REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO 45 OF 1978

GIVINJI MULJI DODHIA .....LANDLORD

VERSUS

JOS HANSEN & SOEHNE (EAST AFRICA) LTD.....TENANT

JUDGMENT

By its order dated 5th April 1978 the Rent Restriction Tribunal dismissed the claim of the landlord (who is the present appellant) to vacant possession, with costs to the tenant measured at Shs 500, and awarded the landlord Shs 45,540, without interest, in respect of arrears of rent for the period from 1st May 1975 to 30th April 1978. The tribunal made no order for costs on this award as it considered that the tenant had been always willing to pay. The landlord appeals against the dismissal of its claim to vacant possession and seeks interest and costs on the sum of Shs 45,540.

Dealing first with the question of interest, it will be observed that, although the plaint does not claim interest, by the Civil Procedure Rules, Order VII, rule 6, the Court may always allow interest, even if not claimed; and, in my opinion, as the tenant had the use of the money over the years, interest at Court rates can fairly be allowed.

As to the costs, however, the landlord admitted in cross-examination that, although he had accepted no rent, the tenant had been willing to pay, and it was on this ground that the tribunal, in its discretion, decided not to award costs on the arrears of rent. I see no reason for interfering with the exercise of that discretion.

The principal issue is whether the tenant, which is a private company incorporated with limited liability in Kenya and which holds the lessee's interest in the suit premises, is entitled to protection from dispossession by virtue of section 24 of the Rent Restriction Act.

For the landlord, which is the successor in title to the original lessors, it is contended that the Act (to which, for convenience, I will refer from time to time as the "principal Act") applies only to dwelling-houses actually used for human occupation; while the tenant submits that, although not itself a human person, it is entitled to the protection of the Act if (as is the case) the premises are vicariously occupied as dwelling-houses in its name by one or more human members of its staff, either singly or in succession.

By its long title the Act is designated as a measure to make provision for:

> restricting the increase of rent, the right to possession and the exaction of premiums and for fixing standard rents, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling house.

The characteristic of "dwelling-house" is therefore inherent in the Act in regard to the premises intended to be protected.

The Act forms one of the series of measures enacted for the purpose of controlling rents, commencing with the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940, and continuing with amending Acts passed in 1941, 1942, 1943, 1945, 1948 and 1949. Generally speaking, the class of houses falling within all these Acts are, or include, "dwelling-houses," that is (as defined in the principal Act) "any house or part of a house or room used as a dwelling or place of residence". Similarly, the term "tenant" (as used in the Act) includes any person from time to time deriving title under the original tenant.

With the exception of section 15(1) (g) of the Act (which substantially repeats section 16(1) (i) of the Act of 1948), there is nothing in the Act which could be said expressly either to extend or restrict this meaning of "tenant". Accordingly, applying the principle of interpretation contained in section 3 of the Interpretation and General Provisions Act that, save where there is something in the subject or context inconsistent with such a construction or interpretation, the word "person" includes any company or association or body of persons, corporate or unincorporate, I see nothing in the principal Act to justify restricting the meaning of "tenant" to a human tenant.

Turning to section 15 of the principal Act, we find in it a general restriction upon the power of the court to make orders for the recovery of possession of premises or for the ejectment of tenants, and (in short) the position is that such an order can be made only in certain defined circumstances.

One of these circumstances, as set out in section 15(1) (g), is that:

> (i) the tenant has, without the consent in writing of the landlord, assigned, sub-let or parted with the possession of the premises or any part thereof;
>
> (ii) a landlord who has obtained or is entitled to obtain an ejectment order on this ground may at his option either obtain a similar order against the occupier or treat such occupier as his tenant;
>
> (iii) for the purposes of this paragraph, if the tenant is a private limited company the transfer, without the consent of landlord, of more than 50 per centum of the total nominal value of the issued shares of the company shall be deemed to be an assignment of the premises.

It has been suggested that section 15(1) (g) is perhaps an unhappy piece of drafting but, however that may be, there is no escaping the fact that paragraph (g) clearly provides that where a tenant is a private company limited by shares the transfer, without the consent of the landlord, of more than 50 per cent of the total nominal value of the issued shares shall be deemed to be an assignment by the tenant of the premises themselves within the meaning of section 15 (1) (g) (i).

The tenant here is a private company limited by shares and falls within section 15(1) (g) (iii) and, therefore, it is sufficient to say that for the purpose of paragraph (g) a transfer, without the consent of the landlord of more than 50 per cent of the total nominal value of the issued shares would be deemed to be an assignment of the premises. Although it is not suggested that any such transfer of shares in fact took place, the effect of section 15(1) (g) (iii) is to reinforce the contention that, by reason of section 3 of the interpretation and General Provisions Act, the word "person", as used in the definition of "tenant" in section 4(1) of the principal Act, must be taken to cover a company or association or body of persons, corporate or incorporate, and in particular a private limited company such as the tenant in this case.

Mr Khanna has been at pains to contend that, on the basis of wellestablished precedent, rent restriction legislation should be so construed as to afford protection from ejectment to natural persons in physical occupation of premises falling under the legislation, but not such protection to incorporated bodies incapable of using premises as a human dwelling or home.

He takes his stand upon a number of well-known decisions, including the Kenya case *Tara Singh and Jwala Singh v Harnam Singh* (1944) 11 EACA 24, the English decision in *Skinner v Geary* [1931] 2 KB

546, and a number of late authorities. On these he bases the question of principle: have the Courts in this country, at Court of Appeal level binding on the High Court, adopted the proposition that the principal Act protects only a natural person in physical occupation of premises falling under the Act after the expiration of the contract of tenancy in the sense of the premises being his home out of which he cannot be turned? If we have adopted this criterion, he submits, then if that approach is to be maintained we cannot hold that a limited company, which has no physical body, can have a home in the same sense as an individual human being and be protected under the Act.

The material distinction between *Tara Singh's* case and the present is that that case turned on the language of the Act of 1940, which contains no provision analogous to section 15(1) (g) of the principal Act. A similar distinction may be drawn between the English cases cited by Mr Khanna and the present case, and by not following those decisions this Court is in no way challenging their correctness. The position in this country now is that a private limited company, which is a tenant of premises falling within the principal Act, is entitled to the same degree of benefit under the Act as it would enjoy if it were a human person, and I can see no logical ground for excluding the benefits conferred by section 24 of the Act.

In the result, save as to the question of interest on the arrears of rent, the appeal fails and is dismissed with costs. There will be a certificate for two advocates.

Chesoni J. The appellant (hereafter called "the landlord") is the owner of flats 3 and 6 in the premises situated on land reference No 1870/1/82, General Mathenge Drive, Nairobi. In 1974 the flats were leased to the respondent (hereafter referred to as "the tenant"). There is a lease agreement in respect of each flat. According to the agreements, the lease for flat 3 commenced on 1st May 1974, terminated on 30th April 1975 and was at a rental of Shs 615 per month, plus water charges; the lease for flat 6 commenced on 1st August 1974, terminated on 31st July 1975, and was at a monthly rental of Shs 650, plus water charges. It appears that when the leases terminated on their respective dates the tenancy was not (since 1st May 1975 and 1st August 1975 in respect of flats 3 and 6, respectively) renewed. The plaint states that the tenancy of each flat has, since the expiry of the lease, been monthly (running from the beginning to the end of each calendar month) and was duly determined by a notice to quit dated 24th August 1977 which required the tenant to deliver vacant possession on 30th September 1977.

The tenant did not vacate the flats (or either of them) and the landlord filed a suit in the Rent Restriction Tribunal at Nairobi praying for an order for possession of the flats, judgment for arrears of rent from the date of termination of the leases in 1975 to 30th September 1977, mesne profits from 1st October until possession, and costs of the suit. The tribunal dismissed the suit on the issue of vacant possession of the flats, but gave judgment for the landlord for the sum of Shs 45,540 (being the rent due in respect of the two flats from 1st May 1975 to 30th April 1978). This appeal comes to us from that order of the tribunal.

The tenant is a limited liability company.

The memorandum of appeal lists four grounds of appeal, with the second ground being divided into thirteen sub-paragraphs of grievance. The third ground deals with jurisdiction of the tribunal and the fourth with costs and interest on the sum of the judgment which the tribunal denied the landlord. The second ground is about the position of a limited liability company under the Rent Restriction Act. The first ground is about the tenancy.

In the first ground it is stated that there was no warrant for holding that the tenancy of the flats after expiry of the leases was deemed to be a monthly tenancy, or that the same was not in dispute. In paragraph 1 of the plaint the landlord states " [The tenant] is a monthly tenant in respect of each of the flats ..." This is clarified in paragraph 2 of the plaint where it is stated that:

> the [tenant's] tenancy has in the case of flat 3 since 1st May 1975 and in the case of flat 6 since 1st August 1975 been deemed to be a monthly tenancy ... and was duly determined by a notice to quit dated 24th August 1977 duly served upon it on or about that date requiring the [tenant] to deliver up possession on 30th September 1977.

When Mr Khanna appeared before us he argued that the tenancy was deemed to be monthly tenancy prior to the notice to quit and although in paragraph 1 of the plaint the tenancy is said to be deemed to be monthly, it was put to an end on 30th 'September 1977, and there was no tenancy of any kind whatsoever. In the circumstances the tribunal could not have held that there was a monthly tenancy. Mr Khanna put the tenancy in

three stages: 1st stage, a contractual tenancy (ie flat 3, 1st May 1974 to 30th April 1975; and flat 6, 1st August 1974 to 31st July 1975); 2nd stage, on expiration became monthly tenancy by acceptance of rent until 30th September 1977; and 3rd stage, put to an end on 30th September 1977 by notice to quit dated 24th August 1977. He further argued that the tenant had not pleaded or contended that the notice to quit was bad, and, since this was not argued before the tribunal even if the notice were bad, the tenant could not argue it for the first time on appeal. It is estopped. Although in his evidence before the tribunal and landlord (Givinji Mulji Dodhia) said that he never accepted rent after the expiry of the leases in 1975, he said (in examination-in-chief) that he was asking for arrears of rent from 1st May 1975 to 30th September 1977 and for mesne profits from 1st October 1977. The evidence before the tribunal, therefore, supports the three stages of the tenancy as set out by Mr Khanna. The tribunal did not say that it had held that the tenancy was monthly; but, by giving judgment for the landlord for rent due from 1st May 1975 to 30th April 1978, the tribunal was saying that the contractual tenancy which had expired had become a monthly tenancy and so remained. It ignored the notice to quit. In the light of the pleadings (paragraphs 1 and 2 of the plaint) and the evidence of the landlord, there is much force in Mr Khanna's contention that there was no evidence before the tribunal for it to have held that the tenancy was deemed to be monthly after 30th September 1977, that is from 1st October 1977 (when the notice to quit became effective). In my opinion the tenancy was put to an end by the notice to quit dated 24th August 1977. The tribunal was not invited, nor was this Court, to go into the validity of the notice. There was no tenancy as from 1st October 1977.

From that date the tenant ceased to hold the premises as a tenant, but held over after the lawful determination of its tenancy. Whether it could hold over is another matter. This is why Mr Khanna asked us to give judgment for the landlord for arrears of the rent in the sum of Shs 36,685 for the two flats from 1st May 1975 to 30th September 1977 and mesne profits at the rate of Shs 615 for flat 3 and Shs 650 for flat 6 from 1st October 1977 until the date of delivery of possession. So, from 1st October 1977, the tenancy was statutory and not monthly.

I shall next turn to the fourth ground dealing with costs and interest. It appears from the last paragraph of the tribunal's judgment that it did not award to the landlord costs of the suit on the judgment of Shs 45,540 given in his favour, because the tenant had always been willing to pay. Costs are discretionary, but, even so, it is a serious matter to deprive a successful litigant of his costs unless there are good grounds for doing so. The fact that a party was always willing and ready to pay another party is not sufficient a cause for depriving the other party its costs, unless the party willing to pay deposited the money into Court or there is evidence that the money was tendered to, but refused by, the successful party. The law is that costs follow the event. Thus section 27(1) of the Civil Procedure Act states:

> ... the costs of and incident to all suits shall be in the discretion of the court or judge ... 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.

The landlord had succeeded in the issue of rent in arrears. If there was a good reason not to give him costs the tribunal would have given the reason, but it did not. Where the Court or judge decides in any suit, cause, or matter or issue that the costs" shall not follow the event or part of the event that is successful the Court or judge should give the reason for the decision. In the absence of any good reason the landlord should have been awarded costs and interest on the judgment sum of Shs 45,540. Nevertheless as there is no evidence that the discretion was exercised on wrong principles or unjudicially I would not interfere.

On the question of jurisdiction this is what the chairman said:

> It would appear, on the English authorities cited by Mr Khanna, that a corporation is excluded from the Act. That being so, if a landlord seeks an order for vacant possession, I am of the opinion

> that he has to go to the High Court to ask for this order as this tribunal will have no power to make such order as far as possession was concerned.

It is not clear from this passage whether the chairman was saying that the tribunal had jurisdiction, or had no jurisdiction. To me it appears what he was saying was that, if corporations are excluded from the Act, the tribunal would not have jurisdiction as the tribunal's jurisdiction extends only to matters within the Act. This view is supported by the chairman's ruling:

> I therefore rule that the [tenant] is protected by the Act. Accordingly I would advice the members to dismiss the [landlords] suit on the issue of vacant possession.

The chairman did not, in my opinion, hold that the tribunal had no jurisdiction. There was therefore, nothing to appeal from on this issue.

The main issue before the tribunal and before this Court is whether a private limited company is protected as a statutory tenant under the Rent Restriction Act after the expiration of its contractual tenancy; and whether it can, under such protection, rely upon vicarious occupation not of a static person from beginning to the end but by a series of occupants?

A number of English authorities were cited to us by Mr Khanna. Among these are *Skinner v Geary* [1931] 2 KB 546 *Hiller v United Dairies (London) Ltd* [1934] 1 KB 57, *Curl v Angelo* [1948] 2 All ER 189, *Cove v Flick* [1954] 2 All ER 441, and G*E Stevens (High Wycombe) Ltd v High Wycombe Corporation* [1962] 2 QB 547. These cases have emphasised the view that to be entitled to the protection under the English Rent Restriction Acts, a tenant must be in personal or actual possession of the premises in respect of which he seeks that protection. Thus, before a tenant can become a statutory tenant his occupation must have an essentially domestic quality. The occupation under the Act must therefore be of a personal nature. These English cases have carried that proposition further and said that, because a company cannot reside in the sense which is necessary for a statutory tenant because its(a company's) occupation can never acquire the domestic quality, it (ie a limited company) cannot be a tenant to whom the Rent Restriction Acts apply; and, in the result, a limited company is not entitled to the protection of these Acts accorded statutory tenants. In fact in *Hiller v United Dairies (London)* Ltd [1934] 1 KB 57 it was clearly held by Lord Wright that limited companies are incapable of having any protection under the English Rent Acts. In that case Lord Wright said (at page 61):

> If the rights under the Acts which are given to the statutory tenant are, as this Court has held in several cases, purely personal, 1 do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted.

The English view is precisely that and I need not dwell any more on it. The position is clear that in England both private and public limited companies cannot be a statutory tenant and are not protected under the English Rent Restriction Acts. The rule is not limited to corporations but extends to non-resident tenant organisations like church organisations.

There are a number of cases in this country where the English view has been discussed. Mr Khanna contended that since 1944 the Court of Appeal for Eastern Africa has adopted the English theory that, in so far as eviction is concerned, the Act protects only human beings and does not extend to bodies vicariously in occupation. This was the case in *Tara Singh and Jwala Singh v Harnam Singh* (1944) 11 EACA 24, which accepted *Skinner v Geary* [1931) 2 KB 546. In *Tara Singh's* case the respondent ie the landlord sued the appellants to recover possession of a room and kitchen in the respondent's premises in Nairobi. The first appellant (who was the son of the second appellant) had left the second appellant living in the premises as the first appellant went to live elsewhere with his wife who had arrived from India. The notice was served on the first appellant.

Following the decision in *Skinner v Geary* the subordinate court judge held that a tenant who was not in actual possession was not entitled to the protection of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940, and that the landlord would be entitled to an order for possession, were it

not for section 11(2) of the Ordinance (which did not permit a landlord to recover possession of a dwelling-house if by such recovery he and his wife and/or minor children would be in occupation of, or would acquire the right to occupy, more than one dwelling-house at the same time). The action was for that reason dismissed. The landlord's appeal was allowed by the High Court and the tenant appealed to the Court of Appeal for Eastern Africa. It was held, *inter alia*:

> that a tenant to be entitled to the protection afforded by the Ordinance, must be in personal occupation or actual possession of the premises in respect of which he seeks that protection.

Sir Henry Webb CJ said (at page 28):

> I will content myself with expressing my respectful agreement with the judgments of Scrutton and Slesser LJJ, in the case of *Skinner v Geary* [1931] 2 KB 546, which, in my opinion, are just as applicable here as in England.

The *Tara Singh* case represented the view of our Courts in the 1940s, in so far as statutory tenants were concerned and whether organisations and private limited companies which could not be in personal occupation or actual possession of premises could be protected under the Increase of Rent and Mortgage Interest (Restrictions) Ordinance 1940 (the forerunner of our present-day Rent Restriction Act). We must, all the same, bear in mind the fact that the original tenant had actually physically left the premises and was not himself in possession. With that in mind there is no need to deal with all early cases; but I would like to look at the development of the rent restriction law in Kenya and how it is affected by the case law of this country and by the previous Court of Appeal for Eastern Africa decisions.

The Increase of Rent and Mortgage Interest (Restrictions) Ordinance 1940 of Kenya is substantially similar to the English Increase of Rent and Mortgage Interest (Restrictions) Act 1920, on the provisions of which the decision in *Skinner v Geary* [1931] 2 KB 546 was based.

The sections of the present Rent Restriction Act I am concerned with are sections 4(1) (interpretation), 15(1) (restriction on right to possession) and 24(1) (conditions of statutory tenancy), which are equivalent to sections 2(1), 8(1) and 15(1) of the 1940 Ordinance. The relevant English sections are sections 5(1) (restriction on the right to possession) and 15(1) (statutory tenancy). Section 8(1) (a) to (g) of the 1940 Ordinance and section 5(1) (a) to (g) of the 1920 English Act are identical in wording. Nowhere in these two sections is the term "private limited company" mentioned. In 1941 the Legislature in Kenya, by Ordinance No 37 of 1941, inserted paragraphs (h) and (i) into section 8(1) and, by Ordinance No 12 of 1943, paragraph (j) was added to the section. Paragraph (h) (added on 29*th* December 1941) is as follows:

> the tenant without the consent of the landlord has at any time after the 1st day or December 1941, or the prescribed date, whichever is the later, assigned or sublet the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sublet.

There is no such provision about sub-letting or assignment in the English Act. Here then was the start of the parting of company between the English and our local Acts. The other paragraphs (section 8(1) (i) and (j) are not of relevance to this case. Paragraph (h), although not in the English Act, did not alter the position of private limited liability companies in so far as protection of a statutory tenant is concerned. Such corporations were not protected. This was the position in 1944 when *Tara Singh and Jwala Singh v Harnam Singh* [1944] 11 EACA 24 was decided.

On 8th June 1949, Governor P E Mitchell, on behalf of His Majesty, assented to Ordinance No 22 of 1949 which, in section 35, provided as follows: "The Increase of Rent and of Mortgage Interest (Restrictions) Ordinance 1940 ... is hereby repealed .... " So the 1949 Increase of Rent (Restrictions) Ordinance expressly abrogated the 1940 statute. Restriction on right to possession was then enacted under section 16(1). Section 16(1) (i) reads:

> the tenant has, without the consent in writing of the landlord, at any time between the 1st day of December 1941, or the prescribed date, whichever is the later, and the commencement of this

> Ordinance, assigned or sublet the whole of the premises, or sub-let part of the premises the remainder being already sub-let; or, at any time after the commencement of this ordinance, has, without the consent in writing of the landlord, assigned, sub-let or part thereof ...
>
> For the purpose of this paragraph, if the tenant is a private limited company or partnership the transfer, without the consent of the landlord, of more than 50 per centum of the share capital of the company or the interest of the partners in the partnership shall be deemed to be an assignment of the premises.

For the first time the Legislature thought of private limited companies. Why? It cannot be said that the Legislature had not known that companies were tenants. Can it be said that the inclusion of the whole of this new sub-paragraph of section 16(1) (i) in the 1949 Ordinance was mere draftman's verbiage or accident, and, had no effect, and that the Legislature always intended that the position of protected tenants in Kenya should remain for ever the same as it was under the English legislation? The Court was urged by Mr Khanna to believe and find that it was so. Then, since the question of sub-letting and assignment by tenants had been well covered by the 1941 amendment which introduced paragraph (h) why would the draftsman and the Legislature want to confuse simple minds like mine? Mr Khanna argued that if the Legislature had not intended the position of private limited companies to be the same in Kenya and in England, in that they were not protected under the Rent Restriction Acts of the two countries, the very eminent and experienced judges who decided cases under the Rent Restriction Act in Kenya and East Africa after the 1949 Ordinance would have said so. The Legislature might have intended the position in Kenya to be the same as that in England (although I do not say that it did intend that) but the reason for holding that that was the intention of the Kenya Legislature lacks both merit and persuasion. This is because the cases cited to the Court where the Court is alleged to have failed to say that a private limited liabi1ity company was protected under the Rent Restriction Act were not dealing with private limited liability companies as the tenants, and, in any event, the question did not arise. Let us look at some of these cases. In *Alimohamed Damji v Punja Hirju Gudka* (1953) 20 EACA 78 the question was whether the onus is on a non-occupying statutory tenant, or the landlord to prove the *animus revertendi* and it was held that it was on the statutory tenant. How would anyone, let alone the Court, have brought into such a case the issue of a private limited liability company being or not being protected under the Act? The tenant was not even a limited liability company. In *Devji Hamir v Gilbert Scott Morley* (1950) 17 EACA 18 the tenant had given up possession of the premises and gone to live elsewhere, leaving behind only some of his belongings. The case was between two individuals and no private limited liability company was involved, so the holding by the Court that the Rent and Mortgage Restriction Ordinance did not apply to a non-occupying tenant who had given up occupation without any intention to return does not carry us anywhere. The question before us could not have been and was not before the Court in that case. *Hindu Dispensary, Zanzibar v NA Patwa & Sons* [1958] EA 74 was a case involving an organisation, ie a dispensary, that was not a private limited liability company and so, whatever might have been said there about a private limited company, was *obiter* and since the issue before us is restricted to a private limited liability company a decision on the position of a dispensary cannot be of much assistance. It will all the same be noted that in this later case the Court of Appeal for Eastern Africa said (at page 78) that:

> A company.... can have possession of business premises by its servants or agents. In fact, that is the only way in which it can have physical possession.

That case, however, dealt with the point whether a body corporate could be a "suitable tenant" of business premises under a section of the Zanzibar Rent Restriction Decree of 1953. The Decree also applied to business premises and it was held that a trading company could be a "suitable tenant" of premises for the purposes of its business. Even if the decision in that case had been on the issue before us it would have been of little, if any, use because the Kenya Rent Restriction Act does not apply to business premises, although the 1949 Ordinance applied to both business premises and dwelling-houses. *Kampala Cotton Co Ltd v Pravinlal V Madhvani* (1954) 21 EACA 129 decided that the provision of housing for the staff of a company may be a normal part of the business operations of the company tenant. Although the question whether a company in Uganda could successfully claim the vicarious occupation was deliberately left undecided. In any event, even if the question had been decided in that case, the facts in the *Kampala Cotton Co Ltd* case are different from the facts of the case before us, in that (in that case) the premises,

although a dwelling-house, were let to the company tenant for use as a shop and/or a private dwelling-house. The user was business-cum-residential. In our case the two flats were let to the company tenant, by virtue of clause 2 (xiv) of the lease agreement, "to use for their own residential purpose only and not to carry on any form of business". There were express forbidding words, in our case, in the lease for the premises not to be used for any form of business purposes.

It should be noted that in the *Kampala Cotton Co Ltd* case the Court, after stating that in *Skinner v Geary* [1931] 2 KB 546 it was said that "the right of the statutory tenant is a purely personal right to occupy the house as his house", and in *Hiller v United Dairies (London) Ltd* [1934] l KB 57 it was held that a limited company was not to be entitled to the protection of the Rent Restriction Acts as a statutory tenant (on the short ground that a company could not fulfill the requirement of personal occupation of the premises as a house, in that it could not have that domestic quality, it could not have a home and it could not in that sense reside, eat or sleep) expressly said that the Uganda statute differed from the English Acts in two important respects. Briggs JA said that the Uganda statute protected businesses as well as dwellings, and that it did not contain any provision similar to the words "so long as he retains possession" in section 15 of the English 1920 Act. These words of course appear in section 24 of the Kenya Act. Sir Newnham Worley Ag P said (at page 137) that:

> The scope and provisions of the Uganda Rent Restriction Ordinance are so different from either the English Rent Acts or the corresponding Kenya legislation that the greatest care has to be observed in seeking precedents or guidance from cases decided under those enactments.

Perhaps one would say the same of the English Rent Act and the Kenya Rent Restriction Act since 1949. So the *Kampala Cotton Co Ltd* case does not help us that much on the issue before us.

An East African Court of Appeal case that cannot go unconsidered is *Tanganyika Shell Ltd v K Jafarbadwalla* [1965] EA 599. There the tenant company was a public company. The tenant applied to the landlord for consent to assign the lease to its associate company, which was refused. The board which had power to give consent where it was unreasonably withheld, gave consent to the assignment of the tenancy. The lease having expired, associate company became the statutory tenant. The landlord successfully appealed to the High Court which held that the word "tenant" in the Tanganyika Rent Restriction Act, section 30 means a contractual tenant and the context includes a statutory tenant; that the board erred in treating the tenant's application as one for consent to assign the last eight months of its lease as the lease board was not vested with jurisdiction to grant consent having effect from a date prior to that of the application; that the word "tenant" in the context of section 19 of the Rent Restriction Act 1962 should be construed as restrictively as it had been in England, that is to say so as to extend the protection of the Rent Restriction Act 1962 only to persons "personally in occupation"; and that a public limited company (as opposed to a private company or a partnership) was incapable of holding over a statutory tenant under section 19 of the Rent Restriction Act 1962. On further appeal, the Court of Appeal for Eastern Africa held that:

> (ii) the provisions of section 19(g) of the Rent Restriction Act 1962 shows that the Legislature of Tanganyika did not intend the word "tenant" in that section to have the restricted meaning it had in England but instead intended it to include corporations as well as natural persons; (iii) in Tanganyika a limited liability company, whether public or private, may claim protection as a statutory tenant because it is implicit in section 19(g).

In the instant case, Mr Khanna while vehemently attacking the decision in the *Tanganyika Shell Co Ltd* case as hasty, has relied heavily on the English cases. I do not know why he did so; nor do I know how he reached the conclusion that the decision in the *Tanganyika Shell Co Ltd* case was hasty. It is quite clear that there is no provision in the English Rent Act similar to section 19(1) (g) of the Tanganyika Rent Restriction Act 1962 and section 15(1) (g) of the Kenya Rent Restriction Act. The two sections are now set out below. The Tanganyika Rent Restriction Act 1962, section 19(1) (g) proviso (this is the material part of the section) states:

> For the purposes of this paragraph, if the tenant is a private limited company or partnership the

> transfer, without the consent of the landlord, of more than 50 per centum of the share capital of the company or the interest of the partners in the partnership shall be deemed to be an assignment of the premises.

The Kenya legislation does not have the words "or partnership" but as we are not dealing with a partnership that does not matter. Section 15(1) (g) (iii) reads:

> for the purposes of this paragraph, if the tenant is a private limited company the transfer, without the consent of the landlord, of more than 50 per centum of the total nominal value of the issued shares of the company shall be deemed to be an assignment of the premises.

The provisions of our section 15 (1) (g) (iii) like those of the Rent Restriction Act 1962 of Tanganyika, clearly show that the word "tenant" as used in the Act means and includes a private limited company. The term "tenant" under the Act is defined in section 4 (1) as follows:

> "tenant" includes a sub-tenant and any person from time to time deriving title under the original tenant, and the widow of a tenant who was residing with him at the time of his death, or where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as may be determined by the Court notwithstanding that the rights under the tenancy may have passed, on the tenant's death, to some other person.

Section 15 protects a tenant from possession. Section 24 protects a tenant who retains possession at the expiration of the lease from possession.

Section 24(1) states:

> A tenant who under the provisions of this Act, retains possession of any premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so long as the same are consistent with the provisions of this Act ...

In my opinion the word "tenant" as used in both sections 15 and 24 has the same meaning and it includes a private limited company.

I do not think that including a private limited company in the definition of the word "tenant" takes away the theory of the occupation of the premises being of a domestic nature. That theory does not necessarily arise from how the occupant came into occupation, ie whether vicariously or otherwise, but from the use of the premises. The occupant may be occupying the premises vicariously. That does not matter. What is relevant is, provided that he is there lawfully, how is he using the premises? Is he using the premises as a home, ie a dwelling-house, or as a place of business? If as a dwelling-house, then the Act applies *in toto* and he is protected through the original lessee from whom he derives his use of the premises. If the premises are being used as a place of business, he does not come within the Act. The test is, therefore, what are the premises used as? It is not who uses or occupies the premises?

Our Act contains a provision on the application of the Act, ie section 3. Under that section the "Act applies to every dwelling house, other than (a) an excepted dwelling-house...." The latter means a dwelling-house belonging to any class but which the Minister, by notice in the Gazette, excepts from the provisions of the Act. The Schedule to the Act gives the classes of dwelling-houses which have been excepted from the provisions of the Act, and these are dwelling-houses which are the property of and let to the tenant by the Government, the former Community, the East African Harbours Corporation or the former East African Posts and Telecommunications Corporation or a local authority. Indeed, here it is these bodies who are the landlords; but what is important is that a tenant who would otherwise, be protected by the Act is excluded expressly by the Legislature, even though he is in a dwelling-house. In my opinion if it had been the intention of our Legislature to exclude any class of tenant from the protection of the Act it would have done so expressly; and, if the Legislature had overlooked the matter, the Minister would have corrected the position and said "for the purposes of section 24 of this Act a dwellinghouse let to a private limited company is an excepted dwelling-house".

The Court has been urged by Mr Khanna to accept the interpretation of the English legislation together with the cases decided in England on their own facts under that legislation, the intention of whose Legislature I do not know, although I can guess, and further urged us to apply those cases and interpretation to Kenya in the face of our local legislation which is very clear on the point at issue. So as in *Tanganyika Shell Co Ltd v K Jafarbadwalla* [1965] EA 599, 605, the Court has been referred to a host of English cases, to the effect that a limited liability company cannot become a statutory tenant under the English Rent Restriction Acts and, further, that the protection afforded a tenant in so far as recovery of possession is concerned does not apply to a limited company. If I were sitting in England in one of Her Majesty's Courts I would hold the same; but I am not. I am sitting in Nairobi in Kenya, in one of His Excellency the President's Courts. If there was no municipal legislation and what applied here were the English Rent Restriction Acts, I would (perhaps) hold the same as the English Courts have done but that is not the position. If the English and Kenya Acts were in all material parts similar and the English Acts had a provision similar to our section 15 (i) (g) (iii) or our Act did not have this provision (as the case was before the 1949 Ordinance), I would hold the same; but the English and Kenyan Acts are not similar. They are very different.

What then is the position? It is simple. The English legislation is quite different from the Kenyan Act, in that it does not contain a provision as to a private limited company as set out in section 15(i) (g) (iii) of the Rent Restriction Act. This section makes it quite clear that the Kenya Legislature intended to (and in fact did) extend the protection of section 15 to a private limited company which is the tenant of a dwelling-house. Section 15 protects tenants during the existence of a tenancy contract. After expiry of the original contract, the tenants in a dwelling-house are protected by section 24. There can be no doubt that, in my view, section 24 extends the protection of section 15 to statutory tenants, ie those who retain possession after the end of the original contract. As was said in the *Tanganyika Shell Co Ltd* case at page 605, the Legislature must have intended that the word "tenant" in section 24 should have the same meaning as it has in section 15 and throughout the Act. Therefore the meaning of the term "tenant" under section 24 must be given its ordinary meaning and not a restricted one and it includes a private limited company.

Our Act, although founded upon the English Acts in certain respects, gives a considerably wider protection to tenants in a dwelling-house than the English Acts. That is what our Legislature intended it to do, and, so it shall be. Under that wider protection a private limited company can be a statutory tenant and is protected.

The parties' intention in the original contract was that there be vicarious occupation, as clause 2 (xiv) of the tenancy agreement provides for the tenant to use the demised premises for their own residential purpose only. The landlord knew the tenant was a private limited company who could not by itself physically occupy the premises. Since, in my opinion, section 15 and 24 protect tenants in a dwelling-house throughout the period they occupy the dwelling-house, a tenant who vicariously derives his right of occupation through a private limited company is protected under section 24 as a statutory tenant and a private limited company can, through such tenant, be a statutory tenant and is protected under the Act. Accordingly, the tenant, if a private limited company, would be protected under the Act. For the reasons I have given above I would dismiss the appeal with costs and award a certificate for two counsel on the ordinary scale for the High Court.

Harris J The facts have been adequately set out in the judgment of Chesoni J and I need not repeat them.

Appeal dismissed with costs.

Dated and delivered at Nairobi this 29th March 1979.

HARRIS

JUDGE

Z.R CHESONI

JUDGE