REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO.29 OF 2015

TRANSALLIED LIMITED.....APPELLANT

VERSUS

SAKAI TRADING LIMITED.....RESPONDENT

JUDGMENT

At all material times, the Appellant was a sub-tenant of a company known as Paging Services Limited in respect of a portion of all that parcel of land known as Land Reference Number 1/565, Ngong Road, Nairobi (hereinafter referred to a "the suit property") for a period of 5 years and 3 months with effect from 1st April, 2004 on terms and conditions that were set out in the sub-lease dated 1st July, 2003. On or about 17th November, 2008, the then owner of the suit property which was the Appellant's head lessor, Denton Court Limited sold and transferred the suit property to the Respondent at a consideration of Kshs.22,000,000/=. On 27th March 2009, the Respondent served the Appellant with a three (3) months' notice to vacate and handover possession of the suit property to the Respondent.

On 17th June 2009, the Appellant filed a complaint at the Business Premises Rent Tribunal (hereinafter "the tribunal") against the Respondent claiming that the Respondent had subjected it to harassment and had issued it with an illegal notice requiring it to vacate the suit property. Together with the complaint, the Appellant filed an application by way of Chamber Summons dated 17th June 2009 seeking an interlocutory injunction to restrain the Respondent from harassing it or in any other manner interfering with its quiet enjoyment of the suit property pending the hearing of the complaint.

On 18th May 2010, the court directed that the Appellant's complaint be heard on affidavit evidence and submissions. In a ruling delivered on 3rd September 2010, the tribunal struck out the Appellant's complaint on the ground that it had no jurisdiction over the suit property. In the said ruling, the tribunal made a finding that the suit property was residential and not business premises and as such it had no jurisdiction over the same.

On 8th September 2010, the Appellant filed an application by way of Notice of Motion of the same date seeking a review of the tribunals said order of 3rd September 2010. The review application was brought on the grounds among others that there was apparent error on the faceof the record of the tribunal and that the Appellant had discovered new and important evidence which it could not present to the tribunal during the hearing of the complaint. The Appellant contended that the issue of the jurisdiction of the tribunal was raised by the Respondent in its advocate's submissions and as such the Appellant was not given an opportunity to rebut the same. In its affidavit in support of the application for review, the

Appellant attached several documents to demonstrate that the user of suit property was commercial and not residential. The Appellant contended that the user of the suit property had been extended to include commercial and what the Appellant was carrying out on the property was a business venture. The Appellant exhibited among others,Single Business Permitsthat had been issued to it by the City Council of Nairobi between 2005 and 2010 to demonstrate that it was carrying out business on the suit property.

The Appellant's application for review was opposed by the Respondent on several grounds. The application was heard by the chairperson of the tribunal, Mochache D. who dismissed the same in a ruling delivered on 1st July 2011. The tribunal held that the Appellant had failed to prove that the user of the suit property had changed from residential to commercial and as such there was no basis for the review which was sought by the Appellant. The tribunal held that in the absence of evidence of change of user from commercial to residential on the title of the suit property, the nature of the undertaking which the Appellant was carrying out on the suit property did not matter. The Tribunal held further that the user for which the Appellant and the Respondent had put the suit property was unlawful and as such the tribunal could not lend its aid to any of the parties.

It is the tribunal's said ruling of 1st July 2011 which is the subject of this appeal. In its memorandum of appeal dated 13th July 2011 the Appellant has challenged the decision of the tribunal made on 1st July 2011 on the following grounds:-

1. That the Honourable Chairperson of the tribunal erred in law and fact in finding that the premises in question were not business premises.

2. That the Honourable Chairperson of the tribunal erred in law and fact in relying on extraneous issues that were outside the ambit of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301 of the Laws of Kenya.

3. That the Chairperson of the tribunal erred in law and fact in finding that the premises were not business premises despite the express provisions and definitions in Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 of the Laws of Kenya.

4. That the Chairperson of the tribunal erred in law and fact in divesting herself of jurisdiction on account of a breach by the Landlord to the disadvantage of the Tenant.

5. That the Chairperson of the tribunal erred in law and fact in finding that the premises were not business premises in spite of the fact that the City Council of Nairobi had issued a Change of User for the premises.

6. That the Chairperson of the tribunal erred in law and fact in giving deference to another statute and abdicating judicial responsibility and jurisdiction imposed on her by the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap. 301 of the Laws of Kenya.

7. That the Chairperson of the tribunal erred in law and fact in making a finding that she could not hear the complaint yet she had invalidated the agreement which action placed the Tenant firmly within the ambit of a controlled tenancy.

8. That the Learned Chairperson of the tribunal erred in law and fact by finding that she had no jurisdiction on the matter in spite of having made an earlier ruling stating that she had jurisdiction.

9. That the Learned Chairperson of the tribunal erred in law and fact by holding that the premises being the subject matter of the proceedings were not business premises in spite of all parties and the tribunal having treated it as such. The parties created covenants for the said premises as business premises.

10. That Learned Chairperson of the tribunal erred in law and fact in failing to consider that the Nairobi City Council had issued trading licenses for the entire period of the tenancy spanning seven

years and had issued a Change of User for the premises for use as business premises.

11. That the Learned Chairperson of the tribunal erred in law and fact by finding that the premises, the subject of the proceedings were prima facie not controlled in spite of having made a comprehensive interlocutory ruling that the premises were within the ambit of the tribunal's jurisdiction.

12. That the Learned Chairperson of the tribunal erred in law and fact by addressing herself to the issues of the agreed user as opposed to the actual user of the premises.

13. That the chairperson erred in law in making a finding that had no basis on the pleadings the law or equity.

The appeal was argued orally before us on 9th March 2016.Mr. Kounah advocate appeared for the appellant while Mr. Kibe Mungai advocate appeared for the Respondent. The parties had earlier filed written submissions. Mr. Kounah argued all the 13 grounds of appeal together. Mr. Kounah submitted that the tribunal erred in making a finding that the user of the suit properly was residential rather than business or commercial and on the basis of this erroneous finding, it proceeded to strike out the appellant's complaint. Mr.Kounah submitted that the tribunal ignored substantial evidence that was placed before it which pointed to the fact that the user of the suit property was commercial. He submitted that the tribunal held that the user of the suit property was residential solely on account of the fact that the same was described as a maissonette. Counsel submitted that the finding by the tribunal that the Appellant had not demonstrated that the user of the suit property was commercial was an error on the face of the record. He submitted thatthe Tribunal misapprehended the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301 Laws of Kenya(hereinafter referred to as "the Act'') when it ruled that it had no jurisdiction to entertain the Appellant's complaint. Counsel submitted that the suit property was controlled under the Act and as such, the tribunal had jurisdiction to entertain the complaint that was brought before it by the Appellant. On the Respondent's contention that the Appellant's appeal was incompetent, Mr. Kounah cited the decision of Anyara Emukule J. in **Ruth K. Wachira t/a Amigirl Beauty Palourvs. The Chairman Business Rent Tribunal(2006) Eklr** where it was held that a party aggrieved by the decision of the tribunal on a complaint has a right of appeal to the High Court (now this court). Mr. Kounah adopted his written submissions and further submissions filed which he had filed on 10th October 2012 and 22nd November 2012 as part of his submissions in support of the appeal. He urged the court to allow the appeal.

In his submissions in reply, Mr. Kibe adopted the respondent's written submissions which were filed on 1st November 2012. Mr. Kibe submitted that the Respondent's letter dated 27th May 2009 to Appellant to vacate the suit property which was the subject of the Appellant's complaint to the tribunal was written when there was no landlord and tenant relationship between the parties. Mr. Kibe submitted that the Appellant was a tenant of the previous owner of the suit property, Denton Court Ltd. with whom the Appellant had entered into a lease dated 1st April, 2004 for a term of 5 years and 3 months. Counsel submitted that the tenancy between the Appellant and Denton Court Ltd. was not controlled. The Respondent did not therefore inherit a controlled tenancy upon purchasing the suit property from Denton Court Ltd. Counsel submitted that a tenant of uncontrolled premises cannot lodged a complaint with the tribunal. Mr. Kibe submitted that even if the suit premises were controlled, it was the duty of the Appellant to apply to the tribunal under Section 12(1) (a) of the Act to be declared a controlled tenant. Counsel submitted that when the tribunal held on 3rd September 2010 that it had no jurisdiction to entertain the Appellant's complaint, the Appellant did not appeal against the decision. Instead, the Appellant applied for the review of the said decision. Mr. Kibe submitted that the ruling of 1st July 2011 which is the subject of this appeal was in respect of the Appellant's application for review. Counsel submitted that the appeal is incompetent for failure to comply with the provisions of Order 42 of the Civil Procedure Rules. He submitted that the Civil Procedure Rules are applicable to the proceedings under the Act by virtue of the provisions of section 15 (4) of the said Act. Mr. Kibe submitted that an appeal lies only as against an order or decree.

He submitted that the Appellant's appeal is against a ruling and that no order or decree has been placed before the court as a basis of the Appellant's appeal. Counsel submitted further that in its memorandum of appeal,the Appellant has not asked the court to reinstate the Appellant's complaint which was struck out on 3rd September 2010. Counsel submitted that so long as the decision of 3rd September 2010 remains undisturbed, the hands of the court are tied and the court cannot grant the reliefs sought in the appeal herein. Mr. Kibe distinguished the decision of Emukule J. which was cited by the Appellant and submitted that the same is not applicable to the circumstances of this case. He submitted that there is no competent appeal before the court and that the Appellant herein was not a controlled tenant.Mr. Kibe submitted that the user of a maisonnette remains residential even if business is being carried out therein.

In his reply to Mr. Kibe's submissions, Mr. Kounahmaintained that the Appellant was a controlled tenant and that the tribunal had found that as a fact. On alleged failure by the Appellant to comply with the provisions Order 42 of the Civil Procedure Rules, Mr. Kounah submitted that a ruling being a final determination by the tribunal can be appealed.

We have considered the proceedings of the tribunal together with the ruling dated 1st July 2011 which is the subject of the appeal before us. We have also considered the memorandum of appeal and the submissions both written and oral by the parties' respective advocates. We wish to determine some preliminary issues which were raised by the advocate for the Respondent before we consider the appeal on merit if that would become necessary. We have identified two preliminary issues which go to the jurisdiction of this court to entertain the appeal before us.

These are:-

1. Whether the Appellant had a right to appeal to this court and,

2. Whether the appeal is competent.

On the first issue, the Respondent had submitted that an appeal does not lie to this court on a determination of a complaint by the tribunal. In support of this submission, Mr. Kibe cited the decision of **Simpson J.** in the case of **Re Hebatulla Properties Ltd. (1979 – 1980) KLR 96** in which he stated that the right of appeal to the High Court conferred by Section 15 (1) of the Actdoes not extend to an order of the tribunal made on a complaint.

The Respondent submitted that since the order of the tribunal which is the subject of this appeal arose from a complaint, the same is not appealable to this court and as such the appeal before us incompetent. We find no merit in this objection for a number of reasons. First,we have noted from the record that the issue as to whether an appeal lies to this court on complaint was raised by the Respondent by way of a preliminary objection dated 20th July 2011 which objection was heard by Angawa J. and was dismissed on 28th July 2011. The decision of Angawa J. on the issue has neither been reviewed nor set aside. The issue having been raised before this court, considered and conclusively determined between the parties herein, the same cannot be re-opened before this court for another determination.

Independently of the decision of Angawa J, we have also considered the issue. With due difference to the decision of Simpson J. in the case of **Re Hebatulla Properties Ltd. (Supra)**, we do not agree with the restricted interpretation which he gave to the word "reference" in Section 15(1) of the Act.The term reference is defined in Section 2 of the Act to mean "reference to a Tribunal under Section 6 of the Act." For appeal purposes, we do not think that the term reference can be restricted only to reference to the tribunal under Section 6 of the Act. We are of the view that if that was the intention of the legislature, it would have stated so expressly in section 15(1) of the Act. Looking at the Act as a whole together with the regulations made thereunder, we have observed that reference can be made to the tribunal under section 6(1) of the said Act or under Section 12 (4) of the Act and the forms for instituting a reference in both cases are provided for in the regulations. See, Regulation 5 of the Landlord and Tenant (Shops, Hotels and Catering Establishments)Tribunal Forms and ProcedureRegulations. Under Regulation 5 aforesaid as read together with Form C in the Schedule to the said Regulations, a complaint by a landlord or a tenant is lodged in the tribunal as a "reference." A party to a complaint is therefore a party to a

"reference" and should be covered under Section 15(1) of the Act. The Act having expressly given a right of appeal to "any party" to a reference, we can find no reason why we should restrict such parties only to those whose reference was brought pursuant to Section 6 of the Act in the absence of express provisions to that effect.

This being a superior court, its jurisdiction cannot be ousted by implication. In the case of **Gatimu Kinguru Vs. Muya Gathangi (1976 – 80) I KLR 317**, Madam J. stated as follows at page 331;

> **"In interpreting a statute, in the absence of an express provision to that effect, it is always wrong for the court to whittle down the rights and privileges, of the subject. The Court's task is to protect the rights and privileges of the people, not to chip and shear them."**

In the case of **East African Railways Corporation vs. Anthony Sefu Dar –es- Salaam,(HCCA No. 19 of 1971) (1983) E. A 327**, it was held that:-

> "**A statute cannot be construed to oust the jurisdiction of a superior court in the absence of clear and unambiguous language to that effect."**

For the foregoing reasons, it is our finding that a determination of a complaint referred to the tribunal under Section 12 (4) of the Act is appealable to this court under Section 15 (1) of the Act. In this regard, we are in agreement with the decision of Anyara Emukule J. in the case of **Ruth K. Wachira t/a Amigirl Beauty Parlour vs. Chairman Business Rent Tribunal (supra).** The foregoing being our view on the matter, the Respondents objection to the appeal herein on the ground that the Appellant did not have a right of appeal is overruled.

The Respondent's second objection was based on the provisions of section 15(2) of the Act and Order 42 rules 1(2) and 2 of the Civil Procedure rules. The Respondent submitted that the provisions of the Civil Procedure Rules apply to appeals arising from the decisions of the tribunal by virtue of section 15(4) of the Act. The Respondent submitted that an appeal can only be against an order or a decree. The Respondent submitted that there is no doubt from the Appellant's grounds of appeal that the appeal herein is against the ruling that was made by the tribunal and not the order or decree that was extracted therefrom.

The Respondent submitted that the Appellant did not extract an order or decree from the tribunals ruling of 1st July 2011 which is the subject of this appeal and did not file the same in court as required under Order 42 rule 2 of the Civil Procedure Rules. The Respondent submitted that in the absence of an order or decree appealed from, the appeal herein is incompetent and cannot be entertained. We are in agreement with the Respondent that for the purposes of an appeal from the decision of the tribunal, the provisions of the Civil Procedure Rules apply. We are also in agreement that, under the Civil Procedure Rules, an appeal from a subordinate court to this court lies only as against an order or a decree. Order 42 rule 2 of the Civil Procedure Rules provides that, an appeal to this court from a subordinate court should not be admitted to hearing under Section 79 B of the Civil Procedure Act if a decree or an order appealed against has not been submitted to the court. See also,Order 42 rule 13(4)of the Civil Procedure Rules.

This appeal was admitted by Angawa J. on 11th July 2012. On 20th July 2012 Onyancha J. gave directions on the hearing of the Appeal. The directions were given in the presence of the advocates for both parties. From the record of that day, the judge was informed among others that a certified copy of the decree had been annexed to the record of appeal and that the appeal was ready for hearing. The judge having satisfied himself that all was well proceeded to give directions on the disposal of the appeal.

We have noted from the record that the issue of the Appellant's alleged failure to furnish a copy of the decree or order appealed against was not raised in the Respondent's written submissions which were filed on 1st November 2012. The issue seems to have been raised for the first time during the parties' oral submissions before us on 9th March 2016. It is not clear to us as to what happened to the certified copy of the decree which the court was informed had been annexed to the record of appeal. We doubt if Angawa J. would have admitted the appeal herein without having seen the decree or order appealed against. Even

if Angawa J. had failed to detect that the decree of the tribunal was missing from the record of appeal, we don't think that Onyancha J. who was informed of the inclusion of the said decree in the record of appeal would have failed to notice that the same was missing. In its response to the objection by the Respondent on this issue, the Appellant was noncommittal as to whether or not it had submitted to court a copy of the decree or order appealed against. The Respondent's argument was that the ruling of the tribunal was a determination and as such was appealable.

We have considered the Respondent's objection to this appeal on the ground of the Appellant's alleged failure to submit to court a copy of the decree appealed against. We havedecided to overrule this objection for a number of reasons. First, from the record before us, we are unable to say with certainty whether or not there was a certified copy of the decree submitted to court by the Appellant. We have not seen a copy of the decree in the record of appeal although from the record, we have noted that Onyancha J. was informed of the existence of the same by the Appellant's advocate during the time directions were given in the matter. We are of the view that in the circumstances of this case, it would not serve the interest of justice to determine this appeal on that issue.The uncertainty which we have have pointed out must be construed in favour of the Appellant for reasons which would become clear herein below.

Secondly, the objection raised by the Respondent goes to the jurisdiction of the court to entertain the appeal herein. We are of the view that objections of this nature should be raised at the earliest opportunity.Order 42 rule 13(2) of the Civil Procedure Rules provides that any objection to the jurisdiction of the court to entertain an appeal should be raised before directions are given. As we have pointed out above, when directions were given in this appeal, both parties were represented and the court was informed that there was a certified copy of the decree in the record of appeal. The Respondent did not contest this fact. We don't think that it was open to the Respondent to wait until after the Appellant had argued his appeal to raise for the first time the issue of the Appellant's alleged failure to furnish the court with a copy of the decree appealed against.

Finally, we are not satisfied that the Respondent has been prejudiced by the failure of the Appellant to provide a copy of the decree or order appealed against assuming that none was annexed to the record of appeal. We are of the view that to uphold the Respondent's objection in the circumstances of this case would be contrary to Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act.

Having laid to rest the preliminary issues that were raised by the Respondent, we can now proceed to consider the appeal on merit. The appeal before us is against the decision of the tribunal that was made on 1st July 2011 by which the tribunal declined to review its order made on 3rd September 2010 striking out the Appellant's complaint for want of jurisdiction. What we have been called upon to determine is whether the tribunal acted correctly in rejecting the Appellant's application for review. Section 12(1) (i) of the Act gives the tribunal power to vary or rescind any of its orders. The Act does not provide for the circumstances under which the tribunal can exercise that power. As we have stated herein earlier, the Act has regulations providing for the forms and procedure to be used at the tribunal.

We are of the view that the provisions of the Civil Procedure Act and the rules made thereunder would apply to the proceedings before the tribunal unless expressly stated otherwise in the Act and the regulations made thereunder which we have referred to above. This is by virtue of Section 1(2) of the Civil Procedure Act which applies the said Act to the proceedings before the High Court and subordinate courts. Under Article 169(1)(d) of the Constitution, the tribunal is a subordinate court. The Civil Procedure Act would however apply only in those situations where the Act and the regulations made thereunder are either silent or expressly apply the Act.

Under Order 45 of the Civil Procedure Rules, any person aggrieved by a decree or order from which no appeal has been preferred may apply for a review of the same upon discovery of new and important matter or evidence which was not within his knowledge or could not be produced by him at the time the decree was passed or order made after exercise of due diligence or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. What we are to determine is whether the Appellant's application for review before the tribunal met the threshold set out under Order 45 Rule 1(1) of the Civil Procedure Rules.

From the material on record, the Appellant lodged a complaint at the tribunal on 17th July 2009. The appellant's complaint was that the Respondent had issued it with a purported notice to terminate its tenancy. The complaint was not supported by any affidavit. Accompanying the complaint was an interlocutory application by way of Chamber Summons dated 17th June 2009 in which the Appellant sought an injunction to restrain the Respondent from interfering with its quiet enjoyment of the suit property. After so many interlocutory applications and counter-applications, the tribunal gave directions on the matter on 18th May 2010.

The tribunal directed that the Appellant's complaint be heard through affidavit evidence and written submissions. Among the issues which were raised by the parties in their affidavits and submissions and which the tribunal was called upon to determine was whether the Appellant was a controlled tenant and if so, whether its tenancy was lawfully terminated by the Respondent. In its ruling made on 3rd September 2010, the tribunal struck out the Appellant's complaint with costs after holding that the Appellant's tenancy was not controlled and as such the tribunal had no jurisdiction to determine the complaint. The tribunal held that,since the suit property was described in the tenancy agreement as "a maisonnette" the user of the same was residential and not business and as such the same did not qualify as a shop under the Act.

The Appellant did not appeal against this decision by the tribunal. Instead, it made an application for review of the said decision on 8th September 2010 under Section 12(1) (1) of the Act. The application was brought on among other grounds that:-

(i) There was an apparent error on the face of the record.

(ii) There was a discovery of new and important evidence which the Appellant could not have presented to the tribunal at the time of the hearing of the complaint.

(iii) The issue of the jurisdiction of the tribunal was raised un-procedurally through submissions.

In its affidavit in support of the application which was sworn on 8th September 2010 by Dickson Mwangi Muraya, the Appellant contended that it was operating a motor vehicles tyre and accessories shop and a motor bazaar on the suit property. The Appellant contended that although the suit property was described in the lease as a maisonnette, the same was let out as business premises. The Appellant contended that the previous owner of the suit property had applied for change of user of the suit property from residential to commercial and the application had been approved. The Appellant contended that allegation that the user of the suit property was residential and not business was raised by the Respondent in its submissions and as such the Appellant did not have the opportunity to adduce evidence to rebut the same.

The Appellant placed evidence before the tribunal that there was an application for change of user of the suit property from residential to commercial by the previous owner and that the suit property was rented out to them as business premises. The Appellant also placed before the tribunal, Single Business Permits issued to it by the City Council of Nairobi between 2005 and 2010 in respect of the business that it was carrying out on the suit property.

The Appellant's application for review was opposed by the Respondent through a replying affidavit sworn by Erick Lubanga Shikuku on 28th October 2010. The Respondent contended that the application had no merit as there was no error on the face of the record and that there was no new evidence which the Appellant could not have presented to the tribunal at the hearing of the complaint.

The Tribunal heard the application and dismissed the same in a ruling delivered on 1st July 2011 which ruling is the subject of this appeal. In its ruling, the tribunal held that the Appellant had failed to prove that the user of the suit property had been changed from residential to commercial. The tribunal made a further finding that the Appellant was operating a business on the suit premises contrary to the agreed user of the premises. The tribunal observed that so long as the agreed user of the suit property was residential, it was immaterial that the then Nairobi City Council had issued the Appellant with a trade

license to carryout business on the suit property. The tribunal observed further that the parties seemed to have put the suit propertyinto auser which was contrary to the lawful user thereof and as such the court could not lend its aid in enforcing the arrangement.

As we have stated earlier in this judgment, the Appellant has challenged the tribunal's decision on a total of 13 grounds. The 13 grounds of appeal were argued together. We are in agreement with the observation that was made by the Respondent's advocate that most of the grounds of appeal put forward by the Appellant goes to the merit of the decision of the tribunal that was made on 3rd September, 2010. That is the decision through which the Appellant's complaint was struck out by the tribunal for want of jurisdiction. That decision is not the subject of this appeal and as such the grounds of appeal directed against the same are misplaced. We are of the view that the 13 grounds of appeal put forward by the Appellant can be summarized into one ground, namely, that the tribunal had erred in its failure to review its ruling or decision made on 3rd September 2010.

The pre-amble to the Landlord and Tenant(Shops, Hotels and Catering Establishments) Act, Cap. 301 Laws of Kenya("the Act") sets out the objective of the Act as follows:-

> **"An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto."**

It is clear from this pre-amble that the Act was enacted for the purposes of protecting tenants. A controlled tenancy is defined in the Act as a tenancy of a shop, hotel or catering establishment:-

> (a) Which has not been reduced into writing, or
>
> (b) Which has been reduced into writing and which –
>
> > (i) is for a period not exceeding five years, or
> >
> > (ii) contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof, or
> >
> > (iii) relates to premises of a class specified under section 2 (2) of the Act.

"Catering establishment" is defined as;

> **"any premises on which is carried out the business of supplying food or drink for consumption by persons other than those who reside and are boarded on such premises."**

"Hotel" is defined as;

> **"any premises in which accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration."**

"Shop" is defined as;

> **"premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth."**

From the foregoing provisions of the Act, whether a tenancy is controlled or not is determined by two things. First by the nature and the length of the tenancy and secondly, by the undertaking being carried out in the premises. In its ruling of 3rd September 2010, the tribunal made a finding that having regard to the nature of the tenancy that the Appellant had entered into with the previous owner of the suit property, the Appellant was a controlled tenant. The tribunal however struck out the Appellant's complaint on the

ground that since the suit premises were described in the lease as a maisonnette, in the absence of any evidence to the contrary, the user of the premises had to be taken as residential rather than business. The tribunal rendered itself as follows:-

> "**The premises are therefore described as Maisionattes (sic) by both Denton and Paging Services and also the tenancy agreement between Paging Services Limited and the tenant herein. In my view where the premises are described as a bungalow, apartment or Maisonatte (sic) and the user is silent then the known user is residential unless there is evidence to the contrary……. There is no material evidence placed before me to show the agreed user.Once this issue was raised by the landlord, it was upon the tenant to bring evidence to show that the agreed user, (not the actual user) (sic).**

As we have stated earlier, the Appellant's complaint before the tribunal was not supported by an affidavit. The affidavit that was filed by the Appellant was in support of its application for interlocutory injunction. The Respondent did not also file an affidavit in response to the complaint. The Replying affidavit that was filed by the Respondent after being served with the complaint and the interlocutory application was in response to the application. See, the affidavit of Jeetnder Singh Dhanjalsworn on 14th July, 2009 at page 34 to 38 of the record. In the said affidavit, the Respondent had contended that the tribunal had no jurisdiction over the complaint on the ground that the lease for the suit premises was for a period in excess of 5 years. See, paragraphs 8 to 12 of the affidavit of Jeetnder Singh Dhanjal aforesaid. The issue that the suit property was let for residential and not business use was not raised in this affidavit. We are in agreement with the Appellant that the issue of the user of the suit property was raised by the Respondent in its submissions in opposition to the complaint. See, paragraph 2 of the written submissions at pages 142 to 148 of the record of appeal. As we have stated above, the complaint was heard by way of affidavit evidence and written submissions. We are in agreement with the Appellant's contention that since the issue of the user of the suit property was not in contention between the parties prior to the filing of the Respondent's submissions in opposition to the complaint; the Appellant could not have placed before the court evidence showing the user of the suit property earlier. For the foregoing reasons, we are satisfied that the Appellant had good grounds for seeking to review of the tribunal's decision of 3rd September 2010 which was made solely on the ground that the Appellant had failed to adduce evidence to show the agreed user of the suit property.

The Appellants application for review as we have stated above was brought on the grounds of discovery of new and important evidence and the existence of apparent error on the face of the record.In its application for review, the Appellant adduced uncontroverted evidence showing that the suit property was let out as business premises and was being used as such by the Appellant.We are of the view that on the material that was placed before the tribunal by the Appellant, the tribunal should have set aside its orders of 3rd September 2010 and proceeded to determine the complaint on merit. The Appellant had established that the suit property was used by the Appellant as a shop and as such was controlled under the Act. We are in agreement with the Appellant that the tribunal erred by adverting to what it referred to as agreed user rather than the actual user of the suit property. In any event, there was no evidence before the tribunal to the effect that the suit property was being used for residential purposes. We don't agree with the tribunal that the mere fact that the suit property was referred to in the lease as a maisonette was conclusive proof that the same was let for residential purposes. We are also in agreement with the Appellant that the tribunal failed to take into account the fact that the Act was meant to protect the tenants rather than landlords. We are satisfied that the Appellant had put forward valid grounds for review of the tribunal's decision of 3rd September 2010.

In the final analysis and for the foregoing reasons, it is our finding that the appeal before us has merit. We allow the same on the following terms:

1. The ruling and order made by the tribunal on 1st July, 2011 is set aside and in place thereof there shall be an order allowing the Appellant's Notice of Motion dated 8th September 2010 in terms of prayer 4 thereof.

2. The ruling and order of the tribunal made on 3rd September 2010 striking out the Appellant's complaint is set aside.

3. The Appellant's Reference dated 17th June 2009 is reinstated and referred back to the tribunal for hearing and final determination on merit.

4. Each party shall bear its own costs of the Appeal.

Delivered and dated at Nairobi this 28th day of October, 2016

S. OKONG'O

JUDGE

L. N. GACHERU

JUDGE

In the presence of

N/A for the Appellant

Mr. Mwathe for the Respondent

Kajuju Court Assistant