



**Jethwa v Janoowalla & another (Tribunal Case 33 & 46 of 2017
(Consolidated)) [2024] KEBPRT 408 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 408 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 33 & 46 OF 2017 (CONSOLIDATED)
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
APRIL 19, 2024**

BETWEEN

RAJNIKANT MADHAVJI JETHWA LANDLORD

AND

S.G JANOOWALLA 1ST RESPONDENT

MARU ENGINEERING WORKS 2ND RESPONDENT

JUDGMENT

1. The Landlord served tenancy notices in respect of premises occupied by the two tenants seeking to increase rent from Kshs 3354/= to Kshs 55,000/= per month in respect of the 1st tenant and Kshs 2528/= to Kshs 35,000/= per month in respect of the 2nd tenant. The notices are both dated 19th January 2017.
2. The ground for increment which is cited in both notices is that the present rent is very low and the premises are likely to fetch the proposed new rent in the open market.
3. The tenants being opposed to the said notices filed the current references challenging the said increment. However, the matter has remained in this Tribunal for the last seven (7) years owing to an appeal arising from a ruling earlier given by this Tribunal allowing the tenants' preliminary objection pursuant to which the tenancy notices were struck out. This occasioned an appeal by the Landlord to the Environment & Land Court pursuant to which the tenancy notices were reinstated.
4. Both parties had been directed to file their valuation reports before the tenancy notices were struck out with the Landlord filing his report dated 8th May 2018 while the tenant only filed theirs on 29th August 2023 after the conclusion of the appeal case. The tenant's valuation report was admitted vide a ruling of this Tribunal delivered on 15th December 2023.



5. On 2nd February 2024, the parties were directed to file their respective submissions with each being granted 14 days. The Landlord filed his submissions dated 6th March 2024 but the tenants did not comply with the said directions.
6. The issues for determination in this case are;
 - a. Whether the tenants' references ought to be allowed or dismissed?
 - b. Whether the tenancy notices ought to be approved or dismissed.
 - c. Who is liable to pay costs?
7. The Landlord's valuation report was prepared by Fairlane Valuers Limited on 4th May 2018. The said report states that the plot is developed with a warehouse constructed of reinforced concrete columns infilled with coral stone walls and high level pre-cast concrete louvres, beneath a G.C.I. sheets roof. The floor finish is cement screed all over. The main doors are sliding metal plates. All essential urban services are connected to the property. The premises are described to be in a good structural and decorative condition.
8. Maru Engineering Works Shop No. 1 occupies 89 square meters at Kshs.3,354 per month (exclusive of V.A.T and service Charge).
9. Maru Engineering Works Shop No. 2 occupies 52 square meters at Kshs.2,528 per 40 per month (Fronts service lane) (exclusive of V.A.T and service Charge)
10. S.G. Janoowalla Shop No.1 occupies 89 square meters at Kshs.3,354 pm (exclusive of V.A.T and service Charge)
11. The Landlord's valuer used the following comparable which are in the same neighborhood to arrive at the fair open market rent;
 - i. Plot L.R NoMSA Block XIX/205
 Tenant Adam Engineering Works with an area of 62 square meters with its present rent being Kshs. 60,000/= per month from 1.4.2017 giving an analysis of Kshs 968 per square meter per month (exclusive of V.A.T and service Charge)
 - ii. Plot 206/XIX-Likoni Road occupied by James Mbugua Ngigi whose area is 89.0 square meters with its present rent being Kshs.51,840/= per month from 1.1.2017. This gives an analysis of Kshs 583/00 per square meter per month (exclusive of V.A.T and service Charge)
 - iii. Plot 200/XIX-Likoni Road occupied by Vimic Auto Parts with a shop area of 60.0 square meters at a rent of Kshs. 25,000/= per month from 1.1.2017 giving an analysis of Kshs 417/00 per square meter per month (exclusive of V.A.T and service Charge)
 - iv. Plot 15/XIX-Liwatoni Road whose tenant is Pretty Auto Car occupying a shop area measuring 150 square meters at a rent of Kshs. 120,000/= per month from 1.1.2018 giving an analysis of Kshs 800/00 per square meter per month (exclusive of V.A.T and service Charge)
12. The valuer concludes that the average rent payable in respect of the foregoing comparable shop premises is Kshs. 692/00 per square meter per month and therefore adopted the same rate for the suit premises herein in recommending as follows:
 - a. Maru Engineering Works Shop No.1 occupies 89 square meters at Kshs.692/00 per square meter at Kshs. 61,588.00 per month. The valuer recommends a fair market rent of



Kshs.61,600.00 per month (exclusive of V.A.T and service charge) and for Maru Engineering Works Shop No. 2 at Kshs.30,500.00 per month (exclusive of V.A.T and service Charge) and S.G. Janoowalla Shop No. 1 at Kshs.61,600.00 per month (exclusive of V.A.T and service Charge)

13. On the other hand, the tenants' valuer confirms that the suit premises are located off Moi Avenue along Likoni Road, Mombasa County.
14. Maru Engineering Works occupies a plinth area of 968.82 square feet or 90 square meters and a rent of Kshs 31,170/= is recommended for Maru Engineering Works premises.
15. In order to arrive at the current market rent, the valuer relied on the following rents payable for neighborhood properties with similar physical attributes with due and prudent consideration being made to the heterogeneous nature of each property in order to take care of some factors including location, construction design, maintenance, lease term, economic life (age), services among others. Other factors considered includes micro-economic performance within Mombasa Town, inflation etc.
16. The following comparable were considered;
 - a. Plot 15/XIX-Liwatoni Road whose tenant is Pretty Auto Car occupying a Shop area measuring 115 square meters at a rent of Kshs.28,000/= per month from 1.1.2020 giving an analysis of Kshs 243/00 per meter square per month (exclusive of V.A.T and service Charge)
 - b. Plot 206/XIX-likoni Road whose tenant is James Mbugua Ngigi with a Shop area of 81.0 square meters at a rent of Kshs.41,840/= per month from 1.1.2019 whose analysis is Kshs 516/= per month (exclusive of V.A.T and service Charge)
 - c. Plot 200/XIX-Likoni Road whose tenant is Vimic Auto Parts occupying a Shop area measuring 89.0 square meters at a rent of Kshs.25,000/= per month from 1.1.2020 (exclusive of V.A.T and service Charge).
17. According to the tenants' valuer, the above rental comparable give an average rent of Kshs.31,170/= per month for the suit premises.
18. The Landlord's Counsel submits that the current rent payable on the premises are informed by the notices annexed to the further affidavit of the Landlord sworn on 7th September 2023 filed herein stating that there has been no rent increment for over 30 years.
19. In support of the rent proposed in these proceedings, the Landlord's position is supported by the valuation report prepared by M/s Fairlane Valuers dated 4th May,2018. Nearly 5 years from then, the valuation therein would naturally be fairly understated and indeed overtaken by time and that a more recent report would likely yield a proposition for higher rentals.
20. The Landlord's valuation report dated 4th May,2018 analyzed the fair market rent payable on the first tenancy (BPRT 33 of 2017) at Kshs 61,600/- per month exclusive of VAT and service charge which was still above the rent of Kshs 55,000/- per month proposed in the tenancy notice.
21. For the second tenancy (covered under BPRT 46 of 2017), the report proposed a fair market rent of Kshs 30,500/- per month. Given the passage of time, it is submitted that the sum of Kshs 35,000/- stated in the Landlord's notice would be reasonably supported and ought to be allowed as such.
22. As for the Tenant's valuation, the report of 29th August, 2023 by Elite Africa Valuers Limited proposes a rental assessment of Kshs 31.170/-per month.



23. The tenant's report considers only one letting and is unclear as to which of the two tenancies herein it relates to.
24. Given the time that has lapsed since the commencement of these proceedings and the filing of the Landlord's report, it is our view that the proposed new rent as per the tenancy notices is well within acceptable values having regard to the fact that the higher rent proposed by the Landlord's valuer is supported by other comparable within the same neighborhood and is nearly 6 years old i.e May,2018.
25. In regard to the effective date of the new rent, it is submitted that the proper effective date is the date of the notice. Per Chanan Singh, J in *Sadhu & Another v Vadgama Garage* (1975) EA 31, delay in hearing a reference is not a sufficient ground for altering the effective date of the notice which should normally be the date in the notice. Here, the delay, if anything, was occasioned by the objection taken by the tenants. The delay occasioned thereby should not therefore be held against the Landlord as the 5-year hiatus would translate to a humungous loss of income to the landlord which loss he did not bargain for.
26. Counsel for the landlord cites the decision in *Shah & Shah Vs Kagunda* (1980) KLR 35, wherein Justices Simpson and Chesoni held inter-alia that the Tribunal has discretion on the effective date of a notice and could in appropriate circumstances backdate the re-assessment to the date of the notice. It is submitted that the circumstances of this case can only support the backdating of the effective date to the date of the notice considering all relevant facts and that a proper exercise of discretion would support a backdating of the effective date of the notice to 1st April 2017.
27. Having analyzed both valuation reports and the time taken from the date of issuance of the notice and this Judgement, it would be most unfair and insensitive to the right of the Landlord to derive a return from his investment if we do not uphold the tenancy notices herein.
28. We have looked at the comparable used by the tenants' valuer and except one, all others are similar to the ones contained in the Landlord's valuer's report. There is therefore no basis upon which the Landlord's valuation report or the notices can be faulted.
29. In regard to the effective date, the tenancy notices were expressed to take effect on 1st April 2017. It is now seven (7) years since then and neither the Landlord nor the tenants can be blamed for the delay in conclusion of the matter. Had the proceedings however not been instituted, the Landlord would have been enjoying the higher rent for the last seven (7) years. On the other hand, we also appreciate that the Landlord was entitled to appeal against the striking out of his tenancy notices pursuant to this Tribunal's ruling on the tenants' preliminary objection and in absence of such an appeal, the proposed rent increment would still have been delayed as he would have been required to issue fresh notices. We shall therefore share the seven (7) years into half between the two parties and fix the effective date of rent increment as 1st October 2020. Any accrued rent arrears based on the new rent will be paid by the tenant within the next three (3) months failing which, the Landlord shall be at liberty to use lawful means to recover the same.
30. The costs of every action before this Tribunal are at our discretion under Section 12(1)(k) of Cap. 301 but always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the Landlord being the successful party.
31. We therefore make the following final orders under Section 9(1) of Cap. 301;
 - a. The tenants' references are hereby dismissed with costs.
 - b. The tenancy notices by the Landlord dated 19th January 2017 are hereby approved and the new rent specified therein shall be deemed to have taken effect on 1st October 2020.



- c. Any rent arrears occasioned by the said increment shall be paid by the tenants within the next three (3) months failing which, the Landlord shall be at liberty to use lawful means to recover the same.
- d. Costs of the references are awarded to the Landlord in the sum of Kshs 60,000/= all inclusive.

It is so ordered.

DATED, SIGNED & VIRTUALLY DELIVERED THIS 19TH DAY OF APRIL 2024

HON. GAKUHI CHEGE - PANEL CHAIRPERSON

HON. JOYCE A OSODO - PANEL MEMBER

In the presence of-

Hassan for the Tenants

No appearance for the Landlord

