



**Burger Chief Limited v APA Insurance Limited (Tribunal Case  
E953 of 2022) [2024] KEBPRT 659 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 659 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E953 OF 2022  
N WAHOME & JOYCE MURIGI, MEMBERS  
MAY 9, 2024**

**BETWEEN**

**BURGER CHIEF LIMITED ..... TENANT**

**AND**

**APA INSURANCE LIMITED ..... LANDLORD**

**JUDGMENT**

1. This suit was originated by way of the reference dated 21<sup>st</sup> October 2022. The same was said to be founded on Section 6 of the Landlord and Tenant (Shops, Hotels and Catering establishments Act) Cap. 301) herein after the Act. The reference related to the Tenant/Applicant's occupation of the space within Plot L.R. Nos.209/377/11, 12 and 13 within Nairobi City. The Applicant requested this court:-

“To investigate the matter and determine the issues involved”.

2. The reference was triggered by the landlord's notice to alter the terms of the Tenancy herein dated 22<sup>nd</sup> August 2022. The same was to take effect on the 1<sup>st</sup> December 2022 and it was said to be grounded on Section 4(2) of the Act. The alterations proposed by the landlord were:-

“To increase the monthly rent from the current rent to Kshs.192,840/-“.

3. The grounds on which the alterations aforesaid were sought are:-

“The Landlord wishes to enhance the monthly rent so as to be commensurate with the current market rate in the same area and so that the investment be profitable to the landlord”.



4. In response to the reference, the landlord through its legal officer namely Rovina Cheroni Koske filed a replying Affidavit sworn on the 9<sup>th</sup> January 2023. In it she reiterated the contents of the notice of termination and further annexed exhibit No. 5 which is a valuation report dated 4<sup>th</sup> July 2022 drawn by M/S Kinyua Koech Ltd a firm of valuers and estate agents to justify the escalation of the monthly rental payment from Kshs.41,000/- to Kshs.192,840/-.
5. Directions were taken on the 4<sup>th</sup> September 2023 and where it was confirmed that the landlord had filed among others the Replying Affidavit dated 9<sup>th</sup> January 2023, the valuation report by M/S Kinyua Koech dated 4<sup>th</sup> July 2022 and that it would call two (2) witnesses in support of its case.
6. On the other hand, the Tenant undertook to make reliance on the reference dated 21/10/2022, the report by M/S Premier Valuers Ltd dated 7<sup>th</sup> March 2023 and would call two (2) witnesses in support of its opposition to the notice to alter the terms of the tenancy dated 25<sup>th</sup> August 2022.
7. The hearing was on the 1<sup>st</sup> December 2023 and for the Landlord M/S Rovina Cheroni Koske the legal officer thereof testified as LW1 whereas Fancy Jeruto Letio a registered valuer working for M/S Kinyua Koech Ltd testified as LW2.
8. The Tenant on its part testified through one Frozali Akbarali Kassam Jaffer a director thereof who testified as TW1 and Nicodemus Charo Kimeu a registered valuer working with M/S Premier Valuers Ltd and who testified as TW2.
9. Both parties eventually filed their respective submissions with those of the Applicant dated 6<sup>th</sup> March 2024 and those for the Landlord are dated 28<sup>th</sup> February 2024. I also confirm that I have perused the three previous files related to the property herein being BPRT case No.s 328, 329 and 330 of 2015.
10. From all the materials placed before me, I am able to summarise the evidence of the parties as follows:-
  - A. Evidence of the Landlord.
    - i. It had issued the notice by increasing the rent payable thereof from Kshs.41,000/- to Kshs.192,840/- for the enterprise to be profitable.
    - ii. The decision to alter the terms of the tenancy was informed by the reality on the ground and also by the valuation report by M/S Kinyua and Koech Ltd dated 4<sup>th</sup> July 2022.
    - iii. All the buildings within the locality taking cognizance of location, the age and the space taken would confirm the proposed alteration as fair.
    - iv. The TW1 did not have any evidence to show that he had the authority of the Tenant to institute these proceedings or testify on its behalf.
    - v. In Tribunal case Nos 328, 329 and 330 of 2015, this court had assessed rent payable for spaces within the present property at between Kshs.73/- and 85/- per square foot and which had been applying since 2015.
    - vi. The Tenant's valuer did not carry out a thorough survey of the market rates for rentals in the area.
    - vii. It needed to be paid rent at the market rates to avoid further losses and make profits.
    - viii. The effective date for the alteration of the terms of the tenancy to be the 1<sup>st</sup> day of December 2023. Reliance was sought on:-



- a. Mutema Uuki Wines and Spirits Distributors Ltd – vs- Thomas K. Mwangi & Others (2004) e KLR which quoted from the case of HCCC 269/93 Tala Investment Ltd – vs- Green spot Ltd and
  - b. Shah and Shah – vs- Kagumba (1978) KLR, 35.
- B. The case for the Tenant.
  - i. The proposed rent increment from Kshs.41,000/- to Kshs.192,840 was unreasonable and without justification.
  - ii. There was need to increase the rent but the same should move from the present rent at Kshs.41,000/- to Kshs.64,600/-.
  - iii. The report by M/S Premier Valuers Ltd depicted the reasonable rent payable on the demised premises.
  - iv. The TW1 was the majority shareholder of the Tenant and was justified to institute these proceedings and testify on its behalf.
  - v. To emphasize on the principle of reasonableness in assessment of the rent payable, reliance was sought from the following case law:-
    - a. Stephen Muthaura – vs- Mary Kinoti (2021) eKLR where the court cited the case of cleaners Ltd – vs- Barclays Bank & Co. (1972) EA 188, and
    - b. Tala Investment Ltd – vs- Green spot Ltd civil Appeal No. 269 of 1993.
    - c. The rent increment should take effect from the date of the judgement as it if takes effect on the date of the notice it can have grave and adverse effect to the Tenant’s business. Reliance was sought from the following cases:-
      - a. Esquire Limited – vs- National Fund for disabled of Kenya (2021) e KLR and
      - b. Supa Duka Nakuru Ltd vs Baringo United Company Ltd in Nakuru ELC Civil Appeal No. 68 of 2016.
11. Having perused all the evidence on record, I am of the view that the issues for determination in this matter are the following:-
  - A. What is the reasonable rent payable on the demised premises.
  - B. What should be the effective date for such rent increment if at all.
  - C. Who should bear the costs of this suit.

**ISSUE NO. A- What is the reasonable rent payable on the demised premises.**

12. The Tenant considered the space occupied as 1,549.56 sq. feet and the reasonable rent payable thereof to be 49.70 per square foot for the space of 1,049.81 Sq ft occupied by the shop and 29.35 per sq ft for the 499.75 for the space occupied by the washrooms. In this, the Tenant lay reliance on four (4) properties said to be within the same locality with the subject premises. This were:-
  - i. L.R No.209/382/3- Argwings Kodhek Road Nairobi City County where the rent payable was alleged to be 48.40 per sq. ft.



- ii. L.R No.209/378/10 Argwings Kodhek Road- Nairobi City where the rent was at 43.01 per sq ft.
  - iii. L.R NO.209/378/10 Argwings Kodhek road where the rent was at 56.82 per sq ft, and
  - iv. LR.No. 209/378/10 Argwings Kodhek road where the rent payable was at 50.54 per sq. ft.
13. It is noteworthy that three of the comparables are within the same building namely L.R No. 209/378/10 Nairobi City. The valuer for the tenant did also not disclose the names of the building with which he made the comparables and only stated that they were in his notes.
  14. He stated that he would be surprised if a square foot of the subject building would be valued at between Kshs.73/- and Kshs.85/-. He therefore vouched for the report. I however find the report deficient in many material information that would give this court the requisite latitude to deliver substantive justice to the parties. The names of the comparable buildings were missing, the report never offered any reasons for the very restricted comparables or even why none was picked from the subject building.
  15. On the other hand, the landlord in its report made material disclosures of all the comparables including their locations and other fundamentals like the matrix employed to reach the proposed rentals for the demised premises. This is to be found at the Landlords exhibit No. 5 at page 8 thereof.
  16. To the Landlord, the rent payable per sq foot in the area was between Kshs.110/- and Kshs.120/-. I would tend to agree with the landlord and are more persuaded by his report in view of the earlier valuation reports prepared in respect of rent assessment for the subject property in earlier suits on related matters and in particular in BPRT case Nos 328, 329 and 330 of 2015.
  17. In the suits, the Tenant's valuer M/S Silvereal appraisers (k) Ltd proposed the rent of Kshs.86.63/- per sq foot in a report prepared on the 17<sup>th</sup> February 2016. M/S Kinyua Koech Ltd had proposed the rent of Kshs.100/- per sq feet in a report dated 15<sup>th</sup> October 2014. The tribunal in its judgement delivered on the 15<sup>th</sup> July 2016 upheld the valuation by the Tenant at Kshs.86.63 per sq ft in assessing the rent payable.
  18. It would therefore in my view be unreasonable to even conceive that a space that was assessed at Kshs.86.63 per sq ft can come down to Kshs.49.70 per sq ft after almost 10 years. I would therefore in taking all matters and circumstances of this case into logical consideration and in applying the principle of reasonableness determine the rent payable for the demised premises at Kshs.110 per sq ft exclusive of VAT and service charge for the lettable area at 1,607 sq feet as per the landlord's valuation report.
  19. In reaching this determination, I have sought reliance in the case of:-
 

Stephen Muthaura – vs- Mary Kinoti (2021) eKLR where the court while citing with approval the case of cleaners Limited – vs- Barclays Bank & co. (1972) EA 188 held that:-

“It is the reasonableness of the rent that must be in the forefront of the Tribunals investigations and determination. It should be the concern of this court too. The average rates per square foot or meter of a number of nearby buildings on the ground floor premises in which similar trades are exercised are among other things relevant to assessing the rent that would reasonably be expected in the open market”.
  20. In view of the valuation reports in BPRT case Nos. 328, 329 and 330 of 2015 and the court's determination thereof, it would qualify the landlord's valuation report as reliable, logical and reasonable against that of the Tenant and therefore reflective of the market forces in the rentals sphere.



21. In the case of Tala investments Ltd – vs- Green Sport Ltd, Civil appeal No. 269 of 1993 the court held that:-

“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 the 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 the Tenant’s valuer’s reports. That is not a proper criteria”.

22. I need not over- emphasis that from the analysis and findings herein before, the landlord’s report is much better report when looked against that of the Tenant.

**ISSUE NO. B- What should be the effective date of such rent increment if at all.**

23. The applicable principles in this regard are now well settled. In the case of Tala Investments Ltd – vs- Greenspot Limited Civil Appeal No. 269 of 1993 the court held that:-

“The ratio decidendi of all the said appeals is that the normal order for the effective date would be that the date specified in the tenancy notice would be proper but the Tribunal has in proper circumstances discretion to alter the effective date and that such discretion must be exercised judicially”.

24. In the case of Esquire Limited – vs- National Bank Fund for Disabled of Kenya (2021) e KLR the court held that:-

“In these circumstances, it would not be fair to order that the assessed rent commences on the date indicated in the notice. In my view, the position would only hold where the Tenant does not oppose the notice to increase rent. It would then be given, not so in this case. I would therefore safely order, and which I hereby do, that the new assessed rent commences from the date of this Ruling.

25. In this matter, I appreciate that the termination notice was to take effect on the 1<sup>st</sup> December 2022. Taking cognizance of the escalation of rent as above determined, back dating the increased rent to 1<sup>st</sup> December 2022 would be devastating to the Tenant’s business and may even kill or force it into liquidation.
26. That is obviously not the purpose for which this court was created. It should protect Tenant’s and their businesses as it ensures that landlord’s rake profits from their enterprises.
27. In further appreciation that the term of this court had at one point lapsed and thus one of the reasons for the delay in conclusion of this matter and further from the above observations, I would order that the increased rent takes effect on the 1<sup>st</sup> day of May 2024.
28. An issue was raised on the standing of the Tenant’s witness namely Frozali Akbarali Kassam Jaffer who testified as TW1. It is true that he never provided any evidence of a resolution to originate these proceedings by the reference dated 21<sup>st</sup> October 2022 or to even represent the Tenant hereof.
29. He however asserted that he was the majority shareholder of the Tenant and that he had the mandate to initiate these proceedings and prosecute the same. In my view, that is not the modus operandi of corporates as known to the law. That omission could as well be fatal to the entire proceedings



commenced by the Tenant. I however determined to administer substantial justice to the parties by invoking the provisions of Article 159(2) (d) of the constitution which provides that:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

- d. “Justice shall be administered without undue regard to procedural technicalities”.

30. The court therefore allowed the Tenant its day in court and both parties were afforded sufficient judicial time before this determination was made.

#### **ISSUE No. C- Who should bear the costs of this suit.**

31. It is apparent that the Tenant’s reference dated 21<sup>st</sup> October 2022 has failed. On the other hand, the landlord’s notice dated 22<sup>nd</sup> August 2022 has largely succeeded. I therefore have no reason to divert from the conventional wisdom of the proviso to Section 27 of the Civil Procedure Act which provides that:-

“Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

I would therefore award costs of this suit to the landlord.

32. In the final analysis, the orders that commend to me are as follows:-

- i. That the reference dated 21<sup>st</sup> October 2022 is dismissed.
- ii. That the notice to alter the terms of the tenancy dated 22<sup>nd</sup> August 2022 is upheld and the rent payable on shop no. 16 within L.R Nos 209/377/11, 12 and 13 in Hurlingham within Nairobi city is increased from Kshs. 41,000/- to Kshs. 176,770 effective the 1<sup>st</sup> day of May, 2024.
- iii. That the Landlord is awarded costs assessed at Kshs.50,000/-.

Those are the orders of the court.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**HON. NDEGWA WAHOME HON. JOYCE MURIGI**

**MEMBER MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL BPRT**

Ruling delivered in the presence of Mr. Kinyua for the Tenant and Mr. Ochieng for the Landlord.

**HON. NDEGWA WAHOME HON. JOYCE MURIGI**

**MEMBER MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL BPRT**

Mr. Kinyua: I wish to apply for the Ruling, proceedings and the order.

Court: The application is allowed on payment of the requisite court fees.

**HON. NDEGWA WAHOME HON. JOYCE MURIGI**

**MEMBER MEMBER**



## **BUSINESS PREMISES RENT TRIBUNAL BPRT**

