Appellants expressed concern that the record did not fully reflect the testimony of the two valuers and that it was apparent that the testimony was too scanty perhaps as a result of selective recording which could either be deliberate, inadvertent or by incompetence.
14. The Appellants contended that without being seized of sufficient testimony from both parties, this court is not capable of assessing and re-evaluating the testimony to arrive at the proper finding regarding the credibility or otherwise of the witnesses. That this scenario leads to the conclusion that the Vice Chairperson did not have sufficient material by which she could have made a finding of credibility of the Respondent's valuation and that she therefore misdirected herself when she based her award on the Respondent's valuation report. The Appellants contended that the issue as to whether the increase awarded by the BPRT was fair could not be ascertained due to insufficient evidence and that this court cannot therefore set out to determine what increase should have been granted based on the scanty information.
15. They also expressed doubt as to whether the court had jurisdiction to determine the increase that should have been granted. The Appellants urged the court to set aside the judgment of the learned Vice Chairperson and substitute it with one dismissing the landlord's notice and upholding the tenants' references.
16. The Respondent pointed out that when they sought to have the BPRT order the revaluation of the suit premises by an independent or neutral valuer, the Appellants opposed that application citing the reason that the valuations were done independently at the instance of the parties and that the application had been overtaken by events.
17. The Respondent submitted that the Appellants must have been satisfied with the valuation report filed and that they should not be heard to complain against the final judgment of the BPRT. The Respondent urged that the Vice Chairperson was not bound by the notices to increase rent which it served on the Appellants. It maintained that the learned Vice Chairperson did not err in increasing rent based on the Respondent's valuation report which she found to be more credible. It emphasised that the BPRT ordered the valuers to attend the tribunal for cross-examination.
18. The Respondent relied on the ruling in which the BPRT observed that it was not able to assess the open market rent because of the disparity of the recommendations in the two valuation reports and the BPRT allowed parties to call the valuers to give evidence and be cross examined by the parties' advocates.



19. The Respondents contended that the BPRT observed that the landlord was entitled to increase rent after two years but had to wait for the BPRT to deliver its judgment. It urged that the Vice Chairperson was entitled to increase the Appellants' respective rents based on the experts' report. It added that the finding by the BPRT based on the report of Probity Valuers Limited was credible and that the BPRT took into account the effluxion of time since 2018, the fact that the valuations were done in 2019 and in order to serve justice to both parties, it went by the recommendation made by the Respondents' valuer which was found more credible.
20. According to the Respondent, those were the reasons the BPRT assigned and that there is nothing to suggest that their valuation was flawed. Further, it contended that there is nothing on record to show that the Appellants' valuation report was more credible than that of the Respondent. It added that the BPRT was entitled to choose the report it found more credible and that the BPRT could not have relied on the rent increases indicated in the landlord's notice dated 9/5/2018 because those were not based on any expert report.
21. The Respondent contended that this court could not substitute any of the valuation reports with another report simply because none exists. Further, that this court cannot find that the Appellants' valuation report was more credible than the Respondent's since there will be no basis for such a finding.
22. The Respondent contended that the Appellants' prayer for dismissal of the landlord's notices would mean that the landlord can never increase rent for its commercial premises. The Respondent contended that the approach taken by the BPRT was akin to this court being faced with two binding Court of Appeal decisions and that the court would be at liberty to choose between the two conflicting judgments.
23. The Respondent reiterated that the Appellants did not accept the proposals it made in the notices which in any event were not based on any expert's report and that the Appellants' contention that the BPRT should not have awarded more than what the Respondent had asked for in its notices had no basis.
24. The Respondent relied on section 12 of the *Landlord and Tenants (Shops Hotels and Catering Establishments) Act* ("the Act") which provides for the powers of BPRT including the staff it can employ for the better carrying out of the purposes of that Act. It also relied on sub-section 4 on the additional powers of the BPRT to investigate complaints relating to a controlled tenancy and make orders it deems fit.
25. Further, it argued that under the powers conferred by section 9 of the Act, the BPRT could approve the terms of the notice subject to such amendments or alterations as it thought just having regard to the circumstances of the case. The Respondent contended that the rent assessed by the BPRT was not exorbitant or unreasonable because the BPRT had power to vary the rent based on Section 12 (i) (b) after the BPRT considered the valuation reports and the evidence of the valuers. It maintained that the rent assessment was fair, reasonable and proper it urged the court to dismiss the appeal.
26. The Appellant filed a reply to the Respondent's submissions and contended that there was nothing in sections 12, 4 and 9 of the Act empowering the BPRT to derogate from the principle that a court does not award beyond what it is asked to award. It urged that there was no evidence before the BPRT to show that in issuing its notices the Respondent had underestimated the market rent. Further, that the BPRT was not empowered to award what it deemed to be the market rent.
27. The Appellants pointed out that it should be borne in mind that the valuation reports were introduced not as pleadings but as evidence to support the respective cases and that they therefore could not supersede the pleadings in the form of notices issued by the Respondent and the references filed by the



- Appellants. They compared the fact of BPRT basing its award on the valuation report to a Magistrate making an award to a party based on evidence introduced in the course of a hearing which was not part of the pleadings simply because the magistrate believed in the credibility of such evidence.
28. The Appellants' took issue with the Respondent's assertion that they agreed with the recommendations made by the Respondent's valuer. They pointed out that they were only expressing surprise that the Respondent was questioning its own valuation and seeking to have an independent valuer appointed. They also pointed out that the analogy of a court being faced with two conflicting decisions of a higher court on a similar issue was on a wrong premise essentially because that would be a matter of law as opposed to two valuations making different recommendations which is a matter of evidence over which the court has to decide which report to adopt based on sound reasoning and not whimsically or capriciously.
 29. Lastly, the Appellants took issue with the Respondent's suggestion that this court ought to take judicial notice that rents and values of commercial properties in the Central Business District keep rising with the effluxion of time and that the demand for such premises is high. The Appellants contended that such an invitation was asking the court to wade into an arena which it was not competent to deal with.
 30. The issue for determination is whether the court should allow the appeal and set aside the award made by the BPRT. The genesis of this dispute is that the Respondent served a notice on the Appellants notifying them that with effect from 1/9/2018, it intended to increase their rent Kshs. 7,000/= to 18,000/= for the 1st Appellant and from Kshs. 10,000/= to Kshs. 33,000/= for the 2nd and 3rd Appellants the basis being that the market price had gone up.
 31. The Appellants filed their references before the BPRT which asked the parties to procure valuations to guide it in the assessment of the rent payable. The valuation reports presented differed so significantly that the BPRT had to have the experts appear before it for cross examination on the reports.
 32. The valuation report presented by the Appellants proposed rent increments from Kshs. 7000/= to Kshs. 8200/= for the 1st Appellant and from Kshs. 10,000/= to Kshs. 18,000/= for the 2nd and 3rd Appellants while the one presented by the Respondent proposed reviews from Kshs. 7,000/= to Kshs. 34, 430/= for the 1st Appellant and from Kshs. 10,000/= to Kshs. 87, 890/= for the 2nd and 3rd Appellants.
 33. It is not in dispute that the demised premises fall under the Landlord and Tenants (Shops Hotels and Catering Establishments) Act. Section 4 stipulates that no terms or condition or rights or service enjoyed by any tenant is to be altered other than in accordance with the Act. That Section enjoins a landlord who wishes to alter any term, condition, right, or service enjoyed by a tenant under the tenancy to give notice to the tenant in the prescribed form if such alteration is to the detriment of the tenant. The notice which the Respondent issued was pursuant to this provision. The Appellants filed the reference under Section 6, which stipulates that a party who wishes to oppose a tenancy notice and who does not agree to comply with the tenancy notice is to refer the matter to the BPRT before the date upon which the notice is to take effect.
 34. Some of the powers of the BPRT under Section 12 include the power to determine whether the tenancy is a controlled one; to determine or vary the rent payable in respect of any controlled tenancy having regard to all the circumstances; and to make orders for the payment of arrears of rent and mesne profits which would apply to any person.
 35. Section 15 of the Act provides for appeals to court by a party to a reference who is aggrieved by the determination of the BPRT. Under that Section, the court has all the powers conferred on the BPRT when hearing the appeal in addition to other powers conferred on it by any written law. That provision



incorporates the powers under Section 12 one of which is to determine or vary the rent payable in respect of any controlled tenancy having regard to all the circumstances.

36. The Honourable Vice Chairperson chose to go with the proposal made by the Respondent's valuer and gave the reasons as the passage of time since the reports were prepared and what she termed as time value for money in our current property market. One of grounds for the Appellants' dissatisfaction with the findings of the BPRT is the reason it gave that the current rents were below those of other tenants in the same building yet the Appellant's contention was that those tenants chose to comply with the landlord's notice.
37. Going by the rents assessed by the BPRT, it means that the Appellants will be required to pay rents which are much higher than the other tenants in the same building who elected not to challenge the notices issued by the Respondent. Would this mean that the Respondent has to automatically increase the rents of the other tenant to match the assessment made by the BPRT? This shows the absurdity that the rents which the BPRT assessed for the Appellants will cause for the other tenants in the same building.
38. Section 4 enjoins the Respondent to give notice before it can alter the terms of the tenancy to the detriment of the tenants. The court therefore agrees with the Appellant that the BPRT was bound to go by the rent increment proposed in the landlord's notice and not consider extraneous factors as the tribunal did when it adopted the rents proposed by the valuer instructed by the Respondent. The fact that the Respondent wanted another independent valuation done before the BPRT delivered its judgment confirms that the remarkable difference between the two valuations made it impossible for one to objectively assess the reasonable rent or even determine which of the reports to adopt.
39. The judgment of the Learned Vice Chairperson of the BPRT delivered on 12/11/2021 is set aside. The Landlord's notices to the Tenants dated 9/5/2018 are upheld to the extent that the Appellants will pay the rent in those notices with effect from 12/11/2021, being the date the BPRT delivered its judgment.
40. Each party will bear its own costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 28TH DAY OF FEBRUARY 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Mwangi Kariuki for the Appellants

Mr. William Bwonwonga for the Respondent

Ms. Stella Gakii - Court Assistant

