



**Central Watch Company Limited v Embu Gaturi Housing Co-op Society Limited
(Tribunal Case E467 of 2022) [2023] KEBPRT 1236 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1236 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E467 OF 2022
CN MUGAMBI, CHAIR
FEBRUARY 27, 2023**

BETWEEN

CENTRAL WATCH COMPANY LIMITED TENANT

AND

EMBU GATURI HOUSING CO-OP SOCIETY LIMITED LANDLORD

RULING

Introduction

1. Nairobi BPRT Case No E467 OF 2022 and BPRT Case No E466 of 2022 were, by consent of the parties consolidated on 22nd September 2022. File No E467 of 2022 was ordered to be the lead file and the parties agreed to file their valuation reports and submissions on the basis of which this matter would be determined.
2. The Landlord's notice to terminate/alter terms of tenancy issued in case No. E466/2022 seeks that the rent be increased from Kshs 102,487/- to Kshs 110,000/- beginning 1st June 2022. It also seeks that a tenancy agreement be executed between the parties in respect of the business premises by 1st June 2022 and that the Tenant does pay a security deposit to the Landlord in the sum of Kshs 330,000/- on or before 1st June 2022.
3. The grounds upon which the above alterations are sought are that a valuation of the premises entitles the Landlord to charge rent of Kshs 139,500/- but the Landlord has opted for Kshs 110,000/-. The Landlord has further stated that the Tenant has been paying rent at a fixed rate without any escalation which is contrary to standard commercial tenancies.

It is also stated that there is need for uniformity of tenancies by the execution of tenancy agreements and provision of security deposits.



4. The Landlord's notice to alter terms of tenancy in BPRT case No E467/2022 dated 10th March 2022 seeks to increase the rent from Kshs 70,600/- to Kshs 90,000/- with effect from 1st June 2022. The notice seeks similar alterations to the one in case No E466/2022 and the grounds upon which the notice is based are also similar.

The Landlord's Valuation Report

5. The Landlord's valuation report is the one dated 21st February 2022 prepared by Danco Ltd. The report has listed fourteen (14) comparables and the analysis of the comparables according to the report reveal that retail space within the area is currently letting in the range of between Kshs 165/- and Kshs 368/- per square foot per month depending on the space occupied and the nature of the building. The report recommended Kshs 180/- per square foot per month in both cases.

The Tenant's Valuation Report

6. The Tenant's valuation reports in both cases have been prepared by ICON Valuers Limited. As regards SONICA Fashions Shop (E466/2022), the report recommends the rent of Kshs 100,900/- per month while for Central Watch Shop (E467/2022) the report recommends a monthly rent of Kshs 45,360/-. The report has used five comparables whose average charge per square foot per month (exclusive of VAT and service charge is Kshs 90/-. The valuation report in case No. 3466 of 2022 has recommended Kshs. 95/= per square foot per month for the shop and Kshs. 65/= per square foot for the Mezzanine floor, although the true average of the comparables is Kshs. 90/=.

Analysis and Determination

7. The issues that arise for determination in this case are in my view the following;
 - a. Whether the affidavit sworn by Jaitender Kumar Luthra sworn on 27th October 2022 ought to be admitted as evidence.
 - b. Whether the Landlord is entitled to the rent increase demanded in its notices to alter conditions of the tenancy.
 - c. Whether the Landlord is entitled to the demand for a three months' security deposit.
 - d. What orders ought to be made in the circumstances of this case.

Issue A

8. The affidavit of Jaithender Kumar Luthra (hereinafter the affidavit) sworn on 27th October 2022 introduced a written consent which allegedly settled this dispute. It is the Tenant's view that the Tribunal ought to give effect to this consent order. In their submissions, the Landlord's counsel states that the said affidavit was filed out of time and without the party seeking the leave of the Tribunal and that the Landlord therefore had no opportunity to respond to the same which is against the principles of fair hearing.
9. In the introductory parts of this ruling, I indicated that the parties agreed to file their valuation reports and submissions on the same. The understanding then and now was that the only documents that were going to be considered were the valuation reports and the submissions of parties. No further directions were given in the matter in this regard. I am also of the view that the present dispute is not one for the enforcement of a consent between the parties and if that were so, the Tenants ought to have taken the issue of the consent as a preliminary issue. the consent, having also not been adopted as an order of the court, the same cannot be enforced as such.



10. In view of the foregoing, the affidavit aforesaid and the consent annexed thereto are not for admission as evidence in determining this reference. I am in agreement with counsel for the Landlord in this regard.

Issue B

11. Section 9(2) (a) of [Cap 301](#) provides that;

“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...”

12. Further, under section 12(1)(b) of [Cap 301](#), the Tribunal has power to determine or vary the rent to be payable in respect of any controlled tenancy having regard to all the circumstances thereof.

13. The [Act](#) does not define what amounts to “all circumstances” and neither does it provide a formula for arriving at the rent at which the premises may be let in the open market. The Tribunal therefore exercises discretion over these matters and this discretion must be exercised judicially having regard to the evidence before the Tribunal. (see the case of Nairobi High Court Civil Appeal No 61A of 1976, [Shah & Shah v Francis Titus Kigundu](#)).

14. In exercising this discretion, the Tribunal is to apply the principles set out in form G of the regulations in the [Act](#) (Cap 301) which are the following;

- a. Ascertaining the original cost of the building.
- b. The age of the building.
- c. The market value of the land on which the premises are built.
- d. The improvement and cost of such improvements.
- e. Amenities or services provided for by the Landlord.
- f. The rent at which the premises were let for the past three years. (See the case of; Nyeri ELCA No 31 of 2015, [Margaret Wanjugu Nduma & 3 others versus James Gichuki Gathara](#) [2020] eKLR.

15. While not strictly following the above criteria/principles, the report by Icon Valuers states that state of repair and maintenance of the building is poor and the building is old. It does not state the age of the building though. The report further states that the building enjoys all the main services like tarmacked roads, piped water, electricity and security services. The report by Danco Ltd (for the Landlord) does also not provide the details required under paragraph 13 above save where it states that the building is an old commercial property.

16. The effect of the foregoing is that the Tribunal is to determine the rent payable based on the comparables and the test of reasonableness. The Tribunal has also to determine which of the two sets of reports is the better report for the purposes of determining the rent payable. In the case of *Cleaners Limited v Barclays Bank & Co* [1972] EA 188, the Court of Appeal held as follows in this regard;

“It is the reasonableness of the rent that must be in the forefront of the Tribunal’s investigation and determination. It must be the concern of this court too. The average rates per square feet or meter of a number of nearby buildings on ground floor premises in which



similar trades are exercises are among other things relevant to assessing the rent that would reasonably be expected on the open market.”

17. Further, in *Tala Investments Ltd v Green Spot Limited*, Civil Appeal No 269 of 1993 the Court stated;

“In dealing with principles upon which a Tribunal should act in assessing rent, its duty is to consider all the reports properly before it. The Tribunal must go into individual comparables to decide which is a better report rather than merely arrive at a mean figure that is the mean figure of the Landlord’s and Tenant’s valuers’ reports. That is not proper criteria.”

18. The Landlord’s valuation report at paragraph 9 states as follows;

“In arriving at the fair market rent, we have taken cognizance of the functional condition of the property, location of the property, its general conditions and evidence of comparable rentals of similar properties in the general area” (underlining mine).

The report goes on to examine comparables along Biashara Street, Standard Street, Haile Sellasie Avenue, Kimathi Street/Kenyatta Avenue Junction, Loita Street and Kenyatta Avenue.

19. The Tenant’s valuation reports have adopted five comparables whose locations have not been disclosed. The reports also do not indicate the sizes of the spaces let out in the said comparables.
20. I have gone through the reports submitted as evidence by the parties, I have considered the comparables therein and I do find the Landlord’s report the better report.
21. Following from the above finding, I therefore assess the rent payable by the Tenants at Kshs 180/- per square foot per month which translates to (180 x 775) 139,500 for the Tenant in E467/2022, Sonica Fashions Ltd and (180 x 510) 91,000/- for the Tenant in E467/2022, Central Watch Co. Ltd.

Issue C

22. The Landlord has demanded in both notices that the Tenants do pay a security deposit equivalent to three months of the revised rent. The rent security deposit is intended to ensure that in the event the Tenant fails in his or her obligations under a tenancy lease agreement, the same is applied to do so (see BPRT case No E069 of 2021, [*Jordana Waceera v Kiama Muturi*](#)).
23. It is my view that the demand for a security deposit ought not to be punitive while at the same time recognizing the Landlords need to be protected against costs incurred or resulting from acts of waste upon the premises by wayward Tenants.
24. In this regard, I will order that the Tenants do deposit security equivalent to two months’ rent of the revised rent.

Issue D

25. The Landlord’s notices to alter terms of tenancy are allowed in the following terms;
- That Sonica Fashions Ltd shall pay rent assessed at Kshs 110,000/- per month.
 - That Central Watch Limited shall pay rent assessed at Kshs 90,000/-.
 - That both Tenants shall pay 220,000/- and Kshs 180,000/= respectively being security deposit.
 - That the effective date shall be 1st March 2023.



- e. The Tenants shall bear the costs of the references.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2023

HON. CYPRIAN MUGAMBI - CHAIRPERSON

27. 2.2023

In the presence of;

Miss Muiruri for the landlord

Miss Ngei for the tenant

